Volume I

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STATE OF IOWA
INDUSTRIAL COMMISSIONER DECISIONS

July 1, 1984 — June 30, 1985

IOWA STATE LAW LIBRARY

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Industrial Commissioner

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HENRY J. AGUILAR,

Claimant,

vs.

OSCAR MAYER COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 735422

A R B I T R A T I O N

D E C I S I O N

FILED
AUG 17 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Henry J. Aguilar, claimant, against Oscar Mayer Company, self-insured employer, defendant, to recover benefits under the Iowa Workers' Compensation Act for a condition allegedly arising out of and in the course of his employment. It came on for hearing on July 11, 1984 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 18, 1983.

At the time of hearing the parties stipulated to the rate in the event of an award of $268.94.

Defendant's counsel provided information regarding the payment of medical expenses as well as the payment of group benefits totaling $6,330.23.

The record in this matter consists of the testimony of claimant, Vernon Keller, joint exhibit 1, claimant's answers to interrogatories; joint exhibit 2, a report from John E. Sinning, Jr., M.D., dated April 23, 1984; joint exhibit 3, reports from Robert W. Milas, M.D.; joint exhibit 4, a series of medical reports from J. A. deBlois, D.O., and Dr. Milas; joint exhibit 5, defendant's answers to interrogatories; joint exhibit 6, reports from Dr. Milas; joint exhibit 7, a series of medical documents; joint exhibit 8, the deposition of claimant; and joint exhibit 9, the deposition of Dr. Milas.

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 a running award of temporary total or healing period benefits.

STATEMENT OF THE CASE

Claimant's testimony is taken from that given at the time of hearing, that contained in his deposition and that provided in his answers to interrogatories.

Thirty-six year old right-handed married claimant, father of three children and a high school graduate with training in lathe and drill operation, served in Vietnam in heavy artillery. When he was discharged from the service, he spent a brief time doing foundry work shifting weights and laboring in the core room with lifting of up to eighty pounds before beginning work for defendant in November of 1970.

His first work for defendant was stacking loin boxes weighing from 90 to 100 pounds. He then sorted pork butts by size and placed them in boxes. This work entailed some record keeping. He next bagged blend which meant that he rolled 200-300 pound barrels of mixing meat to an area and then took away meat in 75 pound bags. He moved to the ham boning department where he started as a trucker with a duty of bringing in the product and dumping it on a table. After a year he became a chisel boner shanking the ham and taking out the body bone on chunks of meat weighing from 18 to 40 pounds. Later he worked on Iowa B hams which necessitated his taking off the skin and fat and taking out the bone. Iowa B hams was his work for seven to nine years. He kept no records doing this work and he supervised no other persons.

Claimant reported having minor nicks and cuts and smashed fingers. In 1973 or 1974 he had a motorcycle accident. He was not wearing a helmet and came off the cycle on his head. He was knocked out and had stitches over his eye. He was hospitalized for about a week and then released to return to work. He denied any trouble with his back, arms or neck resulting from this incident. He also denied any trouble with his neck or shoulder before June of 1982.

Claimant recalled that in June of 1982 he developed pain in his left arm and shoulder and cramping in his arm and chest as he worked at constant pulling with his left hand and constant cutting with his right hand. His head was in a down position and his arms were at shoulder height. He went to first aid to see a doctor. The doctor was concerned with some locking in claimant's little finger. Claimant was dissatisfied with his treatment and went to Dr. deBlois who sent him to Dr. Beaty who sent him to Dr. Milas.

The latter physician was first seen in August of 1982. He took x-rays and prescribed home traction which claimant undertook three times a day for a half hour for two weeks. Claimant returned to work on August 30, 1982. He was able to do his work on the Iowa hams for a time, but then he had a recurrence of symptoms with his arms becoming tired and hurting. A burning sensation started up his arm and into his shoulder. He had a numbness in his fingers as if they were asleep. He saw Dr. Milas in December. Home traction was tried again and then he was sent to the hospital for therapy which included the use of traction and hot packs. He was released for work with a ten to twenty pound limitation.

At work he was placed on the line where he did only a certain portion of the ham as opposed to doing the entire ham as he had done once. He was able to do the work. Eventually Dr. Milas removed the restriction.

Claimant began defatting which was to remove all the fat from the meat with a wizard knife without cutting any meat. The rate for this job was 15 hams per hour. He worked, but he claimed he hurt. He redeveloped symptoms for which he used Ben Gay and wrapped his arms in gauze.

On approximately May 25, 1983 claimant experienced a muscle spasm in his chest which made him think he was having a heart attack. He had pain in both arms. He went to the hospital. He had electromyography, a myelogram and a CT scan all of which were normal.

He was released to return to work with restrictions. He took the restrictions from Dr. Milas to the plant where he was laid off. He understood his restrictions to be "[n]ot very many repeating motions and nothing to lift over twenty pounds." He was told that there were too many people on the sick list for him to be given a job. He applied for unemployment which meant he had to seek work which he tried to find in grocery stores and machine shops, but he was not able to find work within his restrictions. He drew unemployment until March of 1984.

Claimant explained that when he told Dr. Milas what he did, he was telling the doctor about the work of the whole line. He said that Dr. Sinning gave him the same sort of exam he had received from Dr. Milas in about fifteen minutes.

Claimant acknowledged having been a weight lifter for three or four years seven years ago. He now lifts weights occasionally. He listed his present complaints as loss of strength, a twitching in his forearm, upper arm, chest and face and a burning sensation. Claimant thought his condition was about the same as in June of 1983. He does housework and cares for his children.

Claimant agreed that he had received sick leave pay and that his medical expenses had been covered.

Vernon Keller, safety and security manager and administrator for workers' compensation for defendant, testified to familiarity with the ham boning procedure which he said was as claimant described it. He stated that Dr. Sinning had been to the plant to see the ham boning operation.

The witness said that shutting down the slaughtering operation, competition and general economic conditions resulted in layoffs of a number of workers at the plant. He acknowledged that there are jobs within the plant which comport with claimant's restrictions, but he pointed out that claimant is kept from a job by his low seniority and provisions of the labor management agreement. He reported that the company expects to be able to place claimant on a job soon.

Keller stated that claimant's medical expenses have been paid as well as sickness and accident benefits. He contended that the company's position has always been that claimant's condition is non-occupational and non-compensable.

Records from defendant show claimant worked in department 20 trimming and boning hams from October 1, 1979 until he was laid off on March 26, 1982. He was recalled on April 5, 1982. From May 21, 1982 to August 30 he was on a leave of absence. He was laid off on December 17, 1982 and recalled on January 17, 1983.

Answers to interrogatories indicate claimant was paid sick leave from May 24, 1982 to August 29, 1982; from December 13, 1982 to January 9, 1983; and from May 31, 1983 to July 8, 1983.

A report from J. A. deBlois, D.O., dated June 2, 1982 reports that claimant first saw him on May 17, 1982 for a strain, sprain and bursitis of both shoulders. He indicated that claimant's condition was due to neither an accident nor an occupational injury. He found claimant unable to work beginning on May 24, 1982 to a date unknown.

Richard Beaty, D.O., treated claimant for a stenosing tenosynovitis of the left middle finger. He, too, found claimant's condition connected to neither an accident nor an occupational injury. He determined claimant was unable to work from June 17, 1982 to a date unknown, but apparently at least through August 13, 1982.

In his letter dated June 17, 1982, in addition to his impression of stenosing tenosynovitis of the left middle finger, he listed possible C5-6 radiculopathy and possible biceps tendonitis of the left shoulder. A release of the trigger finger was performed on June 21, 1982. Feldene was prescribed.

In July claimant was tried on exercises, warm soaks and home cervical traction. On July 23, 1982 Dr. Beaty noted claimant's having intermittent symptoms and his belief that claimant's muscle mass was causing the problem with thoracic outlet-type symptoms. Claimant was referred to Dr. Milas.

Claimant was receiving chiropractic adjustments when he was seen on November 19, 1982. Dr. Beaty suggested these continue as they seem to be of more benefits than other treatments claimant had received.

Robert J. Chesser, M.D., saw claimant on June 30, 1982 and took a history of left shoulder and upper trapezius pain for one year with episodes of numbness into the left fourth and fifth fingers developing in the past six weeks. Claimant's symptoms were aggravated by lifting and quick movement of the arms. Cervical motion was full. There was pain in the left cervical paraspinals and upper trapezius with no specific radiating symptoms. The left biceps reflex was reduced. Pinprick sensation also was reduced in the C5 distribution on the left.

Electromyography and nerve conduction were normal. The doctor suggested a cervical spine series and a trial of cervical traction. Because of claimant's size, there were some technical problems with the nerve conduction studies.

Claimant was reevaluated on December 20, 1982 at which time he reported a decrease in symptoms until a month before when he started having increasing pain in the left upper trapezius and left shoulder particularly with repetitive use. Claimant also complained of headaches and some migration of his symptoms to the right side. Electromyography and nerve conduction were normal. A myelogram was suggested. Dr. Chesser reported his evaluation of claimant in a letter dated June 20, 1983 in which he mentioned claimant's persistently diminished left biceps reflex. Claimant complained of pain with use of his arm, weakness in the left shoulder, spasms across the upper chest and into the left arm. His cervical range of motion was full. There was pain in the left cervical paraspinal region with right and left lateral bending. There was diffuse weakness in the left upper extremity. The left biceps reflex was diminished. There was reduced sensation in his thumb, index and middle fingers of the left hand.

Electromyography was normal. Nerve conduction studies also were normal. The doctor suggested a CT scan and myelography.

Claimant was hospitalized on December 28, 1982 with left shoulder complaints. X-rays showed mild degenerative osteo-arthritic changes. Claimant was treated with bed rest and cervical traction as well as physical therapy. By the time of his discharge he was demonstrating excellent strength in his left deltoid and left biceps. Claimant was released to return to work without restrictions on January 10, 1983. The discharge diagnosis was left C5 radiculopathy.

Claimant was admitted to the hospital on June 28, 1983 after reporting recurrent cervical discomfort in May. The left biceps was diminished. Claimant was treated conservatively with some decrease in his symptoms; but as he was unable to return to work, he was hospitalized for testing. Mild weakness of the left deltoid and left biceps persisted. The left biceps jerk was diminished.

Claimant was seen in the emergency room on May 11, 1983 with complaints of a muscle spasm across the chest and numbness in both arms. Claimant appears to have told the doctor that he wished workers' compensation because of the worsening of his condition. He was released with a diagnosis of neuromuscular chest wall pain.

A myelogram showed what seemed to be a defect at T7-T8. The cervical area evidenced no defects. A CT scan was normal and claimant was released for return to work on July 5, 1983. The discharge diagnosis was a left C-5 radiculopathy.

Claimant mentioned during his hospitalization his need to change jobs.

Robert W. Milas, M.D., board certified neurosurgeon, first saw claimant on August 6, 1982 on referral from Dr. Beaty. Claimant was complaining of left cervical discomfort with radiation into his upper extremity which started six weeks prior to his visit. Subsequently, the doctor learned that claimant boned hams at a rate between 100 and 200 per hour doing repetitive work utilizing his upper extremities. The doctor had no record of discussing claimant's occupation with him at the time of his first visit. On that first examination the doctor's impression was that claimant had a left C-6 radiculopathy. Later he felt that the radiculopathy might be at C-5. Claimant was to return to work on August 30, 1982.

Dr. Milas testified that his diagnosis was made by examining the strength in claimant's upper extremities, his reflexes and pain pattern. On claimant's initial visit his reflexes were symmetrical. Later the biceps jerk was diminished on the left.

Claimant was seen for follow-up on December 13, 1982 at which time he spoke of cervical discomfort which radiated into his left shoulder and upper extremity with weakness in the left deltoid muscle. Claimant was kept off work beginning on December 13, 1982.

Claimant had a decrease in symptoms when he was seen on February 14, 1983 after he changed jobs. Improvement in strength in the left deltoid and in the left biceps muscles was found.

Claimant returned in May of 1983. Dr. Milas diagnosed a C5 radiculopathy and kept claimant off work for physical therapy.

In a letter of May 18, 1983 Dr. Milas recorded claimant's belief that his symptoms were related to the demands of his work. The doctor wrote: "Certainly degenerative osteoarthritic changes may, if not caused by certain physical activities, certainly be exacerbated by such activity." Then he wrote: "Patient is to investigate the work related basis for his complaints."

Claimant was seen on June 23, 1983 at which time he said his symptoms had decreased, but he was unable to engage in physical activity without recurrence of symptoms. Claimant was hospitalized.

On July 13, 1983 claimant was released to return to work with no lifting over twenty pounds and no repetitive motion of the upper extremities. Those restrictions were to remain in force for three months.

Claimant was seen in follow-up on October 11, 1983 at which time he complained of intermittent burning discomfort in the left cervical area with radiation to the left upper extremity. Claimant had improvement in his strength on the left and Dr. Milas found strength symmetrical. The left biceps reflex remained absent. The doctor wrote: "I do feel that chronologically the patient's aggravation of his problem appears to be related to the type of work he does and hence there is a strong probability that returning to that occupation may indeed lead to further permanent damage."

Claimant had electromyography and nerve conduction studies as well as a CT scan and myelogram. He was treated with rest, physical therapy and cervical traction.

Dr. Milas agreed that body habitus or weight lifting could predispose a person to radiculopathy. The doctor was unaware of whether claimant was left or right handed.

Dr. Milas was asked about a portion of his January 24, 1984 report:

> Q. "Hence, there does not appear to be any permanent disability at this time." Then you go on that, "It would be foolhardy for him to return to his former occupation." Then in your next report where Cook evidently asked you to be more specific or to explain that, you state in the last paragraph of your January 24th report, "Although I am unable at this point in time to quantitate objectively the percentage of permanent partial impairment of the whole man as described in the A.M.A. Guide to Valuations [sic] of Permanent Impairment, I feel that Mr. Aguilar is not able to return to his previous employment as a meat cutter and under that description is, in effect, 100 percent disabled from engaging in his previous employment." I understand that to mean that it is 100 percent wrong for him to go back to his hamboning, but under the A.M.A. rating tables which rate functional disability, you can't find any percentage of permanent disability?
>
> A. That's correct. (Milas dep., p. 17; l. 19-25; p. 18; l. 1-13)

The doctor agreed that there were other types of work of a light or sedentary nature claimant could do. He felt it would be a mistake for claimant to go back to his previous job and risk "permanent impairment." He suggested retraining for claimant.

The neurosurgeon understood that claimant worked between his episodes of pain. Regarding causation, he said:

> Q. And is it your opinion that working aggravated or contributed to the cause of the radiculopathy?
>
> A. I can only relate what Mr. Aguilar relates to me, and he told me that his work environment precipitated his discomfort.
>
> Q. So within a reasonable degree of medical certainty, could you say that the work contributed to the radiculopathy or caused it?
>
> A. I can say that it is a possible cause. (Milas dep., p. 23 ll. 14-23)

The doctor's letter of December 7, 1983 attributes claimant's two episodes to the work required by claimant's employment as a meat cutter.

John E. Sinning, Jr., M.D., orthopedic surgeon, examined claimant on April 19, 1984 and reviewed records from Drs. Milas and Chesser. He understood that claimant worked as a ham boner who experienced a triggering left middle finger which was treated. Both prior and subsequent to that surgery, claimant had a aching in his left forearm.

On examination, Dr. Sinning found a full range of motion in

the neck with all muscles strong and no evidence of muscle irritability or spasm on palpation of the neck. Claimant's complaint of pain on tilting and rotating his neck were inconsistent and not reproducible. Claimant's left arm was slightly smaller than the right. There was a vague absence in sensation to pinprick which did not conform to an anatomical distribution. X-rays showed spurring around C-5 and 6 but no narrowing. The doctor compared films from August 9, 1982 and June 1983 and found no difference. Overall, x-rays were thought to show minor signs of cervical hypertrophic osteoarthritis and degenerative disc disease.

Dr. Sinning's diagnosis was osteoarthritis of the cervical spine of a minor degree and cervical degenerative disc disease which were not related to nor aggravated by claimant's work. He thought that what claimant was experiencing were flare-ups of cervical root irritation "as a part of a cervical disc problem." He did not think claimant had an impairment of function.

APPLICABLE LAW AND ANALYSIS

The issues in this matter according to the prehearing order are whether there is a causal relationship between the alleged injury and the disability; whether claimant is entitled to benefits for temporary/healing/permanent partial disability; 85.27; and rate, credit. On May 14, 1984 claimant filed a request for admissions which included the following: "That the Claimant was injured in the course and scope of his employment on or about June, 1982" and "[t]hat the injury resulted from the continuous and repetitive motions associated with Claimant's former work as a ham boner." Those requests were denied by defendant. At the time of hearing, however, clarification of issues by the undersigned leaves only those of causal connection and claimant's entitlement to temporary total or to healing period benefits.

The claimant has the burden of proving by a preponderance of the evidence that his injury is the cause of his disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 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 that in June of 1982 he developed pain in his left arm and shoulder and cramping in his arm and chest. He was treated with traction. Claimant was given a ten to twenty pound weight limitation which later was removed. Claimant redeveloped symptoms and then had an episode of chest pain which resulted in the imposition of new restrictions and in his being placed on layoff.

Claimant first saw Dr. deBlois who kept him off work but assigned his condition neither to an accident nor to an occupational injury. His diagnosis was strain, sprain and bursitis of both shoulders.

Dr. Beaty saw claimant shortly after he saw Dr. deBlois, concluded that claimant's condition was attributable neither to an accident nor to an occupational injury, kept claimant off work and diagnosed a stenosing tenosynovitis of the left middle finger. A possible C5-6 radiculopathy and possible biceps tendonitis of the left shoulder was suspected. Nothing in the reports and records connects claimant's condition to his work other than claimant's own statement that his shoulder starts to hurt from job activities. At one point in claimant's care Dr. Beaty attributed claimant's problems to his muscle mass.

Dr. Chesser did electromyographies and nerve conduction studies on June 30, 1982; December 20, 1982; and June 20, 1983 all of which were normal. Dr. Chesser does not give an opinion on causation.

Dr. Sinning, who evaluated claimant, had the advantage of reviewing records from both Drs. Milas and Chesser. Dr. Sinning examined claimant, reviewed his x-rays and took x-rays himself. He made diagnoses of osteoarthritis of the cervical spine and of cervical degenerative disc disease of a minor degree. The doctor specificaly said that "the cervical arthritis and degenerative disc disease are not related to Mr. Aguilar's work and further it is my opinion that his work does not aggravate that condition."

The sole support for claimant's claim is found in the evidence from Dr. Milas. On claimant's first visit he complained of intermittent left cervical discomfort with radiation into the left upper extremity beginning six weeks before with no history of trauma or heavy lifting. Dr. Milas made note of claimant's feeling "that his symptoms may indeed be related to the physical demands placed on him at his place of employment" and seemingly suggested that claimant should "investiage [sic] the work related basis for his complaints." Dr. Milas' reports indicate that one change in claimant's work resulted in improvement. A period on light duty resulted in no change.

A letter of October 12, 1983 contains this statement: "I do feel that chronologically the patient's aggravation of his problem appears to be related to the type of work he does and hence there is a strong probability that returning to that occupation may indeed lead to further permanent damage." Following claimant's myelogram he was advised "not to perform repetitive activities with the upper extremities for fear of aggravating his left C5 radiculopathy." Dr. Milas agreed that body habitus or weight lifting would predispose claimant to radiculopathy.

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, 251 Iowa 375, 101 N.W.2d 167. However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish., 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The weight of Dr. Milas' testimony is diminished by his understanding of claimant's work which he thought included boning hams at the rate of 100 to 200 hams per hour. Claimant testified at hearing that he personally would do about fourteen or fifteen an hour. The doctor's deposition testimony regarding causation relied heavily on what claimant told him; i.e., he testified: "I can only relate what Mr. Aguilar relates to me, and he told me that his work environment precipitated his discomfort." When the doctor was asked if he could say the work contributed to the radiculopathy with a reasonable degree of medical certainty he said, "I can say that it is a possible cause."

Claimant's burden is a preponderance of the evidence which means the greater weight of the evidence; i.e., the evidence of superior influence or efficacy. Bauer v. Ravell, 219 Iowa 1212, 260 N.W. 39 (1935). Claimant seeks a running award. The evidence in this matter does not allow claimant to preponderate on the issue of whether or not his continuing disability is causally related to his employment.

FINDINGS OF FACT

That claimant is thirty-six (36) years of age.

That claimant is a high school graduate.

That claimant began work for defendant in November of 1970.

That claimant had a motorcycle accident in 1973 or 1974 in which he landed on his head and had stitches over his eye.

That claimant has been a weight lifter.

That in June of 1982 claimant developed pain in his left arm and shoulder and cramping in his arm and chest.

That in June 1982 claimant was diagnosed as having a stenosing tenosynovitis of the left middle finger.

That claimant was treated with traction.

That claimant was given a ten to twenty pound weight limitation which was later removed.

That claimant was laid off after an episode of chest pain in May of 1983.

That claimant drew unemployment until March of 1984.

That claimant continues to complain of loss of strength; of a twitching in his forearm, upper arm, chest and face and of a burning sensation.

That electromyography and nerve conductions studies were normal in June 1982, December 1982 and June 1983.

That a left C5 radiculopathy was diagnosed in early 1983.

That claimant had a normal CT scan in mid-1983.

That a myelogram of June 29, 1983 showed what seemed to be a defect at T7-T8.

That in July of 1983 claimant was released to return to work with no lifting over twenty pounds and no repetitive motion of the upper extremities.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence a causal relationship between his work and any disability which he now suffers.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That defendant pay costs pursuant to Industrial Commisioner Rule 500-4.33.

Signed and filed this 11 day of August, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TOM AIELLO,	:	
Claimant,	:	File No. 745346
vs.	:	
ALCOA,	:	A R B I T R A T I O N
Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
SEP -5 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is proceeding in arbitration brought by Tom Aiello, claimant, against Alcoa, self-insured employer, defendant, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury arising out of and in the course of his employment on February 25, 1983. It came on for hearing on July 9, 1984 at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted with the receipt of additional wage information on July 12, 1984.

The industrial commissioner's file contains a first report of injury received November 28, 1983.

At the time of hearing the parties stipulated to time off work from February 25, 1983 to September 3, 1983.

The record in this matter consists of the testimony of claimant, Richard Kimball, Larry Delf and David Behensmeyer; claimant's exhibit 1, company medical records; claimant's exhibit 2, records from a hospitalization of February 28, 1983; claimant's exhibit 3, records from a hospital admission of April 19, 1983; claimant's exhibit 4, records from defendant's medical department; claimant's exhibit 5, a letter from Richard T. Beaty, D.O., dated February 7, 1984; defendant's exhibit 1, a report from Dr. Beaty dated September 16, 1983; defendant's exhibit 2, a report from Dr. Beaty dated May 31, 1983; defendant's exhibit 3, a hospital record dated April 20, 1983; defendant's exhibit 4, a letter from Dr. Beaty dated March 4, 1983; defendant's exhibit 5, an x-ray report dated March 1, 1983; defendant's exhibit 6, a report dated February 7, 1983 from Vijay Verma, M.D., dated February 7, 1983; defendant's exhibit 7, a report from M. J. Aden, M.D., dated December 16, 1982; defendant's exhibit 8, a report from Lloyd England, D.O., dated September 28, 1981; defendant's exhibit 9, defendant's medical records; defendant's exhibit 10, an applicaton for group benefits; defendant's exhibit 11, an application for benefits; defendant's exhibit 12, a letter from claimant dated March 2, 1984; defendant's exhibit 13, a record of disability payments; deputy commissioner's exhibit 1, a listing of wage amounts; and deputy commissioner's exhibit 2, additional wage information. The parties filed briefs which were helpful to the undersigned.

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 may suffer; whether or not claimant is entitled to healing period and permanent partial disability benefits; and the rate of compensation in the event of an award. Defendant has raised the affirmative defense of notice.

STATEMENT OF THE CASE

Fifty-one year old married claimant testified to a twelfth grade education and to commencing work for defendant employer on January 28, 1952 in the remelt department where he worked as a laborer. In 1961 he moved to the roll shop where he undertook three and a half years of training to be come a grinder. This training is his only special training. He drove a school bus part time for fourteen years. He also has done transfer for a truck rental firm. His last work at that was three to five years ago. In April of 1983 he commenced a trucking business with two trucks hauling general freight. He has done no driving himself and subsequently lost one truck. His son drives the truck that remains.

Claimant recalled the circumstances surrounding his injury as follows: He was working the 11:00 p.m. to 7:00 a.m. shift. He was working on the number one 28 inch grinder. The safety hook was missing to attach the hoist to change the guard which needed to be removed to change the wheel. His back was not any worse than normal on this day. He did the setup on the grinder. He carried four gibs. He removed and lowered the wheel guard which he understood weighed 79 pounds. He had extreme pain and was unable to stand up. This pain was more severe than he had been experiencing. He went to his supervisor Behensmeyer whom he told his back was hurting and asked for a pass to the medical department.

When he got to the medical department he thought that he had said he was changing a guard when his back started to hurt. On his way home he stopped at the hospital where he told of lifting. He possibly received a shot there. Next he went to Dr. Beaty who admitted him for a myelogram and then on April 20, 1983 performed surgery. He was released to return to work on September 3, 1983 with a 35 pound weight restriction as well as limitation on prolonged standing and sitting and excessive bending or twisting.

He reported to defendant, but there was no work available with those restrictions. He has not worked since his injury. He thought that he could drive a school bus for three or four hours a day or do light factory work if there was no standing for prolonged periods. He indicated that the union president is trying to get him back to work with defendant. Claimant admitted that he might have, because of pride, told Delf he would not take a lower paying job; however, he has reconsidered his position. It was his contention that under union rules he could not get out of the department.

Claimant acknowledged having a 60 pound weight restriction in January of 1982. He recalled having been off work for sixteen weeks including ten weeks of vacation and being hospitalized for x-rays in September 1981 after having his back go out while he was lying down. In early February of 1983 he was examined by Dr. Verma and had a CT scan after having a previous CT scan in December of 1982.

Claimant has collected group benefits which he will draw until February 1985. He asserted that under the plan he cannot look for work or his benefits will be stopped. As a reason for seeking sickness and accident benefits, claimant said he could not wait the time necessary to draw compensation and that sickness and accident benefits are easy to get. Also, if he had sought workers' compensation, he would not have obtained sickness and accident benefits. Claimant testified that what happened to him was not by his definition an accident. He stated that he learned of the concept of aggravation from his nephew. He consulted a lawyer around early October of 1983. In addition to the group benefits, he had car payments made through a disability policy with the credit union. He has not made any other claim for workers' compensation and he has never drawn benefits. He agreed that prior to February 25, 1983 he knew the difference between sickness and accident and compensation.

Claimant stated that he and Delf, the workers' compensation supervisor, had a discussion on May 16, 1983 in which he asked for compensation benefits and which resulted in inquiry being made of Dr. Beaty. Claimant claimed that he told Delf at this time about his back and his claim for compensation which Delf said he would review. In addition to this meeting in Delf's office, they had other discussions by phone and at some time discussed the weight of the wheel guard. He filed further claim for sickness and accident after his discussion with Delf.

Claimant acknowledged knowing that he would need back

surgery sooner or later; however, no surgery was scheduled on February 25, 1983.

As to his present complaints, he listed mild back pain brought on by activity which can be controlled with aspirin, trouble with prolonged standing and pain in the area of his incision with stooping. He is not bothered by walking, bending or twisting; he is most comfortable sitting; and he can drive three to four hours. He can lift, but he will have pain for several days.

In addition to his back problems, claimant is troubled by hypoglycemia and tachacardyia. Besides his back surgery he has had operations for a pilonidal cyst, hernia, hemorrhoids, gall bladder, a gastric resection and two carpal tunnel releases.

Claimant admitted that before February 25, 1983 he neither asked for nor received any assistance with his work. Neither did he complain about equipment. However, he alleged that he had told the supervisor he was unable to handle the work when he was written up for missing work. He further asserted that he pleaded he could not handle the heavy work. He knew the wheel guard was over his limit, but he was used to doing his work himself.

He said that as he has thirty years in, he is eligible for retirement. After two years on sickness and accident the company must find a place for him or he is out.

Richard Kimball, a roll grinder and roll shop committeeman who has worked for defendant for twenty-nine years and who was working with claimant on the eleven to seven shift on February 25, 1983 testified to seeing claimant when they punched in and to knowing claimant was operating a twenty-eight inch grinder which was the same sort of work he was doing himself. He did not recollect claimant's commenting about his physical condition that night. He then spoke to claimant ten or fifteen minutes into the shift. He was aware that claimant did not finish the shift and did not come back to work after that date. As he remembered, claimant complained after lifting off the wheel guard, a lift he did not actually see claimant perform. He did not talk to claimant, but he noticed claimant limped and saw him go to the medical department.

The witness said routine aspects of the grinder's job would be to make setups and change wheels. In order to change a wheel, the wheel guard cover which he estimated weighed from 80 to 100 pounds with the lighter weight applicable when it was free from oil or residue had to be removed. The guard had a hook so that an overhead gib boom could be used to lift it off. This weight might be lifted once or twice a night. The cover was placed in a trough several feet below floor level, and therefore it was necessary to bend and to stoop. Some grinders could be lifting gibs weighing twenty-five to thirty pounds.

He explained the procedure for obtaining a pass for the medical department as going through the supervisor.

The witness testified there was no hook to use with the jib boom on grinder number 1.

He remembered no conversations with Behensmeyer that night, but he said they had spoken of claimant's situation subsequently. He had not talked with Delf.

He indicated an awareness that claimant had problems. He knew that claimant was off work in late 1982 and into 1983 but he did not know it was because of his back. He also knew claimant had a fifty pound weight limitation, but he did not know of claimant's asking for help.

David Behensmeyer, a twenty-one year employee and roll shop foreman, said his responsibility is to coordinate the work and to supervise the people in the shop.

He remembered the events of February 25, 1983 as follows: His shift started at midnight. Claimant was in shortly thereafter. He seemed agitated. He asked for a medical pass, but he did not say why he wanted one. Claimant did not tell him of a work-related incident. He did not remember claimant's limping. He first learned claimant was claiming a work incident after claimant's meeting with Delf.

The witness said that he was certain there was a hoist over grinder 1 on February 25, 1983. He reported that most of his female workers used the hoist while his male workers manhandled the wheel guard. He believed that even if the hook or handle on the wheel guard had been missing, a sling arrangement could have been made to use the hoist. Claimant did not complain of the missing hook.

Behensmeyer recalled that claimant was moved to his building because there had been some trouble in the foil mill area and it was felt that claimant needed closer supervision. He was placed in the main shop when he came back after being on a medical leave.

It was the opinion of the witness that claimant did not like the work in the main shop and he did complain of the heavier work which was in reality more a difference in size rather than a difference in weight. He claimed that running a grinder is the lightest work in the machine shop. He reported that claimant often limped and complained of various problems. He knew of claimant's back trouble.

Larry Delf, who testified in both claimant's and defendant's cases and who was the safety and health supervisor as well as the supervisor of workers' compensation, recalled the circumstances of his meeting with claimant on May 16, 1983: They met in his office for a discussion and went to the medical department where they talked to Dr. Costa. That discussion provoked a letter from Dr. Costa to Dr. Beaty. Claimant told him of the incident on February 25, 1983. He had the guard weighed and he thought the weight was 84 pounds.

The witness stated that prior to that meeting claimant had not made any claim to his knowledge of a work-related injury. He had no requests from claimant that equipment be weighed. Neither did he know of complaints by claimant that he was handling weights in excess of his limitation. He was not cognizant of claimant's complaining of a lack of a safe and healthy work environment.

Delf explained that there is one main roll shop with three satellite shops. Grinding work is essentially the same in all, but there is variety in the materials and equipment. It was his recollection that claimant was sent to the main shop for closer supervision and that claimant resisted being there. He had no personal knowledge as to whether or not the hook was on the wheel guard on February 25, 1983, but he said the hoist was there and the hook was there on May 16, 1983. He acknowledged that employees do not always use the hoist. He did not have information that claimant was complaining of the weights or of the work prior to May 16, 1983.

Delf testified that claimant told him he would not go to a lesser paying job. He agreed that claimant is a proud person.

The witness discussed with Robert Burns claimant's letter of March 2, 1984. He said that he first learned of claimant's dissatisfaction on May 16, 1983 and told Burns about it at that time.

Restrictions come from medical personnel with a copy to him, a copy to the supervisor and a copy to the employee. The employee was told to remind the supervisor of the restrictions in the event the supervisor should forget. In the alternative, an employee with a restriction could seek help from a coemployee.

A letter from claimant to Robert Burns dated March 2, 1984 was offered in evidence.

On March 4, 1983 claimant filed a claim for accident and sickness benefits. He did not complete the portion relating to an accident nor did he answer the question: "Were you at work when the accident happened?" The form states: "This form is not a claim for workers' compensation. The portion completed by Dr. Beaty includes a diagnosis of spinal stenosis and a "no" in response to the question "Did this sickness or injury arise out of patient's employment?"

A similar form is dated May 27, 1983. Attached to that form is a bill from Dr. Beaty indicating claimant's symptoms were recurrent and not work related.

An exhibit shows the payment of 75 weeks and 3 days of accident and sickness benefits at a rate of $291 weekly.

A form to obtain credit union benefits was signed by claimant on October 19, 1983 which gives back surgery as the cause of disability and November of 1982 as the time the condition first appeared. Claimant reported being hospitalized four times between November of 1982 and January of 1983.

Medical department records record back trouble in 1956, 1957, 1960, 1961 and 1964. X-rays in 1957 showed a narrowing in the fourth lumbar vertebra on the left which was thought to be congenital. X-rays in 1961 showed a slight wedging of L2 anteriorly and minimal degenerative disc disease with slight herniation of L4-L5 into L4 on the right.

Records from periodic health checks show acknowledgement of back pain in 1981. During a period of that year, claimant underwent chiropractic care on a daily basis for back pain and pain into the legs.

On January 7, 1983 claimant carried a weight limitation of fifty pounds which was a ten pound reduction from that imposed in 1982.

A note in the medical department records of February 4, 1983 indicates claimant was taking Feldene for his back with complaints of muscle spasm into the right leg. Claimant on that date was restricted to lifting fifty pounds.

A statement from Charles Cunningham, D.O., records his treatment with medication, heat and adjustments of claimant from September 21, 1981 to October 15, 1981 for an acute lumbosacral strain and osteoarthritis of the lumbar spine. Claimant was given a weight limitation of thirty-five pounds.

An x-ray report of September 24, 1981 records an impression of moderate osteoarthritis and a thinning of the disc between L2 and L3.

R. H. Wood, D.C., reports his treating claimant from October 19, 1981 to January 6, 1982 for chronic recurrent lumbosacral strain/sprain with associated myofibrositis and radicular leg pain. He assigned a sixty pound weight limitation.

Records from defendant show claimant was seen in the medical department at nine minutes after midnight on February 25, 1983 complaining of severe lumbar pain which prevented his standing straight. He told of back pain for the past few days and of going to an orthopedist for a pinched nerve. He also announced the possibility of surgery.

Claimant went to the hospital emergency room on February 25, 1983 and gave a history of back problems with his current complaint of pain going down his legs. He claimed no new symptoms. More specifically, his primary complaint was of pain over the lateral aspect of both legs with numbness into the buttocks region. Claimant complained that he aggravated his back while lifting at work.

A note of February 28, 1983 records Behensmeyer's calling the hospital and learning that claimant was there with a bad back.

Eugene Collins, M.D., saw claimant in consultation on February 28, 1983 and took a history of low back pain spanning several years with a flareup in November of 1982. Dr. Collins' impression was spinal stenosis at L4-5 and to a lesser degree at L3-4 with probable intermittent claudication.

X-ray views of the lumbar spine on March 1, 1983 showed extensive osteoarthritis. A lumbar myelogram was interpreted by Charles R. Porter, D.O., as revealing stenosis or narrowing of the spinal canal at L3-4 and L4-5 which was "probably secondary to spondylosis (osteoarthritis)." On March 3, 1983 a Depo-medrol epidural injection was tried.

On April 20, 1983 claimant underwent a bilateral laminectomy at L3/4 after being admitted the preceding day with a chief complaint of pain in both legs. The diagnosis for claimant's condition was spinal stenosis at L3/4. X-rays of the lumbar spine post-surgery showed extensive hypertrophic arthritis.

Dr. Beaty summarized his treatment of claimant in a letter dated February 7, 1984. In that letter the doctor states that he first saw claimant in December of 1982. Claimant had a history of low back and left leg pain and told of a specific incident in November of 1982.

Computerized tomography of the lumbar spine was done on December 16, 1982 which showed probable spinal canal stenosis at L4. Claimant had physiotherapy during this time. M. J. Aden, M.D. expressed an impression of probable spinal canal stenosis at L4.

After some conservative treatment and a Depo-medrol epidural injection, claimant was returned to work on January 10, 1983 with restrictions against lifting in excess of fifty pounds. Dr. Beaty at that time felt that if claimant's condition worsened he would have to be readmitted to the hospital for myelography and a neurosurgical consultation for possible decompression of the spinal stenosis.

Vijay Verma, M.D., examined claimant on February 7, 1983 and took a history of back pain beginning at Thanksgiving when claimant was doing some work. Nerve conduction studies were done in both the upper and lower extremities. Electrodiagnostic study showed muscle membrane instability in the L4-L5 paraspinals. There was no evidence of definite right L3 to S1 radiculopathy.

Following an electromyography in February, the doctor observed that muscle membrane instability at the L4-5 paraspinal might be "secondary to the spinal stenosis as well as hypoglycemia episodes."

The essence of Dr. Beaty's opinion is contained in the following paragraph:

> With regards to the specific asked in your letter, I do not believe that Mr. Aiello would have been able to work indefinitely with a 50 lb. restriction without undergoing a decompression laminectomy, however if the injury as related on February 24, 1983 of lifting 80 lbs. is true, this probably aggravated the patient's low back condition and precipitated the decompression surgery of April 20, 1983. I believe that he did have spinal stenosis which was aggravated by heavy lifting, bending and repetitive twisting activities at work for which he underwent decompression surgery on 4-20-83. The patient has done quite well but I do not believe that he will ever be able to return to a heavy lifting, repetitive, bending, twisting or prolonged periods of standing job activity. I would limit his weight to approximately 35 lbs. This will be permanent. Mr. Aiello was kept off work for his back from February 25, 1983 until October 3, 1983 although some of this obviously was not due to his back in total. I believe that he probably could have returned to work a month earlier had he not had the carpal tunnel releases. The patient has not returned to work because of the restrictions that have been placed on him which I believe to be permanent. These are no lifting over 35 lbs., no repetitive bending, twisting or prolonged periods of standing.

Dr. Beaty rated claimant's permanent partial disability at ten percent.

On September 16, 1983 Dr. Beaty completed a form on which he assessed claimant's ability to stand and to sit at eight hours daily, his ability to walk at five hours and his ability to drive at three. He thought claimant could occasionally lift and carry up to fifty pounds as well as occasionally bend, climb, crawl, squat and reach. He found claimant suited to either light or to sedentary work and possibly to medium work.

Medical department notes from September 27, 1983 show claimant's refusal to return to the main roll shop and indicate claimant's desire to go back to the foil mill. On September 29, 1983 it appears that the doctor visited the shop and determined claimant could not perform work in the roll shop with his restrictions. Apparently a later adjustment was made in the restrictions, but Dr. Costa, after consulting with the superintendent, continued to find the work inappropriate.

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).

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).

Claimant, who had a fifty pound weight restriction, testified that on February 25, 1983 he was lifting and lowering a wheel guard which was described as weighing between 79 and 84 pounds. He said that he had extreme and severe pain which caused him to go to the medical department.

Records from the medical department show that claimant was indeed seen in that department with back pain and an inability to straighten. He said at that time that he had been having back pain for the past few days and had been going to an orthopedist who had suggested to him the possibility of surgery.

Richard Kimball, although not seeing claimant lift the wheel guard, had observed the claimant limping and had seen him go to the medical department after the start of their shift.

Claimant went directly from work to the hospital where he complained that he aggravated his back with lifting at work.

On March 4, 1983 claimant filed for accident and sickness benefits. Claimant explained that he could not wait for compensation, that getting accident and sickness benefits is easy, and that if he claimed a compensable injury he would have been unable to receive accident and sickness benefits.

Defendants make note of Dr. Beaty's referring to an accident of February 24, 1983 rather than February 25. The Iowa Supreme Court has declared the selection of an injury date unimportant in a case where evidence showed that another date, only a few days off from the date given in claimant's application, was the date of injury. Yeager, 253 Iowa 369, 373-74, 112 N.W.2d 299, 301 (1961). Claimant's injury occurred around midnight. The minimal discrepancy is unimportant.

The record supports a conclusion that claimant suffered an injury arising out of and in the course of his employment on February 25, 1983 which aggravated his preexisting condition.

Defendant has raised the affirmative defense notice. 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 st-tutory 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.

Prior to February 25, 1983 claimant had a lifting restriction. On the evening of his injury he went to his supervisor for a pass to the medical department. He recalled saying his back was hurting, but he did not testify that he told Behensmeyer that he hurt it on the job. The medical department notes record a complaint of severe lumbar pain, but contain no notation of a cause for pain. Claimant thought he said that he was changing the guard.

Employer records show that claimant did indeed meet with Delf and someone from the medical department on May 16, 1983 and that claimant's entitlement to workers' compensation was a subject at that meeting. Behensmeyer testified that he first learned that claimant was making a claim for workers' compensation after claimant's meeting with Delf. Defendant's affirmative defense of notice fails.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 25, 1983 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

An 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, 251 Iowa 375, 101 N.W.2d 167. 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 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, 252 Iowa 613, 620, 106 N.W.2d 591 (1961).

Claimant has a long history of back problems with recorded trouble beginning in 1956. X-rays in 1957 were thought to show a congenital narrowing in the fourth lumbar vertebra. X-rays in 1961 showed a slight wedging of L2 anteriorly and minimal degenerati.e disc disease with slight herniation at L4-L5 into L4 on the right.

For a portion of 1981 claimant underwent daily chiropractic care for pain in his back and legs. Dr. Cunningham diagnosed claimant's condition as acute lumbosacral strain and osteoarthritis of the lumbar spine. X-rays showed moderate osteoarthritis and a thinning of the disc between L2 and L3.

Claimant's diagnosis in early 1982 was chronic recurrent lumbosacral strain/sprain with associated myofibrositis and radicular leg pain. He was given a sixty pound weight restriction.

Dr. Beaty began treating claimant in December of 1982 after an incident in late November in which claimant had immediate back pain. Claimant was diagnosed as having spinal stenosis at L3 and L4 and treated with Cortisone injections and a TENS unit. His weight restiction was lowered to fifty pounds. Claimant began taking Feldene. A CT scan showed probable spinal canal stenosis at L4. Claimant was returned to work, but the possibility of decompression was raised. Dr. Verma also took a history of pain beginning at Thanksgiving.

When claimant was seen on February 4, 1983 he reported he was working with a fifty pound weight restriction and doing well. In reality he was not working because of glucose intolerance and reactive hypoglycemia and was released for return on February 7.

Although no early 1983 office notes or reports from Dr. Beaty were offered, a claim for accident and sickness benefits completed by the doctor on March 9, 1983 shows claimant was treated for spinal stenosis which did not arise out of claimant's employment. A similar form with an attached physician's statement dated May 19, 1983 again denies the work-relatedness of claimant's spinal stenosis and of the decompression laminectomy.

A myelogram in March of 1983 showed stenosis at L3-4 and L4-5 which was thought secondary to osteoarthritis. On April 20, 1983 claimant underwent a decompessive bilateral laminectomy at L3-4.

The statement contained in Dr. Beaty's letter of February 7, 1984 is sufficient to establish a causal relationship between an injury of February 25, 1983 which aggravated claimant's pre-existing condition and precipitated his surgery. Claimant will be awarded benefits for the time period to which the parties stipulated--February 25, 1983 to September 3, 1983.

However, as defendant quite properly points out there is no evidence to causally connect Dr. Beaty's impairment rating to the Februa.y 25, 1983 injury. Such evidence is necessary in light of claimant's extensive preexisting condition and the form claimant's surgery took. Claimant had spinal stenosis and a decompressive laminectomy was carried out. No permanent partial disability will be awarded.

The remaining issue is that of rate. The parties agreed to a marital status of married with two exemptions. They were unable to agree on the weeks prior to claimant's injury which should be used to determine the rate.

Iowa Code section 85.36 is the section of the law which deals with rate. The first unnumbered paragraph of section 85.36 mandates a determination of earnings to which an employee "would have been entitled had he worked the customary hours for the full pay period in which he was injured..." Defendant makes note of a portion of 85.36 which refers to "the last completed period of thirteen consecutive calendar weeks immediately preceding the injury." That language speaks of consecutive weeks but it also includes the concept of completeness. Rulings by this agency have been consistent in excluding incomplete work weeks. Lewis v. Aalf's Manufacturing Co., I Industrial Commissioner Report 206 (Appeal Decision 1980); Schotanus v. Command Hydraulics, Inc., I Industrial Commissioner Report 294 (1981).

Applying the method of computation routinely used in these matters results in average gross weekly earnings in the thirteen complete weeks prior to claimant's injury of $675.34. As a married person with two exemptions claimant is entitled to a rate of $377.15.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is fifty-one (51) years of age.

That claimant has a high school education.

That claimant has had additional training to become a grinder.

That claimant commenced work for defendant on January 28, 1952.

That in addition to working for defendant, claimant has driven a school bus and done transfer work for a truck rental firm.

That in April of 1983 claimant began a general freight hauling bu_iness.

That one of claimant's duties on February 25, 1983 was to remove and lower a wheel guard weighing around eighty (80) pounds.

That claimant had back pain which took him first to the medical department and then to the hospital emergency room.

That claimant has not worked since February 25, 1983.

That Delf knew on May 16, 1983 that claimant was making a claim for workers' compensation.

That claimant had back complaints as early as 1957 at which time x-rays showed a narrowing in the fourth lumbar vertebra on the left.

That claimant was off work in the fall and early winter of 1981 and 1982 with a chronic recurrent lumbosacral strain/sprain with associated myofibrositis and radicular left leg pain.

That x-rays of the lumbar spine in September of 1981 demonstrated moderate osteoarthritis.

That as of January 6, 1982 claimant had a sixty (60) pound weight restriction.

That claimant was off work in December of 1982 with a diagnosis of spinal stenosis at L3 and L4.

That claimant received physiotherapy for his back in December of 1982.

That as of January 10, 1983 claimant had a fifty (50) pound weight restriction.

That claimant is married and entitled to two exemptions.

That claimant had average gross weekly earnings in the thirteen completed weeks prior to his injury of six hundred seventy-five and 34/100 dollars ($675.34).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant had an injury arising out of and in the course of his employment on February 25, 1983.

That claimant has established entitlement to temporary total disability benefits from February 25, 1983 to September 3, 1983.

That claimant has failed to show entitlement to permanent partial disability benefits.

That the proper rate of compensation for claimant is three hundred seventy-seven and 15/100 dollars ($377.15).

That defendant has failed to establish by a preponderance of the evidence the affirmative defense notice.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant temporary total disability benefits from February 25, 1983 to September 3, 1983 at a rate of three hundred seventy-seven and 15/100 dollars ($377.15).

That defendant pay interest pursuant to Iowa Code section 85.30.

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

That defendant pay the amount due and owing in a lump sum.

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

Signed and filed this 5 day of September, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT BARNHILL, Claimant, vs. DELAVAN MANUFACTURING CO., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	FILE NO. 459100 D E C I S I O N O N 85.27 B E N E F I T S

FILED
JUL 24 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding wherein benefits available under section 85.27 of the Code of Iowa for medical care and prescription medication are being sought on behalf of Robert C. Barnhill against Delavan Manufacturing Company, employer, and Liberty Mutual Insurance Company, insurance carrier.

The hearing commenced May 18, 1984 in the hearing room at the industrial commissioner's office in Des Moines, Polk County, Iowa.

Claimant appeared through his attorney John R. Ward but did not appear in person. Defendants appeared through their attorney Dorothy Kelley.

The record in this proceeding consists of the testimony of James Brackett, claimant's exhibit 1 and defendants' exhibits A through F. Upon request, official notice was taken of section 2370 of the Medicare Rules and Guides as contained within revision 3-713, of the decision in the case of Robert Barnhill v. Davis as reported at 300 N.W.2d 104 (1981) and of the prior decisions regarding this matter which were made by this agency.

ISSUES

The issues presented by the parties at the time of hearing are claimant's entitlement to benefits under section 85.27 of the Code of Iowa. Defendants contest claimant's entitlement on the grounds that the services were unauthorized and also on the grounds that the services are not for treatment of the work related injury.

REVIEW OF THE EVIDENCE

James Brackett testified that he is the claims supervisor for Liberty Mutual Insurance Company and that his duties include management of claimant's case file with Liberty Mutual. Brackett stated that since exhibit A was issued that claimant has been offered care by a board certified orthopedic physician, which care claimant has refused. Brackett also testified that exhibit D was sent to stress that care by James E. Dolan, M.D., was unauthorized. He stated that care by board certified orthopedic surgeons and psychiatrists continues to be offered to claimant. Brackett conceded that the prior decisions of the agency had required that Dr. Dolan's care be paid for by the defendants and that such decisions were issued in the intervening time between the time exhibit A was issued and exhibit D was issued. Brackett also conceded that claimant would require care from time to time, but that the defendants sought to have the care provided by specialists.

The prior decisions of this agency, namely the review-reopening decision filed April 18, 1979 and the appeal decision filed April 3, 1980, do not address the issue of whether or not care by Dr. Dolan was authorized.

It should be noted that a decision on attorney's fees filed December 9, 1982 authorizes that whatever amount, if any, which is awarded to claimant through this proceeding be paid to Arthur C. Hedberg, claimant's attorney, toward satisfaction of the fees which were awarded to Hedberg for his handling of the previous proceedings.

Claimant's exhibit 1 contains a report from James E. Dolan, M.D., dated February 1, 1983 wherein he relates charges in the total amount of $918.00 which were provided by him to the claimant between June 16, 1978 and December 10, 1982, both dates inclusive. Those charges total $918.00. The report also makes reference to charges for prescription medications in the total amount of $310.83. Dr. Dolan states that both sets of bills, those from himself and those from Drug Mart #6 are related to the October 5, 1976 injury at Delavan Corporation. He also relates that the charges are fair and reasonable for his services.

Defendants' exhibit A is a letter directed to claimant dated June 2, 1977 which indicates that care from Dr. Dolan is unauthorized. Exhibit B is copies of a petition filed by claimant in the Iowa District Court for Polk County wherein he seeks damages for emotional distress as a result of observing an injury suffered by his mother. The decision of the Iowa Supreme Court of which official notice was taken also relates to that

civil action. Exhibit C consists of answers to interrogatories given by claimant in that civil proceeding. In the same he relates stress, anxiety and loss of sleep among the complaints which he alleges as the basis for the damages he seeks in that civil action.

Claimant's exhibit D is a letter from James Brackett to Arthur Hedberg dated January 21, 1983 which states that claimant's care by Dr. Dolan is unauthorized and which also tenders psychiatr and orthopedic care by board certified physicians.

Exhibit E is a collection of records from the Veterans Administration dealing with claimant's medical care.

ANALYSIS AND APPLICABLE LAW

The employer has the right under section 85.27 of the Code of Iowa to choose the medical care which an injured worker will receive. The law imposes upon the employer a duty to monitor the care and provide care which is reasonably suited to the injury. Zimmerman v. L. L. Pelling Co., 2 Iowa Industrial Commissioner Report 462 (App. Decision 1982).

Exhibit A, a letter addressed to claimant, dated June 2, 1977 indicates that care by Dr. Dolan is no longer authorized. The exhibit does not contain a clear concise offer of medical care from any other physician although it does suggest that an orthopedic surgeon be consulted and it makes reference to Dr. Blair who the undersigned assumes to be Donald W. Blair, M.D., a local orthopedic surgeon. The subsequent decisions of the agency, namely the review-reopening decision filed April 18, 1979 and the appeal decision filed April 3, 1980 do not, however, deny payment of Dr. Dolan's bills on the basis of lack of authorization. It appears that those charges which were not made the liability of the defendants were held to be not causally connected to the injury. Defendants did not, however, give any other or further notice of lack of authorization until the letter of January 21, 1983 as shown by exhibit D. The findings of the review-reopening decision and appeal decision found that Dr. Dolan had become an advocate for claimant. Such would be somewhat inconsistent with his role as an objective provider of medical care. For this reason a change in care as directed by the defendants was not unreasonable. The change will not be held effective, however, until January 21, 1983, the date of exhibit D. The prior decisions of the agency coupled with the lack of other clear and concise evidence of notice to claimant of the lack of authorization for Dr. Dolan makes exhibit D a proper point of reference. The fact that claimant requires psychiatric care as well as orthopedic care further indicates that exhibit A is not the proper point of reference for changing the provider of medical care. Further, exhibit A purports to have been sent directly to claimant without any notice to any attorney with whom claimant may have been dealing at that time. From the file in this case it cannot be established whether or not claimant did actually have the services of an attorney on June 2, 1977. This allowance of Dr. Dolan's charges which were incurred prior to January 21, 1983 would clearly be unwarranted under the circumstances of this case.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 4, 1976 is the cause of the medical expenses 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 expenses but it need not be the only cause. Armstrong Tire & Rubber Company v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). The evidence in this case does not contain a medical opinion which conflicts with that expressed by Dr. Dolan in exhibit 1. A close review of all the other reports and exhibits reflects a number of incidents which could reasonably be expected to result in symptoms similar to those which resulted from the 1976 injury. There is no indication, however, that the other incidents caused claimant to recover from the 1976 injury. Dr. Dolan provided services to claimant on a number of occasions which he did not relate to the injury of 1976. Independent review of his notes and the requests for medicare payment as contained in exhibit F confirm that all the charges for medication on exhibit 1 are in fact related to the 1976 injury and that all but seven of the charges are related to the 1976 injury. There is no explanation why the charge of October 31, 1979 which notes removing wax from ears is related to the injury. The problems with claimant's neck on November 21, 1979 are not shown to be related to the lower back injury which claimant sustained in 1976 or the emotional disturbances which it precipitated. The entries of March 7, 1980, April 1, 1980, July 31, 1980, August 15, 1980 and February 12, 1981 may relate to the 1976 injury; however, those entries make references to claimant falling and it appears that the primary purpose for the care rendered on those dates was the treatment of a recent fall. There is no showing in the record of this case that the 1976 injury caused claimant to suffer those falls. The total charges from Dr. Dolan for the services which are not shown to be related to the 1976 injury total $150.00.

This agency does not have jurisdiction to make a determination of whether or not any of claimant's medical expenses, which were paid under medicare, constitute an overpayment to the extent that the same are ordered paid in this proceeding.

FINDINGS OF FACT

1. Claimant is currently receiving permanent total disability compensation as the result of an injury which occurred October 4, 1976.

2. Claimant received medical care from James E. Dolan, M.D., for that 1976 injury during the period including June 16, 1978 through December 10, 1982 which resulted in total charges in the amount of $768.00.

3. Claimant's injury required that he receive prescription medication, which was provided to him at a total cost of $310.83.

4. The charges for prescription medication and those from Dr. Dolan are fair and reasonable.

5. Other intervening incidents may have played a part in claimant's need for care but such were not the only cause of that need for care.

6. Defendants had not effectively removed the authorization for claimant's care by Dr. Dolan until January 21, 1983.

CONCLUSIONS OF LAW

All medical care provided by James E. Dolan, M.D., to claimant herein which was provided before January 21, 1983 was authorized.

The charges for prescription medication in the total amount of $310.83 from Drug Mart #6 were for prescription medication used in treating the injury claimant sustained October 4, 1976.

The charges of James E. Dolan, M.D., were incurred providing reasonable medical care for the injuries claimant sustained on October 4, 1976 as shown in exhibit 1 except for those charges rendered on October 31 and November 21, 1979, April 7, March 1, July 31 and August 15, 1980, and February 12, 1981.

Defendants are liable under the provisions of section 85.27 of the Code of Iowa for claimant's expenses with Drug Mart #6 in the amount of $310.83 and for claimant's expenses incurred with James E. Dolan, M.D., in the total amount of $768.00.

ORDER

IT IS THEREFORE ORDERED that defendants pay one thousand seventy-eight and 83/100 dollars ($1,078.83) to claimant as and for reimbursement of medical expenses, the same to be paid to claimant's attorney of record in these proceedings, Arthur Hedberg, in accordance with the prior order of this agency filed December 9, 1982 in the proceedings which resolved the dispute concerning attorney fees.

IT IS FURTHER ORDERED that defendants file an activity report in twenty (20) days from the date of this decision.

Signed and filed this 24th day of July, 1984.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHIRLEY LEE BAUTSCH,	:	
Claimant,	:	FILE NO. 635732
vs.	:	R E V I E W -
A. Y. MCDONALD MFG., CO.,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
FIREMAN'S FUND INSURANCE,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Shirley Lee Bautsch, against her employer, A. Y. McDonald Manufacturing Company, and its insurance carrier, Fireman's Fund, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on May 5, 1980.

The matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Dubuque, Iowa on May 15, 1984. The record was considered fully submitted on that date.

A review of the industrial commissioner's file indicates that a first report of injury was filed May 16, 1980.

The record in this case consists of the testimony of claimant, of Art Winne and of Luke C. Faber; M.D., of claimant's exhibits A through C; and of defendants' exhibits 1 through 3.

ISSUES

The issues for resolution are:

1. Whether a causal relationship exists between claimant's injury and her alleged disability.

2. Whether claimant is entitled to permanent partial disability benefits for her original work incident.

3. Claimant's rate of weekly compensation.

A review of the industrial commissioner's file reveals that a first report of injury was filed May 16, 1980 and a memorandum of agreement June 18, 1980.

REVIEW OF THE EVIDENCE

The parties stipulated that the commencement date for any award for permanent partial disability was April 7, 1981, claimant's initial work return date.

Claimant, Shirley Lee Bautsch of 2174 River Road, Galena, Illinois, testified in her own behalf. Claimant is 4' 11'' tall and weighs 155 pounds.

Claimant was born May 9, 1943 and graduated from high school in 1961. She has had no formal training since that time. She has worked as a waitress, a nurse's aide, a housekeeper, and a factory laborer. Claimant began work with A. Y. McDonald in April 1979. Claimant worked as a packer wrapper and a Kingsbury operator. The Kingsbury operator had to put a plug into the jaws of the machine and hold the jaws in place tightly. Claimant often used a hammer to assure that the plugs were secured tightly. On her injury date, claimant was pulling on the jaws to keep the plug in tightly. She apparently needed to use her hammer. Her general foreman told her she could not use the hammer but had to close the jaws by hand, however. Claimant reports that the first time she attempted to do so she was "ok"; the second time, she experienced a sharp pain across her back into her right leg. Claimant stated she had had no low back problems nor medical treatment for low back problems before her May 5, 1980 injury date.

Claimant reported she went on her break but needed help getting up following it. She told her foreman who released her to see a doctor. She walked from the plant to the bus depot where she took a bus to her home in Galena. She saw G. J. Klein, M.D., in Hazel Green, Wisconsin that afternoon. Claimant testified she further reported her problems to her employer and the company physician, Luke C. Faber, M.D., in a telephone conference of May 14, 1980. Dr. Faber apparently asked claimant to obtain a statement of Dr. Klein that claimant's work injury was not related to an earlier injury claimant incurred while gardening at home on April 20, 1980. It appears claimant was off work until her injury date as a result of this nonwork incident. At hearing, claimant distinguished the two incidents by stating the gardening incident involved her middle back and shoulders while the work incident produced sharp pain in her lower left side below the belt line and radiating to the right.

Dr. Faber hospitalized claimant from May 15, 1980 to June 4, 1980. She received daily physical therapy and a myelogram was performed. Dr. Faber released claimant to return to work June 8, 1980. Claimant reported she did not feel she could work and asked permission to see Dr. Pearson. Claimant remained off work under Pearson's care through January 1981. Claimant returned to work January 12, 1981 and reinjured herself February 19, 1981. Claimant recited this injury produced the same pain in her low back and occurred when she pulled the jaws of the Kingsbury. Claimant saw David C. Weber, D.C., following this injury at Dr. Faber's direction.

Claimant returned to work April 8, 1981. She bid on a job on a lathe and testified this job did not bother her back so much. Claimant denied that both the Kingsbury and the lathe jobs paid equally well, but express her belief that she had a "hard time making rate" and thereby acquiring incentive pay after her work incident because of back pain. Claimant reported that before her injury her hourly wage had been 125%, but after her injury it was 100% or lower on the Kingsbury and varied from 100% to less on the lathe. Claimant worked from April 1981 to July 1982 when she broke her thumb. Claimant missed seven weeks for this injury then returned and bid for an assembly job which she described as putting saddles together.

Claimant testified concerning her work incident of October 1983. Defendants objected to this testimony on the grounds that it was not admissible if claimant's October 1983 incident resulted in a new injury or an aggravation of her previous injury. Since the evidence is relevant to the question of whether claimant's October 1983 incident was a second injury or aggravation or merely an exacerbation of the symptomology from claimant's earlier problem, defendants' objection is overruled. Claimant recited that she was working in her regular department as an assembler when a supervisor told her to go to department 14 to work on stock boxes. Claimant was then told to drive a fork truck. She stated that when she went to get up in the truck she noticed a very sharp pain in her low back. She characterized her pain as the "very same" as that experienced on May 5, 1980. Claimant later stated she "had reached up real quick" from a bent position to prevent an overhead pipe from hitting a co-worker in stock boxes. She stated she felt a little numbness then and that this occurred approximately five minutes before her great pain. Claimant was hospitalized following this incident. She reported Dr. Faber put weight restrictions on her following this incident, and that she has been unable to return to work since then for A. Y. McDonald's has no work within the restrictions.

On cross examination, claimant stated that her pain is mostly in her right leg and characterized as "wrong" an interrogatory answer which states her pain is in her left leg. Claimant admitted that following her injury she received her base pay even when she did not meet 100 percent of her wage rate. Claimant admitted she received no written warnings concerning her quantity of work following her May 1980 injury. She had received a written warning regarding the quality of her work on April 15, 1980. Claimant could not recall being laid off in summer 1981 nor could she recall whether she ever received unemployment compensation. Claimant thought her hourly rate in October 1983 was $5.59 per hour plus cost of living adjustment.

On redirect examination, claimant again characterized her April 20, 1980 nonwork incident as producing pain between the shoulder blades rather than in her low back. She reported she was given a brace which she characterized as an elastic back support on recross-examination. She also reported she was off work two weeks following this incident and that her shoulder blade pain has gone away and has never again bothered her.

Art Winne, the vice president for personnel relations at A. Y. McDonald, was called by defendants. Mr. Winne identified defendants' exhibit 3 as a summary of claimant's pay during her last 13 weeks at A. Y. McDonald. He identified exhibit 2 as a summary work history for claimant, such as is prepared routinely when workers are discharged. He testified that assemblers at the plant have a lower base pay than some other workers but often receive higher overall pay through incentive pay which he characterized as a function of how fast the human body works.

Luke Charles Faber, M.D., was called by claimant. The doctor described himself as company doctor for A. Y. McDonald. He stated he first saw claimant for her work incident May 8, 1980. He gave the following oral history:

> Well, she stated that on April 20th of 1980 she pulled muscles in her back doing yard work. She saw her family physician for two weeks and she was off for two weeks. She returned to work on 5-5 of '80. She worked for two hours. She pulled her muscles again while running Kingsburys and this involved pulling her arms laterally and twisting her back. I saw her at that time for that problem.

The doctor stated he never received a report from Dr. Klein regarding claimant's April 20, 1980 injury. He denied hospitalizing claimant in May 1980 and stated that James A. Pearson, M.D. did so. The doctor stated claimant was again hospitalized from March 12, 1981 through April 1, 1981. He recalled treating claimant during this hospitalization and said that claimant's discharge summary noted that no diagnosis of claimant's problem was made. He reported regarding this:

> She was under my care primarily, although at that time she was seen by some six or seven specialists

in various fields, including another orthopedist besides Dr. Pearson, a neurologist, a gynecologist, a urologist and an internist who all evaluated her problems and nobody could come up with a diagnosis as the cause of her pain. Therefore, she was signed out as no diagnosis made.

The doctor was questioned regarding claimant's October 18, 1983 incident. Defendants objected on the grounds recited earlier as regards claimant's testimony concerning that incident. For like reasons, the objection is overruled. The doctor recited his recorded notes reflect the following as regards that incident:

> The record states that the patient's complaint is of pain in the lower left back. The record states that the patient said she was at work today, was sent on to a different department, worked there about twenty minutes and then developed pain in the lower back, more on the left side. She has pain when she walks and sits down. The pain radiates down the back to the knee. She's on no medication but did take four aspirin at work and did not relieve the pain.
>
> She complains of a lot of pain in her left sacroiliac area at the point of tenderness, some pain in the left leg with numbness in her left leg. On forward flexion she can flex to come within eight inches of the floor but has pain on straightening back up, pain in the left side in twisting her back to the left, and on the right side she has no pain in twisting to the left side. She had pain on right side flexion and left side flexion showed no pain. She complained of numbness in the left leg and the comment was, "I will hospitalize for control of pain and symptoms in view of her past history.

The doctor stated that when claimant was hospitalized for this incident "a different kind of history came up in terms of her physical examination and history taking than in my office."

He recited the history claimant gave him on hospitalization as follows:

> The patient states that at this time while working at A. Y. McDonald's, having been given a job change, and after the job assignment Shirley informed the personnel people that if she did that job, she would probably have back pain. Sure enough, within a few hours of starting the job on that day while squatting she felt that she squatted improperly and started to have pain. As she walked away from the job, it became progressively worse.

In response to a question of claimant's counsel as to whether claimant's October 1983 incident was a new injury, an aggravation of the preexisting condition or an exacerbation of claimant's injury, the following discourse ensued:

> Yes. Well, if you remember, in that 81' hospitalization we went to a great deal of effort of trying to find out what was her pre-existing condition and we could not come to a diagnosis. She was literally discharged from the hospital with no diagnosis and we had gotten all these people involved that might explain other bizarre reasons for her pain, the urologist for kidney problems, two orthopedists because of bone problems, a gynecologist because of possible pelvic causes of pain giving her back pain, an internist for metabolic diseases and I think at that time probably an MMPI, too, which is a psychological testing.
>
> Regardless, with all of this effort, we were unable to come up with a specific diagnosis so it's very difficult for me to go back and answer your question in light of the fact that we don't have any information as to what was her pre-existing condition or situation or injury, but she comes back now with the same kind of problem with it involved with assignment to a different job that she obviously didn't want to do and she comes in with pain. I would tell you that pain -- I think her pain is real. It's a subjective sensation but I'm sure for Shirley it's real. We could not objectively find any reason for it.
>
> So she comes back in at this time and we're dealing with basically the same kind of issues and the same kind of pain. We came up with the same kind of conclusions. So to answer your question, I don't think I really can because we have no basis to put the criteria on. It certainly is a new part of her pain but it's the old pain that she had before. Is it a recurrence, I can't tell you. I really can't tell you because we don't have anything tied down before as what was the cause. Did it arise out of her work? It happened while she was working but is it due to her work, we can't tell, never been able to tie down what it is that caused her the dfficulty but she has difficulty. There's no question about that.
>
> Q. Well, then are you telling us that with any degree of medical certainty you can't really tell us whether or not she actually had a new injury, maybe she did, maybe not?
>
> A. We could never tell that she had an injury on any one of these circumstances. All she had was pain and pain is a purely subjective sensation. We could not objectively find a reason for this.

The doctor explained that the consistent thread throughout claimant's problems has been low back pain. The doctor opined that claimant does not have an injury explaining: "...after four years of observing this woman with her pain, we have never been able to demonstrate an anatomical breakdown or a demonstrable variant in her neurology or physiology or bone structure."

On cross examination, the doctor stated that obesity is a substantial contributing factor when found in a person with pain. The doctor recited that the only abnormality found on claimant's x-ray examination was a congenital condition at L4-S1 in that three nerve roots exit from her back in the same position.

Claimant's exhibit A is medical reports relative to claimant. Defendants' objections to those concerning claimant's October 18, 1983 injury are overruled. Of interest among the reports are the following: A nursing physical assessment note of March 1981 states claimant has pain in her left leg with tingling in her right leg. Later notes state claimant reports "tingling in both legs from thigh to toes." A Minnesota Multiphasic Personality Inventory profile and case summary contains the following summary of R. H. Lee, M.D.:

> Profile over almost one year's duration (test/retest) has exhibited an elevated Scale 9 - indicative of poor impulse control, high energy level & difficulty with long range goals. More hysterical qualities are apparent on the present profile.
>
> Impression: Patient is easily bored, impulsive & restless. May have difficulty persevering with conventional routine. Prone to represent conflicts in somatic symptoms. Hysterical qualities. Emotional crisis are prabably short in duration & do not markedly incapacitate her for any great length of time. She will probably have reoccurring episodes. Not depressed. Anxiety scales low. Exaggerated need for attention & excitement.

An electroneuromyographic examination report of March 13, 1981 recites that claimant has normal motor nerve conduction study and electromyographic results. It describes her pain as low back pain more left sided with a tingling into the lower left extremity but occasionally on the right side as well.

A discharge report of Luke C. Faber of June 4, 1980 notes:

> 37 year old lady who gives a history of having strained her back and shoulder while working in the garden and then returned to work following a period of several weeks off and 2 hours after returning to work complained of recurrence of her back pain.
>
> She is admitted for treatment.
>
> Under physical therapy and rest she showed gradual improvement and now claims that she has no pain whatever in her back or shoulders and is ready for discharge.
>
> She also brings up that she wants a change in the way that she does her job at home or she certainly will reinjure herself.

An April 1, 1981 discharge summary of Dr. Faber states no "diagnosis made;" recites claimant's evaluation by an orthopedist, an orthopedic surgeon, a neurologist, a gynecologist, and a urologist who found nothing within their specialities that contributed to claimant's pain and by an internist who felt claimant had a chronic pain syndrome based on compensation need. The report further states: "It is interesting in reading the nurses [sic] notes that there are numerous entries in the nurses [sic] notes, her moving with agility and without pain and then stating that when she became aware that a nurse was in the room she started to moan and complain of pain."

A report of J. S. Chapman, M.D., of March 31, 1981 recites that claimant "appears to have some of the characteristics of chronic pain syndrome with secondary gain from her back difficulty."

Defendants' objections to claimant's exhibit B and C are overruled since it appears defendants had access to and control of the exhibits before claimant received them subsequent to discovery deadline in this matter. Exhibit B is a letter report of James A. Pearson, M.D., which recites an impression of chronic lumbar strain with no evidence of permanent partial disability though claimant is not relieved of her pain. The report notes that claimant has no evidence of a ruptured lumbar disc, but that x-rays of January 17, 1984 showed a lateral deviation of the spine to the right and mild narrowing of the L5 disc.

Claimant's exhibit C is an April 24, 1984 letter report of Dr. Faber which notes:

In view of Mrs. Bautsch's long history of significant disability and inability to work because of back problems, it is felt by me that she should in no way be assigned to a job that requires lifting any weight from the floor to her waist level, or that would involve stooping, bending, or twisting. Her weight restrictions should be limited to fifteen pounds or less and the repetition of lifting should be no more than ten to fifteen times per hour at that weight level. It would be ideal if she could be on a job at which she could sit and work at waist level. If standing, that she could stand with a prop-rail, so that she can lift one leg four inches above the other and rest against the rail while working. I do believe that these restrictions should be permanent in view of the long history of disability relative to low back problems.

Defendants' exhibit 1 is medical records relative to claimant. A May 20, 1980 letter report of G. J. Klein, M.D., states that claimant injured her back doing yard work at home April 20, 1980 at 4:00 p.m., exhibited an acute posterior intercostal sprain on the right and a right trapezius muscle sprain, and that, on claimant's May 5, 1980 work return, claimant's "sprain immediately recurred when she was performing her normal job...."

A consultation note of Dr. Pearson of May 22, 1980 states claimant complains of pain in her neck, right arm, right shoulder, and back and some discomfort into the right hip and leg.

Defendants' exhibit 2 is a personnel history of claimant which recites: "DISCIPLINE: 9-18-81, W. Failure to perform required quality; 4-15-80, W. Failure to perform required quality; 10-9-79, W. K Failure to perform required quantity of work."

Defendants' exhibit 3 is a wage history of claimant which recites:

PERIOD ENDING	HOURS	GROSS AMOUNT
05-04-80	----	----
04-27	----	----
20	40.00	232.40
13	40.00	232.40
06	40.00	232.40
03-30	40.00	232.40
23	37.00	214.97
16	40.00	232.40
09	40.00	232.40
02	40.00	224.59
02-24	40.00	224.80
19	24.00	134.88
10	40.00	224.80
TOTAL	501.00	2,867.76
AVERAGE PER WEEK	38.54	5.72
7-3	40.00	224.80
1-27	40.00	224.80

APPLICABLE LAW AND ANALYSIS

Our first concern is whether a causal relationship exists between claimant's injury of May 5, 1980 and her current disability. This question also encompasses the issue of whether claimant's October 18, 1983 incident was a new injury, an aggravation of a preexisting condition or an exacerbation of her symptomology.

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

Claimant does not prevail on this issue. Claimant continues to have problems but little diagnosis as to their origin or cause has been made. Dr. Chapman believes claimant suffers from chronic pain syndrome with secondary gain from her back difficulty. Dr. Faber agreed that claimant has subjective pain but explained that no physician has found any organic basis for such even after extensive testing and treatment during the course of seperate hospitalizations. Dr. Lee, in summarizing the results of claimant's MMPI, noted that claimant was "prone to represent conflicts in somatic symptoms" and had an "exaggerated need for attention and excitement." Claimant's medical history is replete with instances where claimant's difficulties apparently developed only after claimant faced an unpleasantness or a potentially confrontative situation, or saw the possibility of gaining sympathy for her plight These facts create serious questions as to whether claimant's continuing bouts of pain have any connection with her work or the work episode of May 5, 1980. They suggest that claimant's problem originates in needs within herself that are not causally connected to her May 5, 1980 work episode.

Also, disquieting is the fact that claimant cannot locate the position of the pain which she has suffered for at least four years. At hearing claimant testified her extremity pain has always been in the right leg and she so informed her attorney. She characterized as "wrong" her answers to interrogatories that state her extremity pain is predominately in her left leg. Claimant's medical records also indicate she previously described her pain as radiating into her left leg with only some tingling or numbness in the right extremity. That claimant could disremember such a salient detail of her long term physical symptomology is quite disturbing and leaves one doubtful of a physical origin of her problems in a May 5, 1980 work episode.

Equally disquieting is the medical report of Dr. Klein of May 20, 1980 in which the doctor states claimant incurred an acute posterior intercostal sprain on the right and right trapezius muscle sprain while doing yard work at home on April 20, 1980 and that claimant's "sprain immediately recurred when she was performing her normal job..." on her May 5, 1980 work return. The doctor initially treated claimant for both the April and May incidents. This report suggests that if a physical cause for claimant's problem is ever found, the cause will be traced to her nonwork injury of April 20, 1980 and not to any work event of May 5, 1980. All the above cited facts make it probable that claimant's difficulties flow from a source other than any May 5, 1980 work incident. It also appears that claimant's October 18, 1983 work incident is but another manifestation of claimant's continuing nonwork related difficulty and not a new injury or an aggravation of any injury from the May 5, 1980 event. Claimant, herself, characterized her pain on October 18, 1983 as exactly the same as that experienced May 5, 1980. Claimant had had a like work event February 19, 1981. Each followed the medical and behavior pattern of claimant's May 5, 1980 difficulty. For this reason, it cannot not be said that it is probable they are also manifestations of claimant's nonwork difficulties and not new work incidents or aggravations.

Because claimant has failed on her threshold issue, discussion of the remaining issues of benefit entitlement and rate is unnecessary.

FINDINGS OF FACT

WHEREFORE, it is found:

Claimant experienced pain in the course of her work for defendant, A. Y. McDonald, on May 5, 1980 while pulling the lever on her Kingsbury after her foreman had instructed her to not use a hammer to assist in tightening plugs.

Claimant had suffered an acute posterior intercostal sprain on the right and a right trapezius muscle sprain on April 20, 1984.

Claimant was off work on account of this injury until May 5, 1980.

Dr. Klein, who treated claimant following both incidents, reported that her sprain of April 20, 1980 immediately recurred when she was performing her normal job on May 5, 1980.

Claimant had an occurrence of pain at work on February 19, 1981 while working on the Kingsbury.

Claimant had earlier reported to Dr. Faber, the company doctor, that she would reinjure herself if her job conditions were not changed.

Claimant had an occurrence of pain at work on October 18, 1983 after she was transferred from her own department to a second department to fork lift driving.

Claimant expressed a concern that she injure herself were she to drive the fork lift previous to accepting the foreman's direction to drive the lift.

Claimant experienced great pain which she characterized as exactly the same as her pain of May 5, 1980 when she attempted to step into the fork lift.

Claimant has been evaluated by numerous different medical specialists and no organic basis for her pain has been found.

Claimant has secondary pain from her chronic problems with pain.

Claimant has an MMPI profile suggestive of a tendency to represent conflicts in somatic symptoms.

Claimant disremembered that she reported symptoms of left

rather than right leg pain to her physicians.

Claimant's pain is not causally connected to any work episode of May 5, 1980.

Claimant's pain at work on February 19, 1981 and October 18, 1983 are but manifestations of her continuing nonwork-related problem and were new injuries or aggravations of any preexisting condition.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has not established a causal relationship between her work episode of May 5, 1980 and any disability she has.

ORDER

THEREFORE, it is ordered:

Claimant take nothing further from these proceedings.

Defendants pay costs of this action.

Signed and filed this 20th day of September, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES BENI,	:	
Claimant,	:	
vs.	:	
FARMERS CO-OP,	:	FILE NO. 747511
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
FARMLAND MUTUAL INSURANCE,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by James Beni against Farmers Co-op Company, employer, and Farmland Mutual Insurance Company, insurance carrier. Claimant alleges that he sustained a compensable injury to his back on or about July 11, 1983 and seeks compensation for permanent partial disability and for transportation expenses in receiving medical care. The hearing commenced July 2, 1984 in the Industrial Commissioner's office in Des Moines, Iowa with Michael G. Trier, Deputy Industria Commissioner, presiding. Claimant appeared in person with his attorney David Drake and defendants appeared through Cecil Goettsch, their legal counsel. The case was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of James Beni and Ray Chartier. Also admitted into evidence were claimant's exhibits 1, 2 and 3 and defendants' exhibits A, B and C.

ISSUES

The issues presented by the parties at the time of hearing are: whether claimant sustained an injury arising out of and in the course of his employment; whether there is a causal connection between the alleged injury and any disability which claimant exhibits; a determination of the nature and extent of any disability which claimant may exhibit; and a determination of claimant's entitlement to mileage for transportation expenses under section 85.27, Code of Iowa. It was stipulated by the parties that the only disability in issue is permanent partial disability and that there is no claim for temporary total disability or healing period benefits. The parties stipulated that in the event of an award claimant's rate of compensation is $190.44 per week.

REVIEW OF THE EVIDENCE

Claimant testified that he was born February 16, 1955 and is currently 29 years of age. He stated that he is married and has two children, ages three years and nine months.

Claimant testified that he graduated from Dallas Center High School in 1973 and has no further formal education or vocational training. He denied serving in the military.

Following graduation from high school claimant worked installing counter tops and kitchen cabinets which required carrying weights of as much as 80 pounds. He then worked for more than a year at City Automotive in Des Moines, Iowa as a parts-person where he performed counter sales, stocking, shipping and receiving. His next employment was with AAMCO Transmission where he worked removing and replacing transmissions, following which he worked for the Metropolitan Transit Authority in Des Moines servicing buses. He was eventually transferred to the parts department where his duties included bookkeeping, inventory control, shipping and receiving. He left due to a labor dispute at which time he was earning $6.25 per hour. Claimant also stated that he had worked doing general construction work for two different construction firms in Dallas Center, Iowa where his duties involved roofing, framing, wiring, plumbing, siding and cement work. Claimant recalled experience managing a business known as D. C. Auto in Dallas Center for approximately one year.

Claimant described his work for the defendant employer as being in the tire department where he would repair and replace tires, service cars and replace batteries. He stated that when business in his department was slow he would sometimes work at the feed mill or in the front office. Claimant testified that at the time of his injury he was earning $5.50 per hour.

Claimant testified that on July 11, 1983 he was lifting a tire and felt a pop in his back which caused excruciating pain. He stated that his knees buckled and that he fell. He stated that he finished the task he was performing and informed his supervisor. Claimant testified that he could hardly get out of bed the following morning and worked only part of the next day. He stated that he sought care from Robert L. Gustafson, D.C., a local chiropractor. Claimant recalled an incident in July, 1982 involving his back which kept him off work for a couple of days. He stated that such incident did not cause his knees to buckle, however, and that following it he got along relatively well.

Claimant denied any other previous significant back problems. Claimant testified that following the 1983 incident he returned to work but that he was unable to work and arranged with his supervisor to commence his vacation earlier than had been planned. Claimant testified that he contacted his family physician who referred him to Marshall Flapan, M.D. Claimant stated that Dr. Flapan examined him and recommended that he remain off work until August 1. He stated that Dr. Flapan recommended avoidance of excessive lifting. Claimant stated that he discussed Dr. Flapan's recommendations and impressions with Ray Chartier, particularly with regard to ways of adapting his job to fit the recommendations and his future with the Co-op.

Claimant testified that he returned to work on August 1 in the tire department with unchanged duties. He stated that he felt weaker and still had a backache at the time and that on occasion he did request assistance from other employees. Claimant stated that on that day he was called into the office by Ray Chartier where he was told that it would be best for everyone concerned if his employment were terminated. Claimant stated that he was paid for the entire month of August although he only worked until August 15, 1983. He stated that the Co-op kept his medical insurance coverage in effect through the end of September, 1983.

Claimant stated that he next worked for Pitney Bowes reading postage meters for which he earned $5.00 per hour and worked a 20 hour week. Claimant stated that the job was temporary and that when it ended in November, 1983 he found work with Gaylen Haldeman Construction, a firm with which he had been employed before beginning work for the Co-op. Claimant stated that he works as a carpenter and that he has been regularly employed since he started in November, 1983. He stated that he needs help more frequently than before and that his capacity for work is reduced. In defendants' exhibit C, at pages five through ten, claimant indicated that he has performed a variety of functions at his current employment including some digging and shoveling, finishing cement and working from a ladder.

Claimant testified that he earns $6.00 per hour in his current employment but that he does not work as many hours as he previously worked for the Co-op.

Claimant testified that he now feels different from prior to the occurrence of July, 1983 in that he is generally sore in his lower back, tires easily and is stiff when he gets up in the mornings. He stated that bending and lifting is more difficult and that he cannot carry items as he had done in the past.

Claimant testified that he would like to go to some type of schooling which would get him out of performing manual labor. Claimant denied any back problems prior to July, 1982. He

stated that he had seen Dr. Gustafson prior to July, 1983 for other problems. Claimant stated that he hurt his back on a Monday and that he thinks he saw Dr. Flapan on the following Monday. He recalled that x-rays were taken on the first visit. Claimant testified that he believed that the second visit with Dr. Flapan was mid-week and that he was released to return to work on the following Monday. He stated that the dates of July 25 and August 22, as they appear in medical records, do not seem correct and that he thinks that he called Dr. Flapan on the telephone on one occasion.

Ray Chartier testified that he has been the general manager of Farmers Co-op in Dallas Center since January, 1963. He related some problems with claimant's work and did not recall a July, 1982 back injury. He stated that claimant had vacation scheduled during July, 1983 and that he had conversations with claimant regarding his back prior to the time claimant went on vacation and also after claimant had seen Dr. Flapan. Chartier stated that it was his understanding that claimant's problem was a birth defect which heavy lifting would aggravate. He stated that the Co-op had no openings consistent with claimant's restrictions and suggested that claimant find other work. Chartier confirmed claimant's testimony regarding the termination of employment and continuation of pay and benefits. Chartier stated that claimant was not discharged due to job performance deficiencies. He also testified that he based his actions upon what claimant had told him and denied seeing any medical reports or talking with claimant's doctors. Chartier related discharging a 20 year employee who had suffered three back surgeries which involved extended absences from work totaling 26 months.

Claimant's exhibit 1 is a report from Dr. Flapan dated October 6, 1983 with progress notes attached. In the report Dr. Flapan states:

1. Final diagnosis: Symptomatic spondylolisthesis. Theis [sic] spondylolisthesis was present prior to his work related injury, but in my opinion it was aggravated by his job.

...

4. It is my opinion that Mr. Beni has sustained a permanent partial impairment as a result of his work related lifting incident of 7/11/83 in the amount of 5% of the body as a whole. This is based on his subjective findings of pain, discomfort with bending, lifting and straining and the objective findings of pre-existing spondylolisthesis.

5. I would suggest that Mr. Beni follow a regimen of guarded lifting, bending, straining and carrying to avoid reinjury to his back.

6. I have no future recommendations other than the above for treatment. The future for Mr. Beni in regards to his back may be on e [sic] which holds that of recurrent low back pain and discomfort aggravated by lifting, bending and straining. This may eventually require surgical intervention in the form of a laminectomy and lumbar fusion.

The progress notes dated July 25, 1983 include the following interpretations:

X-RAYS: Five views of his lumbosacral spine shows bilateral defects in the pars interarticularis and he has a first degree spondylolisthesis. (emphasis added)

Claimant's exhibit 2 is a report from James R. Bell, M.D., dated August 24, 1982 and states:

> In regard to your recent letter, Mr. Beni stated on 7/12/82 (according to my records) that he had had problems with similar low back difficulties over the past several years. An x-ray of the lumbosacral spine was ordered and was interpreted by Dr. Tigrani, radiologist at Northwest Hospital, as follows: "Lumbosacral spine: examination reveals evidence of defect at the pars interarticularis of L5, S1. There is no evidence of any spondylolisthesis as yet..... (emphasis added)

Claimant's exhibit 3 is a report from Peter D. Wirtz, M.D., dated April 12, 1984 in which he states:

> This patient had an x-ray at Dr. Bast's office on 7/12/82 which shows a congenital anomaly present at the time of his original injury. This congenital defect in the lumbar spine pre-existed his work injury. The injury in July, 82 and July, 83, were temporary in nature. When the healing process has completed, which is anywhere from 6-12 weeks, he has normal motion. This type of a defect will be aggravated with heavy lifting. He has not suffered any permanent impairment from his injuries in July, 82, and July, 83 which were musculoskeletal strains to these structures.

ANALYSIS AND APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 11, 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).

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 supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 721, 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.

Claimant testified to an incident from which his symptoms arose. The evidence showed that it was immediately reported and that claimant commenced his vacation early in order to recover from it. Claimant appeared and testified at hearing and the undersigned observed his demeanor and appearance. Although there appear to be some uncertainties and conflicts in the record, particularly regarding the timing of claimant's visits with Dr. Flapan and the statement of prior similar low back problems contained in exhibit 3 which were denied by claimant at hearing, claimant is found to be credible. There is ample evidence that claimant certainly had a preexisting pars interarticularis defect prior to July 11, 1983, but such had been relatively asymptomatic. In his report of October 6, 1983 Dr. Flapan opines that claimant had a preexisting spondylolisthesis which was aggravated by his work. In exhibit 3 Dr. Wirtz characterized the incident as an injury. It is therefore found and concluded that claimant did receive an injury on July 11, 1983 which arose out of and in the course of his employment. It is further found and concluded that the injury was in the nature of the aggravation of a preexisting condition.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 11, 1983 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 (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).

Dr. Wirtz expressed the opinion that claimant's injury did

not result in permanent impairment. Dr. Flapan disagreed stating that in his opinion the injury had resulted in permanent partial impairment of 5 percent of the body as a whole. It should be noted that in exhibit 2 no evidence of spondylolisthesis was found, but that in Dr. Flapan's notes made approximately one year later a first degree spondylolisthesis was identified. It is apparent that some change had occurred between the times claimant was examined in July of 1982 and July, 1983. Such a change is inconsistent with Dr. Wirtz's opinion that claimant's injury was only temporary in nature. In view of this inconsistency, as well as the fact that Dr. Flapan was claimant's treating physician, the opinion concerning the permanency of claimant's injury which was expressed by Dr. Wirtz is rejected and the opinion of Dr. Flapan is adopted. It is therefore found and concluded that claimant sustained a 5 percent permanent partial impairment of the body as a whole as a result of the work related injury which occurred July 11, 1983.

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).

Claimant's age is such that a change to a sedentary type of employment would not be unreasonable. His education is limited to a high school diploma but claimant has expressed a desire to obtain further vocational training and there is no indication in the record that he would be unable to successfully complete further vocational training. Claimant is currently experienced in carpentry, home building and some phases of auto mechanics. He appears to have the present capability of working as an automotive parts salesperson. His functional impairment is relatively small. Claimant did, however, lose his employment as a result of his injury. Claimant's present favorable employment is the result of a sympathetic employer who has agreed to make accommodation for claimant's limitations. It is therefore found and concluded that claimant has sustained a permanent partial disability of 15 percent when the same is measured industrially.

Claimant's injury has been found to be compensable and claimant is due compensation for 104 miles of travel at the rate of $.24 per mile which computes to $24.96.

FINDINGS OF FACT

1. On July 11, 1983 claimant was a resident of the State of Iowa and was employed by Farmers Co-op Company at Dallas Center, Iowa.

2. Claimant was injured on July 11, 1983 while carrying a tire. The injury was in the nature of an aggravation of a preexisting condition in claimant's back.

3. Pursuant to the stipulations of the parties, no determination of claimant's entitlement to healing period benefits will be made.

4. Claimant's injury resulted in a permanent functional impairment of 5 percent of the body as a whole.

5. Claimant is 29 years of age and at the time of injury was married with one dependent child.

6. Claimant's rate of compensation is $190.44 per week.

7. Claimant presently suffers from continuing discomfort and soreness in his back. He tires easily and is unable to bend, lift and carry items as he did prior to the injury. His treating physician has recommended restricted activities in order to avoid a worsening of his condition which could require surgical intervention.

8. Claimant's education is limited to a high school diploma.

9. Claimant has experience in general carpentry including electrical wiring, plumbing and cement work. Claimant also has experience in the field of auto mechanics and as an automotive parts salesman.

10. Claimant appears to be of at least average intelligence, emotionally stable and well motivated.

11. Claimant's employment was terminated by his employer on the premise of avoiding further injury to claimant. Claimant's former employer employed few people, had no work which was reasonably suited to claimant's medically imposed restrictions and there is no indication that the termination of claimant's employment was made in bad faith.

12. Claimant's injury was in the nature of an aggravation of a preexisting pars interarticularis defect which resulted in a grade one spondylolisthesis. Further heavy work could be expected to result in further deterioration of claimant's back.

13. Claimant traveled 104 miles in order to obtain treatment for his injury.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and of its parties.

On July 11, 1983 claimant sustained an injury to his back which arose out of and in the course of his employment with Farmers Co-op Company.

That injury caused claimant to become permanently partially disabled to the extent of 15 percent of total disability when measured industrially.

Claimant is entitled under section 85.27 of the Code of Iowa to compensation for 104 miles of travel which he performed in order to obtain medical care at the rate of $.24 per mile resulting in a total amount of $24.96.

The payment of claimant's entitlement to compensation for permanent partial disability should begin August 1, 1983, when claimant returned to work.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant seventy-five (75) weeks of compensation for permanent partial disability at the rate of one hundred ninety and 44/100 dollars ($190.44) per week commencing August 1, 1983. Defendants shall pay all amounts which are past due and owing in a lump sum together with interest at the rate of ten percent (10%) per annum computed from the date each such payment became due and running to the date of actual payment.

IT IS FURTHER ORDERED that defendants pay claimant twenty-four and 96/100 dollars (24.96) as reimbursement for travel expenses incurred in obtaining medical care for his injury in accordance with Iowa Code section 85.27.

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 in twenty (20) days from the date of this decision.

Signed and filed this 31st day of August, 1984.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES BROWN,	:	
Claimant,	:	FILE NO. 711210
vs.	:	A R B I T R A T I O N
W.B.M. MARINE, INC.,	:	D E C I S I O N
Employer,	:	
and	:	
HAWKEYE SECURITY INSURANCE COMPANY,	:	AUG - [illegible]
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, James Brown, against his alleged employer, W.B.M. Marine, Inc., and its insurance carrier, Hawkeye Security Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he allegedly sustained August 13, 1982.

The matter came on for hearing before the undersigned deputy industrial commissioner at the municipal court room in the municipal building in Waterloo, Iowa July 13, 1984. The record was fully submitted on that date.

An examination of the industrial commissioner's file indicates no filings have been made with the industrial commissioner's office.

The record consists of the testimony of claimant and of Robert Brighton.

PRELIMINARY MATTER

At hearing, claimant orally moved for bifurcation in order that only the issue of employer-employee relationship and the affirmative defenses of casual employment and independent contractor be heard. It was established that both parties understood this matter would be bifurcated and that this proceeding would address only these issues and prepared for hearing accordingly. Therefore, no prejudice will result to defendants through bifurcation and claimant's motion is granted.

ISSUES

1. Whether claimant was an employee of W.B.M. Marine Inc. when injured. Defendants assert the affirmative defense that claimant was an independent contractor or a casual employee.

REVIEW OF THE EVDIENCE

No stipulations were made. Claimant, James P. Brown, testified in his own behalf. Claimant stated he had worked for defendant, W.B.M. Marine, for five hours on his injury date, August 13, 1982 and not previously. Claimant apparently assisted a Mike Griffin clear a vacant lot on Edwards Street in Waterloo. Claimant reported that when he and Griffin arrived at the lot, a third man was waiting there. This man apparently gave Griffin and claimant tools to use in cleaning the lot and left. Claimant assumed this man was a W.B.M. employee. Claimant testified that he attempted to roll a large log over while clearing the lot and "popped a bone" in his left shoulder blade. An ambulance transported claimant to Allen Hospital where he was apparently treated as an outpatient and released. Claimant testified he is continuing to receive treatment for his condition at University Hospitals in Iowa City. He stated his shoulder still gives him problems.

After his injury, claimant apparently went to W.B.M. headquarters and sought payment for his work. Claimant apparently spoke with Robert Brighton who paid him cash for his labor. Claimant explained he wanted cash rather than a check since he had no ID with which to cash a check.

On cross examination, claimant stated he did not know whether he was free to determine the matter in which the lot was cleaned. Claimant admitted he had only been hired to clear the lot and had not otherwise worked for W.B.M. He asserted that had he not been injured he would have "done more" for W.B.M. Claimant agreed that he was not certain the person leaving the tools was a W.B.M. employee. Claimant did not know for how long W.B.M. had hired Griffin. Claimant admitted he had never met Robert Brighton before seeking payment from W.B.M.

Claimant gave a history of work as a dishwasher and a "labor worker" with no special skills. He apparently served two years in the Mens' Reformatory. While there, he was in the infirmary two or three times as a result of a shoulder injury. Claimant stated he had hurt his shoulder before and that it was the same kind of an injury: "the shoulder would pop out of place." Claimant recited that he had previously injured his shoulder when he fell off a couch; when he fell of a porch, while lifting weights; and while fighting.

On redirect examination, claimant stated the man who left the tools, whom he assumed was from W.B.M., instructed Griffin and claimant as to what work to do on the lot. Claimant explained he initially injured his shoulder five years before the August 13 incident and that it had ached in the intervening years. On further cross examination, claimant stated that while it always ached, his shoulder had never "come out of place" before the August incident. He described its earlier condition as "stretched but not broken."

Robert Brighton, the owner of W.B.M., appeared in defendants' behalf. He stated that W.B.M. is a business which markets marine equipment. He explained that Iowa Machine and Heat Treat Corporation owns the lot which claimant and Griffin were to clean. He testified that Iowa Machine is a separate corporation from W.B.M. but does allow W.B.M. to occasionally store its products on the lot. Apparently, W.B.M. has a storage garage adjacent to the lot. The witness reported that he hired Griffin who then hired claimant. He stated Griffin was a neighborhood person who hung about W.B.M.'s offices and had sought work as a cash day laborer. Taxes were not withheld from Griffin or claimant's pay; neither was social security tax paid for them. The witness stated he was not at the lot while claimant and Griffin worked and did not control the cleaning nor the manner of cleaning the lot.

On cross examination, the witness reported that Griffin's only work for W.B.M. was to clean the lot. Griffin was also paid cash. The witness volunteered that Griffin asked his approval before hiring claimant. He stated it was his understanding that Griffin would pay claimant, but that after claimant's injury claimant came to W.B.M.'s office seeking payment and "because of his injury" W.B.M. paid him directly. The witness agreed that, though claimant was paid cash, claimant could have received a check.

APPLICABLE LAW AND ANALYSIS

Iowa Code sections 85.61(2) and section 85.61(3)(a and b) provide:

> 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":
>
> a. A person whose employment is purely causal and not for the purpose of the employer's trade or business except as otherwise provided in section 85.1.
>
> b. An independent contractor.

The Iowa Supreme Court stated in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1213, 146 N.W.2d 261 (1967):

> This court has consistently held it is a claimant's duty t- 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.)

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:

> 1. 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 not established by a preponderance of the evidence an employer-employee relationship. Defendant W.B.M. Marine did not select claimant for employment. The company's agent merely aquiesced in his employment by Mr. Griffin. The evidence does not establish that W.B.M. Marine was free to terminate claimant without the approval of Griffin. Likewise, the question of responsibility for payment of wages remains in dispute. Claimant states W.B.M Marine was responsible for payment of his wage. Defendants' witness maintained that Griffin was to pay claimant but refused to do so. He further maintained that W.B.M. gratuitously paid claimant following his injury. The method of payment supports defendants' position. Claimant was paid in cash. No apparent attempt was made to record that transaction. Documentation of wages paid has tax advantages for most businesses. One concludes that W.B.M. would have documented wages paid claimant had the company contractually undertaken to pay such wages.

Furthermore, there is little evidence suggesting that W.B.M. had the right to control the work being performed. Claimant testified that an unidentified man met Mr. Griffin and him at the lot, gave them tools to use, and told them what work to do on the lot. The man then left. Claimant assumed, but did not know, that this individual was an W.B.M. employee. The individual's identity was never established. However, even if he were identified as a W.B.M. employee, no intention to control the work was shown. Claimant and Griffin were left to their own devices as to how to clean the lot. No other interaction or direction from W.B.M. was shown. More importantly, no intention of further direction, or control of claimant by W.B.M. can be gleamed from the record as made. Claimant and his co-worker were free to work as they chose. W.B.M. could not be identified as the authority in charge of the work; nor could W.B.M. be identified as the entity for whose benefit it was performed. Claimant only assumed the toolbearer was a W.B.M. employee. No evidence establishing such was presented. Testimony was presented that W.B.M. did not own the lot but was allowed to use it for storage purposes. While W.B.M. arguably derives some benefit from having a cleared facility on which to store its business equipment, it remains unclear whether clearing the lot was a benefit to W.B.M. or to the lot's titleholder, Iowa Machine and Heat Treat Corporation. Claimant's charge under the law is that he preponderate on evidence establishing the factors supporting the existence of an employer-employee relationship. He has failed to do so. Because claimant has not preponderated on this issue, we need not reach the affirmative defenses asserted by defendants.

FINDINGS OF FACT

WHEREFORE, it is found:

Claimant was hired by Mike Griffin to assist Griffin in clearing a lot owned by Iowa Machine and Heat Treat Corporation and used by W.B.M. for storage.

Whether W.B.M. could terminate claimant without Griffin's approval is unclear.

Claimant and Griffin were told what work to do on the lot by an individual whom claimant assumed was from W.B.M. This individual's identity with W.B.M. was not further established.

Claimant and Griffin were given no other instruction or direction as to how to clear the lot and were left to perform the work in a matter of their own choosing.

W.B.M. did not control and did not intend to control the method of performing the work.

W.B.M. paid claimant gratuitously following his injury. W.B.M was not identified as the party responsible for paying claimant for his services. Claimant was paid in cash in an apparently undocumented transaction.

W.B.M. was not identified as the authority in charge of the work or the party for whose benefit the work was performed.

Claimant was not an employee of W.B.M. on the injury date.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has not established that he was an employee of defendant W.B.M. on his injury date.

ORDER

THEREFORE, it is ordered:

Claimant take nothing from these proceedings.

Defendants pay costs of this action.

Signed and filed this 7th day of August, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES P. BURGERT, Claimant,	:	
vs.	:	File No. 606720
FUTURE FOAM, INC., Employer,	:	A P P E A L
and	:	D E C I S I O N
ARGONAUT INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	

FILED
AUG 30 1984
IOWA INDUSTRIAL COMMISSIONER

Claimant appeals from a review-reopening decision in which he was awarded benefits for permanent partial disability to his right knee but denied benefits for disability related to his back. The record on appeal consists of the transcript of the review-reopening proceeding together with claimant's exhibit 1 and defendants' exhibits A through C; the pleadings contained in the record and the briefs and arguments of the parties on appeal.

ISSUE

Whether or not the disability related to claimant's back is causally related to his prior compensable knee injury.

STATEMENT OF THE CASE

Evidence germane to the issue on appeal is: twenty-six year old claimant had a prior injury to his right knee while playing football in high school in 1973. He had surgery in February of 1974 for removal of the right medial meniscus and lateral meniscus.

On September 21, 1979 while employed by defendant employer claimant received an injury when a bun of foam fell on his right knee. Claimant came under the care of Timothy C. Fitzgibbons, M.D., an orthopedic surgeon on October 2, 1979. Claimant was treated conservatively until November 2, 1979 when his knee was injected with Marcaine and Depo-Medrol and also some Xylocaine. He returned to Dr. Fitzgibbons on November 16, 1979 still having pain and an arthrogram was performed at that time. A tear of the medial meniscus was noted. On December 7, 1979 claimant underwent an arthroscopy and arthrotomy. He was noted to have multiple small tears of his medial miniscus as well as a larger tear posteriorly. Also noted when the knee was entered was some chondromalacia of the cartilage of his femoral condyles and tibial plateau. Due to the previous surgery and the chondromalacia of the claimant's knee his recovery was estimated to be somewhat slower than the normal menisectomy. The minimum of two months was estimated. Follow-up care was conducted over the next two years with claimant continuing to complain of recurrent trouble with his right knee and some swelling and catching. On January 10, 1982 another arthroscopic examination, joint debridement and irrigation and injection with Depo-Medrol and Marcaine was performed. A lateral meniscal flap tear was removed.

In February 1982 Dr. Fitzgibbons indicated that he told claimant he would have to live with his problem. He thought claimant would eventually need a total knee replacement.

Claimant testified that after he returned to work in February 1982 his lower back started to bother him after about a week. He indicated no special incident occurred. He had been walking with a limp and felt he was getting cramps in his back. In August of 1982 claimant saw Dr. Fitzgibbons with complaints of pain in his low back and right leg and some mild discomfort in the left leg. Dr. Fitzgibbons reported that claimant indicated he had been having this pain for about a month and that it had recently been getting worse. Examination disclosed decreased ankle jerk on the left and discomfort with straight leg raising on the right. Both ankle jerks were hypoactive and made assessment difficult. Dr. Fitzgibbons thought there were enough signs to warrant the thought of a possible herniated disc. The diagnosis at the time was lumbosacral strain with possible right lower extremity radiculopathy.

Claimant was hospitalized for conservative treatment but shortly after discharge complained of significant discomfort down his left leg. A lumbar myelogram was conducted on October 1, 1982 and a lumbar laminectomy was performed on October 7, 1982.

Dr. Fitzgibbons released claimant to return to work on January 10, 1983. Claimant apparently returned to work and was laid off. Dr. Fitzgibbons indicated that claimant reported to him that he had some discomfort. He saw claimant on February 11, 1983. Examination disclosed claimant still had some moderate limitation of motion due to back discomfort and some occasional numbness in his left foot but straight leg raising was negative at that time. Dr. Fitzgibbons gave a fifteen percent permanent partial disability to the body as a whole rating for the back injury.

Dr. Fitzgibbons reported on August 24, 1982:

In regard to the cause of the patient's symptoms, I suppose, the fact that he has had to favor that right knee for so long, could have put excess stresses on his low back and at least could have been a contributing cause to his back pain, but there is no way of proving that. I don't think anyone can be sure.

In a report dated September 28, 1982 Dr. Fitzgibbons reported:

We had a long discussion about the pros and cons of surgery, and the fact that we can't guarantee anything, and even with the biggest disc sometimes, if the nerve does not recover, the patients don't get better. Mr. Burgert understands and wants to proceed.

We had tentatively planned on scheduling the myelogram for next week. However, the patient also discussed, with me, the fact that unless he can relate his herniated disc symptoms and his back pain to the fact that his knee is so disabled and he has had to walk with a limp, that he will have trouble getting any coverage and have trouble with payment of the bills.

In a previous report, I noted that I felt that the fact that the patient has had to limp on the right leg, certainly was a contributing cause to his back pain, but I could not say with any certainty that it was the cause of his present symptoms exclusively.

I even told the patient that I would discuss this with some of my other colleagues, to see what their feelings were. It is pretty much my feeling and the consensus of some of the members of our office, that there is no way that any one can say with any certainty that a lower extremity problem, which causes a limp, can be the cause of a herniated disc or low back strain.

We all feel that certainly an abnormal gait, or a limp--such as Mr. Burgert has had--puts excess stresses on the back and, thus, can be the cause of development of mechanical low back pain and even the final element of disc herniation, if that occurs.

However, to again comment on the cause and affect relationship of a herniated disc, I believe that I can state that I think the fact that the patient has had disability--from his right knee injury and degenerative arthritis, which has caused him to limp and certainly put excess stresses on his back--it was a contributing cause at the least, to his back pain. If, indeed, he does turn out to have a herniated disc, I, again, feel that this could be a contributing cause to that.

Again, however, I must state that there is no way for anyone to say with absolute certainty that there is a cause and affect relationship one way or the other. In any event, it is my feeling that this patient has significant disability and has a high likelihood of a herniated disc. I certainly feel that it would be advantageous for us to do a myelogram, to see if there is some way that we can help him with surgery. I would hope that there could be some way to get some sort of coverage for his bill, so this could be arranged.

Claimant testified that he is five feet nine and one-half inches tall and weighs 267 pounds. Prior to his injury he weighed about 202 pounds. He lives at home with his parents and does some work around the house.

Claimant's mother testified that the claimant had never complained of back pain until after the last knee surgery.

A long time friend of claimant testified that he had never heard claimant complain of back problems until May 1983. Claimant had complained of left leg problems prior to that.

APPLICABLE LAW

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

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).

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton, 253 Iowa 285, 110 N.W.2d 660 Dailey, 233 Iowa 758, 10 N.W.2d 569.

ANALYSIS

That the knee injury is causally related to the employment is not in dispute. That there is a relationship between the back condition and the knee injury on the other hand is much more problematical. Reviewing the report of Dr. Fitzgibbons dated August 24, 1982 leads to the conclusion that Dr. Fitzgibbons considers the probability of nexus between the knee injury and the back injury to be speculative and conjectural. Dr. Fitzgibbons' doubt as to causal relationship was not greatly overcome after consultation with his colleagues. He indicates in his report of September 28, 1982 that he believes the back pain was contributed to by excess stresses put on his back by the limp which was caused by the injury and degenerative arthritis to his knee. He then goes on to recite that in the event a herniated disc were to be found, this could be a contributing cause to that. Dr. Fitzgibbons reiterates that there is no way to state with certainty the cause and effect relationship one way or the other. Of course certainty is not necessary but it must be an opinion that is beyond mere surmise. When the reports of Dr. Fitzgibbons are taken as a whole, they fall short in being pursuasive that claimant's back condition has the necessary nexus to the injury originally received by claimant to his knee on September 21, 1979.

FINDINGS OF FACT

1. Claimant was employed by Future Foam, Inc., on September 21, 1979.

2. Claimant hurt his right knee while working on September 21, 1979.

3. Defendants filed a memorandum of agreement on October 19, 1979.

4. The testimony indicates that claimant was paid for all time lost prior to December 31, 1981.

5. Claimant has proven by a preponderance of the evidence that the need for additional surgery was caused by the injury of September 21, 1979.

6. Claimant started missing work on January 10, 1982 and returned to work on February 16, 1982.

7. Claimant sustained permanent partial disability to his knee because of the injury of September 21, 1979.

8. Claimant proved by a preponderance of the evidence that he sustained a seven percent (7%) loss to the leg because of the injury of September 21, 1979.

9. Claimant failed to prove by a preponderance of the evidence that a lumbar disc problem was related to the September 21, 1979 injury.

10. Claimant incurred certain medical expenses which are related to the knee injury.

CONCLUSIONS OF LAW

Claimant was employed by defendant employer on September 21, 1979.

Claimant sustained an injury to his knee arising out of and in the course of his employment on September 21, 1979.

Claimant should be paid an additional five and two-sevenths (5 2/7) weeks of healing period compensation at the stipulated rate of eighty-one and 62/100 dollars ($81.62) per week.

Claimant should be paid fifteen and four-tenths (15.4) weeks of permanent partial disability compensation at the stipulated rate of eighty-one and 62/100 dollars ($81.62) per week.

Claimant should be paid the following medical expenses:

Medical Anesthesia Associates (1-11-82)	$ 273.00

Drs. Gross, Iverson, Kratochvil and Klein, P.C. (Dr. Fitzgibbons) 1,030.00

ORDER

WHEREFORE, the review-reopening decision is hereby affirmed.

THEREFORE, it is ordered:

That defendants pay unto claimant an additional five and two-sevenths (5 2/7) weeks of healing period compensation at the rate of eighty-one and 62/100 dollars ($81.62) per week.

That defendants pay unto claimant fifteen and four-tenths (15.4) weeks of permanent partial disability compensation at the rate of eighty-one and 62/100 dollars ($81.62) per week.

That defendants pay unto claimant the following medical expenses.

Medical Anesthesia Associates (1-11-82) $ 273.00
Drs. Gross, Iverson, Kratochvil and Klein, P.C. (Dr. Fitzgibbons) 1,030.00

Costs of the appeal are taxed to the appellant.

Interest on this award is to accrue pursuant to section 85.30, Code of Iowa, from the date of this decision.

Signed and filed this 30 day of August, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES BURGERT,
Claimant,
vs.
FUTURE FOAM, INC.,
Employer,
and
ARGONAUT INSURANCE COMPANIES,
Insurance Carrier,
Defendants.

File No. 606720

REVIEW-REOPENING DECISION

FILED
APR 9 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the Pottawattamie County Courthouse in Council Bluffs, Iowa on October 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 October 3, 1979. A memorandum of agreement calling for the payment of $81.62 was filed on October 3, 1979. The record consists of the testimony of the claimant, Donna Jean Burgert, Edward Fox and Jerome Riley Eledge, Sr.; claimant's exhibit 1; and defendants' exhibits A, B and C.

ISSUES

The issues for determination are:

1) Whether there is a causal connection between the claimant's injury and his condition;

2) The nature and extent of disability; and

3) The payment of certain medical expenes.

STATEMENT OF THE EVIDENCE

Claimant, age 26, testified that he lives in Council Bluffs with his parents. He testified that he made it through the eleventh grade at school after having quit for a time. He testified that he was involved in a number of sports at school and hurt his right knee at a practice game. This resulted in surgery by Robert Klein, M.D., an Omaha orthopedist, in February 1974.

Claimant first worked for this employer after he left school. He worked for defendant for about six months before becoming employed by the Pamida warehouse. He then became employed by an excavating company as a laborer. He then became a part-time replacement through Help, Inc. for defendant and was hired on by them as a permanent employee.

Claimant testified that he injured his right knee at work on September 21, 1979. Claimant testified that he was assisting in moving foam to a saw when the foam fell on claimant's right knee. Claimant testified that he reported the injury and finished out the day despite right knee swelling. Claimant testified that he sought medical treatment after work. Claimant testified that he went to Mercy Hospital and that he was instructed to use ice water soaks and told to see a physician the following day. Claimant did not return to work on the following day.

On October 2, 1979 claimant was seen by Timothy C. Fitzgibbons, M.D., an orthopedic surgeon who practices with Dr. Klein. Dr. Fitzgibbons noted that x-rays of the right knee taken on September 21, 1979 revealed that there was some calcification along the joint line with no fracture. Physical examination by Dr. Fitzgibbons revealed that the knee didn't appear to be painful. There was full range of motion and no instability. Dr. Fitzgibbons thought that claimant had sustained a contusion of the right knee and a possible hyperextension of the knee.

Claimant returned to see Dr. Fitzgibbons on October 19, 1979. Claimant was complaining of pain and popping in his knee and also some aching down his leg. He was started on outpatient physical therapy. On November 2, 1979 claimant again saw Dr. Fitzgibbons and he injected claimant's knee with Marcaine, Depo-Medrol and Xylocaine. On November 16, 1979 he returned and was still having pain and swelling so claimant had an arthrogram performed on him. A tear of the medial meniscus was noted.

Claimant was subsequently admitted to the hospital on December 6, 1979. An arthroscopy and arthrotomy were performed. Claimant was noted to have sustained multiple small tears of his medial meniscus as well as a larger tear posteriorly. Dr. Fitzgibbons noted some chondromalacia of the cartilage of the femoral condylus and tibial plateau when the knee was entered.

Claimant was released from the hospital but continued to have considerable pain and swelling. He could hardly move his leg. On January 1, 1980 claimant was admitted to Mercy Hospital in Council Bluffs, Iowa and remained there until January 12, 1980. An extensive course of physical therapy was conducted during this hospitalization. At that time he had from minus 10 to 75 degrees of motion. Physical therapy was continued on a twice-weekly basis. Dr. Fitzgibbons saw claimant again on February 15, 1980. Dr. Fitzgibbons released claimant for light duty. Claimant had occasional swelling, but his range of motion increased.

Claimant returned to work as instructed. Dr. Fitzgibbons saw claimant again on March 14, 1980. Claimant was still having trouble. He reported some popping and catching in his knee, but did not think there was as much swelling as there was before. Dr. Fitzgibbons asparated the knee of serosanguineous fluid and injected the knee with Xylocaine, Marcaine and Depo-Medrol. Claimant was told to keep his knee active.

Claimant saw Dr. Fitzbiggons on August 1, 1980. Claimant reported that he was working. There was range of motion from -3 to 95- degrees. He had no effusion. He had minimal limp. Dr. Fitzgibbons felt claimant had reached maximum recovery and forecast permanent partial impairment.

Claimant was seen again on February 22, 1981 and claimant complained to Dr. Fitzgibbons that he was having periodic discomfort. Claimant had minimal effusion but had full range of motion. At that time a ten percent permanent partial impairment rating for the right leg was assigned. Dr. Klein had previously assigned a five percent rating for the 1974 right knee injury. Accordingly, Dr. Fitzgibbons indicated that claimant had a total impairment of twelve percent, seven percent of which could be assigned to the instant injury.

Claimant continued to see Dr. Fitzgibbons and had recurrent trouble with his right knee. The two spoke of surgical procedues again in December 1981, but surgey was not done at that time. An arthoscopic examination, joint debridement and irrigation with an injection with Depo-Medrol and Morcaine and a torn lateral medical meniscal flap was removed on January 10, 1982.

In February 1982 Dr. Fitzgibbons indicated that he told claimant he would have to live with his problem. He thought claimant would eventually need a total knee replacement.

After claimant returned to work again in February 1982 he was a saw operator, having been promoted to this position by seniority. Claimant testified that his lower back started to bother him after he had returned for about a week. Claimant indicated that no special incident happended which would have injured claimant's back. Claimant testified that he had been walking with a limp. Claimant felt he was getting cramps in his back.

Claimant told Dr. Fitzgibbons of his back problems in August 1982. Claimant was examined and was found to have a decreased ankle jerk on the left and discomfort with straight leg raising on the right. Both ankle jerks were hypoactive and made assessment difficult. Otherwise, the neurologic examination was within normal limits. However, Dr. Fitzgibbons thought there were enough signs to warrant the thought of a possible herniated disc. X-rays of the lumbar spine showed no significant bony abnormalities. The diagnosis at the time was lumbosacral strain with possible right lower extremity radiculopathy. Claimant was admitted to the hospital. The hospitalization helped claimant for a short time, but shortly after he left the hospital he began having discomfort down his left leg. A myelogram was discussed. A lumbar laminectomy was conducted on October 1, 1982. A lumbar laminectomy was conducted on October 7, 1982.

Dr. Fitzgibbons released claimant to return to work on January 10, 1983. Claimant apparently returned to work and he was laid off. Dr. Fitzgibbons indicates that claimant reported to him that he had some discomfort. Claimant saw Dr. Fitzgibbons on February 11, 1983. On examination claimant still had some moderate limitation of motion due to back discomfort. Claimant had some occasional numbness in his left foot, but straight leg raising was negative at the time. Dr. Fitzgibbons gave a fifteen percent permanent partial disability to the body as a whole for the back injury.

Dr. Fitzgibbons made periodic reports concerning claimant's condition. Of primary concern is the causation of claimant's back problems and Dr. Fitzgibbons wrote two letter with regard to the matter. In a letter dated August 24, 1982 Dr. Fitzgibbons made the following statement:

> In regard to the cause of the patient's symptoms, I suppose, the fact that he has had to favor that right knee for so long, could have put excess stresses on his low back and at least could have been a contributing cause to his back pain, but there is no way of proving that. I don't think anyone can be sure.

He than wrote a more lengthy explanation of causation on September 28, 1982. Although this excerpt is lengthy, it will show the reader the difficulty of the causation issue:

> In a previous report, I noted that I felt that the fact that the patient has had to limp on the right leg, certainly was a contributing cause to his back pain, but I could not say with any certainty that it was the cause of his present symptoms exclusively.
>
> I even told the patient that I would discuss this with some of my other colleagues, to see what their feelings were. It is pretty much my feeling and the consensus of some of the members of our office, that there is no way that any one can say with any certainty that a lower extremity problem, which causes a limp, can be the cause of a herniated disc or low back strain.
>
> We all feel that certainly an abnormal gait, or a limp--such as Mr. Burgert has had--puts excess stresses on the back and, thus, can be the cause of development of mechanical low back pain and even the final element of disc herniation, if that occurs.
>
> However, to again comment on the cause and affect (sic) relationship of a herniated disc, I believe that I can state that I think the fact that the patient has had disability--from his right knee injury and degenerative arthritis, which has caused him to limp and certainly put excess stresses on his back--it was a contributing cause at the least, to his back pain. If, indeed, he does turn out to have a herniated disc, I, again feel that this could be a contributing cause to that.
>
> Again, however, I must state that there is no way for anyone to say with absolute certainty that there is a cause and affect relationship one way or the other. In any event, it is my feeling that this patient has significant disability and has a high likelihood of a herniated disc. I certainly feel that it would be advantageous for us to do a myelogram, to see if there is some way that we can help him with surgery. I would hope that there could be some way to get some sort of coverage for his bill, so this could be arranged.

Claimant testified that he returned to work on January 10, 1983. He only worked that day. Claimant testified that the plant manager told him about two weeks later that he was fired. Claimant testified that he had not worked since January 10, 1983. He has applied for a number of jobs.

On cross-examination, claimant testified that he was five feet nine and one-half inches tall and weight 267 pounds. He used to weigh 202 pounds. Claimant lives at home and does some of the work around the house. He testified as to the job applications he has made. Claimant testified that when he went to work on January 10, 1983 there was a half schedule and that he was told that a position was not open for him. Claimant received unemployment compensation from January 1983 for a period of 36 weeks.

Donna Joann Burgert is claimant's mother. She testified that claimant never complained of back pain until after the last knee surgery.

Edward Fox is a friend of claimant and has known him for over twelve years. He testified that he never heard claimant complain of back problems until May 1983. Claimant complained of left leg problems prior to that.

Jerome Riley Eledge has been Future Foams plant manager for five years. He testified that the company used an outside agency, Help, Inc., to obtain employees on an approval basis. If an employee worked out after six months he will be hired by defendant employer as a permanent employee. He stated that claimant was eligible for rehire. He said that claimant's position had been filled by another but that claimant could be rehired by defendant through one of agencies.

On cross-examination, the witness testified that he was satisfied with claimant's performance prior to his discharge.

APPLICABLE LAW

1. Section 85.3 and 85.20, Code of Iowa, confer jurisdiction on this agency in workers' compensation matters.

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 and Sons, Inc. v. Karr, 180 N.W.2d 444 (Iowa 1970).

3. The claimant has the burden of proving by a preponderance of the evidence that the injury of September 21, 1979 is causally related to the disability on which now bases claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (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. 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).

5. 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).

6. An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

7. 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).

8. In Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983), the court held that the compensation for claimant's scheduld leg injury was limited by statute to the specific impairment and not measured by industrial disability.

Section 85.34(1), Code of Iowa, provides for healing period to be paid from the date of injury until the claimant has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is 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 85.27, Code of Iowa, provides in part:

> The employer, for all injuries compensable under this chapter or 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.

ANALYSIS

Before discussing the result in broad terms, the medical evidence must be discussed. Dr. Fitzgibbons wrote a letter on January 7, 1980 wherein he indicated that the chondromalacia was due to wear and tear secondary to previous surgery, the stress of time, and the injury. I have no difficulty in relating claimant's knee problems to the injury. There was a sufficient continuum of events to find as a fact that the knee problems and disability are related to employment.

The fighting issue in the case is the causation of the back difficulties. Claimant has not proven that the disability for which he seeks additional compensation was proximately caused by the first injury. He has made a case, however, indicating that the first injury caused the second injury. He did not prove the back injury was caused by the original September 21, 1979 knee injury since there was nearly three years' time which passed before the inception of back pain. However, the second De Shaw test allows recovery in a case such as this where a second injury is caused by a work-related injury.

I usually do not quote from medical reports as extensively as I have in this case. The sections quoted were set forth in their entirety in order that the reader who is not familiar with the case might more fully understand the problem I had with the case. The first quote from the August 24, 1982 letter uses the subjunctive mode extensively. It does give us an inkling that the doctor may be unsure of the burden of proof to be applied. Dr. Fitzgibbons uses the words "could" and "can" in conjunction with "absolute certainty." The burden is still upon the claimant to prove that he has a claim by a preponderance of the evidence. This has not been done in this case.

While I have never held to a ritualistic interpretation of the standard of proof, some adherence to the standards is necessary in order to maintain some sense of predictability. Therefore, claimant's case alleging that the back injury was cuased by the knee incident must fail. Claimant will, however, be allowed to recover for his loss to his right leg. Claimant will be awarded a seven percent loss of a leg or 15.4 weeks of permanent partial disability compensation.

As far as healing period is concerned, it is unknown what healing period is concerned, it is unknown what healing period has been paid. It is clear, however, that claimant should be paid healing period compensation, if he has not been so paid, for the period of January 10, 1982 to February 15, 1982, a period of 5 2/7 weeks. This is for the time period when claimant had his last surgery to the right knee.

Certain medical expenses have been submitted for payment. Only those related to the injury should be paid:

Medical Anesthesia Associates (1-11-82)	$ 273.00
Drs. Gross, Iverson, Kratochvil and Klein, P.C. (Dr. Fitzgibbons)	1,030.00

The last amount represents unpaid amounts for the January 1982 surgery.

FINDINGS OF FACT

1. Claimant was employed by Future Foam, Inc. on September 21, 1979.

2. Claimant hurt his right knee while working on September 21, 1979.

3. Defendants filed a memorandum of agreement on October 19, 1979.

4. The testimony indicates that claimant was paid for all time lost prior to December 31, 1981.

5. Claimant has proven by a peponderance of the evidence that the need for additional surgery was caused by the injury of September 21, 1979.

6. Claimant started missing work on January 10, 1982 and returned to work on February 16, 1982.

7. Claimant sustained permanent partial disability because of the injury of September 21, 1979.

8. Claimant proved by a preponderance of the evidence that he sustained a seven percent (7%) loss to the leg because of the injury of September 21, 1979.

9. Claimant failed to prove by a preponderance of the evidence that a lumbar disc problem was related to the September 21, 1979 injury.

10. Claimant incurred certain medical expenses which are related to the injury.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant was employed by defendant employer on September 21, 1979.

3. Claimant sustained an injury arising out of and in the course of his employment on September 21, 1979.

4. Claimant should be paid an additional five and two-sevenths (5 2/7) weeks of healing period compensation at the stipulated rate of eighty-one and 62/100 dollars ($81.62).

5. Claimant should be paid fifteen and four-tenths (15.4) weeks of permanent partial disability compensation at the stipulated rate of eighty-one and 62/100 dollars ($81.62).

6. Claimant should be paid the following medical expenses, to wit:

Medical Anesthesia Associates (1-11-82)	$ 273.00
Drs. Gross, Iverson, Kratochvil and Klein, P.C. (Dr. Fitzgibbons)	1,030.00

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant an additional five and two-sevenths (5 2/7) weeks of healing period compensation at the rate of eighty-one and 62/100 dollars ($81.62) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant fifteen and four-tenths (15.4) weeks of permanent partial disability compensation at the rate of eighty-one and 62/100 dollars ($81.62) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant the following medical expenses, to wit:

Medical Anesthesia Associates (1-11-82)	$ 273.00
Drs. Gross, Iverson, Kratochvil and Klein, P.C. (Dr. Fitzgibbons)	1,030.00

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

Interest on this award is to accrue pursuant to Section 85.30, Code of Iowa, from the date of this decision.

Defendants are ordered to file a final report.

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

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HELEN E. BURR, Claimant, vs. CRESTVIEW MANOR, Employer, and AID INSURANCE SERVICES, Insurance Carrier, Defendants.	FILE NO. 723192 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, Helen E. Burr, against her employer, Crestview Manor, and its insurance carrier, Aid Insurance Services, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained January 6, 1983.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Fort Dodge, Iowa June 12, 1984. The record was fully submitted on that date.

A review of the industrial commissioner's file indicates that a first report of injury was filed January 12, 1983.

The record in the case consists of the testimony of claimant, of Joseph H. Sherman, and of Alice Lynette Patch; of claimant's exhibits 1 through 13; and of defendants' exhibits A through G.

ISSUES

The issues to be resolved are:

1. Whether claimant received an injury which arose out of and in the course of her employment.

2. Whether a causal relationship exists between claimant's injury and her disability.

3. Whether claimant is entitled to benefits and the nature

and extent of any entitlement.

4. Whether claimant is entitled to payment of certain medical expenses under section 85.27.

5. Claimant's rate of weekly compensation in the event of an award.

REVIEW OF EVIDENCE

At hearing, the parties stipulated that claimant's gross weekly wage was $292.00, that she was paid on a biweekly basis, and that she was entitled to one exemption. They also stipulated that medical bills were fair and reasonable if causally related to claimant's injury.

Claimant, Helen Elizabeth Burr, testified in her own behalf. Claimant is single and is 49 years old. Claimant is a registerd nurse who has been employed at Crestview Manor for seven years. Claimant stated she received nurse's training at Drake University and Broadlawns Hospital in Des Moines in 1952-1953 and completed training through Iowa Western Community College. Claimant has been employed as a nurse since 1973. Her only other employment was as a customer service representative for Beeline Fashions. She held this position for seven years. Claimant described her injury thusly: She was seated on the side of a patient's bed while giving the patient medication, she stood up; her legs slipped, she twisted her knee, and felt severe, tearing pain. She stated she attempted to remain at work initially sitting in a wheelchair at the Manor to relieve her pain. When her condition did not improve, her supervisor referred her to Dr. Brown who subsequently referred her to Dr. Brodersen.

Claimant first saw Dr. Brodersen January 13, 1983. She reported he prescribed a mobilizer and crutches until May 1983. Claimant was unable to work during this time. The doctor also prescribed a TENS unit which claimant no longer uses. Claimant apparently had two such units, the first having been found defective after one week of use. She stated defendants did not pay for the second unit and, therefore, even though she was practically pain free while using the newer unit, an effective unit is not available to her.

Dr. Brodersen performed an arthoscope in March 1983. Claimant reported that her doctors found severe degenerative arthritis in the knee. Claimant disclosed that she had injured her knee in an auto accident in 1965. She characterized that injury as consisting of severe lacerations and partial severance of the right knee cap. Claimant asserted that before her work injury neither the effects of the auto injury nor her degenerative arthritis had hindered her work. Claimant admitted her employment application of 1977 notes she has a limp. She ascribed her limp then to the fact that her legs are of differing lengths. She stated she had walked without difficulty before her January 1983 injury. She stated she now has difficulty walking and has a limp and knows it. At hearing, it was apparent claimant walked with a slight limp.

Claimant returned to work on a two and then a three day per week schedule June 6, 1983. She reported Dr. Brodersen has only authorized her to work three days per week. She, herself, does not believe she could work more than three days per week, even though it would be financially advantageous for her to do so. She stated she must "pass pills" two times per day and must make rounds and perform prescribed treatments for patients. She is "on her feet" on the Manor's concrete floors while doing these duties and hurts when walking after she has been on her feet awhile.

Claimant relayed that her injury has curtailed her other life activities. She stated that she can no longer walk for exercise and recreation nor bowl nor bean walk as she did previous to her injury. She stated her general physical health before her injury was good and that she has gained more than 30 pounds since her injury because she cannot exercise or diet properly now. Claimant can no longer drive a straight stick car. She had to change apartments since she could not ascend and descend basement stairs to do her laundry. She has had to stay with her parents or her child at times since she could not manage alone. Claimant is now using Tylenol III or extra strength Tylenol for pain. Dr. Brodersen has told claimant to walk and exercise. She stated she trys to walk two to three blocks on her days off.

Claimant reported that her post-injury part-time status precludes her receiving health insurance, vacation time, or raises. She said she "feels like [her employers] are watching me for any mistake I make."

Claimant stated she has not been reimbursed for 680 miles of travel for medical treatment. She stated exhibit 2 evidences prescription charges for which she has not been reimbursed and that all her hospitalizations and medical bills related to treatment of her knee problem. She stated exhibit 6 evidenced Blue Cross/Blue Shield payment of her Mary Greeley Medical Center bill.

Claimant stated she experiences problems with her right hip and left heel as well as with her knee. She claimed she had not had such problems before her injury. Defendants' objection to such testimony on the grounds that the evidence indicates a scheduled injury is overruled.

On cross examination, it was established that claimant now weighs seven pounds less than she did in June 1982. Claimant explained that she lost 55 pounds between then and January 1983 following a hospitalization for a suspected heart condition. She regained 35 pounds following her injury and now weights 230 pounds. Claimant elaborated on her 1965 auto injury. She agreed she has described this injury as losing one half the right knee cap. Claimant agreed she was hospitalized for three months following this injury and then recuperated at home for four months. A wire was placed in claimant's knee cap to attach her patella to surrounding muscle. Claimant agreed that exhibit A indicates that this wire has broken in two separate places. Claimant asserted, however, that she had only had occasional knee problems between 1965 and 1983. She characterized occasional as one or two times per year. She stated she did not need prescription medication for such problems. Claimant confirmed that she had only limited range of motion in her right knee before her 1983 injury. She stated that other than her slight limp her only limitation prior to her 1983 injury was an inability to bicycle since she could not bend her knee. Claimant admitted Dr. Brodersen was not familiar with her medical history when he began treatment of her injury.

Claimant agreed her work duties now do not differ from those prior to her injury and that she has never received inpatient treatment as a result of her injury.

Defendants called Joseph H. Sherman, administrator and owner of Crestview Manor, as their first witness. The witness stated that prior to her January 1983 injury, claimant had had to use a cart for support and was often fatigued. He opined that before her injury, claimant walked with a "steady, light type of limp." He stated that before her injury, claimant had complained of knee and leg pain after walking beans; he stated her complaints of pain were more frequent than one or two times per year. The witness recalled conversing with claimant about her injury on the injury date. He reported claimant then stated that when she attempted to stand up her right leg gave out, but did not report slipping.

The witness represented that he observed the injury site on the injury date. He stated no wet spot or substance on which claimant might have slipped was apparent on the floor. On cross examination, it was established that the Manor has linoleum floor coverings. The witness agreed claimant has been a prompt and regular employee both before and after her injury. Claimant was called by defendants. Claimant agreed she described the injury honestly and accurately to Mr. Sherman on the injury date. Defendants' counsel noted that claimant's petition states claimant slipped on something on the floor on her injury date.

Alice Lynette Patch, director of nursing at the Manor, was called by defendants. This witness stated she knew claimant both at work and socially before her injury. She stated that, prior to her injury, claimant had much more difficulty walking after she had engaged in outside activities and that weather changes would increase claimant's preinjury pain. She stated claimant used nonprescription pain killers, or limped or elevated her leg when in pain prior to her January 1983 injury. She stated claimant complained of pain at least two or three times per month before her injury.

The witness was working on claimant's injury date and discussed her injury with claimant. She reported claimant denied falling, slipping, or tripping, but that claimant stated her leg "gave way" and "felt like something crossed over." On cross examination, the witness admitted she made no written report of claimant's statement on her injury date. She disclosed claimant was experiencing much pain following her injury and principally described her pain and not the injury itself. She admitted claimant never indicated she fell to the floor but agreed a fall may be a fall against something.

Defendants objected to claimant's exhibits 1 through 12 on the grounds that no causal relationship between claimant's medical problems and claimant's work injury has been established. The objections are overruled. Claimant's exhibit 1 is copies of a prescription by Dr. Brodersen of March 29, 1983 for a TENS unit for claimant for use at home and of a statement of Home Healthcare Center in the amount of $120.50 for a TENS unit. Claimant's exhibit 2 is an endorsed check of Helen E. Burr to Thompson Pharmacy in the amount of $8.50. Claimant's exhibit 3 is a statement of Home Healthcare Center in the amount of $120.50 which apparently duplicates the charges evidenced in exhibit 1. Claimant's exhibit 4 is copies of statements of Hamilton County Public Hospital in the amounts of $35.00, $111.50, and $6.25, respectively. Claimant's exhibit 5 is a statement of Mary Greeley Medical Center in the amount of $682.40. Claimant's exhibit 6 are Blue Cross/Blue Shield of Iowa explanations of health care benefits showing payments of $576.90, $63.00, and $42.50 respectively to Mary Greeley Medical Center, Pathology Department, and Radiology Department in claimant's behalf. Claimant's exhibit 7 is a Blue Cross/Blue Shield of Iowa explanation of health care benefits showing payment of $955.00 to McFarland Clinic, P.C. in claimant's behalf. Claimant's exhibit 8 is a February 2[illegible] 1984 letter of Hamilton County Public Hospital to claimant stating she is in default on her account in the amount of $117.50.

Claimant's exhibit 9 is an April 28, 1983 letter report of Mark P. Brodersen, M.D., to claimant's counsel. The letter states claimant's present condition results from her work injury, but acknowledges claimant had "some prior existing disease." Claimant's exhibit 10 is a March 29, 1983 letter report of Dr. Brodersen to claimant's counsel. In the letter, the doctor states claimant has severe degenerative arthritis of

the medial compartment as well as tears of the medial meniscus. He opines claimant's work injury aggravated her arthritis and caused a tear of the medial meniscus.

Claimant's exhibit 11 is an August 19, 1983 letter report of Dr. Brodersen to claimant's counsel which states:

> ...at the present time, the future of [claimant's] status is uncertain. If she continues to have problems with her knee and with the severity of the deterioration of her joint, it is my feeling that she may need total knee arthroplasty in the future. However, at the present time I am reluctant to advise this because of her relative youth and desire to remain physically active. It obviously is difficult to decide how much of her problem is on the basis of her injury and how much is on the basis of the underlying arthritis. At the present time it appears as though most of her present problem is related to the injury that she sustained and to some extent her underlying arthritis also plays a role. It is my feeling that in using the criteria of the American Academy of Orthopedic Surgeons, that Ms. Burr would have a 15 percent impairment of the lower extremity on the basis of her knee injury. It is my feeling that her total impairment is probably greater than this, but as a result of her knee injury I think the 15 percent figure would be reasonable.

Claimant's exhibit 12 is a December 14, 1983 letter report of Samir P Wahby, M.D., to defendants' counsel. The letter states in relevant part:

> A past history indicated that [claimant] had had a fractured patella 17 years ago for which she had an open reduction and internal fixation.
>
> On examination, [on January 25, 1983,] she had severe tenderness on the medial aspect of the right knee and medial femoral condyle. She had approximately 5 degrees of lack of extension and could not flex her knee due to severe pain.
>
> X-rays were obtained at the office at the time. They showed severe degenerative arthritis of her right knee....
>
> Examination on 10-25-83 revealed full extension and about 70 degrees of flexion with pain and tenderness over the medial and lateral joint lines, more so on the medial joint line. There was medial instability which is probably due to the narrowing of the joint line medially.
>
> The patient had gained weight. She weighs about 215 pounds. The patient was advised to lose weight and that would probably help her knee for the time being. She was also told to use the Indocin PRN for pain....
>
> The patient will still need the total knee replacement sometime in the future if her knee becomes severely painful at all times. However, for the time being if she can get by with pain medication and anti-inflammatory medication until she reaches an age that is appropriate for the proposd surgery [sic].

Claimant's exhibit 13 is the deposition of Mark Brodersen, M. The doctor noted that his impression upon initial examination of claimant was that she had both a preexisting degenerative arthritis in the knee and had suffered a sprain of the knee. The doctor observed that, on examination, claimant's knee was swollen. The ligamentous stability of the knee was normal. Claimant had marked pain on movement and her range of motion was about half the normal range of motion. The doctor stated claimant underwent arthroscopy, which he described as a means of smoothing the ends of the bone in an attempt to stimulate a healing response in the knee itself, on March 24, 1983. The doctor stated that, on arthroscopic examination, he found claimant had almost complete loss of the articular cartilage on the medial or the inner aspect of the knee. He described the condition as damage to the surface covering material on the end of the bone such that the material was eroded away and the underlying hard bone was then rubbing on hard bone. The doctor opined that this condition was attributable to claimant's surgery in 1965 and the deterioration since that time. The following dialogue transpired as regards claimant's condition and her 1983 work injury:

> Q. After going back to the surgical procedure, did you find any conditions in the performance of the surgery that were consistent with the type or caused by the type of injury she described as having occurred in January of 1983?
>
> A. It was my feeling that that injury was primarily to the soft tissues of the knee and to the ligaments and had aggravated the preexisting arthritis in the knee and I did not--I was not able to identify any of the damage as being directly caused by the injury in January of '83 as such.
>
> Q. Were you able to determine whether or not the preexisting condition had been aggravated by the injury in January of '83?
>
> A. Well, that's I think a clinical diagnosis and the findings that we had at the time of surgery would have been consistent with the chronic problem or the old injury gradually deteriorating.
>
> Q. Can you tell me so that I understand your answer whether or not the injury in January of 1983 aggravated that old injury or that old condition?
>
> A. I feel that it definitely did. The reason for that is that normally for a simple knee sprain the healing, expected healing period for that would be six weeks. And in the normal population, a person with a knee sprain should be back to work or at least have full range of motion and their knee should be essentially painless within about six to eight weeks and hers made no improvement whatsoever.

The doctor stated that he examined claimant July 5, 1983 following her work return of June 6, 1983. He described claimant's condition then thusly:

> A. She told me that indeed she had returned to work on 6-6-83, that she had worked three days a week and that she was having a fairly significant amount of pain in her knee. She had been as well using the Feldene but in addition was having to use Tylenol III, Tylenol plus codeine preparation at midday to enable herself to get through the day. And then when she would come home, that she'd have to use crutches to get around.
>
> Her knee motion at that time I felt had deteriorated. It was not as good as when she'd been seen in May and so we did reinject her knee with a steroid preparation again to try and calm things down and we talked then about the possibility of her needing more surgery and specifically discussing the possibility of a knee joint replacement.

The doctor reported that total knee replacement is not favored for persons who are still active and advised that a person under age 65 who has such surgery should not continue an occupation that involves heavy lifting or prolonged walking. The doctor opined the following as to claimant's present and future work capacity:

> Q. Doctor, what would you expect Mrs. Burr's ability to work would be given her situation as you see it now without a total knee replacement?
>
> A. I think that at the present time she is probably not going to be able to work any more than she is at the present time. She has to use a narcotic preparation in the middle of the day to be able to get through her work and I would guess that if she were to continue on as she is now, her frustration with this type of situation would probably lead her to stop working altogether unless she eventually had the knee joint replacement performed.

He stated that, on examination on October 13, 1983, claimant complained of backaches secondary to having to change her gait pattern to protect her knee. The doctor relayed the following as regards to his determination of claimant's permanent impairment:

> A. Well, this is a difficult problem. When there is a preexisting condition such as the arthritis, it's difficult to know how much the underlying disease process has to play. In my experience it is very frequent to have arthritis not be a problem until some significant traumatic event occurs and then it becomes symptomatic often on a permanent basis.
>
> Because of this and reviewing the guidelines of the American Academy of Orthopedic Surgeons, I felt that Mrs. Burr had, in the criteria that had been established, an impairment of 40 percent of the lower extremity. And I came up with a 15 percent impairment on the basis of her knee injury, of the injury itself. And I think that was sent to you in the letter.
>
> Q. Insofar as the other 25 percent, Doctor, is that or can that be described as related to the aggravation of the preexisting condition or how would you explain that?
>
> A. That would be correct.

The doctor opined that it is "almost inevitable" that claimant will need total knee replacement though this procedure should be prolonged as much as possible. Defendants' objections to the balance of testimony regarding such future medical procedure is sustained.

On cross examination, the doctor agreed that claimant's injury is limited to her right knee or leg. The doctor reported claimant had not told him she walked with a limp prior to her work injury. He expressed his agreement that a noticeable limp

is "a significant ramification of a medical condition," which desirably should be included in the patient's medical history.

Defendants' exhibit A is an x-ray report of R. W. Vogt, M.D., which states:

> RIGHT KNEE: Two views of the right knee show extensive osteoarthritic change. Wire suture is seen within the patella, therefore this osteoarthritis could have been induced by previous trauma. I do not see any acute fractures or avulsions. The suprapatellar bursa does show [sic] any distention [sic] thus I doubt that there is any large joint effusion. I have no previous films of this area with which to compare.
>
> IMPRESSION: Prominent osteoarthritic changes, no acute injury demonstrated radiographically.

Defendants' exhibit B is a surgeon's report of January 21, 1983. Defendants' exhibit C is a surgeon's report of Mark Brodersen, M.D., of January 28, 1983. Defendants' exhibit D is a surgeon's report of February 25, 1983. Each of these reports opines claimant's injury will not result in a permanent defect.

Defendants' exhibit E is a work release for claimant dated May 25, 1983 and authorizing a June 6, 1983 work return per Dr. Brodersen.

Defendants' exhibit F is a chest x-ray report of C. P. Pun, M.D. of June 14, 1982 and an Employee Health Examination Record for claimant dated June 11, 1982. The report lists claimant's height as 5'6" and her weight as 237 1/2 pounds. Defendants' exhibit G is claimant's application for employment with Crestview Manor. The application notes: "Limp because of knee Injury [sic] in Auto [sic] accident Mar [sic] 12, 1965."

APPLICABLE LAW AND ANALYSIS

First to be decided is whether claimant received an injury which arose out of and in the course of her employment.

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on January 6, 1983 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).

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.

Claimant explains her accident by stating she was sitting at the side of a patient's bed while administering medication. She then stood up. Her leg slipped and she twisted her knee. Both Mr. Sherman and Ms. Patch testified that claimant did not state she fell onto the floor; merely that she did not know what caused her injury. At hearing, claimant also did not state she fell to the floor. The evidence established claimant had a prior injury to her knee cap and accompanying osteoarthritis prior to her work incident. Defendants suggest claimant's trauma of January 6, 1983 arose wholly from these preexisting conditions. Claimant asserts it originated in her work activities. Larson has stated the principle governing whether an injury arises out of claimant's employment in cases of preexisting weakness or disease, thusly:

> Injuries arising out of risks or conditions personal to the claimant do not arise out of the employment unless the employment contributes to the risk or aggravates the injury. When the employee has a preexisting physical weakness or disease, this employment contribution may be found either in placing the employee in a position which aggravates the effects of a fall due to the idiopathic condition, or in precipitating the effects of the condition by strain or trauma. (Larson Workmen's Compensation Law §12:00).

This is a case where strain in the course of claimant's work duties precipitated the effects of her condition. Claimant was sitting at the side of a patient's bed administering medication, an employment duty. She stood up, which strained her already weakened leg thereby precipitating claimant's current knee injury. Thus, claimant's injury arose from her employment.

Claimant's injury clearly occurred at a time and place where claimant was performing routine work duties. Therefore, it occurred in the course of her employment. Claimant has established an injury both arising out of and in the course of her employment as a nurse at the Manor.

We next must decide whether claimant's disability is causally related to her work injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 6, 1983 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).

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).

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, however. He can recover when aggravation of that condition creates a disability. 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).

Again the telling consideration in this case is whether claimant's disability results wholly from her earlier knee problem; wholly from her work injury or; at least in part from aggravation of the preexisting damage to her knee by her work injury. Dr. Brodersen offers the only expert testimony addressing this issue. In his reports and in his deposition, he consistently acknowledges claimant's preexisting problems but states her work injury produced her present reduced level of functioning. He explained his reasoning in this regard, thusly:

Q. Can you tell me so that I understand your answer whether or not the injury in January of 1983 aggravated that old injury or that old condition?

A. I feel that it definitely did. The reason for that is that normally for a simple knee sprain the healing, expected healing period for that would be six weeks. And in the normal population, a person with a knee sprain should be back to work or at least have full range of motion and their knee should be essentially painless within about six to eight weeks and hers made no improvement whatsoever.

The lay testimony presented also supports the conclusion that claimant's work injury aggravated her earlier condition thereby creating her current level of disability. Both claimant and defendants' witness' testified claimant walked with a limp throughout her employment with the Manor. Even though one side perhaps understated and the other overstated the level of difficulty previously experienced, both claimant and defendants' witnesses recalled that claimant had physical complaints relative to her damaged extremity before the January 1983 work incident. Yet claimant lived independently, moved about relatively freely, and worked a 40 hour, 5 day week prior to her work incident. Claimant, who gave no evidence of malingering, cannot do these things now. This fact, when coupled with Dr. Brodersen's expert opinion firmly establishes that claimant's current disability resulted, at least in part, from an aggravation of her preexisting injury by her work incident.

The next question to be addressed is the nature and extent of claiman 's benefit entitlement. This question has two aspects: One, whether claimant's disability relates to a body as a whole injury or a scheduled member injury; and two, the extent of claimant's disability which results from her work injury.

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).

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).

Section 85.24(2) provides in relevant part...

...For all cases of permanent partial disability compensation shall be paid as follows:...

The loss of two-thirds of the part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred twenty weeks....

In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the disability bears to the body of the injured employee as a whole.

It it is determined that an injury has produced a disability less than that specifically described in said schedule, compensation shall be paid during the lesser number of weeks of disability determined, as will not exceed a total amount equal to the same percentage proportion of said scheduled maximum compensation.

Claimant stated she has experienced low back pain and left leg and hip pain as a result of the change in her gait following her work injury. Dr. Brodersen agreed that claimant experiences low back pain. Yet no further evidence of compensatory change was presented and Dr. Brodersen couched claimant's disability rating in terms of impairment to a scheduled member, her right lower extremity. Thus, the evidence presented is insufficient to support a finding that claimant has a body as a whole injury. Claimant's disability percentage, therefore, must be determined as a scheduled member disability and not as industrial disability.

Dr. Brodersen testified that claimant has a 40 percent impairment to her right lower extremity. He described his arrival at this figure, thusly:

Q. Doctor, have you made a determination of the percentage of permanent impairment that Mrs. Burr has at this time and if so, would you tell us what that opinion is?

A. Well, this is a difficult problem. When there is a preexisiting condition such as the arthritis, it's difficult to know how much the underlying disease process has to play. In my experience it is very frequent to have arthritis not be a problem until some significant traumatic event occurs and then it becomes symptomatic often on a permanent basis.

Because of this and reviewing the guidelines of the American Academy of Orthopedic Surgeons, I felt that Mrs. Burr had, in the criteria that had been established, an impairment of 40 percent of the lower extremity. And I came up with a 15 percent impairment on the basis of her knee injury, of the injury itself. And I think that was sent to you in the letter.

Q. Insofar as the other 25 percent, Doctor, is that or can that be described as related to the aggravation of the preexisting condition or how would you explain that?

A. That would be correct.

This impairment rating, unfortunately, does not account for the fact that claimant had some obvious limitations prior to her work injury and that these resulted from her earlier knee injury. Claimant clearly is entitled to compensation for the 15 percent impairment attributed solely to the work injury. The 25 percent impairment rating which Dr. Brodersen characterizes as related to the aggravation of claimant's preexisting condition must be discounted by the fact that, as a result of her earlier non work injury, claimant walked with a limp and had physical discomfort sufficient to require periodic treatment with pain medication prior to her work injury. Ten percent of that figure must be attributed to claimant's preexisting, disabling condition. When the remaining 15 percent is coupled with the 15 percent attributed directly to claimant's work injury, claimant is found to have a 30 percent impairment of her right lower extremity. Such impairment entitles claimant to 66 weeks of disability benefits under section 85.34(2)(0).

Claimant seeks payment of certain medical costs under section 85.27. The employer shall furnish reasonable medical care and allow reasonable transportation expenses for compensable injuries. The employer also shall furnish reasonable and necessary appliances. Claimant's injury has been found to be compensable. Therefore, claimant is entitled to be compensated for those expenses she has actually paid or is actually liable for, but not for those which her health insurance has paid. The evidence established that claimant requires a TENS unit and that defendants paid the costs of a unit which was found to be defective. While an employer is not required to furnish more than one set of permanent prosthetic devices, no such limitation applies to a treatment appliance found to be defective. Defendants, therefore, shall compensate claimant for the costs of a second working TENS unit.

Claimant's rate of weekly compensation must be decided. The parties stipulated that claimant earned a weekly gross wage of $292.00, paid on a biweekly basis and that she was entitled to one exemption. Claimant is single. Section 85.36(2) governs this issue. The applicable rate of compensation is $175.38.

PINDINGS OF FACT

WHEREFORE, it is found:

Claimant received an injury in the course of her employment with Crestview Manor on January 6, 1983 when the strain from arising from the bed on which she was seated while administering medication to a patient caused her right leg to give way and resulted in a twisting of her knee.

Claimant had injured her knee sixteen (16) years previously in an auto accident. As a result of this injury, claimant had a partially severed right knee cap and a wire support in the knee.

Claimant walked with a limp and experienced episodic pain at the time of her work injury. These conditions resulted from her earlier trauma.

Claimant had preexisting osteoarthritis when injured at work. This condition probably resulted from the 1965 trauma.

Claimant's work injury aggravated claimant's preexisting condition.

Claimant's work injury resulted in an impairment to her right lower extremity and did not result in a body as a whole injury.

Claimant sustained a fifteen (15) percent impairment to her right lower extremity as a result of her work injury. Claimant has a twenty-five (25) percent impairment of the right lower extremity as a result of the aggravation of her preexisting condition. Ten (10) percent of such impairment can be attributed to claimant's preexisting condition and not to her work injury.

Claimant has sustained a thirty (30) percent impairment of her right lower extremity as a result of her work injury.

Claimant requires a TENS unit to alleviate her pain. Defendants have refused to provide a functioning unit.

Claimant's medical costs are causally related to her January 6, 1983 work injury.

Claimant was paid five hundred eighty-four and 00/100 dollars ($584.00) on a biweekly basis. She is single and

entitled to one exemption.

Claimant's rate of weekly compensation is one hundred seventy-five and 38/100 dollars ($175.38).

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has established that she received an injury on January 6, 1983 which arose out of and in the course of her employment.

Claimant has established that her present disability is causally related to her work injury of January 6, 1983.

Claimant has established she is entitled to permanent partial disability resulting from her injury of January 6, 1983 of thirty (30) percent of the right lower extremity.

Claimant has established that she is entitled to payment of medical costs for which she has not been reimbursed by her health insurance carrier including medical travel expenses of six hundred eighty (680) miles and the costs of a functioning TENS unit.

Claimant has established that her rate of weekly compensation is one hundred seventy-five and 38/100 dollars ($175.38).

ORDER

THEREFORE, it is ordered:

Defendants pay claimant permanent partial disability benefits for sixty-six (66) weeks at the rate of one hundred seventy-five and 38/100 dollars ($175.38).

Defendants pay claimant mileage expenses totaling six hundred eighty (680) miles at the rate appropriate for the time at which the expenses were incurred.

Defendants pay claimant the following medical costs:

Thompson Pharmacy	$8.50
Home Health Center	$120.50
Hamilton County Public Hospital	$152.75

Defendants pay claimant any additional costs incurred in the acquisition of a functioning TENS unit.

Defendants pay interest pursuant to section 85.30 as amended

Defendants pay costs of this action.

Defendants file a final report when this award is paid.

Signed and filed this 7th day of August, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. CARROLL,	:	
Claimant,	:	FILE NO. 719104
vs.	:	A R B I T R A T I O N
BLAHNIK CONSTRUCTION CO.,	:	D E C I S I O N
Employer,	:	
and	:	
LIBERTY MUTUAL INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

ROBERT L. CARROLL,	:	
Claimant,	:	FILE NO. 522459
vs.	:	R E V I E W -
SPENCERS, INC.,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
ILLINOIS NATIONAL,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

These are proceedings in arbitration and review-reopening brought by the claimant, Robert L. Carroll, against his employer Blahnik Construction Co., and its insurance carrier, Liberty Mutual Insurance Co., to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained in July 1981; and against his employer, Spencers, Inc., and its insurance carrier, Illinois National Insurance Company, to recover additional benefits under the Act as a result of an injury of October 20, 1978.

The matters came on for hearing before the undersigned deputy industrial commissioner at the juvenile court facility in Cedar Rapids, Iowa March 16, 1984. All evidence presented is considered part of the record in each matter. The record was considered fully submitted at close of hearing in file number 719104. A first report of injury was filed January 8, 1979 and a memorandum of agreement was filed November 15, 1978 in file number 522429.

A review of the industrial commissioner's file reveals that no filings have been made.

The record in this case consists of the testimony of claimant, Robert L. Carroll, of Norma Brown; and of claimant's exhibits 1 through 22; and of defendants'(Blahnik's) exhibits 1 through 5.

ISSUES

The issues for resolution in claimant's case against Spencers are:

1. Whether a causal relationship between claimant's alleged injury and his disability exists.

2. Whether claimant is entitled to benefits and the nature and extent of his entitlement.

The issues for resolution in claimant's case against Blahnik are:

1. Whether claimant received an injury which arose out of and in the course of his employment.

2. Whether a causal relationship exists between claimant's alleged injury and his disability.

3. Whether claimant is entitled to benefits and the nature and extent of his entitlement.

REVIEW OF THE EVIDENCE

Claimant, Robert L. Carroll, born May 25, 1949, completed ninth grade and has obtained a GED. Claimant served in the U. S. Marines from August 1966 to July 30, 1970. He is a veteran of the Vietnam Conflict in which he suffered an injury to his legs, knees, and ankle. Claimant did not elaborate as to the nature of such injury or the circumstances surrounding it. Since 1970 claimant has worked primarily in the construction trades and is a certified ironworker, specifically, a journeyman rodman. Claimant passed both an oral and written exam to obtain his certification. Claimant works from a union hall. Claimant testified that his work has always required considerable lifting,

bending, and climbing. Claimant recited that he began work at Spencers Inc. in September of 1977 or 1978. He testified that he was injured at Spencers on October 20, 1978. Claimant was helping construct an airport hangar. Large fiberglass sheets weighing three to four hundred pounds were part of the building materials. Generally three persons transferred each sheet. Claimant was assisting in transferring a sheet onto the hangar roof. Apparently one person stood on the roof and grabbed the sheet up and the others slid it from the ground. Claimant was a ground worker. The sheeting fell and jammed claimant's back. Claimant reports he felt a "tingling sensation" which got worse as the day progressed. Claimant states he finished his work day, went home and then lay on the floor with heat and aspirin all weekend. His back did not improve. Claimant then sought treatment at Mercy Hospital and was placed in traction for a week. He was released but apparently was later rehospitalized. A myelogram and surgery were performed. He was released to return to work at Spencer in September 1979. Claimant then worked for J J Steel and Abel House Construction before beginning work with Blahnik Construction in October 1980.

At Blahnik claimant stated he initially hauled and lifted old steel beams in a remodeling project. He described these as six to eight feet long and ten inches wide by three to four inches deep and estimated each weighed between three and four hundred pounds. Claimant resumed work for Blahnik in June 1981. He characterized his back condition then by saying he had a "few" problems and occasionally wore a back brace. He then had muscle spasm with pain radiating into his legs. He sought medical treatment and returned to work at Blahnik on a "sheeting" project. Claimant states he lifted sheets to a second worker on the scaffolding. He reports he had leg pain on the July 4th weekend. He sought medical treatment and received a muscle relaxant and a pain killer. Claimant states he tried to return to work on the following Tuesday. He continued to experience problems. Claimant reports that he told his foreman of his problems and was advised to take it easy. Claimant states he "took the lay off" for fear he would further aggravate his condition were he to continue working. Claimant states he sought work as a gas station attendant and a maintenance worker while laid off.

Claimant returned to work at Spencers in November 1981. He only worked for a day or so.

Claimant states his back got worse in December 1981 and he then experienced pain in the back of his leg. In January 1982, he was rehospitalized for traction and physical therapy. A second hospitalization followed. Claimant returned to work for Loomis Construction in April 1982, however. He worked there through much of the 1982 construction season with spot employment elsewhere when he was not working for Loomis. Claimant reports he spread bar joists having an average weight of 300 pounds during this time. He also tied rebars that he described as 30 to 40 feet long, two and one half inches thick and as considerably heavier [than the bar joists.] Claimant also worked construction in 1983. Apparently he performed work which required substantially the same body mechanics as those required in his other jobs.

Claimant described a number of nonwork injuries he has received. Claimant was involved in a two car collision in March 1973. He states that x-ray examination found no injury and that he had some muscle spasm back pain for which he took a few aspirin.

In August 1977, claimant reinjured his right forearm and fingers when his hand went through a grocery store window. Claimant states he damaged his arm muscles and was hospitalized for a few days. In September 1979, claimant broke his leg in five places playing ball. He was treated at Mercy Hospital and reports this injury "came along real good."

On cross examination by Mr. Ferris, counsel for Spencers, claimant admitted he was off work from September 1979 to January 1980 on account of his broken leg. Claimant stated that after his 1979 injury he chose jobs on which he could take it easy for the first few months but as his back improved he took those jobs available. Claimant admitted his injury at Spencers did not reduce his earnings.

On cross examination by Mr. Hoffmann counsel for Blahnik, it was established that claimant denied ever having sustained treatment for back pain or having suffered back pain or having received workers' compensation benefits on his written employment application with Blahnik. Claimant admitted never reporting his injury to his supervisor nor seeking immediate medical attention. Claimant admitted that following the sheeting incident, he simply told Blahnik he would not be in and did not explain he had received a work injury. Claimant never visited Blahnik's company doctor for his injury. It was also established that claimant's medical records reflect that he was treated for lumbar pain in September 1974. Claimant admitted he never advised Blahnik he was wearing a back brace because of his pain. Claimant admitted he volunteered for the layoff at Blahnik and was not fired. He admitted that on his work return following his Blahnik injury, he worked "at least as hard" as anyone else.

On redirect examination, claimant explained he denied having back problems and receiving compensation benefits on his Blahnik application because he was afraid he would not be with an employer that long if the employer knew of his back problems and not many jobs were offered at that time. On recross examination, it was established that claimant has worn his back brace two or three times since it was prescribed.

Blahnik called Norma L. Brown in its behalf. Ms. Brown has worked in Blahnik's payroll department for the past 13 years. She reported she was in the Blahnik office on the first work day following July 4, 1981. The witness recited that she spoke with claimant by telephone that day. She reported claimant stated he would not be at work because he had injured his back. She related that she asked claimant whether the injury was job related. She stated claimant replied that the injury was not work related but resulted from mowing his lawn. On cross examination, the witness admitted she had no notes concerning this conversation. She stated she did tell claimant's foreman that claimant would not report to work. She explained that she does not routinely record nonjob related injuries when these are reported.

Claimant appeared as a rebuttal witness. He stated that from June 1981 through the July 4, 1981 weekend his back had been relatively sore with pain radiating into his legs. He stated lifting or climbing stairs set off the pain. He did not recall the specifics of his conversation with Ms. Brown.

Counsel for all parties presented closing arguments at hearing, and these were considered in the disposition of this matter.

Claimant's exhibits 1 through 22 are various medical records relative to claimant. Claimant's exhibit 1 concerns claimant's September 1974 hospitalization. The history recites that claimant dates his persistent, severe non-relenting pain in his lumbosacral back to a rear-ended auto collison in March 1973. The lumbosacral spine did not show evidence of boney disease or injury; intravertebral disc spaces appeared intact and claimant was felt to have a chronic, acute lumbosacral strain, probably on the basis of continued strain of lifting, more on a mechanical low back pain basis with a mild right sciatica. Claimant's exhibit 2 is medical records relative to claimant's August 1977 arm and finger injury. Claimant's exhibit 3 are medical records relative to claimant's October 25, 1978 hospitalization. The history states the following:

> This is an adult white male, age 29, who was seen by me two days before admission as an out patient in the Emergency Room. complaining [sic] of pain in his right leg posteriorly, extending down to the calf and posterior aspect of the foot. He states that while working for a construction company, he was coming down a ladder, and apparently did not realize that one of the wrungs of the ladder was missing and when he attempted to put his right foot down, he went all the way to the ground and put marked pressure on his right leg and hip. He had considerable amount of discomfort, but finished out the day, and then the following morning, he had severe pain, was unable to scarcely [sic] go to the bathroom and he remained in bed all day and then on Monday morning he came to the hospital for relief and to ascertain the cause of his problem. I saw him in the Emergency Room and he was unable to sit any length of time and walking seemed to be a frightful chore. He had pain in the posterior aspect of the thigh and the popliteal area of the right knee and some in the calf. Naffsiger's sign was +1 on the right. Patrick Fabere was negative. He had no apparent nerve dificit [sic]. Refelexes were normal and the peripheral circulation seemed to be adequate. My impression at that time that he had marked muscle spasms and may have had a ruptured vein in the deep muscle of the thigh. It was advised to have a whirlpool and he left and returned the following day with an extreme amount of discomfort and his wife tells me that he was unable to even drive the car, so he was brought to the hospital for further treatment....

X-ray examination showed satisfactory alignment, minimal spurring at L-5 and slight thinning of the discs between discs L-5 and S-1. No fracture or abnormalities were identified. Claimant's discharge diagnosis was acute lumbosacral strain with possible disc syndrome at the L-5 and S-1 level.

Claimant's exhibit 4 is medical records relative to claimant's November 8, 1978 hospitalization. A lumbar laminectomy was performed with removal of a herniated intervertebral disc at the L5-S1 level on the right. Claimant's exhibit 5 is medical records relative to claimant's September 1979 ankle injury.

Claimant's exhibit 6 is medical records relative to claimant's June 15, 1981 medical treatment at the Mercy Hospital Trauma Center. The diagnosis is lumbar spine strain. The history recites that claimant has had intermittent lumbosacral pain which has responded to bedrest and also complains of a "crunching sensation" in his right hip which has been present for about one month. It states claimant canoed over the weekend but knows of no specific single injury to his spine. The observed data reports:

> Patient has limited flexion and sideways bending to pain in the buttocks area. There is no specific point tenderness down the LS spine but there is mild tenderness to palpation over the paraspinal muscle at approximately L-3, L-4. Straight leg raising tests are negative. Knee jerks and ankle jerks equal bilaterally. Normal sensation. spine [sic] reveals a thinning of the L-5 - S-1 disc

space. Xray of the R [sic] hip within normal limits.

The x-ray report states that no evidence of recent injury exists.

Claimant's exhibit 7 is medical records relative to claimant's January 20, 1982 hospital admission. The reports recite the following history:

> This adult white male, is being admitted to the hospital because of persistent low back pain, [sic] the pain seems to radiate across the entire lower back region and particularly down the left leg at the present time and very marked trigger point area in the left sciatic notch. He has been working, but up until approximately a few days ago, but this pain gets so severe that he is unable to continue with his present occupation. He has not had any real new specific single injury recently and he complains also of a crunching sensation in both right and left hips, which has been present off and on for a month. This patient has a long past medical history. He dates some of his problem clear back to March of 1973, when he was involved in a car accident and at that time, sustained what he thought was a severe neck and back injury. He was seen in the Emergency Room at St. Luke's Hospital at that time and was given muscle relaxants and reported back to work, but eventually became much more uncomfortable and was seen again by me in 1974, at which time he was admitted to the hospital and x-rays again of the back were taken, but showed no significant bony disease. He was placed in traction at that time and had intramuscular injection of Xylocaine, but no great apparent relief. He was advised at that time that he should probably have a myelogram to determine whether or not he had a disc syndrome. The patient was not receptive to this and was discharged again without further studies and given medication for relief of his pain and discomfort. He continued to have discomfort off and on and again in 1978, I saw him and insisted that he have orthopedic consultation. He was seen then by Dr. Naden and myelogram done on 11-09-78 confirmed the physical findings of herniated disc at L-5, S-1. The patient did not elect to do anything at that time, but the pain became quite severe when he was again readmitted by Dr. Naden in 1979 and a surgical procedure was done at that time and the patient had what was apparently an uncomplicated gradual improvement. In 1977, I failed to mention that he had a severe injury where he put the right arm and forearm though [sic] plate glass. HE [sic] was seen then by Dr. Naden and he had surgical procedure of this [sic] arm and forearm, of the flexor musculature under local anesthesia and this repair was very successful. After the decompression of his back, the patient seemed to get along quite well, although from time to time, coming in complaining of some discomfort, but nothing too severe until July of 1981, when he complaind quite severely of this back pain, admitted himself to the Emergency Room of the hospital and at that time, he was advised to get bedrest and given medication for pain and was to call Dr. Naden for further instructions, which he did not do. X-ray at that time was negative for any bony disease of the pelvis or right hip, but x-rays of the lower back were not done at that time. The pain is now so severe that I have told him that he has to be admitted for further observation and possible myelogram.

Claimant's exhibit 8 is medical records relative to claimant's February 18, 1982 hospital admission wherein a partial "laminoctomy" [sic] and a laminotomy were performed. The history recites:

> This 32 year old man, for the last 2-3 weeks, has been having severe cramping symptoms in his left lower extremity, quite reminiscent of a herniated disc.
>
> It is interesting that actually this started back in July, in his right leg, last year. He started developing cramping and numbness and tingling in the middle three toes of his right foot and started developing significant weakness. I checked him over at that time, followed him for a white [sic] and he denied any serious problems [sic] did not want to have anything specifically done. We just watched him along and he had good evidence of a disc, but as I said, refused to have anything done.
>
> About 3 weeks ago, he came in to see me and he was just completely decompensated. He had severe, constant cramping in his buttocks and lower extremities and continued to have the numbness now in both lower extremities. Most of his symptoms were on the left at this time. Positive straight leg raise. Definite weakness of the extensor hallucis longus in both feet and of the flexor hallucis longus on the left. He finally decided to give in and have something done. We brought him in for a myelogram. This was positive and he will have surgery on his back.

Claimant's exhibit 9 is medical notes of several physicians regarding claimant from September 24, 1974 to July 21, 1982. Claimant's exhibit 10 is a standard form surgeon's report for claimant's October 23, 1978 accident. Claimant's exhibit 11 is a letter report of D. C. Naden, M.D., to New Hampshire Insurance Group of February 1, 1979. Claimant's exhibit 12 is an April 2, 1979 letter report of Naden to the Insurance Group. Claimant's exhibit 13 is a July 19, 1979 letter report of Dr. Naden to New Hampshire Insurance Group opining claimant has a 15 percent permanent partial disability rating of the body as a whole as a result of his then current injury. Claimant's exhibit 14 is a July 30, 1979 letter report of Naden to the Insurance Group which elaborates as follows:

> This young man's permanent partial disability rating would be approximately 15 per cent [sic] whole body permanent physical impairment and loss of physical function to the whole body. This would be the result of surgical excision of the disc without a fusion but with moderate, persistent pain and stiffness aggravated by heavy lifting and necessary modification of his activities.
>
> I last saw this young man on July 19 of this year and he was getting along a little bit better than usual. He was back working and able to tolerate it better than I thought he would be able to. However, I still maintain that there is a possibility that he could run into additional problems with his disc disease, either at this level or at a different level in his lower back and that there is a possibility of further treatment. However, I should reiterate that at the present time no active treatment is necessary or recommended.

Claimant's exhibit 15 is a work release for claimant from Dr. Naden for June 6, 1979. Claimant's exhibit 16 is a letter report of Naden to John W. Bickel dated August 11, 1981. The letter states:

> The above named patient of mine has been doctoring with me for approximately six and one-half months for what I think is a new herniated disc that I do not feel is related to his previous back condition. Iam [sic] not just exactly sure if this is work incurred but I am sure that it has been work aggravated during this latter period of time.

Claimant's exhibit 17 is an attending physician's report of January 11, 1982 for claimant. The report recites claimant's history as described by claimant as problems in his lower extremity and left foot with diagnosis of possible disc on left side. The doctor reports treating claimant for a similar condition of discomfort in his back on July 23, 1981.

Claimant's exhibit 19 is a letter report of Dr. Naden to American International Adjustment Company Inc. of March 3, 1982. The letter states:

> I am not exactly sure how the above patient hurt his back but I feel that his herniated disc started in July of last year and then kind of quieted down with a re-exacerbation three weeks ago. He was taken into the hospital where a myelogram revealed a complete cutoff at the L-4,5 [sic] level bilateral.

Claimant's exhibt 20 is a letter report of Dr. Naden to Roger L. Ferris of January 20, 1983. The letter states:

> It is my feeling that Mr. Carroll's back problems that began in January of 1981 and culminated into the surgery that I did in February of 1982 was a new injury and not associated with his October 20, 1978 problem.
>
> Also, I feel that the surgery that I performed on him on the 22nd of February, 1982 was not related to his 1978 injury.

Claimant's exhibit 21 is a letter report of Naden to Thomas Reid of April 16, 1983 which states in relevant part:

> ...At the present time, I would appropriate a 20 per cent [sic] P.P.D. rating to the entire body of Mr. Carroll's functional disability status and would appropriate the insult of 50/50 to each incident associated with surgery. That is, I would appropriate a ten per cent P.P.D. rating to his October of 1978 affliction plus surgery and then another ten per cent [sic] P.P.D. rating to his whole body as a result of the more recent affliction culminating with surgery in February of 1982. The 20 per cent [sic] whole-body permanent physical impairment and loss of function to the whole body would be the result of again the surgical excision of two herniated discs without fusion, but with moderate pain and stiffness aggravated by heavy lifting and necessary modification of his activities.
> ...
>
> No one is going to be able to tell us when he developed his second herniation or disc problem. Certainly his work and activities prior to his surgery in February of 1982 were aggravating his

condition. I feel this culminated into a problem that necessitated surgery February of 1982.

Claimant's exhibit 22 is a letter report of W. J. Robt, M.D., to Liberty Mutual Insurance Company dated February 23, 1984. The report diagnoses claimant's problems as "post laminectomy residuals, minor" and states the following regarding his disability rating:

> I think he has an excellent result considering a two level involvement. I observe that he has a ten percent rating for his first laminectomy and residual from that of ten percent. I would consider the second one an additional five percent or a summary of 15 percent permanent impairment of function to the body as a whole as a result of the two level involvement.

Blahnik defendants' exhibit 1 is certain medical reports relative to claimant, all of which were included in claimant's exhibits. Blahnik defendants' exhibit 2 is an undated Blahnik Construction Company Employee Questionaire executed by claimant. Claimant has checked "no" in response to questions as to whether he ever received treatment for a back condition or back injury, as to whether he ever suffered aches or pains of the back, and as to whether he has ever received workers' compensation. Blahnik defendants' exhibit 3 is a statement executed by claimant which recites:

> I have read the Company's Employee Handbook and understand the personnel policy working rules, Safety and Health rules and regulations and emergency procedure rules and I promise to follow them while in the employe [sic] of this company.
>
> I also understand that in case I am injured, no matter how slight, while in the course of my work, I must report immediately to my supervisor.

Blahnik defendants' exhibit 4 is a Blahnik Construction Company Employee handbook. Claimant's objections to Blahnik defendants' exhibits 3 and 4 are overruled. Blahnik defendants' exhibit 5 is claimant's anwers to interrogatories propounded by Blahnik.

APPLICABLE LAW AND ANALYSIS

We shall first address claimant's claim against defendants Blahnik and Liberty Mutual.

Our first concern 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 July 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 employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 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.

Claimant apparently relies on his activity of lifting sheeting while working for Blahnik in 1981 as the source of his present difficulties. If claimant's problems did arise from this activity, he certainly would have an injury arising out of and in the course of his employment. Unfortunately, serious questions remain unresolved in regard to this matter. Claimant reports he first experienced leg pain on the 1981 July 4th weekend. He first missed work for his 1981 related problem on the first or day following the July 4th holiday. Claimant called Blahnik and reported he would not be at work. Defendants' witness testified claimant spoke with her when reporting his work absence. She recalled that he stated he had injured his back mowing the lawn. This witness appeared credible and, while certainly not wholly disinterested, had no apparent reason to volunteer a fabricated account of the phone incident to claimant's employer. Even if her account is rejected, however, claimant, himself, admits he did not tell his employer that his pain resulted from his work. Claimant knew company policy mandated that he report work injuries. Claimant had had a prior back problem for which he had received workers' compensation. He is an intelligent, well-spoken, apparently socially aware young man. These facts suggest claimant would have possessed the presence of mind to report his back problems were work related had a work incident occurred. Thus, the fact that claimant did not report an injury is most disconcerning and leaves serious doubts as to whether his problem arose out of and in the course of his employment.

It is granted that claimant perhaps feared that reporting a work-related condition to his employer would jeopardize his job security. Such would be understandable in one with previous back problems whose livelihood depends on the physical integrity of his body. The medical histories recorded regarding claimant's 1981 and 1982 treatment for back pain are also troubling, however. No history recites any work incident nor even makes reference to claimant's work activities in describing his condition or its onset. It is more than likely that claimant's examining physicians questioned him regarding the onset of his difficulties. Any work incident producing pain or any aggravation of preexisting pain by work activity described by claimant would certainly have been recorded. Such recordations are wholly lacking. Further, Dr. Naden, on one occasion states he is "not just exactly sure if this is work incurred" and on another occasion states: "No one is going to be able to tell us when he developed his second [1981-1982] herniation or disc problem." Claimant had no reason not to describe a work incident or the fact that his work activities produced his pain. The absence of such descriptions and Dr. Naden's uncertainty as to whether claimant's problems are work incurred, brace claimant's own failure to report his problems as work related and defendants' witness' account of a lawn mowing incident as the source of claimant's initially reported pain in creating obstacles for claimant in his task of establishing that his problems have originated in his employment. For the above cited reasons, claimant fails to preponderate on this threshold issue and his claim fails.

It is noted that even had claimant established an injury which arose out of and in the course of his employment, the insufficiency of the medical histories recorded would also seriously handicap claimant's case as to the issue of whether his current disabilities are causally related to a work injury of 1981.

The claimant has the burden of proving by a preponderance of the evidence that the injury of 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 chat 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 noted above, the histories recited do not establish that claimant's problems result from his work. Dr. Naden opines that it cannot be established that claimant's second herniation was work incurred. Evidence of the work related nature of injury itself is necessary to establish the requisite causal connection to claimant's current disabilities. This is lacking. We grant that Dr. Naden volunteered that claimant's work activities prior to his February 1982 surgery were aggravating his condition. Certainly, the heavy work claimant continued to perform did not alleviate his symptoms and may well have elevated them. But that in itself cannot show the causal connection required under the law. Claimant has neither demonstrated a preexisting condition nor that such condition was lit up by his work activity.

We shall now address claimant's claim against Spencers and Illinois National. Claimant first seeks to establish a causal connection between his current disabilites and his verified October 20, 1978 work incident with Spencers. As noted above, the claimant has the burden of proving by a preponderance of the evidence that the injury of October 20, 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).

Furthermore, when a worker sustains an injury, and 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: (1) that the disability for which he or she seeks additional compensation was proximately caused by the first injury, or (2) that the second injury (and ensuing disability) was proximately caused by the first injury. DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777, 780 (Iowa 1971).

Claimant has failed to show either of the above. Claimant's current problems apparently originate fom his 1981 disc herniation and resultant surgery. The medical evidence presented does not suggest they grew from claimant's 1978 injury. Indeed, the medicals suggest claimant had made a most satisfactory recovery from his 1978 injury and functioned quite well until his new herniation in approximately July 1981. Thus, claimant cannot establish that his current disability was proximately caused by his 1978 injury.

Claimant also cannot demonstrate that the second injury was proximately caused by the first injury. The medical evidence belies such a showing. Dr. Naden, claimant's treating physician, expressly states the 1981 herniated disc was a new condition not related to either claimant's previous back condition or to his 1978 injury. Nothing in the expert testimony offered or otherwise refutes this conclusion. Claimant's case against Spencers Inc., therefore, fails.

FINDINGS OF FACT

WHEREFORE, it is found:

Claimant sustained an injury to his back October 20, 1978 arising out of and in the course of his employment as a steelworker with defendant, Spencers Inc.

This injury cummulated in physical findings of a herniated disc at L-5, S-1 and surgery in 1979 from which claimant apparently made a satisfactory improvement.

Claimant began to experience severe back pain in June or July 1981.

This condition cummulated in physical findings of a bilateral herniated disc at the L4-L5 level and surgery in February 1982.

Dr. Naden opines claimant's 1981 condition did not result from his 1978 injury. Dr. Naden was claimant's treating physician.

Claimant's 1981 condition was not proximately caused by his 1978 injury.

Claimant's 1981 condition developed during the time in which he was employed as a steelworker by defendant Blahnik.

Claimant's first work absence for his condition occurred on the first work day following the July 4, 1981 holiday.

Claimant did not report his condition as a work injury.

Claimant was aware that company rules required him to report all work injuries.

Claimant had a previous work-related back condition for which he received workers' compensation benefits.

Claimant is intelligent and apparently socially aware.

Claimant's medical histories of his 1981 condition describe neither a work incident which produced claimant's condition nor onset of pain with work activities.

Claimant's 1981 back condition did not arise out of and in the course of his employment with defendant, Blahnik.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has not established that his current disability is causally related to his October 20, 1978 work injury while employed for defendant, Spencers.

Claimant has not established that his back condition which had its onset in June or July 1981 arose out of and in the course of his employment with defendant, Blahnik.

ORDER

THEREFORE, it is ordered:

Claimant take nothing further from his proceedings against defendant, Spencers.

Claimant take nothing from his proceedings against defendant, Blahnik.

Defendants Spencers and Blahnik pay the costs of these proceedings apportioning such costs equally between them.

Signed and filed this 27th day of August, 1984.

Copies to:

Mr. Thomas B. Read
Attorney at Law
1710 IE Tower
Cedar Rapids, IA 52401

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY CHURCH, Claimant, vs. FORT DODGE ROOFING CO., Employer, and AETNA INSURANCE CO., Insurance Carrier, and SECOND INJURY FUND, Defendants.	FILE NO. 642717 R E V I E W - R E O P E N I N G D E C I S I O N FILED AUG 16 1984 IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Terry Church, the claimant, against Fort Dodge Roofing Company, the employer, Aetna Insurance Company, the insurance carrier, and the Second Injury Fund, defendants, to recover benefits under the Iowa Workers' Compensation Act arising from an industrial injury which occurred on July 23, 1980. This matter was heard in Sioux City, Iowa on December 7, 1983 and considered as fully submitted at the conclusion of the hearing.

The record consists of the oral testimony of the claimant, defendants' exhibit 1 consisting of various medical reports, the discovery deposition of claimant and the evidentiary deposition of John J. Dougherty, M.D. Through filings by the insurance carrier, payment to claimant of 127 weeks of healing period benefits and payment of 47 weeks of permanent partial disability benefits have been made. The parties stipulated at hearing that permanent partial disability benefits would be paid to claimant in the total amount of 52 4/7 weeks based on a 35 percent functional disability to claimant's right foot. The parties further stipulated to a weekly rate of $197.10.

There are two issues in this case: whether claimant is entitled to additional permanent partial disability; and whether claimant is entitled to second injury fund benefits.

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

Claimant, age 35, is single with no dependents. He completed his formal education through the eighth grade and subsequently received a GED. Claimant has held a variety of jobs in general labor classifications prior to his employment with Fort Dodge Roofing Company including working at meat packing plants, manufacturing and foundry plants and with other roofing companies. Claimant received only on-the-job training in these jobs.

Sometime in 1973 or 1974, claimant was involved in a motor vehicle accident while riding a motorcycle. Claimant sustained a non-industrial injury to his left leg. K. M. Keane, M.D., an orthopedic surgeon, treated claimant for his injuries. In a report dated April 5, 1983, Dr. Keane stated:

> ...he had a comminuted fracture of the tibia with multiple severe abrasions over the leg. The traumatized skin had become necrotic and it was necessary to debride it and do a skin graft. He was treated in a cast for several months until the fracture had healed.....

When released from treatment by Dr. Keane, claimant ultimately went to work as a meat cutter. He then began work as a roofer with another company. For a short period he worked as a beef skinner before being employed by Fort Dodge Roofing Company.

Each of the positions claimant held subsequent to his motorcycle accident, involved standing while working for an average of eight hours per day. According to claimant he experienced pain in his left ankle and leg while working for an average of eight hours per day. According to claimant he experienced pain in his left ankle and leg while working. He favored his left leg by placing more weight and stress on his right leg and foot. During this time claimant found his left leg would get sore and ache if he used it too long.

On July 23, 1980 claimant was working as a roofer for Fort Dodge Roofing Company on a project in Oelwein, Iowa. While loading up materials at the end of the work day, claimant fell 20 to 30 feet from the roof on which he had been working. Claimant landed on both feet.

Claimant was taken to the emergency room at the Oelwein Hospital. R. S. Jaggard, M.D., treated him for an "apparent fracture metatarsals, right foot," and referred him for further treatment in Fort Dodge. (Jaggard Report 8/27/80) In Fort Dodge Paul. L. Stitt, M.D., found "severely comminuted fractures involving the forefoot of the right leg." (Stitt Report 7-26-80) He performed surgery. Due to lack of improvement in claimant's condition, Dr. Stitt referred him for further treatment to K. M. Keane, M.D., in Sioux City.

Dr. Keane admitted claimant to the hospital "with severe comminution involving the navicular cuneiforms, bases of the metatarsals and involvement of all the adjacent joints with collapse of the mid foot." (Marian Health Center, Discharge Summary Sheet 7/31/80) Dr. Keane performed further surgery on July 28, 1980.

On December 22, 1980, Dr. Keane released claimant for light work. Claimant attempted to return to work, but quit due to pain from standing.

Dr. Keane readmitted claimant to the hospital for surgery on March 24, 1981. Dr. Keane found "deformity secondary to severe multiple fracture dislocations mid tarsal and tarsal-metatarsal joints." (Marian Health Center, Discharge Summary Sheet 3/29/81) During this hospitalization, Dr. Keane removed a "large bony prominence from the dorsum of the foot...." Subsequent to surgery, claimant continued to have pain in his foot and instability in his foot and leg when walking or standing.

On November 17, 1981, Dr. Keane readmitted claimant for further surgery due to "Post-traumatic arthritis at the tarsometatarsal joints and retained fragments of fractured cuneiforms." (Marian Health Center, Surgical Report 11/18/81) On January 7, 1983 Dr. Keane released claimant "to work doing whatever he is able to do." (Keane Notes 1/7/83).

During his period of recuperation and treatment claimant's employer, Fort Dodge Roofing Company, went out of business. Upon his release, claimant has sought other employment, but without success. Since his release from Dr. Keane's treatment, claimant continues to experience pain in his right leg and instability while using it. Additionally, claimant no longer uses his right leg to support his injured left leg. Claimant experiences an aching pain in the area of his left ankle and swelling in the same area after walking or standing.

Claimant's treating physician, Dr. Keane, finds in regard to claimant's left leg a "5% permanent disability" (Keane's Notes 4/5/83) To claimant's right leg Dr. Keane finds functional disability of 30 percent and "occupational disability, for heavy work and agility for working on uneven surfaces and returning to the occupation of a roofer, to be even higher than that." (Keane Letter 6/10/83).

Defendants' examining physician, John J. Dougherty, M.D., an orthopedic surgeon, ascribes no permanent disability to claimant's left leg. He further concludes claimant's injuries from the accident of July 23, 1980 are restricted to his foot. He rates the functional disability of claimant's right foot at 35 percent.

Based on the record as a whole and as the treating physician, Dr. Keane's medical evidence is more persuasive. In regard to the left leg, Dr. Dougherty does not totally deny abnormalities. His testimony is to that extent consistent with Dr. Keane's. Further, the claimant's testimony that he began experiencing severe problems with the left leg only after he suffered the injury to his right leg in July, 1980 is undisputed. Since the record discloses no evidence of injury or treatment to his left leg after his fall in July, 1980, claimant's difficulties with his left leg most likely resulted from residual problems as opined by Dr. Keane. Dr. Keane's testimony, as treating physician, is most persuasive and is given the greater weight.

In regard to claimant's right leg, Dr. Keane's testimony places claimant's injury and disabilities at the astragalo-navicular and calcaneal-cuboid joint and at the tarsal-metatarsal joints. His testimony places the injury into the ankle and lower extremity of claimant. Dr. Dougherty also finds restricted motion of the subtalar joint. Dr. Keane's assessment is most persuasive, particularly in view of claimant's undisputed and credible testimony regarding his instability in standing and walking.

Based on the medical evidence as a whole, claimant sustained a 5 percent permanent partial disability to his left leg as a result of his motorcycle mishap in 1973. See Simbro v. Delong's Sportswear, 332 N.W.2d 886, 889 (Iowa 1983). Further, claimant has sustained a 30 percent permanent partial disability to his right leg as a result of the industrial accident of July 23, 1980.

Based upon the record as a whole, and particularly on claimant's undisputed testimony regarding his age, education, work history and earning capacity and his inability to return to his former employment, to obtain work or rehabilitation since the July 23, 1980 injury, claimant has sustained industrial disability of 65 percent. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). The record unequivocally establishes claimant was experiencing problems with his injury to his left leg prior to the industrial injury of July 23, 1980. Further, the record establishes claimant was employed throughout the time between the two injuries. On the basis of the record, 30 percent of claimant's industrial disability was caused by his second injury of July 23, 1980 and 5 percent caused by his earlier injury to his left leg. Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300, 303-04 (Iowa 1979).

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

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

2. That claimant sustained a non-compensable injury to his left leg in 1973 or 1974 in a motorcycle accident.

3. That as a result of the motorcycle accident, claimant sustained a 5 percent functional impairment to his left leg.

4. That subsequent to the injury to his left leg and up to July 23, 1980, claimant engaged in gainful employment in various general labor classifications with various employers and suffered intermittent pain in his left leg.

5. On July 23, 1980, while in the employment of and in the course of performing his duties for defendant employer, claimant fell from the roof of a building and sustained injuries to his right foot and ankle.

6. That as a result of the incident on July 23, 1980, claimant sustained a 30 percent functional impairment to his right leg.

7. That claimant is 35 years old with formal education through the eighth grade, has received a GED and has received no other training.

8. That claimant has worked only as a laborer, has been unable to return to his former employment and has been unable to obtain other permanent employment or rehabilitation, since his release from medical care on January 10, 1983.

9. That claimant has sustained an industrial disability of 65 percent.

10. That 30 percent of claimant's industrial disability was caused by his accident of July 23, 1980 and the injuries to his right leg and 5 percent was caused by the earlier injury to his left leg.

11. That claimant's weekly rate of benefits is $197.10.

12. That defendants, employer and insurance carrier, have paid to claimant 127 weeks of healing period benefits.

THEREFORE, IT IS ORDERED that defendants, beginning on February 10, 1983, shall pay to claimant permanent partial disability benefits for a total period of sixty-six (66) weeks at the weekly rate of one hundred ninety-seven and 10/100 dollars ($197.10). Defendants shall be given credit for prior payments. Defendants shall pay all accrued amounts owing in a

lump sum with accrued interest from the date due.

IT IS FURTHER ORDERED that defendant, Second Injury Fund, beginning on April 23, 1984, shall pay to claimant permanent partial disability benefits for a period of one hundred sixty-four (164) weeks at the weekly rate of one hundred ninety-seven and 10/100 dollars ($197.10) until paid. Defendant shall pay all accrued amounts owing in a lump sum with accrued interest from the date due.

Costs, as contemplated by Industrial Commissioner's Rule 500-4.33, are charged to both defendants equally who are also ordered to file a final report when due.

Signed and filed this 16 day of August, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ERICKA E. CLEMENS,
Claimant,
vs.
IOWA VETERANS HOME,
Employer,
and
STATE OF IOWA,
Insurance Carrier,
Defendants.

File No. 715107
ARBITRATION
DECISION

FILED
SEP 27 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Ericka E. Clemens, claimant, against Iowa Veterans Home, employer, and the State of Iowa, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an alleged injury of April 21, 1981. It came on for hearing on June 5, 1984 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted with the submission of a bill from Dr. Walker on June 28, 1984.

The industrial commissioner's file contains no filings.

At the time of hearing the parties stipulated to a rate in the event of an award of $112.18 and to the fairness of the medical expenses.

The record in this matter consists of the testimony of claimant, John Franklin Clemens and Max Norris Diggins; claimant's exhibit 1, a series of leave of absence slips; claimant's exhibit 2, a series of medical bills; claimant's exhibit 3, a performance evaluation sheet; claimant's exhibit 4, a series of reports from John R. Walker, M.D.; defendants' exhibit A, a series of medical reports; defendants' exhibit B, reports from P. L. Collins, D.C.; defendants' exhibit C, a series of medical records; defendants' exhibit D, a letter from Scott B. Neff, D.O.; and defendants' exhibit E, a series of medical reports.

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 any disability she now suffers; whether or not claimant is entitled to healing period or permanent partial disability benefits; whether or not claimant is entitled to expenses under Iowa Code section 85.27. Defendants have raised the affirmative defense of notice.

STATEMENT OF THE CASE

Forty-six year old married claimant, mother of three children, graduated from high school in Germany, had no other formal education other than an eight hour class offered by her employer. Her work experience in Germany involved working in a flower shop where she cared for and sold plants and made flower arrangements. Her first work in this country was as a waitress in a bowling alley where she also acted as a short order cook, clerk, bartender and cleanup person with wages of $2.25 per hour. For three years she worked in a flower shop selling plants, making arrangements and cleaning the shop once a week. She earned $3.00 per hour.

Her work for defendant employer started in April of 1978 when she was hired to do housekeeping work. She listed her tasks as mopping floors first with a chemical and then with a wet mop, sanitizing various areas, dusting, emptying and relining trash cans, caring for furniture, moving furniture, hand scrubbing stained areas, polishing chrome, cleaning mirrors, scrubbing sinks and toilets, and replenishing paper and supplies. Many of her jobs were done on a daily basis. Her responsibility included sixteen rooms and baths, halls, a stairway, two public areas, nurse's station, nurse's office, a treatment room, a utility room, an elevator lobby and another room.

Claimant recalled the circumstances of her injury in May of 1980 as follows: She was working in an elevator lobby. She was lifting a garbage can weighing perhaps 23 pounds. She had a pulling sensation in her left shoulder. She continued to work by modifying her job. Her pain worsened. She reported to her supervisor. Pain went into her arm and she had tingling in her fingers. The next day she saw a chiropractor, Dr. Collins, who gave her ultrasound treatments and adjusted her neck. She saw him two to three times a week. He advised her to take time off from work which she did.

When she went back to work, pain in her shoulder was still present. There was tingling pain and numbness in her hands. She had trouble with her grip strength and dropped things. She tried to modify her work.

She visited her family physician, Dr. Sullivan, who gave her muscle relaxants. She stayed off work and had some relief from her pain. Dr. Sullivan referred her to Dr. Hughes who gave her Naprosyn and Motrin and kept her off work. Dr. Hughes in turn sent her to Dr. Grundberg who gave her a Cortisone shot which temporarily relieved her condition and also sent her to Mayo Clinic.

Claimant testified to an injury on April 21, 1981: She got "pretty sick." Her shoulder was acting up. The first time she experienced pain in her low back and legs. She was bothered by both mopping and doing her other work. She told her supervisor she was having back pain. Sick leave was requested.

In September she went to the Mayo Clinic where she was x-rayed and had dye injected into her shoulder. Doctors there were unable to help her.

She returned to Dr. Hughes who also was unable to help her. She went to Dr. Kitchell who did a nerve test of her shoulder which was negative. She then saw Dr. Johnson who treated her condition with heat.

Claimant denied any other injury in close proximity to either incident to which she testified, but she reported a fall hurting her tailbone some years before.

She acknowledged a rearend car accident in December of 1982. She saw Drs. Sullivan and Walker and was x-rayed. Her only treatment was aspirin. She said that her neck was stiff for a week or so. A second incident occurred in November of 1983 and resulted in a broken elbow which was surgically treated. She also had a bump on her head. She received no disability payments as a result of either accident.

In January of 1982 she changed to another work area because she thought her job might be easier. She continued to do both dry and wet mopping. She cleaned a wheelchair ramp, the recreation room, an elevator lobby, entryways and exits, and two executive rooms where doctors spent the night. She vacuumed, sanitized and dusted. Periodically, she cleaned a dining room. In the wintertime she shoveled snow.

In 1982 she was hospitalized by Dr. Walker and treated with traction, physical therapy, vitamin shots, whirlpool, heat and medication.

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She estimated that on a good day she could sit for an hour. She can stand for a half hour. She has been able to increase her walking from one block to a half mile with rest. She does exercises to limber up her spine and to strengthen her muscles. She uses a whirlpool. She lies down during the day. Her spouse takes care of most household duties, but she is able to put things in the microwave.

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James A. Rand, M.D., orthopedic surgeon of the Mayo Clinic, reported his examination of claimant in a letter dated September 25, 1981. He took a history of claimant's lifting a garbage can. On examination of the left shoulder, she forward flexed to 180°, abducted to 180°, externally rotated to 60° and internally rotated to T8 bilaterally. She had mild weakness of the external rotators on the left with some localized tenderness over the supraspinatus tendon on the left and a questionable palpable defect. X-rays were unremarkable except for mild degenerative change in the acromioclavicular joint. A shoulder arthrogram was negative. Dr. Rand suggested claimant modify her work to avoid activities exacerbating her shoulders. His diagnosis was periarthritis of the left shoulder.

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On examination, range of motion in her neck was normal. Claimant complained of pain with passive movement of the left shoulder. Reflexes were 2+ throughout both arms. There were complaints of pain with some muscle testing, but no definite significant weakness in any muscle groups. There was possible minimal weakness of the opponens pollicis and abductor pollicis brevis. There was no definite diminution to pin prick although claimant felt there was a slight decline in sensation of the left thumb.

Nerve conduction studies and an EMG were normal.

Dr. Kitchell felt that claimant's pain was musculoskeletal and he could not come up with a definite etiology. He found no neurological impairment and his only suggestion was further orthopedic consultation. He anticipated claimant would be able to return to work.

In a letter dated April 2, 1983 Dr. Kitchell reported: "As to the cause of her complaints, I can only state what she has reported to me, that her discomfort was related to an episode at work in May of 1980. It is certainly possible that she caused some muscle strain with the incident."

In a report dated January 12, 1982 Dr. Kitchell responded "no" to the question, "Will the injury result in a permanent defect?" He concluded claimant was able to resume light work on November 25, 1981.

On November 2, 1981 O. Landis Johnson, D.O., reported treating claimant's shoulder in the preceding month. He found her to be suffering from a chronic shoulder condition (periarthritis).

John R. Walker, M.D., reported his findings on examination in a letter dated May 7, 1982. Claimant told him of the lifting incident. She complained of pain in both her shoulders which was worse on the left and which radiated into both rib cages bilaterally; tingling in her arms, shoulders and hands; pain over both hips; and left knee pain. Claimant had restriction on external rotation of her shoulder, and she had pain. There was no significant atrophy. Upper extremity reflexes were physiological except the left triceps which seemed a little hyperactive at 1++. Grip strength was 80 on the right and 60 on the left. There was no deficit in sensorium. Her neck was slightly tender. Claimant

was tender over both wings of the ilium and the anterior aspect of the ilium.

X-rays showed some instability between the bodies of C3 and C4. Views of the left and right shoulder were practically identical. Dr. Walker's opinion was that claimant had a chronic sprain of her shoulder with some loss of external rotation and that "the work that this patient is doing is causing a great deal of trouble on a chronic basis." He explained: "I don't think one injury alone is responsible for everything but I think what is happening is that she is mopping from side to side with a hand mop some seven hours a day and then wiping windows." He recommended claimant be transferred to a lighter job and stop mopping altogether.

Dr. Walker saw claimant in July with complaints of pain in her right anterior abdomen. Her neck was better, but she had problems in her left anterior lateral chest. Meprobamate was started. Claimant was to be off work until August 19, 1982.

On September 10, 1982 Dr. Walker wrote: "The problem that this patient has is that she is a very well-motivated patient and followed her orders to keep working. She was doing swabbing with a mop all day long, some eight hours a day in spite of the fact that she had pain and injuries. I feel that this has caused the great chronicity of her problems and is the reason why she is not getting along well." He noted claimant's having a high pain tolerance which allowed her to work with extreme pain.

When claimant was seen in 1983, she told the doctor that all her accident of December 1982 did was stiffen her neck. Her complaints were of tingling and aching in her neck; of slight headaches every two weeks; aching in her shoulder which was worse on the left; numbness and tingling in both arms, hands, fingers and palms; a sharp constant ache of the dorsal spine starting around T7 which radiated to the left lateral abdomen and into the thighs, low back ache into the rib area; burning, tingling and aching in both legs, feet and toes and abdominal pain into the pubic area.

On examination claimant had "fairly good grip" and tenderness throughout the cervical, lumbar and dorsal spine. Dr. Walker proposed hospitalization and decided to refer claimant to a psychiatrist.

Claimant was hospitalized on May 16, 1983. She had a cholecystectomy and cholangiogram. X-rays of the lumbar spine were negative; a CT scan of L3, L4 and L5 was negative. A cervical and lumbar myelogram was negative. Discharge diagnoses included lumbosacral sprain with sciatica, cervical spine sprain, chronic myofascial sprains of the posterior chest wall and chronic cholecylitis.

When claimant saw Dr. Walker on October 14, 1983 she acknowledged some relief from her stomach problems after her cholecystectomy. She still had intercostal neuralgia and lots of aches and pains. Dr. Walker thought claimant's permanent disability might be as high as 38 percent of the body as a whole based on her subjective complaints. He wrote in a letter dated November 30, 1983: "She is certainly better than she was but I think we have just about reached maximum benefit of treatment or hospitalization for her."

On December 6, 1983 Dr. Walker wrote that claimant was not able to be gainfully employed.

In a letter dated January 12, 1984 he wrote: "The onset of the injury of course did occur in May of 1980, but because she was persistently sent back to work to do this heavy work, her problems became enlarged, chronic and more severe."

Claimant was hospitalized on December 10, 1983 after a motor vehicle accident in which she suffered multiple contusions and abrasions, a closed head injury with a contusion of her upper right forehead, a fractured dislocation of the left elbow and a contusion hematoma of the right patella. X-rays showed a posterolateral fracture dislocation of the left elbow joint and a fracture of the capetellum. An open reduction and external fixation were performed.

Earl L. Keyser, M.D., reported his findings in a letter dated August 10, 1983. There was no loss of motion in the neck, the shoulders, elbows, forearms or wrists. Sensation was intact. Reflexes were equal. Straight leg raising was accomplished to 85 percent. RA latex and sedimentation tests were normal. Dr. Keyser was unable to substantiate left-sided weakness or decreased range of motion of the back, neck or legs on the left or any other orthopedic, neurological or circulatory defect. The doctor suspected a psychological overlay.

David L. Bethel, D.O., evaluated claimant on September 20, 1983 and diagnosed no specific psychiatric disorder. She demonstrated situational depression secondary to orthopedic difficulties. He found no indication claimant was "exaggerating, misleading or distorting" her physical complaints. Dr. Bethel found indication of orthopedic problems which would make it difficult for claimant to be gainfully employed.

Scott B. Neff, D.O., reported his findings in a letter dated May 7, 1984. He took a history of the lifting incident in 1980 and of a motor vehicle accident causing a neck and muscle injury in December of 1983. Claimant complained of pain in her back at the right and left posterior superior iliac spines with decreased range of motion. Deep tendon reflexes were normal and straight leg raising was negative. Cervical motion was normal. Dr. Neff assigned a five percent disability based on claimant's subjective complaints. He did not find her diffuse musculoskeletal complaints of any definite etiology. He wrote: "In my opinion, she has no disability with reference to her neck, shoulders or back."

Dr. Neff thought claimant able to return to work, but he thought she should be restricted from heavy lifting. He estimated her healing period would have been completed in six weeks.

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).

The source of the problem herein is whether claimant who had a prior injury of May 19, 1980 for which defendants have admitted liability had an additional injury on April 21, 1981.

In May of 1980 claimant had what was diagnosed as a muscle strain of the chest and arms and of the left deltoid tendon. Claimant continued to complain after that date of her left arm, shoulder and hand. Her last visit to the doctor before April 21, 1981 was on April 9, 1981 at which time she saw Dr. Hughes who advised her to continue working, but to avoid some of the heavier aspects of her job. She saw Dr. Collins that same day.

Claimant's difficulty on April 21, 1981, as she testified, was that her shoulder acted up and for the first time she had pain in her back and legs. Claimant took leave for the entire day on April 21. She claimed that she told her supervisor she was having back pain.

There is no evidence of claimant's seeking medical care until July 16, 1981 at which time she saw Dr. Hughes. She complained at that time of shoulder and arm pain. She was referred to Mayo Clinic where in September of 1981 she gave a history only of the May 1980 injury and of paresthesia to all four extremities. Dr. Kitchell was seen in November of 1981 and he recorded the May 1980 incident and left shoulder and arm pain.

More than a year after the injury alleged herein claimant saw Dr. Walker. Again the May 1980 incident was reported. Claimant at this time was complaining of both shoulders, her rib cage, her hips and her left knee. Dr. Collins saw claimant later in the month noting moderate restriction of the left ilium.

At the time of her auto accident in December of 1983, claimant gave a history of a back injury in 1982 which required hospitalization and traction.

Dr. Neff who saw claimant for evaluation took a history of lifting a can cover in May of 1980 which resulted in shoulder pain.

Claimant's burden is a preponderance of the evidence. There is little in the record to support either a specific injury to her back or a cumulative injury which became disabling in April of 1981. Claimant has failed to establish an injury arising out of and in the course of her employment.

In light of the conclusion that claimant has not established an injury arising out of and in the course of her employment, it is unnecessary to examine any additional issues.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is 46 years of age.

That claimant began work for defendant employer in April of 1978.

That claimant's duties included mopping floors, sanitizing areas, dusting, removing trash, caring for furniture, moving furniture, hand scrubbing, polishing and replenishing supplies.

That claimant had responsibilities for caring for a number of rooms and other areas.

That in May of 1980 claimant injured her left shoulder and had pain into her arm and tingling in her fingers as she lifted a garbage can.

That the incident of May of 1980 was the only incident which claimant has reported to the doctors.

That claimant complained of paresthesia to all four extremities in September of 1981.

That claimant did not make significant complaints of her back until some substantial time after April 21, 1981.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence an injury arising out of and in the course of her employment on April 21, 1981.

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 27 day of September, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ERIKA E. CLEMENS,	:	
	:	
Claimant,	:	File No. 649688
	:	
vs.	:	
	:	R E V I E W -
IOWA VETERANS HOME,	:	
	:	R E O P E N I N G
Employer,	:	
	:	D E C I S I O N
and	:	
	:	FILED
STATE OF IOWA,	:	
	:	SEP 27 1984
Insurance Carrier,	:	
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Erika E. Clemens, claimant, against Iowa Veterans Home, employer, and the State of Iowa, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of her employment on May 19, 1980. It came on for hearing on June 5, 1984 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted with the submisson of a bill from Dr. Walker on June 28, 1984.

The industrial commissioner's file shows a first report of injury received October 7, 1980. A memorandum of agreement was received on October 14, 1980. A Form 2 shows payment of four weeks and one day of weekly benefits as well as medical expenses.

At the time of hearing the parties stipulated to a rate of $112.18 and to the fairness of medical expenses.

The record in this matter consists of the testimony of claimant, John Franklin Clemens, and Max Norris Diggins; claimant's exhibit 1, a series of leave of absence slips; claimant's exhibit 2, a series of medical bills; claimant's exhibit 3, a performance evaluation sheet; claimant's exhibit 4, a series of reports from John R. Walker, M.D.; defendants' exhibit A, a series of medical reports; defendants' exhibit B, reports from P. L. Collins, D.C.; defendants' exhibit C, a series of medical records; defendants' exhibit D, a letter from Scott B. Neff, D.O.; and defendants' exhibit E, a series of medical records.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and any disability she now may suffer; whether or not claimant is entitled to further healing period or permanent partial disability benefits; and whether or not claimant is entitled to benefits under Iowa Code section 85.27.

STATEMENT OF THE CASE

Forty-six year old married claimant, mother of three children, graduated from high school in Germany, had no other formal education other than an eight hour class offered by her employer. Her work experience in Germany involved working in a flower shop where she cared for and sold plants and made flower arrangements. Her first work in this country was as a waitress in a bowling alley where she also acted as a short order cook, clerk, bartender and cleanup person with wages of $2.25 per hour. For three years she worked in a flower shop selling plants, making arrangements and cleaning the shop once a week. She earned $3.00 per hour.

Her work for defendant employer started in April of 1978 when she was hired to do housekeeping work. She listed her tasks as mopping floors first with a chemical and then with a wet mop, sanitizing various areas, dusting, emptying and relining trash cans, caring for furniture, moving furniture, hand scrubbing stained areas, polishing chrome, cleaning mirrors, scrubbing sinks and toilets, and replenishing paper and supplies. Many of her jobs were done on a daily basis. Her responsibility included sixteen rooms and baths, halls, a stairway, two public areas, nurse's station, nurse's office, a treatment room, a utility room, an elevator lobby and another room.

Claimant recalled the circumstances of her injury in May of 1980 as follows: She was working in an elevator lobby. She was lifting a garbage can weighing perhaps 23 pounds. She had a pulling sensation in her left shoulder. She continued to work by modifying her job. Her pain worsened. She reported to her supervisor. Pain went into her arm and she had tingling in her fingers. The next day she saw a chiropractor, Dr. Collins, who gave her ultrasound treatments and adjusted her neck. She saw him two to three times a week. He advised her to take time off from work which she did.

When she went back to work, pain in her shoulder was still present. There was tingling pain and numbness in her hands. She had trouble with her grip strength and dropped things. She tried to modify her work.

She visited her family physician, Dr. Sullivan, who gave her muscle relaxants. She stayed off work and had some relief from her pain. Dr. Sullivan referred her to Dr. Hughes who gave her Naprosyn and Motrin and kept her off work. Dr. Hughes in turn sent her to Dr. Grundberg who gave her a Cortisone shot which temporarily relieved her condition and also sent her to Mayo Clinic.

Claimant testified to an injury on April 21, 1981: She got "pretty sick." Her shoulder was acting up. The first time she experienced pain in her low back and legs. She was bothered by both mopping and doing her other work. She told her supervisor she was having back pain. Sick leave was requested.

In September she went to the Mayo Clinic where she was x-rayed and had dye injected into her shoulder. Doctors there were unable to help her.

She returned to Dr. Hughes who also was unable to help her. She went to Dr. Kitchell who did a nerve test of her shoulder which was negative. She then saw Dr. Johnson who treated her condition with heat.

Claimant denied any other injury in close proximity to either incident to which she testified, but she reported a fall hurting her tailbone some years before.

She acknowledged a rearend car accident in December of 1982. She saw Drs. Sullivan and Walker and was x-rayed. Her only treatment was aspirin. She said that her neck was stiff for a week or so. A second incident occurred in November of 1983 and resulted in a broken elbow which was surgically treated. She also had a bump on her head. She received no disability payments as a result of either accident.

In January of 1982 she changed to another work area because she thought her job might be easier. She continued to do both dry and wet mopping. She cleaned a wheelchair ramp, the recreation room, an elevator lobby, entryways and exits, and two executive rooms where doctors spent the night. She vacuumed, sanitized and dusted. Periodically, she cleaned a dining room. In the wintertime she shoveled snow.

In 1982 she was hospitalized by Dr. Walker and treated with traction, physical therapy, vitamin shots, whirlpool, heat and medication.

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On examination, range of motion in her neck was normal. Claimant complained of pain with passive movement of the left shoulder. Reflexes were 2+ throughout both arms. There were complaints of pain with some muscle testing, but no definite significant weakness in any muscle groups. There was possible minimal weakness of the opponens pollicis and abductor pollicis brevis. There was no definite diminution to pin prick although claimant felt there was a slight decline in sensation of the left thumb.

Nerve conduction studies and an EMG were normal.

Dr. Kitchell felt that claimant's pain was musculoskeletal and he could not come up with a definite etiology. He found no neurological impairment and his only suggestion was further orthopedic consultation. He anticipated claimant would be able to return to work.

In a letter dated April 2, 1983 Dr. Kitchell reported: "As to the cause of her complaints, I can only state what she has reported to me, that her discomfort was related to an episode at work in May of 1980. It is certainly possible that she caused some muscle strain with the incident."

In a report dated January 12, 1982 Dr. Kitchell responded "no" to the question, "Will the injury result in a permanent defect?" He concluded claimant was able to resume light work on November 25, 1981.

On November 2, 1981 O. Landis Johnson, D.O., reported treating claimant's shoulder in the preceding month. He found her to be suffering from a chronic shoulder condition (periarthritis).

John R. Walker, M.D., reported his findings on examination in a letter dated May 7, 1982. Claimant told him of the lifting incident. She complained of pain in both her shoulders which was worse on the left and which radiated into both rib cages bilaterally; tingling in her arms, shoulders and hands; pain over both hips; and left knee pain. Claimant had restriction on external rotation of her shoulder, and she had pain. There was no significant atrophy. Upper extremity reflexes were physiological except the left triceps which seemed a little hyperactive at 1++. Grip strength was 80 on the right and 60 on the left. There was

no deficit in sensorium. Her neck was slightly tender. Claimant was tender over both wings of the ilium and the anterior aspect of the ilium.

X-rays showed some instability between the bodies of C3 and C4. Views of the left and right shoulder were practically identical. Dr. Walker's opinion was that claimant had a chronic sprain of her shoulder with some loss of external rotation and that "the work that this patient is doing is causing a great deal of trouble on a chronic basis." He explained: "I don't think one injury alone is responsible for everything but I think what is happening is that she is mopping from side to side with a hand mop some seven hours a day and then wiping windows." He recommended claimant be transferred to a lighter job and stop mopping altogether.

Dr. Walker saw claimant in July with complaints of pain in her right anterior abdomen. Her neck was better, but she had problems in her left anterior lateral chest. Meprobamate was started. Claimant was to be off work until August 19, 1982.

On September 10, 1982 Dr. Walker wrote: "The problem that this patient has is that she is a very well-motivated patient and followed her orders to keep working. She was doing swabbing with a mop all day long, some eight hours a day in spite of the fact that she had pain and injuries. I feel that this has caused the great chronicity of her problems and is the reason why she is not getting along well." He noted claimant's having a high pain tolerance which allowed her to work with extreme pain.

When claimant was seen in 1983, she told the doctor that all her accident of December 1982 did was stiffen her neck. Her complaints were of tingling and aching in her neck; of slight headaches every two weeks; aching in her shoulder which was worse on the left; numbness and tingling in both arms, hands, fingers and palms; a sharp constant ache of the dorsal spine starting around T7 which radiated to the left lateral abdomen and into the thighs, low back ache into the rib area; burning, tingling and aching in both legs, feet and toes and abdominal pain into the pubic area.

On examination claimant had "fairly good grip" and tenderness throughout the cervical, lumbar and dorsal spine. Dr. Walker proposed hospitalization and decided to refer claimant to a psychiatrist.

Claimant was hospitalized on May 16, 1983. She had a cholecystectomy and cholangiogram. X-rays of the lumbar spine were negative; a CT scan of L3, L4 and L5 was negative. A cervical and lumbar myelogram was negative. Discharge diagnoses included lumbosacral sprain with sciatica, cervical spine sprain, chronic myofascial sprains of the posterior chest wall and chronic cholecylitis.

When claimant saw Dr. Walker on October 14, 1983 she acknowledged some relief from her stomach problems after her cholecystectomy. She still had intercostal neuralgia and lots of aches and pains. Dr. Walker thought claimant's permanent disability might be as high as 38 percent of the body as a whole based on her subjective complaints. He wrote in a letter dated November 30, 1983: "She is certainly better than she was but I think we have just about reached maximum benefit of treatment or hospitalization for her."

On December 6, 1983 Dr. Walker wrote that claimant was not able to be gainfully employed.

In a letter dated January 12, 1984 he wrote: "The onset of the injury of course did occur in May of 1980, but because she was persistently sent back to work to do this heavy work, her problems became enlarged, chronic and more severe."

Claimant was hospitalized on December 10, 1983 after a motor vehicle accident in which she suffered multiple contusions and abrasions, a closed head injury with a contusion of her upper right forehead, a fractured dislocation of the left elbow and a contusion hematoma of the right patella. X-rays showed a posterolateral fracture dislocation of the left elbow joint and a fracture of the capetellum. An open reduction and external fixation were performed.

Earl L. Keyser, M.D., reported his findings in a letter dated August 10, 1983. There was no loss of motion in the neck, the shoulders, elbows, forearms or wrists. Sensation was intact. Reflexes were equal. Straight leg raising was accomplished to 85 percent. RA latex and sedimentation tests were normal. Dr. Keyser was unable to substantiate left-sided weakness or decreased range of motion of the back, neck or legs on the left or any other orthopedic, neurological or circulatory defect. The doctor suspected a psychological overlay.

David L. Bethel, D.O., evaluated claimant on September 20, 1983 and diagnosed no specific psychiatric disorder. She demonstrated situational depression secondary to orthopedic difficulties. He found no indication claimant was "exaggerating, misleading or distorting" her physical complaints. Dr. Bethel found indication of orthopedic problems which would make it difficult for claimant to be gainfully employed.

Scott F Neff, D.O., reported his findings in a letter dated May 7, 1984. He took a history of the lifting incident in 1980 and of a motor vehicle accident causing a neck and muscle injury in December of 1983. Claimant complained of pain in her back at the right and left posterior superior iliac spines with decreased range of motion. Deep tendon reflexes were normal and straight leg raising was negative. Cervical motion was normal. Dr. Neff assigned a five percent disability based on claimant's subjective complaints. He did not find her diffuse musculoskeletal complaints of any definite etiology. He wrote: "In my opinion, she has no disability with reference to her neck, shoulders or back."

Dr. Neff thought claimant able to return to work, but he thought she should be restricted from heavy lifting. He estimated her healing period would have been completed in six weeks.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 19, 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).

Claimant testified that at the time of her injury she had a pulling sensation in her left shoulder, pain into her arm and tingling in her fingers.

Claimant was treated on May 19, 1980 by Dr. Sullivan for a muscle strain of the chest and arms. Dr. Collins examined claimant on May 23, 1980 and treated her for a sprain of her left deltoid tendon. He restricted claimant's lifting and placed her on two weeks of light duty. Dr. Hughes saw claimant on August 1, 1980, diagnosed lateral epicondylitis based on tenderness in the elbow area and anticipated claimant's return to work in a week. When claimant was seen on January 13, 1981, she continued to complain of tenderness over the lateral epicondylar area as well as her left shoulder, arm and hand. Claimant's diagnosis was changed to biceps tendinitis and/or irritation of the rotator cuff. Dr. Collins treated claimant for left shoulder bursitis. Dr. Grundberg diagnosed bursitis of the left shoulder. On April 9, 1981 claimant was advised by Dr. Hughes to continue her work, but to avoid some of the heavier portions.

Claimant alleges an additional injury on April 21, 1981. In a companion decision no injury was found at that time.

Dr. Rand examined claimant in September of 1981 and diagnosed periarthritis of the shoulder. About two months later, claimant was seen by Dr. Kitchell who found no neurological impairment and who believed claimant's complaints were musculoskeletal in origin. Dr. Johnson agreed with Dr. Rand's diagnosis of periarthritis.

When claimant saw Dr. Walker, apparently in May of 1982 and about a month prior to her taking a leave of absence from work, she had pain in both rib cages, both shoulders, both hips and her left knee. She had tingling in her shoulders, arms and hands.

Drs. Keyser and Bethel examined claimant in relation to her social security claim. Dr. Keyser was unable to substantiate an orthopedic, neurological or circulatory defect. Dr. Bethel found no specific psychiatric disorder, but he thought claimant demonstrated situational depression secondary to orthopedic problems.

Dr. Neff could not attribute claimant's complaints to any definite etiology.

Claimant's case is a perplexing and a close one on the issue of causation. Her condition worsened after her injury. Her complaints increased. Objective evidence of impairment is scant. Electromyography in April of 1981 was normal. X-rays in September of 1981 showed mild degenerative changes in the acromioclavicular joint. An arthrogram of the shoulder at the same time was normal. Nerve conduction studies and electromyography were normal in November of 1981. In May of 1983 claimant had negative x-rays and a CT scan of the lumbar spine and a negative lumbar and cervical myelogram. Rheumatoid arthritis, latex and sedimentation tests were normal in August of that year.

Dr. Kitchell expressed a possibility that claimant's work episode of 1980 caused a muscle strain. Dr. Walker believed that claimant's work was causing chronic trouble with her shoulder. He summed up his assessment of the case by saying: "The onset of the injury of course did occur in May of 1980, but because she was persistently sent back to work to do this heavy work, her problem became enlarged, chronic and more severe."

It is only dealing with the record as a whole which allows claimant to preponderate. That overview of the record makes Dr. Walker's theory of causation fit. Claimant was doing hard work in terms of lots of physical movement. Her duties required her to bend, twist, lift, reach and stretch. Claimant was characterized by Diggins as "top notch," "a very good worker," and "sincere" about her job. Doctors consistently suggested that claimant modify her work and she testified that she did do that to the extent possible. She continued to work following her May 19, 1980 injury making adjustments she could make and maintaining at least into May of 1982 her own high standards. Dr. Bethel who performed a psychiatric evaluation found no psychiatric impairment.

Claimant has established by a preponderance of the evidence a causal relationship between her injury and her present disability.

The next issue to be considered is claimant's entitlement to weekly benefits.

Dr. Sullivan purposed that claimant do work which would not aggravate her chronic shoulder problem. Dr. Rand made a similar suggestion, but he did not think claimant's injury would result in a permanent defect. Dr. Walker agreed that claimant's work should be adjusted.

Dr. Walker thought claimant's permanent disability might be as high as 38 percent. Dr. Neff gave claimant a five percent "disability" based on subjective muscle complaints. In light of all the negative testing in this matter, the undersigned does not feel that claimant's impairment is as high as 38 percent; however, claimant has some functional impairment and she has restriction on her work activity. Therefore, she has some permanent partial disability to her body as a whole. Claimant's symptoms initially were in her shoulder. Subsequently her symptoms have been more diffuse. Impairment of the shoulder is disability to the body as a whole. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (Appeal Decision 1981); Godwin v. Hicklin G.M. Power, II Iowa Industrial Commissioner Report 170 (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."

The industrial commissioner has stated 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 seemingly was in good health before her injury. She had a fall which injured her tailbone prior to May of 1980. She has had two car accidents since her injury, one of which resulted in a posterolateral fracture dislocation of the left elbow and a fracture of the capetellum. Claimant continues to complain of pain in her neck, shoulders, chest, ribs, groin, hips, legs, knees and feet. Claimant's condition was diagnosed at Mayo Clinic as periarthritis or inflammation surrounding joints.

Claimant has more than 15 years of work life ahead of her. She was educated in Germany. Her potential for vocational rehabilitation has not been explored. Claimant's work experience has included some of a lighter nature. As has been discussed above, claimant's work for defendant employer, although not involving lifting heavy weights, was very physically demanding and of the sort which aggravated her complaints. Work in a flower shop seems to be something claimant could do. She might also perform some of the same type of work she did in the bowling alley. She has not been up to looking for work. She testified that she hated staying at home.

Claimant's spouse took a voluntary layoff to stay home and care for her. His solicitousness may lessen to some degree claimant's motivation to get back to work.

Claimant worked for nearly two years after her injury. Her subsequent healing period has been substantial. Claimant has not had surgical intervention.

Based on the Iowa case law, the discussion in this section of the decision and the findings of fact set out below, it is determined that claimant has a permanent partial industrial disability of 15 percent related to her injury of May 19, 1980.

Claimant has been paid healing period benefits from July 11, 1980 through August 8, 1980.

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 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.

A request for a leave of absence shows claimant was off work because of her shoulder from July 11, 1980 through August 10, 1980. Dr. Johnson saw and treated claimant for her shoulder condition and kept her off work in October and November of 1981. Request for leave shows she took sick leave for her shoulder problems from October 22, 1981 through October 30, 1981; from November 2, 1981 through November 13, 1981; from November 19, 1981 through November 25, 1981 and from December 15, 1981 through December 19, 1981. Dr. Sullivan also recommended claimant be off work for some of this period. Dr. Walker kept claimant off work from July 2, 1982 through August 18, 1982. When he saw her on that date, he decided she should be off for an additional six months. No evidence of Dr. Walker's subsequent treatment is given until May of 1983 when claimant claimed to be worse, but in reality had little change in physical findings.

Healing period is terminated at the first of three events. Claimant has not returned to work. Neither is she medically capable of returning to substantially similar employment. The remaining time for termination is indication that significant medical improvement is not anticipated. In spite of Dr. Walker's statement that claimant was unable to be gainfully employed in December of 1983, his opinion the month before was that claimant had reached maximum benefit from treatment. Overall, Dr. Walker's impression in August of 1982 that claimant should be off another six months seems the most reasonable. See Hebensperger v. Motorola Communications and Electronics, Inc., II Iowa Industrial Commissioner Report 187 (Appeal Decision 1981) (Dist. Ct. Appeal Remanded for Settlement). Claimant's healing period will run as set out above with an additional time from August 18, 1982 through February 18, 1983. Healing period will be awarded for claimant's time in the hospital in May of 1983.

The remaining issue is claimant's entitlement to benefits under Iowa Code section 85.27 which provides in pertinent part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, oseteopathic, 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, artifical 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.

As established by statute, defendants have the obligation to furnish claimant care and to select that care. Little evidence was offered regarding the issue of authorization.

Claimant initially saw Dr. Sullivan and at about the same time went to Dr. Collins. Dr. Sullivan sent claimant to Dr. Hughes who referred her to Dr. Grundberg and to the Mayo Clinic. Dr. Sullivan also directed claimant to Dr. Kitchell. The manner in which claimant found her way to Dr. Walker is unclear, but no findings of an absence of authorization can be made.

Claimant has the burden of proving her medical expenses are causally related to her injury of May 19, 1980. Insufficient evidence was offered relating to claimant's hospitalization at St. Francis Hospital to award any payment. Numerous prescription expenses were offered, but no testimony relating to those was given. Those from the Medicine Store, however, do contain sufficient information to allow awarding those costs.

Claimant's hospitalization in May of 1983 was for a cholecystectomy and cholangiogram as well as testing for her back. The bill submitted does not allow for apportionment of any of those charges and none will be allowed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is a credible witness.

That claimant is 46 years of age.

That claimant graduated from high school in Germany.

That claimant's work experience has been in flower shops and doing various jobs in a bowling alley.

That claimant began work for defendant employer in April of 1978.

That claimant's employment was terminated on July 20, 1983 after she went on unpaid leave status.

That claimant's duties for defendant employer included mopping floors, sanitizing areas, dusting, removing trash, caring for furniture, moving furniture, hand scrubbing, polishing and replenishing supplies.

That claimant's work required bending, twisting, lifting, reaching and stretching.

That claimant was a very good, conscientous worker.

That claimant had responsibility for caring for a number of rooms and other areas. That in May of 1980 claimant injured her left shoulder and had pain into her arms and tingling into her fingers as she lifted a garbage can.

That claimant continues to complain of pain in her neck, shoulders, chest, ribs, groin, biceps, legs, knees and feet.

That claimant had no injury arising out of and in the course of her employment on April 21, 1981.

That Drs. Rand, Walker and Neff suggested claimant modify her work activities.

That claimant had an auto accident in December of 1982.

That in May of 1983 claimant had a cholecystectomy and cholangiogram.

That claimant was involved in a car accident in December of 1983 which resulted in a posterolateral fracture dislocation of the left elbow and fracture of the capetellum.

That claimant has some functional impairment as a result of her injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence that her injury of May 19, 1980 is the cause of the disability on which she now bases her claim.

That claimant has established entitlement to healing period benefits and permanent partial industrial disability of fifteen (15) percent.

That claimant has established entitlement to expenses under Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant healing period benefits at the rate of one hundred twelve and 18/100 dollars ($112.18) for the following periods: July 11, 1980 through August 10, 1980; October 22, 1981 through October 30, 1981; November 2, 1981 through November 13, 1981; November 19, 1981 through November 25, 1981; December 15, 1981 through December 19, 1981; July 2, 1982 through February 18, 1983; and May 17, 1983 through May 30, 1983.

That defendants be allowed credit for amounts previously paid.

That defendants pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at a rate of one hundred twelve and 18/100 dollars ($112.18) with payment to commence on February 19, 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 the following medical expenses:

McFarland Clinic P.C.	$ 271.00
Medicine Store	67.86
John R. Walker, M.D.	1,879.00

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

That defendants file an activity report with the payment of this award.

Signed and filed this 27 day of September, 1984.

Judith Ann Higgs
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 FILED JUL 6 1984 IOWA INDUSTRIAL COMMISSIONER

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

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 m 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

ROBERT DETTMAN,	:	
Claimant,	:	File No. 687071
vs.	:	
QUAD CITY CONSTRUCTION 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 Robert E. Dettman, claimant, against Quad City Construction 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 November 10, 1981. It came on for hearing on June 26, 1984 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 November 16, 1981. At the time of hearing defendants' counsel indicated healing period benefits were paid from November 11, 1981 through November 1, 1983. Eleven and five-sevenths weeks of permanent partial disability benefits also have been paid.

The parties stipulated to a rate in the event of an award of $312.28.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, a letter from Richard L. Anderson, M.D., dated May 16, 1984; claimant's exhibit 2, a surgeon's report dated November 16, 1981; claimant's exhibit 3, a letter from W. B. Hofmann, M.D., dated March 19, 1982; claimant's exhibit 4, a letter from John M. Syverud, M.D., dated March 31, 1982; claimant's exhibit 5, a letter from Dr. Syverud dated June 28, 1982; claimant's exhibit 6, a letter from Dr. Anderson dated February 24, 1983; claimant's exhibit 7, a letter from Dr. Anderson dated June 16, 1983; claimant's exhibit 8, a letter from Dr. Anderson dated October 21, 1983; claimant's exhibit 9, a surgeon's report dated August 22, 1983; claimant's exhibit 10, a letter from William E. Scott, M.D., dated August 9, 1983; claimant's exhibit 11, a letter from Dr. Anderson dated June 13, 1983; claimant's exhibit 12, a note from Dr. Hofmann dated May 26, 1982; claimant's exhibit 13, a letter from Dr. Anderson dated December 27, 1982; claimant's exhibit 14, a letter from Dr. Anderson dated October 1, 1982; claimant's exhibit 15, a letter from Dr. Anderson dated February 18, 1983; claimant's exhibit 16, doctor's notes; claimant's exhibit 17, a medical record from the University of Iowa Hospitals from May 12, 1983; claimant's exhibit 18, hospital records from the University of Iowa Hospitals and Clinics; defendants' exhibit A, a letter from Scott H. Pressman, M.D., dated November 21, 1983; defendants' exhibit B, a letter from Dr. Scott dated January 16, 1984; and defendants' exhibit C, a letter from Dr. Scott dated April 18, 1984.

ISSUE

The issue in this matter is whether or not claimant is entitled to further healing period or permanent partial disability benefits.

STATEMENT OF THE CASE

Fifty-eight year old married claimant commenced work for defendant employer as a cement truck driver in heavy road work five years before his injury. He recalled the circumstances surrounding his injury on November 10, 1981 as follows: He was driving a full loaded cement truck when it turned over. He was taken to the hospital where he was treated for a punctured lung, cracked ribs and cuts to the right side of his face, particularly in the area of his right eye. He was treated by a plastic surgeon.

Eventually, he was transferred to Iowa City for further surgery. He was having double vision. Initially, his bottom eyelid was tightened and his upper eyelid was raised. Post-surgery there was no improvement in the double vision, but his general vision improved a bit.

In October of 1983 Dr. Scott operated on the left eye to correct the double vision. Claimant was seen briefly for follow-up on November 1, 1983. He was not asked to read an eye chart. He had double vision which did get better with time and continued to improve for up to six or eight weeks after November 1.

Additional outpatient surgery was done in March of 1984 to raise his right eyelid. This operation helped his vision.

Between the surgeries his vision was improving but he continued to have irritation. He was unable to work because his eye was irritated and red.

As to present problems, claimant said that he continues to have double vision, redness and irritation. He uses prescription ointment which eases a pain he described as feeling as if someone is throwing sand in his eyes. Artificial tears also are used in the evening as his tear ducts have been cut. Ointment, which results in a blur of his vision, is applied as often as four to five times a day if he is outside. Irritation results from wind, sun, dust and dirt. Dust and dirt must be removed immediately. Dark glasses provide some protection, but do not entirely prevent irritation. His right eye will not close as tightly or open as wide as the left. He claims less mobility in the eye as well. He places heavier reliance on his left eye.

Medication costs average $25 every two weeks.

Claimant denied trouble with his eyes before the accident. In addition to problems with his eyes, claimant has scarring in the area of his eye, nose, mouth and forehead. He testified that the scarred area feels as though it has been deadened with Novocain.

Claimant attempted to return to work and was able to drive a truck for eight hours one day and six the next. Then he decided he could not handle working. On the day of hearing he drove from Tipton to Davenport. He claimed that he never drives for more than one hour.

Doctor's notes show claimant was seen on November 11, 1981 with a severe trauma to the periorbital tissues with a traumatic myriasis of the right eye. A surgeon's report indicates multiple severe facial lacerations, multiple rib fractures, abrasions and contusions of chest, blunt chest trauma, and a right hemithorax.

Claimant's visual acuity on November 30, 1981 was 20/60 on the right and 20/30 on the left.

William B. Hofmann, M.D., ophthalmologist, reported claimant's visual acuity on February 25, 1982 as 20/30- on the right and 20/25- on the left. On May 26, 1982 the doctor wrote that claimant was unable to see out of his right eye because of a ptosis of the right upper lid.

J. M. Syverud, M.D., saw claimant on February 25, 1982 at which time claimant had residual edema of the right periorbital

region, ptosis of the upper eyelid, and nearly complete paralysis of the obicularis oculi. Scars to the upper lip, nose, cheek and forehead were not expected to cause any functional disability.

When claimant was seen on May 13, 1982 motor control was returning to the forehead and obicularis.

Dr. Hofmann referred claimant to the University of Iowa. Examination there showed claimant's medial and lateral canthus were displaced inferiorly and the ptosis of the right eye remained. Claimant's visual acuity was 20/40 on the right and 20/15 on the left. Claimant had diplopia in all fields except down where he was ortho. Impressions were multiple scars, lateral canthal malposition and lower lid ectropion, ptosis and redundant scarred tissues of the right eyelid, strabismus, blockage of the lower canalicular system, infraorbital anesthesia, right globe ptosis, a right enophthalmos and right brow ptosis.

Claimant was to be scheduled for a levator advancement of the right upper lid, right lateral canthoplasty and debulking of the upper lid.

A tarsal strip procedure, levator advancement and upper lid reconstruction with blepharoplasty were done on December 13, 1982.

Claimant was seen by neuro-ophthalmology on January 25, 1983. A traumatic mydriasis was seen. Claimant's visual acuity without correction was 20/60 on the right and 20/30+3 on the left. With refraction his vision was 20/40 on the right and 20/20 on the left.

Claimant returned on May 12, 1983 at which time his vision was 20/40+1 on the right and 20/25-1 on the left. Diplopia was unchanged. Tear function was decreased on the right. Claimant had mild exposure keratitis on the inferior cornea.

In a letter dated June 13, 1983 Dr. Anderson expressed doubt that claimant could return to commercial truck driving requiring binocular single vision.

William E. Scott, M.D., reported seeing claimant on June 24, 1983 at which time his vision with correction was 20/50 on the right and 25/15 in the left. Claimant's right eye was lower than the left.

In a letter dated October 21, 1983, Dr. Anderson suggested that claimant could wear a patch over his affected eye to block out his double vision.

H. Pressman, M.D., reported Dr. Scott's surgery in October as a left inferior oblique recission of 10 mm. and a left superior rectus recission of 3.5 mm. On November 1, 1983 claimant's vision was 20/50 and 20/20 without correction. He had single binocular vision on down, up and left gaze with a small amount of right hypotropia in the primary position. Double vision remained in right gaze and primary position. No restrictions were placed on claimant's working abilities.

On March 28, 1984 claimant underwent a levator advancement of the right upper lid for ptosis. The right lower lid was raised as well. After surgery claimant's lid fissure on the right was 9 mm; on the left 13 mm. A drop of the left eyelid was suggested to make claimant look more symmetrical. Dr. Anderson proposed in a letter dated May 16, 1984 that claimant would have to use artificial tears and ointment on a permanent basis. The doctor noted continued irritation of the right eye, loss of tear production due to injury to the lacrimal gland and tear producing structures in the eyelid, a failure of the lid to open and close completely and decreased eye movement.

Dr. Scott's letter of April 18, 1984 states that claimant has sustained no permanent impairment.

APPLICABLE LAW AND ANALYSIS

The first issue to be discussed is claimant's entitlement to further healing period benefits. He has been paid healing period from November 11, 1981 through November 1, 1983. Claimant requests that additional time be allowed after his October 1983 surgery.

In his letter of August 9, 1983 Dr. Scott explained that claimant's surgery had been booked for October 27, 1983 with postoperative visits at one and three weeks with later visits spaced further apart. Dr. Pressman's letter of November 21, 1983 written in Dr. Scott's behalf reports claimant's still having double vision in right gaze and primary position when he was seen on November 1, 1983. Dr. Pressman wrote: "This should get better in time." Dr. Scott's letter of January 16, 1984 indicates claimant's healing is stable at that point. Claimant's own testimony was that he improved for an additional six to eight weeks. Dr. Pressman's letter of November 21, 1983 anticipated further healing period. Dr. Scott's letter of January 16, 1984 concludes healing is accomplished. Claimant will be awarded a seven week healing period from October 27, 1983. Healing period will be concluded on December 15, 1983.

There is nothing in the record which shows claimant to be entitled to further healing period relating to his most recent outpatient surgery.

The next issue to be addressed is claimant's entitlement to permanent partial disability benefits.

Iowa Code section 85.34(2)(p) provides: "For the loss of an eye, weekly compensation during one hundred forty weeks." Iowa Code section 85.34(2)(t) states:

> For permanent disfigurement of the face or head which shall impair the future usefulness and earnings of the employee in his occupation at the time of receiving the injury, weekly compensation, for such period as may be determined by the industrial commissioner according to the severity of the disfigurement, but not to exceed one hundred fifty weeks.

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).

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).

The matter of claimant's entitlement to any benefits under 85.34(2)(t) will be considered first. Dr. Syverud anticipated no functional disability attributable to scarring. Claimant testified to loss of sensation in the scarred area. He made no claim of difficulty caused by such things as heat or cold. Claimant's scarring is extensive, but it is not at all repulsive. The statute speaks of impairment of future usefulness and earnings in the occupation at the time of injury. No impairment of claimant's usefulness and earnings as a construction truck driver can be found attributable to his scarring.

On the other hand, claimant does have permanent impairment to his eye. None of his physicians have provided a specific numerical assessment, but that does not prohibit an award in a case such as this. Kostohryz v. Lake Center Industries, III Iowa Industrial Commissioner Report 161 (1982).

Claimant denied trouble with his eye prior to his accident. He had a severe traumatic injury. His healing period has been long. He continues to be troubled by some remaining double vision. He uses ointment and artificial tears. He has irritation, an inablilty to close his right eye as tightly or open it as wide as his left and a loss of mobility.

Dr. Scott finds no impairment to claimant's eye. Dr. Scott saw claimant and did surgery to correct his double vision. His surgery, according to claimant, did go a long way toward correcting the diplopia and perhaps claimant has no impairment from the condition for which Dr. Scott saw him.

Dr. Anderson treated claimant's condition in a more general way. His most recent letter points to several persistent problems which must be endured by claimant. He will require artificial tears and ointment on a permanent basis. He has recurrent irritation of his eye. His tear producing system and his drainage system have been damaged. He has decreased eye movement. His right eye will not open and close in the same matter as the left. His fissure on the right is 9 mm. as opposed to 13 mm. on the left.

Claimant is found to have an impairment to his right eye of forty percent which entitles him to fifty-six weeks of permanent partial disability benefits.

WHEREFORE, IT IS FOUND:

That claimant was employed as a cement truck driver in heavy road work for five years prior to November 10, 1981.

That claimant was injured on November 10, 1981 when he had an accident with a cement truck.

That as a result of his accident claimant had multiple severe facial lacerations, multiple rib fractures, abrasions and contusions of the chest, blunt chest trauma and a right hemithorax

That following claimant's accident he had decreased visual acuity, diplopia, a ptosis of the right upper lid, paralysis of the obicularis oculi, enophthalmos and blockage of his lower tear ducts.

That claimant had corrective surgery on December 13, 1982.

That claimant had surgery by Dr. Scott to align his eyes and to decrease his double vision.

That claimant had a third surgery on March 25, 1984.

That claimant's injury has resulted in permanent impairment to his eyes.

That claimant has numbness in the scarred area of his face.

That claimant's scarring does not impair his future usefulness and earnings as a truck driver in heavy road work.

That claimant continues to have double vision, redness, pain, loss of mobility and irritation with his right eye.

That claimant continues to use ointment and artificial tears.

That the ointment causes blurring of claimant's vision.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established entitlement to additional healing period benefits.

That claimant has established entitlement to fifty-six (56) weeks of permanent partial disability based on a forty percent (40%) impairment to his right eye.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant additional healing period benefits from November 1, 1983 to December 15, 1983.

That defendants pay unto claimant permanent partial disability benefits for fifty-six (56) weeks at a rate of three hundred twelve and 28/100 dollars ($312.28) commencing on December 16, 1983.

That defendants be given credit for amounts previously paid.

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 6 day of July, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD DEWALD,	:	
	:	File No. 616297
Claimant,	:	
	:	A P P E A L
vs.	:	
	:	D E C I S I O N
RATH PACKING COMPANY,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED
AUG 21 1984
IOWA INDUSTRIAL COMMISSIONER

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 consists of the transcript; the deposition of Robert P. Dinapoli, M.D.; claimant's exhibits 1 through 33 plus certain exhibits which were transmitted with Mr. Roberts' letter of September 30, 1983 to the hearing deputy, all of which evidence was considered in reaching this final agency decision. The last-referred to evidence consists of an admission summary sheet and enclosures of August 27, 1974; a discharge summary and attachments of December 26, 1974; an admission-summary sheet and enclosures of October 22, 1976; an admission-summary sheet of November 7, 1977; an outpatient and emergency record of July 25, 1978; an admission-summary sheet of July 25, 1978; an admission-summary sheet of January 20, 1979; an outpatient and emergency record of January 31, 1979; an admission-summary sheet of July 2, 1979; and a report of Thomas R. Karlowski, M.D., dated April 11, 1983.

The outcome of this final agency decision will be the same as that reached in the review-reopening decision.

ISSUES

The review-reopening decision granted benefits for permanent and total disability under §85.34(3) unto claimant at the rate of $207.38.

Although the issues on appeal are stated by neither party in their briefs, those issues are taken to be (1) whether or not there is a causal relationship between the injury and claimant's alleged disability, and if so (2) the extent of that disability.

EVIDENCE PRESENTED

The review-reopening decision contained a very thorough review of the facts. Those facts, of course, were interpreted in that decision to mean that there did indeed exist a causal relationship between the injury and the disability and that the disability was permanent and total. Briefly, the evidence showed claimant sustained an electrical shock while at a machine at work. Although defendant filed a memorandum of agreement, it questions the fact that the shock ever occurred, and suggests that claimant's problem (extensive tremors) came from being struck by lightning in 1974. Although all of the evidence was considered by the original hearing deputy, some of it which was not summarized in the review-reopening decision will be discussed here. Defendant argues in its brief that the accident may not have occurred as claimant states (an electric shock). Also, defendant argues that claimant's condition (severe tremors) preexisted the injury. The matters summarized below have been abstracted in light of those arguments as well as others by defendant.

A hospital admission-summary of August 27, 1974 shows claimant was treated for right arm pain and disability secondary to a lightning strike. Claimant was discharged as improved. There was no indication of any tremors. A discharge summary of December 26, 1974 shows claimant had been admitted for syncopal (temporary loss of consciousness) episodes, peripheral neuropathy, and a traumatized external auditory canal. There was no mention of any tremors. Claimant responded well to symptomatic care and was released. An admission-summary of July 22, 1976 showed claimant had acute liver dysfunction and acute hepititis. The extremities showed a full range of motion without tenderness or deformity.

An admission-summary of November 7, 1977 shows claimant was admitted for an acute back strain and responded well to symptomatic care. There was no remark concerning the extremities. An outpatient record of July 25, 1978 shows claimant was treated for a scalp laceration. Then, claimant was admitted to the hospital for that injury which was finally diagnosed as a cerebral concussion. He was discharged as improved, and an examination of the extremities showed a full range of motion without tenderness or deformity.

An admission-summary of January 20, 1979 showed a diagnosis of a back strain and that claimant was discharged as improved. The examination of the extremities showed "[f]ull range of motion of the extremities; actively on the upper extremities and passively on the lower extremities." An outpatient record of January 31, 1979 shows claimant was treated for an acute back

strain. On July 2, 1979, claimant was admitted to the hospital, and the admission-summary showed he had a hematemesis (vomiting material containing blood) and external otitis (inflammation of the ear). He responded well to symptomatic care and was discharged. The examination of the extremities showed a full range of motion without pain.

Finally, claimant was examined by Thomas R. Karlowski, M.D., an internist, who stated in part as follows:

> After reviewing all of these documents and also being informed; that is, co-workers date the onset of his tremor to the late 1960s and to the fact that he has been, because of these tremors, handicapped job for 15 years preceding the onset of his electrical shock accident and because of these tremors not able to use a knife even before the onset of his accident.
>
> If this indeed has been the case, one would seriously have to question whether his disability was caused by his electrical shock that he received while working at Rath and seriously entertain the notion brought up by Dr. Denoply [sic] that this was caused by Parkinsinism [sic] which had its onset much before the electrical shock.

APPLICABLE LAW

The applicable law recited in the review-reopening decision is sufficient and is adopted herein.

ANALYSIS

As the review-reopening decision showed, there can be no dispute but that claimant received a rather severe electrical shock: Claimant himself, as well as eye witnesses, testified to the shock, and he was treated for electrical shock. Also, there is no evidence to the contrary. Therefore, it is concluded that claimant's injury indeed was caused by electrical shock.

Further, there is very little doubt that the cause of claimant's present condition is related to the shock. Defendant claims claimant had preexisting tremors, but the lay evidence in that regard is meager. Also, the extensive medical evidence available to the undersigned deputy industrial commissioner shows that no such tremors appeared to have been medically observed prior to December 10, 1979. One concludes, therefore, that there is a causal connection between the electrical shock and claimant's tremors.

Defendant also claims that claimant's credibility is undermined by his refusal to admit his drinking problems. It is true that the hospital records made at the time of claimant's admittance because of the injury, show a significant history of alcohol abuse. Although claimant's persistent denials of excessive drinking might lower his credibility somewhat, the loss of credibility seems trivial when compared to his obvious injury-related problems, the retailing of which are not really in question. Therefore, it is concluded that claimant's refusal to admit alcohol abuse really plays no part in the outcome of this case.

Otherwise, the analysis found in the review-reopening decision is sufficient and is adopted herein. Likewise, the findings of fact, conclusion of law and order are adopted herein.

FINDINGS OF FACT

That on December 10, 1979 the claimant was an employee of Rath Packing Company.

That on December 10, 1979 the claimant sustained a severe electrical shock which both arose out of and in the course of his employment at Rath Packing Company.

That the claimant has not worked since December 10, 1979.

That prior to the date of injury the claimant experienced an extremely mild occasional shaking of his upper extremities.

That prior to December 10, 1979 the claimant was consistently able to perform his work functions for the employer without restriction or disability.

That claimant has been employed by the Rath Packing Company since 1956.

That claimant has been a productive individual for Rath Packing Company since that date.

That immediately after sustaining the electrical shock claimant experienced an onset of upper extremity tremors bilaterally from which he has continued to suffer from the date of hearing.

That there exists a causal relationship between the electrical shock and the onset of the tremors.

That the claimant has not worked since the date of injury.

That the claimant is permanently and totally disabled.

CONCLUSION OF LAW

That the claimant has sustained his burden of proof and has established a causal relationship between the injury of December 10, 1979 and the resulting disability.

ORDER

THEREFORE, IT IS ORDERED that the employer shall pay unto claimant disability benefits at the stipulated rate of two hundred seven and 38/100 dollars ($207.38) from the date of injury, December 10, 1979, during the period of the employee's disability as that term is contemplated under section 85.34(3) of the Code.

That the employer is given credit for all benefits previously paid.

That the employer shall reimburse the claimant for mileage charges for one thousand four hundred forty-four (1,444) miles at twenty-two cents ($.22) per mile, for a total of three hundred seventeen and 68/100 dollars ($317.68).

That interest shall accrue from November 3, 1983 pursuant to the terms of section 85.30 of the Code.

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

That the employer shall file an activity report upon payment of this award.

Signed and filed this 21st day of August, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD DEWALD,	:	
Claimant,	:	File No. 616297
vs.	:	R E V I E W -
RATH PACKING COMPANY,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
NOV 3 1983
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Richard Dewald, the claimant, against his employer, Rath Packing Company, a self-insured employer, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on December 10, 1979.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Black Hawk County Courthouse in Waterloo, Iowa on April 12, 1983. The record was considered fully submitted on August 23, 1983.

An examination of the industrial commissioner's file indicates that a first report of injury was filed on December 14, 1979. A memorandum of agreement was filed on December 21, 1979. A Form 2A on file indicates the amount of compensation benefits paid to the claimant.

The record in this case consists of the testimony of Tom Eldridge, Lawrence Fenner, Irvin Weber, Richard Dewald, Arlene Patava, Robert Bergman, Dave Sturm, Tom Dewald, Delores Dewald, Duane Raymaker, Orville Kroenecke, Floyd Cox, Lawrence Franzen; the depositions of Robert P. Dinapoli, M.D., Robert L. Downie, M.D., Ronald R. Roth, M.D., Ezio Panegos, M.D., Jesse C. Yap, M.D.; and claimant's exhibits 1 through 33.

ISSUES

The issues to be resolved in this proceeding are whether there exists a causal relationship between the injury and the resulting disability, as well as the extent of that disability. There is no issue of healing period.

REVIEW OF THE EVIDENCE

At the time of hearing the parties stipulated that the applicable rate in the event of an award is $207.38. Additionally, the parties stipulated that any medical bills involved in this proceeding are fair and reasonable.

Tom Eldridge, a Rath employee for 31 years, testified on behalf of the claimant in this proceeding. He has known the claimant for ten or fifteen years. He worked in close proximity with the claimant on December 10, 1979, the date of injury in this proceeding.

On the date of injury claimant was cutting skin off of fat backs. This witness indicated that this work requires the use of the hands.

This witness has observed the claimant post-injury and has observed the continuous shaking of his hands and arms. Mr. Eldridge indicated that the claimant did not have this disorder prior to the date of injury.

This witness recited the facts surrounding the claimant's injury. From his testimony it appears on December 10, 1979 a piece of machinery in the vicinity of the claimant stopped functioning. As the particular machine in question was being replaced and a new one installed meat product began falling off the conveyor line. Mr. Dewald climbed up to move a shute so that the product would not go on the floor, and during this process he was electrocuted. Immediately upon electrocution, this witness observed that the claimant's arms were shaking very badly. Claimant was taken by stretcher to the company nurse. The nurse requested that some of claimant's clothing be removed so that she could determine if he had been burned. This witness indicated that it took two employees to remove the claimant's clothing because he was shaking so badly. This witness has observed the claimant post-injury and indicated that his arms are probably shaking worse now than they were on the date of injury. This witness is of the opinion that claimant could not go back to his former type of employment.

This witness acknowledged on cross-examination that he was aware that claimant drank. He acknowledged that two or three days a week the claimant would smell as if he had been drinking beer. This witness, however, was not aware that claimant had a drinking problem.

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

Lawrence Fenner, of Jessup, Iowa, testified in these proceedings on behalf of the claimant. Mr. Fenner is a farmer and barber by trade. The claimant is one of his barbering customers and has been so for 23 years. As a consequence, he has had the opportunity to visit with the claimant and see him at least once a month over that period of time. This witness indicated that prior to the date of injury the claimant's hands and arms did not shake.

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

Irvin Weber, a Rath Packing Company employee since 1979, testified on behalf of the claimant. He is acquainted with the claimant through their working relationship. Claimant broke this witness in on the pork cut trim job. This witness had the opportunity to work with claimant for a week and to observe him during that period of time. This witness indicated that prior to the date of injury, the claimant's hands and arms did not shake.

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

The claimant, Richard Dewald, testified in these proceedings. Mr. Dewald is 52 years of age, married, and the father of four children. He is a resident of Jessup, Iowa.

The testimony reveals that he has a high school education but no special training in any given field.

His employment history indicated that post-high school he has worked as a mechanic and served two years in the armed forces. This witness began his employment relationship with Rath Packing in 1956. The testimony reveals that he has performed a variety of jobs for Rath Packing. Many of these positions required the claimant to use various knives. This witness testified at length concerning the requirements of keeping up with the production line. He indicated that he never had any difficulty keeping up with the conveyor.

Claimant recited the facts of the injury which occurred December 10, 1979. He confirmed earlier testimony that certain machinery was being changed and in the process the claimant climbed up to move a shute and received an electrical jolt. Claimant indicated that he received "a long jolt."

Mr. Dewald indicated that prior to the date of injury he did not have any tremors. He did not have any shaking of his arms or hands. He also confirmed that prior to the date of injury other employees had received shocks off the machinery in question.

Claimant's present complaints include continuous headaches and continuous shaking of his arms and hands. He has also noted a continuous ringing in his ears. He has a loss of grip strength bilaterally. This witness confirmed that he only wears boots now as he is unable to tie his shoes. It takes a long time, according to him, to get dressed because of the tremors in his arms and hands. He has difficulty writing. He notes difficulty in eating. He has also experienced difficulty in sleeping.

He confirmed that his hands and arms do not stop shaking. He is presently on medication and under the care of Dr. Roth.

The testimony indicated that prior to the date of injury the claimant was also able to do certain electrical work and small engine repair. He has also held a variety of other part-time jobs. Post-injury, he has attempted to do small engine repair but has been unable to do so because of the tremors. He also cannot do the plumbing and electrical work he did before.

This witness confirmed that in 1974 he was struck by lightning while leaving work. His right arm became paralyzed for a two week period, but the paralysis then dissipated. Mr. Dewald indicated that he fully recovered from this incident and was able to go back to his work doing his regular job. There were no tremors or shaking as a consequence.

Mr. Dewald denied that he was ever in a detoxification center. He also denied that he ever was told that he was an alcoholic. The claimant also denied that prior to the date of injury he was ever sent home for drinking. He further denied that he ever missed any work due to alcohol.

This witness has not tried to secure a position after the date of injury. He is not aware of anyone who would want to hire him.

On cross-examination, this witness indicated that he is only a social drinker. He again denied ever being detoxified and was not in a hospital for detoxification. He further denied that he has cirrhosis of the liver. He denied that anyone has advised him not to drink, and he denied giving history to a physician of alcoholism.

This witness confirmed that he has not worked since December 1979. He indicated that post-injury his morale has improved. He has been able to face his problems. He denied having any hand or arm tremors prior to the date of injury.

This witness was transferred off the kill floor because of an inability to do the work. He indicated that he was moved from the kill floor so that a woman might be put in his job. He denied being removed from that position because of shaking.

Mr. Dewald denied telling any physician that he was not examined at the Mayo Clinic. On redirect examination, he indicated that he was never advised in June 1980 that he was released to return to work. He indicated that since the date of injury the employer never contacted him in regard to a job. He indicated that he is unable to control his shaking.

The claimant undertook a demonstration of attempting to put his finger on his nose, and it is very evident that his tremors both in the arms and in the hands are indeed severe.

Arlene Patava, a Rath employee, testified in these proceedings on behalf of the claimant. This witness worked in the same department as the claimant. She confirmed the facts of the incident under discussion. She confirmed that claimant was observed by her lying on the floor on his back with his arms shaking badly after the electrocution. This witness worked with the claimant two years prior to the date of injury and confirmed that he did not shake prior to the date of the incident. She indicated that claimant could not have done the job he was performing for the employer if he was experiencing tremors. She has never known the claimant to come to work intoxicated and indicated that he never missed any work.

This witness indicated that in the job claimant was performing the individual must keep up with the conveyor line. She indicated that the work takes steady hands. She reiterated that the claimant has always been able to do this job.

On cross-examination, this witness indicated that she has never observed the claimant as though he had been drinking.

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

Robert Bergman, a John Deere employee, testified on behalf of the claimant. This witness indicated that he has known the claimant for 25 years. He had been in the claimant's home on many occasions. He has had the opportunity to observe the claimant working on cars and engines prior to the date of injury. This witness indicated that prior to the incident, December 10, 1979, the claimant's hands and arms did not shake. He had no problem gripping. This witness denied that he ever saw the claimant intoxicated.

On cross-examination, this witness denied that claimant is an alcoholic. He does not know if claimant has ever been detoxified.

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

Dave Sturm, a resident of Jessup, Iowa, testified on behalf of the claimant. This individual is married to the claimant's

daughter. He has known the claimant since at least 1977 and has seen him on a regular basis since that date. He indicated that claimant did not shake prior to the date of injury. This witness indicated that prior to the date of injury the claimant was always fixing or tinkering with some mechanical device at home. He indicated that the claimant had no problems in gripping. He denied seeing the claimant intoxicated at any time, although has seen him take an occasional beer. Post-injury, this witness has been in the claimant's home and has observed him. He confirmed that the claimant has a loss of grip and shakes on a continuous basis.

On cross-examination, this witness indicated that he did not know if claimant had been hospitalized for detoxification or alcoholism.

Tom Dewald testified in these proceedings. Prior to the date of injury this witness saw the claimant three or four times per week. He confirmed that the claimant did not shake in his hands or arms. Post-injury, he confirmed that the claimant shakes continually and is unable to use his hands. He confirmed the difficulties the claimant has in eating and dressing himself.

On cross-examination, this witness conceded that he was never aware that claimant had been treated for alcoholism or various alcohol-related difficulties.

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

Delores Dewald, the claimant's spouse of 32 years, testified on his behalf. She indicated that prior to the date of injury the claimant was in good physical condition. She further advised that the claimant was never told that he was an alcoholic. She denied that claimant ever missed work because of drinking.

She noted that prior to the date of injury the claimant did not have shaking or tremors. Post-injury, she re-confirmed that claimant has continuous tremors as well as headaches, and is unable to do virtually any activity. This witness indicated that the claimant is dependent upon her to drive him to various places. She re-confirmed that the tremors last 24 hours a day and prohibit claimant from sleeping soundly. She reaffirmed that he is on medication.

On cross-examination, this witness reiterated that she did not advise the physicians the claimant was an alcoholic. She denied that he was ever hospitalized for alcoholism.

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

Duane Raymaker testified in these proceedings on behalf of the defense. He is 55 years of age and is a supervisor at the Rath Packing Company. He has been supervisor since 1967 and with Rath since 1954.

On the date of injury this witness was the general supervisor. He had no specific involvement with the claimant on that date. He confirmed that he has known the claimant for a long period of time and admitted that claimant once worked for him on the second shift. This witness indicated that the work claimant performed was usually of a lighter nature because of his short stature. This witness thought that the claimant drank occasionally and thought that he might have seen evidence of this in claimant's work. Prior to the date of injury claimant appeared very nervous according to this witness. He indicated that claimant shook somewhat. He conceded, however, that claimant shakes far worse today.

On cross-examination, this witness conceded that when claimant worked under this witness' supervision he was able to perform his job. He confirmed that claimant was never sent home for drinking or for not performing his work properly. He reiterated that the claimant's prior nervous condition is not as bad as his present situation.

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

Orval Kroneneke testified in these proceedings. Mr. Kroneneke is 48 years of age and has spent the last 29 years in the employ of Rath Packing. Six years ago he was promoted to the position of foreman in the sanitation and eventually in the hog cut area. This witness confirmed that the claimant worked under his supervision in the hog cut area prior to the date of injury. This witness indicated that the claimant did light work in the hog cut area. Some of the jobs the claimant performed were handicap jobs. This witness indicated that the fat back job the claimant was performing on the date of injury was considered light work.

This witness indicated that on a couple of occasions he smelled beer or liquor on the claimant. This witness also indicated that prior to the date of injury he noticed the claimant's hands trembled on occasion. This witness felt that this trembling, however, was probably caused from the claimant's drinking. He conceded, however, that this trembling did not affect the claimant's work. This witness did not avoid putting claimant on various jobs because of the shaking. He re-confirmed that the claimant was able to do light work. He further confirmed that the claimant did not shake on a continuous basis.

On cross-examination, this witness conceded that the claimant was never classified as a handicapped worker. He further confirmed that the claimant was never suspended for drinking, nor was he sent home for being inebriated. He confirmed that the employer never recalled the claimant to work. He also conceded that in the claimant's present condition he would not be able to do the fat back trim job.

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

Floyd Cox, an employee of Rath Packing for 29 years, testified on behalf of the defense. He has been the supervisor of the hog kill since 1971. He has known the claimant for 20 years. The record reveals that the claimant has worked for this witness in two areas of the plant. At one point in time claimant tried to break into a new job and had to prove his abilities to do the work. This witness indicated that the claimant was unable to do the work because his hands trembled so badly that he could not hold the knife.

On cross-examination, this witness conceded that the claimant did not shake as badly then as he does today.

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

Lawrence Franzen, a supervisor at Rath Packing since 1974, testified on behalf of the defense. He has known the claimant since 1955 and on the date of injury was claimant's supervisor. This witness has seen claimant on a daily basis and confirmed the claimant's description of the job he was performing.

This witness indicated that claimant had been assigned to various jobs but was unable to perform them because of his shaking. Specifically, the claimant was unable to trim jowls and use a knife in the process. This witness conceded that jowl trimming requires precision cut. Claimant was subsequently transferred to the fat back cut area, which does not require the precision. This witness observed the claimant shaking while doing the fat back job. He is unable to state whether the claimant is shaking more or less now. This witness has also smelled liquor on the claimant.

On cross-examination, this witness conceded that claimant had never been sent home because of the drinking.

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

Ezio Panegos, M.D., an anesthesiologist, with an interest in chronic pain, was deposed in conjunction with this case. Dr. Panegos first examined the claimant on February 9, 1981.

Claimant had been referred to him by Dr. Piburn. On the initial examination, claimant complained of severe headaches. This witness indicated that after the examination, "I soon realized that the headache was derived by continuous tremor of his upper extremities, which generated muscle spasm on the cervical region, thus resulting in continuous headache." After the initial examination a diagnosis of "tremor affecting the upper extremities following electrocution with muscle spasm of the cervical spine, resulting in tension headache." Treatment was undertaken but any success from the treatment was limited. This physician's involvement in the case was discontinued as of February 16, 1981, as he felt he had done all that he could do to help the claimant. This physician expressed the opinion that the electrical shock in question caused the condition for which he treated claimant. He is of the opinion that as of the last examination he conducted of the claimant, Mr. Dewald is totally disabled.

On cross-examination, this witness confirmed that he has had some experience in treating people with alcoholism. He confirmed that he has seen alcoholic tremors but not comparable or duplicated in the signs he observed of Mr. Dewald. It appears that this physician may be unsure of precisely what event caused the claimant's present problems, that is, to say whether it was the electrical shock or the fact that he landed on the cement floor on his head. This physician is not aware of precisely what head injuries may have been sustained. He indicated that he would defer to those physicians who examined and evaluated claimant with regard to the head situation. This witness is familiar with the fact that claimant had been struck with lightning. He again refers to those medical practitioners who treated claimant at the time of this incident with respect to any damage that had been done.

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

Donald R. Roth, M.D., testified in these proceedings. He is specialized in the area of family practice and initially treated the claimant on February 16, 1981. This physician continued to treat claimant for a period of time. He then referred him to the department of neurology in Iowa City. He confirmed that claimant was examined in Iowa City in August 1981. His understanding of the Iowa City diagnosis is that claimant suffered an electrical shock which was followed by the development of bilateral upper extremity tremors. Based on the reports that this physician has seen, he has concluded that the claimant has "some sort of brain injury after an electrical shock which has led to tremors." This physician is of the opinion the claimant is totally disabled as a consequence of his tremors. This witness has treated people with Parkinson's disease and indicated the claimant does not exhibit the classic symptoms of a person

suffering from that malady.

On cross-examination, this physician conceded that he assumed that Mr. Dewald did not have tremors prior to the date of injury. If tremors were present prior to the date of the accident, he would assume that there may be another cause involved. He further indicated that if tremors followed the lightning strike, it may indicate that that injury is the cause of them. This witness conceded that alcoholics may also suffer from tremors. He indicated, however, that the tremors observed in the claimant are greater than would normally be expected. He conceded, however, that alcoholism could be a contributing factor in the severity of the tremors. This witness did not treat the claimant for alcoholism problems. He indicated, however, that if the history reflects the claimant has advanced liver disease it is an indication that he has a severe problem with alcoholism. This witness is unaware of the length of time that the electrical charge went through claimant or the severity of the charge. Also, this witness was not advised that the claimant had been struck by lightning on a previous occasion.

The balance of this witness' examination has been reviewed and considered in the final disposition of this case.

Robert L. Downie, M.D., testified in these proceedings. He is a specialist in internal medicine and employed in the emergency room of Allen Hospital. His first contact with the claimant was on December 13, 1979. Dr. Downie examined the claimant. The specific complaints at this time were neck pain and tremors. This physician expressed the opinion the electrical shock that claimant sustained caused neurological damage, which he feels is probably permanent in nature and which has lead to the tremors and his inability to work in his occupation. This witness continued to treat the claimant through December 30, 1980. He indicated that the claimant's condition has remained basically the same.

On cross-examination, it appears that this witness is aware that claimant exhibited some evidence of tremor prior to the date of injury. He confirmed that the extent of damage precipitated by an electrical shock has a connection with the amount of voltage and the length of exposure. This physician examined the claimant and indicated that there was no evidence of any kind of alcohol withdrawl as a precipitating cause of the claimant's problems. This physician noted that if the claimant had any form of preexisting tremor they clearly do not affect his ability to work. He also acknowledged that if the claimant had tremors before the date of injury they may not be the same type of tremors that he has now. The physician was then asked to assume that the claimant was just marginally able to perform his job immediately before the incident in question and that his hands shook so badly that he could hardly hold a knife. The physician indicated that he had not been led to believe that the claimant's tremors had been that severe prior to the date of injury. If they had been severe he notes that the electrical shock could make them worse or perhaps the claimant was no worse. This physician confirmed that it is the tremors which are primarily disabling the claimant at this time. This physician conducted a liver function test when he examined the claimant and that test revealed that the liver was functioning normally.

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

Robert P. Dinapoli, M.D., testified in these proceedings. He is a board certified specialist in neurology and is practicing at St. Mary's Hospital in Rochester, Minnesota. He is also an assistant professor of neurology at the Mayo Medical School. This witness confirmed that he initially examined claimant on November 20, 1980 and diagnosed the claimant's problem as "Parkinsonism or Parkinson's disease." This witness described Parkinson's disease as "a disease of the central nervous system in which the patient loses fine motor control, develops a shaking tremor and experiences other changes of his motor system." All of these symptoms were observed in the claimant. This witness indicated that he sees people with Parkinson's disease on a regular basis, and in total has seen hundreds of people with this disease. He indicated that Parkinson's disease does not come on suddenly. It could, however, develop over a matter of days or weeks. This witness is aware that on the date of injury the claimant received an electrical shock and that he had to be forcibly removed from the machine in order to cut the current. This witness is aware claimant was struck by lightning on a previous occasion. This witness is aware of articles depicting a relationship between the onset of Parkinson's disease and an electrical shock injury. This physician indicated, however, that individuals who have experienced this onset receive severe electrical injuries which rendered them unconscious or comatose for a period of days, weeks or months. Based on the information available to his physician, he is of the opinion that the claimant's Parkinson's disease bears no relationship to his electrical injury in connection with his work or the lightning injury previously noted. This physician indicated there is no possible way a person could receive a shock and within a few seconds, or perhaps minutes, develop any symptoms of Parkinson's disease. He conceded that a history of alcoholism could be significant in that alcoholism will produce its own neurological sequelae. However, he does not see any connection between Parkinson's disease and alcohol.

This witness confirmed that he only examined the claimant on one occasion. He gave him some medication during the course of this examination and felt that the tremors were somewhat subsiding as a result of the medication. This physician concluded that the claimant had Parkinson's disease and that the electrical shock at work temporarily aggravated the situation. It appears from the cross-examination of this witness that many classic signs of Parkinson's disease were present in the claimant.

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

Jesse C. Yap, M.D., testified in these proceedings. He is a specialist in the field of neurosurgery and particularly stereotaxy, which is a branch of neurosurgery and deals with the treatment of movement disorders, intractable pain, epilepsy, tumors, and cerebral palsy. This witness examined the claimant on April 28, 1981. The claimant's complaint on that date was tremors. An examination was conducted. It appears from the testimony that this physician has treated many thousands of people with Parkinson's disease. He indicated that the claimant's condition did not reveal any of the classics of Parkinson's disease. After examination of the claimant, this physician reached a diagnosis of "bilateral basal ganglia injury, associated with electrocution." The prognosis for this claimant, according to the physician, is that the condition will become permanent. Some surgery was discussed in order to rectify the situations but none has been carried out. It is hoped that the surgery might diminish the tremors but there are clear risks associated with the procedure. This physician expresses the opinion that claimant's tremors are probably secondary to the electrocution.

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

The discharge summary from Schoitz Memorial Hospital, contained as part of plaintiff's exhibit 2 and completed by Dr. Downie, indicates:

> Basically his major problem has now been the continued tremor of his hands and shaking and some light headedness and headache and muscle pains over the back. It is felt that most of these are a spin-off of some neurologic damage done at the time of the DC voltage with nerve damage and in addition, the possibility of this superimposed upon some alcoholic neuropathy which may have been subacute until this voltage problem occurred.

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

APPLICABLE LAW

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

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 10, 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.

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).

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.

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, 253 Iowa 369, 112 N.W.2d 299; Ziegler, 252 Iowa 613, 106 N.W.2d 591.

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.

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

ANALYSIS

It is undisputed that on the date of injury, December 10, 1979, the claimant was an employee of the defendant herein, Rath Packing. The commissioner's official record also reflects that a memorandum of agreement was filed in conjunction with this case. By that unilateral act the employer acknowledges that on the aforementioned date of injury, the claimant sustained a personal injury which both arose out of and in the course of his employment with them.

As recited in the issues section of this opinion, the issues to be resolved include causation and the extent of claimant's disability. In the final analysis, the causation issue is critical.

The record in this case reveals that the claimant has been a long time employee of Rath Packing. It appears that he commenced his employment relationship in 1956. The record establishes that this individual has performed a wide variety of functions for the employer.

It appears from the record that the claimant, due to his slight stature, may have been placed on what could be best described as light duty positions as compared with other jobs in the plant. The record is clear, however, that the position that claimant was filling on the date of injury required him to keep pace with the production line and required him to use a knife with some degree of speed and accuracy. The record would also reveal that the claimant also appears to have been doing an acceptable job in conjunction with the performance of his work. The record would also reflect that over the history of the claimant's employment relationship, he has been a good and productive employee. The argument that claimant was for some reason performing a handicap or light duty job has not swayed the undersigned in the final analysis of this case. The fact remains that on the December 10, 1979 the claimant was performing a work function for Rath Packing that if claimant did not perform someone else would be required to perform.

There has been additional testimony offered from this record concerning claimant's drinking and its possible effect on his present condition. The testimony is at variance concerning the severity of tremors that claimant may have experienced prior to the date of this injury. One witness indicated that he could not determine if claimant was shaking more or less at the date of hearing than he was prior to the date of injury. Based on the description of the work the claimant was performing on the date of injury, and based upon this witness' observation of the claimant at the time of hearing, the opinion of the undersigned is that this witness' testimony is without credibility and is rejected in total. It is the opinion of the undersigned that the claimant would not be able to hold a knife or use a knife with the tremors he was experiencing on the date of hearing.

The record taken as a whole leaves the undersigned to believe that the claimant may have had a mild non-debilitating tremor prior to the date of injury. The extent of this tremor is mild to almost nonexistent. The claimant's friends and family, who have observed him on a day-to-day basis, bolster this opinion. The fact also remains that the tremors must not have been too severe if they existed at all, because the employer permitted the claimant to work with a sharp knife cutting fat backs on the date of injury.

The medical testimony is at variance in this case. Some of the medical data indicates that the claimant suffers from Parkinson's disease. Other medical testimony indicates that there is a relationship between the electrical shock and the claimant's tremors. Dr. Downie indicates in his notes, contained as part of plaintiff's exhibit 2, that his impressions include:

> Trembling and shakiness with mild cerebellar signs probably due to DC voltage, primarily however with the weakness, ataxia and tremulousness in the upper extremities, probably due to nerve damage at the time of the electric shock, perhaps superimposed on an alcoholic neuropathy.

Four of the physicians who testified in this proceeding appeared to the undersigned to be basically consistent in their opinions that there exists a causal relationship between the electrical jolt which claimant received in the course of his employment and the tremors from which he now suffers. Particularly important in this connection is the testimony of co-workers that observed claimant immediately after the electrical shock and who stated that the tremors came on immediately. One witness testified difficulty in removing claimant's clothing immediately post-injury because of the tremors that he was experiencing.

The close proximity between the electrocution and the onset of the symptoms which claimant now suffers is very persuasive in the undersigned's mind.

Dr. Robert Dinapoli testified at length concerning the fact that he believes claimant has Parkinson's disease. He testified that the onset of Parkinson's disease is a gradual process. If the onset of Parkinson's disease is a gradual process, the undersigned is concerned how the claimant can go from a point of being able to do his job with knife in hand to being in a position where he is suffering gross tremors in the course of a few seconds.

The claimant was closely observed by the undersigned at the time of trial. He is found to be credible in his testimony. The undersigned closely observed the claimant's condition and noted that hands, arms and upper extremities bilaterally are in a constant state of uncontrollable motion.

The record establishes that the claimant is a high school graduate, having completed that course of education in 1949. He has had some jobs as a mechanic, but basically has been involved in the meat packing business since 1956. He has worked at a variety of jobs at Rath Packing during the course of his employment. Based upon this deputy's experience, and the numerous cases that have been tried and decided that involved the meat packing industry, the undersigned is of the opinion that claimant would never be able to return to that form of employment.

Taking into consideration the entire record as a whole, and after examining all of the testimony and considering all of the medical depositions and exhibits, the undersigned is of the opinion that the claimant is permanently and totally disabled as a direct consequence of the electrocution which occurred on December 10, 1979.

FINDINGS OF FACT

That on December 10, 1979 the claimant was an employee of Rath Packing Company.

That on December 10, 1979 the claimant sustained a severe electrical shock which both arose out of and in the course of his employment at Rath Packing Company.

That the claimant has not worked since December 10, 1979.

That prior to the date of injury the claimant experienced an extremely mild occasional shaking of his upper extremities.

That prior to December 10, 1979 the claimant was consistently able to perform his work functions for the employer without

restriction or disability.

That claimant has been employed by the Rath Packing Company since 1956.

That claimant has been a productive individual for Rath Packing Company since that date.

That immediately after sustaining the electrical shock claimant experienced an onset of upper extremity tremors bilaterally from which he has continued to suffer from the date of hearing.

That there exists a causal relationship between the electrical shock and the onset of the tremors.

That the claimant has not worked since the date of injury.

That the claimant is permanently and totally disabled.

CONCLUSIONS OF LAW

That the claimant has sustained his burden of proof and has established a causal relationship between the injury of December 10, 1979 and the resulting disability.

ORDER

THEREFORE, IT IS ORDERED that the employer shall pay unto claimant disability benefits at the stipulated rate of two hundred seven dollars and 38/100 dollars ($207.38) from the date of injury, December 10, 1979, during the period of the employee's disability as that term is contemplated under section 85.34(3) of the Code.

That the employer is given credit for all benefits previously paid.

That the employer shall reimburse the claimant for mileage charges for one thousand four hundred forty-four (1,444) miles at twenty-two cents (.22) per mile, for a total of three hundred seventeen and 68/100 dollrs ($317.68).

That interest shall accrue from the date of this decision pursuant to the terms of section 85.30 of the Code.

That the costs of this action are taxed to the defendant 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 3 day of November, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID ELLIOTT,	:	
Claimant,	:	File No. 625596
vs.	:	
RUAN TRANSPORT 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
CARRIERS INSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	JUL 27 1964
	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the Juvenile Court Facility in Cedar Rapids, Iowa on November 18, 1983, when the record was closed.

A review of the commissioner's file reveals that an employers first report of injury was filed on February 4, 1980 along with a memorandum of agreement calling for the payment of $251.87 in weekly compensation. A final report was also filed February 4, 1980 indicating that claimant had been paid seven weeks of temporary total disability compensation representing the period of October 5, 1979 through November 22, 1979.

The record consists of the testimony of the claimant, Craig Levetzow, and Mike Gantt; claimant's exhibits 1 through 12; defendants' exhibits A through E; and an additional exhibit (medical bill) filed November 24, 1983 (filed as exhibit 10A).

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; and

3) Whether certain medical expenses were incurred as a result of injury.

STATEMENT OF THE EVIDENCE

Claimant, presently age 40, was employed by defendant employer in October 1979. He testified that he first became employed by Ruan at Buffalo, Iowa in 1976. At that time he was employed to haul ready-mix around the midwest. Sometimes the cement was bagged and unloaded by hand.

Claimant testified that his prior employment consisted of the army, a glass company and a bread company. When claimant was in the army he drove a semi and obtained a GED. When claimant was discharged, he became employed by Pittsburgh Plate Glass as a laborer. He was employed by Pittsburgh Plate Glass for three and one-half years before taking a job for a bakery as a laborer and straight truck driver. Claimant then became employed by defendant.

Claimant testified that he was injured on October 3, 1979. Claimant was unhooking a "hot" line and slipped and fell after losing his footing. He fell on the platform behind the truck, having fallen three or four feet. Claimant had grabbed a rack on the way down. Claimant testified that he hung by his right arm. His back struck the truck and his shoulder popped.

Claimant went ahead and finished the loading process and told the dispatcher that he was going home and that he hurt himself. Claimant started missing time.

Claimant saw William F. Holmberg, D.C., of Rock Island, on October 8, 1979, at which time he was complaining of lower back pain and extension of the pain into the right leg. Claimant also was complaining of neck pain and periodic headaches. Examination revealed a rigidity of the lumbar spine musculature, primarily on the right. Claimant had normal ankle jerk reflexes, left and right subjective pain and a positive right straight leg raising test. X-rays showed a slight lumbar spine curve and some narrowing of the disc space at L-5 and S-1. Diagnoses at that time was myofascial strain and sprain of the cervical and lumbar spine with neuromuscular spasm and right sciatica. Claimant continued to see Dr. Holmberg through November 12, 1979.

The record indicates that claimant returned to work on November 23, 1979 (see final report). Claimant testified that he had not injured his neck, back and shoulder prior to or subsequent to the injury. He testified that he did hurt his right hand after the injury and that he had some hemorrhoid trouble. Claimant testified that in October 1972 his lower back and shoulder started to ache. Claimant testified that the pain became worse and worse. Claimant last worked October 21, 1982.

Claimant returned to Dr. Holmberg for treatment. Dr. Holmberg's notes indicate that claimant had not recovered from the injury of 1979 and had gotten progressively worse. Examination on October 22, 1982 revealed normal achilles reflexes, pain on right straight leg raising, and pain on flexion and extension of the lumbar spine. X-rays showed little change from those taken three years earlier. Claimant was treated for about two weeks by Dr. Holmberg. Diagnoses were chronic and recurrent myofascial strain and sprain of the cervical and lumbar spine with neuromuscular sprain and right sciatica.

Claimant testified that he went to see William D. Reinwein, M.D., a Moline orthopedist, on November 3, 1982. Orthopedic and neurological examination revealed considerable paravertebral muscle spasm in the lumbar area. The movement of the lumbar area, active and passive, was markedly restricted due to generalized tenderness and pain on motion. Considerable impairment was noted at the L5-L4 level as well as L5-S1 where there was complete rigidity. There was sharp pain on deep palpation over the superior spine on the right, sciatic notch and sciatic points on the thigh and leg. Straight leg raising sign was 2+ at 45° on the right. Lasegue sign was positive at 60° on the right and was negative on the left. Naftziger was positive on the right with considerable exacerbation of pain and evidence of marked hamstring spasms. The achilles reflex was depressed on the right side and there was weakness of the extensor hallucis longus on the right with sensory change noted at L5 dermatome of the right leg.

Claimant was hospitalized and a myelogram was performed on November 8, 1982 which revealed a bulging disc at L5-L4 level. Further conservative management consisted of epidural injections and blocks of the facet joints as well as phonophoresis of the lumbar area. On December 1, 1982 a CT scan confirmed the bulging at the L4-L5 level combined with the stenosis at that level especially on the right side. At the time it was noted that conservative management had not relieved the symptoms. Accordingly, on January 13, 1983, a L5-L4 laminectomy was carried out and decompression of the hypertrophy of the facets, ligimentum flavum and the laminae of L5 and L4 was performed. A large hern.a at L5 and L4 with partial extrusion of the disc at that level was noted. The exposure of the intervertebral space at L5-L4 revealed a large traumatic type of rupture and a discectomy was conducted. A complete anterior decompression was effected and combined with a foraminotomy at L5-S1 level. Claimant was released from the hospital on January 22, 1983.

Dr. Reinwein released claimant to return to work in July 1983 after having assigned a 35 pound weight limitation and a 20 percent permanent impairment. However, claimant did not return to work. Claimant testified that he had had a physical examination by the company physician and was told not to return to work.

Claimant testified that he has returned to part-time employment where his wife works. The work is at a pool sales outlet. Claimant indicates that he has made deliveries of equipment, including diving boards. Claimant testified that he was involved in the winterizing of pools. He was required to lift five gallons of antifreeze and load a pickup.

At the time of hearing, claimant indicated that he had neck and shoudler problems. Additionally, he testified that his lower back gives him problems when he drives, bends or twists. Claimant testified that he has difficulty in driving 80 to 90 miles in a company pickup. Claimant testified that when he went to visit his father in St. Louis, he experienced discomfort in his hips after the trip. He testified that bending and twisting cause problems. He testified that he has to rest for ten minutes or so after having worked 45 minutes. Claimant stated that he has trouble lifting the pool antifreeze since the quantity weighs 40 to 45 pounds. Claimant stated that at this point his shoulder and right lower back really hurts. He stated that he had to stop and relax. Claimant testified that he is able to walk a distance of four or five blocks before his hips tighten up. He testified that he can stand for only 45 minutes. Claimant stated that his recreational activities of hunting and dancing have been affected. Claimant indicated that he had numbness in his right ring and little fingers.

On cross-examination, claimant indicated that he had the same complaints after his return to work in December 1979, but that he worked full time, even up to 60 to 70 hours per week. Claimant's wages with defendant characteristically were lesser in the winter months due to a seasonal slowdown. Claimant testified that after he returned to work in 1979 he missed about 60 days of work over a period of three years. Claimant stated that he did not recall mentioning his physical ailments to anyone because he kept these matters to himself. Claimant testified that his back gave him some problems every day. Claimant indicated that he had hemorrhoid problems in January 1982 and was off about twelve weeks. Claimant also admitted having taken thirteen weeks off in July 1982 after cutting his foot.

Claimant indicated his employer at the pool repair place was just trying to help him out. He stated that there had been no work for the three weeks prior to the hearing. Claimant showed some enthusiasm for a prospective venture into a spa business.

Craig Levetzow has been the dispatcher at Ruan Transport since March 1983. He had nearly daily contact with the claimant. He recalled that claimant complained of hurting his hand on a spoke of a steering wheel in 1980. Claimant also had complaints in August through October 1982 which were limited to his eyes. No back or shoulder complaints were made. The witness testified that on at least six occasions during 1982 claimant was off and none of the calls indicated a sore back.

Mike Gantt has been terminal manager for defendant. He stated that claimant last worked for the defendant on October 20, 1982. The witness testified that in the period from August 1982 to October 1982 the only complaints he heard from claimant were referrable to his eyes. The first indication of back problems was a back complaint made on October 25, 1982 when the witness overheard claimant say to another driver that he was off because of a compensable injury. The witness investigated and claimant said it was an old injury.

The witness testified that claimant was a good worker but difficulty was sometimes experienced in getting claimant to work extended hours. The witness testified that claimant was sent to the doctor on July 7, 1983 and an ICC card was not issued. No follow-up examination was made at the time of hearing.

The physicians in this case indicated that the claimant's later difficulties in 1982 are related to the injury in question. Dr. Holmberg indicates that the services which he rendered in October and November 1982 were related to the injury of 1979. Dr. Reinwein makes the statement that claimant's problems were causally related to the injury of October 1979.

Claimant was examined by F. Dale Wilson, M.D., on August 16, 1983. Physical examination showed that claimant did not limp and that his posture was satisfactory excepting a protruding abdomen. He could stand on either leg and walk on his toes and heels. He could squat and recover without pain. He could kneel on both heels. He noted that there was an operation scar. The sciatic notch was negative. Pressure on the sciatic nerve was negative on the inside of either thigh. Dr. Wilson performed detailed range of motion tests. Dr. Wilson indicated that claimant had sustained a strain of the right shoulder and a ruptured L4-L5 disc. Dr. Wilson attributed a permanent partial disability of 12 percent of the body as a whole to the shoulder and 15 percent of the body as a whole to the back.

On June 17, 1983, claimant was seen by Robert J. Chesser, M.D. Physical examination showed symmetrical reflexes at the knees and ankles. There was no ankle clonus or Babinksi sign noted. Sensation demonstrated reduction of pinprick sensation in the right foot but no specific distribution. Sensation above the foot was normal. Strength of the extensor hallucis longus is symmetrical from a short sitting position. He could fully extend his knees and dorsiflex his ankles and feel pain in the right posterior aspect of the right knee, but show no specific low back or hip pain. Straight leg raising on the right produced symptoms of hamstring tightness. Fabre's maneuver was full and asymptomatic. On both sides lumbar mobility demonstrated no leg length discrepancy. There was no evidence of a list or muscle spasm. Dr. Chesser reviewed the CT scan and the myelogram taken in late 1982. No abnormalities were noted. He then made the following statement:

> At this time, I feel that the patient can return to work early in July. I feel he can return to work as a truck driver but would strongly recommend that he obtain an air cushion seat for his truck. I also feel that he will require a weight restriction in the form of a 30-35 lb. weight limit and no repetitive bending. I have also encouraged him to follow through with the home exercise program. In regards to impairment, I feel he would have a 15 to 20 per cent whole man impairment; this, however is based on subjective responses rather than to any objective loss on examination.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, confer jurisdiction on 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 October 3, 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. 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).

5. Section 85.27, Code of Iowa, provides for medical care for injured workers. The employer, being so obliged, has the right to chose the care.

ANALYSIS

Based on the foregoing principles, it will first be found that claimant sustained an injury arising out of and in the course of his employment on October 3, 1979. A memorandum of agreement was filed and the law in this regard is clear.

The question of causal connection has been addressed by the medical personnel in this case. Both physicians give us the necessary causal connection to find that the problems which claimant had in 1982 were related to the injury in 1979. Although the time between the injury and the resultant surgery was of some length, the physicians were nonetheless adament in the conviction that the injury and subsequent disability were related. No evidence was presented to indicate any other cause for the 1982 disability, although a sceptic might hazard a guess. For this reason, it will be found that claimant sustained his burden of proof that the injury of October 3, 1979 caused the 1982 surgery to take place.

The next item which must be discussed is the claimant's claim for medical benefits. The record indicates that the instant action was commenced at about the time claimant was having his problems in late 1982. Claimant and the employer were both represented by able counsel at time. Although this action is captioned as being a review-reopening, it is more in the nature of an arbitration proceeding since defendants are denying that any payments of compensation or medical benefits are related to the injury. In order for the assertion of nonauthorized medical to succeed, one must offer care, and presumably, accept compensability. Since no such offer was advanced, claimant's medical expenses must be paid.

Claimant has sustained permanent partial disability to the body as a whole because of the October 3, 1979 injury. Claimant is 41 years of age and has a high school education with a GED. His prior employment has been as a truck driver. This has been his primary means of supporting himself and his family. Claimant's testimony indicates to us that he cannot drive long distances. The lifting impositions found upon him since his surgery preclude him from a necessary function of the job--loading and unloading, even if done rarely. Claimant has shown excellent motivation and eagerness to return to work. Claimant has sustained a major back sugery. Considering the elements of industrial disability, it is found that claimant is disabled to the extent of 35 percent of the body as a whole.

Section 85.34(1), Code of Iowa, provides that a healing period be paid in cases of permanent disability from the date of injury until claimant has either returned to work or reached maximum medical recuperation. The record indicates that claimant reached maximum medical recuperation on July 6, 1983 when Dr. Reinwein

assessed permanent partial impairment. Claimant will be awarded an additional 37 weeks of healing period compensation at the appropriate rate.

FINDINGS OF FACT

1. Claimant was employed by Ruan Transport Company on October 3, 1979.

2. Claimant sustained a back injury while working on October 3, 1979.

3. Defendants filed a memorandum of agreement concerning an October 3, 1979 injury.

4. Claimant was paid seven (7) weeks of compensation for the November 3, 1979 injury at the rate of two hundred fifty-one and 87/100 dollars ($251.87).

5. Claimant started having back problems again in 1982.

6. The 1982 back difficulties were causally related to the 1979 injury.

7. Claimant started missing work for back pain on October 22, 1982.

8. Claimant reached maximum medical recuperation on July 6, 1983.

9. Claimant sustained permanent partial disability to the extent of thirty-five percent (35%) of the body as a whole because of the October 3, 1979 injury.

10. Claimant incurred necessary medical expenses because of the injury.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. The claimant was employed by defendant employer on October 3, 1979.

3. Claimant sustained an injury arising out of and in the course of his employment on October 3, 1979.

4. Defendants will be ordered to pay unto claimant an additional thirty-seven (37) weeks of healing period compensation at the rate of two hundred fifty-one and 87/100 dollars ($251.87) per week.

5. Defendants will be ordered to pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of two hundred fifty-one and 87/100 dollars ($251.87) per week.

6. Defendants will be ordered to pay the following medical expenses:

Moline Public Hospital (11/7/82 - 11/9/82)	$ 655.65
Moline Public Hospital (12/1/82 - CT scan)	330.00
Moline Public Hospital (1/13/83 - 1/22/83)	3,054.90
William D. Reinwein, M.D.	4,775.00
Moline Radiology Associates	103.25
Anesthesiology (H. S. Hwang)	285.00
William F. Holmberg, D.C.	168.00

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant an additional thirty-seven (37) weeks of healing period compensation at the rate of two hundred fifty-one and 87/100 dollars ($251.87) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of two hundred fifty-one and 87/100 dollars ($251.87) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant the following medical expenses, to wit:

Moline Public Hospital (11/7/82 - 11/9/82)	$ 655.65
Moline Public Hospital (12/1/82 - CT scan)	330.00
Moline Public Hospital (1/13/83 - 1/22/83)	3,054.90
William D. Reinwein, M.D.	4,775.00
Moline Radiology Associates	103.25
Anesthesiology (H. S. Hwang)	285.00
William F. Holmberg, D.C.	168.00

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

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

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from the date of this decision.

Signed and filed this 27th day of July, 1984.

Joseph M. Bauer
JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUSSELL L. PILIP, Claimant, vs. CEDAR GLASS, INC., Employer, and AETNA INSURANCE COMPANY and TRAVELERS INSURANCE COMPANY, Insurance Carriers, Defendants.	File No. 721819 A R B I T R A T I O N D E C I S I O N

FILED
JUL 27 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Russell L. Filip, claimant, against Cedar Glass, Inc., employer, and Aetna Insurance Company and Travelers Insurance Company, insurance carriers, defendants, to recover benefits under the Iowa Workers' Compensation Act for an alleged condition arising out of and in the course of his employment. It came on for hearing on November 9, 1983 at the Juvenile Court Facility in Cedar Rapids, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file contains a first report of injury received December 23, 1982, and a Form 2 received in March of 1983 from Travelers indicating weekly benefits are not being paid pending investigation.

At the time of hearing the parties stipulated to a rate in the event of an award of $184.90. Time off work was one week. Defendants stipulated to the fairness of medical expenses but not to the necessity.

The record in this matter consists of the testimony of claimant, Patricia Ann Filip, Donald Dearborn, and Steven Ovel; claimant's exhibit 1, a series of medical records; claimant's exhibit 2, the deposition of Jo Lynn M. Glanzer, M.D., claimant's exhibit 3, medical expenses; claimant's exhibit 4, mileage expenses; claimant's exhibit 5, a bill of costs; claimant's exhibit 6, 1981 tax returns; claimant's exhibit 7, 1982 tax

returns; claimant's exhibit 8, various labels; claimant's exhibit 9, documents from the personnel file; claimant's exhibit 10, wage information; claimant's exhibit 12, an employee handbook; claimant's exhibit 13, portions of the safety inspection manual; claimant's exhibit 14, a nontoxic particle mask box; claimant's exhibit 15, a particle mask; claimant's exhibit 16, a chemical cartridge; claimant's exhibit 17, a shirt worn by claimant; claimant's exhibit 18, pants worn by claimant; claimant's exhibit 19, a drawing of the plant; Travelers' exhibit A, an affidavit from Shelby Swain; Travelers' exhibit A1, wage information; Travelers' exhibit D, a mask; Aetna's exhibit A, an affidavit from Diane Dooley. Defendants' objection to claimant's exhibit 11 is sustained. The parties submitted briefs.

ISSUES

The issues in this matter are whether or not claimant's condition 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 may suffer; whether or not claimant is entitled to healing period and permanent partial disability benefits; and whether or not the provisions of section 86.13 have been triggered. Travelers has raised issues under Iowa Code sections 85.26 and 85.23.

STATEMENT OF THE CASE

Twenty-five year old claimant testified that he was last employed by defendant employer on August 31, 1983 at which time he voluntarily terminated his employment for health reasons and to return to college to obtain a degree possibly in business. He has some prior college work heading for a major in criminal justice.

Claimant recalled that before starting work for defendant employer in mid March of 1979 he had worked in a supermarket as a cook and later "deli" manager, had been a restaurant trainee and had served a short time as hotel cook. When he went to work for defendant employer he planned to work his way into a management position.

Several months after he commenced work, he became a gel coat operator. He remembered being told by Dearborn, the plant manager, that he could wear either of two masks he wished to wear. He admitted being told by Dearborn to wear the mask at all times, but he understood it was because failure to wear the mask looks bad to customers coming through rather than because of any health hazard. He did not recollect being reprimanded for wearing the mask on the top of his head. He said that he knew both the nature and the danger of the chemicals with which he worked. He started out wearing the particle mask, but he found it uncomfortable and stopped wearing it for a couple of months.

Claimant reported that he saw Dr. Glanzer in September and talked to Dearborn a couple of weeks thereafter. He agreed that Dr. Glanzer told him not to go back to the plant. He testified that he asked for a transfer and was moved to general labor. He testified both that he thought he sprayed at most a month after seeing Dr. Glanzer and that his last job gel coating was done at the end of October or beginning of November. He was told by Dr. Glanzer to wear the NIOSH mask which Dearborn bought after October. Claimant assumed the NIOSH mask did more filtering, but he thought it uncomfortable, hot and steamy. He was instructed when he went in with a work release to wear the mask in the plant.

In January of 1983 he went back to wearing the particle mask when he was in the production area. He said that it was at this time that trouble with communicating occurred. Some of his symptoms decreased; and all subsided to a certain extent, but he continued to have residuals even though he was not spraying.

Claimant asserted that he was told by Dr. Glanzer to take a week off.

He called Dearborn and asked about being compensated. This call occurred when he came back from vacation. Claimant understood from Dearborn that the insurance company did not think claimant had a health problem and that claimant had not been wearing his mask. Claimant insisted he was informed that he had an attitude problem.

Claimant recalled a steady decline in his health evidenced by headaches, dizziness, numbness in his arm and nausea which prevented his eating lunch. The latter condition came on within six months after he started to spray paint. He had congestion in his nose which became an actual steady drip as time went by. Numbness occurred as early as 1981. He discovered a pattern to his symptoms in that he felt better on weekends and was then able to eat lunch.

Claimant noticed some increased sensitivity to certain materials and more specifically to paint and to acrylic floor wax. He claimed that prior to his chemical exposure at defendant employer he had no such reactions.

Claimant testified to a good work relationship with Dearborn who he said was easy to get along with, but whom he perceived as less than totally truthful. He could not remember any specific incidents of dishonesty at work; however, he recalled Dearborn's saying he had lied to an employee before and would lie again.

Claimant agreed that no doctor had placed any restriction on his ability to get a job in the future and that he could do a management job in an area without fumes. He had not applied for other jobs, but he said that his condition has not restricted his making job applications.

Claimant asserted that he was warned about wearing his mask on one occasion and after that he used the mask as directed.

Twenty-four year old Patricia Ann Filip, claimant's spouse of six years, testified that claimant was in fine health when he commenced work for defendant employer. Eventually, he developed headaches, nausea, dizziness and lethargy. These signs and symptoms were first evident to her a couple of years ago, but in time they worsened. She noted claimant's inability to do things and to get up and get going. His symptoms diminished when he was not at work.

Filip reported that at first she attempted to launder claimant's clothes daily. Finally, he just kept on wearing them until they wore out. His outer clothes were left at work. She recalled an odor on claimant's hair, person and underclothes and a taste when she kissed him.

The witness said that her husband complained about his working conditions and that she had told him he should leave his employment. She stated that claimant's health was a contributing factor in his decision to return to college.

Fifty-six year old Donald Dearborn, plant mananger for defendant since January of 1977, testified that claimant came to work in the lowest job classification and was promoted on the basis of his job performance. He recalled that claimant went to gel coating at his own request.

Dearborn described gel coating as follows: There is one gel coater who works at a high skill level. Gel coating is a part of the production and inspection area. The booth is three-sided and approximately 12 by 12 with a nine foot ceiling. A 36 inch exhaust fan exhausts outside. Filter banks two or three feet high and eleven feet long contain filters that are left for a week. The material utilized gives off an odor which he himself did not find offensive. Gel coaters were instructed in their duties by the plant supervisor. He stated that a minimal amount of gel spray would escape as long as the filter bank and fan are operating.

Dearborn reported that persons are told when they are hired that protective equipment will be furnished on request. There is no safety officer or committee within the company, but safety is discussed at morning meetings. A handbook makes no mention of hazards encountered or protective devices to be utilized. A poster in the production area refers to the catalyst used.

The plant manager testified that the gel coat operator could wear a particle mask if he wanted to and that use of the mask would be in compliance with company rules. He assumed that claimant knew the types of masks available.

Dearborn characterized claimant as a very good employee who took an interest in his work, who approached it with enthusiasm and who wanted to advance to a management position some day.

Although claimant was given no written reprimand, he was warned not to wear his particle mask in a certain position or on top of his head on at least a half dozen different times. Dearborn believed that claimant did not use one of the masks available to him because it would restrict his speaking and his sight.

No citations for violations had been issued against the company by any government agency.

Dearborn indicated that he was never informed of any injury to claimant, but that he first became alerted to claimant's condition about the time he received a communication from Dr. Glanzer. He knew claimant was going to a physician for respiratory problems, however, he did not know the condition for which claimant sought treatment was work-related. He did not observe any decrease in claimant's work activity up to the time of the doctor's report. Claimant's time and attendance records from July 1, 1982 to September 1, 1983, according to the witness, showed no time missed due to illness. He said that claimant worked during January of 1983 with the exception of a vacation.

Dearborn did not know who had talked to Paul McCoy, insurance agent, to tell him of claimant's claimed injury. He acknowledged that two other employees had problems with the components of the gel coat.

The witness thought claimant was not removed from gel coating until January of 1983, but he was unable to verify that opinion. He said that claimant's pay as a gel coater was higher. He thought that at least by December 2, 1982 claimant was receiving less pay and he indicated that it was possible claimant stopped gel coating in October or November.

Dearborn also discussed conditions in the production area. He thought wearing of a particle mask would be protection. He said no mask rule was in effect in that area and that generally with some exceptions masks were not worn in that department.

The witness said that employees are asked about allergies and told what the company manufactures. He did not observe claimant's having any difficultes after November 1, 1983 and he had not criticized claimant for physical ability.

A letter from the toxological and labeling supervisor dated August 31, 1983 provides information regarding coatings. Symptoms of chronic exposure include a metallic taste, loss of appetite, indigestion, nausea, vomiting, constipation, abdominal cramps, sleeplessness, weakness and dermatitis. Special protective information states: "When used in restricted ventilation areas, wear NIOSH approved chemical/mechanical filters designed to remove a combination of particulate, gas and vapor. When used in confined areas, wear NIOSH approved air supplied respirators or hoods. Use NIOSH approved respirators when flame cutting, welding and hazing material coated with this product."

Thirty-five year old Steven Ovel, who was president of defendant employer from 1977 until it was sold, testified to being involved with the company on an almost daily basis. He said that he knew claimant and had observed him working, but that Dearborn was the only employee under his direct supervision and that he wished to observe the chain of command.

Ovel described claimant as an employee with no attitude problem who performed the technical aspects of his job to the best of his ability. He claimed that he insisted gun operators wear facial protection. Although claimant at times wore his mask appropriately, he had at other times seen it on top of claimant's head. On those occasions he would mention the offensive conduct to Dearborn.

The witness indicated that in establishing the policy for wearing facial protection the insurance carrier and the manufacturers' associations working with these kinds of materials had been consulted. When a safety manual was obtained there was an attempt to relate the information to their plant, and the manufacturers were contacted for more information. The company concluded full facial protection was not mandatory and that a particulate mask would be adequate.

Ovel said the company had a disciplinary policy whereby written warnings are given and placed in the employee's personnel file. The witness said that he did not learn claimant was claiming employment-related respiratory problems until recently.

The label from Thermacure indicates it is fifty percent methyl ethyl ketone peroxide in dimethyl phthalate. The label warns contact and inhalation should be avoided.

The container for the nontoxic particle mask contains this warning: "This product is not designed for use as protection against asbestos, silica, or cotton dust or any other toxic dusts, fumes, mists, gases and vapors. NOT FOR USE IN SPRAY PAINT OPERATION."

Jo Lynn Marie Glanzer, M.D., first saw claimant on July 15, 1981 at which time he was complaining of numbness and of tingling in his right arm and chest. The numbness was in the medial aspect of the arm. The tingling was present in the fingers and was worse in the posterior aspect of the chest. It came anteriorly to the pectoral area. Examination of the upper extremities revealed some weakness in the adductus of the right little finger. Claimant gave a history of numbness in his arm and pain in his chest as he operated a sprayer at work the preceding Monday. The numbness increased at night. Claimant was diagnosed as having a brachial plexus neuritis. The doctor gave viral infection as the most common cause and chemical exposures as a possible cause the neuritis. In claimant's case she believed the cause was viral.

Claimant returned on September 27, 1982, a Monday, and told of being ill for a week with a stuffy head and nasal drainage. He said he had been spraying methyl ethyl ketone peroxide. Although he was wearing a particle mask some of the material was getting through to cover his teeth. Claimant did not complain of numbness and tingling at this visit. The physician thought claimant had sinusitis which he treated with Penicillin. She said that the most common cause of sinusitis would be bacterial or viral infection. Dr. Glanzer called the Iowa Health Department to attempt to gain information about methyl ethyl ketone peroxide.

She learned that the chemical could irritate the nasal passages and throat or cause headaches or neuritis. After gaining this information she recommended claimant use a breathing apparatus. She observed that the manufacturers recommended a NIOSH approved vapor or particle respirator for vapors and dust. The doctor had reviewed labels from products claimant was using and she noted that the catalyst he used contained methyl ethyl ketone peroxide in a fifty percent concentration. She did not think the gel coat material contained the substance.

Claimant was seen on Monday, October 18, 1982. Dr. Glanzer discussed the results of her physical exam:

> I questioned an allergy to the material that he was spraying at work causing nasal stuffiness and a red throat. I then discussed it with Dr. Greenblatt who is an allergist, and he stated that we really couldn't test for this type of allergy.
>
> It seemed to be just a cause and effect type of thing. If Russ got better on the weekends, he was probably suffering these symptoms from exposure to the ch mical. His other systems -- excuse me, his other symptoms consisted of dizziness, numbness and tingling in his arms which I thought might be some toxicity from these fumes. (Glanzen dep., p. 14 11. 6-17)

Her diagnoses were possible allergic rhinitis and possible chemical toxicity. Blood tests were done which were within normal limits. The physician said that the neuritis could be caused by a viral illness or a disease such as multiple sclerosis. Claimant returned Tuesday, December 24, 1982 with complaints of a stuffy nose, bad headache, sore throat, extreme fatigue and difficulty breathing. He reported to Dr. Glanzer that he had been off spray painting about three weeks, but that there were persons spraying in his work area.

Claimant was referred to Dr. Greenblatt who found edema and erythema in the nasal mucosa, pharynx and tonsillary pillar. Dr. Greenblatt felt claimant had an irritation as opposed to an allergy.

When claimant continued to have symptoms in January, he was permanently restricted from spraying. Claimant was last seen by the doctor on August 19, 1983 at which time he was having pain in the posterior aspect of his left upper chest area. The pain was diagnosed as a muscle spasm which was unrelated to claimant's other problems.

Dr. Glanzer was of the opinion "that the chemicals that he [claimant] was spraying containing organic peroxide and methyl ethyl ketone were causing irritation to his nose and throat, causing the throat to be sore, probably causing headaches." She acknowledged the possibility that claimant's symptoms were unrelated to his work conditions or environment. She thought that claimant's time off work in December was related to the irritation, but there was no indication in the records that she had kept h.m off. She did not believe that claimant's condition is permanent; however, she said that claimant "may develop irritation of his nose and throat at concentrations less than what other people might notice irritation in the future." But she denied there would be a cumulative effect. She assigned no disability. However, she was questioned:

> In your opinion, based upon reasonable medical probability, will Mr. Filip be able to work around chemicals of the type and specifically the irritants that you have identified here and expressed an opinion in regard to? Will he be able to work around that material in the future?
>
> A. No, I don't think so.
>
> Q. At any time in his life?
>
> A. I don't feel that he could. (Glanzer dep., p. 46 11. 3-11)

She anticipated claimant's developing the same symptoms whenever he was exposed to organic solvents.

Dr. Glanzer thought that claimant was spray painting methyl ethyl ketone, but she had no description of the particle mask he was wearing or the manner in which he wore it.

The physician said that it is not possible to test for toxicity of fumes although lead could be ruled out as a cause. She stated that there are no tests or examinations to definitely relate claimant's symptoms of fatigue and headaches to the chemicals. She noted that Dr. Greenblatt ruled out a number of allergies as a source of the irritation, swelling and redness in claimant's throat and nose.

No examination or testing was done after claimant had been away from his employment. She did not think that claimant's use of the NIOSH mask would necessarily decrease his symptoms as the odor or vapor or fumes could come through the mask and be irritating even if the particulate matter was not getting through. A certificate for return to work or school from Dr. Glanzer reports claimant's inability to work from January 3, 1983 to January 10, 1983.

Jerald J. Greenblatt, M.D., saw claimant on January 10, 1983 with complaints of irritation of the nose, a full head, fatigue and tingling in the arms. The doctor understood that claimant worked with fiberglas, a catalyst and gel coat. Claimant's exposure occurred from April 1977 to October 18, 1982. Claimant said that the area had an exhaust fan and that he used mask. Neither his peripheral blood smear nor his nasal smear showed eosenophils. Pulmonary function studies were 92 percent of normal. Based on a negative family history, skin tests and laboratory data, the doctor was unable to find an allergy. Claimant's symptomatology at work which lessened when he was at home, on weekends or on vacation suggested a response to irritants.

Diane Dooley, claims supervisor for Aetna Insurance Company, signed a affidavit swearing that Aetna had a policy for Cedar Glass from October 2, 1982 through October 2, 1983. H. Shelby Swain, claims supervisor for Travelers Insurance Company, swore that his company provided coverage from March 1, 1982 to October 2, 1982.

An employee handbook from Bremen Glass, Inc., was offered in evidence. Claimant signed that he had received the book on July 15, 1982. In a section on safety employees are admonished to report hazards or unsafe conditions to supervisors, to report injuries immediately and to wear safety equipment in compliance with posted departmental rules.

APPLICABLE LAW AND ANALYSIS

Defendant Travelers asserts 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 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.'"

Claimant's petition was filed on March 8, 1983. Although he had symptoms before July 15, 1981, he did not seek medical treatment until that time at which his primary complaint was of numbness and tingling in his right arm and chest. Dr. Glanzer diagnosed a viral neuritis. It was not until claimant's next appointmen' on September 27, 1982 that Dr. Glanzer began to investigate the chemicals with which claimant was working and to attribute claimant's symptomatology to his work. This deputy commissioner finds that it was not until after claimant sought medical treatment in September of 1982 that he was aware of the nature, seriousness and probable compensable character of his injury. His petition was filed well within the statute of limitations.

Defendant Travelers claims that claimant's petition did not assert a claim under chapter 85A and that assertion is correct. However, pretrial notes, this deputy's notes and the notice of assignment for hearing all contain reference to 85A. The issue of occupational disease is thus a proper one. Therefore, it must be determined whether or not claimant has an injury under chapter 85 or an occupational disease under chapter 85A which arose out of and in the course of his employment.

The Iowa Workers' Compensation Act makes a clear distinction between an injury and an occupational disease. Iowa Code section 85.61(5)(b) proclaims that injury or personal injury "shall not include and occupational disease as defined in §85A.8." Section 85A.14 presents the opposite side: "No compensation shall be payable under this chapter for any condition of physical or mental ill-being, disability, disablement, or death for which compensation is recoverable on account of injury under this workers' compensation law."

In McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (1980) the Iowa Supreme Court at 190 stated that "to prove causation of an occupational disease, the claimant need only meet the two basic requirements imposed by the statutory definition of occupational disease, given in section 85A.8." That section 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 naure of the employment. Such disease must be incidental to the character of the business, occupation 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 McSpadden, said: "First, the disease must be causally related to the exposure to harmful conditions of the field of employment. ...Secondly, those harmful conditions must be more prevalent in the employment concerned than in everyday life or in other occupations."

Claimant testified to the use of various chemical products. Items of clothing offered in evidence at the time of hearing show that his clothes became covered with materials he was spraying. Ovell, president of the company, claimed that he insisted that spray gun operators wear facial protection. Medical evidence also is supportive of claimant's claim. It is apparent that claimant was exposed to harmful conditions in the form of various chemicals in his employment with defendant employer. These chemicals were more prevalent in claimant's employment than outside his occupation. Claimant has established an occupational disease arising out of and in the course of his employment.

Defendant Travelers had raised the affirmative defense of notice. Notice provisions in Iowa Code section 85A.18 make reference to the notice section in chapter 85. 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 there is mention of written notice given in section 85A.18, when that section is read with 85.23 it is apparent that the written notice requirement of section 85A.18 does not eliminate the possibility of satisfying the notice requirement by a showing that the employer had actual knowledge.

It previously has been found that claimant first became aware of the nature, seriousness and probable compensable nature of his disease in September 1982. The time frames in this case are not very clear; however, assuming that claimant had ninety days after September 27, 1982, the date on which he saw Dr. Glanzer, claimant would have had until Christmas day 1982 to give notice. Claimant and Dearborn seemingly had continuing discussions regarding claimant's moving to a different job, his using a mask and the ordering of the new mask. Dearborn acknowledged awareness of claimant's having respiratory problems, but he indicated he was unaware claimant's condition was work related. Even so, this deputy commissioner believes that Dearborn had information which would alert a reasonably conscientious manager to the potential of a compensation claim. The affirmative defense of notice fails.

The next question to be considered is whether or not claimant is entitled to weekly benefits as a result of his disease. The claimant has the burden of proving by a preponderance of the evidence that his occupational disease is a cause of disablement for which he makes claim.

The claimant has the burden of proving by a preponderance of the evidence that his condition 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).

sort of endurance work. He may be able to use the extremity as an assisting extremity, but this may be several months to one year or more for full return to work status with the extremity.

Frank I. Russo, M.D., in a report dated March 5, 1979 stated:

I saw this 55-year-old gentleman today at your request. He relates suffering an injury to his right upper extremity August 7, 1978 when apparently his right arm and hand became briefly caught in a machine and according to description caused a sudden jerking and twisting motion to the right upper extremity which apparently was in a position of complete extension in the elbow and abduction to 90° or so at the shoulder at the time of the injury. He apparently noticed marked discomfort immediately after the injury, sought some medical attention and was apparently hospitalized for a period of a few days. He subsequently persisted in having complaints of discomfort over the right shoulder which is exacerbated by any movement or activity. Attempts were made to return him to work in October or so, but apparently he tolerated this for only about 3 days. He has been under the care of Dr. M.N. Fulton, an orthopedic surgeon in Muscatine, Iowa, has received physical therapy consisting of the use of ultrasound and cortisone in an ultrasound-medium base f r "phonophoresis". [sic] He has not had any direct injection into the right shoulder girdle musculature. Apparently this gentleman developed increasing amounts of parethesias in the ulnar distribution, particularly after attempting to return to work during the fall. This apparently was investigated at Iowa City but as far as I can determine in questioning the patient, the only tests being performed at that time were nerve conduction studies with no accompanying needle electromyographic examination, at least not insofar as the patient could recollect, and I do not have any reports of this study, with the exception of Dr. Fulton's notes stating that there was evidence of slowing across the elbow, suggesting tardy ulnar palsy. The last note which I have from Dr. Fulton states that this gentleman has a full range of motion in the shoulder, although he does have some diffuse discomfort in the shoulder joint upon palpation. This gentleman has had some mild relief with the use of TNS, which he has been using for the last couple of months, but apparenntly has had some difficulty with dermatitis developing from the electrogel and/or the electrodes themselves. This gentleman denies any neck pain as such. He apparently is shortly to be resumed on some physical treatments, the exact nature of which he is uncertain. On questioning he denies any active exercise program ever being initiated for his right upper extremity.

EXAMINATION: This gentleman reveals a well developed white male who does not appear to be in acute distress. Examination of his neck reveals a normal range of motion in all planes. There is a question of some mild decrease in muscle mass of the right shoulder girdle musculature and the supra and infraspinatous areas, as well as in the deltoid. I could not get this gentleman either actively or passively to demonstrate a full range of motion in the right shoulder. He complained bitterly of pain and resisted abduction beyond about 90°. I was able to achieve about 130° of flexion, normal adduction and about 30° of extension at the shoulder. This gentleman complains rather diffusely on palpation of the bicipital tendon area, the area of the deltoid insertion, and the rotator cuff muscles posteriorly. There does not appear to be any gross muscular atrophy in the remainder of the right upper extremity. On manual muscle testing, however, it was very difficult for me to get accurate assessment of strength in the right upper extremity with relative weakness noted rather diffusely in the entire right arm vs. the left with the exception of the right hand, where there was no significant evidence of any ulnar weakness noted despite reports of ulnar entrapment neuropathy. Deep tendon reflexes at the biceps, triceps, and brachioradialis are physiological and symmetrical. Sensory examination reveals a diffuse subjective decrease to pin-prick sensation throughout the entire right upper extremity vs. the left, slightly more intense in the distal ulnar distribution. There is no evidence of any swelling or significant temperature change between the two upper extremities.

IMPRESSION: Chronic right shoulder pain with significant discrepancies in range of motion noted on my attempts at examining this gentleman today and on previous examinations by Dr. Fulton, with significantly less range of motion noted today, possibly because of some hesitancy on the part of the patient to demonstrate a complete range of motion during my exam. Rule out possible brachial plexus stretch injury. Rule out significant psychophysiological overlay.

RECOMMENDATIONS: At the present time I feel it is virtually impossible for me to make any sort of a permanency rating, as I don't feel I can make an objective and accurate measurement of this gentleman's range of motion and some of the other basic functions which I would have to test in order to rate him. As I did note, there does appear to be some discrepancy in the range of motion which he demonstrates for me today and that which Dr. Fulton has noted. I am somewhat concerned about the possibilities of this gentleman having a mild brachial plexus injury with some mild relative atrophy noted in the right shoulder girdle musculature which could well be from disuse or which could represent a neurological problem. As far as I can ascertain from the patient, it does not sound like he had a complete EMG exam at the time of his electrodiagnostic studies and I would strongly recommend that such an exam be performed, whether by myself or at the patient's preference at Iowa City. I also, however, feel that this gentleman should probably have a thorough psychological evaluation to be certain at this point whether there is any conversion or any psychophysiological overlay and if these two work-ups are negative, I would suggest that this gentleman be placed on a very vigorous supervised exercise program for the right shoulder to try to remobilize it.

In the clinical notes of a Dr. Harris and a Dr. Lehmann dated November 6, 1980 it was stated:

The patient is being seen for Social Security disability examination. The patient is a 57 year old white male who on 8/7/78 caught his left arm in a machine which he states malfunctioned and the arm was thrown into ABduction [sic] and external rotation. The patient has not worked since that time and was employed as a machinist for Tool and Dye. He denies any previous problems of shoulder pain or neck pain and denies any previous x-rays having been obtained. The patient has been followed in the Orthopaedic Clinics at the University of Iowa under the care of Dr. Albright for what was initially felt to be a right frozen shoulder. He has had the full gamut of treatments, including Tolectin and Aspirin [sic] which helped some, exercises which increased soreness, neuroprobe which did not change his pain, TNS which helped him somewhat which he used 4 hours a day until he had blistering under the pads, phonophoesis with no effect, manipulation under anesthesia, 10/5/79, and ganglion block in July of 1980 which did not change his pain. The patient states that he has a constant aching in the anterior right shoulder, right shoulder, right pectoral area, right side of his neck and right posterior scapular area as well as aching over the right anterior brachium and right lateral antero-brachial area. The patient states that his aching is made worse with lifting and he can maximum lift 10 to 15 lbs. He states that he has a constant numbness over the ulnar 3 digits of the right hand and on the ulnar side of his distal forearm, dorsally. He states that the numbness is constant in nature and does not change from day to night as no change in its intensity. Because of the aching in his right shoulder, the patient states that he can sleep for a maximum of 3 hours. The past medical history is remarkable for abdominal pain of undetermined etiology, requiring inhospital evaluation in August of 1980. He has a history of analfistulas and has had an appendectomy.

Physical examination - range of motion right over left, external rotation 35-35, internal rotation to billfold area to near the tip of the scapula. ABduction [sic] 75°-180°; flexion 90-160°; with attempted passive range of motion of the shoulder the patient voluntarily resists. There is no crepitation felt on either passive or active range of motion. He has diffused tenderness in multiple areas about the right shoulder including the biceps tendon corcoid process, deltoid bursa and posterior shoulder joint. He has no measurable atrophy, being 29 cm in circumference, bilaterally, 16 cm above the cephaled portion of the . [sic] The patient had an inconsistent 2point examination of the right hand. Initially, he had 5mm 2point over the medium distribution including the radial half of the ring and ulnar half of the long finger, but after testing the small digit, which was greater than 30mm 2point, he began to manifest a 30mm 2point discrimination over the radial side of the ring and over the ulnar side of the long. He has 2point greater than 30mm consistently on the ulnar half of the ring finger. The patient had some mild weakness which was possibly voluntar of the right intrinsics. There was no intrinsic atrophy, per se. The patient had some objective weakness of the flexor carpalmaris on the right. All other motor groups were +5 and symmetric including flexor carpi radialis, wrist extensors, finger flexors, finger extensors, biceps, triceps, pronator, supinator and deltoid. The bicep and

tricep reflexes were +2 and symmetric. Dull vs. sharp discrimination was intact in all dermotomes except on the ulnar side of the right forearm and the lateral posterior right brachium. It was of note, however, that the patient's dull vs. sharp was inconsistent in the other areas, at times being normal and at other times being abnormal. The patient's deep tendon reflexes, biceps, triceps, brachial radialis and pronator were +2 and symmetric, bilaterally. The patient had full range of motion of the neck without discomfort.

Previous x-rays taken at the University of Iowa were reviewed. A c-spine was normal, right [sic] plain films normal, right shoulder arthrogram was interpreted as normal.

ASSESSMENT - periarthritis of right shoulder with some evidence of right ulnar neuropathy.

DISCUSSION - [sic] the patient was seen and examined with Dr. Lehmann. The patient has been out of work for more than 2 years. Because of his age we would expect the patient to have a poor potential for work rehabilitation and would expect him to have some difficulty for being employable.

Joseph A. Buckwalter, M.D., who testified by way of deposition stated that he is an orthopedic surgeon and is an associate professor of orthopedic surgery. Dr. Buckwalter indicated he saw claimant on June 3, 1982 and that his findings were essentially the same as all of the previous physicians. Dr. Buckwalter disclosed that the doctors had exhausted the treatments that could help claimant. Dr. Buckwalter opined that claimant's condition was permanent.

APPLICABLE LAW

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

As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 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 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 Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden v. Big Ben Coal Co., supra.

ANALYSIS

As indicated previously the question presented to the undersigned for consideration is the extent of claimant's permanent partial disability.

Dr. Fulton rated claimant's functional impairment at 20 percent of the whole arm. Dr. Fulton's report does not state that this rating was a a rating of impairment to the body as a whole. However, it is clear to the undersigned that claimant's impairment went beyond the schedule into the body as a whole and was not limited to the scheduled member.

Functional impairment is only one of the factors in determining a persons's industrial disability. Claimant is 59 years old and is a high school graduate, and has also had training in mechanics. Claimant has operated a dairy farm, worked as a mechanic and salesman, managed bowling alleys and pro shops. Claimant has experience as a grinder and finisher, tool and die machinist and a productions inspector. At the time of his injury claimant worked as a machinist and was operating a hand operated vertical turret lathe. Although claimant may not be able to return to the position he held at the time of his injury because of restricted movement it would appear he could return to other positions which he has held in the past.

Defendant terminated claimant's employment because of his injury and restrictions. This is exactly the type of case where the holding in Blacksmith applies. Claimant has had an actual reduction in his earnings as a result of that termination. This termination greatly increases the impact that this injury has on claimant's life.

Claimant appeared well motivated. Claimant has attempted other work since his injury. The undersigned does note that claimant does have transferable skills which would help him in other areas of employment, but claimant has limited the scope of his employment endeavors. Claimant has managerial skills and sales skills, it would not appear from the record that claimant has made any attempt to find work in those areas. It is determined that claimant has an industrial disability of 30 percent as a result of his injury on August 7, 1978.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

FINDING 1. As a result of his injury on August 7, 1978 claimant has a functional impairment of twenty percent (20%) of his whole arm.

FINDING 2. Claimant's impairment goes beyond the upper extremity into the body as a whole.

FINDING 3. Claimant is fifty-nine (59) years old.

FINDING 4. Claimant is a high school graduate and had some training as a mechanic.

FINDING 5. Claimant has experience operating a dairy farm.

FINDING 6. Claimant has worked as a mechanic and car salesman.

FINDING 7. Claimant has managed bowling alleys and pro shops.

FINDING 8. Claimant has experience as a grinder and finisher.

FINDING 9. Claimant has worked as a tool and die machinist.

FINDING 10. Defendant terminated claimant as a result of his injury and restrictions.

FINDING 11. Claimant is well motivated.

FINDING 12. Claimant has transferable skills in both management and sales.

FINDING 13. Claimant has limited the area of his employment search.

CONCLUSION A. Claimant has an industrial disablity of thirty percent (30%) as a result of his injury.

THEREFORE, defendants are to pay unto claimant an additional fifty (50) weeks of permanent partial disability benefits at a rate of one hundred ninety-three and 81/100 dollars (193.81) per week.

Defendants pay cost of this action.

Defendants pay interest on date of award.

Defendants shall file a final report upon payment of this award.

Signed and filed this 30th day of July, 1984.

David E. Linquist
DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD A. GONZALES,	:	
Claimant,	:	File No. 750438
vs.	:	A R B I T R A T I O N
CENTURY SIDING CO., INC.,	:	D E C I S I O N
Employer, Defendant.	:	FILED

JUL 30 1984

INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Edward A. Gonzales, claimant, against Century Siding Co., Inc., employer, defendant, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury arising out of and in the course of his employment on June 29, 1982. It came on for hearing on July 13, 1983 at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted with the filing of additional medical expenses on July 25, 1984.

The industrial commissioner's file contains no first report of injury or memorandum of agreement.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, income tax forms and a statement from claimant; claimant's exhibit 2, a computer printout of medical expenses; and claimant's exhibit 3, various medical records.

ISSUES

Claimant's petition was filed on December 29, 1983 with a proof of service on January 5, 1984. A motion for default was filed on February 24, 1984. That motion was sustained by order of a deputy industrial commissioner filed March 12, 1984. Another deputy commissioner closed the record to further activity or evidence by defendant on April 12, 1984. At the time of hearing no one from defendant appeared nor anyone for it.

Rulings and decisions of the agency have held that the entry of a default resolves all aspects of liability against defendant. Sherwood v. Collins Radio Co., 33 Biennial Report of the Industrial Commissioner 66 (1978).

The issues in this matter are whether or not there is a causal relationship between claimant's disability and his injury of June 29, 1982 which would entitle him to permanent total disability benefits and whether or not claimant is entitled to benefits under Iowa Code section 85.27.

STATEMENT OF THE CASE

Forty-seven year old married claimant, father of seven children with four dependent children at the time of his accident, testified to a tenth grade education with no additional training. His first work out of high school was in a gas station. He spent three years as a marine infantryman. When he got out of the service he delivered dresses for a dress shop. Thereafter, he commenced a series of jobs involving essentially carpentry work doing such things as putting up awnings, storm windows and siding.

Claimant recalled that in March of 1982 he was hired by Rich Davis, the owner of defendant, to put up siding. At that time he was working for another company which recommended his hiring to Davis who called him and arranged to meet him at the job site. Claimant was to be paid on a weekly basis for the application of siding in hundred foot amounts. No taxes were withheld. Materials were supplied by defendant who set hours, controlled the work, and visited the job site each day or every two or three days. Claimant ordered materials as they were needed and billed them to defendant. Claimant was of the opinion that he could be moved from job to job or fired by defendant at will.

Claimant said that he specifically asked defendant about insurance coverage and he was told that insurance was carried. His spouse was told at the time of his hospitalization that there was insurance coverage.

Claimant remembered the circumstances of his injury of June 29, 1982 as follows: It was 11:15 in the morning. He went up a ladder to work on a wall. The ladder shifted. Scaffolding fell and he fell thirty feet. He was taken to the hospital where he remained until mid-September.

Claimant stated that as a result of that injury he had paralysis beginning at T-11. He has no bowel or bladder control.

He reported having physical rehabilitation in Rock Island, Chicago and Rochester. He was going to commence some rehabilitation with the state of Iowa, including getting his GED, but a hospitalization intervened.

Claimant said that he has had a total of ten hospitalizations since his injury spanning sixteen months' time. He continues to see Dr. Verma on a monthly basis and to visit the Mayo Clinic every five or six weeks. He has therapy three times each week with sessions lasting forty-five minutes each. He also has two learn-to-swim classes each week.

Claimant listed his present problems as an inability to walk, constant pain for which he takes Darvon, muscle spasms in his feet, bladder infections treated with Bactrim, swelling in his feet for which Lasix has been prescribed, a burning sensation in his legs, and blood clots. He also takes Valium. He sleeps in a hospital bed with his feet elevated. He has special socks and Ted hose. He avoids bed sores by doing pushups in his chair and by using special cushions.

A statement attached to claimant's tax returns indicates he started work on May 17, 1982. On May 27, 1982 he was paid $1,000; on June 16, 1982 he was paid $1,000; and on July 14, 1982 he was given $950.

A discharge summary regarding claimant's hospitalization at the time of his injury on June 29, 1982 reports claimant's having a fractured dislocation of T-10 and T-11 with an unstable spine and paraplegia. Claimant had a thoracic decompression laminectomy at T-11 with posterior wiring at T-9, T-10, T-12 and L1; a Harrington rod fixation and a spinal fusion with bone graft.

During his hospitalization, claimant was started on a bowel program and taught to catheterize himself. He was treated for depression which cleared. He developed a complete occlusion of the right posterior tibial vein for which anticoagulents were prescribed. Claimant was placed on daily outpatient physical therapy at the time of his discharge.

Claimant has a history of pulmonary fibrosis.

Vijay Verma, M.D., reports claimant's admission to a Chicago hospital for nine weeks of treatment which the claimant told him provided no benefit. Claimant was scheduled to resume rehabilitation with his bilateral lower extremity braces.

Dr. Verma reported claimant's having surgery apparently in early 1984 to remove Harrington rods. Claimant was started on a reconditioning program which consisted of therapy three times each week.

A computer printout shows medical expenses for claimant totaling $282,398.95.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 29, 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 medical evidence supports the conclusion that claimant's current disability is causally related to his injury of June 29, 1982.

Claimant's seeks permanent total disability and such an award is seen as appropriate at this time. Claimant is reaching a difficult age in terms of employability. He is nearing a time when retraining is unlikely, but he still has a number of work years ahead before his retirement. His education is limited and thus far his pursuit of a GED has been hindered by his medical treatment. His work experience also has been limited primarily to carpentry work. It may be that he can put those carpentry skills to work, but his doing so will have to be in a much different capacity from that in which he was working before. In all likelihood, he will need professional rehabilitative assistance to do so.

Claimant's injury was a severe one. He is for the most part confined to his wheelchair. He has been hospitalized for sixteen of the twenty-four months since his injury. His present schedule of therapy would not allow him to perform a regular eight hour a day, five day a week job.

Claimant has incurred medical expenses as a result of his injury and those expenses will be awarded pursuant to Iowa Code section 85.27.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-seven (47) years of age.

That claimant is married and had four dependent children at the time of his injury.

That claimant has a tenth grade education with no additional training.

That claimant served in the marines as an infantryman.

That the major portion of claimant's work experience has been as a carpenter.

That claimant was employed by defendant to apply siding.

That claimant received two thousand, nine hundred fifty dollars ($2,950.00) from defendant for six weeks' work.

That on June 29, 1982 claimant fell from a scaffold at his job site.

That claimant underwent a thoracic decompression laminectomy at T-11 with posterior wiring at T-9, T-10, T-12 and L1; a Harrington Rod fixation and a spinal fusion with graft from the iliac crest.

That claimant has a paralysis which has rendered him unable to walk.

That claimant has been hospitalized for sixteen (16) of the twenty-four (24) months since his injury.

That claimant is troubled by pain, muscle spasm, bladder infections and blood clots.

That claimant is receiving physical rehabilitation.

That because of his medical condition, claimant has been unable to pursue vocational rehabilitation.

That claimant takes various medication.

That claimant has incurred numerous medical expenses.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence a causal connection between his injury of June 29, 1982 and his present disability.

That claimant has established by a preponderance of the evidence entitlement to permanent total disability.

That claimant has established entitlement to benefits under Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant permanent total disability benefits during the period of his disability at a rate of two hundred ninety-four and 18/100 dollars ($294.18).

That defendant pay the accrued amount in a lump sum.

That defendant pay medical expenses as set out in claimant's exhibit 2 which total two hundred eighty-two thousand, three hundred ninety-eight and 95/100 dollars ($282,398.95).

That defendant pay interest pursuant to Iowa Code section 85.30.

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

That defendant file periodic reports as required by the agency.

Signed and filed this 30 day of July, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LORRAINE S. GONZALES, Claimant, vs. GLENWOOD STATE HOSPITAL-SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 660503 A P P E A L D E C I S I O N

FILED
JUL 19 1984
IOWA INDUSTRIAL COMMISSIONER

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. Claimant appeals from an adverse arbitration decision.

The record on appeal consists of the transcript; claimant's exhibits 1 through 93, inclusive; and defendants' exhibits A though G, 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 found that claimant hurt her knee at work on January 31, 1979 but that she did not prove any resulting disability and therefore no right to any compensation benefits.

Claimant argues that she hurt her back on that date and that compensation ought to be awarded for the back injury. Claimant states the issues on appeal:

I. The decision of the Deputy Industrial Commissioner is abusive of his discretion unsupported by substantial evidence in the record made before the Deputy Commissioner when the record is viewed as a whole and is unreasonable, arbitrary and capricious

and can only be characterized by being termed in [sic] abuse of discretion and the opinion is clearly an unwarranted exercise of discretion.

II. The Deputy Commissioner errored [sic] in failing to follow the Iowa Rules of Evidence, in particular, Rule 703 and 705.

III. Claimant has sustained its [sic] burden of proving by a preponderance of the evidence that she received an injury on January 31, 1979, which arose out of and in the course of her employment which is causally related to the disability on which she now bases her claim and the evidence supports a probability rather than a possibility as couched in the terms of the arbitration decision.

EVIDENCE PRESENTED

On Jauary 31, 1979, while in the employ of the Glennwood State Hospital-School, claimant fell in a driveway on the employer's property. On February 12, 1979 she sought treatment of her left knee by her personal physician, Fred A. Hansen, M.D. In May of 1979, she complained of back difficulties. In June 1980 she was referred to an orthopedic surgeon, Ronald K. Miller, M.D., where she was treated for problems with the quadriceps muscles above the knees. She continued to have difficulties with her legs and low back and eventually in 1982 had a laminectomy at L3-L4.

Dr. Hansen testified by deposition that, prior to February 1979, he had treated claimant for routine matters, one of which included an injury to the left knee of 1978, an injury which occurred at the Glenwood State Hospital-School. He further testified:

> Q. On that occasion that you gave her a knee brace [February 12, 1979] for her left knee, did she indicate pain in her back?
>
> A. I think that came shortly after that. On the 14th of May, 1979, we had an X-ray of her back. Something in her back gave her problems and pain on movement. And she said this happened on the 12th of May--12th of May of 1979. (Hansen dep., p. 7 ll. 6-12)

With respect to exactly when claimant's back pain started Dr. Hansen testified: "Q. Prior to May of 1979 had Mrs. Gonzales had any complaints of back problems or back pain? A. No. I think those all came later. Yeah. 12th of February on to May. It began bothering her apparently the first time at the end of May." (Hansen dep., p. 9 ll. 4-8)

In a hospital admission of May 29, 1982, Dr. Hansen stated:

> HISTORY OF PRESENT ILLNESS: The patient has had a chronic backache for sometime. Yesterday and the night before, she had a severe back pain in the left low lumbar area. She was up to the bathroom at 0500, sneezed and immediately had a severe pain in the central lower back. The patient was practically screaming. The patient was brought to the hospital by the Emergency Unit where a hypo of Demerol gave some relief. The pain was in the lower back and radiated down to both legs, especially the anterior side.
>
> PAST HISTORY: In January of 1979, the patient fell on the ice at the Glenwood State School and injuried [sic] her back and left knee. She is now involved in a settlement with the State School at Glenwood. She had had no prior back troubles or leg troubles prior to the injury.

Claimant was also seen by Ronald K. Miller, M.D., a qualified orthopedic surgeon, who testified:

> We initially saw her on 6-12-1980 at the request of Doctor Fred Hansen in Red Oak. She was seen through the Red Oak Orthopedic Clinic, at Montgomery County Memorial Hospital. I have a notation there: 23-year old Glenwood State Hospital employee who apparently slipped and fell approximately one year ago; since that time has been having continued difficulty; on examining her we noted that she had tight hamstrings bilaterally; had minimal back problems or symptoms and we felt that her difficulty at that time seemed to be primarily peripheral. She, in addition, had been having numbness and tingling on the dorsum of her left foot; could be compatible with an L4, 5 disc or root irritation. (Miller dep., p. 4 ll. 1-14)

With respect to exactly why he was consulted, Dr. Miller stated:

> The main thing that we were seeing her for was the weakness and the complaints in her legs. And in going back to this first time that we saw her, we were suspicious that there could have been something going on in her back and certainly wanted to rule that out. And that was one of the reasons why we had Doctor Gill see her in the hospital. And he really didn't come up with much of anything from a neurological standpoint. (Miller dep., pp. 9-10 ll. 23-25 and 1-6)

With respect to the weakness in claimant's legs, Dr. Miller testified:

> The only thing that it [Cybex testing] told us was that she had quite a bit of weakness in the quads and in somebody who is having some knee problems, they can get a lot of quadriceps atrophy. And they can get a lot of quadriceps weakness. And we felt that perhaps at that point that she hadn't been using her leg and had just developed disuse atrophy in the quadriceps musculature. Although that's -- were impressed with the amount of quadriceps weakness she had, much, much more so than you might expect from just a simple knee injury. (Miller dep., p. 11 ll. 7-16)

With respect to the causal relationship, Dr. Miller stated:

> Q. Doctor, Mrs Gonzales has had a laminectomy on -- she underwent a lumbar myelography, which showed a ruptured lumbar disc at L3, 4 on the left and subsequently on September 29th, 1982, underwent a lumbar laminectomy and removal of this disc. Doctor was that -- in your opinion, was a ruptured disc at L3, L4, apparent, in you opinion, on your last examination of Mrs Gonzales?
>
> A. If she had a disc, that level sort of surprises me. I know that when we initially saw her, I had a notation there L4, 5 disc, a root irritation. So, no. (Miller dep., pp. 14-15 ll. 20-25 and 1-4)

Also with respect to causal relationship, Dr. Miller testified:

> Q. Doctor, other than the hamstring weakness that you described and the pain that Mrs Gonzales had in her knee area, were there any other clues or findings that might suggest a ruptured disc at L3, L4 on your examination of Mrs Gonzales?
>
> A. No. Nothing that I was very very impressed with. (Miller dep., p. 16 ll. 4-9)

James W. Dinsmore, M.D., a qualified orthopedic surgeon, saw claimant on October 2, 1981 with reference to her knee injury. At that time, she did not complain to that doctor about back pain. (Dep., 5) With respect to claimant's knee problem, Dr. Dinsmore testified: "Yes. It was my feeling that the patient primarily had symptoms from disuse, what we call disuse atrophy of the musculature as indicated by the three-quarter inch atrophy of the quadriceps muscle above the knee joint." (Dinsmore dep., p. 6 ll. 17-21) Again with respect to a connection between claimant's work incident and the back condition, Dr. Dinsmore testified: "Q. In your opinion was her knee problem that she came in with, was that at all connected in your opinion to any kind of a back injury? A. Well, I didn't find anything and she didn't relate anything in regard to her back." (Dinsmore dep., pp. 8-9 ll. 21-25 and 1)

Alan H. Fruin, M.D., a qualified neurosurgeon, first saw claimant on September 20, 1982. A myelogram showed a ruptured lumbar disc at the L3-4 level, left, and Dr. Fruin did a lumbar laminectomy on September 29, 1982. (Dep., 5) With respect to causal relationship, Dr. Fruin testified:

> Well, she indicated that--when I first saw her on 9/20/1982, before she was admitted to the hospital, that she had had back and left leg pain for approximately three years. She dated all of this to an episode in 1979, in which she fell and injured herself and had leg pain and back pain of varying degrees on a persistent basis since that time.
>
> Her history of this back and leg pain following a fall was, of course, compatible with the final diagnosis of a ruptured lumbar disc at L3-4 on the left. (Fruin dep., p. 6 ll. 11-22)
>
> ....
>
> Q. And what is that opinion?
>
> A. That it was. (Fruin dep., p. 8 ll. 2-3)

Dr. Fruin qualified the causal connection as follows:

> I think--yes, I think it's unusual for someone to have pain of the degree that she had for three years before a diagnosis was made. But--I think it's a little unusual for someone to go that long without having a diagnosis made, yes. (Fruin dep., p. 21 ll. 1-5)
>
> ....
>
> Well, I am--I am constrained by the information that I get from the patient. She says that she fell, you know, when she was at work at the Glenwood State Hospital and had pain in her leg ever since that fall. So I have to say that that fall is the likely source of her ruptured lumbar disc. (Fruin dep., p. 27 ll. 14-19)

APPLICABLE LAW

Claimant has the burden to 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).

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).

In the case where an expert's opinion based upon an incomplete history, that opinion is not necessarily binding on the commissioner. Musselman v. Central Tele. 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).

ANALYSIS

Claimant's arguments I and III are couched in terms which pertain to a judicial review of an industrial commissioner's decision. The case here is, of course, de novo, and those arguments will be taken to pertain to the question of causal relationship between the injury and the back problem. The arbitration decision stated three reasons why such causal relationship was not present, and those are adopted and repeated here:

> 1) Claimant had no back complaints during several of her visits to the doctors. These complaints were not addressed with any significance to the doctors performing the intestinal bypass.
>
> 2) There was a significant time lapse between the date of injury in late January 1979 and claimant's visit to Dr. Hansen in May 1979.
>
> 3) There was a significant length of time between the traumatic incident and the diagnosis of back pathology. Even though one might conclude that Dr. Miller supports causation, it is important to note that he notes that the L3,4 nerve is a "mixed" nerve, thus, indicating that claimant must have sensory and motor loss in order to support recovery.

Actually, only Dr. Fruin's opinion directly tied the injury to the necessity for the surgery, and that opinion was qualified by the fact that it was based upon the history given by claimant. There was no showing that Dr. Fruin had the advantage of the history given to Dr. Hansen originally, which did not include a back problem. Also, nowhere in the record is there an opinion concerning the severe sneezing incident described by Dr. Hansen.

Dr. Miller's testimony could be taken to support a causal relationship between a back injury and a herniated disc at L4-5; however, he testified that he was surprised that the herniation was one level above and he really did not support a causal relationship argument in favor of claimant.

The other medical testimony, that by Dr. Hansen and by Dr. Dinsmore, did not support a causal relationship.

Taking all of the evidence together, then, the record is insufficient to show that the incident of January 31, 1979 was a substantial factor and caused the subsequent need for surgery and the disability which followed.

With respect to claimant's second argument, the Iowa Industrial Commissioner is under the Administrative Procedure Act and is not obliged to follow the Iowa Rules of Evidence as cited. In this connection and elsewhere in her arguments, claimant states that the testimony of Dr. Hansen should be disregarded because that gentleman is an octogenerian. One can only state that the doctor's testimony appears to be quite clear and concise, clearer in fact than much medical testimony by younger doctors.

Claimant, therefore, has shown no entitlement to benefits for a back injury, and has shown no permanent disability to the knee as a result of the incident of January 31, 1979.

The findings of fact, conclusions of law and order of the arbitration decision are adopted below.

FINDINGS OF FACT

1. Claimant was employed as a child development worker at the Glenwood State Hospital-School on January 31, 1979.

2. Claimant fell in the parking lot at her employer's premises on January 31, 1979.

3. Claimant's injury of January 31, 1979 resulted in claimant being treated for her left knee in February 1979.

4. Claimant first expressed complaints regarding back pain to Dr. Hansen in May 1979.

5. Claimant had an intestinal bypass in August 1979.

6. The bypass surgery was not related to the injury.

7. Claimant had surgery to her back in 1982.

8. The effects of the January 31, 1979 injury were confined to the left leg. It is not permanent.

9. Claimant failed to prove by a preponderance of the evidence that the back surgery and any resulting permanency was related to the injury of January 31, 1979.

10. Claimant did not lose three days of work because of the injury.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by Glenwood State Hospital-School on January 31, 1979.

3. Claimant sustained an injury arising out of and in the course of her employment on January 31, 1979.

4. Claimant is not entitled to permanent partial disability compensation because of the January 31, 1979 injury.

5. Claimant lost insufficient time to entitle her to temporary total disability compensation.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

Costs are taxed to defendants.

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

Barry Moranville

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE INDUSTRIAL COMMISSIONER

LORRAINE S. GONZALES, Claimant, vs. GLENWOOD STATE HOSPITAL-SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 660503 A R B I T R A T I O N D E C I S I O N

FILED
JAN 13 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the Pottawattamie County Courthouse in Council Bluffs on August 5, 1983 at which time the case was closed.

A review of the commissioner's file reveals that an employers first report of injury was filed on August 5, 1983. The record consists of the testimony of the claimant, Cheryl Clark, Edwardo Gonzales and Lloyd Morstad; claimant's exhibits 1 through 93; and defendants' exhibits A through G.

ISSUES

The issues for resolution are:

1) Whether claimant sustained an injury arising out of and in the course of employment;

2) Whether there is a causal connection between claimant's alleged injury and the condition;

3) The nature and extent of disability; and

4) Whether claimant is entitled to benefits pursuant to the penalty provisions of section 86.13, Code of Iowa.

STATEMENT OF THE EVIDENCE

Claimant was employed by the Glenwood State Hospital School on January 31, 1979 as a child development worker. She testified that she fell in the driveway on her employer's premises while reporting to work. Claimant fell on her left side. She lay there for a while and went to the nurse's station. She saw her family physician, Fred A. Hansen, on February 12, 1979. Treatment at this time was focused on the left knee and claimant was given a hinged knee brace. X-rays were taken and were negative. Claimant's complaints of pain continued and claimant saw Dr. Hansen again on May 12, 1979. X-rays of the lumbar spine were taken at this time and were negative. Dr. Hansen again saw claimant on May 16, 1979 and May 29, 1979. On May 16, 1979 claimant was reported to have sustained a back strain. On May 29, 1979 claimant reported malaise. Dr. Hansen's records indicate that claimant indicated that her back had improved. At this time claimant reported that she had hurt her right ankle. Claimant lost about a week of work because of this. A first report, memorandum of agreement and Form 5 were filed.

In August 1979 claimant weighed about 273 pounds. Claimant was admitted to the St. Joseph Hospital in Omaha, Nebraska on August 19, 1979 for a ileojujunal bypass. The surgeon was Claude H. Organ, M.D.

Upon her release from the hospital at the end of August 1979 claimant was terminated on September 8, 1979. Defendants' exhibit C indicates that claimant's resignation was voluntary.

On March 17, 1980 claimant saw Dr. Hansen for "chronic distress" of the left thigh. On June 12, 1980 claimant was examined by R.K. Miller, M.D., a Council Bluffs orthopedist. Dr. Hansen referred claimant to Dr. Miller. Examination revealed tight hamstrings bilaterally and "minimal" back problems. Claimant's difficulty appeared to be primarily peripheral. She had numbness and tingling on the dorsum of her left foot. Dr. Miller thought a neurological evaluation was in order. X-rays of the lumbar spine, left hip and left knee were negative.

Claimant was admitted to Jennie Edmundson Memorial Hospital in Council Bluffs on June 21, 1980 for complete studies. The admitting physician was Maurice P. Margules, M.D. During the first night claimant received a phone call from home and she had to be discharged from the hospital at about 3:00 a.m. on June 22, 1980 because her mother had a health problem.

In July 1980 claimant returned to work as a bus driver. She was paid $600 per month and she worked 40 to 50 hours per week. She was laid off because of a funding cutoff. Her other employments since the injury include self-employment selling home interior items. She testified that she could not handle this because the lifting involved hurting her back. Claimant then worked in a nursing home on the night shift for about three weeks. She was paid $3.35 per hour. She testified that she quit because her back hurt. She also worked about three weeks at Union Carbide and wrapped batteries. She drove a bus again. She watched an elderly lady at home at night.

Dr. Miller caused claimant to be admitted to the Jennie Edmundson Memorial Hospital in Council Bluffs on November 27, 1980. Claimant's chief complaint was left knee pain and weakness. Claimant reported that her left knee had given out about Novembe. 23, 1980. Claimant injured her right shoulder when she fell. Claimant was admitted. X-rays and Cybex testing were performed on the left knee. The discharge diagnosis was a small tear in the left medial meniscus, with weakness in the left quadriceps musculature. Claimant was discharged from the hospital on December 1, 1980.

Claimant was examined by James W. Dinsmore, M.D., an Omaha orthopedist. He noted that claimant was able to stand straight. She had full extension of the knee in standing. She had varicose veins which were prominent on the left side. She had mild "varicosities" on the right. She had full motion of the left knee. She would not squat all the way on the knee. However, passively the knee would fully flex and did not hurt when forced. She had a negative twist sign for medical and lateral compartment pathology. The ligaments were intact. She had no swelling. She had three quarters of an inch atrophy of the quadriceps when measured four inches above the patella. She had a little discomfort in patella manipulation. She had some discomfort with pressure over the medial joint but also had some on the lateral side.

X-rays of the left knee showed a rather marked osteoporosis. Dr. Dinsmore felt that claimant's primary problem was "disuse atrophy" at the left knee. Dr. Dinsmore did not have a definite diagnosis. The only disability he could see was the atrophy which he thought could be eliminated with exercise.

Dr. Hansen caused claimant to be admitted to the hospital in Red Oak on May 29, 1982. The admitting history indicates that claimant had severe back pain in the left lower lumbar area. Claimant had sneezed and immediately had severe pain in the central lower back. Dr. Hansen diagnosed claimant's condition as a lumbar disc syndrome. Claimant was released from the hospital on June 2, 1982.

Claimant was admitted to St. Joseph Hospital on June 17, 1982 for evaluation of back pain which was described as achy. It involved claimant's low back and radiated down her left leg. Claimant's treating physician was Dr. Organ. Lab work was compatible to claimant's bypass. X-rays of the thoracic spine showed no fractures and only minimal degenerative changes. The lumbar spine showed a mild scoliosis with convexity to the left. Disc spaces were normal. Claimant's back pain was not felt to be related to the bypass. Claimant was discharged on June 30, 1982.

Claimant was given a company physical at Land O Lakes in Oakland (exhibit 5). Claimant was admitted to St. Joseph's Hospital in Omaha, Nebraska on September 21, 1982. The hospitalization was for the purpose of evaluation and treatment of back and left leg pain. Claimant's treating physician was Alan H. Fruin, M.D., Chairman of the Department of Surgery and Chief of the Division of Neurological Surgery at Creighton University. Following her admission to the hospital she underwent lumbar myelography, which showed a ruptured lumbar disc at L3-4 on the left. On September 29, 1982 Dr. Fruin performed a laminectomy and removal of this disc. At that time her left leg pain was relieved. Claimant was discharged from the hospital on October 7, 1982.

Claimant then sought out the services of vocational rehabilitation and immediate medical referral was made. Lloyd Morstad was the vocational rehabilitation counselor. He testified at the hearing that there was a possibility for claimant to start her own floral design business. However, he did note certain drawbacks in claimant's ability to deal with numbers. Also included in negative factors in claimant's lack of employability was the fact that claimant's skills were limited by living in a small rural community.

Claimant had problems falling during the winter of 1982-1983. In February 1983 claimant was admitted to the hospital in Red Oak after falling flat on her back on the ice. She was brought to the hospital by emergency unit and was treated by Dr. Hansen. X-rays showed postoperative changes in the lower lumbar spine from the laminectomy. There was mild scoliosis involving the L5-S1 apophysial joints. There was minimal anterior ragging of the vertebral body of T12 (this was new since the 1979 x-rays). Claimant was treated with traction and physical therapy and released after five days.

Cheryl Clark testified that she saw claimant fall on the day in question. Her description of the incident was that claimant landed on her knees. She recalled that claimant earned the nickname "crip" following the incident. She testified that claimant was not a complainer prior to the fall and that claimant had become somewhat depressed thereafter.

Edwardo Gonzales, claimant's husband, testified that claimant still complains of pain and that claimant has sought employment on a more or less continuous basis.

As far as causation is concerned, we have the benefit of many medical depositions and reports. Dr. Hansen is claimant's family physician and treated her both before and after the incident in question. He explained the mechanics of the disc problem in this case as follows:

By Ms. Post:

Q. At the time that you examined Mrs. Gonzales in February of '79, were her complaints of pain or symptoms characteristic or compatible with a diagnosis of a ruptured disk in L-3 and L-4?

A. No. No. This developed over a period of time. It's a long process as a rule. I would be surprised if she developed lumbar disk overnight with an injury unless she had dislocation of the vertebrae, which is a very serious injury.

Q. Are you saying, Doctor, that the ruptured disk at L-3, L-4, does not correspond directly to a single injury date or that--

A. No. I say that the only injury to her back that I knew of was the one that we mentioned in February of '79. And there was a series of events that very slowly developed over a period of eight or nine years. Let's see. Be about four or five years, wouldn't it? There is an almost orderly fashion to these things development [sic]. A disk is a soft tissue which does not show in the X-ray, as I mentioned. And as the vertebrae gradually-- If the disk is ruptured, it's a gradual process of compression and pressing in on the spinal cord, which causes the pain. So I say orderly and about the usual picture, I would think. The time element, as I say, would be all right for the history of an injury followed eventually by a laminectomy.

Dr. Hansen acknowledged that claimant did not complaint of back problems until 1979.

Dr. Miller examined claimant on June 12, 1980 and originally thought claimant's back problems were referrable to the L4-L5 level. An arthorgram was performed on the knee. He last saw claimant on February 18, 1981 and Dr. Miller reported that his chief complaint was with claimant's legs. He stated that the Cybex testing showed weakness in the left leg. He testified that claimant's knee problems were caused by the fall (deposition p. 12, ll. 23, 24). He testified as follows in regard to causation:

By Ms. Post:

Q. Doctor, Mrs Gonzales has had a laminectomy on -- she underwent a lumbar myelography, which showed a ruptured lumbar disc at L3, 4 on the left and subsequently on September 29th, 1982, underwent a lumbar laminectomy and removal of this disc. Doctor was there -- in my opinion, was a ruptured disc at L3, L4, apparent, in your opinion, on your last examination of Mrs. Gonzales?

A. If she had a disc, that level sort of surprises me. I know that when we initially saw her, I had a notation there L4, 5 disc, a root irritation. So, no. The only thing that would suggest a lumbar disc would be the amount of hamstring spasm, and you certainly get hamstring spasm and hamstring tightness with a disc. People with a disc can present with just basically a lot of leg pain and sometimes very little back pain. Doctor Gill had seen her when she was in the hospital and certainly if she had an acute disc at that time I would have thought that he would have picked it up or at least suggested EMG's or possibly a myelogram at that time. So he apparently wasn't that impressed with the physical findings at the time of his examination.

Q. With the condition such as Mrs Gonzales displayed on September 29th, 1982, with a ruptured disc, would that become increasingly -- would the pain in her knee and back areas become increasingly more significant with time?

A. With a lumbar disc?

Q. Yes.

A. Yes, it could. Certainly.

He went on to state that he would have expected to find something neurological (sensory or motor). Dr. Miller went on to address the causal connection question further:

By Mr. Gee:

Q. Am I to understand that, I am a little bit confused here, if Lorraine in the fall that she had related through her history, if she had in fact ruptured the lumbar disc at L3, 4, would that condition be consistent with the tightening or the weakness of the hamstrings and/or the quadriceps atrophy that you found?

A. It could be yes. But again you would expect to find other physical findings other than that. For example, if you had, say, ruptured an L3, 4 disc and that would give you the quadriceps weakness. A disc certainly can give you hamstring spasm. It can give you hamstring tightness. But in addition to that you would normally expect to find other things as well. Not just that per se. I guess it would depend upon how big the disc is; whether it is a central disc; whether it is a lateral disc; I presume since she was having so much trouble with her left leg it is more lateralized than central.

Q. Would there always be these other symptoms that you are talking about?

A. You normally would expect to find it, yes, but not always. But I would guess that most of the time you would expect to find it. And particularly after things have gone on for a year and one half or maybe even two years; certainly in that time frame I would expect to find more things showing up.

He thought claimant's knee problem could be consistent with an injury to the medial meniscus or the synovitis. On redirect examination, Dr. Miller indicated that one of the hallmarks of L3, L4 pathology was a tendency toward buckling of the quads. However, he also indicated that there should also be a sensory loss since the nerve involved is "mixed."

Dr. Dinsmore saw claimant on October 2, 1981. Claimant did not complain of back pain. A summary of his examination follows:

Q. On the date of your last examination, did you recommend any treatment?

A. Yes. It was my feeling that the patient primarily had symptoms from disuse, what we call disuse atrophy of the musculature as indicated by the three-quarter inch atrophy of the quadriceps muscle above the knee joint. The x-rays also showed a rather marked degree of osteoporosis and I told her that some of this osteoporosis could be secondary to her bypass surgery, but I felt probably some of it was just due to not using the knee sufficiently. She did have a definite weakness of the quadriceps muscle and she had a distinct lack of any good physical findings to suggest any intra-articular problems such as a torn cartilage or arthritis or anything such as that.

I suggested that she lift weights and try to re-establish the more normal musculature of the thigh. We discussed the possibility of--oh, we discussed that Dr. Miller had done an arthrogram and that he thought that she might have a torn cartilage and I told her I'd be very happy to review the arthrogram films if she would bring them in for me to look at. I never did see them.

We discussed the possibility of arthroscopic examination and I told her that normally when the examination doesn't show anything to suggest a problem that we normally wouldn't find anything. And I did tell her that this does entail hospitalization, anesthetic and all that which is a major diagnostic procedure if you don't find anything. I couldn't recommend an arthroscopic exam at that time.

He testified that some of claimant's knee problem may have been related to her weight and that claimant "had a distinct lack of any significant findings" other than the wasting of a quadriceps muscle. However, claimant did complain that the knee pain radiated up into the thigh and to the back (p. 16).

Dr. Fruin performed back surgery on claimant and testified as to causal connection:

By Mr. Stephens:

Q. With respect to her complaints of a fall on January 31, 1979, which the Industrial Commissioner has an injury report in his file concerning, do you have an opinion, based upon a reasonable degree of medical and surgical certainty as to whether or not the condition of the Claimant found by you was caused by her fall upon the parking lot at the Glenwood State School on January 31 of 1979?

A. Yes.

Q. And what is that opinion?

A. That it was.

He rated claimant's disability as 15 percent of the body as a whole. He recommended a continuing weight restriction of twenty pounds. He testified that claimant's numbness remains but that claimant's pain has left. He testified that claimant reached maximum recovery in December 1982. He thought it was unusual for someone to have pain of the degree to which claimant complained for three years before a diagnosis was made. Dr. Fruin made the following statement with regrad to causation:

BY MS. POST:

Q. Doctor, I just have a couple more questions.

Is it your opinion that a cause of Mrs. Gonzales' ruptured disc was the trauma, but is it your opinion that it was necessarily the trauma in 1979?

A. Well, I am--I am constrained by the information that I get from the patient. She says that she fell, you know, when she was at work at the Glenwood State Hospital and had pain in her leg ever since that fall. So I have to say that that fall is the likely source of her ruptured lumbar disc.

APPLICABLE LAW

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

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 January 31, 1979 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

ANALYSIS

Based on the principles enunciated, it is found that claimant failed to sustain her burden of proof that her back injury was caused by her work. It is specifically found that claimant was injured on the job January 31, 1979. Further, the evidence indicates that that injury was confined to the left knee. The reasons why I feel that the back injury is not related to the injury are:

1) Claimant had no back complaints during several of her

visits to the doctors. These complaints were not addressed with any significance to the doctors performing the intestinal bypass.

2) There was a significant time lapse between the date of injury in late January 1979 and claimant's visit to Dr. Hansen in May 1979.

3) There was a significant length of time between the traumatic incident and the diagnosis of back pathology. Even though one might conclude that Dr. Miller supports causation, it is important to note that he notes that the L3,4 nerve is a "mixed" nerve, thus, indicating that claimant must have sensory and motor loss in order to support recovery.

There is no evidence of record to indicate that any permanent impairment rating has been given regarding the knee. The record indicates that claimant's knee injury is temporary and that claimant lost insufficient time to entitle her to temporary total disability compensation.

FINDINGS OF FACT

1. Claimant was employed as a child development worker at the Glenwood State Hospital School on January 31, 1979.

2. Claimant fell in the parking lot at her employer's premises on January 31, 1979.

3. Claimant's injury of January 31, 1979 resulted in claimant being treated for her left knee in February 1979.

4. Claimant first expressed complaints regarding back pain to Dr. Hansen in May 1979.

5. Claimant had an intestinal bypass in August 1979.

6. The bypass surgery was not related to the injury.

7. Claimant had surgery to her back in 1982.

8. The effects of the January 31, 1979 injury were confined to the left leg. It is not permanent.

9. Claimant failed to prove by a prepondernance of the evidence that the back surgery and any resulting permanency was related to the injury of January 31, 1979.

10. Claimant did not lose three days of work because of the injury.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by Glenwood State Hospital School on January 31, 1979.

3. Claimant sustained an injury arising out of and in the course of her employment on January 31, 1979.

4. Claimant is not entitled to permanent partial disability compensation because of the January 31, 1979 injury.

5. Claimant lost insufficient time to entitle her to temporary total disability compensation.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

Costs are taxed to defendants.

Signed and filed this 13th day of January, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES HANSEN,	:	
Claimant,	:	File No. 614511
vs.	:	
HUGHES STEEL ERECTION CO.,	:	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.	:	

This matter came on for hearing at the Woodbury County Courthouse in Sioux City on November 30, 1983. The case was fully submitted at that time.

A review of the commissioner's file reveals that an employer's first report of injury was filed August 31, 1979. A memorandum of agreement calling for the payment of $271.38 in weekly compensation was filed September 18, 1979. A final report was filed October 23, 1979 indicating claimant had been paid six weeks of compensation.

The record consists of the testimony of the claimant, Kathleen Hansen, James Hughes, Loren Larsen, and Clarence Peterson; claimant's exhibits A through G; and defendants' exhibits 1, 2 and 3.

ISSUES

The issues for resolution are:

1. Whether there is a causal connection between the injury and the disability; and

2. the extent of permanent disability.

STATEMENT OF THE EVIDENCE

Claimant, age 35, was employed by defendant employer on July 20, 1979. Claimant was a crane operator and testified that he had worked for defendant off and on since 1972. Claimant's duties included the operation, maintenance and transportation of a crane. On July 20, 1979, claimant was driving the crane over a railroad crossing when the rear of the crane was struck by a train. Claimant testified that he was stiff and sore immediately following the injury. Claimant testified that he had good health prior to the injury. He had no prior complaints of back pain. He had a burn injury earlier. He testified that just prior to the injury, he had successfully completed a FAA physical. Claimant continued to work. Claimant testified that his physical condition became worse and worse, and that he started missing work on about July 30, 1979. Claimant sought treatment from Allen W. Bronson, D.C., of Jefferson, South Dakota on July 30, 1979. Claimant was complaining of neck pain, tightness in the neck, pain between the shoulders and in the chest, headaches, blurred vision, sleeping difficulties, mid-back pain, and low back pain. Physical and neurological examination was conducted. Pain and tenderness were elicited on palpation at the occiput especially on the right, C-2 and 3 right and left; at C-7 and T-1 left and right. There was marked tenderness on palpation throughout the lumbar spine and especially over L-5 and S-1 right and left. Reflexes appeared normal. X-rays of the cervical spine were negative for recent fracture, dislocation or marked osteopathology. The cervical x-ray showed a marked reversal of the cervical lordotic curve. X-rays of the lumbar spine indicated that Ferguson's perpendicular was anterior to the base sacrum and Ferguson's angle was increased to 49 degrees. Dr. Bronson diagnosed claimant's condition as a traumatic strain of the cervical spine complicated by residual muscle spasm, myogascitis, radicualgia and occiptial neuralgia. He also diagnosed claimant as having a traumatic strain of the lumbar spine complicated by residual muscle spasm and myofascitis. Claimant underwent chiropractic treatments for a period of time. Dr. Bronson indicated that claimant was totally disabled from the time of the accident until October 8, 1979.

Claimant testified that he returned to work on October 7, 1979. He also testified that the relief from Dr. Bronson's treatment was only temporary and that he had a great deal of difficulty when he returned to work. Claimant indicated that he had difficulty in repositioning the crane after it was moved. He testified that the various maneuvers required in placing the outriggers caused a lot of difficulty. Claimant testified that he had difficulty in performing his maintenance duties. In September 1979, claimant had seen Vernon G. Helt, M.D., of Sioux City. Claimant was given Tolectin and Norflex. Claimant only saw Dr. Helt twice. Claimant testified that in April 1980, he was examined by John J. Dougherty, M.D., a Des Moines orthopedist. Claimant stated that he went on his own to see Dr. Dougherty. Dr. Dougherty diagnosed claimant's condition as possible cervical strain, dorsal lumbar sprain superimposed upon a mild scoliosis

in the dorsal spine and a slight increased upper dorsal kyphosis and an increased lumbar lordosis, with questionable early narrowing of the L-5/S-1 disc space. Claimant was advised to do flexion and extension exercises and given a prescription for pain medication. Claimant was to report back to Dr. Dougherty two weeks later but did not do so. Claimant testified that he kept up treatment with Dr. Bronson. In January 1981 claimant commenced treatment with G. L. Taper, D.C. Claimant had treatments from Dr. Tapper for about a year and was diagnosed as having vertebrogenic radiculitis of the cervical spine. Claimant stated that his reason for ceasing treatment with Dr. Tapper was that he had no money to pay the bills. Claimant testified that he was given backrubs by his wife. Claimant states that he has limited himself in his car racing activities and in activities involving his children.

Claimant then testified that he had an eleventh grade education and had received a GED. He worked for a farmer, worked part-time in a blacksmith shop and was a yardman at the stockyards. He also spent some time working in a warehouse where he filled orders. He worked out of the operating engineers hall and became a journeyman. Claimant testified that he was laid off periodically.

The record indicates that claimant saw Dr. Dougherty again in December 1982. Claimant stated that he was not working at the time. Claimant could walk on his toes and his heels. His forward bending was normal. Claimant's neck was tender to a minimal degree over the trapezius. However, motion of the neck was good. X-rays were taken and showed degenerative changes in the mid dorsal area, disc narrowing at L-5/S-1, and some lumbosacral scoliosis. He did not think claimant had any permanent disability. He diagnosed claimant's condition as follows:

> 1. Apparent previous possible dorsal sprain, superimposed upon an increased kyphosis and lordosis, with what appears to be probably an old epiphysitis in the dorsal spine, questionable slight early narrowing of L-5/S-1 with periodic bouts of pain, which radiate up into apparently the neck and with headaches, possible facet type pain in the dorsal spine.
>
> 2. A list to the right with a long scoliosis to the right in the dorsal lumbar spine which appears different than before, etiology of this (?). Neurologically I think he is sound.

On cross-examination it was revealed that when claimant was seeking treatment from Dr. Helt he was originally seeking treatment for a uninary infection. Claimant indicated that after the injury he continued to work. He testified that his union card is suspended for nonpayment of dues. He testified that he can operate any type of construction equipment. He is involved in car racing and sells parts. He owns his own welder.

The last report of Dr. Bronson indicates as follows:

CURRENT IMPRESSION

> Based on the radiographic findings, it is apparent that Mr. James Hansen suffered a rather severe traumatic insult to the cervical spine resulting in a strain/sprain complex of the supportive soft tissues. As a consequence of this injury, there is a moderate cervical hypermobility, alteration in the area of stress and strain, and early Joint of Luschka Arthrosis between C-6 & C-7. Therefore, it must be assumed that the cervical spine is experiencing some degree of instability.
>
> Dr. Bronson set permanent disability at five percent of the body as a whole.

Claimant's wife, Kathleen Hansen, testified that prior to the injury claimant was involved in a number of avocational pursuits, including racing, Little League, bike riding, and bowling. She also testified that claimant helps less with household chores than before. She testified that the roundtrip distance to Dr. Bronson's office is 40 miles (41 trips); 12 miles for Dr. Tapper's (15 trips); and 20 miles for Dr. Dougherty (3 trips).

James Hughes is the sole owner of Hughes Steel Erection Company. He testified that his wife works in the office. The business involves the hiring of crane workers to assist in iron work. The witness testified that claimant had been an employee for some time. Following the injury, the claimant continued to work even though the crane which he was operating had been damaged. When the crane was fixed claimant worked on it. The witness testified that claimant related back difficulties attributable to an infection. The witness indicated that he thought claimant was doing well in 1979 and 1980 because he voiced no complaints. The witness testified that when work was slack, claimant did maintenance. He observed claimant through August 15, 1981 and noted that claimant did not appear to have any physical problems. The witness testified that claimant came in to see him on August 15, 1981 expressing interest as to whether work would be available. The witness testified that he thought claimant was seeking or had obtained employment elsewhere. The witness testified that he told claimant to keep in touch if things didn't work out. He then obtained another operator. The witness testified that a number of other crane operators were employed and that claimant came back in June 1982 and was employed for a short period of time before being laid off again. A lengthy discussion of the people working in 1982 indicates that claimant was laid off in July 1982 and that claimant has not been replaced. The witness had no complaint about the claimant's work.

Loren Larsen was employed as a construction company estimator for another construction company at the time of hearing. From July 1979 to May 1982, he was employed by defendant. At that time he carried a card as an iron worker. The witness testified that claimant always had ability as a crane operator and that he never heard claimant complain of pain. He testified that he recalled the circumstances of claimant's departure in August 1981. Claimant stated that he was going to look elsewhere for employment. The witness testified that he worked closely with the claimant.

Clarence Peterson is the job foreman and indicated that he was a working foreman. He had a conversation with claimant whereby claimant stated that he was going to quit to better himself.

APPLICABLE LAW

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

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 July 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).

4. 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

ANALYSIS

Based on the foregoing principles, it is found that claimant has established his claim to additional compensation. Claimant has proven by a preponderance of the evidence that he sustained a permanent partial disability because of the July 20, 1979 injury. Although the lay evidence would have us believe that claimant's ability to work inferred his lack of disability, the record shows a long and steady course of treatments during the period after claimant had returned to work. This constant return for treatment shows me that the claimant had some problems for a sufficient period of time to call the condition permanent.

Although one might consider the factors of industrial disability to justify a substantial award in this case, one must look at the fact that claimant worked for a sufficient period of time after he returned to work in order to reach an award that is fair to the parties. Claimant's departure from his employment in 1981 and 1982 do not appear to be related to the injury. Considering this together with the other elements of industrial disability, it will be found that claimant sustained a permanent partial disability to the body as a whole of five percent.

FINDINGS OF FACT

1. Claimant was employed by Hughes Steel Erection Company on July 20, 1979.

2. Claimant was involved in a collision with a train on July 20, 1979.

3. At the time he was driving equipment being used by Hughes Steel Erection Company in furtherance of its business.

4. Defendants filed a memorandum of agreement regarding a July 20, 1979 injury.

5. Claimant hurt his back because of the injury on July 20, 1979.

6. The injury of July 20, 1979 caused permanent partial disability to the body as a whole.

7. Claimant's permanent partial disability to the body as a whole is five percent.

8. Claimant incurred 1880 miles in seeking medical/chiropractic treatment.

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by defendant-employer on July 20, 1979.

3. Claimant sustained an injury arising out of and in the course of employment on July 20, 1979.

4. Defendants will be ordered to pay unto claimant 25 weeks of permanent partial disability compensation at the stipulated rate of $271.38 per week.

5. Defendants will be ordered to pay unto claimant $451.20 in reimbursement for travel expenses.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of two hundred seventy-one and 38/100 dollars ($271.38) per week.

IT IS FURTHER ORDERED that defendants reimburse claimant four hundred fifty-one and 20/100 dollars ($451.20) for mileage expense.

Costs are taxed to the defendants.

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from the date of this decision.

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

Signed and filed this 2nd day of August, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALBERT J. HARTL, SR.,

Claimant,

vs.

QUAKER OATS,

Employer,

and

IDEAL MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 701202

A R B I T R A T I O N

D E C I S I O

FILED
AUG 13 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Albert J. Hartl, Sr., against Quaker Oats, employer, and Ideal Mutual Insurance Company, insurance carrier, for benefits as a result of an injury on April 22, 1982. On July 19, 1983 this case was heard by the undersigned. This case was considered fully submitted upon completion of the hearing.

The record consists of the testimony of claimant and David Kennedy Norton; claimant's exhibits 1 through 3; defendants' exhibits A through E; and the deposition of Dennis Purcell.

ISSUES

The issues presented by the parties at the time of the prehearing and the hearing are whether claimant received an injury arising out of and in the course of his employment; whether there is a causal relationship between the alleged injury and the disability on which he is now basing his claim; and the extent of temporary total, healing period and permanent partial disability benefits he is entitled to; section 86.13; and section 85.38(2).

FACTS PRESENTED

Claimant who is a machine operator in the packaging department in instant oats testified that his job required him to run and maintain three lines of machines. Claimant stated he had to lift cases and rolls of paper as well as move pallets and dump barrels of waste product. Claimant testified that on April 22, 1982 he went to help his boss move a dust collector that had fallen over and felt pain in his lower back. Claimant indicated he told his boss he had pain and may have injured his back. Claimant testified that he completed his shift but had increased problems when going home. Claimant disclosed that the following day he was seen by a plant physician, given pain pills, and worked the rest of the day. Claimant was later placed in the hospital and two myelograms were performed. Later claimant had surgery. After being released by his physician, claimant returned to work at the same job he held at the time of his injury. Claimant stated he didn't do all of the lifting he did prior to the injury. Claimant indicated he still has pain most of the time which is aggravated by standing on the cement floor. Claimant stated that in the 70's he had some chiropractic treatment but hadn't seen a chiropractor for a year prior to the injury. On cross-examination claimant revealed he holds the top job in his area.

David Kennedy Norton testified that he works for defendant employer as manager of labor relations and indicated that prior to April of 1982 claimant was a highly regarded employee and an expert in the instant oats area. Mr. Norton stated that claimant has had no performance problems since the injury.

Dennis Purcell, who testified by way of deposition, stated he is a supervisor for defendant employer and that claimant worked under him. Mr. Purcell indicated that claimant's job requires lifting of cases of product weighing between 15 - 20 pounds. Mr. Purcell disclosed that he was moving a dust collector with claimant on April 22, 1982. Mr. Purcell stated that they attempted to lift the dust collector but it was to heavy. Mr. Purcell indicated he couldn't remember if they were able to move it even a little. Mr. Purcell stated he did not hear a pop or snap in claimant's back. Mr. Purcell testified that he couldn't recall claimant complaining about his back that day. Mr. Purcell stated:

> Q. Since Mr. Hartl has returned to work which I believe the record shows was on September 20th, 1982 or at least that's when he had been released to return to work, have you been his supervisor?
>
> A. Yes.
>
> Q. And has he continued to do the same duties as before?
>
> A. Yes.
>
> Q. Before April 22nd, 1982?
>
> A. Yes.
>
> Q. Has his job been changed in any way?
>
> A. Not since the episode with the dust collector, I can't recall any.
>
> Q. Has it been changed in any way to lighter duty?
>
> A. No, I don't think so.
>
> Q. From your observations, is he able to do every duty or task on his job that he did prior to April 22nd, 1982?
>
> A. From my observation, I think he can. It's obvious that he is still having trouble with his back but he has been doing the work.
>
> Q. Has he requested any restrictions?
>
> A. No.
>
> Q. Has he been placed on any restrictions?
>
> A. No.

On cross-examination Mr. Purcell indicated that it is essential to claimant's job that he is able to lift.

W. E. Blair, D.C., who testified by way of deposition, indicated he first saw claimant on October 31, 1973. Dr. Blair gave a history of seeing claimant for back complaints during the 1970's but last saw claimant on April 4, 1980.

David C. Naden, M.D., who testified by way of deposition stated he is a specialist in orthopedic surgery and first saw claimant on May 7, 1980. Dr. Naden next saw claimant in May of 1982 and found evidence of a herniated disc. Dr. Naden stated that he received a history from claimant and opined that his work related injury had some bearing on his herniated disc. Dr. Naden stated:

> Q. Dr. Naden, I know that you responded to my request for a more recent report and I have a summary of that, but I have misplaced, or for some reason it has not been filed, your letter. What is your opinion of the present level of permanent impairment carried by Mr. Hartl without regard to causation?
>
> A. Well, I would say that he has at least a 15 to

17 1/2 percent PPD rating of the entire back as a result of his back affliction.

Dr. Naden indicated that claimant had two to three percent or based on defendants' hypothetical five percent of his permanent impairment related to his prior condition. Dr. Naden attributed ten percent impairment to claimant's work related injury.

On cross-examination Dr. Naden revealed that on June 30, 1982 he performed a partial laminectomy at L3-4 level bilateral. Dr. Naden indicated claimant would have been released to return to work ten to twelve weeks after the surgery. Dr. Naden testified that claimant should not be lifting over 50 pounds on a regular basis, and avoid extensive bending, or twisting of his back but he has not imposed any specific restrictions on claimant's activities. It would appear from his records that Dr. Naden returned claimant to work September 20, 1982.

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 April 22, 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 claimant also has the burden of proving by a preponderance of the evidence that the injury of April 22, 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, 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).

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 greater weight of evidence indicates that claimant received an injury arising out of and in the course of his employment with defendant employer on April 22, 1982. Although the memory of Dennis Purcell appeared lacking, he did remember having claimant try to move the piece of equipment claimant talked about and its weight.

Although it was not raised by the parties as an issue at the beginning of the hearing some of the evidence defendants inquired into may lead one to think there was an issue of lack of notice of claimant's injury. The greater weight of evidence indicates that defendants had notice. Claimant's testimony in fact was not contradicted by the testimony of Dennis Purcell. Mr. Purcell merely indicated he had a lack of memory. The undersigned believes claimant when he states he told his supervisor of his injury.

Claimant has also met his burden in showing he has a functional impairment of ten percent as a result of his injury on April 22, 1982. The causal connection of such impairment is supported by the testimony of Dr. Naden as well as the testimony of claimant. This was a material aggravation of a preexisting problem.

However, functional impairment is only one of the factors in determining a person's industrial disability. Claimant is 47 years old and has an eighth grade education. Claimant has spent the majority of his life working in jobs as a laborer doing work that requires lifting. In 1956 claimant started working for defendant employer and is a good worker. Since his injury claimant has returned to the job he had held at the time of his injury and has been able to continue working without complaints by his supervisors. Claimant is well motivated and has not had any reduction in actual earnings. Although claimant should have some restrictions on his activities, none have actually been placed on him. Based on the evidence presented it is determined that claimant has an industrial disability of fifteen percent as a result of his April 22, 1982 injury.

Claimant raised the issue as to whether 86.13 benefits apply to this injury. Claimant's prior condition plus his own supervisor's lack of memory are adequate to make plausible defenses to claimant's action. Defendants have not appeared unreasonable in denying claimant's claim.

Claimant contends that defendants have to pay back the group carrier for payments that it made to claimant if claimant proves his injury arose out of and in the course of his employment. The undersigned finds no legal authority nor has any been argued that would support such a holding. Section 85.38(2) only speaks of credit to be given defendants for payments under such a plan, not the rights of the different insurance carriers or the employer.

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 22, 1982 claimant was injured while trying to move a dust collector with his supervisor.

FINDING 2. Claimant told his supervisor that he may have injured himself in trying to move the dust collector the day of or day after the injury.

CONCLUSION A. Claimant received an injury arising out of and in the course of his employment.

CONCLUSION B. Claimant gave defendants proper notice of his injury.

FINDING 3. Claimant's injury aggravated a preexisting back condition.

FINDING 4. As a result of his injury on April 22, 1982 claimant has a functional impairment of ten percent (10%).

CONCLUSION C. Claimant met his burden in proving a causal connection between his injury and the impairment on which he is basing this claim.

FINDING 5. Claimant is forty-seven (47) years old.

FINDING 6. Claimant has an eighth grade education.

FINDING 7. Claimant's jobs prior to his employment with defendant employer were mainly as a laborer and required lifting.

FINDING 8. Claimant started working for defendant employer in 1956.

FINDING 9. Claimant has a good work record.

FINDING 10. Since his injury claimant has returned to the position he held at the time of his injury and has performed his duties.

FINDING 11. Claimant is well motivated and has not had an actual reduction in earnings.

CONCLUSION D. Claimant has met his burden in proving that he has an industrial disability of fifteen percent (15%) as a result of his injury on April 22, 1982.

CONCLUSION E. Defendants did not unreasonably delay commencement of benefits.

CONCLUSION F. The undersigned does not have jurisdiction of the group carrier and does not have the authority to order defendants to reimburse the group carrier.

THEREFORE, defendants are to pay unto claimant twenty-one (21) weeks of healing period benefits at a rate of two hundred seventy-nine and 14/100 dollars ($279.14) per week and seventy-five (75) weeks of permanent partial disability benefits at a rate of two hundred seventy-nine and 14/100 dollars ($279.14) per week.

Defendants are to reimburse claimant for the following medical bills.

Orthopedic Surgeons	$1,625.00
Donald Paulsen	368.00
Mercy Hospital	6,003.07
Marion Heights Pharmacy	15.25
William Basler	401.00

Defendants are to pay unto claimant thirty-seven and 70/100 dollars ($37.70) for his mileage expense.

Defendants are to be given credit for all payments previously made to claimant or to the providers of medical services, including credit for the following.

Mercy Hospital	$2,341.14
Mercy Hospital	3,193.12
W. R. Basler, M.D.	165.00
Orthopaedic Surgeons	1,525.60
Donald Paulsen, M.D.	294.40

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 defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendants shall file a final report upon payment of this award.

Signed and filed this 13th day of August 1984.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL M. HARVARD, Claimant, vs. FRYE COPY SYSTEMS, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 613673 R E V I E W - R E O P E N I N G D E C I S I O N FILED AUG 1 IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Michael M. Harvard, the claimant, against Frye Copy Systems, his employer, and American Mutual Liability Insurance Company, the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred June 8, 1979.

This matter was heard in Des Moines, Iowa on January 5, 1984 and considered as fully submitted at the conclusion of the hearing.

We shall be concerning ourselves with the nature and extent of claimant's disability, if any.

Based upon the undersigned's notes, the record in this matter consists of the oral testimony of the claimant, claimant's exhibits A through Z, and defendants' exhibits 1 through 11.

The commissioner's file shows that the defendants have paid the claimant a healing period up to February 26, 1983 at the stipulated weekly rate of $177.32 and further that the defendants are paying an additional 50 week period of permanent partial disability based upon a 10 percent functional impairment of the body as a whole.

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

Claimant, age 40, married with three dependent children, a felon with three convictions, is currently employed in Detroit, Michigan as a parking attendant at a country club.

Claimant fell on June 8, 1979 while attempting to change a roll of carbon paper in his machine. Oil on the floor in the proximity of his work station seems to have been the cause. Claimant struck his head, injured his foot and lower back. The hospital records introduced support the claimant's testimony concerning the injury. (Claimant's exhibits X & Y)

Claimant began to experience low back discomfort after his head and foot pains subsided. A series of examinations confirmed that claimant has a medical problem at the L-5 level. (Cl. exs. D & E) Claimant's treating physician, John H. Kelly, M.D., reports his most recent findings as follows: (Cl. ex. A)

> Michael Harvard was originally seen by us July 12, 1979, one month following an injury to his back. At that time, we felt that he had a midline disc protrusion. We followed him and treated him conservatively following the injury. His course of recovery was protracted. He was admitted to the hospital in December 1979, and a myelogram showed a defect at the L4-5 level. An epidural injection of Cortisone afforded some relief of pain. In December, he was referred to Dr. Dubansky for a second opinion. After Dr. Dubansky's consultation, I lost track of him and did not see him again until 1983. Apparently, he had not returned to work or had much treatment over that period of time.
>
> We saw the patient April 7, 1983 and referred him for a CAT scan. The CAT scan showed some pathologic changes at the L4-5, L5-S1 levels. Objective findings at that time were not remarkable. Neurologically, he is intact.
>
> I think that the findings are compatible with his original injury; however, I am not certain of the extent of his disability. It would be my opinion that the patient could return to light work. He does, in my opinion, have approximately a 10% permanent partial impairment of the body as a whole as a result of the back condition which is the direct result of the fall he described in 1979.

Marvin Dubansky, M.D., in his report of February 28, 1983 (Defendants' exhibit 9) agrees with Dr. Kelly's medical opinion.

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

In applying the foregoing legal principles to the case at hand, it is clear that the claimant has sustained his burden of proof by establishing that his current complaints of low back and leg discomfort are causally connected to the work injury under review.

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. * * * *

In applying the foregoing legal principles to the case at hand, it is concluded that the claimant has sustained an industrial disability of 20 percent of the body as a whole. The report of Timothy J. King, M.A., CRC (Cl. ex. Z & Def. ex. 11) is particularly helpful to the undersigned in assessing claimant's disability. The report confirms the undersigned's impression that retraining of the claimant will be a difficult task due to his educational deficiences. Claimant appears to have a weight lifting limitation of 15 to 20 pounds. It is clear that claimant's future employment activities will be limited to physical activities as opposed to mental activities and necessarily based upon claimant's current complaints of pain, his job opportunities are and will be limited.

Notwithstanding claimant's current reluctance to accept conservative surgery, it is the view of the undersigned, based upon many years of experience, that claimant's physical complaints will ultimately increase sufficiently to where a change of heart will occur. In the absence of a future intervening cause, defendants shall be responsible for the attending medical expenses.

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 June 8, 1979 claimant sustained an admitted industrial injury which arose out of and in the course of claimant's employment.

3. That all of claimant's attending medical expenses have been paid.

4. That the claimant's healing period ended on February 26, 1983.

5. That the claimant has been paid a 50 week period of permanent partial disability for a 10 percent functional impairment of the body as a whole.

6. That the claimant's physical activities have been curtailed and that such curtailment is causally connected to the injury under review.

7. That retraining of the claimant will be difficult due to his educational deficiences both past and future.

8. That claimant's future job opportunities are severely restricted due to his inability to accept and retain formal instruction.

9. That based upon claimant's three prior felony convictions, future employment requiring bonding will be difficult.

10. Claimant appears to be in need of future medical care in the form of corrective surgery.

11. That the claimant is found to have sustained an industrial disability of 20 percent of the body as a whole.

THEREFORE, IT IS ORDERED that beginning on January 10, 1984 defendants shall pay the claimant an additional fifty (50) week period of permanent partial disability at the rate of one hundred seventy-seven and 32/100 dollars ($177.32) per week together with statutory interest from the date due. Any accrued benefits are payable in a lump sum.

Costs, in accordance with Industrial Commissioner Rule 500-4.33, are charged to the defendants.

Signed and filed this 30 day of August, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARVEY DAVID HASCALL, Claimant, vs. KAY WOLTMAN d/b/a SHELBY MARKET: Employer, and HAWKEYE SECURITY INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 731598 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 Harvey David Hascall, claimant, against Kay Woltman d/b/a Shelby Market, employer, and Hawkeye Security Insurance Company, insurance carrier. Claimant alleges that he sustained an injury to his back on April 5, 1983 for which he seeks benefits. The hearing commenced June 22, 1984 at the Pottawattamie County Courthouse in Council Bluffs, Iowa with Michael G. Trier, Deputy Industrial Commissioner presiding. The claimant appeared in person with his attorney James E. Thorn. The defendant, Kay Woltman, appeared in person and with Gregory G. Barntsen, the attorney representing both defendants. The case was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of Harvey David Hascall, Anthony Gress and Kay Woltman. Claimant's exhibits 1 through 31 inclusive were admitted into evidence.

ISSUES

The issues presented by the parties at the time of hearing are a determination of claimant's entitlement to benefits for temporary total disability, healing period and/or permanent partial disability and whether claimant is entitled, under section 85.39 of the Code of Iowa, to reimbursement for the expense of a medical examination performed by Ronald K. Miller, M.D. The issues also include a determination of claimant's entitlement to compensation for mileage and a determination of the costs of this proceeding.

It was stipulated by the parties that claimant did sustain an injury arising out of and in the course of his employment and that a causal connection existed between that injury and the disability which claimant presently exhibits. It was also stipulated that the rate of compensation is $155.03 per week in the event of an award.

REVIEW OF THE EVIDENCE

Claimant testified that he is 48 years of age and was born February 2, 1936 in Erickson, Nebraska. He stated that his height is five feet six inches and his weight is 135 pounds.

Claimant testified that he attended grade school at Shelby, Iowa where he completed the seventh grade but quit while in the eighth grade. He entered the air force when he was 17 years old and was dishonorably discharged in 1955.

Claimant described a work history which consisted primarily of alternating employment between Smith Grocery and Locker in Des Moines, Iowa and Disco Mart, a chain store in Oregon, prior to the commencement of his employment at Shelby Market. The work he performed at both of those previous places of employment consisted of cutting meat. Claimant stated that in 1981 he returned to Shelby to live with his mother and commenced his employment at the Shelby Market.

Claimant testified that when working for Smith Grocery and Locker and Disco Mart he would carry beef quarters which weighed as much as 200 pounds. He stated that at the Shelby Market the meat came in boxes which weighed in the range of 50 to 100 pounds each. The boxes contained pieces of meat weighing generally in the range of 40 or 50 pounds. He stated that the boxes came to the market by truck and that he unloaded them from the truck using a cart and stacked them in the cooler. He stated that when meat was needed he sometimes took it from the cooler a piece at a time and sometimes by taking the entire box.

Claimant testified that on April 5, 1983 he was unloading a truck putting boxes of meat in the cooler when he injured his back.

Claimant stated that prior to August 5, 1983 his back was average. He stated that he could move the boxes without any problem. He related that in 1976 he had injured his back lifting and that he underwent surgery following which he was off work for approximately three and one-half months. He related that following that surgery he worked briefly but shortly thereafter quit and did not return to continual regular employment until approximately two years following the surgery.

Claimant testified that upon injuring his back on April 5, 1983, he ceased working and sought treatment from Charles L. Pigneri, D.O., in Oakland, Iowa. He stated that he traveled 40 miles, round trip, each time he saw Dr. Pigneri. He related that Dr. Pigneri referred him to Behrouz Rassekh, M.D., in Council Bluffs. Claimant testified that Dr. Rassekh's office is approximately 40 miles each way from Shelby and that the office is located by Jennie Edmundson Memorial Hospital.

Claimant testified that after undergoing diagnostic tests, including a myelogram, Dr. Rassekh recommended surgery and that such was eventually performed.

Claimant testified that his back still hurt when he returned to work in early August, 1983. He stated that he went back to his old job but that Kay Woltman helped with the lifting. He stated that he tried to work but that he felt he could not handle the job and quit in November, 1983. Claimant related spending the winter of 1983-1984 in Oregon where he did not actively seek work. He stated that his back improved and he returned to Iowa in March, 1984 where he commenced work at the Embers Cafe in Avoca, Iowa. He described his duties there as cooking hamburgers and steaks. He related that he had to lift 35 pounds once each day, but that generally someone else did the lifting for him. He stated that the job required eight or nine hours of continued standing each day and that his back and left leg starting hurting again so that he quit approximately two or three weeks prior to the hearing in this case.

Claimant testified that he plans to go back to Oregon but that he does not know what he could do in the way of employment. He does not believe he could cut meat due to the lifting which that occupation requires. He related making contact with the Iowa Vocational Rehabilitation Agency but stated that his case had not progressed any further.

Claimant testified that he does not think he could perform a job which required him to be on his feet for more than approximately two hours continuously. He stated that the pain he endures is worse in the mornings and that it is aggravated when he sneezes, and when he sits down or gets up. He stated that he feels that his recovery from this most recent surgery is progressing similar to the recovery from the first. He stated that he is not currently taking any medication.

On cross-examination claimant related that when working at the Shelby Market he spent approximately half of his time in the produce and dairy departments. Claimant related that following his first surgery he supported himself playing pool and that when he had returned to Shelby, Iowa in 1981, he worked part-time bartending.

Claimant testified that he had been paid in full for the compensation due during the time he was off work following the injury and that the defendants had paid all expenses incurred for his medical care.

Anthony Gress testified that he resides in Shelby, Iowa and has most of his life. He stated that he has been in the drywall construction business for approximately 30 years and that during the last 14 years he has been self-employed running his own business which serves an area within a 150 mile radius of Shelby, Iowa.

Gress testified that he is 49 years old and has known claimant since approximately the age of 13. He stated that he has had contact with claimant over the years on the occasions when claimant did return to Shelby and that he has seen claimant approximately four times per week since claimant returned to Shelby in 1981. He stated that he felt that claimant was a good worker, made his own way and was not afraid of work. He stated that prior to claimant's most recent surgery he was agile but that claimant now moves around like an old man.

Kay Woltman testified that she owns the Shelby Market Grocery Store and has for approximately two and one-half years. She testified that claimant quit his employment with her and told her that he was doing so because he would not work with one of the other employees. She stated that claimant had initially told her he was going to take some time off but that when the time off ended he did not return to work.

Woltman stated that before April 5, 1983 claimant handled the meat, produce and milk without any apparent difficulty but that she could tell a difference in his activity after the surgery. She also stated that the claimant was doing his job satisfactorily before he quit and that she had been available to help with the lifting whenever such was required.

Claimant's exhibit 24 relates that claimant was released to return to work on August 8, 1983.

In exhibit 26, a report dated November 17, 1983, Dr. Rassekh states:

> As far as the cause and relationship is concerned, patient related the April 5, 1983 onset of the pain to putting some meat in the cooler. One could say, with the fact that he has had previous disc removal at the same level on the opposite side, that he did have disc degeneration but the accident probably was an aggravating factor.
>
> Due to previous injury and as you will see in the Office Notes, he was given apparently a 20% partial-permanent disability after his operation in Oregon. At the last visit on September 8, 1983 Mr. Harvey Hascall was given a partial-permanent disability of 25% total as a whole body which would be an increase of 5%.

In exhibit 27, a report dated June 8, 1984, Dr. Miller states:

> This gentleman, in my opinion, has a 30% total permanent impairment to the body as a whole. I would generally rate this as 20% related to the old injury and 10% related to the new injury. I think that there is a positive causal relationship between this gentleman's problem and his incident while he was lifting at work on April 5, 1983.

Exhibit 11 is a report from Donald T. Smith, M.D., the surgeon who performed claimant's first back surgery. The report is dated September 9, 1976 and states:

> The patient named above was re-examined in my office on 20 August, 1976. Mr. Hascall attempted to return to work as a meatcutter [sic] but was unable to continue because of pain with excessive bending, lifting, etc., associated with that occupation. He tells me that he is hoping to enroll in a card dealer's school and I heartily would concur that considering his physical status that this type of employment would be more suitable for a long term beneficial back result.
>
> ...
>
> It would be my opinion Mr. Hascall has made an excellent recovery from his recent lumbar surgery. He is having some modest residuals both from his original injury and surgery which I would feel could be considered mild to mildly moderate from a physical impairment standpoint. The patient has a transitional type of lumbosacral back and I believe may have further difficulty with extreme activities and I would concur as stated in his seeking lighter type of employment. I believe his condition is stationary at this time and could be considered for closure.

Claimant received compensation for the 1976 injury. The order of the Workmen's Compensation Board is in the record as exhibit 13 and the pertinent part thereof states:

> The Evaluation Division has considered the medical reports and all other information submitted regarding your injury or disease, and has determined that you are entitled to an award of permanent partial disability...
>
> The Board finds and therefore ORDERS you entitled to compensation for temporary total disability inclusively from
>
> March 8, 1976 thru August 20, 1976 less time worked; AND the Board ORDERS the named insurance company to pay you an award of compensation equal to 64 degrees for 20 percent unscheduled disability resulting from injury to your low back.

Claimant's exhibit 30 is a mileage claim for 760 miles of travel and exhibit 31 is a statement of costs involving expenditures made in the prosecution of this case.

ANALYSIS AND APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 5, 1983 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).

Drs. Rassekh and Miller relate claimant's current disability to the injury of April 5, 1983. There is no contradictory medical evidence in the record and, consistent with the stipulation of the parties, a causal connection between the injury and the disability is found to exist.

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.

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 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960).

In exhibit 26 Dr. Rassekh noted that the accident probably aggravated claimant's preexisting back condition. As shown at page 9 of exhibit 29, the most recent surgery disclosed an extruded disc fragment beneath the nerve root and was removed. It is clear that if the injury is termed to be an aggravation, that it certainly is a material aggravation.

There is no concise evidence in the record of the amount of functional impairment which claimant exhibited following the 1976 surgery. Exhibit 13 awards him compensation for 20 percent unscheduled disability resulting from an injury to his low back. Whether that 20 percent refers to functional impairment or a concept similar to industrial disability as used in Iowa is unclear. Dr. Rassekh believes claimant to presently have a 25 percent impairment and Dr. Miller believes claimant to have a 30 percent impairment. Although Dr. Rassekh speaks in terms of disability, his testimony, as shown in the depositions and reports, is interpreted by the undersigned to mean impairment rather than industrial disability.

As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 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. * * * *

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).

From the experience of the undersigned, a functional impairment of 20 percent of the body as a whole would be unusually high for the type of surgery claimant underwent in 1976 if the same is measured using the same standards and factors as are commonly used by physicians in the State of Iowa at the present time. It should be noted that the 20 percent rating does not appear in a medical report. Claimant's present total functional impairment is found to be in the range of 25 to 30 percent.

Claimant has little in the way of demonstrated work skills which would enable him to be gainfully employed at the present time if he cannot perform heavy lifting. Dr. Rassekh has suggested a 50 pound lifting limitation and avoidance of repeated bending and lifting. After two surgeries claimant certainly should not be carrying beef quarters or boxes of beef weighing nearly 100 pounds. Claimant has exhibited problems with prolonged standing as would normally occur working as a meat cutter or as a cook. Even claimant's employer has noted a difference in his activity since the injury.

Claimant's age is such that complete retraining is unlikely. He has not demonstrated the capacity for further formal education. His efforts at rehabilitation would best be directed to the grocery or food service business where he does have some background and experience. Although no direct testimony was introduced, one would expect that claimant would be skilled in evaluating the quality of meat as a result of his experience in cutting meat for retail sales.

Although claimant does possess marketable skills, his inability to perform moderate and heavy lifting will eliminate him from employment at a majority of the places where he would otherwise be suited to work.

Claimant has not actively sought rehabilitation, however, and does not appear to be highly motivated to return to work. His past employment history contains a number of job changes.

It should be noted that claimant was steadily employed immediately prior to the injury working as a meat cutter. It should also be noted, however, that the duties of working as a meat cutter caused the injury to occur. Claimant probably was able to work at his own pace while at the Shelby Market and it is apparent that it will be difficult for him to find employment for which he is now presently suited.

The primary issue in this case is a determination of the amount of disability which is related to claimant's April 5, 1983 injury. Dr. Miller felt that claimant's impairment had increased by 10 percent as a result of the injury and Dr. Rassekh felt that the increase was in the range of 5 to 10 percent. The evidence indicates a conflict between the 20 percent disability awarded by the Oregon Workmen's Compensation Board and the impairment rating which Dr. Rassekh would normally impose following a procedure similar to that which claimant underwent in 1976. It can fairly be concluded that Dr. Rassekh does not appear to agree that claimant's preexisting impairment was 20 percent. It is therefore concluded that claimant's functional impairment increased by 10 percent of the body as a whole as a result of the April 5, 1983 injury.

If claimant's disability were to be measured industrially, it would fall in the range of 40 percent. If an evaluation were to be made of his industrial disability following the 1976 injury, a rating of approximately 20 percent would be reasonable. It is therefore found and concluded that when the disability arising from the April 5, 1983 injury is measured industrially, that the same is 20 percent of total disability.

Claimant's mileage claim, as shown in exhibit 30, is supported by the testimony and other exhibits and such will be allowed in full.

The statement of costs, as shown in exhibit 31, will be allowed in accordance with Industrial Commissioner Rule 500-4.33 as to the charges of $115.00 and $32.40 respectively charged by Rex M. Blair & Associates. The expert witness deposition fee charged by Dr. Rassekh will be limited to $150.00 in accordance with Iowa Code section 622.72.

Under section 85.27 of the Code of Iowa the employer has the right to choose the medical care which an employee shall receive. That section provides a method of resolving a dispute if the employee is dissatisfied with that care. In this case it is unclear as to whether claimant was directed to Dr. Pigneri or whether he chose to see Dr. Pigneri on his own. In any event, the defendants acquiesced in care by Dr. Pigneri and the resulting care by Dr. Rassekh. Such, in effect, makes those physicians the physicians retained by the employer for purposes of section 85.39 of the Code of Iowa. An evaluation of permanent disability had been made by Dr. Rassekh and claimant apparently felt the same to be too low. Application for independent examination was made and the employer resisted the same. It should be noted that the employer did, at all times, have the right to require claimant to submit to an examination by another physician. It apparently chose not to do so and such confirms that Dr. Rassekh was a physician retained by the employer. It is therefore concluded that claimant is entitled to an independent examination from Ronald K. Miller, M.D., and that the employer shall be responsible for the cost thereof in the amount of $103.00.

FINDINGS OF FACT

1. Claimant is a resident of the State of Iowa and his place of employment at the time of injury was in the State of Iowa.

2. Claimant injured his back on April 5, 1983 while moving boxes of meat in the cooler at his employer's place of business in Shelby, Iowa.

3. At the time of injury claimant was employed by Kay Woltman d/b/a Shelby Market working as a meat cutter and in the produce and dairy departments of the grocery store.

4. Following the injury claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of the injury from April 6, 1983 through August 7, 1983. Claimant returned to work on August 8, 1983. Claimant was paid compensation for the time he was absent from work between April 5, 1983 and August 8, 1983.

5. The injury claimant sustained resulted in 10 percent permanent impairment of the body as a whole.

6. Claimant's rate of compensation is $155.03 per week.

7. Claimant received medical care from Drs. Pigneri and Rassekh, which care was reasonable and necessary for treatment of the injury.

8. Claimant has a 10 percent functional impairment as a result of the injury. He is restricted in his ability to lift and perform repeated actions in the nature of lifting and bending.

9. Claimant is 48 years of age. He dropped out of school during the eighth grade and has had no further formal education.

10. Claimant's work experience is primarily in the area of meat cutting, but he does have a limited amount of experience as a cook, grocery store produce manager and grocery store dairy section manager.

11. Claimant is not highly motivated to find gainful employment.

12. Claimant was able to return to work with the defendant employer but left at his own choosing. Subsequently he has not found other continuous gainful employment.

13. Claimant had a preexisting impairment and disability arising from an injury which he sustained in 1976.

14. In obtaining medical care claimant traveled a total of 760 miles.

15. Claimant incurred costs in the prosecution of this proceeding in the total amount of $297.40 as shown on exhibit 31 and charges in the amount of $103.00 for obtaining an examination and report from Ronald K. Miller, M.D.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and of the parties hereto.

The injury claimant sustained to his back on April 5, 1983 arose out of and in the course of his employment with Kay Woltman d/b/a Shelby Market.

Claimant's healing period ran from April 6, 1983 until August 7, 1983, both dates inclusive, for which he has been fully paid compensation by defendants.

As a result of the injury claimant is permanently partially disabled to the extent of 20 percent of total disability when the same is measured industrially.

Claimant is entitled to reimbursement for the expenses incurred in obtaining an examination and report from Ronald K. Miller, M.D., in the amount of $103.00.

Claimant is entitled to receive payment for traveling 760 miles in obtaining medical care at the rate of $.24 per mile for a total amount of $182.40.

Claimant is entitled to reimbursement for the costs of this proceeding in the amount of $297.40.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred (100) weeks of compensation for permanent partial disability at the rate of one hundred fifty-five and 03/100 dollars ($155.03) commencing August 8, 1983. Defendants shall pay all past due amounts in a lump sum.

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 claimant one hundred three and no/100 dollars ($103.00) for the expenses of an independent medical examination under the provisions of section 85.39 of the Code of Iowa.

IT IS FURTHER ORDERED that defendants pay claimant one hundred eighty-two and 40/100 dollars ($182.40) as reimbursement for expenses incurred for transportation necessary to receive medical care for the injury.

IT IS FURTHER ORDERED that defendants pay to claimant the costs of this action in the amount of two hundred ninety-seven and 40/100 dollars ($297.40).

IT IS FURTHER ORDERED that defendants file an activity report within twenty (20) days from the date of this decision.

Signed and filed this 21st day of August, 1984.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH L. HASS, Claimant, vs. PULLEY FREIGHT LINES, Employer, and CARRIERS INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 700755 A P P E A L D E C I S I O N

FILED
JUL 25 1984
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded additional temporary total disability benefits and medical expenses. The record on appeal consists of the transcript of the review-reopening proceedings; claimant's exhibits 1 through 36; defendants' exhibits A through I; the deposition testimony of James L. Blessman, M.D.; and the briefs and filings of all parties on appeal.

ISSUES

The issues on appeal are extent of temporary total benefit period and entitlement to permanent partial disability benefits.

REVIEW OF THE EVIDENCE

The parties stipulate that the applicable rate of compensation is $328.65 per week. (Transcript, page 15) Claimant was 33 years old at the time of the hearing. He is married and has three children. Claimant graduated from high school in 1968 and has had no subsequent schooling or formal training. (Tr., pp. 5-6) He worked as a laborer and machine operator in a factory following graduation, and then drove trucks for various employers. He began driving for defendant employer in November of 1981. (Tr., pp. 8-14) His duties included loading and unloading, and he was paid by mileage and an hourly rate. His gross earnings were approximately $584 a week. (Tr., p. 14) On April 13, 1982 claimant was assisting in the loading of his trailer when he stepped back and fell between the trailer and the dock, injuring his left leg and left buttock. (Tr., pp. 18-19) Claimant drove the load to Des Moines, reported the injury, and was sent to Herbert Rosen, D.O., the company doctor. (Tr., pp. 19-20; Defendants' Exhibit I) Dr. Rosen reported his findings as: "Skinned leg and skin loss L outer thigh, Hematoma very large L inner lower leg: L hip pain - pulled pain into L shoulder: neck tightening up: sweat attack." (Def. Ex. C) Claimant returned home and consulted George Hegstrom, M.D., for treatment of the blood clot below his left knee. He was released by Dr. Hegstrom to return to work on April 26, 1983. (Def. Ex. C, Tr., pp. 20-21) Claimant testified that his left buttock, left side and tailbone was tender, but his doctors believed it would improve with time. (Tr., pp. 21-22) Claimant continued to drive a semi truck through the summer and into the fall, but his tailbone became more painful, and he was referred by Dr. Hegstrom to Mark Brodersen, M.D., an orthopedic surgeon. (Tr., pp. 22-23; Claimant's Ex. 2) Dr. Brodersen saw claimant on October 5, 1982 and advised sitz baths, one week of rest, and the use of a ring cushion. (Cl. Ex. 1) Dr. Brodersen reported that claimant suffered from coccydynia.

> It is my feeling that Mr. Hass suffers from a problem called coccydynia. I believe that his stated cause of pain is correct. I think that a fall such as he describes could cause the type of problem that he is having at this point. In regards to the question about the x-rays, it is my feeling that he does have a slight abnormality of the tip of the coccyx or tailbone. It is not possible to determine from his initial x-rays whether or not this was present prior to his injuries. I think that this may be merely an anatomic abnormality and does not necessarily represent a fracture. In regards to his prognosis, I feel that in general these patients continue to have a long-term period of discomfort and aggravation. Generally, they do seem to gradually improve as time passes, however.
>
> In regards to his current status I, at this point in time, would have nothing other to add in regards to treatment. Because he continues to have a significant amount of discomfort, I have referred him to Doctor Blessman at the Mercy Medical Center Pain Clinic in Des Moines. (Cl. Ex. 2)

James L. Blessman, M.D., examined claimant in November 1982 for complaints of persistent pain in the sacrum and coccyx region. (Def. Ex. F) Dr. Blessman noted:

> Physical examination here revealed an antalgic gait, especially on the left. Range of motion of his spine was normal. His neurological reflexes

were within normal limits and sensation was intact. Palpation of the coccyx, both externally and by rectal examination, was extremely painful. Impression: Coccyodynia [sic] with no evidence of radiculopathy.

He was seen by our Anesthesiologist, Dr. Dana Simon, who concurred with the above diagnosis and gave him a caudal epideral steroid injection. The patient got immediate complete relief from his chronic pain problem; however, the pain relief lasted only approximately twelve days and then gradually began returning. During this period of time, he was instructed in several different types of exercise including; therapeutic aquatics, yoga, and several different forms of aerobic exercises. The patient was instructed in autogenic training including progressive muscle relaxation, guided imagery, hypnosis, and biofeedback type stress management.

....

Medication used, during his stay in the Pain Center, was Indocin 50 mgs. three times a day with food, and Tylenol two tabs every three hours as needed. We also placed him on a group of nutritional supplements specifically: L-Tryptophan, Vitamin C, Vitamin B-6, and Vitamin B-3.

When the patient's pain began to return, we had him re-evaluated by Dr. Simon who felt that a repeat caudal epideral nerve block was indicated and this will be done one week from discharge. Hopefully this will prolong his relief. I have recommended to the patient that he stay completely off work until following the nerve block next Monday. After this, would expect that we will want to have him stay off work an additional three weeks and then return to his usual employment. There will be no restrictions on bending, stooping, or lifting, when he returns to his usual employment. I would try to negotiate with his employer the first four weeks that he is working in that he be given rather short trips as the only difficulty he has had, even in the past, was in sitting and in all the bouncing involved in driving a truck.

I feel his prognosis for complete recovery is quite good. I have asked him to make an appointment in my office to see me right after the first of the year. He will also be seeing Dr. Dana Simon about that same time to follow-up his second caudal epideral injection. He could be given a total of four caudal epiderals if these were required; however, at this point, it appears that one more injection should get him back to the point where he can return to his usual employment. (Def. Ex. F)

Dr. Blessman testified by deposition that he estimated claimant would have reached a point where no further medical improvement was expected by February 1, 1983. (Blessman Deposition, pp. 17-18) Dr. Blessman explained that claimant improved greatly during his initial treatment at the Pain Center but then became discouraged. Dr. Blessman speculated that claimant's attitude was related to marital difficulties claimant was experiencing. (Blessman Dep., pp. 16-22) Dr. Blessman saw claimant on January 10, 1983 and reported:

> Seen today followup his Pain Center treatment program. He's still having considerable pain in his coccyx radiating up into the LS area of his back. At this point he has full ROM of his back. He has been seeing a counselor, Chuck Roberts, in Ames. Seems to be helping somewhat. Has not returned back to work nor does he feel like he's anywhere near ready. Appears to be poorly motivated to return to work. At this point I do not feel that I have anything further to offer him. Have recommended that he return to see Dr. Simon for followup of his last nerve block and probable repeat nerve block. Failing success here, would recommend he return to Dr. Broderson, his orthopedic surgeon, who referred him down to me 8 months ago. (Cl. Ex. 7)

Dr. Blessman stated that claimant's pain was so severe that riding in his pickup pained him and claimant was unwilling to consider returning to work. (Blessman Dep., p. 15) At that time Dr. Blessman revised his opinion and did not feel claimant would return to work because of pain and motivational factors. (Blessman Dep., pp. 19-20) Dr. Blessman recommended claimant see Marvin H. Dubansky, M.D., for additional orthopedic consultation. (Tr., p. 23; Cl. Ex. 13) On March 3, 1983 Dr. Dubansky reported his findings following examination of claimant.

> Was in the pain center - swimming pool, which helped some, and exercises. None of the exercises the patient demonstrated to me were pelvic tilt exercises or did he receive instructions in correct use and care of the back. He had some cryotherapy which helped temporarily. He also had an epidural nerve block with Dr. Simon, having 3 altogether, the last being January 1983. The first shot helped, and the second felt "super", but the pain gradually came back after each one. The third shot helped for 5 or 8 days and then wore off.
>
> ....
>
> At present he sits on a rubber donut and when he does his legs get numbness down to his toes.
>
> The patient walks without a limp. Chest expansion 3 1/2". There is tenderness from about the 3rd lumbar down to and including the tip of the coccyx which is quite sore. There is also tenderness on the left sacroiliac area. He flexes with fingertips to the lower tibiae, measuring 80 deg. in the back. Extension is 25 deg. Right and left lateral bending 25 deg. Straight leg raising goes to 90 deg. bilaterally. Knee and ankle reflexes are 2+. There is no muscle weakness on testing dorsi- and plantar flexion, inversion and eversion of the feet, flexion and extension of the knees, abduction and adduction of the hips. The sensation is symmetrical and intact to pinprick. The leg lengths are equal between the anterior superior spine and inner malleolus. Circumferential measurements calf and thigh and similar areas symmetrical. There is complete range of hip and knee motion.
>
> (Sent with the patient) Review of these x-rays including a pre-employment x-ray taken before his injury reveals no evidence of fracture or bony abnormality
>
> At this time I feel that Mr. Hass has a so-called "coccydynia".
>
> These can be a problem but if he has had 2 or 3 cortisone injections into the coccyx apparently this has been of no help to him but in some cases it would be.
>
> He has had just about all kinds of treatment. However, in my opinion he has not really had correct back exercises, such as pelvic tilt and instructions in how to use his back. Whether or not this will influence his low back complaints, leg pains, etc. I don't know, but I think it should be at least worked with.
>
> A copy of this letter is going to Dr. Simon. Told the patient to contact Dr. Simon so that Dr. Simon can make arrangements perhaps to have this done either personally or by a therapist under his direction.
>
> Frankly at this time I can find no evidence of bony injury by x-ray, and I can find no clinical evidence of nerve root compression. (Cl. Ex. 13)

Claimant testified that Dr. Dubansky contacted Dr. Blessman regarding different exercises and Dr. Blessman directed a change in claimant's physical therapy program. (Tr., pp. 39-40) Claimant reported he went to the physical therapy department of Mercy Hospital and received ultrasound and hot pack treatments on his back and began new exercises. (Tr., p. 40) Claimant stated that in March Dr. Blessman changed his medication from Zomax to Meclomin. (Tr., p. 41) Mercy Hospital Medical Center records indicate claimant received five physical therapy treatments in February and March. (Cl. Ex. 32-33)

On May 5, 1983 claimant was evaluated by Stuart R. Winston, M.D., a neurosurgeon, at the suggestion of claimant's attorney. (Cl. Ex. 15; Tr., p. 98) Dr. Winston reported:

> His main complaints revolve around a sore tailbone, left belt level muscle spasm and back aches which go up and down and across at about that level. He states that working around the house and yard hurts and that he develops primarily "back aches". Sitting on his bed or his couch can aggravate his tailbone pain. He does exercises and takes baths daily for their heat medicinal purposes.
>
> We repeated lumbosacral and views of the sacrum and coccyx on May 5, 1983 and compared those with the former films. There are no changes and they appear normal. Bone imaging, i.e., bone scanning, was done on May 10, 1983 and it to [sic] is normal.
>
> I feel that the patient suffers from chronic intermittent muscle strain and pain related to contusion of the coccygeal area. I feel that he has probably reached a plateau and any permanency here would be related primarily to the pain since there is no evidence of any anatomic disruption or neurologic involvement. I would think that the patient probably might, if allowed to return to his job, be able to carry on although doing simple things around the home would tend to mitigate against heavy lifting and the like. Perhaps retraining would be in order if this would be his desire. I, quite frankly, feel that the patient could return to his work without any danger to himself but might find that, from time to time, he

would have to have some heat and massage, etc., for his discomfort.

Permanent partial disability, in my view, related to pain in his case would amount to about 5%. (Cl. Ex. 15)

On May 20, 1983 Dr. Rosen examined claimant for Department of Transportation recertification and issued a work release effective June 21, 1983. (Cl. Ex. 16, 17, 18) Dr. Rosen recommended claimant protect the tailbone area from irritation by using a doughnut cushion. (Cl. Ex. 17) Claimant stated that the possibility of surgery on his tailbone had previously been discussed but that none of his doctors had recommended such surgery. (Tr., p. 104) Claimant testified at the June 22, 1983 hearing that he was ready to return to work. (Tr., p. 98)

Robert V. Wolf, director of personnel and labor relations for defendant employer, testified that there were no company or D.O.T. prohibitions against claimant using a rubber cushion while driving. He stated that claimant could stop and stretch to relieve any discomfort, and was in fact required to do so to make periodic checks of truck tires and equipment. (Tr., pp. 108-110) Mr. Wolf testified that all company trucks are supplied with adjustable air seats which can be regulated for comfort. (Tr., p. 110) He reported that defendant employer needed drivers and claimant could begin working the next day. (Tr., p. 118) Mr. Wolf explained that company procedure called for claimant to obtain a release to work from the attending physician, Dr. Blessman, before being scheduled for a D.O.T. physical with the company doctor, Dr. Rosen. Mr. Wolf stated the work release had to be held up until Dr. Blessman released claimant. (Tr., pp. 116-117)

Defendants' final report filed March 25, 1983 states that claimant has been paid temporary total disability benefits from April 14, 1982 to April 25, 1982 and again from October 1, 1982 to March 24, 1983.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 13, 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 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).

ANALYSIS

Defendants argue on appeal that claimant could have returned to employment on or about February 3, 1983 but for his lack of motivation to do so. They maintain that claimant's entitlement to temporary total benefits terminated on that date.

In October of 1982, Dr. Brodersen predicted that claimant would probably experience a long-term period of discomfort and aggravation, and that improvement usually occurs over a gradual period of time. Claimant was then referred to the Pain Center where initial success was achieved with nerve blocks. Dr. Blessman estimated that through continued use of nerve block injections and autogenic training, claimant should be able to return to his usual employment in four weeks. However, in January 1983 Dr. Blessman revised that estimate, reporting that claimant was poorly motivated and had not made the expected progress. Dr. Blessman noted that claimant continued to have "considerable pain" in the coccyx which radiated into the lumbar-sacrum area. Dr. Blessman recommended another nerve block and referred claimant to Dr. Dubansky for further orthopedic evaluation. There is no indication in Dr. Blessman's January 1983 report that he believed claimant was able to return to work.

Dr. Dubansky examined claimant in March and reported findings of tenderness in the lumbar, coccyx and sacroiliac regions. Dr. Dubansky recommended a different program of physical therapy. In May claimant was evaluated by a neurologist who advised claimant to use heat and massage and expressed the belief that claimant could return to work. That same month, claimant reported to Dr. Rosen, the company doctor, for an examination for D.O.T. certification. Dr. Rosen released claimant to return to work effective June 21, 1983.

There is sufficient evidence in the medical reports of Drs. Dubansky and Winston that claimant continued to experience pain which impeded his activities and caused him discomfort in the sitting position required by his work duties. In the period following February 1, claimant continued to seek medical assistan for his pain and appears to have promptly followed through on the various recommendations of his doctors. None of the medical reports prior to May of 1983 state that claimant is able to assume his employment duties, and, in fact, Mr. Wolf indicated that at the time of the D.O.T. examination in May, claimant had not yet been released to work by Dr. Blessman. Claimant was released by the company doctor to return to work on June 21, 1983, and that date will represent the termination of claimant's temporary total disability.

Claimant has been paid benefits up to March 24, 1983 and is entitled to an additional 13 weeks of temporary total benefits.

Defendants contend in their second issue that the question of permanency was tried before the deputy and should have been addressed in his ruling. They argue that the medical evidence establishes that claimant has suffered no permanent impairment. The May 1983 report of Dr. Winston, who determined a five percent permanent partial disability based upon pain, would not appear to support this assertion. However, the deputy was correct in finding that the issue of permanency was not ripe for determination at the time of the hearing. Claimant testified he was ready to return to his normal work duties, and Mr. Wolf indicated that defendant employer was prepared to put claimant to work. As matters stand as the close of the record, claimant will return to his regular employment following termination of the temporary disability period. Should subsequent events indicate the need for reconsideration of the permanency question, claimant may petition for review-reopening and the opportunity to present new evidence.

The proposed decision of the deputy awarded claimant certain medical expenses incurred in the treatment of the work-related injury. Defendants have not contested this award on appeal, and the findings of the deputy as to medical costs are incorporated into this ruling.

FINDINGS OF FACT

1. Claimant was employed as a truck driver by defendant employer on April 13, 1982.

2. While working, claimant sustained an injury to his tailbone, left leg and buttock.

3. Claimant returned to work after approximately two weeks.

4. Claimant continued to experience pain in the coccyx region as a result of the work-related injury.

5. Claimant discontinued working in October of 1982 and was treated by an orthopedic surgeon, Dr. Brodersen, for coccydynia.

6. Claimant did not return to work and consulted various other doctors for relief of his pain.

7. Claimant's treatment included physical therapy, medication and nerve block injections.

8. After February of 1983 claimant continued to experience pain when he sat or attempted to work around his house.

9. In May claimant was examined by Dr. Rosen for purposes of D.O.T. certification.

10. On June 21, 1983 it was medically indicated that claimant could return to work substantially similar to employment in which he was engaged at the time of the injury.

11. As a result of his April 13, 1982 injury claimant has been paid temporary benefits through March 24, 1983.

12. Claimant is entitled to additional temporary total disability benefits through June 21, 1983 for a total of 12 5/7 weeks.

13. Claimant's applicable rate of compensation is $328.65 per week.

14. Claimant intended to return to his regular work duties following his release to work. A determination as to whether claimant has sustained a permanent partial disability may not be made at this time.

CONCLUSIONS OF LAW

WHEREFORE, it is found:

Claimant has sustained his burden of proof that he is entitled to temporary total disability benefits from March 25, 1983 through June 21, 1983 as a result of his April 13, 1982 injury.

Claimant is entitled to the payment of medical expenses incurred in the treatment of the April 13, 1982 injury.

No determination of permanent disability may be made at this time.

THEREFORE, the deputy's decision is slightly modified.

ORDER

THEREFORE, it is ordered:

That the defendants pay the claimant an additional twelve and five-sevenths (12 5/7) weeks of temporary total disability benefits at the weekly rate of three hundred twenty-eight and 65/100 dollars ($328.65) in a lump sum together with statutory interest from the dates due.

That defendants are to pay the following medical expenses:

Charles E. Roberts, MSW	$120.00
Eidbo Clinic	20.00
Neuro-Associates, P.C.	100.00
Family Pharmacy	45.45
Mercy Hospital	241.00
Mercy Hospital	227.00
Radiology & Nuclear Medicine	115.00
Transportation reimbursement	228.40

That costs are charged to the defendants as contemplated by Industrial Commissioner Rule 500-4.33.

That defendants are ordered to file a final report within twenty (20) days from the date of this decision.

Signed and filed this 25 day of July, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH L. HASS,
Claimant,
vs.
PULLEY FREIGHT LINES,
Employer,
and
CARRIERS INSURANCE COMPANY,
Insurance Carrier,
Defendants.

FILE NO. 700755

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED
DEC 9 1983
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Kenneth L. Hass, the claimant, against Pulley Freight Lines, his employer, and Carriers Insurance Company, the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act as the result of an admitted industrial injury which occurred on April 13, 1982 and for which claimant received twenty-six and two-sevenths week period of temporary total disability benefits at the stipulated weekly rate of $328.65. Claimant was last paid weekly entitlment on March 24, 1983.

This matter was heard in this agency's office in Des Moines, Iowa on June 22, 1983 and considered as fully submitted at the conclusion of the hearing.

Based upon this deputy's notes the record in this matter consists of the live testimony of the claimant and Robert Wolf as well as the evidentiary deposition of James L. Blessman, M.D., together with claimant's exhibits 1 to 27 and 29 to 36 and defendants' exhibits A to I.

The issue in this matter appears to be whether or not claimant's continuing difficulty with "coccydynia" and its associated pain is sufficiently severe so as to prevent him from performing his normal duties as a truck driver thereby entitling him to a period of disability beyond the dates voluntarily paid by the defendants.

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

Claimant, age 33, married with three dependents, a resident of Jewell, Iowa, has been a truck driver during his entire employment history. The claimant has been a driver for the defendant employer since 1981 and on April 13, 1982, while loading his trailer with produce, claimant fell between the rear of the trailer and the loading dock due to unforeseen removal of the metal plate used as a bridge allowing a smooth entry into the trailer interior and the loading dock.

Claimant was sent to Herbert Rosen, D.O., the company physician, who in his report of May 11, 1982 (defendant's exhibit C) reported, in part, as follows:

> 6. Give accurate description of nature and extent of injury and state your objective findings: Skinned leg and skin loss L outer thigh, hematoma very large L inner lower leg: L hip pain - pulled pain into L shoulder: neck tightening up: sweat attacks

Claimant's healing was delayed due to a blood clot in his left leg. Mark Brodersen, M.D., an orthopedic surgeon associated with the McFarland Clinic in Ames, Iowa, was authorized to treat the claimant in late summer of 1982. In his report of November 1, 1982 (claimant's exhibit 2) he reported as follows:

> In regards to your information in regards to Kenneth Hass, the following information is provided. It is my feeling that Mr. Hass suffers from a problem called coccydynia. I believe that his stated cause of pain is correct. I think that a fall such as he describes could cause the type of problem that he is having at this point. In regards to the question about the x-rays, it is my feeling that he does have a slight abnormality of the tip of the coccyx or tailbone. It is not possible to determine from his initial x-rays whether or not this was present prior to his injuries. I think that this may be merely an anatomic abnormality and does not necessarily represent a fracture. In regards to his prognosis, I feel that in general these patients continue to have a long-term period of discomfort and aggravation. Generally, they do seem to gradually improve as time passes, however.
>
> In regards to his current status I, at this point in time, would have nothing other to add in regards to treatment. Because he continues to have a significant amount of discomfort, I have referred him to Doctor Blessman at the Mercy Medical Center Pain Clinic in Des Moines.

Thereupon, claimant became a patient of James L. Blessman, M.D., certified member of American Board of Family Practice, and on the staff of Mercy Pain Center in Des Moines, Iowa.

Dr. Blessman expressed doubt on the amount of pain that the claimant complained of following a marked improvement following an epidural injection. (Deposition p. 10, ll. 8-18) Subsequent nerve blocks were unsuccessful in reducing claimant's discomfort. (Depo. p. 14, l. 10) Dr. Blessman also expressed doubt concerning claimant's motivation to return to work.

At the hearing Robert Wolf, personnel director for the employer, offered to allow the claimant to return to work. Mr. Wolf authorized the use by the claimant of a rubber donut while driving to relieve his coccyx pain. Mr. Wolf authorized necessary stops by the claimant while enroute so as to allow him to walk and stretch so as to relieve his discomfort. All of this was conditional upon Dr. Rosen, the company physician, issuing a return to work slip. This was done. Dr. Rosen released the claimant to return to work as of the date of the hearing. (Cl. ex. 18) Claimant stated that he would report for duty the next day, June 23, 1983. So much for claimant's lack of motivation.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 13, 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).

In applying the foregoing legal principles to the case at hand, it is clear that the claimant has borne his burden of proof. All of the medical practitioners whose opinions are a part of the evidence, Dr. Marvin Dubansky, Dr. Blessman, Dr. Brodersen, Dr. Dana Simon and Dr. Stuart Winston, agree that claimant's condition is painful, the only issue being whether such pain continues to be disabling. Claimant appears to have returned to work putting to rest claimant's claim for additional healing period benefits.

Claimant's claim for permanent partial disability of the body as a whole appears to be premature. The doctors all appear to be of the opinion that claimant's coccyx be given time to heal and hopefully this painful condition will resolve itself.

Dr. Blessman approved of claimant's visit to Charles E. Roberts, MSW, a counselor in Ames, Iowa (Depo. p. 16, l. 10) and accordingly the charges so incurred are the defendants' re-

sponsibility.

The unpaid charges of Dr. Walter B. Eidbo, M.D., incurred on May 20, 1983 are payable by the defendant.

The reasonable cost of claimant's independent examination by Dr. Winston is payable by the defendant.

The physical therapy sessions at Mercy Hospital in Des Moines, Iowa are payable by the defendants.

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

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

2. That the claimant sustained an admitted industrial injury on April 13, 1982 resulting in a period of temporary total disability of a twenty-six and two-sevenths week duration.

3. That claimant's rate of entitlement is $328.65

4. That the claimant was unable to perform acts of gainful employment until June 22, 1983 at which time he returned to work.

5. That the claimant is entitled to an additional 13 week period of temporary total disability benefits.

6. That claimant's claim for permanent partial disability is premature in that his "coccydynia" may very well improve resulting in a less painful situation.

WHEREFORE, IT IS ORDERED that the defendants pay the claimant an additional thirteen (13) week period of temporary total disability benefits at the weekly rate of three hundred twenty-eight and 65/100 dollars ($328.65) in a lump sum together with statutory interest from the dates due.

Defendants are further ordered to pay the following medical expenses:

Charles E. Roberts, MSW	$120.00
Eidbo Clinic	20.00
Neuro-Associates, P.C.	100.00
Family Pharmacy	45.45
Mercy Hospital	241.00
Mercy Hospital	227.00
Radiology & Nuclear Medicine	115.00
transportation	228.40

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 9 day of December, 1983.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARIANNA HAYES,	:	
	:	
Claimant,	:	File No. 735407
	:	
vs.	:	
	:	A R B I T R A T I O N
EAGLE SIGNAL DIVISION,	:	
	:	D E C I S I O N
	:	
Employer,	:	F I L E D
Self-Insured,	:	
Defendant.	:	DEC 28

INTRODUCTION

This is a proceeding in arbitration brought by Marianna Hayes, claimant, against Eagle Signal Division, self-insured employer, defendant, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury of April 25, 1983. It came on for hearing on June 28, 1984 at the Bicentennial Building in Davenport, Iowa.

The industrial commissioner's file contains no filings.

At the time of hearing the parties stipulated to a gross weekly wage of $290.64 and a marital status of married with four exemptions; that claimant lost no time from work; that the medical expenses were fair; and that permanent disability commenced on the date of the injury.

The record in this matter consists of the testimony of claimant, Elmer Hayes, James Neifing, Carl Madsen and Bob Blette; claimant's exhibit 1, a diagram of the material claimant was working with at the time of her injury; claimant's exhibit 2, a series of medical expenses; claimant's exhibit 3, a letter from J. Albert deBlois, D.O., dated March 19, 1984; claimant's exhibit 4, a letter from Robert W. Milas, M.D., dated March 6, 1984; defendant's exhibit 1, a listing of gross pay; defendant's exhibit 2, additional earnings records; defendant's exhibit 3, a metal base; and defendant's exhibit 4, a small part with a brass terminal. The parties filed briefs.

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 any disability she now may suffer; whether or not claimant is entitled to permanent partial disability; and whether or not claimant is entitled to the payment of medical expenses pursuant to Iowa Code section 85.27.

STATEMENT OF THE CASE

Married claimant with two dependent children, who has a GED and who has worked for defendant employer for more than twenty-fo years, recalled the circumstances of her April 25, 1983 injury thusly: She was taking small parts with a brass terminal on one end and inserting them into a block. Wires were pulling out of a ring and the flanges on the terminal were bent in an attempt to keep them in place. She used an ordinary screwdriver to bend the flanges. She used the screwdriver in her right hand and pressed as hard as she could press. This was the first time she had done the job which she worked on for three and one-half to four hours. After the flanges were bent they were checked with a lighted magnifying glass. If the flanges had not been opened enough, another attempt was made to open them. The rate to make 100 percent on this work was 600 pieces per hour or a total of 1200 flanges. She was unsure how many she had done, but she thought she was close to 100 percent one of the hours she worked.

She complained to her foreman and to her group leader that her right shoulder blade hurt. She finished the day. She observed trouble with a pain in her shoulder and into her arm. The work was not done the next day.

She went to personnel where she saw Pat West who rubbed liniament on her shoulder. She was not sent to the doctor.

She was called in by Neifing and Madsen who acted as if they knew nothing about her seeing Dr. deBlois. Neifing told her that she had to see the company doctor and then "hee hawed" around. She denied that any company doctor was offered to her. She insisted that she had to see the doctor and ultimately said she would send the bill through group or would cancel her appointment and go to the company doctor.

Dr. deBlois gave her pain pills and did Cortisone injections which helped until she became immune. Therapy was then tried for two or three times each week from December through January or a part of February. A laser and heat were used on her shoulder. Complaints about her being off work led to her quitting that treatment. She continues to work as a hydraulic operator and in subassembly.

Claimant, who is still treating with Dr. deBlois--who has been unable to find a medication which stops her pain--complained of lots of problems depending on what she is doing. She is

bothered by movement and by standing and walking too much. Her pain is constant, but sometimes much worse as determined by what her activities have been. Pain is aggravated by reaching. At times she is better on weekends; at other times she is not. Overall, she seems to think that her shoulder is not that much problem on weekends. She is unable to lie on her right side at night.

Claimant claimed that she has paid for all prescriptions and for treatment by Dr. deBlois except for her last visit. She has been reimbursed for some expenses by the group carrier. She indicated that she was sent by Dr. deBlois to Dr. DeAngelo, who in turn sent her to Dr. Milas.

Claimant stated that she has taken some vacation because she had shoulder pain. She went nowhere on vacation, but rather stayed at home.

Claimant acknowledged seeing the doctor for things other than her shoulder and most recently for a blood test because of the possibility of low potassium. In March of 1984 she had an auto accident when an uninsured motorist slid into her. She told that she had injury to her forehead and a whiplash. Pain came from the back of her head around to her forehead. She had blurred vision. She told that she recuperated from the accident after having been off for a week. Bills were covered by her insurance carrier and no law suit was filed.

Before April 1983 she had seen Dr. deBlois for menstrual and sinus trouble. She denied osteopathic manipulation to her back.

Elmer Hayes, claimant's spouse of twenty-five years, recalled that claimant came home complaining of her shoulder and the cords in her neck. He told her to take her problem to the union. He rubbed on linament. He remembered claimant's sitting in hot water and using a heating pad. He described her as in constant pain.

He testified that claimant complains quite often of pain, but she bears with it.

James Neifing, manager of personnel and industrial relations, who has been employed by defendant for eight years, recounted a May 3, 1983 meeting with claimant as follows: He first became aware of claimant's alleged problem on that date when claimant reported to West in personnel that she was going to Dr. deBlois for her shoulder. He got Madsen and sent for claimant. He explained to claimant the difference between workers' compensation and group insurance. She insisted on seeing Dr. deBlois. She was told she could see the company doctor. It was agreed that claimant could go to her own doctor. He heard nothing further of the incident until the chief steward came to Madsen with bills for claimant's treatment.

Neifing indicated that medical bills incurred and submitted directly to the group carrier by the employee would be paid. Forms could be those maintained in the personnel office or those available from the doctor. He acknowledged there were advantages to the company to having claims paid under the group plan.

Neifing thought the work claimant was doing on April 25, 1983 had been done by five persons over a two day period at the end of which time all defective parts had been completed.

Carl Madsen, supervisor of personnel who has worked for defendant employer for four years and whose duties include handling employee safety and benefits programs, also recollected the meeting with claimant: Neifing told her of the difference between compensation and group benefits. She said she wished to keep her appointment with the doctor for that day. She was informed of the availability of two company physicians. She expressed her confidence in Dr. deBlois. She was told her visit would be under the group plan and not the compensation policy.

The witness also does work in the payroll area. In April of 1983 claimant's earnings were 129%, in May 129%, in June 134%, in July 132%, in August 135% and in September 132%. He characterized claimant as a high earner and one of the top in the plant. He agreed that the amount of earnings would depend on the work done and that the work done was light.

Madsen testified that he and Neifing did not tell claimant her injury was workers' compensation because they were not certain it was. The company has continued to deny the claim.

Bob Blette, claimant's supervisor of April 25, 1983, testified to no awareness of claimant's injury until he heard about it from her group leader. He made further explanation of the work claimant was doing on April 25, 1983 by saying that an attempt was made to salvage a number of defective brass terminals. A magnifying glass was used to see if the flanges had been opened as far as possible and also to see if the flanges had been fractured in the opening process. The job was run for two days in one area and a day in another. He estimated that claimant had done the work for a little more than three hours. He denied ever being told by personnel to give claimant an easier job.

Records from defendant employer show that claimant usually made in excess of 100% and in excess of 120% as well.

A report from J. Albert deBlois, D.O., dated March 19, 1984 reports claimant was seen on May 3, 1983 for pain in the right shoulder. He understood that her job involved constant repetitive use of her right hand, arm and shoulder and a large amount of force in using a screwdriver for precision work. Claimant had full range of motion with pain centered over her right shoulder and along the right scapula. Paraspinal myospasm was present in the upper thoracic area. Claimant was treated conservatively with anti-inflammatories. X-rays taken later in the month were negative.

Subsequently, claimant was injected in trigger points with Xylocaine and Aristocort. The doctor thought these injections produced satisfactory results. Physical therapy was started on December 6, 1983.

Claimant seemingly told Dr. deBlois that her pain was not a problem during periods of rest or inactivity. He wrote: "In my opinion, the problem is work related and is caused by her repetitive use of the hand & shoulder in her job activity. The prognosis is satisfactory if the type of work activity is greatly reduced or eliminated." He found claimant "capable of working with the shoulder but not...rapid, repetitive activity necessary for running of the 500+ pieces presently required."

Anthony D'Angelo, Jr., D.O., saw claimant on February 23, 1984 and diagnosed right scapular pain. He proposed ruling out a cervical disc.

Robert W. Milas, M.D., neurosurgeon, saw claimant on March 5, 1984 at which time she gave a history of progressive discomfort in the right scapula since April 1983 and of treatment by Dr. deBlois. Neurologically, claimant was intact. Motion in her cervical and thoracic spine was normal. The doctor's impression was right scapular pain of unknown etiology. No evidence of a herniated disc was found.

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 her 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 she 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).

Claimant claims injury on April 25, 1983 from repeatedly using a screwdriver to open flanges. Claimant worked at this job for three and one-half to four hours doing as many as 600 pieces per hour. Claimant's spouse verified her coming home with shoulder and neck complaints.

A letter from Dr. deBlois reports claimant's first being seen by him on May 3, 1983 for pain in the right shoulder which she told him had occurred at work. The doctor believed claimant's "job involves constant and repetitive use of the right hand, arm and shoulder apparatus. A large amount of force is required when a screwdriver is used in precision work." He expressed the feeling that claimant "is capable of working with the shoulder but not in the job situation she has been in and not in the rapid, repetitive activity necessary for the running of the 500+ pieces presently required."

Claimant was seen by Dr. Milas on March 5, 1984 whose impression was that the etiology for claimant's right shoulder pain was unknown.

There is no evidence of claimant's having right shoulder and arm complaints prior to the time she was seen on May 3, 1983. The letter from Dr. deBlois finds her problems to be work related. The undersigned believes the record supports the finding that claimant had an injury to her right upper thoracic area including the rhomboid muscle group on April 25, 1983 which arose out of and in the course of her employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 25, 1983 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).

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, 251 Iowa 375, 101 N.W.2d 167. 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.

Claimant continues to complain, but the matter of causal connection to disability is primarily a medical issue. Medical evidence in this case is scanty. The letter of Dr. deBlois correctly describes claimant's job activity at the time of her her injury, but that job was done on a single occasion for less than half a work day. Claimant, subsequent to April 25, 1983, was involved in an auto accident. No documentation was offered as to time claimant took vacation allegedly because of pain or to show that claimant saw a doctor on those days off. Claimant, in fact, stipulated to no loss of time.

Claimant has not shown by a preponderance of the evidence that any disability she now suffers is causally related to her injury of April 25, 1983 and for that reason no consideration will be given to awarding permanent partial disability.

The remaining issue is claimant's entitlement to benefits under Iowa Code section 85.27 which provides in pertinent part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

Defendant has denied the compensability of this claim and therefore cannot seek control of the medical treatment. Holbert v. Townsend Engineering Company, 32 Biennial Report of the Industrial Commissioner 78 (Review Decision 1975). The letter from Dr. deBlois supports awarding payment of the doctor's charges, of prescription charges and charges for treatment at River Rehabilitation, Inc. Claimant testified that she was referred to Dr. DeAngelo by Dr. deBlois and his charges also will be allowed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-four (44) years of age.

That claimant has a GED.

That claimant has worked for defendant employer for more than twenty-four (24) years.

That claimant is an outstanding production worker.

That on April 25, 1983 claimant worked at opening flanges between three and one-half and four hours.

That the work of opening flanges required use of a screwdriver in the right hand.

That April 25, 1983 was the only date on which claimant did the flange opening job.

That claimant had an automobile accident in March of 1984 which resulted in an injury to her forehead and a whiplash.

That claimant missed no work at the time of her injury other than possibly time to see the doctor.

That claimant has incurred medical expenses for treatment of her injury.

That the opinion of Dr. deBlois was based on an inaccurate description of claimant's usual work.

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 her employment on April 25, 1983.

That claimant has failed to prove by a preponderance of the evidence a causal relationship between her injury of April 25, 1983 and any disability she now suffers.

That claimant has shown entitlement to benefits under Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay the following medical expenses:

Prescription charges	$120.05
Albert deBlois, D,O.	396.00
River Rehabilitation, Inc.	440.00

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

Signed and filed this 28 day of August, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES R. HEGGE,	:	
Claimant,	:	File No. 712121
vs.	:	A P P E A L
PITTSBURGH-DES MOINES STEEL COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
SEP 28 19
IOWA INDUSTRIAL COMM

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision wherein the Iowa Industrial Commissioner was found to have subject matter jurisdiction in these proceedings.

The record on appeal consists of the testimony of claimant, John Newmeister and David Neitzke; claimant's exhibits A and B; defendant's exhibits 1 through 5; and the briefs and filings of all parties on appeal.

ISSUE

Whether the Iowa Industrial Commissioner has subject matter jurisdiction over claimant's workers' compensation proceedings.

REVIEW OF THE EVIDENCE

Claimar . was a twenty-four year old single male residing in Whitehall, Wisconsin at the time of hearing. Claimant's involvement began with defendant employer while he was a welding student at Western Wisconsin Technical Institute in 1979. (Transcript, pages 94-95)

Claimant recalled that he and his roommate, David Neitzke, were told of a job opportunity with defendant employer by their welding instructor, Bill Van Riper. Claimant testified that Mr. Van Riper gave them the telephone number of the defendant employer in Des Moines, Iowa and told them to ask for Vern Reynolds, the field supervisor of defendant employer. (Tr., p. 95

Claimant testified that Neitzke made the telephone call to Reynolds in the claimant's presence. Claimant testified that

Neitzke was told by Reynolds' secretary that Reynolds was out of the office so Neitzke left a message for Reynolds to return his call. (Tr., pp. 95-97)

Claimant testified that a couple days later, Neitzke recieved a call from Vern Reynolds. Claimant testified that Reynolds offered both claimant and Neitzke jobs in Elwood, Indiana. (Tr., pp. 97-101)

In corroboration of claimant's testimony, David Neitzke recalled the series of events at the hearing:

Q. Did you call Des Moines, Iowa?

A. Yes.

Q. Did you talk to the person that Mr. Van Riper told you to talk to?

A. No.

Q. Who did you talk to? Anyone?

A. His secretary, I believe.

Q. Did you identify yourself when you called down there?

A. Yes.

Q. Did you tell them why you were calling?

A. For a job, yes.

Q. You told them you were calling for a job?

A. Yes.

Q. Wh. did the secretary tell you?

A. That he wasn't in right now, but to leave my name and phone number and they'd have him call me back.

Q. Did someone call you back?

A. Yes, about two days later.

Q. Who was that person?

A. I'm blank right now.

Q. Was it Mr. Reynolds?

A. Yes. Vern Reynolds.

Q. Where did he call you? Did he call you in La Crosse?

A. Yes.

Q. Did he identify himself when he called?

A. Yes.

Q. What did you say to him or what did he say to you when he called?

A. I told him I was looking for a welding job.

Q. Did he say anything about Pittsburgh-Des Moines Steel Company hiring at that time?

A. Yes.

Q. What did he say?

A. He said they were hiring -- said they had job openings and it sounded good to me so --

Q. Excuse me. I didn't here what you said.

A. He said they were hiring; there were job openings.

Q. Was there any discussion about salary?

A. Yes.

Q. Did he tell you how much the job would pay?

A. Yes, around $10 an hour.

Q. Was there any discussion about job location?

A. Yes.

Q. What did he say in that regard?

A. It would consist in a lot of traveling. They had a job in Elwood, Indiana.

Q. He said there was a job at that time in Elwood, Indiana?

A. Yes.

Q. Did you tell him that you were interested in the job?

A. Yes, I did.

Q. What did he tell you?

A. "If you want the job you're hired." He told me to report down to Elwood, Indiana, at 7:00, to Gaylord Brandt.

Q. Now let me -- he told you that if you wanted the job you're hired, was that your testimony?

A. Yes.

Q. You know Jim Hegge, don't you?

A. Yes.

Q. Was he your roommate at Western Wisconsin Technical Institute?

A. Yes.

Q. Was he with you when Mr. Van Riper told you about the job?

A. Yes.

Q. Was he with you when you called down to Iowa the first time you called down there?

A. Yes.

Q. Was Mr. Hegge with you when he called back?

A. No.

Q. Did you and Mr. Hegge ever talk about this job or about this prospective job that Mr. Van Riper had told you about?

A. Yes.

Q. What was said?

A. He said if the job sounded good to me to vow for him too. He wanted a job, too.

Q. I'm sorry. What was that please?

A. He said if the job sounded good to me to tell him that he'd like a job, too, with me.

Q. When did he say that?

A. Before. We talked about it before he called back about the job.
(Tr., pp. 77-81)

Vern Reynolds testified in a telephonic deposition that he did recall talking to Neitzke from his office in Des Moines, Iowa. Reynolds testified that he told Neitzke there were openings in Elwood, Indiana but that he would have to go the the job site and interview with Gaylord Brandt, the foreman. (Defendant's Exhibit 5, p. 8)

Reynolds testified that he told Neitzke that if claimant wanted a job, he too should visit with the foreman and "if they were qualified, he'd put them on." Reynolds testified that the foreman on the job site makes the final decision regarding the hiring of an employee. (Def. Ex. 5, p. 9)

John Newmeister is senior construction manager of defendant employer. Newmeister testified that it is company policy to hire at the job site. He stated that in the company union contract, "the job starts and ends at the job site." Newmeister testified that the union contract governed the employment of boilermakers, boilermaker helpers, and boilermaker learner helpers. He testified claimant has classified as a boilermaker/welder. Newmeister testified that he did not know whether claimant was a union worker or not. (Tr., p. 58)

Claimant and Neitzke began working for defendant employer on June 4, 1979. (Claimant's Ex. A, Def. Ex. 1) Claimant testified that when they arrived for their first day of work, they immediately asked for the foreman, Gaylord Brandt. Claimant testified they introduced themselves as "the boys from Wisconsin that Mr. Reynolds had hired." Claimant testified that Brandt then responded "okay, lets get some equipment for you," and then he started looking for safety belts and hard hats. (Tr., pp. 101-103) Both claimant and Neitzke filled out employment cards. (Cl. Ex. A, Def. Ex. 1) Claimant testified that after working one week, Neitzke quit his job. Claimant testified that he continued to work in Elwood, Indiana for a month at which time he also quit. Claimant testified that he called the foreman a few days later and told him he had quit. (Tr., pp. 106-107) After being out of work for about a week and a half, claimant testified he called Vern Reynolds in Des Moines, Iowa and asked for his job back. Regarding this chain of events, claimant testified:

Q. Did you go back to work for Pittsburgh-Des Moines Steel Company?

A. Yes.

Q. How did that come about?

A. Well, after about a week and a half or so I got worried that I was -- figured that I had better get a job so I called Des Moines.

Q. Who did you talk to?

A. Vern Reynolds.

Q. What did you say to him?

A. Asked him for my job back.

Q. What did he say?

A. He said, "Okay, you're going to go to Waukesha, Wisconsin, and you'll be working for Tom West."

Q. He hired you back, did he?

A. Yes.

Q. Over the telephone?

A. Yes.

Q. He told you where to report to?

A. Yes.
(Tr., p. 107)

Vern Reynolds testified that he remembered claimant calling him up and telling him that he was available to work, but Reynolds couldn't remember when or for what job. (Def. Ex. 5, pp. 36-37)

Claimant testified that when he arrived in Waukesha, Wisconsin, he did not have to fill out an application for employment card as he had in Indiana. (Tr., p. 108) Claimant recalled he worked in Waukesha for a couple of months. From July 21, 1979 until the time of his injury, claimant worked for defendant employer in the following states: Wisconsin, Nebraska, Minnesota, Oklahoma, Texas, Iowa, North Dakota, Illinois, and Kentucky. (Def. Ex. 2) Claimant was injured on December 17, 1980 in Wises Landing, Kentucky when he fell off a ladder working for the defendant employer.

APPLICABLE LAW

The industrial commissioner's subject matter jurisdiction over workers' compensation claims based on injuries sustained outside the state is governed by Iowa Code section 85.71:

> 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, whole workers' compensation law is not applicable to his employer, or
>
> 4. He is working under a contract of hire made in this state for employment outside the United States.

The primary focus under Iowa Code section 85.71 is on the jurisdiction where the employee's employment is "principally localized." George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495, 500 (Iowa 1983). 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. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 533 (Iowa 1981).

The place of contract or hiring becomes significant "only when the employment is not principally localized in any state, the law of the state where employment is principally localized is not applicable to the employer, or the employment is outside the United States. George H. Wentz, Inc., 337 N.W.2d at 500.

Where the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligati and its sanctions are subject in some measure, to the legislati control of the state. Pierce v. Foley Bros., Inc., 168 N.W.2d 346, 352 (Minn. 1969).

A contract for employment is made at the time and place where the last act necessary to complete meeting of the minds o the parties is performed. George H. Wentz, Inc., 337 N.W.2d 495, 500.

While Iowa courts have not addressed the issue of offer and acceptance of a contract made by telephone, the prevailing view in other jurisdictions is that the contract comes into existenc at the place where the offerer utters the words of acceptance. Standard Oil Co. v. Lyons, 130 F.2d 965 (8th Cir. 1942); Pierce, 168 N.W.2d 346, 355; Travelers Ins. Co. v. Workmen's Comp. Appea Bd., 68 Cal.2d 7, 64 Cal Rptr. 440, 434 P.2d 992.

Citing Lyons at 968, the court stated:

> 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.

ANALYSIS

On the question of the jurisdiction of the Iowa Industrial Commissioner to hear the workers' compensation proceeding of claimant, all parties agree that if Iowa has jurisdiction in this case it must rest upon Iowa Code section 85.71, which requires that the contract of hire be made in this state for employment not principally localized in any state.

Defendant herein has cited several cases which it believes establish that no contract was entered into in the state of Iow between claimant and defendant employer. In reviewing these cases, however, they are found to be distinguishable, and the conclusion reached is that, had the facts of the case at bar been present in these cases, those courts would have held that contract was entered into in the state of Iowa. It was made clear in these cases that, ordinarily, to constitute an accepta of an offer there must be an expression of the intention by work, sign, writing, or act communicated or delivered to the person making the offer or his agent. These cases indicate that the controlling question is not whether a party accepted the offer but where he accepted it, and that it is agreed that a contract is deemed to have been made where the final assent is given.

Accordingly, the question that must be answered in the case at bar is, where was the acceptance or assent finally given?

At the center of controversy is the July 1979 contract in which claimant was rehired. The record clearly indicates that claimant offered his services from Wisconsin and they were accepted by defendant employer's agent, Vern Reynolds, in Iowa. Unlike the June 1979 contract that claimant made with Reynolds through a third party, claimant made his July 1979 offer direct to Reynolds. Further, in June of 1979, claimant's work qualifi tions were unknown to Reynolds. By July of 1979, Reynolds was well aware of claimant's capabilities. Thus, defendant's argument that the July 1979 contract was made at the job site appears far less compelling.

The deputy industrial commissioner was also correct in finding the collective bargaining agreement inapplicable to the claimant. The deputy correctly stated that a contract comes into existence where the meeting of minds takes place, not where the contract is to be performed. Since it has already been decided that the contract was made in Iowa, this issue need not be addressed any further.

FINDINGS OF FACT

1. Defendant employer is a Pennsylvania corporation with its principal place of business in Pittsburgh, Pennsylvania.

2. In 1979 defendant employer maintained its central district office in Des Moines, Iowa and was authorized to do business in the state of Iowa.

3. In 1979 claimant was domiciled in the state of Wisconsi

4. In June 1979 claimant was hired by defendant employer t work in Elwood, Indiana as a welder.

5. Approximately late June or early July 1979, claimant formally quit his employment with defendant employer.

6. In July 1979 claimant called from Wisconsin to Vern Reynolds in Iowa, and offered to return to work for defendant employer.

7. In July 1979 Reynolds, on behalf of defendant employer,

accepted claimant's offer to return to work and told claimant to report to a job in Waukesha, Wisconsin.

8. From July 1979 to December 17, 1980 claimant worked in at least eleven different stated for defendant employer.

9. On December 17, 1980 claimant was involved in a work-related injury in Wises Landing, Kentucky.

10. Claimant was working under a contract entered into in July 1979 with defendant employer at the time of his injury.

11. Claimant has received workers' compensation benefits pursuant to the laws of the state of Kentucky.

CONCLUSION OF LAW

The Iowa Industrial Commissioner has subject matter jurisdiction in this proceeding.

THEREFORE, it is ordered:

That this matter shall come on for hearing before the Iowa Industrial Commissioner.

That the defendant pays costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 28 day of September, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS J. HEIN,

Claimant,

vs.

FOREMAN TIRE & SERVICE, INC.,

Employer,

AMERICAN MUTUAL INSURANCE, COMPANY,

Insurance Carrier, Defendants.

File No. 730864

A R B I T R A T I O N

D E C I S I O N

FILED

SEP 25 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Thomas J. Hein, claimant, against Foreman Tire & Service, Inc., employer, and American Mutual Insurance Company, insurance carrier, for benefits as a result of an alleged injury on March 11, 1983. This case was heard by the undersigned on June 15, 1984 at the Woodbury County Courthouse in Sioux City, Iowa.

The record consists of the testimony of claimant, Rex Foreman; claimant's exhibits 1 through 11 and defendants' exhibits A, B, C and D.

ISSUE

The sole issue for determination is the nature and extent, if any, of permanent partial disability to the claimant as a result of a myocardial infarction on March 11, 1983.

At the time of the hearing, claimant moved to amend the petition to include a request for additional compensation pursuant to chapter 86.13, Code of Iowa. Said motion is hereby overruled.

EVIDENCE PRESENTED

Claimant testified he is 35 years of age, married and the father of one son, age eight years. He stated that he has completed high school though he was an average to less than average student. Claimant explained that after high school he began employment with TG & Y Stores which provided him with a number of in-house management trainee programs. Claimant also advised that he has received additional management training while in the employee of the Goodyear Stores.

Claimant's employment with TG & Y continued from 1968 to 1971 during which time he moved from the position of manager trainee at a store in Fremont, Nebraska to the co-manager of the TG & Y Store in Sioux City, Iowa. His salary increased from $400 a month to $850 a month plus bonuses. Claimant said he quit TG & Y Stores in 1971 to accept employment with Coit International as an area supervisor. He described this position as that of a wholesale fabric salesman which required a considerable amount of travel. He advised that his salary with Coit International was approximately $1,000 per month. In 1973 claimant again changed jobs and began employment with Goodyear Tire & Rubber Company. His first position with Goodyear was that of salesmanager for which he was paid $400 per month plus commission. He stated that he was later promoted to service manager and from service manager to credit manager and from credit manager to assistant manager. Claimant advised that when he ceased his employment with Goodyear Tire & Rubber Company he was earning approximately $1,200 per month plus bonuses. At that time claimant went to work for Foreman Tire & Service, Inc., as a manager at a salary of approximately $1,400 per month. Claimant described all of these jobs as "working manager" type positions which required not only his managerial skills but also a certain degree of physical labor. Claimant testified that while he was in the employ of Foreman Tire & Service, Inc., he would spend a little over 50 percent of his time performing jobs requiring physical exertion and the remainder of his time would be involved in general accounting, bookkeeping, and managerial activities.

Claimant stated that on March 11, 1983 he was the only employee of Foreman Tire & Service, Inc., at the Haywood location due to the recent resignation of another employee. He stated that he left for work that morning at about 6:00 a.m. and went to the store to open it up for the business day. He stated that things were somewhat hectic that day due to the fact that he was the only employee at the store and was having to conduct regular business as well as interviews for the vacant position. Near closing time claimant was in the process of cleaning up the shop when he decided to move the tire mounting machine outside to wash it up. He stated that he moved the machine outside, which weighed several hundred pounds, and as he was doing so he began to perspire greatly and experience hot flashes. Claimant said he felt dizzy, felt a sharp pain in his left side and began to have a "spacey" sensation. He said he was, however, able to complete the task and then headed for home. Claimant testified that when he got home he was experiencing severe pain and became aware of the fact that he needed medical attention. At that time he called 911 for an ambulance to take him to the hospital. Claimant said he was in the hospital from March 11 to March 30 or 31 as a result of what was later described to him as an acute myocardial infarction.

Claimant testified that he has not been employed since March of 1983. He said that since September of 1983 he has looked for employment at K-Mart, several insurance companies and a bank. He said that in total he has sought employment at about 40 to 50 different places. He said that most of the potential employers asked about his physical health on their employment applications and though most have not said anything to him about his heart condition, some employers have in fact said that they would not hire him due to his present problems. He stated that the defendant insurance carrier has not assisted him in finding employment and that he has not been able to return to his former employment. Claimant testified that since his myocardial infarction on March 11, 1993 he has found that he is more sensitive to very hot and very cold weather, that he has found it necessary to restrict his physical activities and that he occasionally suffers chest pain. Claimant admitted that he continues to smoke though he has been advised that smoking is dangerous to his health.

Claimant appeared well dressed at the hearing and expressed himself in an articulate and personable way. He indicated that he would be willing to relocate to find employment and that he would consider any employment for which he is qualified.

Rex Foreman testified that he is a co-owner of the Foreman Tire & Service, Inc., and that he hired claimant to work in the Haywarden Store in 1980 as a manager. Mr. Foreman indicated that in his opinion claimant would not be able to perform the job as manager at the store at this time due to the requirement for physical labor in the position. He did, however, indicate that there were jobs available in the Sioux City area for which the claimant would be qualified and would not require physical labor. He indicated that although he was aware of these jobs he had not communicated their availability to the claimant.

Deborah A. Hanson testified by way of deposition that she is employed as a rehabilitation counselor for the State of Iowa Rehabilitation Education and Services Branch of the Department of Public Instruction. She outlined her educational background and indicated that she has been employed in her present position since August of 1974. Ms. Hanson testified that she first saw claimant on March 7, 1984. She indicated that a release of information was obtained from the claimant and an interview was conducted at that time. She outlined the work history that she received from Mr. Hein. She stated that the purpose of the interview was to determine whether or not the claimant qualified for vocational rehabilitation services.

Ms. Hanson testified that there are three basic criteria

which must be met in order for an individual to qualify for the vocational rehabilitation program. First, she stated is whether or not an individual does in fact have a disability. Second, is whether or not that disability presents a substantial vocational handicap, and third, is whether or not the agency believes it can give substantial benefit to that individual. Ms. Hanson testified that based upon her interview of Mr. Hein and a review of his background and medical situation that he did not in fact qualify for vocational rehabilitation services because it was their opinion that he did not have a substantial vocational handicap. She based this opinion on the fact that claimant had a background of management, general sales, general clerical activities and experience in those areas which would give him marketable skills. It was her opinion that such jobs were generally available in the Sioux City area. She did not believe that claimant suffered any significant disadvantage because of his age or his present health. She did admit, however, that some employers would be concerned about claimant's heart condition and that that concern may cause some employers to reject him as a potential employee.

Claimant's exhibit 1 contains numerous medical reports from several different doctors. A review of these reports indicates that on March 11, 1982 claimant suffered a myocardial infarction following excertion at work. At the time of the myocardial infarction, claimant was suffering from a preexisting athero-sclerotic coronary disease. Clark Hyden, M.D., Ronald A. Drauer, M.D., and Paul From, M.D., all concur that claimant's myocardial infarction was the result of aggravation of the preexisting coronary disease. In other words, claimant's employment aggravated the preexisting condition bringing about the myocardial infarction at a time earlier than it otherwise would have occurred. They all agree, however, that the underlying coronary disease is not work related.

Three different doctors examined claimant to determine the functional impairment resulting from the myocardial infarction. Stephen R. Zumbrun, M.D., examined claimant on August 31, 1983 and found that claimant was suffering a 20 to 25 percent limitation in his functional aerobic tolerance. Dr. Ronald Drauer examined claimant on January 25, 1984 and found that claimant had an approximate decrease of 15 to 20 percent in his capacity to perform physical work as a residual of the myocardial infarction. Dr. Paul From also examined claimant and concluded that claimant was suffering a physical impairment of 20 to 45 percent. It was Dr. From's opinion that of the 20 to 45 percent impairment presently suffered by the claimant that approximately 75 percent of the impairment was due to the myocardial infarction and approximately 25 percent of the impairment was due to coronary artery disease in the left coronary system. None of the doctors were willing to state that claimant's left coronary artery occlusion was the result of either the right coronary occlusion or subsequent myocardial infarction. All of the physicians who examined claimant seemed to concur that his prognosis was guarded. Each of the doctors indicated some concern with claimant's weight and the fact that he had not yet quit smoking. Each of the physicians also recommended that claimant avoid strenuous working situations and that he not partake in competitive sports.

APPLICABLE LAW

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

It is clear from the facts presented that claimant is in fact suffering a permanent impairment as a result of the myocardial infarction which occurred on March 11, 1983. It is also clear, however, that claimant's present impairment is greater than that caused solely by the March 11, 1983 injury. At least part of his impairment is the result of left coronary artery disease for which no particular cause has been established. Dr. From gives a broad range of impairment from 20 to 45 percent of which he says 75 percent is the result of the myocardial infarction. Dr. Drauer finds claimant suffering a 15 to 20 percent impairment. While physical impairment is not the sole criteria for determining industrial disability, it is clear in this case that claimant does in fact suffer a significant physical impairment which limits his ability to perform physical activity. As a result, claimant will be forced to change both his personal and professional life style in order to accommodate the limitations imposed upon him at this time. These physical limitations will to some extent reduce the number of jobs available to claimant and may reduce his ability to earn income.

Claimant has a strong managerial background particularly in the retail sales area. Thus far in his working career, claimant has demonstrated an ability to move up the ladder to higher paying positions with considerable consistency. While it is clear claimant may no longer be able to function in the capacity of a "working manager," it is also apparent that he still retains his managerial skills and that those skills are indeed marketable. It should be noted that claimant did not qualify for vocational rehabilitation services from the State of Iowa because he has not in fact suffered a significant or substantial vocational handicap. Although claimant does not have any formal education beyond high school, his background with employer sponsored training programs nevertheless makes him an attractive candidate for managerial positions.

Claimant's age would not appear to be a disadvantage in the employment market. Assuming claimant does not suffer any fatal heart attacks in the future, he would still offer an employer some 30 years of service. The problem, of course, is claimant's prognosis. Each of the doctors expressed considerable concern about this man's prognosis. Each used the term guarded in describing claimant's future well being. This would surely be of concern to any employer who carefully examines claimant's present physical condition. He is still suffering from coronary artery disease. He is still smoking. He is still overweight. He has not apparently continued with an exercise program and consequently he remains an excellent candidate for future coronary difficulties. Claimant would be well advised for his own benefit and that of his eight year old son to follow his physicians' advice and attempt to reduce the risk factors which he presently maintains.

In summary, claimant is a 35 year old man suffering a significant physical impairment as the result of his myocardial infarction. Although the impairment is significant, it must be noted that claimant has an extensive educational background and work experience in managerial areas where physical requirements would be minimal. He is articulate and personable and possesses marketable job skills. He has demonstrated some unwillingness to reduce those factors which would most likely cause him additional coronary problems in the future. He has in the past demonstrated an ability to increase his earning capacity with each of his employers and there would not appear to be any reason why he cannot do so now. Claimant's physical limitations do not preclude him from the job market but merely limit the number of jobs available to him. Although the number of jobs available to him are limited, it would not appear that he would suffer significant loss of income as a result of the physical limitations. Based upon all of the factors relevant to a determination of industrial disability, claimant has proven by a preponderance of the evidence that he has suffered an industrial disability as a result of the myocardial infarction equal to 25 percent.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. Claimant is 35 years old, married and has one child.

2. Claimant has a high school education and several years of management training with TG & Y Stores and Goodyear Tire and Rubber Company.

3. Claimant is personable and articulate.

4. Claimant has demonstrated managerial ability and has a long work history of consistent advancement.

5. On March 11, 1983 claimant suffered a myocardial infarction as the result of work-related stress and a preexisting atherosclerotic coronary disease.

6. Claimant suffers a significant physical impairment as the result of the myocardial infarction.

7. Claimant should avoid strenuous physical activity and competitive sports.

8. Claimant has shown poor motivation to reduce coronary risk factors such as obesity and smoking.

9. Claimant has a guarded prognosis.

10. Claimant's rate of compensation is $204.74.

11. The parties stipulated at the hearing that the conversion date from healing period to permanent partial disability is October 10, 1983.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that he suffers a permanent partial disability for industrial purposes of twenty-five (25) percent as a result of the injury of March 11, 1983.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred twenty-five (125) weeks of compensation at the rate of two hundred four and 74/100 dollars ($204.74) for permanent partial disability from October 10, 1983. All accrued payments to be made in a lump sum together with statutory interest.

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

Defendants are to file an activity report upon completion of this award.

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

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUTH A. HEWITT,

Claimant,

vs.

FOODS, INC.,

Employer,

and

MARYLAND CASUALTY CO.,

Insurance Carrier,
Defendants.

File No. 688647

A P P E A L

D E C I S I O N

FILED

AUG 21 1984

IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 27, 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 6; and defendants' exhibit A, all of which evidence was considered in reaching this final agency decision.

Defendants state the issues on appeal:

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 twenty-two per cent (22%) industrial disability as the result of the work related injury at issue.

IA. Industrial disability is determined by consideration of the employee's age, education, qualifications, experience, functional disability and, inability because of the injury to engage in employment for which he or she is fitted.

A review of the record discloses that the hearing deputy's findings of fact and conclusions of law are proper.

Wherefore, the review-reopening decision filed December 13, 1982 is hereby adopted as the final agency decision.

FINDINGS OF FACT

WHEREFORE, it is found:

Claimant sustained an injury in the course of her employment December 2, 1981.

Claimant suffered lumbosacral strain with lower left radiculopathy. Subsequent to a work return in March 1983, a herniated disc at L4-5 was discovered.

Claimant's work as a clerk/cashier in defendants' supermarket required standing, twisting, turning, lifting of small grocery items, and, at times, lifting of 50 pound bags of dog food.

Claimant has been advised to restrict lifting in excess of 25 pounds by one physician and in excess of 15 pounds by another.

Dr. Carlstrom approved claimant's return to work as a clerk/cashier on a job hardening basis wherein she initially worked only two hours per day in March 1983. Claimant was unable to sustain such schedule.

It is unlikely claimant's condition will improve so significantly that she will be able to return to her former position as a clerk/cashier.

Claimant performed well in vocational evaluation regarding bookkeeping and other clerical skills she could likely perform within her physical restrictions.

Claimant is fifty-five (55) years old. Her work experience in bookkeeping and other clerical areas ended in 1960.

Defendant employer advised claimant that an intracompany transfer from clerk/cashier to office work is against its policy.

Claimant earned in excess of nine dollars ($9.00) per hour as a clerk/cashier at her injury date; entry level clerical positions would pay approximately three and 45/100 dollars ($3.45) per hour.

Claimant's functional impairment rating is between five percent (5%) and twelve percent (12%).

Claimant is a high school graduate with subsequent on-the-job training in credit management and bookkeeping.

The insurer advised claimant's counsel that further treatment by Dr. McClain was disallowed in October 1982. Claimant sought treatment subsequent to that time.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has established a causal relationship between her December 2, 1981 injury and her present disability.

Claimant has sustained an industrial disability of twenty-two percent (22%) of the body as a whole.

Claimant is not entitled to reimbursement for costs incurred for medical services provided by Dr. McClain after defendants advised that such treatment was no longer authorized.

ORDER

THEREFORE, it is ordered:

Defendants pay claimant one hundred ten (110) weeks of permanent partial disability benefits at the stipulated rate of two hundred thirty-five and 94/100 dollars ($235.94) per week with credit for the nineteen (19) weeks of benefits previously paid.

Defendants are hereby ordered to pay interest on the award pursuant to §85.30, The Code, from April 19, 1984.

Defendants are to file an activity report upon payment of this award.

Signed and filed this 21st day of August, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUTH A. HEWITT,	:	
Claimant,	:	File No. 688647
vs.	:	R E V I E W -
FOODS, INC.,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
MARYLAND CASUALTY CO.,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review reopening brought by Ruth A. Hewitt, the claimant, against her employer, Foods, Inc., and Maryland Casualty Co., the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury sustained December 2, 1981.

This matter came on for hearing before the undersigned deputy industrial commissioner in Des Moines, Iowa December 16, 1983. The record was considered fully submitted at that time.

An examination of the industrial commissioner's file indicates that a first report of injury was filed December 7, 1981; a memorandum of agreement was filed December 21, 1981.

At time of the hearing, the parties stipulated that the rate of weekly compensation is $235.94; that medical bills are fair and reasonable; and that any additional award of permanent partial disability will "tack on" to those amounts already paid. The amended form 2A filed establishes that defendants had paid 19 weeks of permanent partial disability as of the hearing date.

The record consists of the testimony of claimant, Ruth Hewitt, of her husband, William S. Hewitt, of her daughter, Karen Donahue, of Ross Nixon, of Willam Miller, and of Kathleen Benson; claimant's exhibit 1 through 7; and defendants' exhibit A. Claimant's exhibit 1,3, and 4 were offered jointly. Reserved rulings on objections will be made in the review of the evidence.

ISSUES

The issues to be decided are:

1.) Whether a causal relationship exists between the alleged injury and the disability.

2.) Whether claimant is entitled to permanent partial disability benefits.

3.) Whether certain treatment by David McClain, D.O., is compensable under section 85.27.

REVIEW OF THE EVIDENCE

Claimant testified in her own behalf. Claimant is 54 years old, married and has reared three daughters and four foster sons. One daughter remains at home. Claimant has a high school diploma and began, but did not complete, a secretarial shorthand course at the American Institute of Business. She completed a six month credit management training program with the National Association of Credit Managers in 1947. Between 1949 and 1960, claimant held various jobs as a payroll clerk, bookkeeper, and credit manager. She then raised her foster sons and her adopted daughters. She began employment with Foods, Inc. as a part-time cashier and checker at Dahl's, the retail supermarkets operated by the employer, in 1968. She left in 1970, but returned to full-time employment as a courtesy counter clerk in 1974 and remained employed until March 1983. At the time of her injury, she was working as a clerk/cashier.

She reported her earnings in March 1983 as $10.50 or $10.55 per hour. On her injury date, her duties included lifting all groceries over the scanner and standing throughout the day albeit with break periods every 2 hours. She reported groceries include pet food packed in 25 to 50 pound containers.

Claimant stated she smokes one and one half packs of cigarettes a day and drinks 1 or 2 drinks per evening. Claimant relayed that she slipped on the ice and broke her tail bone in 1975. This resulted in 3 weeks bed rest followed by a period of part-time work only. Claimant reportd she had no back problems following that incident.

On the injury date, December 2, 1981, claimant reports she was pushed into the work counter when a customer slammed a grocery cart into her. She reports Mark Brase, the assistant manager, was sacking groceries for her at the time. In response to his questioning, claimant reported she was "ok" but left work within the hour. Defendants' objection to this testimony is overruled. Claimant reports she called Ross Nixon, who directed her to seek medical attention from her own doctor. Claimant saw Dr. Hatchitt and reports she had continued treatment with him until January 1982 with little improvement. Defendants' objection to this testimony is overruled.

Claimant attempted a work return in January 1982. She reports she worked about 50 hours but found she could not handle the pain. Dr. Hatchitt referred her to Dr. McClain, an orthopedic specialist, in March 1982. Claimant states her employer never indicated that treatment by Dr. McClain was not authorized. Dr. McClain hospitalized claimant for traction and physical therapy throughout March 1982. Claimant was discharged in a full body cast. She reports this hospitalization "did not help much." Claimant described her pain as running down her middle back with numbness and tingling in the left leg and some numbness in the right leg.

Claimant reported William Miller referred her to Crawford Rehabilitation and set up her appointments with Dr. McClain. She states he directed her to Dr. Carlstrom for a second opinion. She reports it was not her understanding that treatment by Dr. McClain was no longer authorized.

Dr. Carlstrom directed claimant to Younkers Rehabilitation Center where she underwent physical therapy in Summer, 1982. Claimant reports Dr. Carlstrom restricted her to lifting 15 pounds or less, and advised her that neither twisting or turning nor standing nor lifting for prolonged periods was in her best interests. Claimant understood the doctor believed she should seek other employment and she could not continue work which involved lifting.

Claimant returned to work in February 1983 working first a two day or three day week. She reported lifting all items coming across her scanner even if their weight exceeded Dr. Carlstrom's weight restrictions. She stated even lifting a gallon of milk caused her pain.

Claimant returned to Dr. Carlstom who ordered both a bone and CT scan and informed Dahl's claimant could not work. Claimant reported the CT scan showed a disc pressing on a nerve.

Claimant reported that from March 1983 she has had problems getting out of of bed, bathing, walking, standing, cleaning her home, and lifting her grandchildren. She last saw Dr. Carlstrom in September, 1983. He has not lifted her restrictions. She reported she has discussed several job possibilities with employers in an attempt to ascertain whether she could perform them. These included working as a waitress, as a convenience store clerk, and working as a file clerk. She felt she would be unable to perform these jobs with her physical disabilities. Claimant has paid $115.00 of unreimbursed medical expenses to Dr. McClain.

On cross-examination, claimant stated that all three of her daughters, now ages 19, 18, and 16, were living at home on the injury date. Claimant's mother-in-law, who suffered from advanced senility though in good physical health, also lived with the family until her death in October 1983. Claimant and her family cared for this lady with assistance of a home health aid who visited biweekly. Claimant admitted she has not sought employment as a credit manager since beginning employment with Dahl's.

Claimant denied she had ever received treatment for alcohol consumption or that her doctors had advised her that her alcohol consumption was a problem. Claimant denied ever telling her physicians she drank two beers and mixed drinks each day. She stated she is allergic to beer. She admitted she had taken a six pack to the hospital and stated Dr. McClain permitted this and allowed her to drink two cans per day though she only drank one.

Claimant denied she had missed approximately one half of her scheduled physical therapy sessions. She stated she had missed three or four because of illness. Claimant's physical therapy sessions ended in August 1982. She admitted reporting her condition improved while in physical therapy.

Claimant has undergone testing with state vocational rehabilitation. Claimant reported vocational rehabilitation did not recommend additional training but recommended she consider employment as a clerk, bookkeeper, or secretary.

Claimant denied Dr. Carlstrom ever advised her she could return to work when her symptoms subsided. She also denied ever telling Crawford Rehabilitation that her family obligations would prevent her from ever returning to full-time employment. Claimant admitted that she has not inquired at Dahl's regarding her employment status since March 1983. Claimant admitted that, in Fall 1982, her attorney advised her that the insurer would no longer pay for treatment by Dr. McClain. Claimant's counsel objected to questions regarding whether counsel advised claimant of defendants' right to choose medical treatment as protected by the attorney client privilege. The objection is sustained.

On redirect examination, claimant testified that Dr. Carlstrom's treatment had been of no greater help than Dr. McClain's. Claimant denied ever discussing her household duties with the physcial therapist. She stated that Dahl's does not provide stools for its checkout personnel and that Dahl's has never offered her a clerical job but has informed her that intra-company job transfers violate company policy. Claimant believes she could do bookkeeping and coupons in Dahl's offices. She understands that she has not been released to return to work when she returned in March 1983. Claimant stated that when the

store is busy, it is not possible to stop and seek assistance when lifting. She expressed her belief that Dahl's policy is that the employee either do the job or go home.

Claimant's husband of 36 years testified in her behalf. He characterized claimant's pre-injury physical condition as "very good." He substantiated that claimant now has daily pain which hinders her ability to perform routine household activities. He stated claimant had been improving until her work return where upon her condition had become "worse than it was in the first place." On cross-examination, he admitted claimant does bookkeeping for his cleaning business and does some housework such as dishes, cooking, and folding laundry. He characterized the daughter who lives at home as emotionally disturbed and requiring close supervision.

Karen Donahue, claimant's daughter, testified in her mother's behalf. She also substantiated claimant's pain and stated claimant can perform only a limited amount of housework. She reported seeing claimant fall twice. She stated claimant has difficulty sleeping.

William Miller, a claims representative for the insurer, testified in defendants' behalf. Claimant's counsel's objections to substantial portions of the witness' testimony on the general grounds that the witness lacked direct contact with claimant and the ensuing direct knowledge concerning her condition and physical abilities are overruled. The substance of the witness' testimony related to the insurance company's handling of claimant's claim, an issue of which he has direct knowledge. Objections regarding the relevancy of such testimony are also overruled. Mr. Miller's testimony was fully considered in the preparation of this decision. It need not be set forth in full. Of significance are the facts that claimant's counsel was advised in 1982 that treatment by Dr. McClain would no longer be authorized; that the insurer sought and obtained a job analysis of claimant's job by Crawford Rehabilitation and that Dr. Carlstrom approved claimant's work return after reviewing such analysis.

On cross-examination, it was established that further treatment by Dr. McClain was disallowed in October 1982. The witness opined that, the notice of work return which claimant received could have led claimant reasonably to assume she was being ordered back to work. The witness expressed his understanding claimant was to return to work for monitoring to ascertain whether she could perform her job. He reported inquiry was made as to whether claimant could work in Dahl's offices but that management indicate jobs were not available. On redirect, the witness stated he had understood Dr. Carlstrom permitted claimant to return to work without weight restrictions.

Ross Nixon, a manager for Dahl's, was next called in defendants' behalf. Mr. Nixon supervises cashiers. He related that he was a cashier for Dahl's from 1970 through 1973 and that he is familiar with cashiers' work duties. He stated, that but for 50 pound bags of dog food and deicer and 25 pound bag of dog or cat food, most grocery items weigh 10 pounds or less. He reported that cashiers need not lift dog food since this is price marked and need not be scanned. He explained that cashiers are "somewhat mobile" at their station, receive two 15 minute breaks and one half hour lunch break each day. He reported cashiers generally will not be at their stations for more than two hours without a break. He stated he is familiar with Dahl's employment policy, but was unaware of any restriction on transfer from a cashier to an office position. He reported observing claimant carry her nine or ten month old grandchild while shopping, but stated he has never observed claimant shopping or pushing a shopping cart. He relayed that claimant has not approached him regarding reemployment since March 1983.

On cross-examination, the witness did not dispute that claimant could have been told that intracompany transfers were against company policy. He agreed he had never asked claimant whether she need a stool at her station even though stools had been provided other workers post-injury. He admitted cashiers are required to lift grocery sacks into cars and these sacks weigh 15 pounds or more. He recited that cashiers receive one break in each three hours of work. He agreed that cashiers occasionally lift up to 25 pounds and even agreed occasional may be defined as meaning up to 33 percent of their work time. He stated cashiers pack groceries when they are available to do so.

Kathleen Benson of Crawford Rehabilitation next testified in defendants' behalf. Ms. Benson has testified before this agency on numerous occasions. Her qualifications are well known to the undersigned and will not be fully set forth herein.

Claimant's objections to oral testimony regarding defendants' exhibit A and Crawford's business records concerning claimant are overruled.

Ms. Benson outlined Crawford's procedure in handling claimant's case. It was established that claimant missed 14 physical therapy sessions. Ms. Benson testified that Crawford prepared a job analysis and report regarding the duties and physical requirements of claimant's position with Dahl's. She characterized the cashier's position as one where the worker would be shifting [her] weight continually and as one of constant motion. Ms. Benson expressed her belief that claimant's exhibit 3 understates claimant's clerical skills in that claimant possesses transferable skills beyond the entry level which provide claimant career alternatives. The witness cited bank teller, ticket agent, information clerk-cashier, audit clerk, bookkeeper 1, general ledger bookkeeper, inventory clerk, traffic manager, traffic clerk, or security officer as positions claimant could pursue. She stated such positions are available in the Des Moines area. Ms. Benson opined claimant is employable though "job hardening" would be appropriate initially.

On cross-examination, it was established that illness was a substantial factor in claimant's absences from physical therapy; that entry level wages would be approximately $3.45 per hour; and that age may have a positive or negative impact on employability.

On further cross-examination, the witness testified that by signing off on claimant's exhibit 6, Dr. Carlstrom agreed that claimant was physically able to attempt progressive part-time duties as described in the job analysis with a maximum goal of return to full-time employment.

Karen E Donahue was called as a rebuttal witness for claimant. She testified that in July, 1983 her son, claimant's grandson, weighed approximately 14 pounds; that there were no unusual stresses in claimant's home; and that hospital and defendants' representatives cancelled several of claimant's physical therapy sessions and medical appointments.

Joint exhibit 1 is the medical reports regarding claimant. These were fully reviewed in rendering this decision. Of special significance were the following: An October 7, 1982 letter of David B. McClain, D.O., to Jack Strokesberry of Rehabilitation Education and Services Branch of the Department of Public Instruction states claimant is in treatment for lumbosacral strain with lower left radiculopathy and advises claimant should avoid lifting in excess of 25 pounds on more than an occasional basis; an October 25, 1982 letter of Dr. McClain to claimant's counsel opines that claimant has sustained a permanent partial impairment of 12 percent of the body as a whole as a result of her work incident: A May 10, 1983 letter of Thomas A. Carlstrom, M.D., to claimant's counsel states as follow:

> To take your questions one by one: Number one, no I do not believe Mrs. Hewitt's return to work in March of this year had anything to do with her lumbar disc protrusion. Number two, yes I believe Mrs. Hewitt can return to her previous employment at Dahls, [sic] should her symptoms improve significantly. Most likely she will not experience enough improvement in her symptoms to return to work. I do believe she has basically reached maximum benefits of healing at the present time and should be considered permanently stable at her present level.
>
> To answer questions [sic] three, based on the answer to question two, yes I do believe she has suffered a permanent partial impairment. The AMA criteria would suggest a 5-7% permanent partial impairment.

An April 21, 1983 letter of Dr. Carlstrom to the insurer reports claimant's CT scan shows a herniated disc at L4-5 on the left. A March 8, 1983 letter of Dr. Carlstrom to whom it may concern advises that claimant remain off duty for an indefinite period. An October 19, 1982 Carlstrom letter to Mr. Strokesberry states as follows:

> Her examination is consistent with a myofascial back pain picture with mildly diminished forward bending, but otherwise normal range of motion of her low back and normal neurological exam. I have recommended to her workmen's compensation insurance company that she be given a partial permanent disability and rehabilitated to a job requiring no lifting, no forward bending, no prolonged sitting or standing, and have recommended a weight limit of fifteen pounds. I do believe her disability may improve in the future, although she has been stable for sometime, and would be pessimistic about that eventuality.

A June 7, 1982 letter of Dr. Carlstrom to Crawford Rehabilitation states: "I do believe Mrs. Hewitt is very tense woman, an in addition, may be experiencing some secondary gain from her disorder. I would [sic] pessimistic that any treatment modality will result in a rapid improvement in her symptoms, but will keep you informed as to her progress."

Claimant's exhibit 2 is several statements of Dr. McClain which apparently show medical costs in the amount of $115.00. Joint exhibits 3 and 4 are a copy and corrected copy of the vocational evaluation of claimant apparently by State Rehabilitation Services. The corrected copy recites that all claimant's activities were evaluated seated and no attempts were made to evaluate her in standing activities. The evaluation states:

> The above stated competitive skills would probably only allow for Ruth to obtain the minimum wage for an entry level position. Evaluator feels that besides the fact of seeking new employment, she would need to prepare to accept possibly less wages and less benefits if it is necessary to change her place of employment.

Claimant's exhibit 5 is a February 8, 1983 letter of Maryland Casualty to claimant's counsels which states: "Please have your client report to Mr. Ross Nixon at the Dahls [sic] Food Store at

3425 Ingersoll, Des Moines, Iowa at 10 A. M. February 14, 1983. Foods, Inc. is agreeable and does offer to your client working ONLY TWO HOURS as opposed to regular eight hour work day."

Claimant's exhibit 6 is a December 14, 1982 letter of Crawford Rehabilitaion in which Dr. Carlstrom gives his signature approval to the following statement:

> Having reviewed the job analysis of Ms. Hewit's [sic] previous position at Dahls [sic] where she worked as cashier/checker, it is my opinion that Ms. Hewit [sic] is physically able to perform progressive, part-time job duties as described in the written job analysis. Regular evaluation with the employers and Ms. Hewit [sic] concerning her progress and the physical demands required on-the-job are recommended with full-time employment viewed as a maximum goal.

Defendants' exhibit A is a job analysis of the position of cashier/checker at Dahl's Grocery Store on Ingersoll Avenue, Des Moines, prepared by Crawford Rehabilitation.

APLLICABLE LAW AND ANALYSIS

We first must decide whether a causal relationship exists between claimant's injury and her disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 2, 1981 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

There appears to be little dispute that claimant's injury is related to her disability. Both Drs. McClain and Carlstrom have causally connected the injury and the disability and have assigned claimant functional impairment ratings. Dr. Carlstrom does not believe that claimant's disc protrusion resulted from her March 1983 work return. However, the evidence does not suggest that that condition is unrelated to claimant's original injury. Claimant's life restrictions and work problems arose only after her injury. This factor also suggests a causal connection where the record does not intimate other conditions arising subsequent to the injury from which claimant's disability might result. Thus, claimant has carried her burden of establishing a causal relationship between her injury and disability. The extent of her disability remains undecided, however.

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).

Claimant is a 55 year old woman whose work experience is as a cashier and as a clerk bookkeeper and as a credit manager. Her functional impairment ratings rage from 5 to 12 percent of the body as a whole. The evidence suggests that it is unlikely claimant will recover sufficiently to return to her previous position. This fact may result at least in part from secondary gain claimant receives from her injury. While claimant has participated in vocational rehabilitation evaluation she has made no formal attempts to find employment in fields which remain open to her. Neither has she inquired regarding her employment status with Foods, Inc. On the other hand, the record suggests Foods, Inc., has not offered claimant office work which she likely could perform with her restrictions. Also, if claimant accepted a clerical position within the physical restrictions, she would likely receive a salary equaling only one-third to one-half that which she received as a cashier at Dahl's. This is a substantial reduction in earning capacity and must be considered in determing claimant's industrial disability. Further, to be considered is claimant's age. Claimant is 55 years old. While maturity may be an asset in some employment situations, it is less so where the employee may need substantial retraining in order to function successfully in the work environment. The record reveals that claimant has aptitude in the clerical area but has not worked in these fields since 1960. Thus, she would need training in the bevy of innovations in procedures and production equipment that have taken place in the last quarter century. This fact substantially reduces the realism of any expectation that claimant gain lucrative employment in clerical areas. When these factors are all considered, it is apparent claimant's industrial disability is considerably higher than her functional impairment rating. Claimant's permanent partial disability is determined to be 22 percent of the body as a whole.

The question of claimant's right to be reimbursed for payments made to Dr. McClain remains. "Claimant is not entitled to reimbursement for medical bills unless he shows that he paid them from his own funds." See Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890 (Iowa App. 1983).

The record established that claimant has paid the $115.00 owed Dr. McClain. Claimant's counsel was advised in October 1982 that further treatment by Dr. McClain was not authorized, however. Defendants acted reasonably in believing counsel would act as claimant's agent and inform her of the disallowance. His knowledge is imputed to claimant. Under section 85.27, the employer has the right to choose the medical care provided claimant. Therefore, claimant is not entitled to reimbursement for charges incurred after being advised that care with Dr. McClain was no longer authorized. Certainly all charges after November 1982 are disallowed. It is uncertain whether a charge of $15.00 incurred October 20, 1982 should be disallowed. If claimant can make a showing that such was incurred before defendants' withdrawal of authorization of care by Dr. McClain, such will be allowed.

FINDINGS OF FACT

WHEREFORE it is found:

Claimant sustained an injury in the course of her employment December 2, 1981.

Claimant suffered lumbosacral strain with lower left radiculop Subsequent to a work return in March 1983, a herniated disc at L4-5 was discovered.

Claimant's work as a clerk/cashier in defendants' supermarket required standing, twisting, turning, lifting of small grocery items, and, at times, lifting of 50 pound bags of dog food.

Claimant has been advised to restrict lifting in excess of 25 pounds by one physician and in excess of 15 pounds by another.

Dr. Carlstrom approved claimant's return to work as a clerk/cashier on a job hardening basis wherein she initially worked only two hours per day in March 1983. Claimant was unable to sustain such schedule.

It is unlikely claimant's condition will improve so significant that she will be able to return to her former position as a clerk/cashier.

Claimant performed well in vocational evaluation regarding bookkeeping and other clerical skills she could likely perform within h r physical restrictions.

Claimant is fifty-five (55) years old. Her work experience in bookkeeping and other clerical areas ended in 1960.

Defendant employer advised claimant that an intracompany transfer from clerk/cashier to office work is against its policy.

Claimant earned in excess of nine dollars ($9.00) per hour

as a clerk/cashier at her injury date; entry level clerical positions would pay approximately three and 45/100 dollars ($3.45) per hour.

Claimant's functional impairment rating is between five percent (5%) and twelve percent (12%).

Claimant is a high school graduate with subsequent on-the-job training in credit management and bookkeeping.

The insurer advised claimant's counsel that further treatment by Dr. McClain was disallowed in October 1982. Claimant sought treatment subsequent to that time.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has established a causal relationship between her December 2, 1981 injury and her present disability.

Claimant has sustained an industrial disability of twenty-two percent (22%) of the body as a whole.

Claimant is not entitled to reimbursement for costs incurred for medical services provided by Dr. McClain after defendants advised that such treatment was no longer authorized.

ORDER

THEREFORE, it is ordered:

Defendants pay claimant one hundred ten (110) weeks of permanent partial disability benefits at the stipulated rate of two hundred thirty-five and 94/100 dollars ($235.94) per week with credit for the nineteen (19) weeks of benefits previously paid.

Interest accrues pursuant to section 85.30 as amended.

Defendants pay costs of this action.

Defendants file a final report upon payment of this award.

Signed and filed this 27th day of April, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD C. HOSKINS,	:	
Claimant,	:	
vs.	:	File No. 622908
CITY OF CEDAR RAPIDS,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
BITUMINOUS INSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	AUG 27 1984
		IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 27, 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 23; and defendants' exhibits A through J, all of which evidence was considered in reaching this final agency decision.

The outcome of this final agency decision will modify the review-reopening decision somewhat; however, that modification will be in favor of the claimant.

ISSUES

The hearing deputy awarded a 15 percent permanent partial disability and allowed a $4,000 credit against the award on account of a third party settlement.

The issues on appeal are stated by defendants:

I. Whether Appellee's disability for industrial purposes is accurately assessed at fifteen percent of the body as a whole.

II. Whether Appellant-Bituminous Insurance Company took $4,000.00 from said $10,000.00 settlement and waived its claim to any further credit for the remainder of the settlement.

EVIDENCE PRESENTED

Claimant was hurt in a work-connected car-pedestrian accident on January 11, 1980. Claimant had a dislocated left shoulder, a fracture of the left sacrum, a fracture of the spine of the tibia of the left knee and a fracture of the tibia of the left leg, as well as a contusion of the calf and multiple abrasions on the chestwall on the left. Claimant was treated by Martin F. Roach, M.D., and returned to work on March 3, 1980. He had to return to the hospital again on June 1, 1980 for follow-up care. Dr. Roach assigned a permanent partial disability. Claimant had developed a traumatic cyst on his thigh as a result of the injury. When asked upon what the doctor based the five percent rating, he replied that it was "on that traumatic cyst and the subsequent sequela." (Roach dep., p. 9 ll. 14-15)

Claimant was examined twice by John R. Walker, M.D., who was more specific as to the actual source of claimant's problems. In his report of March 10, 1982, Dr. Walker states:

1. He still has some disability due to the dislocated left shoulder in the form of a slight loss of motion in abduction and pain and discomfort.

2. He has a very painful, burning type of scar in the region of the trauma and also in the region of the main trauma, where his traumatic cyst was removed surgically.

3. He has a moderate lumbosacral sprain.

4. He has a definite sacroiliac injury with disruption of the joint due to his comminuted fracture of the pelvis.

5. He has a chronic sacroiliac sprain on the left side only due to this injury.

6. He has some loss of muscle tissue laterally in the vastus lateralis with a painful, burning scar.

7. He has some more or less insignificant scars of both calves.

8. He has a chronic sprain in the region of the astragulo-tibial joint on the left laterally.

Dr. Walker first opined claimant's impairment was 18 percent of the body as a whole and later raised that amount to 20 percent.

Claimant was 55 years of age at the time of the hearing and a high school graduate. He had worked part-time at Wilson and Company and in a grocery store while in high school. He worked at Wilson and Company full-time until 1948 when he became employed by the Cedar Rapids Street Department. After service in the Korean Conflict, he was reemployed by the street department and has been there for some 35 years. His experience was varied, including labor, truck driving, and heavy equipment operating. He was in management for about the past 13 years.

Claimant entered into a settlement with the representatives of the third party who had caused the accident. Under the agreement, claimant received $6,000 and the workers' compensation insurance carrier, The Bituminous Insurance Company, received $4,000. No memorandum of settlement was filed with the industrial commissioner.

APPLICABLE LAW

The legal authorities as cited by the hearing deputy are adequate and correct. Specifically, section 85.22(4) states: "A written memorandum of any settlement, if made, shall be filed by the employer or insurance carrier in the office of the industrial commissioner."

Also, it should be emphasized that claimant's disability is industrial which is reduction of earning capacity, and not mere functional impairment. Such disability includes consideration of functional impairment, age, education, qualifications, experience, and claimant's inability, because of the injury, to engage in employment for which he is fitted.

ANALYSIS

Defendants argue that Dr. Roach's rating of five percent permanent partial impairment (as opposed to Dr. Walker's rating of 20 percent) is superior. One would agree, of course, that between these two doctors, who have very similar qualifications, Dr. Roach's knowledge of the case is superior because he was the treating doctor. Although Dr. Roach's rating is accorded more weight, Dr. Walker's rating is not to be ignored.

Perhaps the main problem here is that defendants base too much emphasis on the permanent impairment rating and attempt to equate it to the disability rating. As shown above in the applicable law, impairment is only one factor of disability, and it is not a figure which is added to or substracted from in order to reach the amount of disability.

Here, in this case is a 55 year old man whose background shows considerable achievements. Also, he has retained his position with the employer. Nevertheless, at claimant's age, his employment horizons are limited because of his injury. Thus, a permanent partial disability of 15 percent is not excessive.

With respect to the third party release, defendants argue that they are entitled to indemnity from the recovery; however, indemnity applies where a workers' compensation claimant brings a third party action in district court, wins his lawsuit, and owes indemnity from the damage award. Section 85.22(1), Code of Iowa. Such is not the case here.

In the present case, defendants participated in the settlement between claimant and the third party, and defendants released their subrogation rights against the third party. The question then becomes whether defendants have any right to a credit against their liability for workers' compensation payments. Section 85.22(4), The Code, clearly says that defendants are required to file a memorandum of the settlement with the industrial commissioner. It would seem that the very reason for this requirement is to avoid future confusion as to the amount of the credit. Therefore, if defendants participated in a settlement under §85.22(3) and wanted credit against future compensation liability, they should have made the required filing under §85.22(4). Defendants did not do so and will not be allowed the credit.

The findings of fact in the review-reopening decision are adopted except that number 10 has been changed slightly, and the conclusions of law are adopted except that number 7 will be deleted. The order, likewise, is adopted except that defendants will not be given a credit.

FINDINGS OF FACT

1. Claimant was employed by defendant City of Cedar Rapids on January 11, 1980.

2. Claimant was struck by a vehicle.

3. That at the time claimant was struck he was performing duties for the City of Cedar Rapids,

4. Defendants filed a memorandum of agreement concerning a January 11, 1980 injury.

5. Claimant was paid compensation for lost time.

6. Claimant sustained permanent partial disability to the body as a whole because of said injury.

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

8. Claimant, claimant's wife and defendant insurer entered into settlement with the alleged third party tort-feasor Dennis Neuzil whereby a total of $10,000 was paid on behalf of Neuzil to claimant, his wife and the insurer.

9. Defendant Bituminous Insurance took $4,000 from said settlment and waived claim to further credit for the remainder.

10. Claimant and his wife received $6,000 as their share of the third party settlement.

11. The charge of Dr. Walker in the amount of $324 is reasonable.

12. The gross weekly wage is $315.

CONCLUSIONS OF LAW

1. Claimant was employed by defendant City of Cedar Rapids on January 11, 1980.

2. Claimant sustained an injury arising out of and in the course of his employment on January 11, 1980.

3. Claimant is entitled to no further healing period compensation.

4. The rate of compensation is $192.28.

5. Defendants will be ordered to pay seventy-five (75) weeks of permanent partial disability compensation at the rate of one hundred ninety-two and 28/100 dollars ($192.28) per week.

6. Defendants will be ordered to pay three hundred twenty-four dollars ($324) for Dr. Walker's examination pursuant to section 85.39, Code of Iowa.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of one hundred ninety-two and 28/100 dollars ($192.28) per week.

IT IS FURTHER ORDERED that defendants pay three hundred twenty-four ($324) to Dr. Walker for the examination pursuant to section 85.39, Code of Iowa.

Costs of this proceeding are taxed against defendants.

Interest is to accrue in this award from March 7, 1984.

A claim activity report shall be filed upon payment of this award.

Signed and filed this 27th day of August, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD C. HOSKINS,	:	
Claimant,	:	File No. 622908
vs.	:	
CITY OF CEDAR RAPIDS,	:	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
BITUMINOUS INSURANCE CO.,	:	FILED
Insurance Carrier, Defendants.	:	MAR 7 - 1984
		IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the Linn County Courthouse in Cedar Rapids on September 9, 1983 at which time the record was closed although briefs were later filed.

A review of the commissioner's file reveals that an employer's first report of injury was filed January 14, 1980. A memorandum of agreement was filed January 21, 1980 calling for the payment of $192.28 in weekly compensation. A final report was filed on February 29, 1980 showing that claimant was paid 6 2/7 weeks of compensation.

The record consists of the testimony of the claimant, Doug Fields, Don Fleagle and Freda Hoskins; claimant's exhibits 1 through 23; and defendants' exhibits A through K.

ISSUES

The issues for resolution are:

1) The nature and extent of disability;

2) The rate of compensation; and

3) The applicability of a third party settlement.

STATEMENT OF THE EVIDENCE

At the commencement of the hearing the parties stipulated as to the items in the petition for declaratory ruling, excepting paragraph seven.

Claimant, presently age 55, is a high school graduate. He worked part-time at Wilson and Company and in a grocery store while he was in high school. He worked at Wilson's full-time until 1948. He then became employed for the Cedar Rapids Street Department. He was in the service during the Korean conflict. He then became re-employed by the street department. He has been employed by the street department for 35 years. He was a laborer, a truck driver and heavy equipment operator. For about the last 13 years he has been in management.

Claimant testified that on the date of injury he was paid $640 every two weeks. In addition to the regular pay and regular overtime, claimant was entitled to be paid standby pay which apparently compensated him for being available for emergencies.

On January 11, 1980 claimant was on standby and at 5:45 a.m. was called to erect a barricade. Claimant testified that it had been raining and that there had been a drop in temperature. While claimant was turning the barricade flasher to face traffic he was struck by a vehicle driven by Dennis Neuzil. Claimant was taken to the hospital and his treating physician was Martin F. Roach, M.D., a Cedar Rapids orthopedist. Claimant had a dislocated left shoulder, fracture of the left sacrum, fracture of the tibia spine of the left knee and fracture of the fibula of the left leg. He had a contusion of the calf and multiple abrasions over the chest wall on the left side. Claimant underwent closed reduction under intravenous IV Valium on the day of admission.

Post-reduction x-rays were normal. His calf contusion and swelling gradually subsided. Claimant continued to complain of pain in the left hip and pelvis and "coned down" views revealed disruption of the sacroiliac joint. He was started on ambulation with a walker, partial weight bearing on the left side and gradually improved. Claimant was released from the hospital on January 16, 1980.

Claimant continued to see Dr. Roach. On January 28, 1980 Dr. Roach undertook to start claimant on exercises for his quadriceps and shoulder. Claimant continued to be treated by Dr. Roach. The record (exhibit I) indicates that claimant returned to work about March 1, 1980.

On June 1, 1980 claimant was admitted to the hospital. A large traumatic synovial cyst on the left thigh had developed and was excised. A drain was placed in the thigh and later removed. Claimant was discharged from the hospital on June 8, 1980. Exhibit 7 indicates that claimant returned to work about June 21, 1980. Claimant returned to see Dr. Roach on two occasions following this date. On July 14, 1980 Dr. Roach noted a couple of areas of sensitivity along the lateral thigh but had good range of hip motion and negative straight leg raising.

Claimant testified that he does not do as much on the job as he did formerly. He testified that he has dislocated his shoulder twice since he returned to work. He testified that in the last year his hip is getting worse. He testified that it hurts when he sits down. He has seventeen people working for him. He stated that he has become more cautious in movements. He stated that his mental attitude is worse in that he is touchy in the office.

Claimant testified that he entered into a settlement with representatives of Dennis Neuzil. The settlement was in the amount of $10,000 paid by Neuzil. A copy of the release is labeled exhibit F. Claimant testified that $6,000 went to claimant and $4,000 went to the workers' compensation insurance carrier. Claimant stated that he considers the money received to have been paid on a 50-50 basis to himself and his wife. The record indicates that no memorandum of settlement was filed with this agency. Claimant stated that he and his wife are having some marital problems. These existed prior to the injury.

At the time of the hearing claimant testified that he would like to get out of management and back into labor. His complaints were that he had left hip pain, back pain and shoulder pain.

On cross-examination, claimant admitted that he was making more money. He went back to essentially the same duties. Claimant indicated that he was able to perform the duties necessary to get the job done, but was unable to do what he did formerly. Claimant indicated that he sought no medical attention in 1981. Claimant testified that he gardens and that he laid a patio since the injury. Claimant testified that at the time he signed the release he was represented by counsel but "didn't think" to have counsel examine the document.

Don Fleagle is a foreman of the Cedar Rapids Street Department. He testified that claimant had some trouble after he returned to work and that claimant attempts to hide his injury. He testified that claimant has not changed much since he returned to work. He stated that claimant's work ability has not been affected.

Doug Fields is head of the Cedar Rapids Sewer Department. This witness testified that he did not see much change in claimant's work performance after the injury. He indicated that claimant is not one to complain, but he could tell when claimant was having an off day.

Frieda Hoskins, claimant's wife, testified that claimant had lost interest in many avocational activities. She testified that their relationship had deteriorated in that claimant is moody. She testified that she was not a party to the negotiations surrounding the third party settlement. This witness indicated that some problems between herself and claimant stemmed from a 1978 injury which the witness sustained. However, she did indicate that matters were clearing up prior to claimant's injury and worsened thereafter. She had some psychological problems in 1981. She testified that the couple has had severe marital problems which antedated the injury.

Claimant last saw Dr. Roach on July 14, 1980. He performed another examination on February 10, 1983. In December 1981 Dr. Roach gave a permanency rating. He indicated that claimant had sustained a five percent partial disability because of the injury. The rating was based on more than loss of function (deposition p. 8).

Claimant was seen by John R. Walker, M.D., a Waterloo orthopedist, on March 10, 1982. Claimant was complaining of low back pain and pain in the left buttock. He had a catching in his left hip. He had numbness over the left lateral thigh. He had pain across the top of his left foot. He had pain over the left anterior chest wall and complained that his left arm had become weaker. Physical examination showed that claimant lacked the last fifteen degrees of complete abduction of the left shoulder and the abduction adduced was not smooth. There was tenderness over the pectoralis major muscles with tenderness in the deltoid region anteriorly of the left shoulder. There was no atrophy of the arm or forearm and the biceps, triceps and forearm reflexes were within normal limits. Examination of the low back revealed tenderness at L4, L5 and over the sacroiliac joint. Straight leg raising tests were positive. Internal pelvic torsion tests revealed that there was some discomfort in the left sacroiliac joint.

Examination revealed that the claimant was limber and could touch his fingers to his toes. He had some discomfort upon coming upright. X-rays revealed a well-healed fracture of the upper one-fourth with the middle one-fourth of the fibula. X-rays of the pelvis revealed what appeared to be a well-healed fracture of the pubic ramus. Dr. Walker thought claimant sustained a permanent partial disability of 18 percent to the body as a whole.

Dr. Walker examined claimant again on August 6, 1982. The examination on that date showed some difference in that some atrophy of the left leg was observed. Dr. Walker observed that claimant had lost fifteen degrees of external rotation of the left shoulder, lost the last fifteen degrees of complete abduction of the left shoulder and had developed some deltoid muscle atrophy. Dr. Walker raised his permanent partial disability rating to twenty percent.

APPLICABLE LAW

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

2. The claimant has the burden of proving by a preponderance of the evidence that the injury of January 11, 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).

3. 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."

4. 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).

5. Section 85.34(1) deals with healing period compensation.

6. Section 85.22 deals with subrogation rights under the workers' compensation act.

7. Section 85.36 deals with the computation of gross weekly wage.

ANALYSIS

Based on the foregoing principles, it is found that claimant sustained a permanent partial disability to the body as a whole because of the injury of January 11, 1980.

Claimant is 55 years of age and has spent the major portion of his life working for the Cedar Rapids Street Department. He will, in all likelihood, continue to work for the Cedar Rapids Street Department until he retires. Claimant has not been cast out of a job because of his injury. His employer accepted him

back. Granted, some loyalty and some civil service rules may have facilitated claimant's return, but claimant has not fallen under the holding in recent cases which indicate that an employer's refusal to offer employment may be evidence of disability. Considering the elements of industrial disability, it is found that claimant is disabled to the extent of fifteen percent of the body as a whole.

I have examined the record with regard to healing period paid to date in this case and it appears to "dovetail" with the medical evidence presented.

Defendants have asserted a defense of election of remedies. Defendants' theory is that the language of the release precludes claimant from pursuing an action for compensation before this agency. While the argument advanced is novel, it is in error. The release was not executed in defendants' favor (but in favor of the third party tort-feasor). The law states that no release can be effective without the approval of the industrial commissioner. There being no such approval, the defense must fail.

Claimant has submitted a bill for 85.39 examination by Dr. Walker. The cost of the March 10, 1982 examination will be allowed. Section 85.39 envisions a single examination or at most two to three examinations in close temporal proximity. $324.00 will be ordered to be paid.

The issue of the subrogation interest presents a question rarely litigated before this agency. It is clear that the insurer, claimant and claimant's wife entered into a settlement with the third party tort-feasor for $10,000. An informal agreement was had whereby the insurer received $4,000 and claimant and his wife $6,000. The two questions presented are whether the settlement is effective if not filed and whether the settlement interest of the wife is deducted from the credit.

As to the first question, it is found that a settlement does not have to be filed to be effective. No affirmative action is required by this agency, especially in the instance where the parties agree to the terms of the settlement.

The language of section 85.22(5) stating that money "paid as damages resulting from and because said injury was caused under... liability" is determinative of the second question. Certainly a wife's claim arises out of a cause of action which may have been compensable. To hold that the loss of consortium claim was a separate cause would negate the clear intention of section 85.22. All one need do to circumvent the statute would be to lump a major portion of the settlement with the spouse's claim. This was not the intent of the law. Defendants will receive their $4,000 credit pursuant to their agreement. There will be no reduction of credit for loss of consortium.

Claimant asserted that rate was in issue. Claimant testified that his bi-weekly gross pay was about $10 higher than that revealed on the filings made with this office. However, no tax returns or other tangible evidence was offered to indicate that the rate shown on the forms provided is incorrect. It is still claimant's burden to prove a higher rate. He has not sustained his burden. Claimant's rate will be awarded at $192.28.

Claimant has listed some out-of-pocket expenses, wishing to have them taxed as costs. Forty-two miles were incurred as mileage seeking treatment from Dr. Roach. These expenses shall be allowed in the amount of $10.08. A number of other items were submitted, all of which falls within the preview of Rule 500-4.33 of the industrial commissioner. No specific order shall be issued except for mileage.

FINDINGS OF FACT

1. Claimant was employed by defendant City of Cedar Rapids on January 11, 1980.

2. Claimant was struck by a vehicle.

3. That at the time claimant was struck he was performing duties for the City of Cedar Rapids.

4. Defendants filed a memorandum of agreement concerning a January 11, 1980 injury.

5. Claimant was paid compensation for lost time.

6. Claimant sustained permanent partial disability to the body as a whole because of said injury.

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

8. Claimant, claimant's wife and defendant insurer entered into settlement with the alleged third party tort-feasor Dennis Neuzil whereby a total of $10,000 was paid on behalf of Neuzel to claimant, his wife and the insurer.

9. Defendant Bituminous Insurance took $4,000 from said settlement and waived claim to further credit for the remainder.

10. Claimant and his wife received $6,000 because of the injury.

11. The charge of Dr. Walker in the amount of $324 is reasonable.

12. The gross weekly wage is $315.

CONCLUSIONS OF LAW

1. Claimant was employed by defendant City of Cedar Rapids on January 11, 1980.

2. Claimant sustained an injury arising out of and in the course of his employment on January 11, 1980.

3. Claimant is entitled to no further healing period compensation.

4. The rate of compensation is $192.28.

5. Defendants will be ordered to pay seventy-five (75) weeks of permanent partial disablity compensation at the rate of one hundred ninety-two and 28/100 dollars ($192.28) per week.

6. Defendants will be ordered to pay three hundred twenty-four dollars ($324) for Dr. Walker's examination pursuant to section 85.39, Code of Iowa.

7. Defendants will receive a four thousand dollar ($4,000) credit for compensation and medical paid previously.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of one hundred ninety-two and 28/100 dollars ($192.28) per week.

IT IS FURTHER ORDERED that defendants pay three hundred twenty-four dollars ($324.00) to Dr. Walker for the examination pursuant to section 85.39, Code of Iowa.

IT IS FURTHER ORDERED that defendants receive a four thousand dollar ($4,000.00) credit toward the total amount paid on this claim.

Costs of this proceeding are taxed against defendants.

Interest is to accrue in this award from the date of this decision.

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

Signed and filed this 7th day of March, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH LEROY HUTCHISON,	:	FILED
Claimant,	:	File No. 687421 AUG 30 1984
vs.	:	A P P E A L IOWA INDUSTRIAL COMMISSIONER
AMERICAN FREIGHT SYSTEM, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

By order of the industrial commissioner filed June 27, 1984, the undersigned deputy industrial commissioner has been appointed under the provisions of section 86.3 to issue the final agency decision on appeal in this matter. Defendant appeals from an adverse review-reopening decision.

The record consists of the hearing transcript; claimant's exhibits 1 through 20; defendant's exhibits A through Z, inclusive and defendant's exhibits AA, AB, AC, AE, AF, AG (there was no exhibit AD), all of which evidence was considered in reaching this final agency decision.

The outcome of this final agency decision will retain that of the review-reopening decision as to the first three appeal points presented by defendant; the matter brought up by defendant last appeal point will be remanded to the hearing deputy for further action.

ISSUES

The review-reopening decision ordered defendant to pay 89 weeks of healing period, 50 weeks of permanent partial disability interest, and to pay "to claimant" certain benefits under section 85.27, Code of Iowa. The defendant was further ordered to pay some mileage.

Defendant states the issues:

1. Causal connection between the alleged injury of November 1, 1981, and the subsequent long history of medical care and disability.

2. The nature and extent of Claimant's disabilities and impairments.

3. Whether the course of medical treatment incurred by the Claimant was "authorized" under the terms of the Iowa Compensation Act.

4. Does the record support the Findings of Fact, the Conclusions of Law, and the Order contained in the Review-Reopening Decision filed herein on April 27, 1984?

EVIDENCE PRESENTED

This is a complex and difficult case, and feelings run high on both sides. Briefly, claimant was hurt and received treatment by Herbert Rosen, D.O., some time after which he was sent to the Mayo Clinic in Minnesota. He still claimed pain in his foot and went to another Des Moines doctor, David L. Friedgood, D.O. There is a conflict in the evidence as to whether or not the employer could be construed to have authorized that care. Claimant was sent by the employer to Michael J. Taylor, M.D., a psychiatrist. Claimant then went on his own to J. D. Bell, D.O., who performed three surgeries.

The record has been exhaustively summarized in a 32 page decision by the hearing deputy. The undersigned designee of the industrial commissioner has likewise examined and analyzed the record at length. At this time a chronological approach to the facts would be most helpful.

November 1, 1981.

Claimant was hurt when a piece of steel slid and struck him. An eyewitness, Bruce A. Wolfe says the steel struck claimant's left arm, shoulder and slid down his right leg. Claimant was pinned beneath the steel until Wolfe managed to move it. Claimant was given initial treatment at Iowa Lutheran Hospital in Des Moines.

November 2, 1981.

Claimant was treated by Dr. Rosen for pain in his left foot.

December 4, 1981.

At the behest of the employer claimant visited Joshua D. Kimelman, D.O., who recommended claimant try to walk normally.

December 16, 1981.

Claimant still had a swollen left ankle, but Dr. Rosen was unable to find any fracture.

December 18, 1981 - December 28, 1981.

Claimant was admitted to Iowa Lutheran Hospital where a hidden fracture was found in the left ankle. He was discharged with a cast on his left foot. To this time, the records do not indicate claimant had any problems in his left arm, left shoulder or neck. Claimant testified (Transcript, page 67) that he had symptoms in his arm and "back across my shoulder blade" but thought that at that time it was just a sprain.

January 1982.

The cast was removed from his left leg and foot, but claimant still had pain.

February 25, 1982.

A report from the Mayo Clinic written by Miguel E. Cabanela, M.D., recommended that claimant return to a normal gait and stated that claimant had a "functional" problem. Claimant testified that he told Dr. Cabanela about pain in the neck and arm as well as the leg (Tr., p. 70); however, the doctor wrote "[a]t the end of the interview on February 19, he asked me what I was going to do about his neck, but he had not mentioned his neck before." Dr. Cabanela's examination showed claimant's neck was normal.

March 26, 1982.

Dr. Rosen reported that claimant could return to work by the end of March.

April 2, 1982.

Dr. Rosen signed a return to work slip.

April 7, 1982.

Claimant quit working after two and one-half days at which time his weekly indemnity payments were stopped. On that day, he visited Dr. Rosen, but the doctor was not in. A nurse or secretary in the doctor's office obtained an appointment for claimant to visit Dr. Friedgood.

April 8, 1982.

A report by Dr. Friedgood showed that claimant mentioned pain in his neck radiating into his right shoulder. It also shows that claimant had "good bulk, tone and strength in his left leg." Dr. Friedgood, however, noted some problems in claimant's right foot and leg.

April 13, 1982.

Dr. Rosen reported that claimant needed no further treatment.

April 21, 1982.

Iowa Lutheran Hospital's physiotherapy reports show claimant treated for low back, neck and left foot problems. The difficulty with the left foot was described as a peripheral neuropathy.

April 28, 1982.

A report by Dr. Friedgood referred to a traumatic neuropathy in his right foot, but the word "right" was altered to read "left" (Exhibit N). When claimant was asked why he returned to Dr. Friedgood around this time, he stated his frustration: "Because I wasn't getting nowhere. I was feeling a little relief while I was having the sessions, but right after they quit working on me, my symptoms came right back."

May 7, 1982.

A physiotherapy report showed claimant had problems with his left hip, leg and ankle and neck and left shoulder.

May 26, 1982.

A report by Dr. Friedgood showed claimant was treated for his left arm and cervical radiculopathy. The report also stated claimant was able to work.

June 1982.

Claimant went on ADC.

July 20, 1982.

Claimant was seen by Dr. Taylor, the psychiatrist, who stated:

> I find no evidence that Mr. Hutchison suffers from any mental disorder which causes any limitation in his ability to function. I view Mr. Hutchison as an excellent candidate for the Pain Clinic at Mercy and think that there's a good probability that he would benefit from treatment at that facility.

August 2, 1982.

A physical therapy report (Exhibit L) showed that claimant stated that he was going to see Dr. Friedgood "because he is still having considerable pain in his neck and shoulder and also in his low back and leg."

August 4, 1982.

A report by Dr. Friedgood states that the doctor cannot explain "the various symptoms in his head and neck region and in his arms." (Exhibit T) Dr. Freidgood also believed that a pain clinic would be a good idea for claimant.

August 16, 1982.

The claimant first saw Dr. Bell.

September 14, 1982.

A left arthrogram showed a partial tear in the left rotator cuff. (Exhibit X)

September 17, 1982.

A consultation report by Robert Hill, D.O., showed a "strong suggestion of both cervical and perhaps lumbar neuropathic disorder, undoubtedly from trauma." (Exhibit X)

September 21, 1982.

An arthroscopic examination of the left knee showed a mild chrondromalacia. (Exhibit X)

September 27, 1982.

A report by Larry L. Richards, D.O., shows a reactive depression due to physical incapacitation and injury.

October 13, 1982.

Dr. Bell did surgery on claimant's left leg and foot, releasing a tarsal tunnel syndrome.

October 11, 1982.

A letter from defendant's counsel to claimant's counsel stated that defendant wanted claimant examined by Dr. Kimelman.

October 19, 1982.

A letter from claimant's counsel to defendant's counsel stated that claimant objected to seeing Dr. Kimelman at that time.

October 21, 1982.

Defendant's counsel responded that the care by Dr. Bell and Dr. Richards was unauthorized and that defendant tendered the care of Dr. Kimelman.

October 27, 1982.

A letter from claimant's counsel to defendant's counsel stated in part:

> Mr. Hutchison takes the position that treatment reasonably suited to treat the injury as required by §85.27 was not provided by the employer. Specifically, Mr. Hutchison would point to the fact that the injury occurred on or about November 1, 1981 and he did not receive surgical relief until he sought out Dr. Bell's services in September of 1982. Further, Mr. Hutchison feels that Dr. Taylor's recommendation with respect to a pain clinic were not supplemented. These feelings of Mr. Hutchison are not meant to be exhaustive, but Mr. Hutchison is not agreeing to waive your client's responsibility under §85.27 for appropriate medical care. We have some difficulty transferring to Dr. Kimmelman's [sic] care now that Dr. Bell has performed two surgeries and a third one is indicated. He is reluctant to leave the care of Dr. Bell at this time.

November 12, 1982.

A letter from defendant's counsel to claimant's counsel stated in part:

> So that there will be no misunderstandings between you and me, please be advised that as of this time and at all times heretofore the only authorized care for this claimant for which the employer will assume responsibility is that in the office of Dr. Kimelman and Dr. Rosen. Since we did not authorize any surgery by Dr. Bell and since we have received no reports of what Dr. Bell has done and only a one-sentence report by Dr. Richards which did not address itself to any real indentification of any problems of this claimant, we must regard all of this care as unauthorized and without giving us the basis for the authorization of care in the future.

January 11, 1983.

A surgery report by Dr. Bell shows the left median elbow nerve was decompressed.

July 13, 1983.

A hospital report by Dr. Bell showed claimant's left shoulder had chronic bicipital tenosynovitis. Dr. Bell operated for a small tear in the rotator cuff, some one-quarter inch or longer. (Bell dep., 19)

October 28, 1983.

Claimant was admitted to Des Moines General Hospital for treatment of adhesive capsulitis of the left shoulder.

December 21, 1983.

Claimant returned to work and has been working since that time.

December 29, 1983.

A report by Dr. Bell showed a left shoulder impairment which equates to nine percent of the whole person. There is no other impairment as a result of the injury.

APPLICABLE LAW

The authorities cited by the hearing deputy basically are proper. The citation of Barnhart v. Mag, Inc., I Iowa Industrial Commissioner Report 16 (Appeal Decision 1981) may not apply here, however. The fourth unnumbered paragraph of §85.27, Code of Iowa, states:

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

The right to choose the care implies an obligation to manage the treatment actively. Zimmerman v. L. L. Pelling Co., II Iowa Industrial Commissioner Report 462, 463 (Appeal Decision 1982). Also, in the context of the case, the industrial commissioner stated in Rittgers v. Iowa Parcel Service, III Iowa Industrial Commissioner Report 210, 213 (Appeal Decision 1982):

> Although defendants are entitled to choose the claimant's medical care provider, it appears questionable that the claimant's condition would have improved as it did had defendants continued control of claimant's care. Defendants had ceased providing care for the claimant subsequent to the first proceeding. Examination by doctors of defendants' choice currently concurs with the care provided by Dr. Johnson. The care provided to claimant by Dr. Johnson proved to be reasonable and necessary for the treatment of claimant's employment related injuries as contemplated by Iowa Code section 85.27. The expenses involved in the services of Dr. Johnson and the surgery of March 3, 1981 should properly be paid for by the defendants.

See also Larson, The Law of Workmen's Compensation, Vol. 2, §61.12(d), pp. 10-692 to 10-707.

"Claimant is not entitled to reimbursement for medical bills unless he shows that he paid for them with his own funds." Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890 (Iowa App. 198

ANALYSIS

The issues will be considered in the order given by defendant.

1. Concerning the issue of causal relationship, Dr. Bell is the only physician with a total perspective of claimant's case, and his unrebutted testimony establishes a causal connection between the injury and the necessity for a treatment and the resulting disability. (Bell dep., 23) From this uncontested evidence, one can only conclude that the requisite causal relationship exists.

2. With respect to the issue of the nature and extent of claimant's disability, one considers first his functional impairment which is shown to be nine percent in unrebutted testimony. Otherwise, claimant has a GED, having gone through the ninth grade in high school. His experience has been in medium and heavy labor. Considering claimant's physical limitati due to the injury, his restricted experience and education, but also that he retains a job with his employer, a ten percent permanent partial disability is not excessive.

3. Concerning the dispute over whether or not claimant's medical case was authorized, the above chronology shows that the treatment by Dr. Roesen on the left foot was not successful initially and the fracture was not found for two months. Claimant still complained and there was virtually no more treatment of his left foot until October 1982 when Dr. Bell performed the tarsal tunnel release. The employer sent claimant to the Mayo Clinic, which shows good management of the medical case. However, Dr. Cabanela found a no organic pathology and found that claimant had a "functional" problem. He further stated that claimant should return to his normal gait and to work. The ensuing evidence tends to show that Dr. Cabanela badly missed the mark: Claimant did have a problem with his foot and a subsequent psychiatric examination by Dr. Taylor, who is well-respected, showed claimant had no serious mental problems And, even though Dr. Richards stated that claimant had a reactive depression, Dr. Cabanela's suggestion that claimant's problems were functional tends to indicate claimant had no physical problems, which was not the case.

At any rate, claimant continued to complain but in April 1982, Dr. Rosen said claimant should return to work. Claimant managed to see Dr. Friedgood, and a traumatic neuropathy was diagnosed. There is some question as to whether Dr. Friedgood was mistaken when he said the neuropathy was in the right foot and not the left foot. The Iowa Lutheran Hospital report, certainly, says it is the left foot.

Whatever, claimant was treated by Dr. Friedgood and still had problems.

In is important that claimant was next sent to Dr. Taylor who recommended a pain center, but nothing was done. That is to say, defendant did not follow the advice of its own chosen physician.

By this time, claimant had had his workers' compensation weekly indemnity payments cut off, was on ADC, and was refused the services of the pain center. It is not unreasonable that he sought out the services of Dr. Bell and had three surgeries, all of which, by unrebutted evidence, are tied to the injury.

Of course, claimant's actions are by no means model for a workers' compensation claimant. He very nearly lost all of his medical and allied benefits under §85.27. Still, his actions show one signal fact: He was right about having a physical basis for his pain. Thus, although he was returned to work and had his complaints dismissed at the Mayo Clinic, he had pain which later, undisputed evidence by Dr. Bell showed came from the injury.

Defendant's actions certainly are not censurable. They provided claimant care by a licensed physician and they sent claimant to a famous health institution, the Mayo Clinic. However, they did not abide by the advice of another doctor of their own choosing, Dr. Taylor. That is to say, the management

of the medical case could have been more active. There is a substantial difference between an employer's actively monitoring a claimant's care and passively waiting for a claimant to state his or her dissatisfaction with that care. Monitoring the care includes an attempt to interpret helpfully the reports so that a claimant's treatment will be more efficacious. Here, Dr. Taylor pointed the way, and the employer should have followed.

Finally, there is some analogy to the Rittgers case, cited above. It is not the best comparison, however, because here defendant had not ceased to furnish care, as in the Rittgers case. The case is comparable in that the care furnished by Dr. Bell improved claimant's medical case and resulted in a lesser degree of disability than the course of treatment set by the employer's care for the nine-month period November 1982-August 1983.

Considering all the above factors, the medical and allied expenses which are connected to the injury are compensable under the above interpretation of §85.27.

4. The extent of those expenses is another matter and leads to the reason for the remand. Defendant's arguments that a portion of the bills should not be considered as connected to the injury may have substantial validity. It is difficult to determine whether the bills are connected to the injury because many of the sub-exhibits in exhibit 19 are illegible photocopies. The method used to determined whether or not the bills were connected to the injury apparently was to read them as well as possible and make the decision. In the analysis portion of the review-reopening decision, the hearing deputy showed which bills were non-compensable.

In fairness to defendant, it would be best to list separately each compensable bill and show (1) the identity of the bill, (2) the amount and, (3) the reason for the causal relationship.

In fairness to claimant, claimant should be given an opportunity to present any other outstanding bills which had accrued by the date of the first hearing.

Finally, the order to make payment "to claimant" is proper under the Caylor case, above, only when it is shown claimant has actually himself paid the bills; the order should be appropriately amended where necessary.

The findings of fact basically are adopted except that number 13 is amended and numbers 17 and 21 are deleted because of the nature of the remand. The conclusions of law and order are amended.

FINDINGS OF FACT

1. Claimant sustained an injury arising out of and in the course of his employment on November 1, 1981.

2. The injury occurred when a sheet of steel weighing from 600 to 1000 pounds fell striking claimant's left forearm and left side and came to rest upon claimant's left ankle pinning him to the floor.

3. The accident caused a fracture in claimant's left ankle and resulted in denervation in that ankle.

4. The injury to claimant's ankle was resolved by surgery which was performed October 13, 1982 and healed with no residual permanent impairment.

5. The accident caused an injury to claimant's left forearm in the nature of constriction of the median nerve.

6. The constriction of claimant's median nerve was resolved by surgery performed January 11, 1983 and healed with no residual permanent impairment.

7. The accident caused a tear in the rotator cuff of claimant's left shoulder.

8. Claimant's rotator cuff tear was surgically repaired.

9. The injury to claimant's rotator cuff caused a residual permanent impairment of nine percent of the body as a whole.

10. Claimant is a married 33 year old male who has a GED but no higher education or specialized vocational training.

11. All of claimant's prior work experience has been in the nature of medium to heavy physical labor.

12. Claimant was unable to perform the regular duties of his employment from and after November 1, 1981 until December 21, 1983 when he returned to work, except for the three days he returned to work on a trial basis in April of 1982.

13. The employer's management of claimant's medical case was such that claimant's action of seeking care without authorization was reasonable; further that that care improved claimant's health and lowered the otherwise possibly higher cost of care.

14. The employer denied that the physical ailments for which claimant sought medical care subsequent to April 6, 1982 were the result of a work related injury.

15. Defendant did not pay weekly compensation benefits to claimant subsequent to April 6, 1982.

16. The medical care which claimant received from Drs. Friedgood, Bell, Richards, Egly, Anesthesiologist Affiliated, Des Moines General Hospital, Mayo Clinic, Hammer Medical Supply and Iowa Methodist Medical Center were reasonably suited for treatment of the injuries claimant sustained at work November 1, 1981.

17. Claimant traveled 608 miles in order to obtain medical care, the expense of which defendant has not paid.

18. Claimant's healing period consists of 110 weeks, 4 days.

19. Claimant's permanent partial disability is 10 percent.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED:

1. This agency has jurisdiction of the subject matter of this proceeding and its parties.

2. The work related injury of November 1, 1981 caused injuries to claimant's left shoulder, forearm and ankle.

3. Claimant's healing period consists of one hundred ten (110) weeks, four (4) days of which defendant has paid claimant twenty-one (21) weeks, four (4) days leaving an unpaid balance of eighty-nine (89) weeks.

4. Claimant's rate of compensation is three hundred seven and 38/100 dollars ($307.38) per week.

5. Claimant is ten percent (10%) permanently partially disabled in industrial terms.

6. Employer's management of claimant's case under §85.27 was such that claimant's seeking care without authorization was proper.

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant eighty-nine (89) weeks of healing period compensation over and above that already paid at the rate of three hundred seven and 38/100 dollars ($307.38) per week commencing April 7, 1982.

IT IS FURTHER ORDERED that defendant pay claimant fifty (50) weeks of permanent partial disability compensation at the rate of three hundred seven and 38/100 dollars ($307.38) per week commencing December 21, 1983.

IT IS FURTHER ORDERED that defendant pay interest at the rate of ten percent (10%) per annum from the date each payment became due until the same is paid pursuant to Iowa Code section 85.30.

IT IS FURTHER ORDERED that if defendant has not previously paid the bill of Mayo Clinic in the amount of four hundred one and 70/100 dollars ($401.70) that it shall do so now.

IT IS FURTHER ORDERED that defendant pay claimant one hundred forty-five and 92/100 dollars ($145.92) for reimbursement of travel expenses incurred in obtaining medical care.

IT IS FURTHER ORDERED that defendant pay all amounts which have accrued in a lump sum. This includes all weekly benefits for claimant's healing period and all weekly benefits for permanent partial disability which have accrued since December 21, 1983 but which have not yet been paid.

IT IS FURTHER ORDERED that defendant pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33 which are taxed against them in the amount of four hundred forty-six and 82/100 dollars ($446.82).

IT IS FURTHER ORDERED that defendant file a claim activity report within twenty (20) days from the date of this decision.

WHEREFORE, this case is remanded to the hearing deputy to show a listing of the compensable bills as follows: (1) show the identity of the bill; (2) the amount; and, (3) the reason for the causal relationship. The hearing deputy may, if he chooses, give claimant an opportunity to present any bill claimed to be compensable which was received prior to the hearing. Finally, the hearing deputy is authorized to pre-hear and hear any evidence which he feels is necessary in order to complete the medical and allied benefits portion of this case.

Signed and filed this 30th day of August, 1984.

Barry Moranville

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH LEROY HUTCHISON,	:	FILE NO. 687421
Claimant,	:	
vs.	:	REVIEW -
AMERICAN FREIGHT SYSTEM, INC.,	:	REOPENING
Employer, Self-Insured, Defendant.	:	DECISION

INTRODUCTION

This is a proceeding in review-reopening brought by Kenneth Hutchison, claimant, against American Freight System, Inc., a self-insured employer.

Claimant seeks further weekly benefits and payment of medical expenses as a result of the injury which occurred on November 1, 1981.

The hearing commenced February 15, 1984 in the hearing room at the office of the Iowa Industrial Commissioner in Des Moines, Iowa.

The record in this proceeding consists of the testimonies of claimant, Anita K. Smith, Bruce A. Wolfe and David Babcock. Also admitted into evidence were claimant's exhibits 1 through 20, jointly offered exhibits A through W, defendant's exhibits A through Z, AA, AB, AC, AE, AF and AG.

ISSUES

The issues presented by the parties at time of hearing are whether or not there is a causal connection between the injury claimant suffered November 1, 1981 and the extended history of disability and medical care which claimant alleges; a determination of the nature and extent of any disability which is found to be related to that injury; a determination concerning whether or not the medical expenses which claimant presents are the responsibility of the defendant, particularly with regard to the authorization for such expenses; a determination of the costs of this proceeding and of the relative rights of the parties with regard to the subrogation rights and lien held by the Iowa Department of Human Services.

The parties presented a written stipulation which states that the correct rate of compensation in the event of an award is $307.38 per week; that the charges for the medical and hospital services rendered to claimant were fair and reasonable; that claimant did not work from November 2, 1981 through April 1, 1982, for which claimant was paid compensation; that claimant was again off work from April 7, 1982 through December 20, 1983 for which no compensation has been paid; that claimant returned to his regular employment duties on December 21, 1983 and that defendant paid claimant's air fare to and from the Mayo Clinic in Rochester, Minnesota in the sum of $272.00.

REVIEW OF THE EVIDENCE

Anita K. Smith testified that she is employed by the State of Iowa, Department of Human Services in the Medical Utilization and Review Unit. She stated that she works on subrogation claims pursuant to chapter 249A of the Code of Iowa. She identified exhibit 10 as being a payment history of all of claimant's medical expenses which were paid by the Department of Human Services and that exhibit 19 is copies of claims which had been submitted to the department for payment and which were believed to be related to the injury of November 1, 1981. The witness related that many of the claim forms noted in exhibit 19 were marked as to indicate that the medical care was not related to a work related injury. She did not know why the full amount charged was sometimes not paid. She agreed that exhibit 10 may have numerous items which are not related to the injury of November 1, 1981.

Bruce A. Wolfe testified that he has been employed at American Freight Systems for five years. He related that on November 1, 1981 at approximately 11:45 p.m. he was working with claimant unloading a trailer when a sheet of steel fell, hit claimant's left shoulder and arm and pushed claimant against the side of the truck. He related that claimant fell and that the steel landed on his left leg. Wolfe stated that claimant ended up on his hands and knees with the steel on his left foot and that he, Wolfe, moved the steel enough to allow claimant to pull his foot out from under it. Wolfe testified that claimant could get up by himself, but that he could see that claimant was hurt and he went to get the foreman.

Wolfe testified that the weight of the piece of steel was such that he could not carry it by himself. He stated that claimant had made no prior complaints on the day of the accident and that up to the time of the accident claimant did his usual customary job.

Kenneth L. Hutchison testified that he is married with five children and is 33 years of age. He related that on November 1, 1981 he was employed as a dock worker and a freight handler at American Freight Systems. He stated that his job involves moving numerous amounts of anything and everything. He described the accident of November 1, 1981 as it had been described by Bruce Wolfe. He described the sheet of steel as being approximately five and one-half feet wide, eight feet long, constructed of one quarter-inch steel and weighing 700 to 1000 pounds.

Claimant stated that after the accident he felt pain in his left side and foot, in particular the left forearm across and above the knee, the shin bone and the left foot and ankle. He stated that he filled out an accident report and rode home with a coemployee.

Claimant testified that when he arrived home he discussed the injury with his wife and had trouble sleeping. He related that he went to Lutheran Hospital, was examined and sent to Herbert Rosen, D.O. He related that the treatment he was given consisted of ultrasound, heat packs and changing the dressings on his abrasions. He stated that he used a cane and crutches at that time. He stated that he was experiencing pain in his arm and across his shoulder blade and that he could not walk due to the pain in his foot and leg.

Claimant described seeing Joshua Kimelman, D.O., on December 4, 1981 and being told to walk on the foot.

Claimant stated that he still was not feeling better and that Dr. Rosen sent him to Lutheran Hospital where special x-rays were performed which disclosed a fracture in his left foot. Nerve damage was also detected. His foot was then placed in a cast which was removed in three weeks because his foot became swollen and painful. He stated that he experienced a lot of pain across the top of his foot and down the center of his foot after the cast had been removed and that he continued to see Dr. Rosen. He stated that he was also experiencing pain in his arm and shoulder at times.

Claimant described being sent to Mayo Clinic for tests but, that his neck and shoulder were not tested. He stated that he had advised the personnel at Mayo Clinic of problems in his arm but that the person who took the history apparently limited the examination to his left foot.

Claimant testified that Dr. Rosen released him to go back to work as shown in exhibit I but that he was unable to tolerate the pain and left after working only two and one-half days. Claimant testified that the following morning he went to Dr. Rosen's office and that the nurse informed him that the doctor would be gone until Monday. At claimant's request she scheduled an appointment with David L. Friedgood, D.O., as shown on exhibit O. Claimant testified that he had seen the nurse there on other occasions and believed her to be a regular employee. Claimant stated that he saw Dr. Friedgood on the eighth of April and that he related complaints involving his neck, shoulder, arm, knee and foot. He stated that he was given a TENS unit and sent to Iowa Lutheran Hospital for physical therapy. Claimant stated that he felt that the physical therapy was not working and asked Dr. Friedgood to write a letter to his union representative and employer, which letters are identified as exhibits N and P. Claimant stated that he was advised that his employer did not have that type of work available. Claimant testified that he continued to see Dr. Friedgood until shortly after he had been examined by Michael J. Taylor, M.D.

Claimant testified that he returned to see Dr. Rosen about two weeks after he left work in April. He stated that Dr. Rosen kept telling him to go back to work and that he would not refer claimant to any other physician.

Claimant testified that he received no weekly compensation benefits after April 7, 1982 and that the employer did not pay Dr. Friedgood nor the charges for physical therapy. He identified exhibit 7 as the statement he received from Dr. Friedgood for the services provided for the symptoms which he began experiencing after the accident of November 1, 1981.

Claimant testified that he began seeing Jimmy D. Bell, D.O., in August of 1982 upon the suggestion of an acquaintance. He described his complaints as that he could not tighten his arm or raise it above his shoulder without pain and that he also was experiencing pain in his knee, foot and lower back. Claimant described being hospitalized for EMG's, an arthrogram of his shoulder and nerve tests on his arm. He related being hospitalized November 12, 1982 for surgery on his foot, in January, 1983 for surgery on his elbow, in July, 1983 for surgery on his shoulder and in October, 1983 for manipulation of his shoulder. Claimant related that he engaged in physical therapy during his course of treatment and that he saw Dr. Bell on numerous occasions.

Claimant testified that in October of 1982 he was made aware that his employer had offered him treatment by Dr. Kimelman but that he refused that treatment as he was already being treated by Dr. Bell and also because Dr. Kimelman had not helped when he had seen him previously.

Claimant identified exhibit 13 as a summary of the travel which he performed in order to obtain medical care and related that the round trip mileage shown on the exhibit was the round trip mileage from his home to the place where treatment was provided.

Claimant testified that exhibit 9 is a statement he received from Iowa Methodist Medical Center for the repeat arthrogram which was performed there at the request of Dr. Bell.

Claimant testified that exhibit 8 is the bill he received from Hammer Medical Supply for the TENS unit that he received under the direction of Dr. Friedgood for relief of the symptoms which he began to experience following the November 1, 1981 accident.

Claimant testified that he received no benefits of any nature from his employer after April 7, 1982 and that he was able to return to work December 21, 1983. He stated that he still has sharp pain when raising his left arm higher than his shoulder but that surgery removed the constant pain which he previously experienced following the accident. Claimant stated that surgery improved the problem in his foot and that it corrected the problem in his elbow.

Claimant testified that he quit high school in the tenth grade and received his GED in 1972. He stated that he has no other specialized education or vocational training.

Claimant testified that most of the work that he has done has been in the nature of labor. He related working in a bindery, for Elena Chemical Corporation and as a gas station attendant. He stated that he can do his present job but that it is difficult. He relates that he uses his right arm to compensate for the left and that he uses two wheel carts and a motor tow more than he did prior to the accident.

Claimant examined exhibit J and related that the reference in it to his right foot is in error and that he does not know how the word "right" in exhibit N came to be altered. He related that Dr. Bell advised the surgeries which were performed and that he chose to have them in order to be able to function.

Claimant testified that he served in the Marines but received a medical discharge due to a chipped bone in his wrist which had arisen from a motorcycle accident in 1967. He denied telling anyone that he had received a dishonorable discharge.

Claimant stated that he is now earning $13.21 per hour and has had the benefit of all pay increases which occurred while he was off work. He denies seeing any notice posted on a bulletin board at work which lists the doctors which the company has authorized to provide medical treatment for work related injuries.

Claimant testified that he had advised Drs. Kimelman and Rosen of problems in his arm and shoulder but that when he was seeing them his main complaint was his foot. He could not explain why entries of those complaints did not appear in their records and reports.

Claimant related that he had a history of bronchial trouble which was not related to this claim and also that his ingrown toenails were not related to this claim.

Claimant admitted having an injury to his right wrist from a 1967 motorcycle accident and also head injuries. He stated that a lawn mower threw a piece of metal into his right ankle when he was approximately eight years of age and that approximately seven months before the accident at work he was involved in an auto accident. He stated that he did not tell Dr. Bell about the auto accident.

Claimant admitted that he had been convicted of a felony in the State of California.

David Babcock testified that he is the terminal manager for American Freight Systems in Des Moines, Iowa. He stated that the bulletin board has a list of approved doctors on it and that such list appears on both the union board and on the company board. He testified that no one in the terminal authorized Dr. Rosen's nurse to refer claimant to Dr. Friedgood. He stated that the company has no light duty available and has not since November of 1981. He also stated that he does not know if the bill for claimant's care at Mayo Clinic has been paid.

The exhibits in this case consist of many pages of medical records concerning claimant's attendance at work, copies of letters involving the discussion between counsel concerning authorization for claimant's medical care and statements and summaries of claimant's medical and travel expenses. The undersigned has thoughly reviewed all of those exhibits. Joint exhibits A through W are the same as the defendants' exhibits A through W.

Exhibit A is the emergency record of claimant's treatment at Lutheran Hospital on November 2, 1981. It notes:

> O. Superficial abrasions of the left forearm, the thigh, the left lower leg and the left ankle. The arm, thigh and lower leg are unremarkable with no swelling or ecchymosis and good circulation. There is mild tenderness to palpation over the dorsolateral aspect of the left ankle joint. There is no swelling or ecchymosis. The patient can bear weight without pain but there is discomfort with ankle range of motion. X-ray negative.

Exhibit B consists of several pages. Most noteable include the radionuclide bone imaging report of November 30, 1981 which indicates a bone injury in claimant's left ankle. The radiographic report dated December 12, 1981 discloses a longitudinal undisplaced fracture disclosed by a lateral tomogram which corresponds perfectly to the site of increased activity shown in the earlier bone scan. On the first page of the exhibit, the discharge summary, appears the following statement:

> Problem is to prevent a nerve pathology and a foot ptosis and causalgia and re-evluation [sic] by Orthopedics confirmed this and he will be treated outpatient to try to ambulate him. All attempts made to relieve distress, but he is persistent about it and it does look like he is not able to walk well....EMG shows early denervation, possible left medial and lateral plantar, as well as the extensor halluces brevis....

Exhibit C is a report from Orthopedic Associates, P. C., dated December 4, 1981. It relates the increased activity from the bone scan report and the early tomogram which did not show evidence of fracture. The impression notes is an apparent contusion and sprain of ankle.

Exhibit D is a surgeon's report from Dr. Rosen dated January 5, 1982 which relates that nerve damage was present.

Exhibit E is an EMG dated January 13, 1982 which shows denervation in the extensor halluces brevis, the same as was earlier noted on December 17, 1981 as appears on the second page of exhibit B.

Exhibit F is a report of Miguel R. Cabanela, M.D., from Mayo Clinic, dated February 25, 1982. It relates a possible plantar nerve lesion but the majority of the report deals with claimant's lumbar spine.

Exhibit G is another EMG report dated March 22, 1982 which concludes that its results are similar to the previous EMGs.

Exhibit H is a report from Herbert Rosen, D.O., dated March 26, 1982. In it he states:

> Regarding his original problem of a burning sensation, it was considered some type of mild neuritis. Be aware that multiple EMG's have revealed very minimal or no impairment of the nerves. If there was a slight change, it was considered not severe enough for any type of impairment at this time period.
>
> ...
>
> He did have a fracture of the bone which healed satisfactorily and I feel there is no impairment regarding the bone.
>
> Mr. Hutchison has also had Orthopedic consultations and has been encouraged by the Orthopedist to return to full duties to prevent any impairment of a leg.
>
> ...
>
> My goal is to place him in a position of active work capacity with minimal functional inability; I, therefore, cannot at this time place any inability until he returns to his full duties. This is a difficult type of evaluation to make because of the type of case he has.
>
> Of great importance is, I find most of his problems are subjective at this time and so, too, have the consultants.
>
> It is my intent that he be returned to full duties by the end of March. I feel, in my opinion, that he is capable of performing his work duties. It is necessary that he perform these to determine his ability for the use of his leg. I find no other impairment of the leg, other than subjectively having a "burning sensation".

Exhibit I is the return to work release from Dr. Rosen dated April 2, 1982.

Exhibit J is a report from David L. Friedgood, D.O., dated April 8, 1982, addressed to Dr. Rosen, which includes the following statement:

> He has recently tried to return to work, was able to work for about three days and then noted that his foot began hurting more and was swelling and he had to leave work....

The physical examination notes mild weakness in claimant's "right" [sic] foot and the impression noted is some form of traumatic neuropathy involving his "right" [sic] foot.

Exhibit K is Dr. Rosen's report dated April 13, 1982 which relates the possible posttraumatic neuropathy and neuritis and that it is his opinion that the injury should heal if patient uses leg as advised by himself and the orthopedist. He also indicates that no further treatment is needed if the patient follows instructions regarding using the leg. He indicates that the patient was able to resume work on April 3, 1982.

Exhibit L consists of 11 pages of physical therapy progress notes and records covering the period from April 9, 1982 through August 2, 1982. On the second page which appears to have been

dictated on May 24, 1982 reference is made to left shoulder pain. Similar references continue thereafter through the exhibit.

Exhibit M is the report of a chest x-ray which shows no abnormality in claimant's lungs, mediastinum or bony structures.

Exhibit N is a letter from Dr. Friedgood which states that claimant is suffering from a traumatic neuropathy involving his "right" [sic] foot and that this disability is entirely related to the pain which he is experiencing. He recommends continued supportive care including physical therapy and suggests light duty work. He states that he expects a nearly full recovery eventually.

Exhibit O appears to be a note from Dr. Rosen's office which indicates that Sue Hill arranged an appointment with Dr. Friedgood on April 8, 1982.

Exhibit P is a letter from Dr. Friedgood to defendant dated May 6, 1982 which advises them that he has been seeing claimant for neurologic problems related to his accident of several months ago.

Exhibit Q is a letter from Dr. Friedgood to Dr. Rosen dated May 26, 1982. He notes some decreased pin sensation along the inferior aspect of claimant's left upper arm. He states that he feels claimant is capable of returning to work in a position that does not involve heavy lifting or long periods of time on his feet.

Exhibit R is an EMG report of claimant's left arm and paraspinal muscles dated June 9, 1982 which shows results within normal limits.

Exhibit S is a report from Michael J. Taylor, M.D., dated July 20, 1982. His observation includes the fact that claimant had a blister on his right hand from the use of a previous cane. He was unable to find any mental disorder which caused a limitation in claimant's ability to function and opined that claimant was an excellent candidate for the pain clinic at Mercy Hospital.

Exhibit T is a report from Dr. Friedgood to claimant's attorney dated August 4, 1982 which relates an inability to explain claimant's symptoms in his head, neck and arms. He indicates that he had referred claimant to the Mercy Hospital Pain Clinic in the past and states that Dr. Taylor's suggestion concerning it is excellent. He again states that claimant is capable of working except that he cannot stand for any length of time.

Exhibit U consists of several pages of what appears to be claimant's progress notes with Dr. Bell. They reflect treatment for complaints concerning claimant's left ankle, left arm and shoulder, cervical and dorsal spine as well as treatment for some matters such as a stuffed head and ingrown toenails. The exhibit appears to contain notes from physical therapy as well as the doctor's own progress notes.

Exhibit V is a report from Dr. Bell dated August 16, 1982. It reflects complaints of pain in claimant's cervical spine, left shoulder, left knee and both feet. The physical examination notes the following:

> Strength testing cannot be adequately tested in the upper extremities due to the patient having a subacromial tenderness on the left. Range of motion is satisfactory in passive action of the left shoulder girdle region. The patient abducts his arm to 90 degrees without any scapulothoracic motion at the present time. After the circumduction [sic] and normal motions are satisfactory. There appears to be no atrophy of the deltoids or the musculature of the shoulder girdle, bilaterally. Examination of the lower extremities demonstrates neurologically intact lower extremities.

Exhibit W contains 25 pages of records of Des Moines General Hospital concerning an admission on September 14, 1982. Pages 7 and 8 are a report of consultation dated September 27, 1982 from Larry L. Richards, D.O. His final impression is noted as, "reactive depression secondary to physical incapacitation and injury." He recommends administration of the Minnesota Multiphasic Personality Inventory, psychotherapy on an as needed basis and antidepressant therapy if the depression continues or worsens. The interpretations from the MMPI states the following: "Individuals who obtain similar profiles often present themselves as being physically ill. Pain is a frequent complaint and it is often localized in the extremities." At page 11 there is noted evidence of a left lower lumbar radiculopathy. The 13th page notes a left shoulder arthrogram which notes a partial tear involving the rotator cuff. The 14th page is a summary of x-ray reports which deal with the lumbar spine, left foot, left knee, chest, cervical spine and left shoulder. All were found to be normal with the exception of the lumbar spine as shown on the 15th page by the addendum dated September 18, 1982. The 17th page shows a normal lumbar and cervical myelogram while the 18th page shows a normal lumbar discogram. The 25th page relates an arthroscopic examination of claimant's left knee which disclosed no significant abnormalities.

Exhibit X consists of records from Des Moines General Hospital dealing with claimant's admission October 13, 1982 and also contains duplication of the contents of exhibit W. The 20th page is a more legible copy of the left shoulder arthrogram report than what was found in exhibit W. The 6th page of the exhibit is the report of operation for the correction of the anterior tarsal tunnel syndrome which was performed October 13, 1982. It reflects a decompression of the peroneal nerve at the ankle.

Exhibit Y consists of records of Des Moines General Hospital dealing with claimant's admission on January 11, 1983 and the resulting correction of what had been diagnosed to be a pronator syndrome in claimant's left elbow by surgical decompression of the left median nerve at the level of the elbow. The 2nd page of the exhibit is the report of operation for that surgery and it is noted that a restricted area was found around the median nerve and that decompression was performed. The 34th page of the exhibit relates a date of admission on January 1, 1983 and that the surgery was performed on January 1, 1983. This is inconsistent with all other reports dealing with the left elbow surgery and is presumed to be an error. Exhibit Y also contains duplication of reports previously in the record as parts of exhibits W and X dealing with claimant's two previous admissions.

Exhibit Z consists of records from Des Moines General Hospital dealing with claimant's admission on October 28, 1983. The 3rd page of the exhibit is the final progress report which reflects that claimant underwent a manipulation under anesthesia for correction of adhesive capsulitis in his left shoulder. The exhibit also notes that claimant had bilateral ingrown toenails surgically removed while he was under anesthesia for the shoulder manipulation.

Exhibit AA is a report from Dr. Bell dated November 9, 1982 addressed to defendant's counsel which indicates the diagnosis of an anterior tarsal tunnel syndrome and pronator syndrome. He relates that the surgical release of the left ankle has been performed.

Exhibit AB consists of records from Des Moines General Hospital dealing with claimant's admission of July 11, 1983. The 6th page of the exhibit, which is part of the history and physical, indicates that orthopedic examination reveals normal range of motion of all extremities with the exception that abduction is limited to approximately 90 degrees at the left shoulder and there is pain elicited with movement of the left arm at the shoulder joint. The 14th page of the exhibit is the report of operations which indicates that during surgery, examination of the lateral insertion of the rotator cuff at the humeral head demonstrated a one and one-half centimeter tear at the insertion in the humeral head. It goes on to describe the surgical repair of the tear. The report also describes the arthrotomy and tenodesis which was concurrently performed.

Exhibit AC is the report of Dr. Bell addressed to claimant's counsel dated December 29, 1983. In the report Dr. Bell states:

> Mr. Hutchinson was seen in my office on 12/15/83 at which time he was examined and given full duty, back to work release. He has a 15% permanent partial disability of his left shoulder due to his injury of the rotator cuff. At the present time he is rehabilitating well and I will see him again in two months' time.
>
> The 15% upper extremity permanent partial disability converts into a 9% whole man disability rating.

Exhibits AE, AF, and AG consist of a warning letter, final warning letter and letter of discharge addressed to claimant asserting absenteeism during the period commencing December 7, 1979 up to and including April 25, 1981. Where a cause is indicated the majority of the absences relate to sickness, injury or family illness. The greater portions of the other absences are related to being late for work.

Claimant's exhibit 1 is the records of Des Moines General Hospital dealing with claimant's admission on October 13, 1982 and the surgical decompression of the deep peroneal nerve at the ankle in order to resolve the anterior tarsal tunnel syndrome. The exhibit is generally a duplication of what is already in the record through other exhibits.

Claimant's exhibit 2 is a record of claimant's admission to Des Moines General Hospital on October 24, 1982. The report notes that it is a recheck of the surgical incision in claimant's left leg and ankle.

Claimant's exhibit 3 is a report from Larry L. Richards, D.O., dated October 25, 1982 addressed to defendant's counsel which indicates that he diagnosed claimant in September of 1992 as suffering from reactive depression and that psychotherapy treatment was given on September 22 and 24.

Claimant's exhibit 4 consists of records from Des Moines General Hospital dealing with the surgery in his left elbow performed January 11, 1983. It duplicates the reports which are already in the record as part of other exhibits.

Claimant's exhibit 5 is a report of Dr. Bell to claimant's counsel dated January 28, 1983. The reports states:

> At the present time, I feel that I can say with reasonable degree of medical certainty that the relationship between the left ankle pain and the injury date of October 31, 1981, [sic] is connected. The left forearm and elbow complaint, at the

present time, I feel is similarly related.

Claimant's exhibit 6 is a statement from Mayo Clinic addressed to claimant seeking payment in the amount of $401.70 for services performed February 17, 1982 to February 19, 1982.

Claimant's exhibit 7 is a statement from Neurological Associates of Des Moines addressed to claimant seeking payment in the amount of $170.00 for services rendered on April 8, 1982, April 20, 1982, May 6, 1982 and May 26, 1982. It should be noted that this involves Dr. Friedjood.

Claimant's exhibit 8 is a cure of default notice addressed to claimant in accordance with the Iowa Consumer Credit Code seeking payment in the amount of $115.46 to satisfy claimant's account with Hammer Medical Supply.

Claimant's exhibit 9 is a statement from Iowa Methodist Medical Center addressed to claimant seeking payment in the amount of $131.65 for services rendered April 11, 1983 related to an arthrogram.

Exhibit 10 was admitted and received into evidence. It was, however, taken by the witness, Anita K. Smith, when she left the hearing room and it has not been subsequently recovered. The exhibit consisted of a computer printout which summarized the contents of what is also in the record as claimant's exhibit 19. In view of its nature as a summary of other evidence which is in the record, its loss is not material.

Exhibits 11 and 12 are photographs with exhibit 11 showing what appear to be scars on claimant's left shoulder and the crease of his left elbow while exhibit 12 shows claimant's left foot to be elevated and bandaged.

Claimant's exhibit 13 is a summary of travel expenses in which claimant seeks reimbursement in the amount of $155.52 for traveling 648 miles in obtaining medical care.

Exhibits 14 through 18 consist of letters between counsel for claimant and defendant dealing with claimant's medical care. In exhibit 14 defendant's counsel seeks to have claimant re-examined by "Dr. Kimmelman" [sic]. Exhibit 16 is the reply which states that claimant was hospitalized in September of 1982, has been treated by Drs. Bell and Richards and that he objects to seeing "Dr. Kimmelman" [sic]. Exhibit 15 is a response to that letter which states that care by Dr. Bell and Dr. Richards is unauthorized and which offers care by "Dr. Kimmelman" [sic]. It also states that if claimant should decline the offer, defendant will take the position that it has offered appropriate medical care and has no further responsibility in that regard. Exhibits 17 and 18 generally restate the contentions of the parties with regard to medical care.

Claimant's exhibit 19 consists of 58 numbered pages of health insurance claim forms dealing with claimant, the majority of which make reference to the conditions for which he underwent surgery. The reports reflect the provider of care, the amount charged and the amount that was paid by the Iowa Department of Human Services.

Claimant's exhibit 20 is a deposition of Jimmy D. Bell, D.O., taken November 7, 1983. Regarding claimant's history and complaints Dr. Bell stated:

> A. Reading from the dictation of the office notes of August 16, 1982, "He was a 32-year-old Caucasian male. Patient was seen on August 16, 1982 complaining of an injury he suffered on February 1, 1981. He stated that he was unloading a semitruck and two sheets of heavy steel fell on him. Since that time he had been treated by his company doctor and has been seen at the Mayo Clinic. During a conversation he felt that the Mayo Clinic believed that he was a malingerer and he received no satisfaction from that examination.
>
> "At the present time he is complaining of numerous complaints located in the cervical spine, left shoulder, left knee and bilateral foot. The patient complains that approximately one month prior to going to the Mayo Clinic, it was about two months after the original injury, he developed back pain. His main complaint prior to that was the left lower extremity region. Since that time he has had problems in the neck and left shoulder as well as the left lower extremity, referable mainly to the knee and left foot. He states that he is now beginning to have some kind of painful sensation in the right foot."

Dr. Bell stated that the reference to February 1, 1981 could be a typographical error. He went on to describe his examination as follows:

> A. Reading from the examination on August 16, "Cervical spine is examined. There appears to be trigger point activation on the left side as compared to that of the right. Neurological examination is essentially unremarkable at the present time. During the examination the patient states that he sometimes has some numbness and tingly sensation in the left thumb and index finger of the left hand. Carpal tunnel examination of left upper extremity is essentially negative at the present time.
>
> Strength testing cannot be tested in the upper extremities due to the patient having subacromial tenderness on the left. Range of motion satisfactory in passive action of the left shoulder girdle region. Patient abducts his arm to 90 degrees without any scapulothoracic motion at the present time. After the circumduction and normal range of motions are satisfactory.

With regard to claimant's foot and ankle, the following discussion occurred:

> A. At that time we made a diagnosis of what is called anterior tarsal tunnel syndrome of the left foot and we scheduled his surgery for an outpatient surgical procedure.
>
> Q. What abnormal findings were there that allowed you to make that diagnosis on 10-7-82?
>
> A. Previous EMG had demonstrated some abnormalities in the muscle which would go along with the compression of the nerve involved.
>
> ...
>
> Q. What did you do next, Doctor? Did you see him again?
>
> A. Scheduled for surgery. He had surgery and he was visited in the office periodically for his recovery time.
>
> Q. When was surgery undertaken?
>
> A. On or about 10-12-82.
>
> Q. What surgery was undertaken, Doctor?
>
> A. The release of tarsal tunnel, anterior tarsal tunnel.
>
> Q. Can you tell me a little bit about how this procedure is carried out in general terms?
>
> A. Skin incision is made over the anterior aspect of the foot carried down to the deep peroneal nerve through the extensor retinaculum at the ankle. The artery, nerves and veins are then tied and the extensor retinaculum is incised to relieve pressure off the nerve.
>
> Q. Did you make any observations that led you to believe there was an abnormal condition once you got in there, after you had opened Mr. Hutchinson up?
>
> A. No. The anatomy in that area is pretty much the same in either a diseased or nondiseased state so from gross examination you cannot tell.

Discussion concerning the treatment for claimant's left elbow and forearm complaints progressed as follows:

> Q. Did you see Mr. Hutchinson then again after December 15 of '82?
>
> A. Yes, we visited with him numerous times. He was scheduled for an outpatient surgical procedure on his left forearm to release the median nerve at the elbow.
>
> Q. When was that procedure undertaken?
>
> A. On or about 1-10-83.
>
> ...
>
> Q. Prior to 1-10-83 what physical complaints did Mr. Hutchinson have? Did you see him just prior to that?
>
> A. His main complaints are that of his shoulder and his forearm complaint.
>
> ...
>
> Q. Can you tell me what you found upon doing that surgery?
>
> A. Surgical procedure is and clinical findings is that similar to the tarsal tunnel release. The pathology is not grossly abnormal from that of normal anatomy. The procedure is to relieve pressure on the median nerve, deep fascia and muscle that is laying up against it and this was performed.
>
> Q. Did you find any areas that appeared to you to be restricted or compressing the median nerve?

A. There were at that time fascial bands laying over the median nerve that appeared to be tight and those were broken down to bring more freedom for the median nerve to travel through that area surface.

Discussion moved to the problem in claimant's shoulder and the following was related:

A. On 3-7-83 he was seen in the office and his pain persisted in his shoulder and at that time we ordered an arthrogram to be performed. As soon as an arthrogram was to be performed, then we were going to see him back.

...

Q. Doctor, had there been a previous, to your knowledge, arthrogram performed on this patient?

A. Yes. He had hospitalization at Des Moines General Hospital at which time he had had a battery of tests run to eliminate certain problems due to the multiplicity of the complaints and some of the conflicting reports on the EMG. He had had a positive arthrogram report from Des Moines General and subsequent negative report from I believe it was Iowa Methodist.

...

Q. Now, Mr. Hutchinson then was ultimately hospitalized for surgery on the left shoulder?

A. Yes, he was.

Q. And the date of that hospitalization was July 11, 1983, is that correct, Doctor?

A. I do not have that date, but that is reasonable.

Q. Did you go in and do surgery on the left shoulder?

A. Yes, I did.

...

Q. What was the name of the surgery that you did?

A. It was a decompression of his -- the shoulder. The articulation of the joint motion between the acromion and the humerus were very tight and impinged on the soft tissue. It is called shoulder impingement syndrome.

Commonly the things that are found in those are the bicipital tendon is subluxal or moves, slides, more motion than it should have in the groove in the shoulders. The tissues are pressed up against the bony structures and they are tried to carry through an arc of motion. And in Ken's case the small tear in the rotator cuff was identified that the first arthrogram had previously diagnosed.

Q. You then did see a tear?

A. Yes.

Q. How big was that tear if you recall?

A. Approximately a quarter of an inch, maybe a little larger.

Q. Medically in your judgment is that kind of tear the kind of tear that would produce the symptoms that this patient complained of?

A. Yes, it is.

...

Q. Did you see him again after 7-26-83?

A. Yes. He was to remain in therapy on 10-13-83. He had not -- or was not able to recover his range of motion to his shoulders and developed what is called adhesive capsulitis, a frozen shoulder. At that time we decided that therapy had been prolonged far enough and that we would take him to the hospital and put him to sleep and manually carry his shoulders to a range of motion to speed up his recovery from the surgery.

Q. Did you do that?

A. Yes, that was subsequently done.

The doctor then described his impression of claimant's current impairment as follows:

A. He does not have full range of motion. He has some restrictions of internal rotation. He does have a painful range of full motion in other planes.

Q. What areas is he limited in terms of his range of motion in his left shoulder?

A. Internally he has pain limitation. He has recovered enough to go through the major components of shoulder motion at the present time. This will improve as he works on his therapy.

Q. At this time have his complaints of pain resolved themselves?

A. No. He is still in the recovery phase of his pain in his shoulder. This will resolve as he gets further into the range of motion exercises.

Q. Earlier in the deposition you indicated that he was complaining of some pain in his left ankle, I believe of a pulling nature?

A. The conversation as best I [sic] can recollect was that we asked him why he was limping and he stated that he was having some pulling sensations.

Q. Does he have any other complaints that you are aware of at this This will improve as he works on his therapy.

Q. At this time have his complaints of pain resolved themselves?

A. No. He is still in the recovery phase of his pain in his shoulder. This will resolve as he gets further into the range of motion exercises.

Q. Earlier in the deposition you indicated that he was complaining of some pain in his left ankle, I believe of a pulling nature?

A. The conversation as best I can recollect was that we asked him why he was limping and he stated that he was having some pulling sensations.

Q. Does he have any other complaints that you are aware of at this time?

A. No.

Q. Do you expect or do you know whether Mr. Hutchinson has any permanent partial impairment in the left ankle or foot?

A. I do not see any permanent partial disability in his left ankle at the present time. His left shoulder is a different story. We will have to evaluate that six months after his last procedure, which was his manipulation under anesthesia.

Q. Do you know or can you say with a reasonable degree of medical certainty whether or not he will have any permanent partial disability or loss of range of motion or impairment of any kind in the left arm at the elbow?

A. I do not believe that there will be any.

Concerning the cause of claimant's impairment the following discussion occurred:

Q. Doctor, when you first saw Mr. Hutchinson, you took then a rather lengthy history, I understand?

A. Yes, it was a long interview.

Q. And he gave you a history of how he had allegedly injured himself, is that correct?

A. That's correct.

Q. Now, based upon your findings, your surgery, the history that have taken [sic] from this patient and with your training, can you say with a reasonable degree of medical certainty whether there is a relationship between the injury Mr. Hutchinson allegedly suffered in his employment and the conditions that you treated him for; namely, the injury, the trapped nerve in the left ankle, the trapped nerve in the left or impinged nerve in the left medial area of the elbow and the rotater [sic] cuff tear in the left shoulder?

A. Based on a reasonable degree of medical certainty, if Mr. Hutchinson has not complained of these complaints prior to his accident, then all of the circumstances he described to me are compatible with injury to those areas.

With regard to claimant's ability work to and the amount of time he was unable to be employed, Dr. Bell was questioned and responded as follows:

Q. Can you say during the period you treated Mr. Hutchinson, which appears to run from August 16 of 1982 through the present time, whether he would be able to return to employment during that period at

any time if that employment required that he be on his feet six hours out of an eight-hour day and lift up to 100 pounds on a regular basis?

A. If the question is during the time that I was examining and treating him could he do that kind of work, the answer is no.

Q. Could he do work during that period of time that required him to stand on his feet six hours out of an eight-hour day and lift up to 50 pounds?

A. No.

Q. Would Mr. Hutchinson have been able to do work that required him during this period of time, again August 16, 1982 to the present time, that required him to stand on his feet six hours out of an eight-hour day and repeatedly lift or carry 25 pounds?

A. We are moving into an area now where the ambiguity of how many repetitions, which side of the body you are using, in a normal fashion to use the left side of his body would not have been compatible with standing on his feet for six hours and doing repetitious work with the left side of his upper extremity.

Q. Do you know, can you say with a reasonable degree of medical certainty based upon the information you have given at this deposition, when Mr. Hutchinson will be able to return to his employment if that employment will require him to be on his feet six hours of an eight-hour day and repeatedly lift and/or carry weights up to 100 pounds?

A. I am not sure that he will ever been [sic] able to lift weights up to 100 pounds with that left shoulder. Standing on his feet I think is reasonable, but I do not feel that he probably will be able to do repetitious work at that major weight handling.

Q. Can you say within a degree of medical certainty what kind of work he would be suited for at the point at which he recovers?

A. Well, we will have to make that decision probably in six months.

Dr. Bell indicated that a diagnosis of claimant's actual physical problems had been difficult. When questioned concerning whether or not the complaints had been consistent with his physical findings, Dr. Bell stated:

A. Mr. Hutchinson had numerous complaints and due to that fact -- sorting out all of his complaints required extensive testing, consultation and final sorting out those complaints that were not relevant to the shoulder, the forearm and his ankle. Those complaints referable to his painful forearm and shoulders have been consistent. It has been difficult diagnosing and treating Mr. Hutchinson due to the number of complaints that he has had.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 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).

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

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).

An injury to the shoulder is an injury to the body as a whole. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949).

Where an employer fails to monitor the care an employee is receiving it cannot later complain that the care was unauthorized. Zimmerman v. L. L. Pelling Co., 2 Iowa Industrial Commissioner Report 442 (Appeal Decision 1982).

If the employer denies the compensability of an injury it cannot guide the medical treatment. Barnhart v. MAQ, Inc., 1 Iowa Industrial Commissioner Report 16 (Appeal Decision 1981).

Interest which is payable under Iowa Code section 85.30 begins to accrue on the date a compensation payment became due. Farmers Elevator Co., Kingsly v. Manning, 286 N.W.2d 174 (Iowa 1979).

ANALYSIS

There appears little doubt that the accident happened as described by claimant and Bruce Wolfe. The precise weight of the steel sheet cannot be determined although estimates range from 600 pounds to 1000 pounds. Wolfe characterized it as more than he could carry by himself. The fact that it was of sufficient weight to hold claimant and that Wolfe could only raise it enough for claimant to escape confirms that it was within the range of those estimates.

Claimant's initial emergency care confirmed abrasions located on his left arm as well as his ankle as shown by exhibit A.

D. K. Rafferty, M.D., found an area of very definite increased activity on November 30, 1981 as is shown in the bone scan on page 9 of exhibit B. Such was apparently discounted as shown by the contents of exhibit C and the nature of the treatment which was initially provided to claimant. On December 17, 1981 the lateral tomogram shown in exhibit D at page 4 demonstrated a longitudinal undisplaced fracture of the tibia with the fracture line corresponding perfectly to the increased activity noted in the bone scan. An abnormal EMG was attained that same day as reflected in exhibit B at page 2. It suggested early denervation of the left medial and lateral plantar as well as the extensor halluces brevis. Injury to the left peroneal and posttibial nerve was also suspected. Evidence of nerve damage continued to appear throughout the exhibits in the case as shown in exhibits E, F and G.

In October of 1982 Jimmie D. Bell, D.O., diagnosed an anterior tarsal tunnel syndrome of claimant's left lower extremity and performed a surgical decompression of the deep peroneal nerve. Dr. Bell felt that the surgery had resolved the problem without any residual permanent impairment. Claimant states that he still has occasional heel pain but that the surgery improved the problems in his foot.

Dr. Bell felt that the condition in claimant's foot had arisen from the work related injury as it was described to him. Dr. Friedgood had previously diagnosed a traumatic neuropathy as shown in exhibits J and T and related the problem to the injury at work. As shown in exhibits D and K, Dr. Rosen was aware that nerve damage had resulted from the injury but he, nevertheless, termed claimant's complaints as subjective. The circumstances of the accident itself are consistent with nerve damage of the type noted by all three physicians. There is no reasonable conclusion but that the injury did cause nerve damage to claimant's left foot which was surgically resolved by Dr. Bell.

The problems concerning claimant's left upper extremity and shoulder are not as easily resolved. The first recorded notations of complaints involving the left upper extremity are found in exhibit J dated April 8, 1982 and relate to the shoulder. Exhibit A, emergency room report from Lutheran Hospital dated November 2, 1981 notes superficial abrasions on the left forearm.

Dr. Bell diagnosed a partial tear of the rotator cuff, found such to exist during the surgery and made a surgical repair of the defect.

Dr. Friedgood found decreased pin sensation in the left arm as shown in exhibit Q. The EMG was not abnormal, however. Dr. Bell diagnosed a pronator syndrome and surgically released the left median nerve at the elbow. During the surgery he found the nerve to, in fact, be constricted. Dr. Bell found no permanent impairment in claimant's elbow post-surgically and claimant agrees that surgery corrected his elbow problem.

At time of the last examination Dr. Bell found claimant's range of shoulder motion to be limited by pain. He assigned a 15 percent permanent partial impairment rating of the shoulder which he converted to a 9 percent of the whole man. Claimant states that the surgery on his shoulder relieved the constant pain but that he still had sharp pain when he moves his arm above shoulder level.

Dr. Bell opined that the upper extremity defects were caused by the accident at work. His opinion is not controverted by any other medical evidence in the record. The circumstances of how the accident occurred are consistent with the injuries which were found by Dr. Bell. His opinion concerning causation of the upper extremity injury will be adopted.

In reaching this decision, consideration has been given to the fact that Dr. Bell's opinion is based, to a large degree,

upon claimant's denial of previous problems in his upper left extremity. The felony conviction, results of the MMPI, inconsistent statements regarding use of alcohol and other inconsistencies in claimant's history and complaints are all recognized as consideration which could effect his credibility. The fact remains, however, that he did work without limitation prior to the trauma of November 1, 1981. He had continuing complaints after the trauma. Surgical treatment resolved those complaints except for the residual permanent impairment in his shoulder. Claimant is now able to perform his old job with minimal limitation. The conditions which were confirmed by surgery could reasonably be expected to have arisen from an accident of the type described in this case.

Claimant's foot was his initial concern. It is not incredible that little attention was directed to the arm and shoulder until his foot had become less symptomatic.

An injury to the shoulder is an injury to the body as a whole and claimant's disability must be evaluated industrially.

Claimant is presently 33 years of age. At time of hearing he had been back to work for nearly two months and apparently had been able to adequately perform his job. Presently he earns $13.21 per hour and has received the benefit of all pay increases which occurred during the time he was absence from work.

Claimant quit high school in the tenth grade and received a GED in 1972. He has no other specialized vocational training. His prior work experience consists of medium to heavy physical labor.

Heavy lifting and lifting above shoulder level are part of claimant's usual work. The fact that he retains his position and earning level significantly reduces his industrial disability from what it might otherwise be. Some loss of his earning capacity is present, however, primarily as a result of the physical impairment. When claimant's disability is measured industrially he is found to have a permanent partial disability of 10 percent.

Defendant provided claimant with medical care prior to April 2, 1982. It is found that continuing care by Dr. Rosen had been offered at all times.

Subsequent to April 6, 1982 defendant did not pay weekly benefits to claimant which action indicates a denial that the condition was the result of a work related injury. Defendant was certainly aware that claimant had continuing complaints and even Dr. Rosen, the assigned physician, related those complaints to the injury. Nevertheless, defendant did not take any action which could reasonably be construed to constitute an attempt to resolve those complaints.

Claimant had seen Dr. Friedgood and Dr. Kimelman prior to April 2, 1982 and this was admittedly authorized by the defendant. At hearing defendant urged that the care provided after April 2, 1982 by Dr. Friedgood was unauthorized. The appointment to see Dr. Friedgood was made through Dr. Rosen's office without any warning or objection. Dr. Friedgood corresponded concerning claimant with the defendant employer and Dr. Rosen as shown in exhibits P and Q without any objection to his treatment ever being voiced. Prior to the time that the services of Dr. Kimelman were offered in October of 1982, his status was the same as that of Dr. Friedgood. Both conducted a prior examination but had not provided any further treatment. It was not until defendant's counsel learned that claimant was receiving treatment from Dr. Bell in Des Moines General Hospital that the offer of Dr. Kimelman was made.

Defendant's denial of authorization for treatment by Dr. Bell and Dr. Friedgood is found to be unreasonable under the existing circumstances. The right to select medical treatment carries with it a corresponding responsibility to provide prompt treatment which is reasonably suited for the complaint or injury. As shown by exhibit 14 which is dated October 11, 1982, defendant sought to have claimant examined by Dr. Kimelman. Reference is made to treatment only after exhibit 16 had been sent to defendant's counsel. The last word from Dr. Rosen was in the nature of a statement that claimant's complaints were subjective and that he should go back to full duty at work. Such is not found to be reasonable medical care. Claimant saw Dr. Taylor as requested in July of 1982 but the employer did not follow the recommendations made by Dr. Taylor. More than six months elapsed between the time claimant left work on April 6, 1982 until medical care or treatment, other than examination, was offered by the defendant. During all this time it did nothing to manage claimant's case and was not paying compensation benefits which it had the obligation to do if it felt that claimant's condition were actually work related. Such denial is confirmed by paragraph 9 of defendant's answer to claimant's petition.

Defendant had abandoned claimant's care and left him to his own means. Prompt treatment reasonably suited for the injury had not been offered for more than six months. Under these circumstances the employer will not be allowed to interrupt the successful ongoing course of treatment or avoid liability for its expense.

The expenses of claimant's medical care are not easily ascertained. Exhibits 6, 7, 8, and 9 reflect expenses which are clearly related to treatment of the injuries claimant sustained at work on November 1, 1981. They are the following:

Mayo Clinic	$401.70
Neurological Associates of Des Moines	$170.00
Hammer Medical Supply	$115.46
Iowa Methodist Medical Center	$131.65

Exhibit 19 is 58 pages of health insurance claim forms for treatment received by claimant. By review of those forms together with exhibit U, the other exhibits in the case and claimant's testimony, the majority of the charges on exhibit 19 are found to be related to claimant's work related injury. Exceptions to this general statement are, however, the following:

a. Page 3 is a statement from Des Moines General Hospital for services rendered October 28, 1983 to October 31, 1983 which includes bilateral removal of ingrown toenails. The expense of that period of hospitalization can fairly be divided equally between the two medical problems. Of the total charge of $1,325.58, $662.79 is attributed to the work related injury.

b. Page 4 is a statement from Wilden Clinic in the amount of $447.00 which includes $205.00 for removal of ingrown toenails. Only $222.00 of that statement is attributable to the work related injury.

c. Pages 10 and 11 are actually the same statement with a total charge of $37.50.

d. Page 16 is a duplicate of page 15 and will not be charged twice.

e. Page 26 contains a charge of $26.00 on February 22, 1983 which is unexplained. Reference to exhibit U does not clarify the situation. Of the total charges on page 22 only $34.00 is related to claimant's injury at work.

f. Page 40 contains a charge of $2.75 for a knee brace which has not been shown to be work related.

g. Page 41 is a duplicate of page 40 and will not be charged twice.

h. Page 43 includes charges of $17.00 for services on November 29, 1982 which are not explained and cannot be found to be related. The total work related charges on page 43 are $34.00.

i. The total amount charged on page 51 is illegible although the nature of the treatment is clear. The amount paid by the Department of Human Services is shown to be $579.98 and defendant's liability will be limited to that amount.

j. Page 58, the charge from R. W. Evans, D.O., of Wilden Clinic is not shown to be related except by claimant's testimony and it appears from the testimony that Dr. Evans did not provide any actual care.

When the charges contained in exhibit 19 which have been found to be related to treatment of the injuries claimant sustained November 1, 1981 are totaled the result is as follows:

Des Moines General Hospital	$13,631.81
Wilden Clinic - Dr. Bell	5,746.98
Anesthesiologist Affiliated	1,151.25
Larry L. Richards, D.O.	440.00
Neurological Associates of Des Moines - Dr. Friedgood	35.00
Des Moines Emergency Medicine, P. C. - James Egly, D.O.	20.00

Claimant testifed that he traveled from his home to obtain medical care at the times and places noted on exhibit 13. Reference to the other evidence in the record indicates that he did appear at the places shown on the dates indicated. Duplication appears, however, on December 15, 1982, March 17, 1983, April 7, 1983 and October 13, 1983 where claimant was seen on the same day at two locations in the same building or same general area. Accordingly his total mileage claim has been reduced by 40 miles to result in 608 miles of compensable mileage at $.24 per mile for a total of $145.92.

Claimant's affidavit of costs was filed and resisted by defendant. Industrial Commissioner Rule 500-4.33 includes cost of transcription as cost to be taxed. Where the deposition is admitted into evidence the expense of transcription is an appropriate cost and the entire amount of $132.32 will be taxed. The limitation of Iowa Code section 622.72 is retained in Rule 500-4.33 and only $150.00 will be allowed as an expert witness fee for Dr. Bell's testimony. The commissioner's rule does not, however, adopt the restriction of Iowa Code section 622.64 and the service fees for the supeona in the amount of $14.50 are found to be reasonable and will be taxed as costs. The costs of the reports from Dr. Bell at $75.00 each are within the rules and will be taxed. Total costs to be taxed against defendant are the sum of $446.82.

The reference in Dr. Friedgood's reports to claimant's right ankle is considered by the undersigned to be a typographical error as claimant's complaints have generally centered on his left side and, more importantly, because the EMG's upon which Dr. Friedgood relies were performed upon claimant's left side.

It appears that claimant could have performed light duty work during much of the time he was off work but the employer has indicated that none was available and that none was offered.

In his deposition on November 9, 1983, Dr. Bell stated that claimant was about two months away from being released medically and that he could not, at that time, perform duties which were similar in description to what was described as his regular work duties. Dr. Bell stated that claimant had been unable to do such work during all the time claimant had been under his treatment. The record shows only one short period of return to work after the accident. Claimant's subsequent medical condition appears substantially unchanged until the surgical treatment was rendered. In exhibit 4 Dr. Rosen relates that sending claimant back to work was to determine claimant's ability to use his leg. Close examination of Dr. Rosen's statement seems to indicate that his intention when he returned claimant to work in April was somewhat of an experiment. The opinions of Dr. Bell are given the greater weight due to the fact that Dr. Rosen had not seen claimant after the brief return to work and that Dr. Bell was claimant's treating physician. It is found that claimant's healing period ended December 20, 1983 by virtue of his return to work on December 21, 1983. There is no showing in the record that claimant could have reached the point of maximum medical improvement prior to that date.

FINDINGS OF FACT

1. Claimant sustained an injury arising out of and in the course of his employment on November 1, 1981.

2. The injury occurred when a sheet of steel weighing from 600 to 1000 pounds fell striking claimant's left forearm and left side and came to rest upon claimant's left ankle pinning him to the floor.

3. The accident caused a fracture in claimant's left ankle and resulted in denervation in that ankle.

4. The injury to claimant's ankle was resolved by surgery which was performed October 13, 1982 and healed with no residual permanent impairment.

5. The accident caused an injury to claimant's left forearm in the nature of constriction of the median nerve.

6. The constriction of claimant's median nerve was resolved by surgery performed January 11, 1983 and healed with no residual permanent impairment.

7. The accident caused a tear in the rotator cuff of claimant's left shoulder.

8. Claimant's rotator cuff tear was surgically repaired.

9. The injury to claimant's rotator cuff caused a residual permanent impairment of 9 percent of the body as a whole.

10. Claimant is a married 33 year old male who has a GED but no higher education or specialized vocational training.

11. All of claimant's prior work experience has been in the nature of medium to heavy physical labor.

12. Claimant was unable to perform the regular duties of his employment from and after November 1, 1981 until December 21, 1983 when he returned to work, except for the three days he returned to work on a trial basis in April of 1982.

13. The employer failed to provide prompt medical care to claimant which was reasonably suited to treat his injury.

14. The employer denied that the physical ailments for which claimant sought medical care subsequent to April 6, 1982 were the result of a work related injury.

15. Defendant did not pay weekly compensation benefits to claimant subsequent to April 6, 1982.

16. The medical care which claimant received from Drs. Friedgood, Bell, Richards, Egly, Anesthesiologist Affiliated, Des Moines General Hospital, Mayo Clinic, Hammer Medical Supply and Iowa Methodist Medical Center were reasonably suited for treatment of the injuries claimant sustained at work November 1, 1981.

17. The charges for the services provided to claimant for treatment of his work related injury were reasonable in relation to the services rendered.

18. Claimant traveled 608 miles in order to obtain medical care, the expense of which defendant has not paid.

19. Claimant's healing period consists of 110 weeks 4 days.

20. Claimant's permanent partial disability is 10 percent.

21. The total charges for medical care for injuries of the work related incident are $21,843.85 which have not been paid by the employer but a possibility exists that $401.70 owed to Mayo Clinic may have previously been paid by the employer.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED:

1. This agency has jurisdiction of the subject matter of this proceeding and its parties.

2. The work related injury of November 1, 1981 caused injuries to claimant's left shoulder, forearm and ankle.

3. Claimant's expenses of medical care for the injuries total twenty-one thousand eight hundred forty-three and 85/100 dollars ($21,843.85) which are the responsibility of the employer under Iowa Code section 85.27 but have not been paid by the employer.

4. Claimant's healing period consists of one hundred ten (110) weeks four (4) days of which defendant has paid claimant twenty-one (21) weeks four (4) days leaving an unpaid balance of eighty-nine (89) weeks.

5. Claimant's rate of compensation is three hundred seven and 38/100 dollars ($307.38) per week.

6. Claimant is ten percent (10%) permanently partially disabled in industrial terms.

7. Defendant failed to provide claimant prompt medical care reasonably suited for treatment of his injuries and did not acknowledge claimant's medical problems were work related, which circumstances denied the defendant the right to choose the care which claimant will receive and avoids defendant's defense that the medical expenses incurred by claimant for treatment of his injuries were unauthorized.

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant eighty-nine (89) weeks of healing period compensation at the rate of three hundred seven and 38/100 dollars ($307.38) per week commencing April 7, 1982.

IT IS FURTHER ORDERED that defendant pay claimant fifty (50) weeks of permanent partial disability compensation at the rate of three hundred seven and 38/100 dollars ($307.38) per week commencing December 21, 1983.

IT IS FURTHER ORDERED that defendant pay interest at the rate of ten percent (10%) per annum from the date each payment became due until the same is paid pursuant to Iowa Code section 85.30.

IT IS FURTHER ORDERED that defendant pay to claimant the expenses incurred in obtaining medical care for his injuries as follows:

Des Moines General Hospital	$13,631.81
Wilden Clinic and Jimmy D. Bell, D.O.	5,746.98
Anesthesiologist Affiliated	1,151.25
Larry L. Richards, D.O.	440.00
Neurological Associates of Des Moines and David L. Friedgood, D.O.	205.00
Des Moines Emergency Medicine, P. C. and James Egly, D.O.	20.00
Hammer Medical Supply Company	115.46
Iowa Methodist Medical Center	131.65
TOTAL	$21,442.15

IT IS FURTHER ORDERED that if defendant has not previously paid Mayo Clinic in the amount of four hundred one and 70/100 dollars ($401.70) that it shall do so now.

IT IS FURTHER ORDERED that defendant pay claimant one hundred forty-five and 92/100 dollars ($145.92) for reimbursement of travel expenses incurred in obtaining medical care.

IT IS FURTHER ORDERED that defendant pay all amounts which have accrued in a lump sum. This includes all weekly benefits for claimant's healing period and all weekly benefits for permanent partial disability which have accrued since December 21, 1983 but which have not yet been paid.

IT IS FURTHER ORDERED that defendant pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33 which are taxed against them in the amount of four hundred forty-six and 82/100 dollars ($446.82).

IT IS FURTHER ORDERED that defendant file a claim activity report within twenty (20) days from the date of this decision.

IT IS FURTHER ORDERED that defendant may, if it so desires, satisfy its obligations to claimant and the lien rights of the Iowa Department of Human Services by making payment of medical expenses payable jointly to the claimant and the Iowa Department of Human Services and delivering the same to claimant's counsel, Michael Sheesley.

Signed and filed this 27th day of April, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MYRNA B. HYMAN,	:	
Claimant,	:	File No. 484567
vs.	:	
STUART FOOD & BEVERAGE,	:	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
UNITED FIRE & CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the offices of the Iowa Industrial Commissioner in Des Moines on November 14, 1984 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 January 11, 1978. A memorandum of agreement was filed on February 6, 1978 calling for the payment of $74.30 in weekly compensation. This matter was the subject of prior litigation, culminating in an agreement for settlement, wherein it was agreed that claimant's industrial disability was ten percent of the body as a whole. The parties also agreed that claimant was entitled to 84 weeks of healing period compensation. The record consists of the testimony of the claimant; claimant's exhibits 1, 2 and 3; defendants' exhibits A, B and C; and all previous filings.

ISSUES

The issues for resolution are:

1) Whether there is a causal connection between the injury and the condition; and

2) The nature and extent of injury.

STATEMENT OF THE EVIDENCE

Claimant, age 37, was employed by defendant employer on December 31, 1977. Claimant had been involved in restaurant work for a number of years. Claimant testified that on December 31, 1977 she was employed as night manager (although her title was otherwise). She testified that she slipped and fell and while falling, hit her neck on a table leg. She testified that she landed on her right side. She testified that her back was out of place. Claimant testified that she had no prior back problems.

Claimant testified that she did not work and was off work until November 1979 when she became employed as a dispatcher at the sheriff's office in Minneapolis, Kansas. Claimant testified that she left this sedentary job after two months. In February 1980 she became employed as a restaurant cook and worked only two weeks. In June 1980 she became employed as a grill cook for a period of two or three weeks. Claimant testified that she did not sustain any injuries subsequent to the original injury.

Claimant indicated that she can only walk about two blocks before she has to sit down because of lower back pain. Claimant testified that she could stand for only five minutes before she wants to sit down because of hospital back pain. Claimant testified that she would not pick up things normally. She can only lift from five to six pounds. She takes a medication called Triavil which she states helps her sleep. She receives assistance from social services in Kansas. Claimant testified that she went to job training for a two week period.

On cross-examination, claimant testified that she saw Drs. Schramm, Hudson and Blair in addition to receiving physical therapy from Ina Hellweg. She testified that her work at the Colonial House in Salina ceased in February 1980. Claimant testified that she then tried to work at a truck stop in Salina, Kansas. Claimant testified that she had difficulty walking and standing. Claimant testified that she suffers from depression. She testified that the two week school she attended was a school designed to be more in the nature of an extended aptitude testing procedure. Claimant testified that her condition has changed in that she cannot work at all and that she has nervous problems relating to the injury.

A discussion of the medical evidence in this case necessarily involves a look at the commissioner's file which was presented as evidence in this case. Claimant's injury occurred on New Year's Day 1978. Claimant wrote a lengthy holograph to this agency which was received on February 26, 1979. Claimant relates that she saw Dr. Ralph Schramm, D.C., of Guthrie Center. Claimant was apparently complaining of arm, elbow and shoulder pain. Claimant relates that Dr. Schramm referred her to Frank M. Hudson, M.D., a Des Moines Neurosurgeon. Claimant was admitted to Iowa Methodist Mecical Center on February 9, 1978. Dr. Hudson thought claimant had degenerative disc disease. Extensive testing showed spinal fluid protein of 23 mg. %. He diagnosed claimant as having a cervical muscle bundle spasm, and when an electromyogram was done it was suggested and was interpreted as consistent with bilateral carpal tunnel syndrome. Because the right hand was claimant's primary concern, section of the right transverse carpal tunnel ligament was performed on February 15, 1978. The relief of the symptoms in the right hand was thought to be excellent. Claimant continued to participate in physical therapy consisting of twice daily hot packs, massage and ultrasound to the back of the neck. Claimant was seen by Donald Blair, M.D., a Des Moines orthopedist, who diagnosed epicondylitis about the right lateral epicondyle and this was injected with cortisone. Claimant was discharged from the hospital on February 17, 1978.

After claimant's discharge from the hospital she indicated that the elbow problems gradually returned. A secondary area of complaint was relative to the low back with an occasional sensation of burning in the anterior aspect of the right thigh. Examination revealed discomfort across the lumbosacral region of the back into the posterior aspect of the thigh. Claimant complained that at times some feeling of the lower leg going to sleep was present. On forward bending claimant was able to touch her toes with low back discomfort. Claimant's remaining back motions aggravate her low back symptoms. The right straight leg raising test goes to 80°, the left to 90° with some aggravation of her low back discomfort, but with no leg radiation. On sensory examination there was some diminution described over the lateral right calf and foot. Knee jerks and ankle jerks were active and normal. There was good strength on flexion and extension. Dr. Blair indicated that claimant's symptoms were suggestive of some mild nerve root irritation. He thought that claimant should lose weight. He thought claimant had chronic lumbosacral strain, including obesity. Dr. Blair gave claimant a prescription for a lumbosacral support.

The records indicate that claimant saw R. D. Pennington, D.C., of Salina, Kansas. Dr. Pennington diagnosed claimant's condition as subluxation-fixation complex; cervical sprain; brachia neuralgia; and myofascial fibrositis. Claimant's letter reveals that the reason she moved to Salina, Kansas was because her husband had found work there after becoming unemployed here.

Dr. Blair indicated that he saw claimant on June 5, 1978. Dr. Blair noted that claimant weighed 253 pounds. He thought claimant's marked obesity contributed to her low back symptoms. Dr. Schramm also wrote a report concerning claimant's condition on September 10, 1979. Dr. Schramm noted that claimant experienced back pain. His diagnosis was discussed above. He indicated that claimant was given a cervical collar. Claimant was treated with chiropractic manipulations. Dr. Schramm wrote his report more than a year after seeing the claimant, so he stated determination of permanency was difficult. He did indicate, though, that the "distinct possibility" of recurring pain and stiffness was present. Dr. Pennington wrote two reports which were considered as evidence in this case. The reports are undated and indicate that claimant had extreme soreness and muscle spasms of the trapezius, rhomboid and latissimus dorsi with muscle spasm upon palpation. There was also bilateral spasm of the lateral cervical muscles from the wrist up the radial side of the right forearm, more pronounced in the elbow, and stiffness of the deltoid muscle on the right, with some tenderness of the triceps braculi. X-rays showed no evidence of bone fracture and a subluxation-fixation complex. Dr. Pennington felt claimant had sustained a myofascial fibrosis and brachial neuralgia which was causally connected to the fall. Dr. Pennington then assigned a five percent impairment to the body as a whole for the injury.

The other report that was submitted indicates that Dr. Pennington was of the opinion that claimant could not return to her former employment. He went on to state that claimant had a disability of from ten to fifteen percent of the body as a whole because of claimant's inability to return to her former occupation.

On December 15, 1980 the parties submitted an application for agreement for settlement. The parties proposed that a ten percent disability to the body as a whole be approved. Additionally, the parties agreed that claimant should be paid healing period and medical expenses. Claimant also was to receive a $300 advance for medical expenses. An approval of agreement for settlement was entered on December 15, 1980.

Claimant presented herself for treatment at the Smoky Hill Family Practice Center in Salina, Kansas. Claimant was first treated by Ronald E. Hunninghake. At the time claimant was being treated for calluses on her foot. About four months later a social security disability rating was given because of neck pain and pain in her back, legs and arms. Dr. Hunninghake's diagnoses were chronic cervical strain and chronic pain syndrome. He recommended that claimant see an orthopedist. On June 4, 1982 Dr. Hunninghake indicated that claimant had a long history of chronic cervical pain syndrome exacerbated by prolonged standing and heavy lifting. The recommendation was made that claimant lose weight.

On July 6, 1982 claimant was seen by Dr. Richard Early who recommended weight loss. No mention was made of pain. On August 10, 1982 claimant complained of pain in her right shoulder and elbow due to the fall at work. Claimant related this to the fall five years previously. Physical examination revealed that claimant was very tender over the right trapezoid and rhomboid muscles. Claimant desired a prescription of Benadryl. Claimant had taken some of this and had had some remission of symptoms.

No medication was prescribed, since the medicine taken was an antihistimine. Dr. Early felt that claimant's weight problem was far more significant than claimant's shoulder discomfort. He thought the loss of weight should first be pursued, since it may have well been the cause of the pain. Dr. Early recommended that claimant continue her diet and to pursue symptomatic self-care (e.g., hot water bottles, exercises and medication).

On October 21, 1983 Dr. Hunninghake stated that claimant should not pursue any further work in the restaurant business involving heavy lifting becaue of the back pain "allegedly from a fall that occurred in December of 1977." Dr. Hunninghake examined claimant in 1982 and she had chronic mild fibrosis in her back. Dr. Hunninghake wrote a report on November 8, 1983 indicating that claimant was "having additional difficulties relating to her fall on December 31, 1977."

Claimant testified that she can now walk only two blocks before sitting down. She states that she can stand for only five minutes because her hip and back become severe. She testified that her source of income is $155 a month from social services in Kansas. Claimant also complains of depression. She went to a two week aptitude testing procedure. Claimant testified that she has worked for short periods of time since the injury, and has quit on each occasion. Claimant states that there has been a change in her condition in that she cannot stand and this has made her nervous.

APPLICABLE LAW

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

2. Section 85.26(2), Code of Iowa, provides that an award for payments may be reviewed within three years from the last payment of weekly benefits.

3. 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).

4. In Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) the court indicated that a change in earning capacity subsequent to an original award which is proximately caused by the original injury also constitutes a change in condition. Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

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

6. 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 agreement for settlement was approved on December 15, 1980. In order to reopen the case successfully, the claimant must show a change of condition since that date. This change of condition must be within the meaning of the law. The record indicates that payment of $10,300 was made in 1980 contemplating payment of weekly compensation and permanent partial disability compensation. An amount of $300 was reserved for future medical expenses. The parties agreed that claimant was disabled to the extent of ten percent of the body as a whole. "Temporary total disability" compensation was paid for a period exceeding 84 weeks. At the commencement of the hearing it was indicated that there were no outstanding medical bills nor additional lost time. $130 was expended by claimant in securing medical information. Claimant last worked on about June 1980. She tried to work, albeit unsuccessfully in the summer of 1981, after the approval of the agreement for settlement. The dictates of Blacksmith indicate that claimant has sustained a change of condition within the meaning of that case. Claimant's condition has stabilized, thus, showing that she is not entitled to healing period compensation. However, claimant is entitled to be paid additional permanent disability within the meaning of McSpadden, 288 N.W.2d 181.

Claimant is 37 years of age, has a high school education (GED) and one year of college. Most of her employment experience is in the food service area. Claimant did serve a short time as a dispatcher. She has made repeated attempts to return to work. Medically, the issue of causation is not as clear as the factual evidence would indicate. Claimant has not sustained a physical injury of sufficient severity as to be able to be surgically corrected. However, claimant's injury is of sufficient severity to preclude her working despite her attempts to do so. Considering the elements of industrial disability, it is found that claimant's total disability for industrial purposes is twenty percent, thus, entitling the claimant to be paid an additional ten percent or fifty weeks at the rate of $74.30. Claimant also is entitled to be reimbursed $130 for medical reports. See Industrial Commissioner Rule 500-4.33.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on December 31, 1977.

2. Claimant hurt her neck and back when she fell at work on December 31, 1977.

3. Defendants filed a memorandum of agreement concerning a December 31, 1977 injury.

4. Claimant and defendants entered into an agreement for settlement whereby they agreed that claimant was entitled to in excess of eighty-four (84) weeks of healing period and fifty (50) weeks of permanent partial disability compensation at the rate of seventy-four and 30/100 dollars ($74.30) per week.

5. The agreement for settlement was approved December 15, 1980.

6. Claimant has made bona fide efforts to return to work since the approval of the agreement for settlement and has been unable to do so for any sustained period.

7. Claimant has sustained a change of condition since the approval of the agreement for settlement.

8. Claimant's condition has stabilized.

9. Claimant's disability, for industrial purposes, is twenty percent (20%) of the body as a whole.

10. Claimant incurred a medical expense of one hundred thirty dollars ($130.00) to obtain reports.

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 employment on December 31, 1977.

3. Claimant is entitled to be paid an additional fifty (50) weeks of permanent partial disability compensation at the rate of seventy-four and 30/100 dollars ($74.30).

4. Claimant is entitled to be reimbursed one hundred thirty dollars ($130.00) for a medical report.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant an additional fifty (50) weeks of permanent partial disability compensation at the rate of seventy-four and 30/100 dollars ($74.30) per week.

IT IS FURTHER ORDERED that defendants reimburse claimant one hundred thirty dollars ($130.00) for medical reports.

Interest is to accrue on this award from the date of this decision pursuant to section 85.30, Code of Iowa.

Defendants will file a final report upon payment of this award.

Costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 6th day of July, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANDREW H. JACKSON,

Claimant,

vs.

R & R WELDING SUPPLY COMPANY,

Employer,

and

HARTFORD INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 689113

A P P E A L

D E C I S I O N

FILED

JUL 23 1984

IOWA INDUSTRIAL COMMISSIONER

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 an adverse review-reopening decision.

The record on appeal consists of the transcript; claimant's exhibits 1 through 44; and defendants' exhibits A through E, all of which evidence was considered in reaching this final agency decision.

The outcome of the proposed agency decision will be modified in that an award of 25 percent of the body as a whole for industrial purposes will be granted instead of a 40 percent award for such disability.

ISSUES

The review-reopening decision, as indicated above, granted an award of 40 percent of the body as a whole for industrial purposes and awarded certain benefits under §85.27, The Code, for medical and allied services.

The issues on appeal are stated by defendants:

I. The Deputy's decision does not adequately recite the "evidence relied upon, standards applied, and reasoning used in reaching conclusions of fact and law," all in violation of specific Iowa Supreme Court directives.

II. The Deputy's decision violates the directives of the Industrial Commissioner in that he has factored various elements of industrial disability and added them to the functional impairment.

III. The Claimant's employment relationship with this defendant was discontinued due to poor economic conditions. As a consequence, no award of industrial disability may be premised of this factor.

IV. The Employer and Insurance Carrier have the "right to choose the care" in the area of medical treatment. All medical treatment secured by Claimant directly or by referral from his own physician is unauthorized and not the responsibility of the Defendants.

V. The Employer and Insurance Carrier are entitled to credit for all benefits previously paid.

EVIDENCE

In his work for the employer, claimant worked with spools of welding wire which weighed 1,000 pounds; such spools were run off into 60 pound coils or 30 pound spools. Claimant describes his injury thus:

> I was loading a side plate on a 1,000-pound spool and had my knees on the right-hand side of it. And I bent over the 1,000-pound spool to pick up the other plate and was putting the big brass nut on, keeping the pressure against the side plate, when the 1,000-pound spool tipped. And as it went over, I grabbed it to bring it back; and it just drug me right down to the floor. (Tr., pp. 19-20 11. 22-25 and 1-4)

Claimant was hospitalized for some 10 days with thoracic and lumbar back complaints.

Claimant continued to have back problems.

Examinations, including CAT scans have failed to show any reason for surgery; however, Robert A. Hayne, M.D., a qualified neurosurgeon, rated claimant at three percent permanent partial impairment and Robert C. Jones, M.D., a qualified neurosurgeon, rated claimant at 15 to 20 percent permanent impairment of the body as a whole.

Claimant states that the "severe pain is in the small of my back and down my left leg and into my left foot," adding that his left knee also bothers him. (Tr., p. 36) Also, claimant wears a TENS unit, an electrical pain suppressor.

Claimant was released to return to work and actually did so in February 1982. However, the next day, he was told that his services would no longer be required. (Tr., pp. 25-26)

Claimant is a high school graduate, age 36, and hopes to obtain some schooling in accounting or bookkeeping. He describes his life presently as follows: "Oh, get up in the morning, I usually turn the shower on real hot to get my back loosened up, and then I'll use the back traction for about a half hour and walk down to the Hy-Vee Store and back and light household duties." (Tr., p. 37 11. 11-15)

Randall A. Jones, of the sales department of R & R Welding, was called on behalf of the employer and testified that he was on the premises when claimant was hurt but did not see the injury. He rode with claimant in the ambulance to the hospital.

Keith A. Kline, branch manager of the employer's Des Moines office, testified for defendants that claimant was not discharged because of his injury. He stated as follows as to why claimant's employment was terminated:

> A. Due to the economic condition which we're all suffering and still are suffering. We had a position of not utilizing a respooler for an excess of sixty days as had been the case for at least four additional days during that year while Mr. Jackson was ill. Therefore, we found we did not need that particular function and did not replace it.
>
> Q. Have you replaced it since that time?
>
> A. Approximately four and a half months ago we did replace that employment.
>
> Q. And why didn't you replace it until four and a half months ago?
>
> A. There was not the demand for the welding product. (Tr., p. 76 11. 5-19)

Ronald D. Waugh testified for defendants that he was the store manager for the employer in Des Moines and was claimant's direct supervisor. With respect to claimant's discharge, Mr. Waugh stated:

> A. At that time we were thinking that we wouldn't need him in spooling, full-time man back there, because we'd gotten along without him for sixty days or so. I said that I didn't particularly want him to come back to work that day because I had to do some talking with Keith and we'd get in touch with him.
>
> Q. Did you get in touch with him?
>
> A. Yes, I did.
>
> Q. Why?
>
> A. Told him his services were no longer needed.
>
> Q. Why weren't they needed?
>
> A. Because we just didn't have the business to pay for a full-time man back there at that particular time. (Tr., p. 92 11. 10-25)

APPLICABLE LAW

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

In Catalfo v. Firestone Tire & Rubber Co., 213 N.W.2d 506 (Iowa 1973), the court says at page 510:

> A deputy industrial commissioner is charged with making findings of fact and conclusions of law in proceedings before him. §86.23, The Code. We believe the deference courts are required to give his findings of fact in a direct appeal from a review-reopening decision carries with it a correlative duty on his part to state the evidence he relies upon and specify in detail the reasons for his conclusions. His decision must be sufficiently detailed to show the path he has taken through conflicting evidence.

In discussing industrial disability, the Iowa Industrial Commissioner in Birmingham v. Firestone Tire & Rubber Co., 2 Iowa Industrial Commissioner Report page 39, 40 (1981) 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.

In Webb v. Lovejoy Construction Co., 2 Iowa Industrial Commissioner Report 430 (1981), the industrial commissioner held that a temporary downturn in the economy would not entitle claimant to additional compensation benefits.

The case of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) at 192 states that "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." And the court said that Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) at 354, was "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 fourth unnumbered paragraph of §85.27, The Code, states:

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

ANALYSIS

The first two appeal points may be handled together. In his analysis, the hearing deputy stated:

> Dr. Jones indicates that the claimant has a 15 percent to 20 percent functional impairment of the body as a whole. (Cl. ex. 12)
>
> Dr. Hayne indicates that the claimant has a 3 percent functional impairment of the body as a whole. (Cl. ex. 5 & 6)
>
> It is concluded that this claimant has a 10 percent functional impairment of the body as a whole.

Defendants complain, first, that the "award" of functional impairment was made arbitrarily. However, although not explained in any detail, it is clear that the hearing deputy split the difference between the two estimates of permanent impairment to arrive at the 10 percent impairment. Defendants state, second, that 15 percent permanent disability was added to the 10 percent impairment (making a total of 25 percent disability), which does not seem to be the case at all. Again, the hearing deputy could have explained the process more completely; however, there is no reason to assume that the hearing deputy was ignorant of the distinction between the impairment and the disability when he clearly recited legal propositions which show impairment is a mere part of, not an equivalent to, disability. The third matter, that of the question of the employer's refusal to re-hire claimant, will be determined below.

Defendants make the point that under the Birmingham case, 2 Iowa Industrial Commissioner Report 39, 40 since there are no formulae, the factors cannot be added to the percentage evaluation of permanent impairment to arrive at the disability figure. As has already been stated, it is not believed by the undersigned deputy industrial commissioner that that procedure was used in this case, and therefore no violation of the principle in Birmingham has occurred.

It is true, however, that the hearing deputy apportioned the disability into two parts: (1) That part which considers those factors of industrial disability such as age, education, experience, physical impairment, etc., totalling 25 percent and (2) that disability which is attributable to the employer's alleged refusal to re-hire claimant totalling 15 percent, making a grand total of 40 percent. Such a method of apportioning or pro-rating the disability is not prohibited and, in fact, clearly shows the thought process which seems to be the desired aim of Catalfo, 213 N.W.2d 506.

Therefore, the method of assessing the 15 percent impairment for the alleged refusal to re-hire claimant is not questioned. However, whether or not it should be a part of the award is another matter.

Claimant testified with respect to this issue as follows:

Q. Did you, in fact, then return to work?

A. Yes.

Q. And when was that?

A. I took the note in to Ron Waugh on February 3rd.

Q. And did you work on February 3rd?

A. No, he just patted me on the back and told me he was glad to have me back and see me in the morning.

Q. February 4th?

A. Yes.

Q. Did you go to work on February 4th?

A. No.

Q. Why is that?

A. They called me -- Ron called me about quarter to six or six-thirty that night and told me I was no longer needed for employment.

Q. And have you been employed since that time?

A. No. (Tr., pp. 25-26 ll. 10-25 and 1-4)

The employer's testimony has been set out above.

In his reasoning for allowing the 15 percent permanent partial disability for the refusal to re-hire claimant, the hearing deputy stated:

> Defendant's [sic] termination of the claimant following the injury is contrary to a doctrine recently announced in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).
>
> In light of the foregoing legal principles, it is concluded that the claimant has an industrial disability of 40 percent of the body as a whole. Defendants' testimony that claimant was discharged due to an economic slow down belies the facts that he was discharged the day he reported back to work with a medical restriction. It is clear from the attitude and demeanor of the defendants' witnesses that the defendant employer did not want a man with a bad back working for them, notwithstanding that they were dealing with an industrial injury.

The hearing deputy's decision, of course, has significance. See Iowa State Fairgrounds Security v. Iowa Civil Rights, 322 N.W.2d 293 (Iowa 1982). However, even though the attitude and demeanor of the defendants' witnesses is important in reaching a decision, it does not seem possible to conclude from only the attitude and demeanor that the employer did not want to re-hire claimant on account of his back. Instead, the written record shows to the contrary: (1) Claimant's testimony does not show defendants' reasons for not re-hiring him, simply that he was not re-hired; (2) The employer's testimony clearly shows that the reason he was not re-hired was because of an economic downturn.

On the whole, it must be concluded that the employer's reason for not re-hiring claimant was because of an economic downturn, not because of his injured back. The tenor of the rulings in Blacksmith and McSpadden pertain to only increased disability on account of a refusal to re-hire because of an injury, not because of an economic downturn.

In summary, then, claimant's industrial disability is 25 percent, and that is the amount which will be awarded. As the review-reopening decision showed, claimant is a man of 36 years of age, and a high school graduate. It appears that he has a good potential for rehabilitation, but it also appears that his injury is severe enough to provide a rather substantial disability.

As for the argument on the question of the employer's right to choose the care, the bills were entered into the record (Tr., pp. 9-13) and no objection was made. It is assumed that defendants waived any lack of foundation to which they might have objected, and that the bills' presence in the record sufficiently substantiates the right to recovery. Therefore, no change will be made in the order to pay those bills.

Finally, defendants should of course get credit for any payments heretofore made.

FINDINGS OF FACT

1. While working for R & R Welding, claimant hurt his low back while loading a 1,000-pound spool and was dragged to the floor.

2. As a result, claimant has a permanent partial impairment of between three percent and 20 percent of the body as a whole.

3. Claimant is age 36, a high school graduate and has had mainly laboring jobs in his work career.

4. Claimant has good rehabilitation potential.

5. The employer failed to re-hire claimant because of an economic downturn.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on December 1, 1981.

Said injury entitles claimant to payment of healing period benefits at the rate of one hundred fifty-seven and 62/100 dollars ($157.62) from December 1, 1981 until August 30, 1982.

Said injury caused claimant to sustain an industrial disability of twenty-five (25) percent of the body as a whole and entitles claimant to compensation benefits for permanent partial disability for a period of one hundred twenty-five (125) weeks at the rate of one hundred fifty-seven and 62/100 dollars ($157.62) per week.

Claimant failed to prove that the employer failed to re-hire him because of his injury.

ORDER

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant from December 1, 1981 until August 30, 1982 for the healing period at the rate of one hundred fifty-seven and 62/100 dollars ($157.62) and to pay permanent partial disability benefits unto claimant for a period of one hundred twenty-five (125) weeks at the rate of one hundred fifty-seven and 62/100 dollars ($157.62), said payments to be made in a lump sum together with statutory interest from the date of this decision. Defendants are to receive credit for any payments heretofore made.

Defendants are further ordered to pay the following medical and allied expenses under §85.27, The Code:

Transportation expense	$ 357.92
Abbot Northwest Hospital	230.00
Hammer Pharmacy	232.64
Drug expense	6.41
Robert Hayne, M.D.	65.00
Robert Jones, M.D.	620.00
Mercy Hospital	4,393.23
Ronald Evans, D.O.	160.00
Douglas Chiropractic	208.20
Peter Wirtz, M.D.	50.00
Iowa Methodist Hospital	1,007.02
Alexander Lifson, M.D.	145.00
Kenneth B. Heitoff, M.D.	100.00
Mercy Center Anesthesiologists	317.00

Costs of this action are taxed against defendants.

Defendants are ordered to file an activity report within twenty (20) days from the date below.

Signed and filed this 23rd day of July, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANDREW H. JACKSON,	:	
Claimant,	:	
vs.	:	File No. 689113
R & R WELDING SUPPLY COMPANY,	:	REHEARING
Employer,	:	RULING
and	:	FILED
HARTFORD INSURANCE COMPANY,	:	AUG 22 1984
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

On July 23, 1984 the undersigned deputy industrial commissioner wrote a final agency decision which granted, inter alia, interest "from the day of this decision." Claimant moved for rehearing, and defendants resisted.

The original review-reopening decision, which was reviewed by the undersigned, granted merely statutory interest. It was filed February 29, 1984. In a review-reopening case, interest accrues from the date of the award. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). Therefore, the final agency decision should have granted interest from February 29, 1984.

WHEREFORE, statutory interest on the award of weekly compensation benefits will accrue from February 29, 1984.

SO ORDERED.

Signed and filed this 22nd day of August, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANDREW H. JACKSON,	:	
Claimant,	:	
vs.	:	FILE NO. 689113
R & R WELDING SUPPLY COMPANY,	:	REVIEW-
Employer,	:	REOPENING
and	:	DECISION
HARTFORD INSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	FEB 29 1984
	:	IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Andrew H. Jackson, the claimant, against R & R Welding Supply Company, his employer, and Hartford Insurance Company, the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on December 1, 1981 at the employer's place of business resulting in a period of temporary total disability of eight and six-sevenths weeks at an agreed rate of $157.62.

This matter was heard in Des Moines, Iowa on September 6, 1983 and considered as fully submitted at the conclusion of the hearing.

Defendants made all of the necessary statutory filings prior to the commencement of this proceeding. In this decision we shall concern ourselves with the nature and extent of claimant's disability, if any.

Based upon the undersigned's notes the record in this matter consists of the oral live testimony of the claimant, Randall Jones, Keith Cline and Ron Waugh, together with claimant's exhibits 1-44 and defendants' exhibits A-E.

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

Claimant, age 36, married with four dependent children and a high school graduate, has had a series of employments since his honorable discharge from the U.S. Marine Corps. Claimant began his work experience for the defendant employer on January 1,

1980. Claimant operated a machine which reduced 1,000 pound spools of MIG welding wire to deliverable weights of 30 to 60 pounds. Defendant employer operates a retail delivery service of welding supplies to customers in the central Iowa region. On December 1, 1981 while attempting to mount a one-half ton roll of continuous welding wire, the wire spool slipped and knocked the claimant to the floor. Claimant was found by fellow employees and taken to the Iowa Lutheran Hospital. (Claimant's exhibit 21) Claimant, at the direction of D. D. Schmitt, M.D., received physical therapy during his 10 day hospital stay. (Cl. ex. 2) Some 30 days post-injury Dr. Schmitt assessed the claimant's condition as follows: (Cl. ex. 20) "ASSESSMENT: Thoracic and lumbar strain. Rule out herniated intervertebral disk." A myelogram was performed which disclosed no identifiable abnormality. Claimant was returned to his employment duties on February 3, 1982. Defendant employer advised claimant that his job was filled and that due to an economic slow down, no work was available.

Claimant's recovery since has not proceeded well, and accordingly, claimant sought medical assistance from Robert C. Jones, M.D., a neurosurgeon on February 26, 1982. (Cl. ex. 10 & 13)

On April 21, 1982 Dr. Jones reported as follows: (Cl. ex. 14)

> Since my letter of February 26, 1982, I saw Mr. Jackson again on March 18th and he was using Bactrac for his low back and, at his request, I gave him a slip to return to light duty so he could draw unemployment. He was doing his exercises. He was denied Workerman's [sic] Compensation by Hartford. I gave him a back to work slip with a 30 pound weight restriction and he said he was 40% better.
>
> When seen on April 20th there was some improvement with the Bactrac at first but none since his last visit. X-rays from Lutheran showed a normal lumbar spine and myelogram. On examination there was tenderness at lumbosacral bilaterally and I referred him to Dr. Simon, anesthesiologist, who has a special interest in these pain problems, to see if some injections might help. Limitation of forward bending was present to 30 degrees. I suggested continuing with the Bactrac and I will see him again in 2 weeks.

Thereafter, on May 10, 1982, claimant was sent to Robert A. Hayne, M.D., another neurosurgeon, who reported on August 30, 1982, in part, as follows: (Cl. ex. 5 & 6)

> I first saw Andrew H. Jackson for examination on May 10, 1982. He was thirty five years of age and had a history dating back to December 1, 1981, at which time he stated he was injured on the job. He had been working at the R&R Welding Company and "a plate tripped and dragged him down". He was taken to Lutheran Hospital by ambulance and he remained there for eleven days. He had been unable to work since the accident. He was experiencing pain in the region of the neck and between the shoulder blades. He felt at the time of the May 10th examination that the pain was not as severe as it had previously been. Along with the neck pain, he was having pain in the low back with pain down the back of the posterior left lower extremity. He had been seen by Doctor Charles Roland and Doctor Robert Jones. He had been treated with home traction. In January of 1982, a lumbar myelogram which had been carried out at Lutheran Hospital was reported to be normal. Coughing and sneezing would accentuate the pain in the extremity. He stated that his left knee would give out at times.
>
> His past medical history reveals he had problems with kidney stones in April of 1969 and February of 1976.
>
> Neurological examination on May 10, 1982, showed the strength and coordination of the upper and lower extremities to be normal. The knee reflexes were 1+ on either side with the ankle reflexes being 0-1+ on the right and 1+ on the left. There was marked limitation of forward motion of the lumbar spine region. Sensation was normal. There was no evidence of muscular atrophy. The blood pressure was 125/98. The physical examination otherwise was within normal limits.
>
> He was admitted to Iowa Methodist Medical Center on May 18, 1982. A repeat lumbar myelogram was carried out which showed no x-ray evidence of a protruded intervertebral disc or other abnormality. He was discharged from the hospital on May 20, 1982, and it was recommended he continue on conservative type measures.
>
> He was seen in my office on July 2, 1982 at which time he was complaining of pain in the back of the left lower extremity. He stated he had been discharged from his job. The neurological examination did not disclose any new findings. Because of his persistence of pain, it was felt advisable for him to have a CT scan of the lumbar spine carried out.
>
> On July 8, 1982, a CT scan of the lumbar spine was carried out in St. Louis Park, Minnesota. This was a normal scan. There was no evidence of pathological disc bulge or herniation. There was no stenosis of the spinal canal noted. There was mild scoliosis with convexity to the left seen, but there was no evidence of spondylolysis, spondylolisthesis or disc space narrowing.
>
> In view of the negative findings on the myelogram and CT scan, I recommended he continue on conservative measures. He should be instructed in good body mechanics so that activity does not place stress and strain on his low back region. His permanent disability referable to his symptomatology that dates back to the injury on December 1, 1981, appears to be no greater than 3% of body total.

Of further interest is the report of James Blessman, M.D., medical director of Mercy's Pain Center who reports on November 30, 1982 as follows: (Cl. ex. 1)

> Thank you for referring your patient, Andrew Jackson, to me for evaluation and treatment of his chronic pain syndrome.
>
> As you are aware, he is a thirty-five year old gentleman who had previously been employed by R & R Welding as a warehouse worker. He gave a history of having had low back and left leg pain and pain going down the back of his left leg since December of 1981. He was also complaining of pain in his left knee. He denied any previous problems with back pain prior to the injury in December of 1981. He described the injury as a twisting injury to his back while he was wrestling with a 1,000 lb. roll of welding wire. He felt immediate, sudden, severe pain in his back radiating down his left leg. His initial treatment was by Dr. Roland and he was originally hospitalized for two weeks of bedrest and physical therapy. Since that time, he has had a total of three myelograms and two CAT Scans--all of which failed to reveal any surgically correctable lesions. He has had a trial of epideral steroids times two, without any benefit, and his second one was complicated by temporary paralysis and a deral leak requiring a few days of bedrest. He has previously been given a 3% disability rating by Dr. Hayne, who examined him for the insurance company. He has had multiple chiropractic treatments. He has had considerable dispute with his previous employer, in fact, he was discharged from employment while on complete disability.
>
> At the time I first saw him he was on no medications and had no medication allergies. He had a history of hypertension in the past. He had had two episodes of kidney stones--one in 1969 and one in 1976. He also had had a fractured jaw in 1964 and surgeries for lipomas on his back and chest in 1980 and 1981. He also had had a T & A as a child. The remainder of his review of systems was negative. His mother died of cancer at age sixty-two; his father is living and well at age eighty-one. He has two brothers, ages thirty-eight and forty-one, who are both in excellent health.
>
> Social history: He is married and has four children, ages from three to thirteen. He has a high school education and four years of service in the military, the Marine Corps. He has not been able to work since the time of his injury in December of 1981. He admits to drinking a six pack of beer weekly. He is a non-smoker and did not participate in any regular form of exercise at the time of initial evaluation. He reported that he had gained approximately twenty-five pounds since the time of his injury. He did not report any excess intake of caffeine.
>
> On physical examination, he is alert, oriented, and in no acute distress, although he was complaining of pain in his back. EENT examination was normal. Range of motion of his neck was full. His lungs were clear with good breath sounds bilaterally. Heart was regular, without murmurs. Abdomen was soft. Liver and spleen were not palpable. Examination of his back reveals no previous lumbar surgery and sensation was intact. Range of motion was markedly decreased, limited to 5° extension, 10° flexion, 10° lateral side bending, and marked limitation of rotation. Impression, upon admission, was chronic back strain, and mental depression secondary to chronic back pain.
>
> He was treated with a very comprehensive pain management approach here at Mercy Pain Center. He was instructed on several different types of exercise, including yoga, aquatics, and aerobic exercises. He was a very well motivated patient and participated actively in everything we ask him to do. Because of persistent pain in his knee, he was seen in consultation by Dr. Peter Wirtz for evaluation of his left knee. He finally underwent

an arthrogram which was essentially within normal limits. However, because of the persistence of his knee pain, Dr. Wirtz recommended that he have a follow-up arthroscopy if he continued to be symptomatic with his left knee. At the time of discharge, the patient was somewhat reluctant to go ahead with the arthroscopy because of the marked discomfort that he had following his arthrogram. He was instructed in several different types of autogenic training including: biofeedback, self-hypnosis, progressive muscle relaxation, and guided imagery.

He was placed on our usual nutritional program which restricted him from refined sugars, caffeine, nicotine, alcohol, and decreases his intake of white flour, red meat, and sodium. Medication used consisted of Elavil 50 mgs. at bedtime, however, this had to be discontinued because of marked sedation; he was also placed on our usual nutritional supplements which include Tryptophan, Vitamin C, Vitamin B-3, and Vitamin B-6.

As stated above, he was a very well motivated and cooperative patient. He was seen in counseling by our Psychologist, Dr. Dianne Alber, and seemed to progress quite well through the Program. His family stresses included being unemployed at the present time, having his wife also unemployed, having four children at home, one of which is markedly retarded and requires lots of parental supervision. The patient spent four years in the Marine Corps and considerable time in Viet Nam, having some very bad experiences in the Country. He feels that he was affected by Agent Orange and I would expect he is still suffering from considerable emotional strain related to his Viet Nam experience.

In physical therapy we treated him with transcutaneous electrical nerve stimulation and biofeedback. He responded quite well to the TENS therapy, and will arrange for a home TENS unit for him. He had complete relief of his pain while the unit was on; however, as soon as it would be turned off the pain would return. By using the TENS frequently throughout the day, he was able to participate in our very active exercise program and begin rehabilitating his back.

I feel that Andy has a very high potential for physical rehabilitation. He also appears to be quite bright and well motivated. I would highly recommend him for some additional educational rehabilitation in addition to the physical rehabilitation that we have already started. At this time, I feel that he is healthy enough to enroll in any type of educational rehabilitation program and would recommend that he proceed with this rather than returning to heavy manual labor.

It is also extremely important that he continue with his active exercise rehabilitative program, and would recommend that he obtain a one year membership in the YMCA and continue with supportive psychological counseling, which possibly could be obtained through the VA System at minimal cost to him. Should he choose to do this privately, I would recommend that he continue seeing our Psychologist, Dr. Dianne Alber.

If I can be of any further assistance, I would be happy to see Andy again. I do feel that he has had a very successful chronic pain management program.

On September 16, 1982 Alexander Lifson, M.D., of the Institute for Low Back Care reported, in part, as follows: (Cl. ex. 7)

DIAGNOSTIC IMPRESSIONS:
1. Chronic pain syndrome.

RECOMMENDATIONS: Patient was provided with the booklet Be Good to Your Back for further information in regards to total low back care and isometric exercises. We have encouraged that the patient undergo a weight loss program which is sensible in nature, two to three pounds weekly, to attain a 35-pounds weight loss. We have referred the patient to a chronic pain rehabilitation program to help the patient develop coping mechanisms in regards to handling his pain. We see no pathological reason in regards to the lumbar spine for his pain profile. A brochure was given to the patient in regards to the Chronic Pain Program at Sister Kenny Institute, but one similar to this program would be just as efficient and helpful. No further follow-up is indicated at this time with our clinic.

C.

Ronald C. Evans, D.O., following an examination reported on January 17, 1983, in part, as follows: (Cl. ex. 8)

In my opinion, Mr. Jackson, as a result of a work related accident occurring on 12/1/81 has sustained a severe lumbar sprain syndrome, with discogenic sciatica to the left leg; L5-S1 suspected. I did not elect a trial therapeutic period for this patient. Due to the nature of this condition supported by my findings upon examination, the prognosis in this case must be considered poor. It should be noted that the patient's response to conservative therapy has been consistent in view of the severity of this condition.

With the patient's less than desirable response to conservative management, a further consultation appointment has been made for Mr. Jackson with Dr. Lifson at Sister Kenny Low Back Institute on September 16, 1982. We may yet realize resolution of this problem thru surgical or percutaneous desensitization procedures. Dr. Lifson is indeed a physician in whom this office places great confidence, and will act in the best interests of the patient.

After review of my clinically objective findings for this patient, reports, radiogrpahs [sic] and other supportive data, it is my opinion that an alternate form of therapy is indicated.

After thorough review of all medical records supplied with this patient, I find that the records do reflect the facts as related by the patient in his history; that these facts and physical events are compatible with the described mode of onset. I further find the medical records and the ongiong [sic] residual symptoms to be supported by my physical examinatin [sic] of this patient.

The degree of permanent disability has not yet been determined for this patient. Enough time has elapsed since onset, that should you desire a rating of permanent impairments for Mr. Erdman [sic] may be accomplished by this office.

Claimant has not been gainfully employed since his date of discharge alleging that his injury and the associated pain prevents him from so doing.

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).

In applying the foregoing legal principles to the case at hand, it is clear that the claimant has sustained his burden of proof by providing competent medical evidence in support of his contention that he has suffered permanent injury.

Dr. Jones indicates that the claimant has a 15 percent to 20 percent functional impairment of the body as a whole. (Cl. ex. 12)

Dr. Hayne indicates that the claimant has a 3 percent functional impairment of the body as a whole. (Cl. ex. 5 & 6)

It is concluded that this claimant has a 10 percent functional impairment of the body as a whole. It is further concluded that the claimant's healing period ended August 30, 1982, the date of Dr. Hayne's report wherein he concludes that claimant's condition will not improve.

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. * * * *

In applying the foregoing legal principles to the case at hand, it is clear that this claimant will have difficulty in regaining a place in the labor force without additional training. Claimant's days of being able to provide an employer with heavy labor are at an end. It is found that the claimant has sustained an industrial disability of 25 percent of the body as a whole.

Defendant's termination of the claimant following the injury is contrary to a doctrine recently announced in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

In light of the foregoing legal principles, it is concluded that the claimant has an industrial disability of 40 percent of the body as a whole. Defendants' testimony that claimant was discharged due to an economic slow down belies the facts that he was discharged the day he reported back to work with a medical restriction. It is clear from the attitude and demeanor of the defendants' witnesses that the defendant employer did not want a man with a bad back working for them, notwithstanding that they were dealing with an industrial injury.

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

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

2. That the claimant sustained an admitted industrial injury on December 1, 1981 when a 1,000 pound roll of wire forced him to the floor.

3. That the claimant's failure to perform acts of gainful employment from December 1, 1981 until August 30, 1982 is casually connected to the injury under review.

4. That the claimant achieved maximum medical recovery on August 30, 1982 resulting in a healing period entitlement of thirty-nine and three-sevenths weeks at the weekly rate of $157.62.

5. That the claimant was discharged by the defendant employer on February 3, 1982 due to the industrial back injury he sustained.

6. That the claimant is well motivated and an excellent candidate for rehabilitation.

7. That the claimant has sustained an industrial disability of 40 percent of the body as a whole.

8. That a portion of claimant's medical bills remain unpaid.

WHEREFORE, IT IS ORDERED that the defendants pay the claimant a healing period of thirty-nine and three-sevenths (39 3/7) weeks duration at the weekly rate of one hundred fifty-seven and 62/100 dollars ($157.62) beginning on February 3, 1982 together with statutory interest from the date due.

IT IS FURTHER ORDERED that beginning on February 4, 1982 defendants pay the claimant a two hundred (200) week period of permanent partial disability at the weekly rate of one hundred fifty-seven and 62/100 dollars ($157.62) together with statutory interest.

Accrued benefits are payable in a lump sum.

IT IS FURTHER ORDERED that defendants pay the following medical expenses incurred by the claimant and necessary to treat his injury:

Transportation expense	$ 357.92
Abbott Northwest Hospital	230.00
Hammer Pharmacy	232.64
Drug expense	6.41
Robert Hayne, M.D.	65.00
Robert Jones, M.D.	620.00
Mercy Hospital	4,393.23
Ronald Evans, D.O.	160.00
Douglas Chiropractic	208.20
Peter Wirtz, M.D.	50.00
Iowa Methodist Hospital	1,007.02
Alexander Lifson, M.D.	145.00
Kenneth B. Heitoff, M.D.	100.00
Mercy Center Anesthesiologists	317.00

Costs are charged to the defendants in accordance with Iowa Industrial Commissioner's Rule 500-4.33.

Defendants are ordered to file an activity report within twenty (20) days from the date below.

Signed and filed this 29 day of February, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL D. KAMMERDINER, Claimant,	:	File No. 693463
vs.	:	R E V I E W
VIKING PUMP-HOUDAILLE INDUSTRIES, Employer,	:	R E O P E N I N G
	:	D E C I S I O N
and	:	
LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILED SEP 27 1984 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Paul Kammerdiner, claimant, against Viking Pump-Houdaille Industries, employer, and Liberty Mutual Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on January 28, 1982. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed in this proceeding and stipulated by the parties is $250.68. A hearing was held before the undersigned on August 17, 1983.

The record consists of the testimony of claimant, Judith Kammerdiner and Roger Fiscus; claimant's exhibits 1 through 14; and defendants' exhibits A through E.

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 he is now basing his claim and the extent of healing period and permanent partial disability benefits he is entitled to. The parties stipulated that second period of time off work was June 2, 1982 to June 13, 1982 and August 24, 1982 to December 21, 1982.

FACTS PRESENTED

On January 28, 1982 claimant received an injury arising out of and in the course of his employment with defendant employer when while lifting up a casing to throw in a barrel he felt pain in his back. Claimant revealed that he had no prior back problems. Claimant stated he was with his foreman at the time the pain occurred and talked to him about it. Claimant went to first aid and took some bufferin. Claimant indicated that his foreman set up an appointment for him with the company physician. Claimant testified that he was kept off work for a week with bedrest and physical therapy because of back and right leg pain and returned to work February 8 or 9. Claimant testified he continued to have pain so he started seeing E. C. Vorland, D.C. Claimant revealed that he could not remember if he told defendants he was seeing a chiropractor. Claimant stated he continued to have back and right leg pain.

Claimant testified that defendant employer had periodic shutdowns because of lack of work and had one for one week in May of 1982. Claimant indicated that they returned to work on May 10, 1982. On May 11, 1982 claimant again experienced pain while chopping logs and indicated that the pain was similar to his previous pain and in the same area. Claimant revealed that he started seeing Glen L. Groothuis, D.C., but continued to work.

On June 2, 1982 claimant saw his family physician who was in the same medical group as defendant employer's company doctor, and was placed in the hospital in traction for one week. Claimant again returned to work and had an additional three treatments by Dr. Vorland. On August 17, 1982 claimant was seen by David F. Poe, M.D. On August 24, 1983 a myelogram was taken and a ruptured disc was discovered. Claimant had surgery performed by HoSung Chung, M.D., on September 28, 1982. Claimant revealed he returned to work on December 20, 1983.

Claimant testified that following his surgery his right leg pain had disappeared and his back pain was greatly improved. Claimant stated he can lift now but has pain across his leg if he does a great deal of heavy lifting. Claimant has returned to the same job he had at the time of his injury but limits himself on what he lifts and the way he lifts. Claimant indicated he no longer shovels and opined he could no longer be a core helper or laborer, but felt he would be able to do the job of a core worker. Claimant has not missed work because of his back since December 21, 1982.

Judith Kammerdiner testified she is claimant's wife and remembered claimant complaining of leg pain in January of 1982. Mrs. Kammerdiner revealed that claimant complained a lot about back pain and leg pain. Mrs. Kammerdiner disclosed that she did most of the driving because claimant couldn't twist to look over his shoulder and also had a hard time tying his right shoe lace. Mrs. Kammerdiner opined that since his surgery claimant's pain has not been as bad and disclosed that claimant has started taking over driving again as well as mowing the lawn.

Roger Fiscus testified that he is assistant manager with defendant employer and indicated that claimant does his job well and is a good employee. Mr. Fiscus stated he was with claimant when he was injured and saw claimant experience the pain. Mr. Fiscus revealed that since his surgery claimant has done well and that he hasn't noticed claimant's limitations.

In a report dated October 14, 1982, HoSung Chung, M.D., disclosed that claimant underwent a hemilaminectomy and diskectomy at level L4-5 on the right and exploration of L5-S1 interspace on the right on September 28, 1982. Dr. Chung disclosed that claimant had been doing well without any subjective complaints.

In a report dated June 15, 1983 Arnold E. Delbridge, M.D., stated:

> Mr. Kammerdiner was seen initially on May 10, 1983 and then he appeared to be consistent as far as his findings are concerned. Therefore I don't think he changes significantly from one exam to the next in terms of motion and that type of thing.
>
> On exam at the time I saw him, Mr. Kammerdiner appeared comfortable. He was able to sit. He was able to walk. He was able to heel and toe walk without difficulty. Other than having some throbbing pain in his right leg he did not have noticeable weakness in his lower extremities according to him. He also did not have any difficlty with bladder problems or other potency problems.
>
> On exam at the time I saw him he had a loss of ten degrees of flexion of his back but otherwise a full range of motion. He had negative straight leg raising. He had symmetrical reflexes. He may have a tiny bit of residual weakness in his right great toe but that is minimal.
>
> On reviewing his operative report we found that they took the disc from L4 in his lumbar spine and explored the L5 disc but did not remove disc material.
>
> Considering that this gentleman had a disc space invaded, very minimal residual findings in his right leg and a ten degree loss of forward flexion I would rate him at an 8% permanent impairment.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 28, 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 (1967). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (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, 258 N.W. 899, (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, ___ (1963).

The industrial commissioner has said 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 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

Claimant has met his burden in proving that all of his back and leg problems were related to his injury on January 28, 1982. The undersigned found claimant and his wife credible. Claimant and his wife testified that the wood chopping incident did not change the location or kind of pain he had previously experienced. The medical reports also indicate that the symptoms of which claimant complained were the same from January 28, 1982 until the surgery on claimant's back. Furthermore, no contradictory evidence was submitted.

Claimant has also met his burden in proving he has some permanent impairment as a result of his injury. Dr. Delbridge rated claimant's permanent impairment at eight percent. However, permanent impairment is only one of the criteria in determining a person's industrial disability. Claimant was born on November 6, 1947 and is a high school graduate. Claimant has taken a six week course in blueprint reading and a course in metallurgy. Claimant has worked for defendant employer since he was 18 in jobs of laborer, core maker helper, core maker and inspector. Claimant's jobs have required some heavy lifting.

Since his surgery claimant has returned to the job he held at the time of his injury and has been able to handle his job. Although claimant may not experience an actual reduction in earnings, he has suffered a reduction in his earning capacity. As disclosed by claimant, he has changed the way he lifts things and the amount he lifts. Other employers would be less likely to hire claimant if he loses his job for any reason. It is determined that as a result of his injury, claimant has an industrial disability of fifteen percent.

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 28, 1982 claimant was injured while working for defendant employer.

FINDING 2. On May 11, 1982 claimant had a pain while chopping wood but that episode did not increase claimant's problems.

FINDING 3. As a result of that injury claimant required surgery on his back.

FINDING 4. As a result of his injury and back surgery claimant has a permanent impairment of eight prcent (8%) of the body.

FINDING 5. Claimant was born on November 6, 1947.

FINDING 6. Claimant is a high school graduate and completed a six week course in blueprint reading as well as a course in metallurgy.

FINDING 7. Claimant has worked for defendant employer since he was eighteen (18) years old.

FINDING 8. Claimant has worked as a laborer grinding cores, core maker's helper, core maker and inspector.

FINDING 9. Claimant returned to the job he held at the time of his injury afer recovery from his surgery.

FINDING 10. Claimant is a good worker.

FINDING 11. Claimant has been able to handle his job since returning to it.

CONCLUSION A. Claimant has met his burden in proving his problems are causally connected to the injury he received on January 28, 1982.

CONCLUSION B. Claimant has met his burden in proving he has an industrial disability of fifteen percent (15%) as a result of his injury on January 28, 1982.

ORDER

THEREFORE, defendants are to pay unto claimant eighteen and six-sevenths (18 6/7) weeks of additional healing period benefits at a rate of two hundred fifty and 68/100 dollars ($250.68) per week and seventy-five (75) weeks of permanent partial disability benefits at a rate of two hundred fifty and 68/100 dollars ($250.68) per week.

Defendants are to be given credit for benefits paid under the group plan.

Defendants are ordered to reimburse claimant for any medical bills shown in claimant's exhibit 12 which were paid by claimant or remain unpaid.

Defendants are ordered to reimburse claimant sixty-nine and 17/100 dollars ($69.17) for mileage expenses.

Interest is to accrue in this award from the date of this decision.

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 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 September, 1984.

David E. Linquist

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL M. GRIFFEY,	:	
Claimant,	:	
	:	File No. 764441
vs.	:	
	:	R U L I N G
LORENZEN TRUCKING and BOOTH REFRIGERATED FREIGHT,	:	O N
Employer,	:	S P E C I A L
and	:	A P P E A R A N C E
ROCKWOOD INSURANCE CO. TRUCKERS INSURANCE ASSOC.,	:	FILED
Insurance Carrier, Defendants.	:	SEP 27 1984
		IOWA INDUSTRIAL COMMISSIONER

Defendants filed their special appearance challenging the jurisdiction of the industrial commissioner on July 2, 1984. Claimant did not file a formal response, but filed an affidavit of claimant's counsel on July 27, 1984. Defendants filed a request for hearing on July 10, 1984. Pursuant to an order of this agency filed August 7, 1984, a telephone hearing was held August 14, 1984. Defendants filed their brief in support of special appearance on August 17, 1984.

In their special appearance, defendants assert the following facts: Claimant's employer is Lorenzen Trucking, a sole proprietorship with its principal place of business in Omaha, Nebraska. The employer has not maintained an office in Council Bluffs, Iowa since February 1, 1984 when the employer's base of operations was moved to Omaha, Nebraska. The employer has not conducted business in Council Bluffs since its move to Omaha. Claimant is an over-the-road truck driver whose injury occurred in Detroit, Michigan. Claimant drove trucks owned by the employer and leased to others with each trip commencing and ending at the employer's base of operations in Omaha, Nebraska effective February 1, 1984. Also, as of February 1, 1984, all communications of claimant by telephone were with the employer or his representatives in Omaha, Nebraska. On or after that date the employer's dispatcher operated from the employer's Omaha office.

Defendants further assert that based on the foregoing recital of facts, claimant's employment was principally localized in Nebraska on his alleged injury date and that the employer's place of business was in Nebraska on the injury date, and that claimant regularly worked at or from that place of business, and that the Iowa Industrial Commissioner and the Iowa courts of general jurisdiction do not have jurisdiction of the subject matter of claimant's petition under section 85.71.

Defendants also assert a lack of personal jurisdiction over defendants and a resulting constitutional deprivation of property without due process of law.

The affidavit of claimant's attorney states that the affiant is familiar with the operation of the employer, Lorenzen Trucking and Booth Refrigerated Freight; that the employer has just recently moved its operation from Council Bluffs, Iowa to Omaha, Nebraska; that at the time of claimant's injury, the employer's operations were located in Council Bluffs, Iowa; and the employer hired claimant through that location.

At oral hearing, claimant further alleged the employer continues to do business in Iowa and defendants admitted payroll checks for Lorenzen Trucking are drawn on a Council Bluffs, Iowa bank though either mailed from or picked up in Omaha. Defendants stated defendant Lorenzen Trucking is a subsidiary of defendant Booth Refrigerated Lines, Inc., a Nebraska corporation located in Omaha.

Claimant's petition alleges a May 9, 1984 injury date and that claimant's address is "RR 1, Fairfax, Missouri [sic] Iowa 64446." All parties agree claimant's domicile is in Iowa.

Section 85.71 provides:

> 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 principally localized in another state, whose workers' compensation law is not applicable to his employer, or

3. He is working under a contract of hire made in this state for employment outside the United States.

In interpreting section 85.71(1), the Iowa Supreme Court in Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 534, Iowa 1981), stated domicile alone is not sufficient to entitle an employee, injured outside Iowa, to benefits under our Act, but rather, some meaningful relationship between domicile and the employer-employee relationship must exist. The court then held that the employer's placement of a help wanted ad, to which claimant responded, in an Iowa newspaper was not material to claimant's employment and was, therefore, insufficient to supply the necessary connection. The court did not address the issue of how sufficient the connection between domicile and the employment relationship must be to entitle an employee injured in another state to benefits under our Act.

The Iowa Supreme Court next addressed the interpretation of section 85.71 in George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495 (Iowa 1983). In Wentz, the court expressly overruled Haverly v. Union Construction Co., 18 N.W.2d 629 (Iowa 1945). That case held that making an employment contract in Iowa without more would support an award of benefits under our Act. The Wentz court at 499 said: "We think Iowa law on extraterritorial application of our workers' compensation act has changed since the Haverly decision, and the rule of that case is no longer valid."

The court then said at page 500:

The place of contract or hiring 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 employment is outside of the United States....Permitting recovery of Iowa benefits based solely on a showing the contract of hire was made in Iowa, following Haverly, would render nugatory the additional requirements of subsections 85.71(2), (3) and (4) of the act.

In Iowa Beef Processors and Wentz, the court referred to the Counsel of State Governments Model Act definition of principally localized employment which reads as follows:

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, is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.

Section 85.71(1) clearly is inapplicable to claimant. Claimant's employment is not principally localized in this state since claimant does not regularly work in Iowa. Claimant is domiciled here but the only apparent relationship between his domicile here and the employer-employee relationship is that his employer had a place of business in this state when claimant was hired and that the employer draws its payroll checks from an Iowa bank. Neither of these alone is sufficient to establish a meaningful relationship between claimant's domicile here and his relationship with an employer whose place of business was outside this state on claimant's injury date. Likewise, these two disjoint facts together are not sufficient to establish the requisite meaningful relationship and subsection 1 does not provide this agency with jurisdiction.

Subsection 4 is clearly inapplicable since claimant's employment is within the United States. Thus, claimant is within the purview of our Act only if his situation is within the perimeters of subsections 2 or 3.

Whether claimant's employment is principally localized in any state and if so, which state, is the controlling issue as regards subsection 2. We look to the Model Act definition of principally localized employment for assistance with this issue. The definition, in its subsection 1, finds principally localized employment when an employee's employer has a place of business in the state and the employee regularly works at or from such place of business. Claimant's employer has its place of business in Omaha, Nebraska. Claimant is an over-the-road truck driver. Claimant picks up his loads and is dispatched from the Omaha work site. He returns to that site. Communication between claimant and his employer originate at that site. Clearly, claimant regularly works from that job site. Indeed, despite the interstate nature of claimant's truck driving, in this regard his situation is little different from that of an intracity delivery person who is dispatched from and returns to a specific work site at completion of his assigned deliveries. Claimant, thus, works in employment principally localized in Nebraska and subsection 2 does not confer jurisdiction over his claimant upon this agency.

Subsection 3 also is inapplicable to claimant's circumstance. That section would only apply if Nebraska's workers' compensation law were not applicable to claimant's employer. Neither party specifically addressed this issue and facts expressly proving claimant's employer is within the purview of the Nebraska Act were not presented. Claimant's employer has his place of business in Nebraska, however. In the absence of exceptional circumstances which exempt him from that state's statutes, the employer is charged to abide by them. The reasonable inference, therefore, is that Nebraska's workers' compensation statute is applicable to claimant's employer. Thus, subsection 3 also does not grant this agency jurisdiction over claimant's claim.

Section 85.71 does not confer jurisdiction over claimant's claim onto the Iowa Industrial Commissioner. Defendants' special appearance is sustained. The issues of personal jurisdiction and constitutionality of the Iowa statute will not be addressed.

WHEREFORE, IT IS FOUND:

Section 85.71 does not confer jurisdiction over claimant's claim onto the Iowa Industrial Commissioner.

THEREFORE, IT IS ORDERED that defendants' special appearance is sustained.

Signed and filed this 27th day of September, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VASILIOS KARRAS,	:	
Claimant,	:	
vs.	:	
CONTINENTAL BAKING COMPANY, INC.,	:	File No. 526945
Employer,	:	A P P E A L
and	:	D E C I S I O N
INSURANCE COMPANY OF NORTH AMERICA,	:	
Insurance Carrier, Defendants.	:	

FILED
AUG 27 1984
IOWA INDUSTRIAL COMMISSIONER

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 an adverse review-reopening decision.

There is no recitation of the record by the hearing deputy. The record appears to consists of the transcript; claimant's exhibits A, B, C and D; and defendants' exhibits A and B, all of which evidence was considered in reaching this final agency decision.

This final agency decision will modify the review-reopening decision in that the award for permanent partial disability will be lowered.

ISSUE

Defendants raise one issue on appeal: "Whether the Hearing Officer erred in finding that the Claimant's industrial disability is 30 percent of the body as a whole."

EVIDENCE PRESENTED

Claimant was hurt on February 1, 1979 when some materials fell from above as he was getting out of an elevator. Apparently some fellow employees threw flour and liquid food coloring onto claimant. He injured his neck and shoulder. He missed some six

days of work and was able to return to his usual activities. However, his neck did not respond well to treatment and he continued to have problems.

Defendants do not directly argue that there was no causal relationship between the injury and the resulting impairment. Rather, they point out that the evidence of Keith McLarnan, M.D., is equivocal in apportioning the disability. Dr. McLarnan, in part, states: "[t]he degenerative changes in the cervical spine could not entirely be accounted for in his accident in February, 1979. The accident may have aggravated a pre-exhisting [sic] condition." Further, the original treating physician, Aaron L. Katz, D.O., says nothing about permanent impairment, and William P. Isgreen, M.D., who evaluated claimant, found no impairment which was attributable to the injury.

Thus far, the recitation does not support a finding that any part of claimant's impairment was caused by the injury. However, in a report of October 6, 1982, Dr. McLarnan gave claimant a permanent partial impairment and stated that "I do not think this can be totally ascribed to his work." He went on to say that the degenerative changes account for claimant's impairment but his preexisting condition can be aggravated. Dr. McLarnan's opinion, as principal treating physician, is given the greater weight.

It is clear, therefore, that the resulting condition came from a combination of (1) the preexisting degenerative condition and (2) the work injury. A prior, nondisabling defect that contributes to the end result is not subject to apportionment, and an aggravation of that condition can be fully compensated. Varied Enterprises, Inc. v. Sumner, ___ N.W.2d ___ (Iowa August 22, 1984).

The question of whether or not claimant's termination from his employment has any compensable consequences requires a more substantial review of the record.

Claimant testified:

Q. What was the reason given for your discharge?

A. Oh, like I say, mis -- not for the safety precautions -- How they call?

Q. Failure to follow safety precautions?

A. Yes.

Q. Can you tell us what that incident involved?

A. There was a -- That day with no reason they have called union steward, and the union to come down with no reason. It's normal. If anything was wrong they have given warning letter or warning letter to be there, and that day came down with no reason.

Q. Well, what were they saying you were doing wrong?

A. Okay. And that day before this happened, we have argument about schedule or schedule -- working schedule to know what's my job, what I have to do. So that they refuse tell me, and they -- about the work, what work I have to do. They told me I have to do anything that they tell me to do, so --

Q. Is chis something different that had been happening --

A. Different than my regular job, yeah. That -- it was not my regular job, no.

Q. But previously had you been scheduled and --

A. Yes.

Q. -- had you been told by --

A. I had orders if I had to do something the day or two before to do.

Q. Now, did the -- did they say something to you about turning the electric off while cleaning the ovens?

A. No. They didn't say nothing. I have done some way -- There is two ways, they say. One way I knew, because I have worked the area for six, seven -- for six years. There is two kinds. There is switch bar.

Q. Switch bar?

A. Yeah.

Q. Switch bar.

A. Closing -- shut off the power. And I have done same way I knew it, so -- And five minutes later, everybody come back and say I don't have shut off the power. I didn't have locked the power, the main -- the main box.

Q. You hadn't turned off the power at the main box?

A. No. If I was -- First, if I was done that way that time, it's no lights to go on; and second, no one told me any difference than I knew.

Q. So your complaint was that nobody had told you that you had --

A. To do anything different, yeah.

Q. We can only talk one at a time, Bill. No one had told you to do it any different, and if you did shut off the main light then you wouldn't have any light to clean the oven?

A. Yes.

Q. Was that your understanding?

A. Yes.

Q. And that resulted in your being fired?

A. Yes. (Tr., pp. 42-43 ll. 4-25, 1-25 and 1-6)

Claimant further testified:

Q. Okay. They claimed that you violated a lockout procedure, do they not?

A. They claim.

Q. Pardon me?

A. They claim, but the truth, it's not there.

Q. Okay. Now, what's a lockout procedure?

A. It's -- Like I don't understand why they try to say -- First there was not my job to be there. I don't know what they have. I don't have no idea. I have done the way with safety -- with safety I knew it, and I have done it.

What they say, I don't have no idea how they come up with numbers. I don't understand with numbers. They put that in reading numbers. I don't have no idea.

Q. A lockout procedure has something to do with turning off machines for the safety of the employee, does it not?

A. Yes. I have done it.

Q. All right. And they claim that you violated a procedure for the safety of an employee, is that not true?

A. No, it wasn't. No.

Q. Don't they claim that?

A. They claim, but it wasn't.

Q. Okay. All right. They claim that you didn't turn off a machine --

A. Yes.

Q. -- for your own safety, do they not?

A. No, no. There is two -- also two ways to shut off, and I did it one way I knew. The way I have shut off is a mistake. Was not running. The machine was not running. I have shut off. And that part you cannot use lock on that bar, because it's thin bar. It's no way to pull.

They came out with the main power. It's not the case to do one with the other.

Q. But, again, the employer alleges, do they not, or they claim, do they not?

A. They claim.

Q. All right. And it's up for someone else to determine whether or not --

A. Yeah, yeah. They claim, but it's not the truth.

Q. All right. That's a matter for somebody else --

A. Yes.

Q. -- to decide?

A. Yes.

Q. Except for your termination in March of 1983 for the claimed violation of a company policy, do

you feel you could still be working at Continental Baking?

A. Yes. Not because they like me. (Tr., pp. 79-81 ll. 6-25, 1-25 and 1)

Clyde Edwards, the plant sanitarian and claimant's supervisor, testified:

Q. Had he been locking out the ovens?

A. This was the first time that he had locked out the oven, but he had used the lockout procedure in the mixing area, because when they clean mixers, they lock the mixers out the same way as the oven.

Q. Is that a safety precaution for that particular employee?

A. Yes. Any -- any person, maintenance, the engineers, sanitation or production, whenever they'd work on a piece of equipment, cleaning the inside, or whatever, they have to lock it out --

Q. Okay.

A. -- so it can't be turned on.

Q. Except for his current problem with the company, do you know of any reason why he could not still be working for Continental Baking?

A. No, I don't. (Tr., pp. 96-97 ll. 10-25 and 1)

The hearing deputy's analysis states as follows:

> Claimant's testimony, which stands unrebutted, concerning the harassment that he underwent at the hands of his co-employees borders upon the edge of unconscionable behavior.
>
> In addition, the assault which gave rise to this industrial injury, claimant's testimony relating to having his locker broken into on three occasions, having his car stolen, windshield smashed and tires slashed, indicate a pattern of physical and mental harassment that appears to have been condoned by the defendant employer. The net result of this outrageous conduct appears to be that the claimant was discharged by the defendant employer. The testimony of Clyde Edwards, claimant's foreman, belies the actions of the defendant employer. It is concluded that claimant was discharged by the defendant employer because of his industrial injury and the fact that claimant saw fit to file this proceeding. The testimony of Mr. Edwards is rejected as it relates to the reason for claimant's discharge.
>
> Claimant's discharge is found to be predicated upon claimant's injury which gives rise to claimant's continuing inability to find work.

Some of claimant's testimony about the vandalism is as follows:

Q. Okay. Have you ever been able to prove, Mr. Karras, that it was Continental Baking or persons employed by them were the ones who slashed your tires or broke your windshield or did things of that nature?

A. Just a minute. For one thing, the reason -- Like I said, one reason, say -- To prove, no. Mrs. Miller, she told me the windshield was -- She give me idea it was a little farther by -- It happened like mistake, all right?

The only thing I have, they have my car towed twice off the place for damage. If I have caught who it was -- If I have caught who has stolen my car or have the other things they have done, is not reason to repeat here, because it is responsible on him, the person who has done it.

Q. But you can't say somebody from Continental Baking did that?

A. Yes, because in the morning nobody else was there. It's snowing and -- and minutes from up -- to go from outside my car. I was running to get in. Was a minute. No one was walking on a snowing day.

The first time happened was wintertime, snowing, and no one moving round there. It's not -- I don't have to go -- If someone was stealing my car, they have -- get away, not get the car for damage, both times.

And after three weeks, they do it -- they do it again. The person who has the keys, after second time. There is -- Things speak for themselves what goes on there. (Tr., pp. 76-77 ll. 25 and 1-25)

APPLICABLE LAW

The authorities recited by the hearing deputy are adequate.

ANALYSIS

First, the evidence seems conclusively to show that claimant was discharged in a dispute over a safety procedure. Nothing in the evidence suggests that there was any connection to the injury. As defendants rhetorically ask, why would the employer wait four years after the injury to fire claimant because of the injury?

Second, the facts do show that claimant was harassed by fellow employees and that his injury was caused by certain of them. There was no showing, however, that the employer even remotely condoned such conduct. Thus, the matter of the discharge and of claimant's fellow employees bullying him and vandalizing his property may be labor disputes, but they are neither compensable nor even relevant to the Iowa Workers' Compensation Law.

Thus, since the review-reopening decision held that a wrongful discharge contributed to claimant's industrial disability, that disability must be re-evaluated.

Claimant was born in Greece in 1933 and went to the equivalent of sixth grade there. He had some experience in working in retail stores and drove a truck in the military service. In the late 50s and early 60s, he drove buses and trucks in Greece. He arrived in the United States in 1967 and began working for the defendant employer in the sanitation department. He has difficulty in reading and speaking English and has no formal education in this country. On the other hand, claimant appears to be a hard worker and his physical impairment is moderate. Considering the various factors of industrial disability, he is found to have sustained an industrial incapacity of 20 percent.

After claimant's appeal brief was filed, he and his attorney went separate ways, and the attorney filed an application for a lien. This decision does not concern that dispute, and it is left to the attorney to pursue his remedy.

Some of the findings of fact of the review-reopening decision have been retained, and one is new.

FINDINGS OF FACT

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

2. That the claimant sustained an admitted industrial injury on February 1, 1979.

3. That said industrial injury occurred when unidentified co-employees threw flour and liquid food coloring onto claimant.

4. That the claimant was riding in a freight elevator at the time of this assault.

5. That in an attempt to flee this encounter, claimant jumped over the safety gate falling onto the floor from a height of five feet injuring his neck and shoulder.

6. That the defendant employer failed to conduct an investigation following this incident.

7. That the claimant has undergone additional mental harassment since this episode in the form of theft and damage to his personal property while on the defendant employer's premises.

8. That the claimant was discharged by the defendant employer in March of 1983.

9. That Dr. McLarnan's statement that the injury cannot be totally ascribed to his work is construed to mean that the work injury nevertheless did substantially contribute to claimant's cervical problems.

10. That some of claimant's medical expenses remain unpaid.

CONCLUSIONS OF LAW

On February 1, 1979 claimant sustained an injury which arose out of and in the course of his employment and which resulted in an industrial incapacity of twenty (20) percent of the body as a whole.

Claimant's discharge from his work by his employer was not connected to the injury.

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant at the rate of one hundred forty-three and 38/100 dollars ($143.38) for a period of one hundred (100) weeks for the permanent partial disability beginning on March 15, 1983, accrued payments to be made in a lump sum together with statutory interest from February 24, 1984.

Defendants are ordered to pay the following medical expenses:

Marian Health Center	$276.00
Keith McLarnan, M.D.	236.00

Costs are charged to the defendants under Iowa Industrial Commissioner Rule 500-4.33.

Defendants are ordered to file an activity report within twenty (20) days from the date below.

Signed and filed this 27th day of August, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VASILIOS KARRAS, Claimant,	:	
vs.	:	File No. 526945
CONTINENTAL BAKING CO., INC., Employer,	:	R E V I E W - R E O P E N I N G D E C I S I O N
and	:	
INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	FILED FEB 24 1984 IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Vasilios "Bill" Karras, claimant, against Continental Baking Co., Inc., his employer, and Insurance Company of North America, the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an industrial injury that occurred on February 1, 1979. This matter came on for hearing at the courthouse in Sioux City, Iowa on Tuesday, October 4, 1983, at 2:00 p.m., and considered as fully submitted at the conclusion of the hearing.

Prior to the commencement of litigation, defendants made all of the necessary appropriate statutory filings. It appears therefrom that the agreed rate for temporary total disability was $143.38 per week. It further appears that the appropriate rate for permanent partial disability is likewise $143.38 per week. Form 5 filed by defendants on May 7, 1979 indicates the claimant was paid temporary/healing period for three of the six day period from February 5, 1979 through February 10, 1979, for a total sum of $61.45. It does not appear any payment has been made to the claimant for permanent partial disability benefits.

The issues to be determined are whether there is a causal relationship between the claimant's injury and the resulting disability, as well as the extent of that disability. There is also an issue as to whether certain medical expenses were authorized by the employer under section 85.27.

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

Claimant, Vasilios "Bill" Karras, single, was born on or about December 20, 1933 in the country of Greece. He attended school in Greece to a point that appears to be equivalent to a sixth grade education in the United States of America. Thereafter, he engaged in various unskilled work until he served in the Greek Army. It appears that prior to coming to the United States, he was employed principally as a driver of a truck. Claimant immigrated to the United States in August of 1967, and was employed August 14, 1967 as a janitor at Continental Baking Co., Inc. He was employed almost continuously as a janitor at Continental Baking Co., Inc. from August 14, 1967 to March 15, 1983. It appears that on or about May 11, 1969 claimant injured his back in the course of his employment resulting in herniated intervertebral discs at the L-4, L-5 level and L-5, S-1 levels. Semi-laminectomy of the L-4 and S-1 segments and excision of herniated discs were performed on July 17, 1969 and claimant was later determined to have eight percent to ten percent disability of the body as a whole.

The claimant's next injury was in February of 1975. The claimant was in a car accident at the time and sustained an injury to the neck. The claimant testified that he was bothered with this injury until the fall of 1976.

Claimant testified that on or about February 1, 1979, while riding the freight elevator from the mixing room to the basement, the elevator stopped between floors and someone dumped flour, caramel color and water on claimant from one of the upper levels. In getting out of the elevator which had been stopped between floors, claimant fell injuring his right arm, shoulder and neck. Claimant treated with Aaron K. Katz, D.O., for the injuries sustained during the months of February, March and April 1979, but actually missed only six days of work from the 5th day of February, 1979 through the 10th day of February, 1979. It appears that in October of 1979, claimant had an aggravation of the February 1, 1979 injury and again treated with Dr. Katz from October 15, 1979 through April 25, 1980.

Next, the claimant injured his left knee. This was in November of 1980 (Defendants' Exhibit 1, Item 15). In August of 1981 the claimant sustained a back injury. The record (Defs. ex. 1, item 16) reveals that the claimant was lowering a metal shelf and twisted his back. The next injury was in October, 1982. The claimant testified that he injury his left shoulder, neck and back. The record (Defs. ex. 1, item 17) reveals that the claimant was pulling a catch pan out from beneath the dough mixer. The catch pan was half full of water and hard to pull out. The floor was wet and the claimant's feet slipped out from under him and he fell backward on his arm and shoulder. The claimant's last injury was in March of 1983. This was an injury to the left knee. The claimant had surgery on the knee and testified that he was capable of going back to work six to eight weeks following the surgery. The claimant testified that following each of his injuries he was capable of doing what he did before and could do the same job now. However, no claims are being made in this action for such subsequent injuries. The difficulties that claimant experienced with his shoulder, neck and back did not appear to completely resolve themselves and in July of 1981 Dr. Katz referred him to Keith McLarnan, M.D. In a letter to the claimant's attorney dated January 18, 1982, Dr. McLarnan wrote: "...[T]he degenerative changes in the cervical spine could not entirely be accounted for in his accident in February, 1979. The accident may have aggravated (emphasis added) a pre-exhisting [sic] condition...."

In a follow-up letter to the claimant's attorney dated October 6, 1982, Dr. McLarnan wrote: (Defs. ex. 1, item 11)

> [H]e does not qualify for loss of motion in that plane of action. Nor does he qualify for loss of motion with head tilting at least 35 degrees to the left or the right and in anteflexion. However, retroflexion seems somewhat restricted for 3% evaluation.
>
> There is obvious X-ray evidence of anterior bridging and ankylosis between C4 and 5 and between C5 and 6 vertebral bodies and the alignment is off; hence, that's probably a 13%.
>
> Finally, he has had some radicular involvment for pain but I have never been able to depict clear cut loss of muscle strength or reflex pattern changes and in the latter examinations he has had less problem with sensation than originally, so I judge that to be about 5%. Accordingly, summation would be 21%.
>
> I do not think this can be totally ascribed to his work. These are degenerative changes...but (the accidents) could not be the sum total cause of these changes...

Dr. McLarnan has further indicated that the accidents that claimant has had could have caused an aggravation of preexisting problems or conditions of the claimant.

The defendants had the claimant evaluated by William P. Isgreen, M.D., on January 5, 1983. In his formal neurological evaluation dated January 5, 1983, Dr. Isgreen wrote: (Defs. ex. 1, item 12)

PHYSICAL EXAMINATION:

The general examination is unremarkable.

NEUROLOGICAL EXAMINATION:

Examination of the head and neck shows gingerly calculated movements of the neck in all directions,... There is no spasm. There is no point tenderness on percussion of the spine. Mobility as the man talks and gestures and moves ahead when other movements are called for, was perfectly unrestricted. This is both in the vertical and horizontal plane....

DISCUSSION:

The only abnormality of any note that I can detect... is depressed right ankle jerk....I really don't think it has anything to do with the accident as related from February of 1979.

The x-ray report from July of 1981 shows spondylitic changes in the cervical spine....

It really is inconceivable to my mind that this is related to the man's alleged accident in 1979.... However, I rather suspect that the man's degenerative disease would be at the same place it is right now with the same symptoms given injuries or not. In fact, cervical spondylitic disease...is not felt to be accident or injury related.

In Dr. Isgreen's January 5, 1983 letter to the defendants' attorney he states: (Defs. ex. 1, item 12)

> The man has cervical spondylitic disease as described on the x-ray of 1981. And the man's symptoms are not unusual for that entity....
>
> I find no permanent impairment in Mr. Karras as a result of his injury in 1979. His problem of a cervical...spondytlic [sic] problem is almost by definition not trauma related.... By enormous stretch of imagination and fact, one might say that a pre-existing condition was aggravated. It may have been aggravated for awhile but that state was not made worse by injury. The man would have gotten to the same place in the same amount of time, injury or not.

Since there is no evidence of preexisting problems or conditions to the neck and shoulder area of claimant that kept him from doing his work, one must assume that any problems or conditions claimant had in that area were dormant and were accelerated by the accident of February 1, 1979.

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 1, 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).

In applying the foregoing legal principles to the case at hand, it is concluded that the claimant has bourne his burden of proof. The opinion of Dr. McLarnan as the attending physician is given the greater weight in this decision and it is found that the claimant has a 20 percent functional impairment of the body as a whole traceable to this elevator incident.

Claimant's testimony is given the greater weight in this decision. Claimant's 14 year history of employment by the defendant employer weighs heavily in the claimant's favor, especially when taken together with claimant's demeanor at the hearing.

Claimant's testimony, which stands unrebutted, concerning the harassment that he underwent at the hands of his co-employees borders upon the edge of unconscionable behavior.

In addition, the assault which gave rise to this industrial injury, claimant's testimony relating to having his locker broken into on three occasions, having his car stolen, windshield smashed and tires slashed, indicate a pattern of physical and mental harassment that appears to have been condoned by the defendant employer. The net result of this outrageous conduct appears to be that the claimant was discharged by the defendant employer. The testimony of Clyde Edwards, claimant's foreman, belies the actions of the defendant employer. It is concluded that claimant was discharged by the defendant employer because of his industrial injury and the fact that claimant saw fit to file this proceeding. The testimony of Mr. Edwards is rejected as it relates to the reason for claimant's discharge.

Claimant's discharge is found to be predicated upon claimant's injury which gives rise to claimant's continuing inability to find work.

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).

"Claimant is not entitled to reimbursement for medical bills unless he shows that he paid them from his own funds." See Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890 (Iowa App. 1983).

In applying the foregoing legal principles to the case at hand, it is concluded that the defendants failed to abide by the rule as announced above.

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 the claimant sustained an admitted industrial injury on February 1, 1979.

3. That said industrial injury occurred when unidentified co-employees threw flour and liquid food coloring onto claimant.

4. That the claimant was riding in a freight elevator at the time of this assault.

5. That in an attempt to flee this encounter, claimant jumped over the safety gate falling onto the floor from a height of five feet injuring his neck and shoulder.

6. That the defendant employer failed to conduct an investigation following this incident.

7. That the claimant has undergone additional mental harassment since this episode in the form of theft and damage to his personal property while on the defendant employer's premises.

8. That the claimant was discharged by the defendant employer in March of 1983.

9. Notwithstanding defendant employer's position that claimant was discharged for failure to follow safety rules, it is found that claimant was discharged for reasons surrounding this industrial injury.

10. That the claimant has a 20 percent functional impairment of the body as a whole by reason of this injury.

11. That some of claimant's medical expenses remain unpaid.

12. That claimant's industrial disability is 30 percent of the body as a whole.

WHEREFORE, IT IS ORDERED that the defendants pay the claimant a one hundred fifty (150) week period of permanent partial disability beginning on March 15, 1983 at the weekly rate of one hundred forty-three and 38/100 dollars ($143.38) together with statutory interest from the date due.

Defendants are ordered to pay the following medical expenses:

Marian Health Center	$276.00
Keith McLarnan, M.D.	236.00

Costs are charged to the defendants under Iowa Industrial Commissioner's Rule 500-4.33.

Defendants are ordered to file an activity report within twenty (20) days from the date below.

Signed and filed this 24 day of February, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROSE KASTER,	:	
Claimant,	:	File No. 722222
vs.	:	R E V I E W -
JOHN DEERE DAVENPORT WORKS,	:	R E O P E N I N G
Employer, Defendant.	:	D E C I S I O N

FILED

AUG 9 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Rose Kaster, claimant, against John Deere Davenport Works, self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of her employment on September 28, 1981. It came on for hearing on July 12, 1984 at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file contains a first report of injury received January 28, 1982. On July 12, 1984 defendant filed a form 2A which shows the payment of weekly benefits from December 11, 1981 through January 31, 1982.

At the time of hearing the parties stipulated to a rate of compensation in the event of an award of $230.52 and to a conversion date of February 1, 1982.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, a bill from Lutheran Hospital; claimant's exhibit 2, nursing notes from defendant employer; claimant's exhibit 3, doctor's notes from defendant employer; claimant's exhibit 4, doctor's notes from defendant employer; claimant's exhibit 5, additional nursing notes; claimant's exhibit 6, a letter from M. A. Sanguino, M.D., dated September 12, 1983; claimant's exhibit 7, a letter from Dr. Sanguino dated September 30, 1983; claimant's exhibit 8, a letter from Dr. Sanguino dated November 14, 1983; claimant's exhibit 9, additional doctor's notes; claimant's exhibit 10, a report from Barry L. Fischer, M.D., dated April 4, 1984; claimant's exhibit 11, the curriculum vitae of Dr. Fischer; claimant's exhibit 12, a letter from John P. Johnson, D.O., with accompanying test results dated May 4, 1984; defendant's exhibit A, a letter from G. K. Dice, M.D., dated June 5, 1984; and defendant's exhibit B, a letter from Donovan D. Stiegel, M.D., dated January 9, 1984. Claimant filed a brief at the time of hearing.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and any disability she now may suffer and whether or not she is entitled to permanent partial disability benefits.

STATEMENT OF THE CASE

Twenty-six year old single right-handed claimant commenced work for defendant on September 28, 1978 in the janitorial department where she was on hourly work. As of September 28, 1981 she had no restrictions.

She recalled the circumstances surrounding her injury on September 28, 1981 as follows: She was working the second shift. It was toward the end of her work time. She had cleaned the dispensery. She slipped and fell on a wet spot and landed on her knees and then threw her arms forward to catch herself. Her head jerked. She reported to the nurse. On her way home she noted that she was feeling sore and stiff. She saw the nurse again and then the company doctor who placed her on light duty. She was then seen by a series of doctors and she was hospitalized for a number of tests. She was off work from December 11, 1981 after an episode of laughing and received compensation until February 1, 1982.

When she went back to work, she was on light duty for a brief time and then went to regular duty. She took some time off for treatment. She was on layoff from October 10, 1982 until August 15, 1983. During that time she drew unemployment and a supplement from defendant.

After layoff she was again on light duty by order of the company doctor, Dr. Karlsson. After Thanksgiving she tried regular duty for four weeks, but she went back to light duty and she remained on light duty at the time of hearing. Her restrictions as assigned by Dr. Karlsson are avoidance of excessive head movement and no work above the shoulders.

Her present work assignment is as a "gofer" for other workers. She sometimes runs the strip tank. It is claimant's contention that she would make more money if she were doing incentive work. She claimed that she had quite a bit of overtime work in the janitor department. Her rate of pay at the time of injury was $10.35. It is now $10.41.

Claimant's current complaints are of tightness, pain and spasms in the back of her neck, tightness in the left scapula, pain in her left arm, redness and a cold feeling in her left hand, difficulty with pushing and pulling and a loss of grip strength. Her condition is aggravated by cold weather, and she is bothered by laughing, coughing, sneezing and certain movements of her head. Such things as having her hair done or going to the dentist are difficult. She also has difficulty with quick movements required by some sports activities. She takes Naprosyn.

Claimant acknowledged her testing has been negative and no surgery has been required.

Medical records from defendant show claimant pulled a muscle in her right shoulder on January 23, 1980, had neck pain in March of 1980, strained the left shoulder and scapula in May of 1980, complained of a sore shoulder in July of 1980 and reported neck, upper arm, right arm and upper back complaints in February 1981.

A note of September 30, 1981 records claimant's fall two nights before with soreness in the shoulder and left side which radiated to the spine. By the week after her fall she had soreness in her left shoulder and cervical spine.

She was seen by the company doctor, Dr. Karlsson, on October 8, 1981 at which time the muscle of the left trapezius was tense as were her paravertebral muscles on the left. There was a slight decrease in motion on bending to the right. The doctor's impression was muscle strain of the trapezius and possibly the low back. Claimant was placed on light duty with avoidance of pushing, pulling and twisting and of lifting weights over twenty pounds. Hot packs, ultrasound and Motrin were prescribed.

On December 8 Dr. Karlsson planned to refer claimant for evaluation to see if additional therapy or testing would be needed. However, on December 10, 1981 she had a sudden onset of pain in her back when she was laughing. The doctor observed that claimant's left arm was slightly bluer and colder than her right. Claimant's tilting her head to the right created pain. There was tenderness between the scapula and in the spine. Dr. Karlsson consulted with Dr. Rippenger who suggested a soft collar, muscle relaxants and bed rest.

Dr. Karlsson's note of December 15, 1981 reports Dr. Rippenger's feeling of a possible cervical disc protrusion. He recommended bed rest and exercise. Claimant was seen on January 15, 1982 and given a diagnosis of acute cervical strain. She was scheduled to return to work on January 30, 1982. She was to avoid using a buffer or doing heavy lifting. On February 17, 1982 claimant was moved to her regular work.

In August of 1983 claimant was placed under restrictions of no work above shoulder height, no repeated bending or twisting of the neck and limited use of the left arm.

In late November of 1983 claimant was returned to regular work. In January of 1984 claimant was restricted from gripping with both hands and from overhead work. At the end of the month the restriction was just on overhead work.

The following month restrictions were changed to no overhead work or repeated bending and twisting of the neck. As of April 5, 1984 those restrictions remained in effect.

M. A. Sanguino, M.D., neurologist, saw claimant on Septemer 12, 1983 at which time she complained of stiffness and pain in her neck with pain radiating into her left shoulder and occasional severe headaches. On examination there was tenderness in the supra-semispinalis on the left. The doctor's impression was chronic strain of the cervical spine, possible cervical myalgia or a cervical disc. He suggested cervical x-rays, electromyography and nerve conduction studies.

The above suggested tests were carried out and were termed essentially unremarkable and normal. Dr. Sanguino observed that claimant's left hand became colder than her right. He suspected a mild sympathetic dystrophy of the left upper extremity secondary to the injury. Claimant was started on Sinequan and a myelogram was proposed. The myelogram and a CT scan of the cervical spine were normal.

Donovan D. Stiegel, M.D., saw claimant on January 9, 1984 and concluded that claimant did not have thoracic outlet syndrome, causalgia or a sympathetic dystrophy. Claimant was exquisitely tender on the lateral aspect of the left side of her neck and in the right supraclavicular fossa over the scalene anticus. The doctor wrote: "I feel that this woman's symptoms are totally on the basis of strain, anxiety, and she has typical ligamenta nuchae tenderness, which goes along with this type of problem." As as vascular surgeon he did not recommend a surgery.

Barry Lake Fischer, M.D., board certified occupational physician, saw claimant on March 28, 1984 at which time she complained of pain, soreness and stiffness in her neck and left shoulder, pain and numbness in the left arm, swelling in the left arm and difficulty raising her left arm and turning her neck.

On examination Dr. Fischer found tenderness to palpation and pressure of the left cervical, rhomboid and trapezius area. There was decreased motion in the cervical spine. There was tenderness to palpation over the left shoulder as well as decreased shoulder range. Coolness of the skin suggested possible sympathetic dystrophy.

The doctor wrote that claimant had a strain to the left cervical, rhomboid and trapezius area with myositis, decreased motion in the cervical spine, residual left cervical tendonitis, a strain of the left shoulder with decreased motion and residual myositis on the left and the possibility of a reflex sympathetic dystrophy. A permanent partial disability of 25 percent of the left arm was assessed.

John T. Johnson, D.O., in a letter dated May 14, 1981 reports sending claimant to a neurologist, Daniel B. Johnson, M.D., who thought she had thoracic outlet syndrome, apparently based in part at least on his findings of slight prolongation of the distal ulnar sensory latency on the left. Dr. Johnson added that diagnosis to his own of chronic strain-type injury to the cervical, rhomboid and trapezius on the left with myositis of the musculature, decreased motion of the cervical spine with cervical tendonitis, decreased range of motion of the left arm and shoulder and probably a reflex sympathetic dystrophy.

Dr. Johnson causally connects claimant's condition to the injury and declares her condition to be permanent.

G. K. Dice, M.D., of defendant's medical department, apparently examined claimant in June of 1984. There was tenderness over the left trapezius and left corocoacromial ligament. Cervical ranges of motion were flexion 25°, extension 25°, right lateral bending 25°, left lateral bending 35°, right rotation 25° and left rotation 30°. A five percent impairment of the left upper extremity was assessed.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 28, 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).

Before her September 1981 injury claimant had complaints of a pulled muscle in her right shoulder, neck pain, strained left shoulder and scapula, the right arm and her upper back.

Claimant fell on her knees, threw her arms forward and jerked her head. Claimant has consistently complained of her left arm, shoulder and neck area. On examination shortly after her fall tenseness was found in the muscle of the left trapezius and paravertebral muscles. Her initial diagnosis was muscular strain of the trapezius and possibly the low back.

Claimant was seen frequently in the medical department where her complaints of shoulder and later neck pain were recorded on a persistent basis. She also developed trouble in her arms and hand.

On December 10, 1981 claimant had an aggravation of pain in a laughing incident according to medical department notes. Her trouble after that time seems to have been more in her neck and her diagnosis was of cervical strain. Claimant has been under restrictions of various sorts placed by the company doctor.

Claimant has had a number of tests of the cervical area which have been normal. She continued to have restriction of cervical motion in her most recent examinations. Several of claimant's physicians have suggested a possible sympathetic dystrophy. A vascular surgeon disagreed. Dr. Johnson specifically connects claimant's condition to her injury and finds her condition permanent. Drs. Fischer and Dice assign a permanent impairment to her upper extremity.

The record viewed as a whole supports the conclusion that claimant has a permanent condition related to her injury of September 28, 1981.

The next issue to be considered is that of permanent disability. Claimant has been given impairment ratings to her left upper extremity by the doctors she has seen. It is, of course, the province of this deputy commissioner to determine the site of the disability. Pullen v. Brown & Lambrecht, II Iowa Industrial Commissioner Report 308 (Appeal Decision 1982). Impairment of the cervical spine is disability to the body as a whole. Impairment of function of the shoulder also is considered disability of the body as a whole. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W. 2d 161 (1949); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (Appeal Decision 1982).

Dr. Dice found tenderness over the left trapezius and left corocoacromial ligament. Although he does not indicate what normal values are in reporting the ranges of motion, the values he assigned appear to evidence some restriction in the cervical area. Dr. Fischer recorded decreased motion in both the cervical and left shoulder areas. He made a number of diagnoses relating to those areas. Claimant's restrictions involve neck movement as well as work overhead. In spite of the assessment made by the physicians of impairment to the upper extremity, claimant's testimony and the medical evidence support a finding that claimant has disability to her body as a whole.

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).

Right-handed claimant is a young woman. Evidence regarding her education was not supplied. Neither was information as to her work experience before she went to work for defendant. It seems, however, that most of her work experience has been for defendant. Claimant indicated she would make more money if she could do incentive work. She was doing hourly work at the time of her injury. Her hourly rate has increased from $10.35 to $10.41. Claimant seems motivated to continue to work.

Claimant's complaints have been persistent and she takes medication. She has done primarily light duty and she carries restrictions on both working overhead and on repeated bending and twisting of her neck.

Because defendant has kept her at work and has made provision for her restrictions, her industrial disability is less than it would be if defendant had failed to provide a job. On the other hand, she has a functional impairment which has reduced her versatility within the plant. Based on the Iowa case law, the discussion in this portion of the decision and the findings of fact set out below, it is determined that claimant has a permanent partial industrial disability of eight percent.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

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

That claimant is right-handed.

That claimant fell on her employer's premises on September 28, 1981.

That claimant had an aggravation of her condition resulting from the fall which kept her off work from December 11, 1981 until February 1, 1982.

That claimant was on layoff from October 10, 1982 until August 15, 1983.

That since February 1, 1982 claimant has spent most of her time on light duty.

That claimant's current complaints are of tightness, pain and spasm in the back of her neck, tightness in the left scapula, pain in her left arm, redness and a cold feeling in her left hand, difficulty with pushing and pulling and a loss of grip strength.

That claimant is troubled by laughing, coughing, sneezing and movement of her head.

That claimant takes Naprosyn.

That claimant had some prior complaints of her neck, shoulder and right arm.

That claimant is restricted from overhead work and from repeated bending and twisting of the neck.

That claimant has had cervical x-rays, electromyography and nerve conduction studies and a myelogram which were normal.

That a difference in the temperature in claimant's left upper extremity has been observed.

That claimant was an hourly worker before her injury.

That claimant continues to do hourly work rather than incentive work.

That claimant has had an increase in actual earnings since her injury.

That claimant has impairment of her body as whole.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence that her injury of September 28, 1981 is a cause of the disability on which she now bases her claim.

That claimant has shown entitlement to permanent partial industrial disability of eight percent (8%).

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant forty (40) weeks of permanent partial industrial disability at a rate of two hundred thirty and 52/100 ($230.52).

That defendant pay amounts due and owing in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30.

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

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

Signed and filed this 9 day of August, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA J. KERSH, widow of, SAM ELLIS KERSH, deceased, Claimant, vs. MASON & HANGER, SILAS-MASON COMPANY, INC., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 695660 A P P E A L D E C I S I O N FILED JUL 25 1984 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a proposed decision in arbitration wherein claimant, the surviving spouse of Sam E. Kersh, was denied death benefits. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 6; and the deposition testimony of Rodney L. Pfeiff, Dwight Hill, Patricia J. Kersh, Todd Kersh, Joan Kersh, Keith Henry McNeil, William E. Anderson, Jr., M.D., and George R. Zimmerman, M.D. Also a part of the record are the briefs and filings of all parties on appeal. A request by claimant to present additional testimony and oral argument was denied by the industrial commissioner in a ruling filed June 21, 1984.

ISSUES

Claimant states the issues on appeal as:

1. The Deputy Industrial Commissioner erred in not considering credible evidence favorable to the Claimant and by omitting said evidence in his Statement of the Case.

2. The Deputy Industrial Commissioner erred by not giving Dr. Anderson's testimony any weight in his findings, especially where corroborated by Dr. Zimmerman's testimony, and by giving Dr. Zimmerman's testimony greater weight in medical areas where Dr. Anderson was clearly the superior medical authority.

3. The Deputy Industrial Commissioner erred in his Findings of Fact number 3 whereby he stated, "that following the fall Decedent did not seek medical assistance".

4. The Deputy Industrial Commissioner erred in his Findings of Fact number 7 whereby he stated, "that the results of the autopsy indicated that the Decedent expired by reason of a myocardial infarction".

REVIEW OF THE EVIDENCE

Sam E. Kersh, Sr., was 47 years old. He was married and had four dependent children. (Transcript, page 146; Claimant's Exhibit 1)

John Hostetter, an employee of defendant employer, testified that Sam Kersh had been employed by defendant employer for approximately 30 years and was working as a compressor control operator on January 24, 1982. (Tr., pp. 3-5) Mr. Hostetter stated he talked with Kersh during the shift change, and Kersh informed him he had taken a hard fall outside the air compressor building around 6:25 in the evening. (Tr., pp. 6-7) Mr. Hostetter testified that Kersh indicated he had slipped on the ice, hit his head, and lost consciousness. (Tr., pp. 7-9) Mr. Hostetter stated that Kersh called him later, about one o'clock in the morning, to ask if he (Kersh) had told something to his relief man. Kersh said he could not remember. (Tr., pp. 9-10)

Keith Henry McNeil testified by deposition that he was employed by defendant employer on January 24, 1982 and talked to Sam Kersh at midnight when he was beginning work and Kersh was finishing his shift. (McNeil Deposition, pp. 3-7) Mr. McNeil stated Kersh told him about the fall on the ice. McNeil recalled it was the same evening that Kersh's truck had been stuck on the road near the compressor house. (McNeil Dep., pp. 9-10) Mr. McNeil testified Kersh appeared normal in his speech and behavior. (McNeil Dep., p. 15)

Dwight Hill, testifying by deposition, stated he is employed by defendant employer as a fire inspector. Mr. Hill recalled that sometime in late January Sam Kersh came to the plant fire station and asked to see the emergency medical technician. (Hill Dep., pp. 3-6) Mr. Hill stated it was about 11:00 p.m., and Kersh said he had a headache. Hill took Kersh to the EMT on duty. (Hill Dep., pp. 7-8) Mr. Hill stated there was a field hospital at the plant, but it was closed at night. (Hill Dep., p. 11)

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Rodney Pfeiff testified he is a fire officer and certified

EMT for defendant employer. (Tr., p. 74) On January 24, 1982 he examined Sam Kersh and gave him some aspirin. Mr. Pfeiff stated Kersh told him he had fallen on the ice, hit his head and had a headache. (Tr., pp. 75-77) Mr. Pfeiff stated Kersh had no cuts or swelling on the back of his head. He did not check Kersh's eyes, pulse or blood pressure. (Tr., pp. 75-79) Mr. Pfeiff testified that Kersh appeared normal and had no complaints except the headache. (Tr., pp. 83-85)

Patricia Kersh, wife of the deceased, testified her husband called from work on January 24, 1982 and told her about his fall. He complained of his head feeling "funny" when he came home, and he went to bed. (Tr., pp. 138-139) The next morning Kersh commented on his eyes being red. Kersh complained of a headache and a "tingly" sensation in his arm but said nothing about swelling or a cut on his head. The couple drove to two furniture stores and Mrs. Kersh recalled her husband seemed quiet and didn't go in to look at the furniture. (Patricia Kersh Dep., pp. 15-16) He had dinner with his family that evening and later went to work. (Joan Kersh Dep., pp. 6-7) Mrs. Kersh stated her husband changed shifts that night and worked midnight to eight o'clock. On Tuesday, the couple went to vote, and Kersh again complained about a headache. Mrs. Kersh stated her husband was taking Tylenol and his skin was gray in appearance. (Tr., pp. 141-143) In the evening Kersh slept in a chair and went to bed at 8:30 p.m. Kersh came out of the bedroom later, complaining that his throat was hurting. He asked his son to take him to the hospital. (Tr., pp. 144-145)

Joan Kersh, daughter of decedent, testified by deposition that when she saw her father on Tuesday, his eyes were red and his complexion was ashy. He complained of having a headache. (Joan Kersh Dep., p. 9) She stated her father had complained of his upper right arm hurting on Monday. (Joan Kersh Dep., p. 11)

Todd Kersh, decedent's son, testified that he drove his father to the hospital. His father leaned against the car window and used his inhaler during the ten minute drive. Todd stated his father complained his throat was on fire and was gasping for air. (Tr., pp. 129-134) At the hospital entrance Kersh fell and was helped inside by the nurses. (Tr., p. 135)

William E. Anderson, Jr., M.D., who was Kersh's physician, testified he was called at home by the hospital. When he arrived, C.P.R. was in progress and an ambu bag to facilitate breathing had been attached to an esophageal airway. (Tr., pp. 92-95) Kersh was in respiratory arrest but cardiac rhythm strips indicated a heartbeat was present. (Tr., p. 96) Dr. Anderson testified that Kersh had no pulse, was incontinent and rigid. Dr. Anderson noted that Kersh's eyes were swollen and bloodshot. (Tr., pp. 100, 107)

Resuscitation was unsuccessful and death was pronounced at 10:40 p.m. on January 26, 1982. Dr. Anderson reported the cause of death as: "[A]cute myocardial infarction and subsequent cardiorespiratory arrest and aspiration of gastric contents into his lungs that resulted in retarded inhibition of adequate Oxygen perfusion from the breathing apparatus into his blood stream." (Cl. Ex. 3)

Dr. Anderson noted that the family consented to an autopsy to find out what had happened. (Cl. Ex. 3)

George R. Zimmerman, M.D., and a board certified pathologist, testified he performed the autopsy on decedent on the morning of January 27, 1982. (Tr., p. 18) Dr. Zimmerman stated he was given a brief oral summary of the decedent's medical history prior to the autopsy. Dr. Zimmerman's autopsy report states:

> CLINICAL DATA: The deceased collapsed in the entrance way to the Emergency Room. His jaw was tightly clenched and the arms were rigid. There was no spontaneous respiration. An airway was inserted. At first there were strong slow carotid and radial pulses palpated about 58 to 60 per minute. The cardiac rhythm (ECG) subsequently went from sinus bradycardia to asystole. Resuscitation was unsuccessful.
>
> The patient was brought to the Emergency Room by his son. He had complained that his throat was hurting. He had fallen on the ice at the IAAP and hit his head quite hard one week previously. In the more remote past the patient had undergone cardiac catheterization for apparent coronary insufficiency. He was being treated for asthma and hypertension. (Cl. Ex. 1)

Following the autopsy, Dr. Zimmerman's anatomic diagnoses were:

1. Coronary atherosclerosis with narrowing;
2. Focal fibrosis of left ventricular myocardium;
3. Rheumatic myocarditis, intermediate stage;
4. Rheumatic valvulitis, inactive;
5. Hypertrophy of left ventricular myocardium, severe;
6. Hypertension (clinical diagnosis);
7. Acute congestion of viscera;
8. Bronchial asthma (clinical diagnosis);
9. Hyaline thickening of basement membranes of bronchi and bronchioles, due to asthma, severe;

(Cl. Ex. 1)

Dr. Zimmerman found no evidence of injury to the scalp, skull or brain. The report attributes death to acute myocardial infarction. (Cl. Ex. 1) The death certificate certified by Dr. Anderson on March 5, 1982 indicates cause of death was acute respiratory distress due to acute epileptic seizure as a result of a traumatic brain concussion. (Cl. Ex. 3)

Dr. Anderson testified that he changed his initial diagnosis of heart attack after reviewing the rhythm strips of heart activity at the emergency room and after receiving more information from the family. (Tr., p. 99) Dr. Anderson stated that the decedent's incontinence, rigidity, and clenched jaw, as well as the blood gases results, were associated with seizures. (Tr., pp. 100-101) Dr. Anderson stated that decedent had been in for a checkup four to six months previously and was doing well. Dr. Anderson received periodic reports from the cardiology clinic that was treating the deceased's blood pressure and allergy problems. (Tr., pp. 94, 111-112) Dr. Anderson stated that the deceased had hypertension, asthma and a heart murmur. (Tr., pp. 115-116) Mr. Kersh also had sickle cell trait which Dr. Anderson believed was not significant to the loss of the left ventricular function. (Tr., pp. 118-119) Dr. Anderson was of the opinion that microscopic examination should have been made of the pons and medulla areas of the brain. (Tr., pp. 121-122)

Dr. Zimmerman testified that redness and bulging of the eyes was related to asphyxial death, as was clenching of the jaw. (Tr., pp. 39-40) There was no other evidence of convulsive seizure. (Tr., p. 44) Dr. Zimmerman did not believe the heart activity revealed by the rhythm strips excluded a heart attack. He reported that tachycardia or fibrillation can correct itself spontaneously, and that a spasm of the artery can produce secondary rhythm changes. (Tr., pp. 26-28) Dr. Zimmerman stated that he examined the medulla and pons areas of the brain, which control respiration, and found no evidence of damage. (Tr., pp. 45-50, 64) In a rebuttal to Dr. Anderson's conclusions from the circumstances surrounding the death, Dr. Zimmerman reported:

> The circumstances surrounding Mr. Kersh's demise are important. Mr. Kersh's final and fatal illness began at home presenting itself as <u>pain in the throat</u>. The pain was so severe that he asked to be taken to the hospital. With pain of this apparent severity one would expect to find some abnormality in the neck or throat at autopsy; however, the neck and throat were examined in detail and there was no demonstrable abnormality. Pain from a heart attack, on the other hand, is frequently referred to the neck as well as to other body sites distant from the heart (Cecil, Textbook of Medicine, Fifteenth Edition, page 1230).
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> Support for the position that Mr. Kersh died from a convulsive disorder secondary to a head injury is elusive. There was no evidence at autopsy of a head injury. There is nothing in Mr. Kersh's recent history to suggest that he suffered from a head injury other than that he complained of headaches at times. This symptom, standing alone, is unconvincing as evidence of a head injury severe enough to incite a fatal convulsive seizure. Headaches are a common sign or symptom of many minor illnesses. They are common in patients with high blood pressure, a condition for which Mr. Kersh was being treated, and headaches are also a side affect of Metaprel inhalation which Mr. Kersh used to control his asthma.
>
> Muscular rigidity and twitching are not uncommon in the process of dying from sudden deprivation of oxygen to the brain, whether the lack of oxygen is due to failure of the heart, to sudden obstruction of the breathing passages or due to some other mechanism. It was noted that Mr. Kersh's jaw was tightly clenched and that his arms were rigid when he was in the emergency room; this is perhaps not improperly referred to as a convulsion, which is a term with broad medical meaning. However, under these circumstances muscular rigidity is not unexpected, and without supportive evidence it is not indicative of <u>prior</u> brain damage.
>
> Most importantly, Mr. Kersh's final and fatal illness did not <u>begin</u> as a convulsive disorder. There is no indication that any of the several physicians attempting to resuscitate Mr. Kersh considered a convulsive disorder while they were treating him. There is no historical evidence that Mr. Kersh had convulsions until he reached the emergency room at which time he apparently already had irreversible brain damage due to lack of oxygen. The direct and circumstantial evidence that Mr. Kersh died from a heart attack appears to override any other conjecture. (Cl. Ex. 5)

Dr. Zimmerman stated he had performed between 1500 - 2000 autopsies and had supervised another 3000 - 5000 while teaching forensic pathology at the University of Iowa. (Tr., pp. 60-61)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 24, 1982 is causally related to the death on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). 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 issues on appeal arise from the finding of the deputy that the medical evidence fails to establish that Sam Kersh died as a result of brain trauma incurred in a work-related injury. Claimant contends that insufficient consideration was given by the deputy to the evidence favorable to claimant's position, primarily the testimony of Dr. Anderson, who was Mr. Kersh's doctor and treated him in the hospital emergency room.

The record substantiates the following: On Sunday, January 24, 1982 while at work, Mr. Kersh fell and hit his head. He saw a plant EMT that night with a complaint of a headache and was given aspirin. The technician found no visible signs of cuts or swelling when he examined Mr. Kersh's head. The next day, the deceased followed a normal schedule; he took his wife shopping, ate an evening meal with his family, and worked a full shift. He complained of pain in his arm and a headache on Monday and again on Tuesday. By Tuesday afternoon Mr. Kersh appeared unwell and had a greyish color. That night he complained of a burning pain in his throat and was having difficulty breathing. He was rushed to the hospital where he collapsed and died. An autopsy was performed the following day. On the basis of his examination of the deceased, the pathologist attributed death to a heart attack. Dr. Anderson concluded that death was caused by a brain concussion resulting from the fall at work.

Medical experts can and do disagree on the inferences and conclusions that may be drawn from the same set of facts and circumstances. In this case, however, the opinions of Dr. Anderson are based on an assumption that has no support in the evidence; that Mr. Kersh suffered a brain injury.

Dr. Anderson formed his diagnosis after considering the deceased's complaints of headache following the fall; the symptoms of seizure in the emergency room; and the presence of some heart activity after Mr. Kersh collapsed. The record does not indicate whether Mr. Kersh normally experienced headaches, but Dr. Zimmerman has reported that headaches are common in patients who suffer high blood pressure and in asthmatic patients who use a Metaprel inhalor. Mr. Kersh was being treated for both hypertension and asthma, and he used an inhalor to facilitate breathing. Dr. Zimmerman has also testified that the muscle rigidity and red, swollen eyes evinced by the deceased in the emergency room were attributable to asphyxia following respiratory failure. The pathologist points out that Mr. Kersh's illness did not begin as a convulsive disorder. Dr. Zimmerman believed that the presence of heart activity in the emergency room did not exclude a heart attack, and found sufficient evidence of coronary atherosclerosis and fibrosis of the left ventricular myocardium to conclude that Mr. Kersh's death resulted from acute myocardial infarction.

Finally, and most significantly to claimant's contention of death due to head trauma, Dr. Zimmerman found no evidence of trauma-induced injury to either the scalp, skull or brain of the deceased. Although Dr. Anderson has taken issue with the lack of specificity in the pathology report of the brain, Dr. Zimmerman's testimony as to the examination sufficiently establishes the credibility of his findings.

FINDINGS OF FACT

1. On January 24, 1982 the deceased, Sam Kersh, fell while working for defendant employer.

2. Mr. Kersh told the plant EMT he had struck his head and complained of a headache.

3. The technician found no signs of cuts or swelling on the head.

4. Mr. Kersh completed his shift and worked again the following night.

5. On January 26, 1982 Mr. Kersh was taken to the hospital with complaints of throat pain. He was experiencing breathing difficulties.

6. Mr. Kersh collapsed and died at the hospital.

7. An autopsy was performed on January 27, 1982.

8. No trauma to the skull or brain was indicated.

9. The deceased suffered from coronary artherosclerosis and focal fibrosis of the left ventricular myocardium.

10. Sam Kersh died as a result of an acute myocardial infarction.

11. The heart attack was not causally related to his employment.

CONCLUSIONS OF LAW

WHEREFORE, claimant has failed to sustain her burden of proof that the deceased's fall of January 24, 1982 is the cause of the death on which she now bases her claim.

THEREFORE, the proposed decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered that the claimant take nothing as a result of these proceedings.

That each party shall bear their own costs as contained in Industrial Commissioner Rule 500-4.33.

Signed and filed this 25 day of July, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY L. KEYS,	:	
	:	File No. 654811
Claimant,	:	
	:	A P P E A L
vs.	:	
	:	D E C I S I O N
CHAMBERLAIN MANUFACTURING CORPORATION,	:	
	:	FILED
	:	
Employer,	:	AUG 27 1984
Self-Insured,	:	
Defendant.	:	IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 27, 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 and claimant cross-appeals a review-reopening decision.

The record on appeal consists of the transcript; claimant's exhibits 1 through 17; and defendant's exhibits A, B, and C, all of which evidence was considered in reaching this final agency decision.

Neither party filed briefs.

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

The review-reopening decision awarded 78 3/7 weeks of healing period at the rate of $183.82 per week and awarded 85 weeks permanent partial disability at the same rate, as well as certain medical and hospital benefits.

According to the pre-hearing order, the issues to be heard were (1) Whether there was a causal relationship between the injury and the subsequent disability, (2) If so, the extent of the healing period and permanent partial disability, and (3) "85.27."

The treating doctor found a causal relationship between the work and the resulting condition and he found a permanent partial impairment. His opinion was taken by the hearing deputy over that of the examining physician, which seems to be the proper measure in this case. The record shows that the hearing

deputy thoroughly reviewed the record as it related to industrial disability and made a correct finding. Therefore, the result reached by the review-reopening decision will be retained, but the findings of fact and conclusions of law are those of the undersigned.

FINDINGS OF FACT

1. Claimant hurt himself at work for the employer on October 31, 1980 when he was pushing loaded cases down a conveyor. His pain was in the low back.

2. Claimant was treated for his low back condition by P. Thomas McGarvey, M.D., by Thomas F. Thornton, Jr., M.D., and by John R. Walker, M.D.

3. Dr. Walker recommended surgery for a herniated lumbar disc, but claimant refused to have such surgery.

4. Claimant was also examined by Richard F. Neiman, M.D.

5. Considering the conflicting opinions of Drs. Walker and Neiman and Gillman, claimant is found to have a moderately severe permanent partial impairment.

6. Claimant was 27 years of age at the time of the hearing and his work background included general labor. He finished the 11th grade of high school.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on June 27, 1984.

Said injury resulted in a permanent partial disability to the body as a whole for industrial purposes of seventeen (17) percent.

Claimant is entitled to a healing period of seventy-eight and three-sevenths (78 3/7) weeks.

ORDER

WHEREFORE, defendant is hereby ordered to pay healing period benefits unto claimant for a period of seventy-eight and three-sevenths (78 3/7) weeks at the rate of one hundred eighty-three and 82/100 dollars ($183.82) and to pay permanent partial disability weekly payments unto claimant at the same rate for a period of eighty-five (85) weeks, accrued payments to be made in a lump sum, with statutory interest from January 26, 1984.

Defendant is further ordered to pay the following medical and hospital bills:

T. F. Thornton, Jr.	$ 45.00
J. R. Walker, M.D.	813.00
P. Thomas McGarvey, M.D.	25.00
Schoitz Hospital	1,592.56
Richard Neiman, M.D.	85.00
Mercy Hospital	448.00

Costs are charged to the defendant in accordance with Industrial Commissioner Rule 500-4.33 and shall include an expert witness fee of one hundred fifty dollars ($150) payable to John Walker, M.D.

Defendant is ordered to file an activity report within twenty (20) days from the date below.

Signed and filed this 27th day of August, 1984.

Barry Moranville

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY L. KEYS,	:	
Claimant,	:	FILE NO. 654811
vs.	:	REVIEW -
CHAMBERLAIN MANUFACTURING CORPORATION,	:	REOPENING
Employer, Self-Insured, Defendant.	:	DECISION

FILED
JAN 26 1984
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Gary L. Keys, the claimant, against Chamberlain Manufacturing Corporation, his employer and holder of a valid certificate of exemption as contemplated by section 87.11, Code of Iowa, under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on October 31, 1980 resulting in a period of temporary total disability of eight and one-seventh weeks at the agreed weekly rate of $183.82 with the claimant returning to gainful employment on December 29, 1980.

This matter was heard in Waterloo, Iowa on June 17, 1983 and considered as fully submitted at the conclusion of the hearing.

Based upon the undersigned's notes, the record in this matter consists of the oral testimony of the claimant, Fanny Keys, his mother, and John Seaggins; claimant's exhibits 1-17; defendant's exhibits A, B and C, together with the evidentiary depositions of John Walker, M.D. and Richard Neiman, M.D.

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

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

Claimant, single, age 27, began his employment activities for the defendant employer in February 1980 as a tap machine operator. Claimant described his work activities as requiring him to insert a finished shell into a box and as these cases of shells are filled he is required to push them down a roller conveyor. Shortly after commencing this activity, claimant began to experience low back discomfort in March and August of 1980. (Defendant's exhibit C) On October 31, 1980 while attempting to push three or four cases of shells down the conveyor, claimant developed sharp low back pain. Confusion exists in this record as to the exact day of this occurrence; however, the memorandum of agreement filed by the defendant employer admits that an injury did occur and did arise out of and in the course of claimant's employment.

Claimant began to lose time from work based upon the findings of Thomas McGarvey, M.D. (Claimant's exhibit 2)) Dr. McGarvey felt the need for an orthopedic consultation and Dr. Edward J. Sitz reported his findings, in part, as follows: (Cl. ex. 1)

> Office visit: The patient returns as requested. He says that the prescription bothered his stomach and he only took 2 or 3 of them. I still feel that his symptoms are basically those of muscular low back strain with no evidence of nerve root irritation. I feel that he can return to work now and he is given a slip for a RTW as of tomorrow, December 20, Tuesday. The patient mentions that he isn't due to return until next Monday as there is a holiday break but I date RTW as of tomorrow anyway, December 30. He should use Bufferin if the Norgesic bothers his stomach and he's to continue to use local heat for the muscular symptoms of the low back. RTO prn.

Claimant returned to work January 5, 1981 without restrictions and began to experience pain upon work activity. Defendant sent the claimant to Thomas F. Thornton, Jr., M.D., who indicated that an orthopedic examination should be undertaken. (Cl. ex. 4) This apparently was not done.

Claimant resigned his position on January 30, 1981.

Claimant was next seen by John Walker, M.D., who reported on July 17, 1981, in part, as follows: (Cl. ex. 3)

> OPINION: This patient has a very, very acute low back situation. There are some congenital anomalies which are not causing his pain, but contributes to it, of course, because a back like this just doesn't stand up well under heavy work. I believe that this man is probably going to end up having surgery on his low back unless some marked improvement can be obtained through conservative therapy. He should definitely be hospitalized and treated with traction and physical therapy and a complete conservative regime before anything is attempted, however.
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> At this point, he is 100% disabled for any work. As far as the cervical spine is concerned, he has

probably sprained his neck pushing these heavy objects and this is not a big factor. It would seem to me that perhaps the Chamberlain doctors should get ahold of this man and try to treat him and get him well, however, I will let you decide what is best for the patient as far as all are concerned.

Claimant commenced this proceeding on August 20, 1981 following a period of hospitalization in July ordered by Dr. Walker, who saw the claimant on an irregular basis during late 1981 and early 1982. (Cl. ex. 13)

Dr. Walker, following an April 19, 1982 examination reported, in part, as follows: (Cl. ex. 3)

From what I see of his examination today, I don't see how at 27 years of age he is going to go through life with this type of a back with no more motion and with this much pain and discomfort. I don't think that we have carried out full treatment measures and I think that surgery is a very genuine probability in the low back region. For this reason, I believe that the 8% permanent, partial disability at this time does not stand up and should be retracted.

In the meantime, I have given him an appointment to return to see me in two months and he may call sooner than this if he has any suggestions.

In his deposition Dr. Walker indicated that he recommends a myelogram to confirm his opinion that claimant "has a midline herniated lumbar disc with sciatica in both legs now." (Deposition page 13, line 18)

Claimant has refused this operative procedure. (Depo. p. 15, l. 23) Dr. Walker concluded that surgical intervention would reduce claimant's impairment from 28 percent to 20 percent should the claimant choose to undergo surgery. (Depo. p. 16, ll. 16 to 24)

Indicative of the medical problems presented in Dr. Walker's testimony: (Depo. p. 17, ll. 1-5)

A Well, I believe that he has a disc problem, and because of the instability and congenital anomaly he needs a fusion of L-4, L-5 and the sacrum. And this I think would get him out of what I consider to be the bad trouble that he seems to be in now and put him into an employable range, I believe.

In November of 1982, Richard Neiman, M.D., an Iowa City neurologist, reported his findings to the defendant as follows: (Def. ex. A)

I apologize in not getting back to you in regard to the studies on Mr. Gary Keys. The EMG studies performed on October 6, 1982, revealed no evidence of ruptured disc. The radiologist thought there might be some mild encroachment as far as the lateral recesses at L5-S1. I have carefully looked over the CT scan and in fact have shown this to one of my senior orthopedic consultants, Dr. Webster Gelman. It is our mutual opinion that the CT scan of the spine is absolutely negative. At the present time, I do not think this patient has anything more than a mild strain of the back. I think he should go back to work. The figure of 30% disability for him is absolutely absurd. There is no way that he would qualify for this level of disability. I would suggest he return to work, perhaps to a job which requires less vigorous lifting, however, I think he could certainly handle a weight restriction of 35-50 pounds.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 31, 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 applying the foregoing legal precepts to the matter at hand, it is clear that the claimant has established that a portion of his current lumbar abnormality is traceable to the industrial episode under review.

Based upon his rather passive activities since this episode, together with his demeanor during the hearing, it is apparent to the undersigned that this claimant lacks motivation. It is further clear that this claimant has a preexisting spinal abnormality which has been aggravated by this industrial 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).

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).

In light of the foregoing, it is found that the claimant has a functional impairment of 12 percent to the body as a whole chargeable to the episode of October 31, 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."

In applying the foregoing legal principles to the case at hand, it is concluded that the claimant has an industrial disability of 17 percent to the body as a whole.

Claimant's healing period requires determination. Claimant is required to provide supportive medical evidence in corroboration of his allegation that he is unable to perform acts of gainful employment.

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).

Accordingly, it is found that claimant was unable to work beginning on July 17, 1981 and continuing until November 8, 1982 at which time Dr. Neiman suggested a return to work.

Claimant's medical expenses incurred during 1981 and 1982 are casually related to the injury and are found to be the responsibility of the defendant, with the exception of the charges of Thomas E. Dahl, D.O., whose December 1980 treatments overlapped the care being offered by the defendant.

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. That this agency has jurisdiction of the persons and the subject matter.

2. That the claimant sustained an admitted industrial injury on October 31, 1980.

3. That in addition to the eight and one-seventh weeks of entitlement previously paid, claimant is entitled to a healing period from July 17, 1981 until November 8, 1982 or 78 3/7 weeks.

4. That claimant's rate of weekly entitlement is $183.82.

5. That the claimant has a preexisting spinal abnormality which was aggravated by the industrial accident.

6. That as a result thereof, claimant has a functional impairment of 12 percent to the body as a whole chargeable to this defendant.

7. That claimant's industrial disability is found to be 17 percent to the body as a whole.

8. That claimant's medical expenses remain unpaid.

WHEREFORE, IT IS ORDERED that the defendant pay the claimant a healing period of seventy-eight and three-sevenths (78 3/7) weeks at one hundred eighty-three and 82/100 dollars ($183.82) per week beginning on July 17, 1981 together with statutory interest from the date due payable in a lump sum.

IT IS FURTHER FOUND that beginning on November 8, 1982 defendant is ordered to pay the claimant an eighty-five (85) week period of permanent partial disability at the weekly rate of one hundred eighty-three and 82/100 dollars ($183.82) together with statutory interest. Past due payments are payable in a lump sum.

Defendant is furthered ordered to pay the following medical expenses:

T. A. Thornton, Jr.	$ 45.00
J. R. Walker, M.D.	813.00
P. Thomas McGarvey, M.D.	25.00
Schoitz Hospital	$1,592.56

Richard Neiman, M.D.	85.00
Mercy Hospital	448.00

Costs are charged to the defendant in accordance with Industrial Commissioner Rule 500-4.33 and shall include an expert witness fee of one hundred fifty and no/100 dollars ($150.00) payable to John Walker, M.D.

Defendant is ordered to file an activity report within twenty (20) days from the date below.

Signed and filed this 26 day of January, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

ite 1

Mr. Jay P. Roberts
Attorney at Law
528 West Fourth
P. O. Box 1200
Waterloo, Iowa 50704

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT W. KINCAID,
Claimant,
vs.
SEEDORF MASONRY,
Employer,
and
WAUSAU INSURANCE COMPANY,
Insurance Carrier,
Defendants.

File No. 676214
A P P E A L
D E C I S I O N

FILED
JUL 13 1984
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded permanent partial disability benefits and medical costs.

The record on appeal consists of the transcript of the review-reopening proceeding, claimant's exhibit 1, defendants' exhibits A through C, and the briefs and filings of the parties on appeal.

ISSUE

The sole issue on appeal is whether chiropractic expense incurred by claimant after August of 1981 are chargeable to defendants.

REVIEW OF THE EVIDENCE

The parties stipulate that the applicable rate of compensation is $245.05 per week, and that medical costs at issue are fair and reasonable. (Transcript, page 2)

Claimant is a 37 year old married man with one child. He has nine years of formal schooling and a GED which he obtained while in the navy. (Tr., pp. 5-7) Claimant's previous work experience has been in general labor and truck driving. He served in the navy as a machinist's mate and worked for ten years on the kill floor and in offal packing for Iowa Beef Packers. (Tr., pp. 8-12) When he left the packing plant, claimant joined a labor union and received various construction job assignments through the union hall. He began working for defendant employer on June 20, 1981. (Tr., pp. 12-14) Claimant testified his job was to tend the bricklayers. His duties included providing the bricklayers with blocks, equipment and mortar. Claimant stated he moved blocks weighing approximately 20 pounds each from one part of the building to another. (Tr., pp. 14-15) On July 20, 1981, claimant was building a scaffolding for the bricklayers. As he moved a six foot section of steel, he twisted his back. (Tr., p. 18) Claimant testified he suffered a sharp pain in the middle of his back above his belt. He reported the injury to his supervisor and then worked for the next several days. (Tr., pp. 18-19) Claimant stated the condition worsened until he could barely walk. On July 23, 1981, he went to St. Luke's Medical center and was x-rayed. The emergency room record notes claimant complained of pain in the upper lumbar region. X-rays of the lumbosacral spine were normal, and rest, heat and massage were advised. (Claimant's Exhibit 1) Claimant saw James D. Smith, D.C., on July 24, 1981, complaining of pain in his lower back with standing or strain. Dr. Smith diagnosed the complaint as a sprain of the lumbar spine and initiated chiropractic treatment. (Cl. Ex. 1) Dr. Smith's records indicate claimant received 16 treatments in July and August of 1981. (Cl. Ex. 1) Claimant testified that the chiropractic treatments relieved his pain. (Tr., p. 20) In August of 1981 claimant was referred by defendants to Albert D. Blenderman, M.D., an orthopedic surgeon. (Tr., p. 21; Defendants' Ex. C, p. 2) Dr. Blenderman examined claimant on August 24, 1981 and reported:

> At first when he had his mid-lumbar spine pain, he says the discomfort was only in the midline of the lower back and gradually started radiating anteriorly to go into the groin area. Now, however, he says the groin pain has subsided, but he does have a little pain radiating around the crest of the pelvis to the front of the lower abdomen, although this discomfort is mild in degree and getting better.
>
> However, he says he is still unable to move the back normally because of pain and he says he still has a moderate degree of discomfort. The discomfort is always located in the mid-lumbar region as yet and does not go into either leg.
>
> On physical examination the patient is a rather short, stocky individual, who has limitation of motion on flexion, lateral bending right and left and hyperextension. He bends forward to 45 degrees, then complains of discomfort in the mid-lumbar area, mild in degree. Any effort to go further produces increased discomfort in the mid-lumbar region. In addition, the patient states it gives a tight pulling sensation in the lower back.
>
> He bends to the left and right about 15 to 20 degrees, then complains of mid-lumbar spine pain, but no leg pain.
>
> He has no muscle spasm in the back, but complains of pain on pressure over the 2nd, 3rd and 4th lumbar vertebrae; though he has no pain on palpation over the muscles on either side of the midline at these levels.
>
> He has no pain on sacroiliac stress and no pain on palpation in either sciatic notch.
>
> Straight leg raising to 90 degrees produces a tight pulling sensation in the lower back, but no leg pain or back pain. The patient's reflexes are normal and sensation is normal on both lower extremities.
>
> All muscles appear to be functioning normally on both lower extremities.
>
> Miltiple x-rays of the lumbar spine were taken here in our office on this date.
>
> These x-rays are considered within normal limits, there being no evidence of recent or old fracture, no evidence of disc narrowing and no evidence of a pedicle defect or other bony defect in the lower back.
>
> DIAGNOSIS: LUMBAR LIGAMENT STRAIN IN THE RECOVERY PHASE.
>
> Discussion: As far as treatment is concerned, I would feel that the patient would benefit by use of some back exercises.
>
> I think it is a matter of time before the patient can return to his usual job, but at the present time do not feel he can return to the heavy-duty lifting that is involved, unless the company can put him back on some type of very light work - where lifting not to exceed 25 or 30 pounds is required. Even this amount of lifting should not be repetitive throughout the entire day. (Cl. Ex. 1)

Dr. Blenderman advised hot tub soaks and exercises. He saw claimant on September 14, 1981 and noted that claimant complained that the back pain was worse and now extended up to the mid-thoracic area. Dr. Blenderman stated there was no evidence of disc herniation and recommended the use of a high Taylor corset as a back brace. (Cl. Ex. 1) Claimant testified that he asked defendant employer for another doctor as he felt Dr. Blenderman was not helping him. (Tr., p. 22) On September 8, 1981 claimant had been notified by defendant insurer that further care by Dr. Smith was unauthorized. (Def. Ex. A) Following claimant's request for a different doctor, he was referred to William P. Isgreen, M.D., a neurologist. (Tr., p. 22; Def. Ex. A) Dr. Isgreen evaluated claimant on September 30, 1981 and reported:

> Examination of the musculoskeletal system shows a man who arises from a chair in a somewhat stiff fashion. However, once he gets going, he walks without undue problem. He gest [sic] on his heels and his toes without difficulty. I can detect no weakness in any of the muscle groups. There is no loss of coordination. There is no evidence of atrophy.
>
> The myotatic responses are symmetrical in the arms. They are asymmetric at the knees. The right knee jerk is simply not as active as the left. It is active and it is there, but it's not as active as its brother on the left. Both ankle jerks are present and equal. The toes are downgoing.
>
> Examination of the dorsal and lumbar spine shows some point tenderness at the mid-dorsal area. There is diffuse tenderness in the lumbar area. Straight-leg raising is acceptable to 90°.
>
> DISCUSSION:
>
> Curiously enough I do find a very mild defect in the reflexes with the right knee jerk a little less than the left knee jerk. I did this several times and rather carefully, and even the patient and his wife noticed the difference.
>
> It could be that the L-3 root has been compromised mildly. I don't get that story out of him though. However, he is tired of sitting around and having pain. I really don't blame him, and I would be tempted to put him in the hospital and in addition to a myelogram get an EMG and certainly an MMPI.
>
> IMPRESSION:
>
> Low back strain with mildly abnormal neurological examination. (Def. Ex. A)

On November 3, 1981, Dr. Isgreen reported that the results of the EMG and MMPI were normal and that claimant had no neurological evidence of impairment. (Def. Ex. A) Claimant continued to be treated by Dr. Blenderman in October and November of 1981. On November 23, 1981, Dr. Blenderman released claimant from his care and reported the following conclusions:

> He still has a multiplicity of complaints, namely - pain in the lower thoracic region rediating around the rib cage and then going down into the groin region bilaterally, pain in the lower back with an aching sensation going into the back of both legs and an occasional sensation of numbness and tingling in the legs. He says he cannot do any work because of the discomfort in the back and the legs. He says that even if he goes shopping with his wife and stays up for several hours he has increased pain in the areas described above.
>
> The other day he said he tried to wash and wax his car and this put him in bed for three days.
>
> His examination this date reveals pain on palpation all the way from the lower thoracic through the lower lumbar region on pressure in the midline, as well as over the adjacent muscles throughout this area.
>
> He also says he has mild discomfort on palpation in both sciatic notches.
>
> Straight leg raising to 70 degrees intensifies the lower back pain and produces an aching sensation in the posterior legs, expecially the one being raised. Reflexes and sensation, however, are normal.
>
> Range of motion of the back is minimally limited on flexion, extension or lateral bending right and left. However, all maneuvers, according to the patient, give pain in the areas previously described.
>
> The patient thinks that over a lengthy period of time the discomfort in his back is somewhat better than when I first saw him, though not all that much better. I told the patient I had nothing further to offer from an orthopedic standpoint. All of his tests have been found to be within normal limits and he has had the benefit of a second opinion from Doctor Isgreen, who is unable to account for the patient's discomfort.
>
> He has had various medications, none of which have seemed to materially improve his condition.
>
> The patient wants to know what he should do if he continues to have his pain and also wants to know how he is going to live if he does not have a job to return to, since the company has already left Sioux City and he has no other means of making any money, other than his disability benefits.
>
> I told him that this was a very definite problem for him, but unfortunately, I cannot get him a new job, nor can I continue his benefits indefinitely. I told him, therefore, that I would give him a disability rating of 7 percent of the spine.
>
> I further suggested that he should contact Vocational Rehabilitation in South Dakota in an effort to gain some type of retraining. He has had a 12th-grade education and should therefore be rather easily retrained for some type of office work or sales work, which he should be able to carry out without too much difficulty.
>
> The patient asked if the insurance carrier would send him to someone else and I told him I had no knowledge as to whether they would or would not do this, but I would mention it in my report and he could contact the insurance carrier about this. However, I told him that he had already had two opinions, we have not been able to find anything conclusive and would doubt that another opinion would give much further information; though if the insurance carrier wished to pursue this further, I certainly had no objection to them referring him to another physician of their choice.
>
> We are therefore DISCHARGING the patient as of 11-23-81.

Claimant testified that following his discharge by Dr. Blenderman, he continued to suffer pain in his back which was increased by any physical labor he attempted at home. (Tr., p. 27) Dr. Smith's billing records indicate claimant resumed chiropractic treatments on November 30, 1981 and continued weekly care under Dr. Smith through April 26, 1983. The records reveal an unpaid balance of $485.00 as of the April 1983 date. (Cl. Ex. 1) Claimant testified that his temporary compensation benefits were terminated in November or December of 1981. (Tr., p. 22) After Dr. Blenderman suggested vocational rehabilitation, claimant visited the rehabilitation office in Yankton, South Dakota. He underwent testing and took some basic education courses in March 1982 to prepare for computer training. In August 1982 claimant entered a two-year course of study in computer programming at Western Iowa Technical School. (Tr., p. 25) At the time of the hearing, claimant had completed one year of that program. He testified that the vocational rehabilitation office paid his tuition and transportation expenses. Claimant stated he had not received compensation benefits from defendant insurer for his rehabilitation training. (Tr., p. 25) Claimant testified he was able to go to school in August of 1982 as he was paid a lump sum for 20 weeks by defendant insurer. (Tr., p. 26)

In May of 1983 claimant was once again evaluated by Dr. Isgreen, who noted claimant was seeing a chiropractor for the pain he experienced. Dr. Isgreen found no evidence of neurological impairment and recommended a lumbar CT scan. (Def. Ex. A) On June 1, 1983, Dr. Isgreen reported the CT scan revealed evidence of mild degenerative disc disease at several levels. Dr. Isgreen did not believe the condition was trauma associated. (Def. Ex. A) In June of 1983, claimant was again examined by Dr. Blenderman who also noted that claimant had been under the care of a chiropractor. Dr. Blenderman reported that x-rays of the thoracic and lumbar spine revealed scoliosis and spurring in the thoracic spine area. The CT scan indicated bulges at L4-5 and L5-S1, and Dr. Blenderman believed the bulges represented a spondylosis or some degenerative change in the disc. (Cl. Ex. 1) In June of 1983, claimant also consulted Horst G. Blume, M.D., a neurosurgeon, who reported the results of claimant's examination by his partner, a Dr. Rojas.

> There is evidence of spondylosis and spondylarthrosis in the thoracic spine by x-ray, which was already present in 1981, so as far as the pain in the thoracic spine is concerned, this is definitely an aggravation of a pre-existing condition; however, no arthritic or spondylotic changes were seen in the lumbar spine x-rays so we can make the presumption that the low back pain is also directly related to the accident sustained but there was no pre-existing condition that we know of.
>
> It was Doctor Rojas' impression that the patient could not go back to his former occupation as a heavy construction worker but may become a candidate for re-training for light activity. You asked in regard to the extent or rating of any permanency: the patient has a disability to the body as a whole of 8-10% temporary, but it seems that this may become permanent since the accident relates back to 1981 and no significant improvement in his condition

has been obtained. (Cl. Ex. 1)

Claimant testified that prior to his work-related injury he had only childhood diseases and pneumonia. He had a physical examination just before taking the job with defendant employer and had no physical problems. Prior to his injury he did body work on cars and refinished furniture for a hobby. He also did the handy work for his mother and his mother-in-law. (Tr., pp. 15-17) Claimant stated he was no longer active in his hobbies, and his wife now did all the work around the house. He has constant back pain and does not do much bending or lifting. (Tr., pp. 28-30)

Ann Kincaid, claimant's wife, testified that claimant no longer did the yard work or heavy scrubbing. She stated claimant doesn't roller skate or ride his bicycle now. Mrs. Kincaid noted that claimant's walk was different, and he has put on weight. (Tr., pp. 33-34)

APPLICABLE LAW

Section 85.27, Code of Iowa, provides: "The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefore and shall allow reasonably necessary transportation expenses incurred for such services."

Industrial Commissioner Rule 500-4.33 states in relevant part:

> Proof of payment of any cost shall be filed with the industrial commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs 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.

ANALYSIS

This appeal arises from a proposed decision filed December 30, 1983 in which the claimant was awarded compensation benefits based upon a finding of 15 percent permanent partial disability as a result of a July 20, 1981 work-related injury. The prior issues of causation and extent of disability, as well as vocational rehabilitation benefits have not been renewed on appeal, and the deputy's findings are incorporated into this ruling.

Defendants contend on appeal that claimant is not entitled to payment for the cost of Dr. Smith's chiropractic treatment after August of 1981. Defendants maintain that such treatment was clearly unauthorized and cannot be construed as emergency medical treatment since it continued from November of 1981 to August of 1983.

Under the provisions of section 85.27, Code of Iowa, the employer is obligated to furnish reasonable medical services to the injured employer. Defendants had initially paid for chiropractic treatment by Dr. Smith, and terminated authorization of Dr. Smith's care only because they had designated Dr. Blenderman as the treating physician. When Dr. Blenderman discharged claimant from his care in November of 1981, four months after the injury, he did not report that claimant was ready to resume his regular work duties or that no further medical treatment was indicated. He did report to defendants that claimant continued to suffer debilitating pain; that he could do nothing further for claimant; and that claimant was seeking referral for further medical care. There is no indication in the record that defendants at that time or during the following 16 months offered claimant alternative medical services although they knew or should have known through the reports of Dr. Blenderman that claimant believed he was in need of further medical assistance for his pain. It was only after claimant's treatment had been abandoned by Dr. Blenderman that claimant returned to the care of Dr. Smith. The record substantiates that claimant continued to experience back pain which limited his activities during 1982 and 1983, a period for which claimant has been awarded permanent partial disability benefits. Claimant received some relief from this pain through chiropractic treatment as he made commendable effort to gain new vocational skills. The evidence supports a finding that claimant is entitled to the costs of such care. Claimant has submitted an unpaid bill from Dr. Smith in the amount of $485.00 which covers treatment from November 30, 1981 to April 26, 1983. Such amount was stipulated as fair and reasonable and is chargeable to defendants.

FINDINGS OF FACT

1. Claimant is a 37 year old married man with one dependent.

2. Claimant has a GED.

3. Claimant's previous work experience was in the areas of general labor and truck driving.

4. Claimant incurred a back injury on July 20, 1981 while working for defendant employer.

5. Claimant received chiropractic care from Dr. James Smith through August of 1981.

6. Defendants referred claimant to Dr. Albert Blenderman in August of 1981 and terminated authorization of care by Dr. Smith after August 1981.

7. Dr. Blenderman treated claimant for pain in the thoracic and lumbar spine region until November 23, 1981 at which time he discharged claimant from his care.

8. Claimant continued to suffer back pain which was causally related to his July 1981 work injury.

9. Claimant discussed his concern for continuing medical treatment with Dr. Blenderman.

10. Defendants did not offer claimant alternative medical services after his discharge by Dr. Blenderman.

11. Claimant returned to the care of Dr. Smith in November of 1981 and received weekly chiropractic treatments for relief of his back pain.

12. Claimant has been engaged in a vocational rehabilitation program since March of 1982.

13. Claimant is entitled to healing period benefits from July 20, 1981 to November 24, 1981.

14. Claimant is entitled to compensation benefits based upon a finding of 15 percent permanent partial disability.

15. Claimant is entitled under the provisions of section 85.27, The Code, to payment of chiropractic expenses incurred between November 30, 1981 and April 26, 1983.

16. The applicable rate of compensation is $245.05 per week.

CONCLUSIONS OF LAW

WHEREFORE, it is found:

Claimant has established that his injury of July 1981 is the cause of the disability on which he now bases his claim.

Claimant is entitled to healing period benefits from July 20, 1981 to November 24, 1981.

Claimant is entitled to permanent partial disability resulting from his injury of July 20, 1981 of 15 percent.

Claimant is entitled to payment of expenses incurred in chiropractic treatment.

THEREFORE, the proposed decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

Defendants are to pay claimant additional permanent partial disability benefits for seventy-five (75) weeks at a rate of two hundred forty-five and 05/100 dollars ($245.05) per week to commence November 24, 1981.

Defendants are to pay accrued amounts in a lump sum.

Defendants are to pay chiropractic costs of Dr. Smith in the amount of four hundred eighty-five dollars ($485.00).

Defendants are to pay interest pursuant to Iowa Code section 85.30 as amended.

Defendants are to pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Defendants are to file a final report when this award is paid.

Signed and filed this 13 day of July, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAVERNE KREUTZER,	
Claimant,	
vs.	FILE NO. 706776
JOHNSON GAS APPLIANCE COMPANY, 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
IOWA NATIONAL MUTUAL INSURANCE COMPANY,	
Insurance Carrier, Defendants.	

INTRODUCTION

This is a proceeding in review-reopening brought by LaVerne Kreutzer, claimant, against Johnson Gas Appliance Company, Inc., employer, and Iowa National Mutual Insurance Company, insurance carrier. Claimant seeks further benefits based upon the injury which occurred on April 7, 1982. Claimant's rate of compensation is $232.62 per week as established by the memorandum of agreement on file and by the stipulation of the parties.

The hearing commenced May 25, 1984 at the Iowa County Courthouse in Marengo, Iowa. Claimant appeared in person with his attorney, Ronald W. Wendt. Defendants appeared through their attorney, Robert M. Jilek. The case was considered fully submitted upon conclusion of the hearing.

ISSUES

The issues presented by the parties at the time of hearing are a determination of the nature and extent of any disability which claimant may have which is causally related to the injury. Also in issue is an assessment of the costs of the action. The parties stipulated that claimant's healing period was terminated by a return to work on October 4, 1982. Based upon the Form 2A, which is in the agency file of this case, it appears that claimant has been paid benefits for a permanent partial disability of 28 percent of the arm. The primary issue in this case is a determination of whether claimant's disability should be measured industrially or as a disability to a scheduled member. The evidence upon which the issues must be resolved consists of the testimonies of LaVerne Kreutzer, Beverly Kreutzer, Tom Davis, Paul Saylor and Beryle Brown. Also admitted into evidence are claimant's exhibits 1 through 21, of which 1 through 16 are exhibits to the deposition of Fred J. Pilcher, M.D., which is exhibit 21. Also in evidence is defendants' exhibit A. Defendants' objection to the results of the CYBEX testing is overruled. The same appears to be a diagnostic and evaluative device commonly used by the medical profession, even though its results may be less than perfect.

REVIEW OF THE EVIDENCE

LaVerne Kreutzer testified that he is presently 64 years of age and was 61 years of age at the time the injury occurred on April 7, 1982. He stated that he is married and has no dependents other than his spouse. He related that he completed his formal education at the eighth grade level. He described his work history as including work as a stockboy in a drugstore, welding, operating a bulldozer and making cigarette lighters before commencing employment with Johnson Gas in 1946. While with this employer he has worked in the machine shop operating a punch, drill press and other machines. He has also worked as a seam welder, placed firebrick in furnaces, mixed cement and worked in the packing and shipping department. He described most of the positions as heavy work which required lifting in the range from 35 pounds up to as much as 300 pounds. He is presently assigned to the assembly department where he works testing burners.

Claimant stated that prior to his injury he could lift heavy weights and objects, as much as 200 pounds, without assistance and denied having any problems with his back, arms, legs or neck. He related that his only medical problem was high blood pressure which was controlled by medication. He stated that prior to the injury he could perform every job at his employer's place of business and, over the years, had worked in every department.

Claimant stated that the injury occurred when he was using a staple gun while working in the shipping department. He described pushing down to staple the lid of a box when he moved the gun off the edge of the box and fell to the floor landing with his left hand on the gun. He stated that when he hit the floor it felt as if he had torn everything from his fingers to the back of his left shoulder blade.

Claimant stated that he reported the incident to his foreman and other supervisors who suggested to him that it was merely a sprain. He stated that he kept working and worked for approximately two months using only his right arm. He described experiencing continuous pain running from the back of his shoulder down to his hand. Claimant stated that when he awoke on June 10, 1982 his whole arm was black and blue. He reported the same to the office at work and was seen by Fred J. Pilcher, M.D., that same day.

Claimant stated that at that time his bicep muscle was in a big ball by the elbow. He reported having surgery on June 29, 1982 and exhibited a scar on his shoulder approximately four inches in length running vertically from the armpit. He reported making gradual improvement until February, 1983 when he experienced severe pain and consulted Dr. Pilcher. After consulting the doctor, it was determined that the surgical staple used to repair the arm had pulled loose but that further surgery was not adviseable.

Claimant testified that he returned to work October 4, 1982 and has continued to work since. He related that he can use his left arm only as a guide and that he continues to experience pain in his arm and shoulder. He reported a burning sensation below the shoulder and stated that the pain runs from the back of the shoulder to the elbow when he uses the arm. He demonstrated the ability to raise his left arm to an angle of approximately 45 degrees from his body when the elbow is held straight and to nearly 90 degrees if the elbow is bent. He demonstrated the ability to move his left hand to approximately the belt line in the middle of his back.

Claimant testified that his present job as a tester would normally involve lifting as much as 40 pounds but that another worker does that lifting for him. He occasionally performs other work which involves handling weights in the range of 15 pounds. He confirmed that the employer has not requested that he perform tasks which are beyond the medical restrictions and confirmed that he receives help from other workers when needed.

Claimant testified that he presently earns $9.83 per hour and that he was earning $9.62 per hour at the time of the injury. He confirmed that he has been classified as a tester for 15 years and is performing many of the same duties now as he performed prior to the injury. He stated that he is right handed and denied the occurrence of any other injury to his arms or shoulders. Claimant stated that he enjoys working and would not be satisfied with staying home. He stated that he plans to continue working until age 70, the mandatory retirement age at his place of employment. He stated that he has no plans to retire and has not applied for social security benefits.

Claimant testified that since the injury he has tried but has been unable to play golf. He stated that he can fish although it is difficult to do so. He reported that he cannot start the lawnmower at home and that he even uses his right hand to turn on the turn signals in the car when he is driving.

Claimant identified exhibits 17, 18 and 19 as bills which he has paid in the prosecution of this case.

Beverly Kreutzer was called to testify. She had not been listed as a witness and defendants' objection to allowing her to testify was sustained. Her testimony was taken as an offer of proof but is not considered in this decision.

Thomas Davis testified that he is a general laborer at Johnson Gas where he has been employed for 27 years. He related being acquainted with claimant and having worked with him occasionally under varied circumstances. He stated that before claimant's injury, they worked in the same area and were within sight of each other. He confirmed that over the years claimant had performed practically every job in the place, some of which required heavy lifting. He stated that since the injury claimant favors his left arm noticeably and requires help when lifting. He related that claimant makes no complaints and rarely requests help. He described claimant as a hard worker who seems to enjoy working and, that prior to the injury, he was very strong for his age and size.

Davis confirmed that the employer encourages the employees to help each other as needed and that there has been no adverse action taken against claimant as a result of his reduced work capacity or need for assistance.

Paul Saylor testified that he has worked at Johnson Gas for 22 years, is acquainted with the claimant and has observed the claimant occasionally for the last 16 or 17 years. He stated that prior to the injury claimant was a "go getter" and did not exhibit any signs of weakness or difficulty in working. He related observing claimant pull a box of parts which weighed approximately 400 pounds.

Saylor stated that claimant now requires help on many occasions although he is reluctant to request help. He stated that claimant tries to work as he did before and does not complain about his condition. He agreed that the workers at the facility are encouraged to help each other.

Beryle Brown testified that he has been employed at Johnson Gas for approximately 18 years and that he has been claimant's supervisor over the past several years. He confirmed that it is the general policy of the company to encourage the employees to help each other, particularly with heavy lifting as was described by Davis and Saylor. Brown confirmed that claimant generally does not request help and that he has assisted him on occasion. He stated that claimant is now assigned to the same job as before the injury and that claimant's wage rate has not been adversely affected by the injury. He confirmed that since the injury claimant has obvious difficulty using his left arm and

that prior to the injury such difficulties did not exist.

Brown testified that claimant is a good worker, well motivated and likes to get the job done and done properly. He stated that he is as aggressive now as before the injury but that his limitations do slow him down. He also agreed that there are now jobs in the facility which claimant is physically unable to perform.

Exhibits 1 through 16 are a number of medical reports from Dr. Pilcher. The reports relate claimant's treatment including the circumstances of the injury consistent with claimant's testimony and initial evaluation of 18 percent permanent impairment of the upper extremity which was equivalent to 11 percent of the whole man as shown in exhibit 5. Exhibit 6 relates discovery that the staple had become dislocated. Exhibit 9 shows his reluctance to perform a second surgery. In exhibit 12 Dr. Pilcher opines that claimant has a 28 percent impairment of the upper extremity which converts to 17 percent impairment of the whole man. Exhibits 1 through 16 contain a continuing discussion upon the issue of whether claimant's injury is limited to the arm or whether it includes his shoulder.

Claimant's exhibit 21 is a deposition of Dr. Pilcher which was taken February 28, 1984. In the deposition, at the pages indicated, Dr. Pilcher explains the actual location of the injury which claimant suffered and the results of that injury. They may perhaps be best summarized as stating that claimant had degenerative changes in the acromium clavicular joint which caused him pain, that the injury itself was located in the bicep muscle tendon at a point where the tendon and the muscle join near the upper portion of the humerus. The testimony in the deposition further reflects that the injured tendon attaches to the scapula at the upper end and around the elbow at the lower end. The doctor relates that a loss of motion in the shoulder is a result which normally follows from an injury of the type claimant suffered although there is no actual injury to the shoulder itself. In the deposition the doctor made the following statements:

> I reviewed his X-rays and it showed that he did have some degenerative changes or some arthritis if you will, over the A.C. joint, acromium clavicular joint, more so when compared with the assymptomatic right side and he was tender in that area.
>
> ...
>
> I feel that his discomfort at that time was partially related to his shoulder joint, the acromial clavical joint and the sub acromial bursa. I could in no way absolutely say it has any direct relationship with the biceps tendon.

(Deposition page 17, lines 1-6 and 12-17)

> ...It's a big operation, you have to work down into the arm. And to get normal motion after an operation like that would not be expected. You would expect near normal motion. So in that respect, he lost motion from the biceps tear and the subsequent surgery.

Q. And we are referring to the motion in the shoulder itself?

A. Right.

Q. When you said earlier that when you performed this surgery, part of the surgery was in the shoulder, could you explain specifically where in the shoulder the surgery occurred and why it was necessary to have surgery in this area of the shoulder?

A. The biceps tendon hooks around the elbow and goes up the upper arm and across the shoulder joint and has basically two places it hooks in, and they are both on the shoulderblade but it was torn free from the long head. That is, the section that goes up over the joint was torn free.

Now, did I not operate in the joint itself. I stayed out of that completely, but in order to do the surgery, to retrieve this tendon which had migrated or slipped down into the arm, you have to dissect away a fair amount of tissue just to get to it. It's hard to find because it goes down inside.
Dep., p. 22, ll. 14-25 and p. 23, ll. 1-16)

A. Actually, the tendon turns into the biceps muscle and as I mentioned in the operative report, one of the things that made it hard to even treat is, it had torn near the musculo-tendinous junction, and it didn't tear really up here. It tore more down where the tendon turns into muscle.

Q. And where would that be located, can you tell us? Were you pointing to it?

A. It would be the upper one third of the humerus.

Q. So actually when we are looking at the humerus, being the bone between the elbow and the shoulder joint, about one third down from the shoulder joint towards the elbow is where this is torn?

A. Oh, I'm sorry, it would be -- well, that would be about right. Maybe one fourth.

Q. But definitely on the humerus bone or arm section and not up into the shoulder section?

A. Oh, no, nowhere near the shoulder.
Dep. p. 38, ll. 8-25)

A. Well, I think the main component of his -- the main reason Laverne Kreutzer had a loss range of motion in his shoulder was because he had a biceps tendon rupture. The other thing is he had these underlying conditions, the acromial clavicular joint arthritis, which he said never bothered him before. The arthritis is only mild. It's worse on the other side and it's all relative, but his age, I mean you can blame him for being as old as he is, as far as that goes.

He would not tolerate immobilization as well as a younger person. I just don't feel that his arthritis, if you want to call it that, or his abnormality in the acromial clavicular joint has that much to do with lost motion in the shoulder. He hadn't hurt it, he was tender over it many times, but he had had that for years. That didn't just occur in a year, that has been there for many, many years.

Q. If the issue is, and I'm not so sure it is, I'll preface the question with that, if the issue is whether or not any injury he suffered at work extends beyond the shoulder joint itself, in your opinion, was there any injury work related which extended beyond the shoulder joint of this particular patient?

A. No.

Q. Whatever injury he has was either in the biceps or the arm or the shoulder joint itself and stops at the shoulder joint?

A. Those are the injuries, right.

Q. And nothing included in the clavicular area or the back area or the neck area?

A. No (Indicating). He came in with the biceps tendon rupture, that was his injury. Absolutely, no doubt about it, that was the injury that he had.
(Dep. p. 47, ll. 6-25 and p. 48, ll. 1-17)

I don't know how he is doing but you can't operate on a shoulder of a man sixty-two years old who has had a biceps tendon rupture, who had it fixed, who is immobilized, who goes through the physical therapy and not lose motion in his shoulder.

I mean, I wish we could. And I don't know, I don't know if you want to be a devil's advocate, but he may have not had any better motion in his shoulder prior to hurting the biceps tendon, I don't know.

I never saw the man here. I'm speaking probabilities here. Anything is possible. He could get hurt going to therapy, he would need other physicians' records and talking to Laverne, but he told me he never had any trouble with his shoulder but I can't isolate the humerus from the shoulder joint because the humerus is part of the shoulder joint.

Q. And so what we are talking about is ball and socket again, the ball being the humerus, that's what you are saying was involved because of the loss of motion and the socket itself?

A. The humerus did not lose motion. The humerus is a bone that sits in the arm. The shoulder lost motion.

Q. Thank you, that's more accurate.

A. See, the humerus has no motion by itself. Okay, you have to have -- the humerus is one half of the shoulder joint, maybe that's what we need. But I guess that's all I can say, the humerus lost no motion, all right? It's the shoulder that controls the motion because the humerus is one half of the shoulder joint.

If we didn't have the humerus, there would be no motion at all, no shoulder joint either, see.

Whatever you apply to the upper humerus, as far as motion of the humerus, has to relate to the shoulder joint. The lower end relates to the elbow. If it was the elbow, it would be easier to deal with.

...

Q. Is the shoulder joint a part of the shoulder?

A. Yes.

Q. And in your letters referring to the injury in this case when you used the term upper extremity, did you mean for that term to include not only the arm but also the shoulder?

A. The only time I really used the upper extremity in those words, as I recall, was when I gave him a permanent disablity rating and I have to apply that according to the texts, the books that we have. We do not have a category of shoulder impairment as such.

It relates to the upper extremity so you know, the upper extremity in the evaluations deal with the humerus and the shoulder joint.

Q. Is the condition to Mr. Kreutzer's shoulder a permanent condition?

A. Yes.
(Dep. p. 49, ll. 3-25, p. 50, ll. 1-18 and ll. 22-25, and p. 51, ll. 1-14)

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 7, 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).

At page four of his deposition Dr. Pilcher notes that he was aware that claimant's condition was a "workman's [sic] compensation related injury". Although the history related in some of the exhibits refers to lifting rather than the fall claimant described at hearing, it is apparent that the tear of the bicep tendon is the result of an injury which the claimant suffered at work. There is no evidence in the record to the contrary.

The primary issue in this case is a determination of whether claimant's disability is to be measured as disability to a scheduled member or if the same is to be measured industrially. Section 85.34(2)(m) states: "The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks." Section 85.34(2)(u) states: "In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the disability bears to the body of the injured employee as a whole." It should be noted that the statute speaks in the terms of "the loss of" and not in the terms of "an injury to". The phrase "the loss of" is construed to mean the loss of the use of whatever member is involved. An injury to the shoulder is an injury to the body as a whole. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Alm the injury was to the collar bone.

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability.

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).

This case differs, however, from Kellogg in that Dr. Pilcher has medically confirmed that the loss of motion in claimant's shoulder joint is related to the injury to the bicep tendon which occurred in claimant's arm. In his deposition he also indicates that the impairment of the shoulder is permanent. In Barton the injury or trauma was to the foot; however, a circulatory ailment which resulted was held to require that the disability be measured industrially. In Daily there existed as a result of a fracture of the femur a compensatory tilting of the pelvis and curvature of the spine. Claimant has degenerative changes in his acromium clavicular joint but Dr. Pilcher is unwilling to relate those to the injury to the bicep tendon as shown at page 20 of his deposition. There is no medical evidence in the record which shows that any alteration of claimant's body occurred beyond the shoulder joint. The range of motion upon which the impairment was determined was actually the motion of the arm measured at the point of the shoulder joint. The strength testing which was performed actually measured the strength with which the upper arm moved in the shoulder joint. The definition of the scheduled member begins at the shoulder joint. It is found and concluded that claimant's impairment does not extend into the body as a whole and that his compensation should be measured under the provisions of section 85.34(2)(m) of the Code of Iowa. Dr. Pilcher imposed an impairment rating of 28 percent of the upper extremity. Such appears reasonable under the record in this case and will be adopted.

The costs of this proceeding as shown in exhibits 17, 18 and 19 are proper except that the fee for the deposition should be limited to $150.00 in accordance with section 622.72 of the Code of Iowa and Industrial Commissioner Rule 500-4.33(5). The resulting total of reimburseable cost is therefore $351.90. This case involves an extremely close question of law and the costs will be assessed against the defendants under the provisions of Industrial Commissioner Rule 500-4.33 even though their defense of this proceeding was successful.

FINDINGS OF FACT

1. Claimant is a resident of the State of Iowa and his place of employment at the time of injury was in the State of Iowa.

2. Claimant was injured on April 7, 1982 when he fell and tore his bicep tendon.

3. Following the injury claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from June 11, 1982 through October 3, 1982, both dates inclusive, when claimant returned to work with his employer.

4. As a result of the injury claimant suffered a permanent partial functional impairment of 28 percent of his left arm.

5. The injury claimant suffered was located at a point where the bicep tendon joined the bicep muscle near the upper one-third of the humerus.

6. The injury caused a loss of motion and loss of strength at claimant's left shoulder.

7. The injury did not cause any structural change which extended beyond his arm.

8. The loss of motion and strength from which claimant suffers is permanent.

9. As shown by the Form 2A filed July 28, 1983, claimant has been paid for a 28 percent permanent partial disability of the left arm.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and its parties.

Claimant has failed to prove that the injury he sustained on April 7, 1982 extended beyond his arm and into his body as a whole. Claimant's disability is therefore properly evaluated as a scheduled member disability under the provisions of section 85.34(2)(m) of the Code of Iowa.

Claimant is entitled to receive 70 weeks of compensation for permanent partial disability at the rate of $232.62 per week commencing October 4, 1982.

The amount of costs which may be reimbursed to claimant are $351.90.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant seventy (70) weeks of compensation for permanent partial disability at the rate of two hundred thirty-two and 62/100 dollars ($232.62) per week commencing October 4, 1982. Defendants shall receive full credit for all amounts previously paid.

IT IS FURTHER ORDERED that defendants pay any portion thereof which has not been previously paid in a lump sum together with interest pursuant to section 85.30 of the Code of Iowa.

IT IS FURTHER ORDERED that the costs of this proceeding in the amount of three hundred fifty-one and 90/100 dollars ($351.90)

are assessed against defendants, the same to be paid to claimant in accordance with 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 30th day of July, 1984.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS LAMBORN, Claimant, vs. COHRON & SONS, INC., Employer, and WESTERN FIRE INSURANCE, Insurance Carrier, Defendants.	:	File No. 604280 A P P E A L D E C I S I O N

FILED
JUL 20 1984
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a proposed decision in review-reopening wherein claimant was denied further healing period and permanent partial disability benefits. The deputy found that claimant was not entitled to benefits pursuant to section 86.13, Code of Iowa.

The record on appeal consists of the transcript of the review-reopening proceeding, claimant's exhibits 1 through 10 inclusive, defendants' exhibit 1, and the briefs and filings of the parties on appeal.

ISSUES

Claimant states the issues as:

> The claimant's injury and disability, caused by this work-related incident extends into and beyond the right hip joint. As a consequence the extent of claimant's disability is determined under the terms of §85.34(2)(u) and the concept of industrial disability as defined by the Iowa Supreme Court is applicable.
>
> As a direct and proximate result of the injury of September 10, 1979, Thomas Lamborn has sustained an industrial disability of substantial proportions.
>
> The claimant's gross weekly wage should include the value of the "on the road lodging" which the employer furnished claimant.
>
> The defendants acted without reasonable or probable cause or excuse in failing to pay weekly compensation benefits based on a disability extending into the body as a whole.

REVIEW OF THE EVIDENCE

The parties stipulate that defendant insurer has paid benefits for a 40 percent permanent partial disability of the lower right extremity. (Transcript, page 7) The parties further agree that portions of the deposition of claimant taken on March 18, 1983 may be used as a part of the evidence in the review-reopening proceeding. (Tr., pp. 130-131)

Claimant was 45 years old at the time of the hearing. He is married and has one dependent child. (Tr., pp. 15-16) Following graduation from high school, claimant worked as a general laborer and served four years in the navy as a radio man. (Tr., pp. 16-17) He then worked in construction and as an electrical linesman for two utility companies. Claimant testified his work involved climbing poles and heavy lifting. (Tr., pp. 19-21) He worked as an electrician in home wiring until 1979, when he went to work for defendant employer. Claimant stated he was hired for general labor in bridge construction around May 1, 1979. (Tr., pp. 22-23) He worked on projects in Bridgewater, Wapello, and Oskaloosa. Claimant testified that when he worked on a project that wasn't within commuting distance of his home, he would stay in campers provided by the employer. Claimant explained that employees working away from home worked four and a half days and could quit just before noon on Friday in order to have a longer weekend at home. (Tr., pp. 23-25) On September 10, 1979 claimant was working for defendant employer in Marengo. His duties included carpentry and electrical work and required the lifting of weights up to 150 pounds. (Tr., pp. 25-26) While working, claimant fell through the decking of the bridge to the ground. He was taken to Marengo Hospital and from there transferred by helicopter to Methodist Hospital in Des Moines. (Tr., pp. 25-26)

Claimant was diagnosed as having suffered a subtrochanteric fracture of the right hip. On September 11, 1979 an open reduction and internal fixation of the femoral fracture was performed by Ronald K. Bunten, M.D., an orthopaedic surgeon. (Claimant's Exhibit 1) Claimant spent ten days in the hospital and was discharged on crutches. (Tr., p. 28) His progress was followed by Dr. Bunten, who noted on May 16, 1980:

> He is progressing slow with endurance. He uses a cane most of the time. Not having much pain but
>
> Examination shows he walks with a mild antalgic gait unsupported, much better with the cane in the opposite hand. He measures one inch short spine to malleolus. There is no fixed flexion deformity with good rotation and further flexion to beyond 120 degrees. No unusual tenderness is noted.
>
> Two views of the right hip show further healing and mild varus position which is stable. Hardware looks satisfactory.
>
> He will do some flexion, abduction, and extension exercises for the hip muscles and continue working on endurance and weight bearing. I don't think he will be likely able to return to vigorous construction work activity in the several months ahead, but we will reassess in two months. (Cl. Ex. 1)

Dr. Bunten continued to see claimant periodically and on December 10, 1980 reported:

> He continues limited in his endurance in ability to carryout [sic] ambulatory activities. He works some pulling and assisting with fence post removal, but after about 2-3 hours had to rest. Most of his discomfort seems centered on the lateral aspect of the hip where there is some tenderness over the hardward [sic]. He has a short leg limp, but has an antalgic component when unsupported. He does much better with a cane or crutch in the opposite hand.
>
> Films of the hip were not obtained today. The old films were reviewed and the fracture appears satisfactorily healed.
>
> I think he might be improved with removal of hardware and details were discussed. Arrangements were made to carry this out on January 6, 1981, at Methodist Hospital. (Cl. Ex. 1)

Testifying by deposition, Dr. Bunten stated that the hardware consisted of a Smith-Peterson nail, a Thornton side plate with screws, and a wire affixed to the upper part of the femur. (Cl. Ex. 10, p. 7) On January 6, 1981 Dr. Bunten performed surgery to remove the hardware. On June 24, 1981 he discharged claimant from his care. (Tr., p. 51) Dr. Bunten's final report states:

> He continues to have a limp and some discomfort on the lateral aspect of his thigh. He may be some improved with hardware removal. He continues to use a cane in the opposite hand for endurance. He

is unable to lift and carry items that are heavy, more than just a few steps because of weakness and limp in the right leg.

Examination shows that he has an external rotation short leg type of gait which is better with a cane in the opposite hand. He is not wearing his lift today, but generally does so. He is about 1½" short. His range of motion about the hip is only mildly restricted and his range seems painless.

Films of the hip in two views shows [sic] the fracture to remain soundly healed without the hardware. There is no evidence of arthritic change in the hip. There is a mild varus present.

I am not sure why he isn't doing a bit better. I expected him to have a better gait and better function. I think he probably has reached his maximum improvement. I would rate his lower extremity as 40% impaired, but I think he is 100% industrially disabled by the condition of his left leg. I think he would be a candidate for Vocational Rehabilitation and training for sedentary sorts of work activity. (Cl. Ex. 1)

Dr. Bunten testified that claimant may have suffered injury to the muscles of the femur and pelvis.

Q. Now, you have mentioned in the course of Mr. Hanssen's examination that some of the muscles that may have been injured along with the fracture had attachments in the pelvis as well as, I assume, in the femur, is that right?

A. Yes.

Q. Now, with regard to those muscles, I was not clear from your testimony before whether you were deducing that there had been injury to the muscular structure or whether you were describing your observations as to the muscular structure. Could you clarify that for me?

A. I think I was deducing principally, knowing something about the magnitude of these injuries, that there almost has to be injury and bleeding and subsequent scarring in the surrounding muscles. I don't think I have any specific information learned at the time of his operative treatment. I think some of his restricted motion, his external rotation posturing and so on might be evidence of some scarring and restricted flexibility due to scarring in these muscle groups. (Cl. Ex. 10, pp. 17-18)

Dr. Bunten did not find evidence of physical impairment to the pelvis itself.

Q. Did you find any physical impairment to the pelvis?

A. None that I would specifically assign to the pelvis, no.

Q. Did you find any physical impairment to the head of the femur or the socket of the pelvis?

A. None that I would assign to the joint surface, no.

Q. Or did you find any physical impairment to the ligaments or cartilage or other soft tissues surrounding the head or socket?

A. No.

Q. Did you find any injury to the tendons or ligaments or muscles or other soft tissues except those injuries which you indicated were in the area of the fracture, that is, the area of the upper part of the femur?

A. No. Except I think he has restricted motion about the hip and I think that's in part due to the injuries of the soft tissues in the area of his injury. (Cl. Ex. 10, pp. 20-21)

On May 6, 1983 claimant was examined by Thomas B. Summers, M.D. (Cl. Ex. 5) Dr. Summers found weakening and atrophy of the right thigh. He noted that claimant limped when walking and used a cane for support. Dr. Summers reported: "He states he has continued to have pain in the right hip. The pain becomes more intense and severe the longer he is upright. Weight bearing also aggravates the pain and discomfort. He states that numbness extends into his back and at times into his neck."

Dr. Summers noted that the contour of the lower spine was normal and that claimant could bend well in all directions. (Cl. Ex. 5)

CLINICAL IMPRESSIONS: 1. Status post-traumatic inter-trochanteric fracture involving the right femur and with resulting deformity, as narrated above.

2. Post-traumatic arthropathy, secondary to #1.

3. Myofacial strain, lumbar, secondary to #1.

DISCUSSION: The injury and resulting deformity, pain and discomfort do involve primarily the right lower extremity.

There is clinical evidence of proximal muscle weakness involving the right lower extremity and particularly the abductor muscle group, that is the gluteus medius muscle group. The various muscle groups which serve to execute functional movement of the thigh on the pelvis, at the hip joint level, do originate in and about the region of the corresponding hemipelvis. Anatomically, this must be considered a part of the torso or trunk and not structures of the limb, per se. Not unlikely, the distress in the lower back which Mr. Lamborn refers to as a 'numbness' is that of a myofascial strain and is secondary to the abnormal posture brought about by the fracture and resulting deformity including the shortening of the right lower extremity.

Insofar as loss of motion for the right hip joint is concerned, the impairment of the right lower extremity is approximately 30%. Other conditions or disabilities must be considered, however, including the pain and discomfort, the consequent shortening of the right lower extremity and resulting gait disturbances, the strain on the lumbar spine and so on. For this reason, it is my feeling that the functional impairment of the body taken as a whole is approximately 25%. (Cl. Ex. 5)

Claimant testified he can only walk two to three blocks before he incurs pain in his leg, hip and lower back. (Tr., p. 32) He can stand for up to an hour, and can sit for an hour to an hour and a half. Claimant stated he usually sits for a half an hour and then changes position by standing or walking around. (Tr., pp. 32-34) Claimant stated he had driven himself from his home in Fontanelle to Des Moines for the hearing, a distance of 65 miles. (Tr., p. 50) He testified he is aware of the jobs available in his community and does not believe he could physically handle them. He has not considered relocating as he owns his own home, and his wife works at a local medical clinic. (Tr., pp. 37-39) He testified he had contacted one employer a couple of years ago to inquire about light work. (Tr., pp. 54-55) He has not made inquiry into any kind of training programs. (Tr., p. 60) Defendant employer's supplemental information report indicates that at the time of injury, claimant's gross weekly wage was $226.15. Claimant has been paid 93 2/7 weeks of healing period benefits and 88 weeks of permanent partial disability compensation.

Patricia McCollum, a registered professional nurse and job development specialist, testified she made an employability assessment of claimant in September of 1982. (Tr., pp. 73-75) In her report of September 27, 1982, Ms. McCollum stated that claimant had transferrable skills in communications, electrical work and mechanics, all of which could be developed. (Cl. Ex. 6) Ms. McCollum testified claimant was cooperative at his interview but expressed feelings of hopelessness with regard to what he could do. (Tr., p. 81) Ms. McCollum stated that she was aware of employment opportunites in claimant's area and that opportunities were generally limited. She did not find any work available in Greenfield, Corning or Creston that claimant could do. (Tr., pp. 84-92) Jobs within claimant's physical limitations paid minimum wages. (Tr., p. 92) Ms. McCollum believed aptitude and interest testing needed to be done before she could recommend an educational program for claimant. (Tr., p. 93)

At the request of defendants, Roger Marquardt, director of North Central Rehabilitation Service, prepared a vocational evaluation of claimant based in part on the reports of Drs. Bunten and Summers and of Patricia McCollum. Mr. Marquardt also interviewed claimant on July 22, 1983. (Def. Ex. 1) Mr. Marquardt reported that claimant has knowledge in basic electrical current and wiring and could utilize his skills for sedentary work in small appliance repair, bench assembly and wirework. Claimant could also work as an electrical production inspector. The entry level wage averages $5.50 an hour. Mr. Marquardt stated that availability of this work is limited in claimant's residential area. (Def. Ex. 1) If claimant does not utilize his electrical skills, unskilled, light work in his area would pay approximately $3.60 an hour. Mr. Marquardt estimated that claimant's former job in bridge construction now pays approximately $6.20 per hour. (Def. Ex. 1)

A stipulation of evidence, signed by the attorneys for claimant and defendants, was filed on January 11, 1984. The stipulation states that Keith Harlan, vice-president of defendant employer, if called as a witness, would testify that small mobile trailers were provided for lodging of employees who worked at out of town construction sites. Employees were not required to use the trailers. After claimant left the employ of defendant employer, the use of the trailers was discontinued and employees received $20 a week for lodgings. It is not stipulated that the value of the lodging is allowed to be included in gross weekly earnings for rate computation purposes.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 10, 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 injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton, 253 Iowa 285, 110 N.W.2d 660; Dailey, 233 Iowa 758, 10 N.W.2d 569.

Section 85.34(2)(o), Code of Iowa (1979) states: "The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred twenty weeks."

Section 85.61(12), Code of Iowa, provides: "'Gross earnings' means recurring payments by employer to the employee for employment, before any authorized or lawfully required decuction 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."

ANALYSIS

Claimant contends in his first issue on appeal that his disability extends into and beyond the right hip joint. Under the provisions of section 85.34(2)(o), The Code, a loss extending into the hip joint is compensated as a loss to a scheduled member. Therefore, claimant's burden is to show an impairment which extends into the body beyond the juncture of the femur and the pelvis.

Dr. Bunten, an orthopedic specialist and the treating physician, has testified that the fracture to the femur was sustained below the intertrochanteric line, which is an area below the head and neck of the femur. Dr. Bunten has also testified that he found no evidence of impairment to the pelvis or of damage to the ligaments, tendons and muscles beyond the fracture area. Dr. Bunten speculated that other muscle groups may have been damaged by the injury, and if damaged, could be a contributing factor in claimant's restricted motion, but conceded that the only injury to soft tissue he had observed was limited to the area of the fracture in the upper part of the femur.

Dr. Summers, who saw claimant once for purposes of evaluation, determined a 25 percent impairment of the body as a whole. Dr. Summers confined claimant's loss of motion in the lower extremity to the hip joint but included a lumbar strain in his impairment rating, based upon claimant's complaint of "numbness" in his lower back and neck. Dr. Summers' only objective findings with regard to the lumbar spine were that the contour was normal and claimant could bend well in all directions. There is no medical testimony as to the nature of claimant's numbness or to its limiting effects, if any, on claimant's ability to engage in physical activities. Absent evidence that claimant is physically restricted by the numbness he reports, no finding of disability that extends to the body as a whole is possible. The deputy's finding that claimant is entitled to benefits based on a 40 percent permanent partial impairment of the right lower extremity is accepted as correct.

Since claimant's injury represents a scheduled loss, this decision does not reach the question of extent of industrial disability.

Claimant asserts in his third issue that claimant's gross weekly wage should include the value of the lodging provided by defendant employer. The statement of Keith Harlan indicates that lodging was made available to the employees should they choose to use it. Under the definition of gross earnings as provided under section 85.61(1), The Code, such lodging could not constitute recurring payment for employment and the value of such lodging may not be computed as gross earnings. Claimant's rate of compensation, as found by the deputy, is $144.78 per week.

Claimant's last issue on appeal addresses the failure of defendants to pay compensation benefits based on a body as a whole disability. Claimant demands application of the penalty provisions of section 86.13, The Code. Since defendants have already paid the benefits due for healing period and permanent partial disability compensation, the penalty provision is not applicable.

FINDINGS OF FACT

1. Claimant was injured on September 10, 1979 while working for defendant employer.

2. Claimant has sustained a subtrochanteric fracture of the right leg.

3. Claimant underwent surgery for an open reduction and internal fixation for the femoral fracture.

4. Claimant continued to suffer pain and walked with a limp due to a shortened right leg.

5. On January 6, 1981 surgery was performed to remove the hardware in the upper part of the femur.

6. Claimant continued to limp and had discomfort in the thigh.

7. On June 24, 1981 it was medicaly indicated claimant had reached maximum improvement.

8. Claimant has an impairment of 40 percent of the lower right extremity.

9. Claimant has been paid 93 2/7 weeks of healing period benefits for the work-related injury.

10. Claimant has been paid 88 weeks of permanent partial disability compensation based on a 40 percent loss to the lower right extremity as a result of the work-related injury.

11. Defendant employer provided trailers for overnight lodging to employees who worked away from home.

12. The value of the lodging may not be included in gross earnings as contemplated under section 85.61(12), Code of Iowa.

13. Claimant's rate of compensation is $144.78 per week.

14. Defendants have already paid all benefits due claimant.

CONCLUSION OF LAW

WHEREFORE, it is found:

Claimant sustained a permanent partial disability of forty percent (40%) to the lower right extremity. Claimant is entitled to ninety-three and two-sevenths (93 2/7) weeks of healing period benefits from September 10, 1979 to June 24, 1981. Claimant is entitled to an additional eighty-eight (88) weeks of permanent partial disability benefits. The applicable rate of compensation is one hundred forty-four and 78/100 dollars ($144.78) per week. All healing period benefits and disability compensation due claimant have been paid. Claimant is not entitled to benefits as provided under section 85.13, Code of Iowa.

THEREFORE, the proposed decision of the deputy is affirmed.

ORDER

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

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

Signed and filed this 20 day of July, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Copies To:

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DORIS LEEPER,

Claimant,

vs.

AMF LAWN AND GARDEN,

Employer,

and

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 488301

A P P E A L

D E C I S I O N

FILED

AUG 30 1984

IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 27, 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 6; and defendants' exhibit 1, 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.

Neither side filed briefs.

The hearing deputy ruled that claimant had sustained a permanent and total disability as a result of her injury of February 14, 1978. The issues for resolution in the review-reopening decision were (1) whether there is a causal relationship between the injury and the disability; (2) the nature and extent of such disability; and (3) whether certain medical expenses should be paid. (The record shows that all medical expenses sought were paid after the hearing.)

The medical evidence by Dr. Jones and Dr. Summers was unrebutted as to the causal relationship, and their opinions showed claimant had a serious impairment. Claimant has a limited education and her experience has been in factory work and as a shirt press operator, precisely the types of work that her permanent partial impairment would prohibit. At this time, her employment horizons are totally limited. As her problems have persisted since early 1978 and show little likelihood of improvement, one agrees that an award of permanent and total disability under §85.34(3) is appropriate.

The findings of fact, conclusions of law and order of the review-reopening decision are adopted herein.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on February 14, 1978.

2. Claimant was injured while working on February 14, 1978.

3. Defendants filed a memorandum of agreement concerning a February 14, 1978 injury.

4. Claimant sustained an aggravation of a preexisting carpal tunnel condition on February 14, 1978.

5. Claimant's injury now extends into the body as a whole.

6. Claimant is permanently and totally disabled as a result of the February 14, 1978 injury.

7. Claimant entered into a prior agreement for settlement of this case.

8. Claimant's condition has worsened since the approval of the agreement for settlement.

CONCLUSIONS OF LAW

1. Claimant was employed by defendant employer on February 14, 1978.

2. Claimant sustained an injury arising out of and in the course of employment on February 14, 1978.

3. Defendants will be ordered to pay unto claimant $167.74 per week of permanent total disability compensation during the period of claimant's disability.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant permanent total disability compensation at the rate of one hundred sixty-seven and 74/100 dollar ($167.74) per week commencing February 15, 1978 during the period of claimant's disability.

Defendants are to receive credit for compensation already paid.

Interest shall accrue on this award pursuant to §85.30, Code of Iowa, from May 3, 1984.

Costs of this proceeding are taxed against defendants.

A claim activity report shall be filed upon payment of this award.

Signed and filed this 30th day of August, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DORIS LEEPER,

Claimant,

vs.

AMF LAWN & GARDEN,

Employer,

and

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 488301

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED

MAY 03 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the offices of the Iowa Industrial Commissioner in Des Moines on October 26, 1983 at which time the record was closed.

A review of the commissioner's file reveals that an employer's first report of injury was filed on February 17, 1978. A memorandum of agreement was filed March 27, 1978 calling for the payment of $167.74 in weekly compensation. This case became a contested case proceeding which eventually was resolved when an agreement for settlement was filed. Roughly a year of healing period compensation was agreed to and claimant was paid permanent partial disability based upon an 18 percent loss to the body as a whole. The agreement was reviewed and approved by the commissioner on August 21, 1980. The record consists of the testimony of the claimant; claimant's exhibit 1 through 6; defendants' exhibit 1; and all filings submitted prior to this time.

ISSUES

The issues for resolution are:

1) Whether there is a causal relationship between the injury and the disability;

2) The nature and extent of disability; and

3) Whether certain medical expenses should be paid.

REVIEW OF THE EVIDENCE

Claimant was employed by AMF Lawn and Garden on February 14, 1978. On that date she sustained an injury arising out of and in the course of her employment. Claimant was found to have aggravated a preexisting bilateral carpal tunnel syndrome. Claimant was awarded healing period through January 30, 1979. Claimant's injury was found to be permanent. Claimant later settled the case on an agreement that she was disabled to the extent of 18 percent of the body as a whole.

Claimant, age 60, testified she has lived in Des Moines her entire life. She testified that she now weighs 128 pounds, having weighed 148 pounds prior to the injury. Claimant attributes her weight loss to decreased food consumption in reaction to pain. Claimant testified that she left school in the eleventh grade in 1939 to care for her sick mother. Claimant became employed by the National Youth Administration for a short while. She then became employed at the Iowa Packing Company as a packer, bone cutter and butcher. Claimant was employed by Iowa Packing from 1942 through 1948. Claimant was paid piece work in addition to an hourly wage. Claimant went to work for Clean Towel and Uniform and worked as an inspector for about two years. Claimant took a cut in pay to 68 cents an hour. In 1950 claimant became employed at New Monarch Machine as a machine operator. Claimant was given a short on-the-job-training orientation. Although claimant could not recall her exact earnings, she does recall that she made more money than before. Claimant quit in about 1957 to become employed at her husband's restaurant business. Claimant went back to the Clean Towel business in 1959 and became a shirt press operator. In October 1966 claimant went to work for defendant employer until February 1978 when she was injured.

Claimant was an assembly line worker to start and was a parts chaser at the time of her injury. Her duties included ordering parts and keeping sufficient parts in the work area for production workers. Claimant testified that she had taken minimal time off work for the births of her four children. Claimant was struck by a crane. Claimant testified that her chief complaints were with regard to her arms, shoulder and back.

The previous decision in this case reveals that claimant was treated by Albert L. Clemens, M.D., who in turn referred claimant to Robert C. Jones, M.D., who performed operations on claimant's wrists for the carpal tunnel problem. Dr. Jones referred claimant to be examined. The record reveals that claimant also had a number of prior medical problems. The record indicates that claimant had seen Dr. Jones about six months before she had her injury. However, Dr. Jones indicated that the injury at work was responsible for the aggravation of the carpal tunnel syndrome. Dr. Jones thought claimant had also sustained a spinal strain. A bilateral carpal tunnel release was conducted in April 1978. At the hearing of this matter on October 26, 1983 claimant indicated that the hands, arms and shoulders bothered her more after the February 1978 injury than before.

Claimant had her first hearing on this matter in June 1979. She testified that she partook in physical therapy thereafter. Dr. Jones referred claimant to Dr. Dubansky, an orthopedist, but the bill was not paid by the insurer. The matter was the subject of dispute and the employer's representatives agreed to pay for treatment. In September 1982 claimant went to a pain center, but was not treated. Claimant then received physical therapy from Ina Hellwig, a physical therapist. Claimant testified that the neck problems are far worse at this time than those she experienced prior to the injury. Claimant testified that she did not have neck limitations prior to the injury.

Claimant testified that she now has more severe pain in her shoulders than she had before the injury. Claimant testified that she could lift her arms before the injury, and that she could not do so now. Claimant testified that she was having problems with her lower back after the injury, but that the pain remained about the same.

Claimant testified that she has to have someone assist her in a number of routine household tasks. She testified that a daughter and a grandchild live with her now to help her with these tasks.

Claimant indicated that Dr. Dubansky's bill was eventaully paid. Dr. Blessman's bill was paid after the hearing of this matter.

The depositions of Dr. Jones and Thomas B. Summers, M.D., were received into evidence in this case.

Dr. Jones testified that he saw claimant on November 19, 1979 at which time claimant was complaining of wrist pain with a decrease in range of motion. Claimant's hand position had become frozen. There was a decreased range of motion of both shoulders.

On January 30, 1979 claimant complained of low back pain and pain in both legs. Claimant's upper arms and shoulers were bothering her. Dr. Jones asked claimant to see an orthopedist in order that claimant's back, hand and arm problems could be treated.

Claimant saw Dr. Jones again in April 1979 with basically the same symptoms and Dr. Jones testified that he referred claimant to see Marvin Dubansky, M.D., an orthopedist. Dr. Jones placed claimant on an anti-inflammatory medication. Dr. Jones did not see claimant again until November 1979 when claimant complained of pain in the wrist with a decreased range of motion. She was unable to close her fingers on either hand. Claimant never saw Dr. Dubansky because the insurer would not pay for services rendered by Dr. Dubansky.

Claimant saw Dr. Jones again in January 1980 when claimant was complaining of pain in both arms and shoulders. She had both frozen hand and shoulder syndrome. Dr. Jones continued to treat claimant and he testified that claimant had a partial clawhand of both hands and that claimant was in need of treatment to increase the range of motion of her shoulder.

Dr. Jones indicated that the delay in obtaining or seeking physical therapy itself was worsening the claimant's condition. He felt that claimant had a permanent physical impairment both for contracture of the shoulder and the hands. Dr. Jones testified that claimant never was able to work after the prior decision in this case. Dr. Jones indicated that there was a causal relationship between the injury and the condition. Dr. Jones thought claimant was still disabled. In a letter of July 8, 1980 to claimant's former counsel, Dr. Jones indicated that he thought that claimant's permanent impairment was 25 percent of the body as a whole.

On cross-examination, Dr. Jones indicated that the shoulder and arm problems were caused by the carpal tunnel syndrome. He thought that physical therapy would help claimant's condition. He stated that claimant had had frozen shoulder before but that the condition worsened following the 1978 injury. Dr. Jones testified that his testimony was at variance with an earlier statement that the shoulder condition was not worsened by the injury. Dr. Jones thereupon stated that he would stay with the deposition testimony that the shoulder problems were aggravated by the injury.

Claimant has also been examined by Thomas B. Summers, M.D., on three occasions. Dr. Summers is a neurologist and his first examination was conducted on December 29, 1976 for the purposes of social security disability. Claimant was also examined by Dr. Summers in 1979. Claimant's counsel first directed his questions to the July 14, 1983 examination. Dr. Summers noted flexion contractures involving all fingers of the right hand at the proximal interphalangeal level. The metacarpo-phalangeal joint of the right was bulbous. There was flexion contracture of the metacarpo-phalangeal joint of the right thumb. Flexion contractures involving the middle finger, ring finger and little finger of the left hand at the proximal interphalangeal joint level were observed. Both hands were held in a claw-like fashion. The hand grasp or hand grip is from 10 to 25 percent of normal on either side. Flexion and extension of the forearms at the elbow was normal. There was a restriction of motion at the shoulder joint level at either side. Abduction of the arms could only be conducted through an angle or arc of only 30 degrees. Dr. Summers made the following diagnosis:

1. Lumbar radicular syndrome, lower lumbar, chronic, severe.

2. Acroparesthesiae, upper extremity, bilateral, post-traumatic, severe.

3. Digital flexion contractures of both hands, secondary to #2.

4. Post-operative status referable to the cervical spine for surgical treatment in the form of cervical interbody fusion in the past, as narrated above.

5. Emotional depression, reactive type.

6. Arthropathy, shoulder joint, bilateral, chronic.

Dr. Summers indicated as follows concerning causation:

A. It was my feeling or my opinion that as a result of the accidental injury which occurred on or about February 14, 1978, Mrs. Leeper had developed various medical conditions or disorders. It was my feeling that in comparison with her physical status almost four and a half years ago that her course had been one of progression, and actually her disability had increased significantly.

Dr. Summers then expressed the basis of his opinion.

Q. Can you state the basis or the reason for this opinion, sir?

A. Yes, sir. At the time of my examination here on July 15, 1983, I did find evidence of severe stiffness and limitation of motion in the shoulder joint on either side. In addition, there was a deformity involving the fingers and thumbs of both hands. Her fine dexterity or finger coordination was severely impaired.

It was my feeling that she did have stiffness or what we in the medical profession refer to as contractures involving the fingers and thumbs.

And in addition, there was evidence of emotional

depression; and she herself quite frankly indicates that because of her many problems emotionally, depression has plagued her throughout the years. And she is quite honest about it and is aware of this.

Dr. Summers thought at that time claimant could perhaps be examined by a physiatrist as a candidate for extensive physical therapy. Dr. Summers observed that in 1976 and 1979 claimant had displayed weakness in her hands and difficulties using her hands, but that this condition had worsened considerably by 1983. He stated that there was a significant change in claimant's condition from 1979 to 1983. He was of the opinion that claimant was totally disabled. Dr. Summers thought that the delay in physical therapy added to claimant's disability.

On cross-examination, Dr. Summers indicated that his contact with the claimant was confined to examination only. Dr. Summers did not make a specific rating as to physical impairment.

APPLICABLE LAW

1. Section 85.3 and 85.20, Code of Iowa, confer jurisdiction on this agency in workers' compensation matters.

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 85.26, Code of Iowa, provides that an award for payments on agreement for settlement may be reopened within three years of the last payment of compensation.

4. In Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978) the court of appeals held that the commissioner would award increased compensation when no physical change of condition was present. The court cited Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1975).

5. 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).

6. 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

Based on the foregoing principles, it is found that claimant has established her claim. The record clearly shows that claimant had some permanent partial disability at the first hearing as was noted in Deputy Jackwig's award of healing period benefits. Claimant, however, entered into an agreement for settlement in August 1980. Claimant argues that a denial of needed physical therapy has worsened claimant's condition. Claimant also argues that claimant's preexisting carpal tunnel problem was aggravated to such an extent that a subsequent series of events commenced which lead to a hand-arm-shoulder situation as addressed by Dr. Jones and Dr. Summers.

Defendants, on the other hand, indicate that the claimant's sought-after medical treatment was not causally connected to the injury but rather to deterioration in the claimant's makeup due to the aging process.

This record indicates that both Dr. Summers and Dr. Jones think that there is an aggravation of a preexisting condition. The important fact in this case which separates this particular finding from other cases is that the opinions were arrived at independently.

The doctor's opinions also indicate that claimant's disability is serious. The case, though, was settled earlier on the basis of 18 percent of the body as a whole. Although the prior opinion in this case inferred that claimant's recovery might be scheduled (i.e., to two arms) the record indicates to me that claimant's injury is to the body as a whole because the injury extends beyond the arms. Dr. Jones refers to a yet-to-be-named orthopedist for treatment of her condition. Dr. Jones stated that claimant has been "at least" entitled to temporary total disability since the injury. Dr. Summers indicates that claimant's condition has worsened and that claimant is totally disabled.

Considering this record and based upon my personal observations, the finding will be made that claimant sustained a permanent and total disability because of the aggravation of the preexisting condition. This case is held to fall within the exception noted in Meyers in the respect that claimant's condition failed to improve, and in fact deteriorated since the time of the settlement. All medical expenses sought were paid after hearing.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on February 14, 1978.

2. Claimant was injured while working on February 14, 1978.

3. Defendants filed a memorandum of agreement concerning a February 14, 1978 injury.

4. Claimant sustained an aggravation of a preexisting carpal tunnel condition on February 14, 1978.

5. Claimant's injury now extends into the body as a whole.

6. Claimant is permanently and totally disabled as a result of the February 14, 1978 injury.

7. Claimant entered into a prior agreement for settlement of this case.

8. Claimant's condition has worsened since the approval of the agreement for settlement.

CONCLUSIONS OF LAW

1. Claimant was employed by defendant employer on February 14, 1978.

2. Claimant sustained an injury arising out of and in the course of employment on February 14, 1978.

3. Defendants will be ordered to pay unto claimant $167.74 per week of permanent total disability compensation during the period of claimant's disability.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant permanent total disability compensation at the rate of one hundred sixty-seven and 74/100 dollars ($167.74) per week commencing February 15, 1978 during the period of claimant's disability.

Defendants are to receive credit for compensation already paid.

Interest shall accrue on this award pursuant to section 85.30, Code of Iowa, from the date of this decision.

Costs of this proceeding are taxed against defendants.

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

Signed and filed this 3RD day of May, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY LEONARD,	:	File No. 704963
Claimant,	:	REVIEW -
vs.	:	REOPENING
JOHN MORRELL & COMPANY,	:	DECISION
Employer,	:	FILED
Self-Insured,	:	AUG 4 1984
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Gary Leonard, claimant, against John Morrell & Company, a self-insured employer, for the recovery of further benefits as the result of an injury on June 2, 1982. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed in this proceeding is $264.83. A hearing was held before the undersigned on May 30, 1984 at Storm Lake, Iowa. The case was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of the claimant, Francis S. Conway, M.D., Sandra Leonard, and Dennis Howrey; claimant's exibits A and B; and the deposition of David L. Hoversten, M.D., and John J. Dougherty, M.D., and the deposition exibits attached thereto.

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 injury and the disability upon which the claimant bases his claim and the extent of temporary total or healing period and permanent partial disability benefits to which he is entitled.

On June 11, 1984 claimant filed a motion to reopen the record in this proceeding for the purpose of submitting additional evidence concerning the employment of claimant. Having reviewed the request, it is apparent that the additional evidence sought to be admitted by the claimant is not material to this proceeding and the request is therefore denied.

EVIDENCE PRESENTED

The claimant in this proceeding testified in his own behalf. He was observed to have moved slowly and cautiously and appeared to be in considerable discomfort throughout the proceeding.

Claimant testified he is 37 years of age, married and father of two children ages 11 and 12. He stated that he lives in Emmetsburg, Iowa, and that his wife is employed as a school teacher there. Claimant revealed a long work history beginning with odd jobs and construction work in high school and continuing until June 2, 1982. He stated that he began his employment with defendant in 1967 at the starting wage of $3.50 per hour.

Claimant stated that he served two years in military service in the United States Navy during 1968 and 1969. He denied that he had obtained any special training in the military though he did act as a barber for six months. Claimant stated that he received an honorable discharge and returned to work at John Morrell & Company in 1970. He stated that he worked in the pork plant there until it was closed in May 1982. When the pork plant was closed, claimant was transferred to the beef plant. He advised that because of the transfer he was at the bottom of the seniority list at the beef plant.

Claimant described his job at the beef plant as "lugging" beef. He said that this job required him to carry as much as 175 to 240 pounds of beef on his back to load it into a truck. He stated that he would carry about three sides of beef per minute. Claimant described the job as both difficult and demanding in terms of the amount of physical labor required. He had been working at this job for about one week before he received an injury on June 2, 1982. Claimant explained that the injury occurred when a side of beef was dropped on to his back before he was ready to carry it. He stated that the sudden weight on his back caused him to flex backwards, but he was able to keep the beef from falling to the floor. Claimant said he was able to place the beef into the truck but he felt severe pain in his back and began to get dizzy. He immediately reported the incident to his foreman and went to the plant personnel office. He revealed that it was necessary for him to receive assistance to get to the personnel office.

Claimant testified that he was sent to a chiropractor by the company for an examination. Claimant stated that when he arrived at the chiropractor's office he thought he was close to passing out because of the pain and, since the doctor was not in, he lay down for awhile. He said that he was awakened by the doctor who then proceeded to take x-rays. The doctor did some massage to claimant's back and sent him home with the advice that he should return the next day to start work. Claimant testified that he did return to work the following morning and had been there a short time when the chiropractor called the plant and requested that claimant return to see him. Claimant advised that he returned to the doctor who stated that he had seen a spot in the lower vertebrae in claimant's back and that the doctor did not feel he was competent to treat the problem. The chiropractor recommended that claimant see a specialist in orthopedic medicine, David L. Hoversten, M.D. Claimant said he went to see Dr. Hoversten on June 4, 1982. Claimant testified that he was examined by Dr. Hoversten and x-rays were taken. He was advised by the doctor that he had a fracture of his vertebrae. He stated that the doctor prescribed Codeine and some other medication as well as rest.

According to the deposition of Dr. Hoversten, claimant's x-ray demonstrated an unusual fracture of the posterior elements of the L4 vertebrae. Dr. Hoversten said claimant's condition could also be described as spondylolisthesis of the posterior bony body of L4. It was Dr. Hoversten's testimony that he believed claimant would best benefit from rest, a corset and pain medications.

Dr. Hoversten went on to testify that he saw claimant again on July 14, 1982 at which time claimant demonstrated a very tender spot to the left of the low back area and told him that his pain was worse when he was lying in bed or when he was wearing the corset. Dr. Hoversten testified that he continued to prescribe rest. Claimant indicated that he continued to suffer pain throughout this period of time.

Dr. Hoversten testified that he again saw claimant on August 27, 1982. At that time Dr. Hoversten felt it was unclear as to whether the fracture was healing as he had hoped and suggested to claimant that a CAT scan be obtained. Dr. Hoversten advised that a CAT scan was obtained and that it demonstrated the persistent fracture line as well as significant degenerative facet changes on the left and right side at two levels; L4 and L5. He explained that the facet changes were an indication of a deterioration of the function of claimant's spine. He opined that the findings of the CAT scan were consistent with the type of injury described and received by the claimant. Dr. Hoversten testified that he continued to monitor claimant's condition seeing him again in November 1982, March 1983, September 1983, January 1984, and April 1984.

It was Dr. Hoversten's opinion that claimant would respond best to conservative treatment because the location of the injury did not lend itself to surgical repair. His reasoning was that the injury was located in an area which is by its nature unstable and that surgical repair would most likely be unsuccessful. Dr. Hoversten said he did attempt to determine claimant's suitability for a surgical procedure by having him fitted with a polypropylene brace which often reveals an individual's likely success with a spinal fusion. He advised that this was done in January 1984 and by April of 1984 it had become apparent that claimant was not a good candidate for surgical repair. Dr. Hoversten did not believe that claimant would ever be able to return to the type of work he had been doing for John Morrell & Company and suggested that it would be necessary for claimant to be significantly rehabilitated. Dr. Hoversten opined that claimant's injury had resulted in a physical impairment to his body as a whole of approximately 30 to 35 percent.

Claimant testified that he had a strong desire to obtain additional education and rehabilitate himself in order to become a productive member of society. Claimant advised that he has not been employed since June 2, 1982 even though he did return to work for a few days in January 1984 in an effort to determine whether or not he could perform a job at John Morrell & Company. Claimant stated that although the job did not involve lifting considerable amounts of weight, it did involve bending and twisting and he was not able to perform the job. In addition to not being able to work, claimant testified that his activities had been greatly reduced since the injury. He stated that he used to play golf, tennis, fish, and hunt but was no longer able to do any of these activities. Claimant said that he owns about 40 acres on which he used to raise cattle but is not now able to do so because he cannot care for their needs. He indicated that he still attempts to help around the house by doing the dishes and cooking and occasionally engages in some restricted gardening activities. He stated that he has a riding lawnmower and has attempted to mow the lawn but the vibration of the machine causes him severe pain. Claimant went on to testify that at the present time he is always suffering from pain which is aggravated by even minimal activity; that he is subject to very sharp and intense pain from some types of movement; that if he sits for longer than a half of an hour or so he will suffer pain when he gets up; and that although he continues to take pain medication it has not relieved him of the discomfort.

Claimant testified that he has checked with the local community college concerning possible educational courses to improve his employability and find a vocational position which would not require physical labor. Claimant stated that it was his intention to enroll at the community college the week of the hearing in this matter.

Sandra Leonard testified that she has been claimant's wife for 13 years. She advised that prior to his injury claimant was a very active individual and was involved in a considerable amount of physical activities. She stated that after his injury claimant has been forced to considerably restrict his activities because of constant pain. She revealed that claimant has difficulty sleeping, walking and playing with the children. She stated that she and claimant had discussed his future since the injury and both believe that education was the best course of action to follow. Along these lines she advised she has checked

for claimant at the community college about enrollment at that facility.

Dennis Howrey testified that he is the personnel manager at John Morrell & Company and has been so for the past six years. He stated that he knew claimant prior to the injury and has followed his medical progress since the injury. Mr. Howrey testified as to the efforts of the company to find a suitable position that the claimant could fill. He stated that claimant was placed as the storeroom clerk when he returned in January of 1984, which was the lightest type of employment available at the John Morrell plant. He described claimant as an excellent employee dedicated to and concerned about his employer.

John J. Dougherty, M.D., testified that he examined claimant on May 10, 1984 at the request of defendant's counsel. Dr. Dougherty obtained a history from the claimant and examined portions of the medical record of Dr. Hoversten. Dr. Dougherty testified that he was uncertain as to whether or not claimant's present back condition was the result of a single traumatic experience or the result of an aggravation of a preexisting congenital defect. According to the deposition and deposition exhibit 1, which is a report from Dr. Dougherty to defendant's counsel, Dr. Dougherty was apparently under the impression that claimant did not see Dr. Hoversten until August 27, 1982. Dr. Dougherty's report seems to indicate that he placed significant value on this mistaken assumption. Dr. Dougherty did, however, find that claimant was presently suffering from a 10 to 15 percent permanent impairment of his body as a whole as a result of the back condition. He noted that there were few objective findings upon which an impairment rating could be based since claimant's chief complaint involved pain and not restriction of motion. Dr. Hoversten likewise noted in his deposition that there were a limited number of objective findings with respect to claimant's physical impairment. Dr. Dougherty did state that the physical impairment rating that he gave would be greater in the event that the back condition arose from a single incident rather than an aggravation of a preexisting condition or repeated trauma.

The record reflects that claimant was examined in Mayo Clinic in Rochester, Minnesota, on at least one occasion by Patrick J. Kelly, M.D., a specialist in orthopedic surgery. He had been referred to the Mayo Clinic by Francis Conway, M.D., claimant's family physician. Dr. Kelly examined the claimant on April 18, 1983. He obtained a history from the claimant which was consistent with claimant's testimony at trial. Dr. Kelly suggested that claimant may be a candidate for a tranverse process fusion from L4 to L5. He felt, however, that claimant must clearly understand that he would not be able to return to heavy labor and that claimant would best benefit from vocational rehabilitation.

Francis Conway, M.D., testified that he is claimant's family physician. He has been treating claimant and his family since approximately 1963. He stated that he had seen claimant on occasion prior to 1982 for colds, flu and minor illness; he had never treated claimant for any type of back pain.

Dr. Conway stated that he saw claimant on June 6, 1982, at which time claimant related to him the incident which occurred at work on June 2, 1982. The doctor said he did not recall the specific treatment that he prescribed at that time. He indicated that he has continued to see claimant for his back pain and has prescribed muscle relaxers, pain pills and physical therapy at the direction of Dr. Hoversten. Dr. Conway revealed that claimant is presently taking medication for pain and insomnia. Dr. Conway testified that he was uncertain as to whether or not claimant's condition was permanent, but indicated that claimant would be in need of medical treatment for some time in the future.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 2, 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).

ANALYSIS

There would appear to be little doubt regarding the question of causal connection between the injury of June 2, 1982 and the disability from which claimant is presently suffering. Dr. Dougherty may indeed be correct that claimant has a congenital defect in the lumbar region of his back. The fact that he may have had a congenital defect, however, would in no way bar his recovery under the facts of this case. It is clear that even if we assume that claimant was suffering from a congenital defect, the congenital defect in no way affected claimant's ability to earn income. The aggravation which occurred on June 2, 1982 was material and severe. The record clearly shows that claimant was not suffering from any sort of back pain prior to the injury nor had any sort of back problem manifested itself in this individual. As a consequence, claimant is entitled to recover for the aggravation of any preeixsting condition which he may have had. Certainly claimant's back was not broken before June 2, 1982. Thus, whatever disability claimant is suffering is compensable under the Iowa Workers' Compensation Act because of the injury he received at work on June 2, 1982. The real issue in this case is what is the extent of claimant's disability?

Claimant's injury is to the body as a whole, therefore he has sustained an industrial disability. There are a number of factors which relate to an industrial disability which include the functional impairment, claimant's experience and background and his ability to rehabilitate himself. In the instant case, claimant's treating physician, Dr. Hoversten, found that claimant's functional impairment was somewhere in the neighborhood of 30 to 35 percent of the body as a whole. Dr. Dougherty found considerably less functional impairment; however, he admitted that if claimant's injury arose out of a single incident that the impairment rating he gave would be higher. In addition, it is clear from Dr. Dougherty's testimony that he was unaware of the fact that claimant had sought immediate medical attention for his back injury. It is apparent then that Dr. Dougherty based his opinion on inadequate, or at least uncertain, factual information. Under the facts of this case it is clear that greater weight must be given to the treating physician because of his greater knowledge of the claimant and of the factual background under which the impairment arose.

The functional impairment suffered by this claimant is to such an extent that it is clear that he will no longer be able to engage in heavy physical labor. This is made abundantly clear by the employer and claimant's attempt at reemployment in January of 1984. The employer placed claimant in the least physically demanding job available in their plant. Although claimant gave a sincere and valiant effort to perform the job, he was unable to do so because of continued pain in his back. Dr. Hoversten allowed claimant to fill this position on an experimental basis to determine whether or not he could in fact perform a job for the defendant. He was unable to do so. Clearly the claimant is forever barred from manual labor.

It is apparent that claimant is a dedicated employee. His

employer indicated complete satisfaction with claimant's performance prior to his injury of June 2, 1982. These attributes make claimant an attractive candidate for employment in some area in which he can perform. The problem, of course, is that claimant is at the present time untrained in any area other than manual labor. Fortunately, this individual has demonstrated a strong desire to rehabilitate himself and appears to have the capability of so doing. He appeared at the hearing neat, well dressed and attentive. He is an intelligent individual who could no doubt succeed in academic training. He indicated at the hearing that it is his desire to further his education. Since there is little, if anything, in claimant's background which gives him transferrable skills, it is apparent that if he is to return as a productive member of society it is imperative that he expand his education.

In addition to claimant's intellectual ability to pursue further education, his age is such that additional education is a very real possibility. Certainly it would appear that claimant's emotional condition would be greatly improved by a serious rehabilitation program. He appears well motivated to pursue such a program.

In summary, claimant is a 37 year old high school graduate with a prior work history limited almost entirely to manual labor. His present medical condition is such that he can no longer earn a living as a manual laborer. He has been blessed with sufficient mental faculties to be able to rehabilitate himself and obtain an education which would eliminate the need for him to physically exert himself to any significant degree. It is apparent that he will probably suffer from some back pain throughout the remainder of his life although his physicians have indicated that, with time, the pain should reduce itself to some extent. With sufficient education claimant would probably be able to obtain wages similar to those which he earned with defendant. Weighing these factors in this case, claimant has demonstrated an industrial disability equal to 55 percent of the body as a whole.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. Claimant is married and has two children.

2. Claimant is 37 years old and has completed a high school education.

3. Claimant is an intelligent and well motivated individual.

4. On June 2, 1982 claimant suffered an injury to his back while at work.

5. As a result of his injury, claimant was off work from June 3, 1982 through January 13, 1984.

6. As a result of his injury, claimant suffered a permanent impairment to his back equal to 30 to 35 percent of his body as a whole.

7. Claimant cannot return to work as a manual laborer.

8. Defendant has no job available which claimant can perform.

9. Claimant needs to and wants to rehabilitate himself by a post high school education.

10. Claimant's rate of compensation is $264.83.

11. Claimant has suffered an industrial disability equal to 55 percent of the body as a whole.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

On June 2, 1982 claimant receied an injury arising out of and in the course of his employment.

There is a causal relationship between claimant's injury of June 2, 1982 and his industrial disability of fifty-five (55) percent.

Claimant's rate of compensation is two hundred sixty-four and 83/100 dollars ($264.83).

Claimant is entitled to healing period benefits from June 3, 1982 to and including January 13, 1984.

ORDER

IT IS THEREFORE HEREBY ORDERED:

Defendant shall pay unto claimant healing period benefits for eighty-four and two-sevenths (84 2/7) weeks at the rate of two hundred sixty-four and 83/100 dollars ($264.83) and permanent partial disability benefits for two hundred and seventy-five (275) weeks at the same rate, accrued payments to be made in a lump sum together with statutory interest. Defendant shall be given credit for any benefits previously paid.

IT IS FURTHER ORDERED that the costs of this action are taxed to the defendant.

Defendant is to file an activity report upon completion of this award.

Signed and filed this 17th day of August, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK McCORMACK, Claimant, vs. SUNSPROUT, Employer, and GENERAL CASUALTY COMPANIES, Insurance Carrier, Defendants.	:	File No. 722209 A R B I T R A T I O N D E C I S I O N FILED JUL 26 1984 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at Cedar Rapids, Iowa on November 17, 1983. The record was closed at that time.

A review of the commissioner's file reveals that an employers first report of injury was filed on January 17, 1983. No other filings were made. The record consists of the testimony of the claimant, Joe Seiter, Jean Lukavasky, and Jerry Wegmann; the depositions of Joe Seiter and Warren N. Verdeck, M.D.; claimant's exhibits 1 through 9; and defendants' exhibit 1.

ISSUES

The issues for resolution are:

1) Whether claimant sustained an injury which arose out of and in the course of employment;

2) Whether there is a causal relationship between the alleged injury and the disability;

3) The nature and extent of disability;

4) The rate of compensation;

5) Claimant's entitlement to medical benfits; and

6) Whether claimant is entitled to be paid additional

compensation pursuant to the last unnumbered paragraph of section 86.13, Code of Iowa.

STATEMENT OF THE EVIDENCE

Claimant, age 26 at the time of hearing, is married and presently employed by United Parcel Service. He is a high school graduate with about two years of community college. Claimant testified that he lost interest in college and dropped out. Claimant's first employment was with a retail tire outlet right after high school. He had worked there part time while he was in high school. Claimant described his duties as anything from light mechanical work to delivery work. In about 1973 claimant became employed by Nash Finch in Cedar Rapids for about a year. Claimant unloaded trucks and drove a forklift. Claimant then became employed by United Parcel Service (UPS) on a part-time basis. Claimant was a preloadeer who sorted parcels into trucks to be delivered in the Cedar Rapids area. Claimant testified that he would be required to lift fifty pounds and move this weight as far as twenty to thirty feet. Claimant trained for a driving position. In May 1983 claimant started in a driving position and was working as both a driver and a preloader on an as-needed basis. At the time of hearing claimant was a full-time employee.

Claimant testified that since 1975 he has also worked for a gas station and a discount store on a part-time basis. In late 1979 claimant testified that he became employed by Sunsprout. Sunsprout is involved in the production and distribution of alfalfa sprouts. Claimant testified that he was a general employee at first and later became a truck driver. Claimant testified that he routinely pushed weights of sixty to seventy pounds and lifted weights not exceeding 100 pounds. Claimant described his duties with regard to the maintenance of the vehicle. Claimant stated that he was required to check the oil in the truck refrigeration unit, which sat atop the truck cab. Claimant testified that when he did this chore his feet would be about eight feet above the ground.

At this point claimant testified that he had had knee problems prior to November 1981. He also testified that he had been seeing a chiropractor intermittently. Claimant described being hospitalized in 1974 following an automobile accident. Claimant testified that he was paid $12.92 per hour by UPS in November 1981. He worked twenty to twenty-five hours per week. Claimant testified that he made $14,000 as an employee of UPS in the year before November 1, 1981 and $2,000 from Sunsprout during that period. Claimant testified that he devoted between fifty and sixty hours a week to his employment at Sunsprout when he started. At the same time, claimant was working at UPS. Claimant's boss at Sunsprout, Joe Seiter, would direct the number of hours to be worked. Claimant was married July 25, 1980 and claimant took several months off as an employee of Sunsprout. When he wanted to return to work at Sunsprout, he contacted Mr. Seiter and was rehired. He then worked about 25 hours a week.

Claimant testified that he was to drive to Iowa City and the Quad Cities from Cedar Rapids on November 2, 1981. Claimant worked a "full" day of four to five hours at UPS. Claimant had gone to work at UPS at 3:00 a.m. or so and reported to Sunsprout at about 9:00 a.m. Claimant climbed on top of the truck to start the refrigeration unit and check the oil. Claimant, while so doing, fell to the ground. He remembers waking up after he fell from the truck. Mr. Seiter was kneeling next to claimant. Claimant was taken to the hospital where he was complaining of a headache and pain in the occipital area.

Physical examination showed tenderness in the lower lumbar paraspinal muscles. Straight leg raising was negative bilaterally. There was tenderness in the left gluteal region and left paraspinal region. X-rays of the lumbosacral spine showed the vertebral to be well aligned. X-rays were negative also for the skull and the cervical spine. Claimant was diagnosed as having a minor head injury and a cervical and low back strain. Claimant was released from the hospital that day. He testified that he returned to work to pick up his car and went home. Claimant felt discomfort in his back and his head hurt.

Claimant testified that on the following morning he went to work at UPS and completed his work day of four and a half hours. Claimant worked only an hour for Sunsprout. Claimant testified that he worked about nine hours total for each employer the balance of the week. Claimant testified he felt very sore during this period.

Claimant testified that he retained an attorney (a different attorney than he who represented claimant at the hearing), who sent claimant to David C. Naden, M.D., an orthopedic surgeon. The records revealed that claimant had first seen T. C. Munger, D.C., on five occasions. At the end of this regimen, claimant was still complaining of minor left sacroiliac pain. Claimant was examined by Dr. Naden on March 12, 1982. Dr. Naden noted that claimant had problems in the dorsal upper lumbar area prior to the injury in question. Dr. Naden indicated that claimant described the pain as being in the left lower back which was in a different location than previous complaints noted by claimant. Claimant also noted pain going down the left lower extremity. Claimant indicated that he had difficulty walking and numbness on the bottom of his left foot.

Physical examination revealed that claimant only had about 20° of forward flexion. Lateral bending was five or ten degrees at most. There was no hyperextension. Disc crests were level. In the sitting position, straight leg raising is positive on the left at about fifty or sixty degrees, accentuated with dorsiflexion of the foot. Dr. Naden thought claimant had definite weakness of the extensor hallicus longus on the left. The strength was only 25 to 50 percent of the right. X-rays revealed claimant to have four lumbar vertebrae. Dr. Naden indicated that claimant had a herniated nucleosis pulposis at the L4, 5 level with nerve root encroachment of L5 on the left. Claimant did not seek further treatment from Dr. Naden immediately following this examination.

Claimant testified that from the time he saw Dr. Naden he never got any better or any worse. Claimant testified that he has modified his activities and that he has slept on the floor. He indicatd that he now works differently in that he squats even for the slightest lifting job. He testified that he gave a statement to the insurer following the injury.

On cross-examination, claimant initially indicated that he took off from his job at Sunsprout for his honeymoon. Claimant characteristically worked part time. Claimant admitted that he gave the statement which was received into evidence. Claimant testified that after he had engaged current counsel he was sent to see Warren N. Verdeck, M.D., a Cedar Rapids orthopedist. Claimant testified that the job at UPS paid more than the job with Sunsprout. Claimant testified that he left Sunsprout voluntarily in order to become a full-time driver with UPS. Claimant agreed that when he returned to Sunsprout he averaged about $4.37 an hour for an eleven to twelve hour week. Claimant testified that he is making more money totally since he quit with Sunsprout. Claimant testified that he has back problems which interfere somewhat with his duties at UPS. Claimant testified that the average weight he lifts is about twenty pounds. Claimant agreed with the proposition that the job working for UPS is better than being in a similar position with Sunsprout. Claimant testified that the only time he missed on account of the injury at Sunsprout was that missed on the date of the injury pursuing hospital care. Claimant candidly admitted seeking chiropractic care prior to the injury.

Joseph Seiter was the president of Sunsprout at all times material hereto. He outlined that claimant had a spotty record as an employee because of alleged tardiness and lax paperwork procedures. Mr. Seiter explained that he took claimant to the hospital because claimant was complaining of dizziness and upset stomach.

On cross-examination, Mr. Seiter stated that claimant had made complaints of back pain prior to the injury and time when claimant could not perform his duties because of back complaints. The witness testified that claimant expressed no more or less complaints following the injury. The witness indicated that claimant missed no work following the injury. The claimant quit voluntarily in May 1982.

Jean Lukavasky is a UPS employee who started work with UPS as a preloader in May 1977. She testified that she worked with claimant from that time until claimant went to driving. The witness testified that weights of seventy pounds are not lifted that often in the preloader job with weights of fifty pounds being lifted about ten to twenty times an hour. The witness indicated that claimant and she conversed often and that she was told of the incident a couple of days after it happened. The witness did not recall the specifics of the conversation relating to the injury. The witness testified that claimant spoke of going to chiropractors and of having the need to have his back cracked. The witness testified that she, too, worked at Sunsprout and that claimant worked as much as everyone else. She indicated that claimant was more vocal in his complaints about his back.

Gerald P. Wegmann is a supervisor for UPS. He testified that claimant took no time off because of a back injury. He recanted the claimant's prior injuries. The witness testified that claimant was a very good employee and a willing worker.

Joe Seiter's deposition contained the revelation that claimant may have played semi-pro football (denied by claimant). Seiter revealed that claimant struck his head when he fell.

The record indicates that in 1981 claimant received $1,970.56 from Joe Seiter as wages and $15,089.79 from UPS. The record indicates that claimant's earnings from all employment between November 1, 1980 and November 1, 1981 was $16,821.35.

After claimant's initial examination by Dr. Naden, claimant was given a permanent partial disability rating of fifteen percent of the body as a whole as a result of the herniated nucleosis pulposis at the L4, 5 level and nerve root encroachment of L5 on the left. Dr. Naden also stated in a letter dated October 12, 1982 that claimant's injury was at a different place in his back. Therefore, he still felt that claimant had a new condition and not an aggravation. He stated that the cause of claimant's disability was the injury. Dr. Naden wrote a letter report and made the following statement:

> If this young man continues to show symptoms like he had in March of 1982 and also has corroborative evidence of a herniated disc, either by a Cat Scan or a myelogram, yes, he does have a herniated nucleosis pulposus in his lower back with a nerve root encroachment on the left and should probably have surgery. Surgery in a young person with a definitive disc like this usually is successful and they do improve. Therefore, if his condition has

remained status quo and he is still having problems like he had back in March of 1982 his PPD Rating would be somewhere around 17 1/2 to 20 percent. In other words, following a successful laminectomy, their disability usually lessens somewhat and is around 15%.

Claimant had been treated since 1974 by Dr. Munger, a chiropractor. Dr. Munger treated claimant five times after the November 1981 injury.

Claimant was seen by Warren N. Verdeck, M.D., a Cedar Rapids orthopedist, on April 11, 1983. Claimant continued to have some complaints of numbness in the bottom of the left foot. Physical examination revealed that claimant was able to reach over to about four inches from the floor. Lateral flexion was to about twenty degrees. The gait was normal. Heel and toe walking was performed well. Straight leg raising was negative bilaterally. Plantar responses were down. Sensory examination revealed some altered sensation to pinprick over the lateral and plantar aspects of the left foot. X-rays showed some unremarkable narrowing at the lower two disc levels. Claimant was seen again the week following an EMG. Dr. Verdeck did not feel that surgery was called for to correct the herniated disc at that time.

Dr. Verdeck testified in his deposition that the injury was the probable cause of symptoms (Verdeck dep., p. 14-15). Dr. Naden gave an impairment rating of three percent of the body as a whole (Verdeck dep. p. 13) which was restated on cross-examination (Verdeck Dep. p. 17).

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 November 2, 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).

3. The claimant has the burden of proving by a preponderance of the evidence that the injury of November 2, 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).

4. Section 85.34(1) provides for a statutory healing period to be paid following an injury.

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, 257 (1963).

6. The last unnumbered paragraph of section 86.13, 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 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.

7. Section 85.36(10), Code of Iowa, provides in pertinent part:

> If an employee 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 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

Based on the foregoing principles, it is found that claimant has established his claim to permanent partial disability compensation and medical expenses. Claimant has failed to prove his entitlement to healing period compensation and additional compensation pursuant to section 86.13, Code of Iowa.

The facts of this case indicate that claimant was injured at a time and in a place where he was performing duties incidental to employment. The testimony of Dr. Verdeck gives us the finding that the injury was caused by the employment. Dr. Verdeck discounts a finding that the injury aggravated a preexisting condition. Since the injury was caused by the employment, it will be concluded that claimant's injury arose out of and in the course of his employment.

It will be concluded that claimant's injury caused permanent partial disability. This finding is supported by the testimony and writings of respected orthopedic surgeons. Because of this finding, the claimant would ordinarily be awarded healing period for the time missed from work, but he will not in this case since he lost no time. This is an example of the rare case where no healing period is awarded in a case of permanent disability.

Both Dr. Naden and Dr. Verdeck rate claimant's permanent disability to the body as a whole. Since this is so, claimant's injury must be evaluated industrially. The record amply shows the claimant's prior back problems which required treatment. One might also presume that claimant had intermittent back problems for which medical or chiropractic care was not sought. Claimant's injury was to his back, and claimant is employed in a position where the use of a back is a must. Claimant is young and has a good education. He is able to do his work and appears to "tough it out" and has earned the respect of his supervisors in this regard. He has, because of his motivation to get ahead, become employed in a better paying position. Claimant's injury is not so serious as to have caused surgery and an attendant loss of considerable lost time. Nevertheless, claimant has sustained a documented permanent partial disability because of the injury.

Considering the elements of permanent partial industrial disability, it will be found that claimant has sustained a permanent partial disability for industrial purposes of five percent of the body as a whole.

Claimant has alleged that the nonpayment of compensation entitles him to additional compensation pursuant to the terms of section 86.13, Code of Iowa. This section allows an additional benefit for those benefits unreasonably denied. I cannot find that the defendants' failure to pay workers' compensation benefits in the form of permanent partial disability compensation was unreasonable when there was no time lost or other occurrences that would alert a reasonable individual that some payment was due. The claim for additional section 86.13 benefits will be denied.

The intent of section 85.36, Code of Iowa, is to set the rate of weekly wages of an injured employee. It tries, within the limitations imposed by language, to get to a true and accurate gauge of an individual's weekly wage. Once this figure is obtained, the rate of compensation is derived. Defendants allege that section 85.36(6) should apply since claimant and all other employees worked similar hours. However, the evidence belies this since the claimant and another witness were both UPS and Sunsprout employees. The economics of the situation would indicate to me that an individual would have to supplement his income. The finding, therefore, is that claimant made less than the regular full-time employee, entitling him to have his gross weekly wage computed on the basis of section 85.36(10), Code of Iowa. Claimant earned $16,821.35 for the twelve months, indicating that his gross weekly wage was $336.00. Claimant is married and entitled to two exemptions. The rate of compensation is $204.44.

FINDINGS OF FACT

1. Claimant was employed by defendant Sunsprout on November 2, 1981.

2. Claimant was also employed by United Parcel Service on November 2, 1981.

3. Claimant fell from a Sunsprout truck while working on November 2, 1981.

4. Claimant lost no time from work with Sunsprout because of the fall except the time off on November 2, 1981 seeking necessary medical treatment.

5. Claimant sustained permanent partial disability to the body as a whole of five percent (5%).

6. Defendants' action in not paying permanent partial disability was not unreasonable.

7. Claimant incurred reasonable and necessary medical expense because of the injury.

8. Claimant is married and entitled to two tax exemptions.

9. Claimant's weekly wage was three hundred thirty-six dollars ($336.00).

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by defendant Sunsprout on November 2, 1981.

3. Claimant sustained an injury arising out of and in the course of his employment with Sunsprout on November 2, 1981.

4. Defendants will be ordered to pay unto claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of two hundred four and 44/100 dollars ($204.44).

5. Claimant will be denied additional benefits pursuant to

section 86.13, Code of Iowa.

6. Claimant will be awarded the following medical expenses:

St. Luke's Methodist Hospital	$186.00
Dr. Verdeck	103.00

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of two hundred four and 44/100 dollars ($204.44) per week.

IT IS FURTHER ORDERED that defendants pay the following medical expenses:

St. Luke's Methodist Hospital	$186.00
Dr. Verdeck	103.00

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from the date payments become due.

Costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 26th day of July, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRUCE A. McCURRY,

Claimant,

vs.

SPEEDWAY SCAFFOLD,

Employer,

and

WAUSAU INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 710878

A R B I T R A T I O N

D E C I S I O N

FILED

SEP 28 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Bruce A. McCurry, claimant, against Speedway Scaffold Company, employer, and Wausau Insurance Company, insurance carrier, for benefits as a result of an injury on August 11, 1982. On June 26, 1984 this case was heard by the undersigned and was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Robert Lewis and James T. Rogers; claimant's exhibits A through D and F; and defendants' exhibits 1 through 3. The objection to exhibit A-19 is overruled. Claimant's objection to defendants' post trial brief is overruled.

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 claimant is now basing his claim and the extent of temporary total or healing period and permanent partial disability benefits to which he is entitled.

EVIDENCE PRESENTED

Claimant testified he is 37 years old, single, and the father of two children. He stated he is a graduate of high school, a four year veteran of the United States Navy from which he was honorably discharged, and has been vocationally trained as an ironworker. Claimant advised that he was employed as an ironworker for the defendant employer on the date of his injury, August 11, 1982. As an ironworker, claimant's duties included lifting up co 100 to 150 pounds and climbing on various gerdings, scaffolds and buildings.

Claimant said he was working for defendant employer on a project at Western Iowa Community College on the date of his injury. Claimant testified that he was working on a roof scaffold approximately 12 to 15 feet off the ground when he slipped and fell. Claimant was uncertain how the fall occurred and said he could not recall anything following the fall. Claimant stated he could only recall waking up in the hospital with a backache and headache. Claimant stated he has continued to suffer from back and head pain since the accident.

Claimant recalled that he had seen four or five different doctors since his injury of August 11, 1982, though he was most uncertain as to the type of treatment he received. He did indicate that some time after the accident he began to suffer from severe depression and other people told him that his personality was changing. As a result of these problems, claimant said he began to see Michael L. Egger, M.D. He stated that as of the date of the hearing he had been seeing Dr. Egger for over one year. Claimant said he is presently continuing on medication and continues to see Dr. Egger. He sated that he has not been able to return to work.

Robert Lewis testified that he is a construction laborer in the Council Bluffs area. He stated that on August 11, 1982 he was working for defendant employer at Iowa Western Community College. He stated that he knew the claimant and had known him for a considerable length of time prior to that date. He described the claimant as a good strong worker who had no difficulty in following the instructions given to him by the foreman. Mr. Lewis testified that on August 11, 1982 he and claimant were spreading four by fours on a scaffold. He advised that one of the boards split and claimant went through, falling approximately 12 to 15 feet. He stated that after claimant hit the ground a four by four fell and struck claimant on the top of the head. He stated that he last saw claimant approximately one year ago and at that time he was unable to observe any significant changes in the claimant's behavior.

James T. Rogers testified that he is employed by the Iowa Department of Public Instruction as a rehabilitation counselor. He outlined his professional credentials and work experience in the area of vocational rehabilitation. He stated that he became involved in claimant's situation as a rehabilitation counselor and referred him to Des Moines for an evaluation. Mr. Rogers indicated that there were three basic criteria which an individual must meet in order to qualify for rehabilitation benefits from the State of Iowa. Those three criteria are (1) the person must have a substantial disability which (2) causes a vocational disability and (3) the individual must be able to be rehabilitated into competitive employment.

Mr. Rogers stated that claimant was sent to Des Moines for an evaluation, the results of which were obtained on April 2, 1984. According to Mr. Rogers, the results of this test showed that claimant would not qualify for vocational rehabilitation services because of serious questions about his ability to be rehabilitated. These problems centered primarily on claimant's inability to remember schedules and instructions, significant problems with low back pain and poor results in the area of academic functioning. Mr. Rogers indicated that it was the opinion of the people in Des Moines that claimant would best benefit from a volunteer day care program. Mr. Rogers did not believe that claimant was employable at the time of the hearing.

Timothy C. Fitzgibbons, M.D., testified by way of deposition. Both parties stipulated as to the qualifications of Dr. Fitzgibbons to testify about the matters contained in the deposition. Dr. Fitzgibbons advised that he became involved in the claimant's treatment as a consulting physician. Claimant was first seen by an associate of Dr. Fitzgibbons on August 17, 1982 at Mercy Hospital in Council Bluffs. According to Dr. Fitzgibbons x-rays taken at Mercy Hospital failed to disclose any definite fractures to the claimant's back. Accordingly, claimant was treated in the hospital for back pain from August 11, 1982 until August 31, 1982. Dr. Fitzgibbons stated that the first time he personally saw the claimant was after his discharge on September 9, 1982.

Dr. Fitzgibbons stated that he performed a physical examination of the claimant on September 9, 1982 at which time he found a negative neurologic examination and negative straight leg raising which indicated that there was not a herniated disc in the claimant's back. He stated that the claimant was complaining at the time of persistent headaches which the doctor believed may have been attributable to a possible concussion. The doctor revealed that at that time he started the claimant on outpatient physical therapy at St. Joseph Hospital and prescribed medication to help control the pain. The diagnosis at that time was post traumatic back strain.

Dr. Fitzgibbons testified that the claimant returned to see him for a follow-up examination on October 12, 1982. The doctor stated that at the time claimant was still having trouble with his back but did not want to return to the hospital, so he continued on outpatient treatment. The doctor said that he saw the claimant again on November 16, 1982 at which time he was still suffering from back discomfort and headaches. The doctor said that claimant returned again on December 9, 1982 complaining of back discomfort and having even more trouble in standing up

straight. The doctor stated that he felt claimant may have been suffering from a herniated disc so he admitted him to St. Joseph Hospital on December 12, 1982.

The doctor advised that claimant's hospital treatment in December of 1982 consisted of extensive physical therapy from December 12 through December 18. Although a myelogram had been considered earlier, it was decided that claimant had made sufficient progress that a myelogram would not be of benefit. The claimant was discharged from the hospital on December 18 with an improved condition. Dr. Fitzgibbons said he next saw the claimant in January of 1983. At that time there was a physical examination although there were no x-rays. The claimant continued to complain of discomfort in the back and some pain in the right leg. The doctor again expressed his concern that claimant may have been suffering from a herniated disc. The doctor said he next saw the claimant on February 3, 1983 at which time he noted that claimant seemd to be depressed. He said the claimant was having difficulty with straight leg raising bilaterally and again decided that hospitalization might be helpful in arriving at a diagnosis. The doctor stated, however, that claimant's personal problems were of such proportion that it would be advisable to obtain a psychiatric evaluation prior to proceeding with a myelogram. Accordingly, the doctor referred claimant to Michael Egger, M.D. Dr. Fitzgibbons testifed that claimant was seeing Dr. Egger by the time Fitzgibbons saw him again on March 3, 1983. Because of persistent symptoms, it was decided that claimant should be admitted to the hospital and a myelogram performed. Dr. Fitzgibbons stated that the myelogram disclosed a minimal defect in the left side of the vertebral column at L4, 5 level. It was the doctor's opinion that the defect was not significant enough to justify surgical intervention in the claimant's case. He stated that although there is no way to determine for sure whether the defect was the result of the fall, Dr. Fitzgibbons did believe that it was likely that the bulging area was started by the accident. He did not believe the minimal defect which was observed in the myelogram was a true herniated disc.

Dr. Fitzgibbons testified that during claimant's hospitalization in December of 1982 a CAT scan was performed which failed to disclose any type of defect.

Dr. Fitzgibbons stated that the claimant's persistent pain over a period greater than six months was an indication that the claimant had in fact suffered a permanent disability. Dr. Fitzgibbons assigned a permanent impairment of five percent of the body as a whole as a result of the minimal defect and continued pain of the claimant. He made this assessment of disability on March 29, 1983. The doctor said he saw the claimant again in May of 1983 at which time he advised the claimant that he had probably reached maximum recovery and that there was little he could do to help relieve the pain. He recommended to the claimant that his best course would be to seek vocational rehabilitation and change his lifestyle.

Dr. Fitzgibbons testified that he last saw the claimant on May 16, 1983. He advised that the claimant was at that time complaining of discomfort in the lumbosacral area, but did not have specific neurologic complaints such as numbness or tingling in his legs or weakness. The doctor continued in his opinion that claimant's permanent disability was five percent of the body as a whole and indicated that the claimant should not do repeated lifting of objects weighing over 20 pounds.

Michael L. Egger, M.D., testified by way of deposition. Dr. Egger outlined his qualifications as an expert which included a medical degree from the University of Nebraska, psychiatric residency training at the University Medical Center in Omaha, two years active duty with the United States Navy as a psychiatrist, and board certification from the American Board of Psychiatry and Neurology. Dr. Egger also stated that he has been the author of a number of published articles and is the coauthor of one textbook on the medical dimensions of mental retardation. Dr. Egger also advised that he has been in the private practice of psychiatry for 10 years.

Dr. Egger stated that he first saw the claimant on February 6, 1983 upon referral from Dr. Fitzgibbons. At that time, Dr. Egger conducted an initial interview from which he drew the tentative conclusion that claimant was suffering from a severe reactive depression as a result of his injury of August 11, 1982. In order to obtain a full and complete psychiatric evaluation of the claimant, Dr. Egger admitted the claimant to Mercy Hospital in Council Bluffs on February 6, 1983. The claimant remained in the hospital until February 25, 1983. Dr. Egger advised that during that period of time the claimant was given a Minnesota Multiphasic Personality Inventory test and a Luria-Nebraska Neuropsychological Battery. He explained that the purpose of these tests was to determine whether or not claimant was suffering from a personality disorder or possibly from some form of organic brain damage. Dr. Egger stated that these tests were administered and interpreted by his associate, Dr. Gustavson, a psychologist.

Dr. Egger admitted that he was quite surprised that the Luria-Nebraska Neuropsychological Battery disclosed an organic brain syndrome from which the claimant was suffering. Dr. Egger said he was surprised because his initial contact with the claimant failed to disclose to him that any such problem existed. Dr. Egger conceded that on at least two different occasions he expressed the opinion that it would not be possible to determine the cause of claimant's organic brain syndrome; however, at the time of his deposition he opined that the condition was probably the result of claimant's injury of August 11, 1982. He based his argument for causation upon his belief that claimant would not have been able to function in the capacity which he had prior to the injury had the organic brain syndrome been present at that time. For example, he questioned whether the claimant could have successfully completed high school, whether he could have successfully completed four years of service in the United States Navy and whether he could have maintained the eye-hand coordination necessary to perform his job as an ironworker with this condition existing. Dr. Egger stated that much of his information concerning claimant's past performance came from the claimant and his mother. The doctor stated that he was aware of a number of problems claimant had had early on in his adult life such as fighting, shootings, threats and abusive behavior. He stated, however, that claimant's prior behavior did not alter his opinion about when the organic brain syndrome occurred.

Dr. Egger advised that following the hospitalization he continued to treat claimant with various antidepressant drugs and counselling. As a result, it was the doctor's opinion that claimant's condition had improved from the time he first saw him in February of 1983 to the time of his deposition in December of 1983. He did not believe that claimant's organic brain syndrome or the impairment caused thereby would improve and that it was in fact a permanent condition. The doctor opined that the impairment caused by the organic brain syndrome was 40 to 50 percent of the body as a whole. He did not believe that the claimant would be able to return to his former employment and that in the future his employment would be limited to simple repetitive tasks which would require a minimal amount of co-ordination and cognitive thinking. Dr. Egger summarized his statement of causation with respect to the claimant in a letter of May 2, 1983 when he stated:

> Following hospital treatment Mr. McCurry has been seen in my office on March 4, March 23, April 11, and April 27, 1983. He is due to be seen again in three weeks.
>
> Tofranil seemed to lose it's effect in controlling headaches and mood, and this was changed to Norpramin 200 mg. at bedtime with Mellaril 25 mg. used on an as needed basis for anxiety. Mr. McCurry reported yesterday that he was sleeping well and that his mood was fair with the Norpramin. He has completed testing at Iowa Western Community College fo Vocational Rehabilitation Program, but does not yet have the results of that. I anticipate he will continue under my care until depressive symptoms are well controlled and he is satisfactorily adjustment [sic] in Vocational Rehabilitation Program. As I stated in hospital summary, he is suffering from major depressive disorder, reactive type, as well as organic mental disorder. The depressive symptoms are directly related to his injury and forced inactivity secondary thereto. His personal problems are largely secondary also to the injury and forced inactivity rather than the depression being secondary to the personal problems. As I stated in my letter of March 8, 1983, I cannot state with certainty that the organic mental disorder is secondary to the injury sustained in his fall at work, however, the pattern of symptomatology and history strongly suggest that it is secondary to the injury. I assume you will forward this reply to Wausau Insurance Company as you did previously.

Charles J. Golden, Ph.D., testified by way of deposition. Dr. Golden's qualifications as an expert were outlined in his curriculum vitae which was attached to and incorporated in his deposition as exhibit 1. Dr. Golden received his Bachelor's Degree in 1971 from Pamona College in Claremont, California, and received a Master's Degree in 1973 from the University of Hawaii, Honolulu, Hawaii. In 1975 he received a Ph.d. from the University of Hawaii and conducted a post graduate degree in training at Hawaii State University in Honolulu, Hawaii. He served an internship in child and adult neuropsychology assessment and therapy. Dr. Golden is a licensed psychologist in the states of Iowa and Nebraska and is board certified as a professional neuropsychologist and clinical psychologist. Dr. Golden has been involved in considerable professional research including the development of the Luria-Nebraska Neuropsychological Battery. He has served on the faculty of the University of South Dakota, the University of Nebraska College of Medicine and presently holds the title of Professor at the College of Medicine of the University of Nebraska. Dr. Golden has written approximately 14 books dealing with neuropsychology and diagnoses of neuropsychological problems and published over 145 articles on essentially the same subjects.

Dr. Golden testified that he examined and evaulated the claimant on February 22, 23 and 24, 1984 at the request of the defendants. Prior to conducting the evaluation, he obtained the records of the claimant from Dr. Egger, reviewed claimant's high school record, contacted the claimant's most recent employer, interviewed the claimant's mother and the claimant. He stated that the following tests were administered to the claimant: (1) the Luria-Nebraska Neuropsychology Battery; (2) the Peabody Individual Achievement test; (3) the Millon Multiaxial Personality Inventory; (4) the Minnesota Multiphasic Personality Inventory and, (5) the Interpersonal Behavior Survey. Dr. Golden stated that as a result of these tests he reached the opinion that claimant was suffering from a mild neuropsychological impairment

and reactive depression. It was Dr. Golden's opinion that the neuropsychological impairment of the claimant was of long standing duration. In support of this position the doctor relied upon the results of the Luria-Nebraska test and his review of the claimant's history of poor academic performance and inappropriate social behavior. He believed that the neuropsychological impairment was equal to approximately eight to ten percent permanent impairment of the body as a whole. He did not believe the neuropsychological impairment was the result of claimant's accident and he did not belive that the claimant would suffer any permanent and psychological impairment as the result of the accident. He was of the opinion that claimant's reactive depression was a treatable condition.

APPLICABLE LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 11, 1982 is the cause of the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 296, 18 N.W.2d 867 (1965); Lindahl v. L. O. Boggs Co., 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956).

The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 383, 101 N.W.2d 167, 171 (1960). However, the weight to be given to the expert testimony is for the finder of fact, and the provision of evidence weight will be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 521, 133 N.W.2d at 870.

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

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

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

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

ANALYSIS

The parties are in agreement that the claimant suffered an injury on August 11, 1982 when he fell from a scaffold at work. There is agreement that, at a minimum, claimant suffered a permanent partial disability of five percent of his body as a whole as a result of that fall. The five percent impairment is the result of chronic low back strain. The question in this case is whether the fall caused any other impairment other than the low back strain.

The record is clear that the claimant does suffer impairments to his ability to earn income for reasons other than chronic low back strain. The two primary impediments to his earning ability are the depression and the neuropsychological deficits. The experts disagree as to the cause of these problems. Dr. Egger is of the opinion that claimant suffered organic brain damage in the fall. He suggests the possibility that the claimant's depression is the result of the brain damage rather than a reaction to his back injury. Dr. Golden believes claimant's brain damage is of long standing duration and preexisted the injury of August 1982. He also finds claimant to be suffering from reactive depression.

Both of the doctors express the opinion that the depression is not a permanent condition. Although defendants contend that Dr. Golden testified that claimant's depression preexisted the August 1982 injury, such testimony is hard to find. Dr. Golden specifically stated that claimant was suffering reactive depression. (Exhibit C, p. 39 ll. 1-4)

Concerning the cause or origin of the claimant's organic brain disorder, the opinion of Dr. Golden will be accepted as being entitled to greater weight than Dr. Egger. Both Dr. Golden and Dr. Egger possess considerable experience and education in their fields. Dr. Egger's medical background adds little weight to his testimony however, because his diagnosis is not based upon medical findings; it is based upon the results of a psychological test. Dr. Golden being the author and designer of the psychological test employed, probably has greater expertise at interpreting the results. Also, the extent and degree of research into claimant's background by Dr. Golden is most impressive. Dr. Egger's personal contact with and knowledge of the claimant is offset by such extensive background investigation.

Although the defendants correctly state that Dr. Egger expressed the possibility that claimant's depression arose from the organic brain disorder, he is in fact merely stating a possibility. In addition, the doctor's opinion is based on his assumption that the organic brain deficits arose at the time of injury. This record supports the conclusion that the depression arose subsequent to and as a result of the injury. The expert testimony of both doctors, when considered as a whole and reconciled to the extent possible, disclosed that claimant suffers from reactive depression as a result of his injury. Further, that the reactive depression exacerbates an underlying personality disorder. Likewise, the personality disorder exacerbates the depression. When viewed in the context of the workers' compensation law, the conclusion must be that the injury to claimant's back caused the reactive depression. The reactive depression aggravated a preexisting organic brain deficit. As stated above, claimant is entitled to recover for disability which results from the aggravation of a preexisting condition. The materiality of the aggravation is apparent from the fact that prior to August 11, 1982 claimant was employed and employable and now he is not.

Since claimant has suffered a permanent partial disability at least to his low back, he is entitled to healing period benefits until the extent of permanent partial disability can be determined. In the instant case, claimant was still suffering from reactive depression at the time of Dr. Golden's evaluation. Since that evaluation claimant has continued to receive psychiatric counselling and antidepressant drugs. Both doctors indicated that claimant's depression would improve though Dr. Egger was less certain. Claimant has not returned to work, it has not been established on this record that there will be no significant medical improvement in his condition and it does not appear he can return to substantially similar employment. It is therefore clear that claimant continues in healing and that his compensation should continue until one of the three conditions of §85.34(1) are met. Only at that time could there be a valid assessment of his industrial disability.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On August 11, 1982 claimant fell from a scaffold while at work.

2. As a result of the fall, claimant received a mild permanent impairment to his low back.

3. As a result of the fall and subsequent disability, claimant developed a reactive depression.

4. Claimant's reactive depression aggravates and is aggravated by a preexisting neuropsychological deficit.

5. Claimant's preexisting neuropsychological deficit is of long standing duration and is permanent.

6. Claimant is presently suffering from reactive depression.

7. Claimant's reactive depression is not a permanent condition.

8. Claimant has not returned to work and cannot presently engage in substantially similar work.

9. Claimant has not achieved maximum recovery from his injury of August 11, 1982.

10. Claimant's rate of compensation is $290.06.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that on August 11, 1982 he received an injury arising out of and in the course of employment.

Claimant has proven by a preponderance of the evidence that he has suffered a permanent partial disability as a result of his injury.

Claimant has proven by a preponderance of the evidence that he has not returned to work; that it is not medically indicated that he can return to substantially similar employment; and, that it is medically indicated that his present condition may significantly improve.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant compensation at the rate of two hundred ninety and 06/100 dollars ($290.06) from August 11, 1982 until such time as one of the conditions of §85.34(1) are met.

Defendants shall pay the costs of this action.

Signed and filed this 24th day of September, 1984.

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD McDONALD,	:	
Claimant,	:	File No. 687503
vs.	:	
PULLEY FREIGHT LINES,	:	R E V I E W -
Employer,	:	R E O P E N I N G
and	:	D E C I S I O N
CARRIERS INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Ronald D. McDonald, claimant, against Pulley Freight Lines, employer, and Carriers 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 November 5, 1981. It came on for hearing on July 30, 1984 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa.

The industrial commissioner's file shows a first report of injury received November 18, 1981.

At the time of hearing the parties stipulated to a rate in the event of an award of $270.01.

The record in this matter consists of the testimony of claimant and Marian Jacobs; claimant's exhibit 1, a series of medical reports from James B. Worrell, M.D.; claimant's exhibit 2, a report from Dr. Worrell dated June 28, 1983; claimant's exhibit 3, reports from Stan Christensen, LPT; claimant's exhibit 4, reports from Christensen and Dr. Worrell; claimant's exhibit 5, medical information and a report from R. S. Rattray; claimant's exhibit 6, a report from Donald D. Berg, M.D. and from G. Brian Paprocki; claimant's exhibit 7, the deposition of Paprocki; claimant's exhibit 8, medical reports and a report from Carlos Chase; defendants' exhibit A, the curriculum vitae of Marian Shanley Jacobs; defendants' exhibit B, a report from Jacobs; and defendants' exhibit C, the deposition of claimant.

ISSUES

The issues in this matter are whether or not claimant is entitled to further temporary total, healing period or permanent partial disability benefits and whether or not the provisions of Iowa Code section 86.13 have been triggered.

STATEMENT OF THE CASE

Thirty-five year old married claimant, father of two children and a high school graduate, testified to beginning work experience as a material handler for a brick company. At the same time he had a laborer's job as a shaker removing sand from molds. After graduation from high school, claimant spent two and a half months as an assistant manager trainee before being drafted. He served nearly two years in the navy with two tours in Vietnam--one as a boatswain's mate and a second as a sonar technician standing watch on the scope. When he returned to civilian life he spent a year working for a loan company doing such things as closing loans, prospecting for loans and evaluating household goods as collateral. He left the loan corporation both because of managerial problems and because he wished to go to college.

Claimant went to college full-time under the G.I. bill. He then attended part-time for the next four or five years and did local trash hauling with a friend. Later he acquired some equipment for landscaping. He attained between ninety-five and one hundred and fifteen hours of college credit. He said that he needs one more course to obtain an A.A. degree. That course is accounting which he has attempted but failed.

Claimant's next employment was as a warehouseman--a job he held intermittently over the next three years. Initially, he dispersed furniture when drivers brought it in. He did some lifting, but he had assistance from another employee and special equipment. During this time he got a class one license to drive an eighteen-wheeler. He drove both intrastate and locally. He spent three months as a salesperson selling the services of a freight hauler. He served two months as a dispatcher, but he was told he was not working out. He improved his salary while he worked six months delivering local freight and loading and unloading materials weighing from ten to fifty pounds.

Claimant moved to another California location and took a job driving a three-axle dump truck and doing some cement mixing. This was a seasonal job and as claimant was last hired he was on layoff from time to time.

Claimant returned to Iowa where he was employed by defendant employer in August of 1981 as a driver driving out of Rock Island. Claimant attributed his many changes in employers to an attempt to better himself.

Claimant testified that he had a physical when he got out of the navy and each year to update his license to drive the truck.

Claimant recalled the circumstances of his November injury as follows: It was a Thursday. He was unloading an overweight trailer at the scales after having driven for about eight hours with catnaps. A path was made through the boxes so the weight could be taken from the nose. He moved the boxes by bending over and pulling them through his legs as he worked in a small space. The cartons which were unloaded contained bleach bottles and weighed sixty-five pounds. The truck was weighed three times before it passed. By that time he was feeling stiff and sore.

He took another load to Indianapolis with stops for food and catnaps. He did no lifting. He washed out his truck and got another load for Rock Island where he arrived on Saturday morning after sleeping in the cab of his truck.

He called the dispatcher and then his spouse to come get him. He had no prior back trouble. He could stoop, but he was unable to get back up. He saw the doctor and missed three weeks' work. He was released for light duty; but as there was none, he was told to take another two weeks off.

He drew compensation while he was not working.

On December 15, 1981 he returned to work as a driver. He was sometimes capable of doing the loading and unloading. At other times he hired help.

There was a layoff in March during contract negotiations and in this time he became accustomed to sleeping nights instead of on an irregular schedule.

He remembered his next back incident thusly: He had been on the road since Sunday night or Monday morning. He was asleep with his head on the passenger side in his truck parked by the roadside. He was startled by something. He pulled himself up by the steering wheel wrenching his back and feeling sharp pain which was the same back pain he had felt before. He continued to drive, but his lower extremities and buttocks began to feel numb. By Saturday afternoon, he felt "pretty rough." He used heat.

He reported back to work and did some relocating of trailers and then commenced doctoring with Dr. Hart over the next six weeks. He received workers' compensation. He was referred to Dr. Berg, an orthopedic surgeon, who treated him with medication

and who told him to do exercises and to lose weight. He had a myelogram.

Eventually, he was sent to Dr. Worrell in Iowa City whom he continues to see to the present.

Claimant reported that he was paid compensation until May 10, 1983. He understood that his compensation terminated at that time because he allegedly was not cooperating by losing weight.

Claimant agreed that he is better, but he did not think he could go back to the sort of work he was doing at the time of his injury. He is limited to lifting twenty-five pounds with no excessive bending or lifting and no repetitive bending, twisting or turning. His medications are Norge Forte and Elavil. Valium and Tylenol 3 are taken as he needs them. He said that he walks two miles a day and tries to swim for ten to thirty minutes five days a week.

Claimant indicated that he was sent by Paprocki, a vocational expert, to state vocational rehabilitation services where he saw a counselor named Carlos Chase with whom he has consulted about jobs. He underwent four days of testing in Des Moines. He acknowledged doing well on the tests and expressed the feeling he could complete college. He stated that he is writing for his transcript. He claimed that he has no funds to use to attend college. Claimant testified that he wishes to get into something business oriented, preferably sales and preferably in the Oskaloosa area. He thought he would be able to drive to work in a larger area, but he was not sure; and he felt that whether or not he could do the driving might be determined by the job he was driving to and from.

Claimant admitted he had been referred to a job by Jacobs, another vocational counselor, as a night watchman with a salary of $3.50 per hour. Claimant expressed the opinion he is capable of earning more money and the desire to have a job which will take him somewhere.

Claimant declared he is starving on the 1000 calorie diet. His weight is at 238 pounds. He estimated his normal working weight at from 225 to 230 pounds. He agreed that he had been told by Dr. Berg that weight loss would help his healing, but he related that Dr. Worrell did not think his weight was "substantially relevant" to his condition.

Claimant asserted that he would not be bondable because he had trouble with his credit when he lived in California.

Marian Jacobs, a vocational consultant with a master's degree from a rehabilitation specialist's program, testified to interviewing claimant to assess his post-injury earning capacity. Her procedure is to start by looking at the medical records to see what the employee's functional impairment is and what medical limitations have been placed on activity. She then interviews the employee to take an educational and work history to enable her to assess transferable skills. She also looks for skills obtained through avocations. She investigates the relevant labor market for jobs available in the geographic area. This investigation includes contacting local employers. She also visits Job Service and the local vocational counselor.

In making the determination of what claimant can do, Jacobs used restrictions of twenty-five pounds with no frequent bending or twisting and also considered what claimant said he was able to do. Claimant's self-placed limitations were an ability to walk up to two miles, to drive twenty-five to thirty miles, to lift up to thirty pounds and to bend and to stoop occasionally. Claimant told her of an inability to stand and to sit in one position for a long period.

As jobs claimant can do with his demonstrated skills and the limitations assigned by Dr. Berg, she listed manager trainee for a loan officer, driver's license examiner, Clerk IV with the Iowa Merit classification, and factory representative. As jobs coming within claimant's self-imposed limitations and using his demonstrated skills, she proposed route driver, sales representative, supervisor for a convenience store, security guard, painting helper or worker, support service supervisor or production worker. In discussion, she noted that a route driver delivering such items as potato chips or cookies would use sales skills and be engaged in a lighter job. She said that sales representatives often do not lift over twenty-five pounds. She explained that the position of security guard would be a means of getting claimant back to work and of establishing him with a company. This placement, she believed, might lead to other things.

Jacobs, who expressed the opinion that after initial training in a new field, claimant's post-injury earnings would equal his preinjury earnings as an over-the-road truck driver, pointed out that claimant could utilize a veterans preference or benefits available through JTPA. She also spoke of targeted job tax credit as an advantage to an employer hiring claimant.

As important aspects of claimant's experience, Jacobs looked to his loan company work, his keeping books and logs, his dealing with customers and his good communication skills. She anticipated claimant's returning to truck driving if his condition improves.

Jacobs acknowledged that if the security guard job at $3.50 were the only job claimant could do, he would have industrial disability.

G. Brian Paprock, vocational consultant who has a master's degree in vocational rehabilitation, met with claimant on April 22, 1983. In doing his evaluation of claimant, he considered claimant's age, education, past work, the diagnoses made by Dr. Worrell in his reports dated April 21, 1983, June 28, 1983, August 2, 1983 and August 19, 1983, and claimant's subjective complaints. He did not formulate an opinion regarding claimant's industrial disability as he thought claimant continued to undergo medical treatment, had no release to return to work and had not had specific restrictions or limitations assigned. He did believe that claimant would have industrial disability as he questioned claimant's ability to return to the level of physical exertion necessitated by his employment with defendant employer.

Paprocki had not seen reports from Dr. Berg, but he knew of his involvement in the case. He agreed that it would be significant if Dr. Berg felt claimant was going to recover and have no permanent impairment.

The expert assessed claimant's work experience as running the gamut from non-skilled physical labor to semi-skilled to very skilled and from heavy physically to very light or sedentary.

Paprocki at the time of his deposition found claimant's medical prognosis too undefined to allow conclusions regarding his employability. He said that when claimant is released for some kind of employment he will no longer be totally disabled because he has skills which will enable him to do work other than physical labor.

The consultant provided a supplemental report dated May 14, 1984 in which he suggested industrial disability of approximately twenty-five percent. Factors considered included good potential for learning and employment experience in other than physical labor positions. He anticipated the likelihood of direct job placement in the clerical or sales fields, but with a decrease in actual earnings.

Also included in the record is a summary of claimant's short-term evaluation from the state rehabilitation, education and services branch. Claimant was not able to solidify his vocational interests which changed almost daily during his testing.

Claimant was given a level II wide range achievement test which resulted in scores in the eleventh and twelfth grade range except in math. Claimant was given a Valpar drafting work sample. It was concluded that drafting was not a likely potential field due to claimant's level of math skills and also to his trouble maintaining concentration for quality and attention to detail. Math skills also were viewed as lowering the likelihood of claimant's succeeding in a computer occupation and his limited mobility as a hindrance to computer maintenance. Claimant did well on an accounting orientation test, a bookkeeping sample and the independent problem solving sample.

Claimant's verbal I.Q. was 111; his performance 104; and his full scale 108.

During the period claimant was being evaluated he complained of difficulty sleeping and of back pain.

Claimant was seen as vacillating between seeking training or finding immediate employment. Recommmended areas of employment pursuit were loan interviewer, loan application clerk, collection clerk, or skip tracer. With additional training, claimant was believed to have the capacity for being a loan officer or clerk. Claimant expressed interest in work as a real estate sales agent, appraiser or estimator.

Claimant's concern over his ability to work in the loan area because of his own financial difficulties was viewed as a job seeking skills problem which could be handled by helping claimant explain the situation, develop reasons for why it occurred and place stress on the skills he had obtained.

Donald D. Berg, M.D., saw claimant for evaluation on November 17, 1983 after not having seen him since December 1982 and found claimant "essentially about the same." Straight leg raising was negative; knee reflexes were present and equal. Range of motion in the back was 80 percent of normal. The doctor proposed that the only way for claimant to improve would be for him to lose weight. Claimant was placed on a 1000 calorie diet. The orthopedist thought that claimant could return to sedentary work, but not to manual labor because of his pain. Although the doctor was unable to say when it occurred and he stated that he would normally expect a six month healing time for a lumbosacral strain, he thought claimant had achieved maximum healing. The doctor wrote: "From this point on, I feel loss of weight will be the key factor for him and healing."

Dr. Berg saw claimant on December 29, 1983 at which time he was evaluated for back pain. The doctor wrote that claimant seemed to be improving although his flexibility was unchanged. Note was made of claimant's failure to lose weight. Claimant was advised not to do heavy lifting and to continue to lose weight and do the flexibility exercises.

In early January claimant was told to continue weight loss and to walk two miles each day and swim a half hour. Thirty degrees loss of flexion and ten degrees loss of extension were recorded. Lateral tilting was diminished by thirty degrees.

In a letter of May 7, 1984 Dr. Berg wrote: "I feel when he loses weight he probably will get well. Until he loses weight I do not feel he will." The doctor expressed the belief that claimant will be unable to do heavy lifting until his weight is decreased and his flexibility increased. He rated claimant's permanent impairment at five percent due to claimant's persistent loss of flexibility and muscle tightness in his spine. He proposed claimant would have no impairment should his weight be reduced.

In July Dr. Berg wrote that claimant's healing occurred in November of 1983. Claimant's restrictions included a twenty pound lifting limitation and a recommendation of no frequent bending or twisting.

James B. Worrell, M.D., saw claimant on December 29, 1982 and took a history of claimant's lifting heavy cases and carrying them to the truck in November of 1981. Claimant complained of severe lumbar pain radiating down both buttocks with pain into the right leg. Claimant said his pain was aggravated by riding in a car, sneezing or twisting.

On examination, straight leg raising was positive bilaterally at about 60 to 70 degrees. He was tender in the paraspinal muscles and over the spinous process of the lumbar area but not the buttocks. Claimant's right ankle jerk was diminished and claimant had a consistent decrease in pin perception over the lateral aspect of the foot. Claimant had good pulses and no sensory loss. There was a suggestion of an S1 radiculopathy on the right. Claimant's myelogram was interpreted as showing only a slight bulging at L4-5. Dr. Worrell suggested a CT scan and electromyography.

Electromyography was interpreted as essentially normal without changes great enough to diagnose an L5 radiculopathy. The CT scan also was normal. Claimant was referred for pain management.

When claimant was seen on March 8, 1983 he was using a TENS and doing stretching, abdominal and posture training exercises.

On April 6, 1983 Dr. Worrell wrote that "it would help if Mr. McDonald would lose weight but I do not think this is the entire basis for his problem." He subsequently wrote in a letter to claimant: "I would like to offer that you have been extremely cooperative in keeping your appointments and following up on your physical therapy program and have been attempting to lose weight. You are improving gradually and hopefully your situation will resolve here over time."

On June 28, 1983 Dr. Worrell wrote that claimant continued to be disabled by back pain. He also said that claimant should commence vocational rehabilitation.

On August 2, 1983 Dr. Worrell reported his diagnosis of severe back pain and right sciatica. He estimated treatment for claimant's permanent condition would require six to twelve months more. He declared claimant unable to work and suggested he avoid lifting, driving, bending and prolonged sitting.

On August 19, 1983 the neurologist reported that claimant was making headway on June 28; however, when he was seen on August 2 his symptoms had increased. The doctor's suggestion for treatment was to continue therapy and to provide analgesics and muscle relaxants.

When claimant was seen in October, he was again no better. Claimant was taking a large amount of Codeine and getting no relief from Feldene. The doctor put claimant through a series of tests to insure claimant's problem was not arthritis including a sedimentation rate, antinuclear antibodies, a CBC and a latex study. As those tests were negative, Dr. Worrell concluded he could offer only continued conservative management.

In a letter dated July 16, 1984 Dr. Worrell used the manual for orthopedic surgeons to reach a ten percent rating for claimant's syndrome of the lower lumbar area with persistent muscle spasm, rigidity and pain.

Stan Christensen, L.P.T., saw claimant on January 17, 1983 at which time claimant complained of central pain at L3, L4, muscle soreness adjacent to the central spine and frequent severe headaches. Claimant's pain was increased by working in cold areas, sitting, turning and bending. Pain was helped by standing up and moving around. Forward flexion to 60 degrees was guarded. Claimant was tight on forward flexion. Claimant's lumbar lordosis was moderately increased, his abdominal musculature weak and his mechanism for straightening from a bent position poor.

Good body mechanics were demonstrated to claimant and he was given a stretching program. A TENS was ordered.

Claimant was seen periodically from January apparently to April. Claimant was then seen in August at which time he was given a neuroprobe treatment which gave him good initial relief. A week later he returned with complaints of pain and of a poor sleep pattern. He was taking Valium. Christensen did not feel neuroprobe treatments could be effective as long as claimant was taking Valium.

APPLICABLE LAW AND ANALYSIS

The first issue to be decided is claimant's entitlement to additional temporary total or healing period benefits. As claimant will be found to have permanent disability, Iowa Code section 85.34(1) is applicable. It 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 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 85.34(1) cited above lists three situations in which healing period can be terminated. Claimant has not returned to work. Claimant does not appear capable of returning to truck driving as he was doing at the time of his injury. Claimant's healing period will be terminated at the time he reached maximum medical recuperation.

When claimant was seen by Dr. Berg in November of 1983 his condition was found to be essentially the same as it had been in December of 1982. Claimant was treated by Dr. Worrell in the interim. In a letter dated November 17, 1983 Dr. Berg wrote that claimant could do sedentary work and that he had reached maximum medical healing.

In a letter dated December 8, 1983 Dr. Worrell determined that the only thing to be offered to claimant was continued conservative management. Although a report from Dr. Worrell indicates his expectation that claimant would have need of treatment for an additional six to twelve months, the receipt of medical care in and of itself is insufficient to extend healing period. Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112 (Appeal Decision 1982) (District Court Appeal remanded for settlement).

Based on the medical evidence from Drs. Berg and Worrell, claimant will be found to have reached maximum medical recuperation on November 17, 1983, the date of Dr. Berg's evaluation.

The next issue to be decided is claimant's entitlement to permanent partial disability. As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 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 many times:

> 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 health seemingly was excellent prior to the development of back difficulties. Although he has not had surgical intervention, his back complaints have been persistent. He has been treated with a number of modalities. He continues to take medication including a drug for pain. He carries a permanent weight restriction, and it has been recommended that he not do frequent bending or twisting. Claimant has been paid a substantial healing period--well in excess of that routinely seen--and he is being awarded additional time by this decision.

Claimant is a young man with a long work life ahead of him. His education is good and he has potential for obtaining more education. Those factors lower his industrial disability. Asher v. Polk County, III Iowa Industrial Commissioner Report 19 (Appeal Decision 1982); Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Report 426 (1981). He was concerned about his ability to work in the finance business because of his own financial background. The state evaluators viewed this concern as a job seeking skills problem which could be overcome.

Claimant has not returned to work. As a truck driver claimant had actual earnings that were substantial if he was working. In all likelihood, claimant will have to go through a period in which he earns a lesser amount. The permanent partial disability benefits he is being awarded should help sustain him in that time.

Claimant's job experience has been varied. As Paprocki pointed out, it runs the gamut from non-skilled physical labor to semi-skilled to very skilled and from physicaly heavy to very light or sedentary. Claimant claimed that the frequency with which he changed jobs was attributable to his hoping to better himself. On the one hand, claimant's past conduct has provided him with a number of transferrable skills. On the other hand, the repeated changes in employment have not given claimant the kind of solid work pattern and stability employers sometimes seek.

While claimant's behavior may be considered to show good motivation to improve himself, the undersigned has some question about claimant's ability to maintain a direction. He started in college to attain a degree. He eventually got off the standard path and began to take courses which interested him. Evaluators at the state rehabilitation facility observed claimant's difficulty in solidifying a vocational objective. Claimant has not attained a transcript from the California college to assist him or the vocational experts who have tried to help him.

Claimant's motivation also is evidenced by his inability to reduce his weight. Anyone who has ever had a weight problem can sympathize with claimant. However, both his doctors have pointed to the importance of losing weight and it seems his motivation to do so has not been a sustained one. See Cowell v. Insulation Services, Inc., III Iowa Industrial Commissioner Report 57 (Appeal Decision 1982).

Claimant was given a functional impairment by Dr. Berg of five percent which he proposed could be zero if claimant's weight were reduced. It is important to keep in mind that permanent means an indefinite and indeterminable period. Wallace v. Brotherhood of Locomotive Firemen & Engineers, 230 Iowa 1127, 1130, 300 N.W. 322, 324 (1941). Dr. Worrell, using the orthopedic guides, assessed an impairment rating of ten percent.

Vocational expert Jacobs found a number of jobs she felt claimant could do. State vocational evaluators also suggested several jobs.

Based on the Iowa case law, the findings of fact below and the discussion set out herein, claimant is found to have a permanent partial disability of 17 1/2 percent.

The remaining issue is whether or not the provisions of Iowa Code section 86.13 have been triggered. 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 benefts 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.

Claimant understood that his benefits were being terminated on May 10, 1983 because of his failure to cooperate in his treatment by losing weight. Both Drs. Berg and Worrell have directed claimant to lose weight. In April of 1983 Dr. Worrell wrote that losing weight would be helpful to claimant, but that his weight was not the sole reason for his difficulty. Defendants' position is somewhat understandable. It would seem that claimant would want to do whatever is necessary to recondition himself and to rid himself of the pain. However, in light of Dr. Worrell's letter of April 6 and of a subsequent letter indicating claimant has been cooperative, defendants' termination of benefits was unreasonable. See Eversoll v. Swift Dairy & Poultry Co., 32 Biennial Report of the Industrial Commissioner 206 (1975).

Section 86.13 gives the undersigned discretion to determine the degree of unreasonableness in that additional benefits up to fifty percent can be awarded. Overall, defendants' conduct is viewed as minimally unreasonable and an additional ten percent will be awarded to run from the date of termination, May 10, 1983, until November 17, 1983 when healing period ended. No additional benefits will be allowed on the award of permanent partial disability.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-five (35) years of age.

That claimant is a high school graduate.

That claimant has between ninety-five (95) and one hundred fifteen (115) hours of college credit.

That claimant served for two years with the navy.

That claimant has work experience as a material handler, shaker, assistant manager trainee, loan collector/appraiser, trash hauler, warehouseman, truck driver and dispatcher.

That claimant commenced work for defendant employer in August 1981.

That claimant initially injured his back as he was unloading an overweight truck in November of 1981.

That claimant was paid weekly benefits from November 7, 1981 to December 14, 1981.

That claimant returned to work on December 15, 1981.

That claimant had a second back incident in May of 1982.

That claimant received workers' compensation payments until May 10, 1983.

That claimant reached maximum medical recuperation by November 18, 1983.

That claimant continues to take medication.

That claimant has not returned to work.

That claimant cannot return to the type of truck driving he was doing at the time of his injury.

That claimant has undergone rehabilitation through the state rehabilitation agency.

That claimant wishes to find a job that pays more than minimum wage and will provide him with an opportunity for advancement.

That claimant is on a 1000 calorie diet.

That claimant's current weight is two hundred thirty-eight (238) pounds.

That claimant needs to reduce his weight and increase his flexibility.

That claimant has a twenty-five (25) pound lifting limitation with a recommendation of no frequent bending or twisting.

That claimant has a functional impairment as a result of his back problems.

That claimant is having difficulty selecting a direction for his vocational rehabilitation.

That claimant has skills from past work which can be transferred to new employment.

That defendants' termination of claimant's benefits because of his failure to decrease his weight was unreasonable.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established entitlement to healing period benefits through November 17, 1983.

That claimant has established entitlement to permanent partial industrial disability of seventeen and one-half percent (17 1/2%).

That claimant has established entitlement to additional benefits under Iowa Code section 86.13.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant healing period benefits from May 10, 1983 through November 17, 1983 at a rate of two hundred seventy and 01/100 dollars ($270.01).

That defendants pay an additional twenty-seven dollars ($27.00) per week from May 10, 1983 through November 17, 1983 pursuant **to Iowa Code section 86.13.**

That defendants pay permanent partial disability benefits for eighty-seven and one-half (87 1/2) weeks commencing on November 18, 1983 at a rate of two hundred seventy and 01/100 dollars ($270.01).

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 29 day of August, 1984.

Judith Ann Higgs

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS J. McDONOUGH,	:	File Nos. 661605
Claimant,	:	700318
vs.	:	ARBITRATION AND
DUBUQUE PACKING COMPANY,	:	REVIEW-
Employer, Self-Insured, Defendant.	:	REOPENING
	:	DECISION

These are proceedings in review-reopening and arbitration brought by the claimant, Thomas J. McDonough, against his self-insured employer, Dubuque Packing Company, to recover additional benefits and benefits under the Iowa Workers' Compensation Act as a result of injuries he sustained on May 12, 1979 and May 8, 1980 respectively.

The matters came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Dubuque, Iowa on May 16, 1984. The records were considered fully submitted on that date but for written submission of an oral stipulation filed May 21, 1984.

An examination of the industrial commissioner's files indicates that a first report of injury was filed August 27, 1980 and a memorandum of agreement July 10, 1981 in file number 601605. No filings have been made in file number 700318.

The record in these cases consists of the testimony of claimant, of Robert Scott Cairns, M.D., and Luke Charles Faber, M.D.; and of claimant's exhibits A, B and C.

ISSUES

The issues to be resolved in file number 61605 are:

1) Whether a causal relationship between claimant's injury and his disability exists.

2) Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement, including the issue of whether defendant is entitled to credit under section 85.38.

3) Whether claimant is entitled to payment of certain medical expenses under section 85.27.

These issues as well as the issue of whether claimant received an injury which arose out of and in the course of employment must be resolved relative to file number 700318.

REVIEW OF THE EVIDENCE

The parties stipulated that the rate of compensation as to claimant's May 8, 1979 injury is $262.50 and as to his May 22, 1980 injury is $270.00.

Claimant has received 28 weeks and 5 days of temporary disability and 26 weeks of disability styled as permanent partial disability benefits following the temporary disability benefits relative to his May 8, 1979 injury. Since May 1, 1982 claimant also has received monthly retirement disability benefits in the amount of $768.00 to which the employer contributed.

Claimant, Thomas Joseph McDonough, testified in his own behalf. Claimant was born May 18, 1935, is 5'9 1/2" tall and weighs 190 pounds. He stated he weighed 180 pounds at the time of his injuries. Claimant stated that on May 8, 1980 he was working on utility as a car storer. As such, he packed boxes of meat weighing between 10 to 100 pounds onto trucks. Claimant reports his right shoulder was sore at this time, and, therefore, he worked almost constantly with his left arm. He agreed that he had experienced problems with his left shoulder in 1968 but denied having any problems with that shoulder in May 1980. Claimant stated his pain began at approximately 2:30 p.m. He began his shift at 7:30 a.m. Claimant testified that he had to put 25 pallets of meat in each truck. The last seven pallets must be unloaded and repacked in the truck. To do so, claimant had to lift these boxes overhead and then push them forward with his left arm. He experienced a severe, sharp pain in his left arm which radiated down into his chest and arm. Claimant reports he thought he had had a heart attack and told a coworker to finish the job and went home. The pain in his left shoulder decreased, but claimant states he continued to experience pain and stiffness in his left shoulder which was very similar to his right shoulder pain. Claimant worked his full shift the next day. He stated he reported his problems to Mr. Conrady, a coworker, and Mr. Campbell, his supervisor.

Claimant saw Dr. Lockhart, a chiropractor, but his condition did not improve. Lockhart referred claimant to E. E. Herzberger, M.D., who diagnosed claimant's problem as two torn rotator cuffs, recommended surgery and referred claimant to Robert Scott Cairns, M.D. Dr. Cairns hospitalized claimant, but surgery was not performed. Claimant then saw Luke C. Faber, M.D., the company physician, who directed him to Julian G. Nemmers, M.D.

Dr. Nemmers apparently performed surgery on claimant's right shoulder. Dr. Nemmers released claimant to return to work with light duty restrictions on February 8, 1981. Apparently claimant was not offered work within the restrictions and was not allowed to return to work. He was given additional compensation but was informed by way of a letter that "anything from February 9, 1981 [counted] against [his] permanent partial disability." Claimant admits he lost no additional work time as a result of his left shoulder problems since these coincided with the time he was off work as a result of his right shoulder injury. Claimant reports that all his medical bills have been paid, but states he made approximately eighty round trips for physical therapy and doctor visits in 1980 at seven miles each.

Claimant reported that he can no longer bowl nor play baseball. He stated that he cannot raise his arm out at the side "with any strength" and that the first three fingers are numb on his right hand. He reported he has less pain in his right shoulder now than he had before surgery and that his left shoulder remains in constant pain. Claimant is right-handed and feels that for this reason the right arm problems create greater restrictions for him even though the condition of and use restrictions for the two limbs are similar.

Claimant was placed on disability retirement May 1, 1982 as a result of his rotator cuff problems. Claimant is allowed to earn $6,500 per year in addition to his disability. He stated he has sought other work but has been unable to find any for almost a year and a half. He attributed this to the requirement that he advise potential employers of his disability retirement. Claimant now works 22 hours per week at minimum wage as a security guard for Skowronek's Jewelry.

Claimant graduated from high school in 1953 and has no advanced formal training. He has worked at a utility company reading meters and as an unskilled laborer in a wood finishing factory. Claimant is well spoken and articulate.

On cross-examination, claimant admitted he did not report his 1980 injury to the company first aid department on his injury date but reiterated he told his foreman of his injury. Claimant admitted he served in the U.S. Army for six to eight years and did general supply duty which he characterized as including accounting and distributing supplies as per written or oral instructions. Claimant reported he received a pension of $768 per month; one-half of which is attributable to disability benefits and not to normal retirement benefits. Claimant admitted he had a sore arm every spring he played ball but stated he has not played ball for twelve years. Claimant expressed his understanding that Dr. Nemmers and his doctors in Iowa City have told him never to have his left shoulder operated on, but stated surgery had been necessary in the right shoulder

since it had gotten so much worse. Claimant denied his doctors told him his was a degenerative condition.

On redirect examination, claimant relayed that his arm "tingled" and swelled once from post-surgical mobilization, but denied that tingling was present when x-rays were taken in July 1980. Claimant stated he was examined by Dr. Mallapurdi who "called it a tunnel syndrome" and advised surgery. Claimant stated that Dr. Nemmers and his Iowa City Physicians advised against this. Claimant reported Dr. Faber has examined his shoulders for disability at the company's medical offices on at least one and possibly two separate occasions.

Robert Scott Cairns, M.D., was called by claimant. The doctor relayed that he first saw claimant in July 1980 on consultation from Eugene Herzberger, M.D. The doctor recited claimant's medical history and concluded by stating that arthrograms obtained by Dr. Herzberger revealed rotator cuff tears on both the left and right shoulder. In response to a hypothetical question that incorporated substantially the fact pattern of this case as claimant has reported such, the doctor opined that, assuming the facts of the hypothetical to be true (as to claimant), it was probable that the rotator cuff injury to claimant's left shoulder was caused by the act of lifting the box (from the pallet) and extending the box outward onto the pile of boxes (already in the semitrailer).

The doctor explained the following as regards rupture of the rotator cuff:

> Well, I believe that an entirely normal rotator cuff rarely ruptures. It requires massive trauma for an entirely healthy tendon to rupture. I think that as a consequence of aging in some individuals there's a consequence of external environmental factors such as occupational demands and so forth that given the right set of circumstances, the tendon will rupture. I think that the usual history and the usual cause is that some accident or untold event causes the tendon to rupture and while the tendon was not entirely healthy or normal to begin with, the precipitating factor was the lifting or the fall or what have you. So I guess in answer, it is probably truly a combination of things except for massive violence. (Trans., p. 19 ll. 11-24)

The doctor indicated that claimant's history of July 1980 records claimant's left shoulder injury as occurring five or six months earlier rather than two months earlier. On cross-examination, the doctor stated claimant gave no history as to what caused his shoulder symptoms. The doctor noted that a medical report from Iowa City gives a history much as claimant's hypothetical with sudden pain in the left shoulder after lifting.

The doctor evaluated both claimant's left and right shoulder. As to claimant's right shoulder, he found 95° abduction, 150° of forward flexion, normal extension, 4° external rotation, and 5° of internal rotation. Claimant was also tender over the ulnar nerve. The doctor concluded claimant had a 12 percent impairment of the upper right extremity or a seven percent body as a whole impairment as a result of his right shoulder condition. As to claimant's left shoulder, the doctor found 105° abduction, 150° of flexion, 30° of extension, 9° of external rotation, 25° of internal rotation. The doctor concluded claimant had a nine percent impairment of the upper left extremity or a five percent body as a whole impairment as a result of his left shoulder condition. The doctor explained that he uses objective criteria only and not an individual's complaints of pain or weakness when assigning an impairment rating. The doctor agreed that adding claimant's two separate body as a whole ratings would result in a 12 percent body as a whole impairment rating but indicated he was not altogether certain this would be the method for obtaining a body as a whole impairment rating under the standard impairment rating guides. The doctor agreed that he evaluated claimant for rating purposes after his right shoulder surgery.

Luke Charles Faber, M.D., testified in defendant's behalf. Dr. Faber reviewed exhibit A, the medical notations for defendant from the employer's first aid office from 1968 onward. He represented that at his direction all visits to the office by any employee for any reason are recorded. The doctor testified the records indicate claimant sought treatment for left shoulder pain on January 5, 1968, January 6, 1968, April 23, 1968, December 19, 1968, April 14, 1969 and that the records show claimant did not seek treatments for left shoulder pain in any year after 1969 including 1980 and 1981. The doctor further testified that the records show claimant first sought treatment of right shoulder soreness on March 22, 1977 which was diagnosed as biceps tendinitis for which claimant received diathermy on March 24, 1977. The doctor stated the records reflect claimant was next seen for right shouler problems on May 8, 1979. He was then seen on May 9, May 11 and May 14, 1979 and started on diathermy. Treatment continued throughout May into early June 1979 when claimant was taken off work (June 7, 1979) and referred to Dr. Nemmers. Claimant's last visit to the first aid office for 1979 is June 10, however. Claimant was next seen for his right shoulder on July 28 and 29, 1980 with subsequent visits on August 4 and 5, 1980 and either January 9 or February 9, 1981. The doctor stated he had a personal memory of claimant seeking treatment from him in the first aid office but had no recollection of treating claimant for a left shoulder condition. He noted that the record contains no reference to treatment of claimant for a shoulder condition around May 9, 1980. The doctor indicated an arthrogram of July 22, 1980 showed claimant has bilateral rotator cuff tears. He stated a myelogram of claimant's neck showed a lateral disc involving the interspace between the fifth and sixth vertebral bodies in the neck and a lumbar myelogram showed a herniated disc centrally between the fourth and fifth lumbar vertebrae and thickening or enlargement of the nuchal ligaments giving a posterior defect at the C-4 and 5, C-5 and 6, and C-6 and 7 interspaces. The doctor opined that the lateral disc symptom revealed could result in pain and stiffness. He stated the cervical myelogram was left-sided and opined this left side involvement could impair the function of claimant's shoulder and arm on that side. The doctor agreed that hypertrophied uncinate processes giving a posterior defect at the interspaces of C4 and 5, C5 and 6, and C6 and 7 could produce a tingling sensation or numbness in the hands and fingers. The doctor further opined:

> ...that the lateral disk involvement on the left side with impingement on the nerve roots that come out on 5 and 6 is very likely to present itself on the left side with numbness, tingling and inability to move that shoulder, arm. Pain, I think it unlikely although possible but unlikely that the hypertrophied uncinate processes and the anterior defects would manifest symptoms of that nature. (Trans., p. 100 ll. 1-8)

The doctor then expressed his belief that claimant's degenerative arthritis and spondylolysis was probably not contributing and probably had no relation to his symptoms. The doctor denied having ever made a disability evaluation or examination of claimant.

On cross-examination, the doctor represented that an intervertebral disc has a higher probability than a rotator cuff rupture of causing arm tingling because of the disc's proximity to the nerves.

Claimant's exhibit A is certain medical reports relating to claimant. Special note is given to the following: An August 27, 1982 letter report of Julian G. Nemmers, M.D., states that claimant had a repair of the rotator cuff and acromioplasty and division of the coracoacromial ligaments August 7, 1980 and was continuing to have some residual symptoms and physical findings in the right shoulder. Claimant had full range of motion in the right shoulder but weakness in abduction and flexion of the right shoulder and complaints of pain when strong downward force was applied on the right arm. He opined that claimant has a permanent impairment of not more than ten percent of the body as a whole as a result of his left shoulder disease and surgery. He noted claimant complained of an impingement in the left shoulder joint with a rotator cuff tear in the left shoulder and degenerative changes in the left acromioclavicular joint. He opined that claimant has an eight percent whole body disability as a result of his left shoulder disease. Notes of the doctor of February 11, 1981, May 27, 1981 and July 23, 1981 stated:

> 5-27-81: The more I talk with this man, the more I am convinced that his symptoms in the right arm are a result of the Sudeck's that came on following the shoulder surgery. He has good abduction of the shoulder, full and complete flexion and abduction but lacks only a little internal rotation. He is back working at the Pack doing any kind of job they ask of him. I told him to give this a summer of playing golf and using his arm and return next September and we would do a final disability evaluation. I believe there is some functional component in this patient. I do not believe it is a lack of motivation as much as it is a functional component. I do not believe that he tolerates pain or stress very well.
>
> 9-23-82: He talks about falling asleep while watching TV with his arms up behind his head and his right shoulder locks on him. He talks about holding his arm out in abduction and he gets a numbness down the medial aspect of the arm. He talks about a pain throughout his shoulder and his arm going dead on him. He talks about his medial elbow being sore and a numbness down into his medial and ring finger, etc. He has recently had an EMG by McKee and McKee gave him clearance and said it was normal for everything distal to the elbow but he could not test everything proximal.... The only possible thing that I know this could be is a thoracic outlet syndrome with pressure on the brachial plexus due to a fibrous band up in his axilla.

The exhibit also contains copies of the handwritten first aid office notes of the employer relative to claimant. Two 1980 entries, the dates of which are not ascertainable note claimant was seen for previous shoulders with referral to Dr. Nemmers.

Other entries in 1980 and 1981 refer to right shoulder only. An entry of 1982 refers to previous shoulders. An August 26, 1981 letter report of John McKee, M.D., states that claimant has a postive Tinel's and Phalen's signs (on the right) which suggests a carpal tunnel syndrome but that corroborating evidence of the syndrome was not found on the nerve conduction studies. In an April 29, 1982 report to Dr. Faber, Dr. Nemmers opines that claimant is permanently unable to perform any repetitious shoulder height or overhead work in his employment at Dubuque

Packing Company. General notes of Dr. Cairns, the first of which is dated December 17, 1982, indicate the doctor's impairment ratings as those he recited in his oral testimony.

Claimant's exhibit B is further medical and employment records relative to claimant. A Mercy Health Center discharge summary of July 25, 980 apparently of E. E. Herzberger, M.D., states in part:

> This 45-year-old patient was admitted to the hospital because of weakness of both shoulders, as well as of pain in the same location. The symptoms started in May of 1979 with the right shoulder and the symptoms in the right shoulder have persisted and then for the past three or four months they started in the left shoulder also. The patient has chiropractric [sic] treatments. He has not improved sufficiently on them and as cervical spine films showed cervical disc disease, he was referred for neurosurgical evaluation. In the hospital, the patient had a cervicaland [sic] lumbar myelogram which revealed the presence of significant cervical spondylosis and possible disc herniation at C5-6 on the left side, and in addition to this, he had also protrusion of the L4-5 intervertebral disc. As it was felt that the patient could have rotator cuff tear, bilateral arthrograms of the shoulder were done. These arthrograms showed the patient had indeed bilateral rotator cuff ruptures....

A clinical report of Nemmers of July 22, 1980 notes:

> The patient was off work for about nine weeks, then he returned to work. As he continued to have pain in his right shoudler he has tried to do his work mainly with his left arm using his left shoulder. He started having pain and numbness in the left shoulder also and has been seen again by Dr. Nemmers. Then however he went to a chiropractor and had chiropractic treatments. The left arm has been hurting mainly for the past 3-4 months. The pain is different than from the right side.

A consultation request and report of Dr. Cairns of July 25, 1980 states an impression of "bilateral rotator cuff tears (chronic)" after reciting the following history:

> HISTORY: This patient is a 45 year old white male Packing House worker who was working on the beef kill when apparently a heavy stomach dropped and he injured his shoulder. He had had some previous problems in his opposite shoulder and felt he probably needed a steroid injection. Because he did not like Dr. Faber's technique of steroid injection, he told Dr. Faber that he had aggravated an old baseball injury. He did this so that he would be referred to Dr. Nemmers who had injected him previously. Dr. Faber told him that since he was honest about how the injury occurred, he would take care of it himself and thus injected his shoulder. This apparently didn't work. He was kept off work for about five weeks and then was told that he had a rotator cuff tear and was referred to Dr. Nemmers. Dr. Nemmers examined him and felt that he probably did indeed have a rotator cuff tear but felt that perhaps another steroid injection would be indicated. He did inject him and again was off work and apparently improved. Dr. Nemmers discussed rotator cuff surgery with him at that time and apparently the statistics were grim enough that the patient became frightened at them. At any rate he returned back to work and tried to use his left shoulder. About 5-6 months ago he developed pain in the left shoulder. He ultimately saw a chiropractor who felt that he was having troubles in his 5th nerve root and referred him to Dr. Herzberger when his synptoms persisted. The patient currently complains of pain more in the left side than on the right. The pain on the left side was down the left arm somewhat.

A report of lumbar myelogram of July 22, 1980 concludes:

> 1. L4-5 central herniated disc.
>
> 2. Lateral disc involving the C5-6 intervertebral disc space with more involvement on the left side.
>
> 3. Hypertrophied uncinate processes producing both anterior defect and hypertrophic posterior nuchal ligament giving the posterior defect at the C4-5, C5-6 and C6-7.

A report of cervical spine x-ray of July 22, 1980 concludes:

> 1. Moderate amount of degenerative osteoarthritis.
>
> 2. Degenerative cervical spondylosis involving the C4-5 and C5-6.

A report of a right shoulder arthrograph of July 23, 1980 notes impression of rotator cuff tear at shoulder. A report of a left shoulder arthrogram of the same date notes an impression of bilateral rotator cuff tears of the right and left shoulder.

An October 14, 1981 summary report of the University of Iowa Hospitals and Clinics contains a history for claimant which states in part:

> [P]roblems all began approximately 4-5 years ago when he was working at a packing plant dumping bags and noticed a pain in his right shoulder. He continued working that day, however the next day he states that he could not abduct his right arm. He went to see the company doctor who injected cortisone which gave him no relief and he was off of work for 5 weeks giving the shoulder rest hoping that it would heal. He then went back to work and after 2 hours it was just as bad as it had been 5 wks. previously. He went to see another doctor who injected cortisone again and placed the patient in a right shoulder immobilizer for 5 wks. After this he went back to work and had the same problems he had had initially. Because he did not want to use his right arm or shoulder very much, he began over using his left arm and shoulder and one day while lifting a box he felt this sudden onset of left shoulder pain. His left shoulder gradually got worse and is now with bilateral shoulder pain. He went to see a chiropractor.

Claimant's exhibit C is a February 10, 1981 letter from Melvin Keibel, Dubuque Packing Company workers' compensation manager, to claimant. The letter states that the writer has concluded claimant's healing period has ended and further states:

> Since Dr. Nemmers has placed the restriction of "no work with your hands that is shoulder high or above"; and since we do not have any jobs that we can give you within this restriction at this time, I must stop your Worker [sic] Compensation payments as they relate to healing period.
>
> However, your injury has left you with a permanent disability to an extent not known at this time. I am, therefore, going to continue to send a check weekly to you that will be part of this permanent disability. When the degree of your disability is known, we will know for how long these weekly benefits will be paid.
>
> In the meantime, if there is work that you can do and are entitled to under the agreement between this company and your union, it will be offered to you.

APPLICABLE LAW AND ANALYSIS

Claimant allegedly has sustained two separate injuries. The issues raised in regard to each file will be discussed concurrently, however. As regards to file number 661605, a memorandum of agreement was filed, which memorandum conclusively established that claimant's right shoulder rotator cuff rupture arose out of and in the course of his employment. This issue remains for resolution as regards file number 700318, which concerns claimant's alleged left shoulder injury.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 8, 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).

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.

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.

"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 v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant, at hearing, gave a history of favoring his right shoulder and arm following his original injury. He states that while loading meat boxes onto a semitrailer with his left arm, he raised a full meat box above his head and then shoved it across another box and then experienced extreme pain into his left shoulder and arm. A medical history recorded in claimant's records at the University of Iowa Hospitals and Clinics describes the onset of claimant's left shoulder difficulties in substantially the same matter. In response to a hypothetical question posed by claimant's counsel and incorporating a history like that given at hearing and contained in the hospital and clinic records, Dr. Cairns opined that if the facts were true, then the

left rotator cuff injury occurred as a consequence of the incident described. Regrettably, claimant's other medical histories do not refer to a specific incident which resulted in claimant's left rupture nor did claimant apparently report this injury to the company's first aid station. Claimant testified that he reported the incident to a co-worker and his supervisor. Defendant has not raised the affirmative defense of lack of timely notice of any left rotator cuff injury nor offered evidence, other than Dr. Faber's testimony regarding the first aid reports, refuting claimant's testimony in this regard. Also, claimant's other medical records do refer to claimant's favoring his right side and consequently developing left shoulder problems. Dr. Cairns, at hearing, explained the following regarding rupture of a rotator cuff:

> Well, I believe that an entirely normal rotator cuff rarely ruptures. It requires massive trauma for an entirely healthy tendon to rupture. I think that as a consequence of aging in some individuals there's a consequence of external environmental factors such as occupational demands and so forth that given the right set of circumstances, the tendon will rupture. I think that the usual history and the usual cause is that some accident or untold event causes the tendon to rupture and while the tendon was not entirely healthy or normal to begin with, the precipitating factor was the lifting or the fall or what have you. So I guess in answer, it is probably truly a combination of things except for massive violence. (Trans., p. 19 ll. 11-24)

The doctor's discourse is the mortar that cements together the tidbits of evidence painfully educed from various parts of the record in this case. The following scenario ensues: Claimant injured his right shoulder. Claimant began to favor that shoulder and extremity in his work and began to perform his work tasks left-sidedly insofar as possible. This resulted in stress to and weakening with apparent discomfort in claimant's left rotator cuff which then ruptured as a result of the lifting and shoving of the full meat boxes in the course of his work for the packing company. The cause or source of claimant's left rotator difficulties must be attributed to the weakening of his left shoulder as a result of favoring his right shoulder while doing his tasks for the employer. Thus, claimant preponderates on the issue of whether his left rotator cuff rupture arose out of and in the course of his employment.

We shall next address the issues of causal connection between claimant's injuries and his current disability.

Our threshold concern is whether a causal relationship exists between claimant's 1979 injury to his right shoulder and his current disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 22, 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, 261 Iowa 352, 154 N.W.2d 128.

Lamentably, neither claimant nor defendants directly raised the question of whether claimant's current disability is causally connected to his May 1979 work injury on either direct or cross-examination of either Dr. Cairns or Dr. Faber. It is apparent from the record as a whole including the medical histories recorded, and the medical treatment rendered, and disability assignments given claimant that claimant's May 22, 1979 work injury resulted in a rotator cuff tear and that claimant is disabled as a result of such tear. The weight restrictions assigned by Dr. Nemmers and claimant's own complaints of motion restrictions and pain following the incident substantiate the causal connection between the 1979 injury and claimant's right shoulder disability. Thus, claimant has established--although his evidentiary sketch was indeed drawn with a very broad pen--the requisite causal connection as regards that injury.

Questions remain as regards claimant's left shoulder disability, however. Several different physicians, two of whom have assigned disability ratings, also have diagnosed claimant's left shoulder condition as a rotator cuff rupture. Claimant, at hearing, characterized his pain and problems with his left arm and shoulder as similar to that in his right arm and shoulder. Claimant's lumbar myelogram of July 22, 1980 reveals a lateral disc involving the interspace between the C5 and 6th vertebrae bodies with more involvement on the left side. Dr. Faber opines that this disc involvement with nerve root impingement is very likely to present itself on the left side with numbness, tingling and inability to move the shoulder and arm. Thus, the question becomes whether claimant's disabling symptoms on the left result from his work-related rotator cuff rupture or from the condition found at the C5-6 interspace. It is concluded they result from his left cuff rupture. Claimant recited he did not have left arm tingling in July 1980. A thorough survey of claimant's medical records of that period also does not reveal reference to left arm tingling or numbness even though more reference are made to such symptoms on the right. These apparently are largely attributed to Sudeck's which claimant developed following his right rotator surgery. Dr. Faber's opinion is based on the possibility that the disc problem creates a nerve root impingement. But for the myelogram, no evidence of nerve root impingement is offered, however. As stated, claimant recites that his problems on the left are similar to those on the right. While this might suggest that claimant does, indeed, have tingling and numbness and loss of motion on the left, it also suggests it is more probable than not that claimant's left side symptoms have their origin in his rotator cuff rupture as do his right side symptoms. Claimant's lateral disc involvement is thus coincidental and not compelling to the resolution of this issue. Claimant's disabling symptoms on the left are found to result from his work-related left rotator cuff rupture.

The larger question of claimant's benefits entitlement remains.

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).

Claimant's disability to the shoulder is viewed as a disability to the body as a whole. Alm v. Morris Barich 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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257.

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, 288 N.W.2d 181.

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. Id.

Dr. Nemmers has opined that claimant has a ten percent permanent functional impairment of the body as a whole as a result of his right rotator cuff injury. Dr. Cairns has opined claimant has a seven percent body as a whole permanent functional impairment as a result of that injury. Dr. Nemmers opined claimant has a seven percent body as a whole impairment a result of his left rotator cuff injury. Dr. Cairns has opined the same produced a five percent body as a whole impairment. Claimant worked for over a year following his right shoulder injury. Only after his left shoulder problem developed was he referred to Dr. Nemmers for treatment of the right and subsequent treatment of the left. Dr. Nemmers placed work restrictions on claimant when he released him for work in 1981. The employer did not accommodate these, and claimant was returned to regular duty work March 23, 1981. On May 1, 1982 claimant was placed on retirement disability. Claimant sought other employment following his retirement. He reports he found none for approximately eighteen months and attributes this to the need to reveal his condition to potential employees. Claimant, at the time of the hearing had secured other employment as a security guard. He

works only twenty-two hours per week and earns only minimum wage. The record is unclear as to whether this is true because claimant may only earn $6500 per year above his retirement pension, or because claimant is unable to work more hours or because only twenty-two hours of work are available. Nevertheless, this represents a substantial reduction in actual earnings and tends to demonstrate that claimant's actual job opportunities and earning capacity were significantly diminished by his injuries. On the other hand, claimant is a high school graduate and is articulate and well-spoken. He is now middle aged and while he could receive training for a less physically demanding job, such is not nearly as feasible as it might be for a gentleman ten years younger than claimant. He appears well motivated and desirous of continuing gainful employment insofar as he is able to do so, however.

These factors all must be considered in assessing claimant's separate impairment ratings for his right and left rotator cuff injuries. Both Drs. Nemmers and Cairns give claimant a higher functional impairment rating as a result of his right shoulder injury. Yet, claimant continued working for more than a year following that injury albeit by favoring his right side. Furthermore, nothing in the record suggests that had claimant not subsequently injured his left shoulder, he would have been precluded from continuing work for his employer following surgical repair of his right cuff. Thus, it appears that claimant's right rotator cuff injury produced an industrial disability of fifteen percent. On the other hand, claimant's real difficulties appear to have developed subsequent to and as a consequence of his left cuff injury. It was only following such that claimant was unable to continue his job duties and the chain of e ents resulting in his present life station ensued. Thus, it must be concluded that claimant's greater disability results from that injury even though the actual physical impairment from such is less. When the factors are considered as a whole, it is concluded that injury produced an additional industrial disability of 22 percent for claimant.

Claimant's healing period remains at issue. 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 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.

A medical release of Dr. Julian Nemmers of March 18, 1981 releases claimant to return to his regular duties on Monday, March 23, 1981; thus, claimant's healing period for his right shoulder injury extends to such date. Claimant testified he missed no additional time for his left shoulder injury. Therefore, a healing period award for such injury will not be made.

Defendant raises the issue of entitlement to a credit against permanent partial disability benefits for the portion of claimant's retirement pension attributable to his disability retirement. One-half of claimant's pension of $768.00 is characterized as disability related. Section 85.38, The Code, speaks to benefits which should not have been paid or payable had rights of recovery existed under the Workers' Compensation Act and expressly states it does not apply to benefits which would have been payable even though a compensable injury occurred. No showing was made that claimant would not have received his disability retirement benefits were a compensable injury established. Therefore, defendant will not receive a credit against those amounts paid under the program.

Claimant seeks payment of certain medical travel expenses. Section 85.27 entitles him to such. Claimant testified he made in the vicinity of 80 seven mile round trips for physical therapy and six or seven seven mile round trips to see his doctor. The parties stipulated that any mileage rate would be paid at the 1980 rate. Claimant shall be paid for 602 miles of medical travel at that rate.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained a right rotator cuff rupture arising out of and in the course of his duties for his employer on May 22, 1979.

Claimant sustained a left rotator cuff rupture arising out of and in the course of his employment on May 9, 1980 while lifting and shoving boxes of packed meat as he loaded a semitrailer for the employer.

Claimant had surgical repair of his rotator cuff in July 1980.

Claimant has not had surgical repair of his left rotator cuff.

Claimant has a lateral disc involving the interspace between the C5 and 6 vertebrae with more involvement on the left.

Claimant's complaints are of pain, discomfort, and restrictions of motion.

Claimant's physical discomfort and problems are similar on the right and the left.

Claimant's 1979 right shoulder injury is causally related to his current disability of the right shoulder and extremity.

Claimant's 1980 left shoulder injury is causally related to his current disability of the left shoulder and extremity.

Claimant is fifty (50) years old.

Claimant is a high school graduate.

Claimant has no other formal training but served as an inventory clerk in the U.S. Navy.

Claimant is well-spoken and motivated.

Claimant was released to work March 23, 1981 and returned to work at such time.

Claimant has received retirement disability since his May 1, 1982 disability retirement.

Dr. Nemmers opines claimant has a seven percent (7%) body as a whole functional impairment of his left shoulder and a ten percent (10%) body as a whole functional impairment of his right shoulder.

Dr. Cairns opines claimant has a five percent (5%) body as a whole functional impairment of his left shoulder and a seven percent (7%) functional impairment of his right shoulder.

Claimant sought work following his disability retirement. He found none for approximately eighteen (18) months.

Claimant is now working twenty-two (22) hours a week as a jewelry store guard at minimum wage.

Claimant worked for more than one year following his right shoulder injury.

Claimant's right shoulder injury produced an industrial disability of fifteen percent (15%).

Claimant's left shoulder injury produced an industrial disability of twenty-two percent (22%).

Claimant had eighty (80) seven (7) mile round trips for physical therapy related to his right shoulder injury.

Claimant made six (6) seven (7) mile round trips for medical treatment of his injuries.

Claimant incurred six hundred two (602) miles of compensable medical milage expense at the 1980 mileage rate.

Claimant receives three hundred eighty-four dollars ($384.00) in disability retirement pension. A showing is not made that these would not have been paid if claimant's condition were compensable under this act. Defendant is not due a credit for disability retirement pension paid claimant.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that a causal relationship exists between his May 22, 1979 injury and his current right shoulder disability.

Claimant is entitled to further healing period benefits from February 9, 1981 to March 23, 1981.

Claimant is entitled to permanent partial disability of fifteen percent (15%) as a result of his May 22, 1979 injury.

Claimant has established that he received an injury on May 9, 1980 which arose out of and in the course of his employment.

Claimant has established that his May 9, 1980 injury is causally related to his current disability of the left shoulder.

Claimant is entitled to permanent partial disability of twenty-two percent (22%) as a result of his May 9, 1980 injury.

Claimant is entitled to payment of six hundred two (602) miles of medical mileage expenses at a rate of twenty cents ($.20) per mile.

Defendants are not entitled to a credit under section 85.38 for the portion of claimant's retirement pension which is retirement disability payment.

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant permanent partial disability benefits for seventy-five (75) weeks at the rate of two hundred sixty-two

and 50/100 dollars ($262.50). Defendant receives credit for twenty (20) weeks of permanent partial disability benefits already paid.

Defendant pay claimant permanent partial disability benefits for one hundred ten (110) weeks at the rate of two hundred seventy dollars ($270.00).

Defendant pay claimant additional healing period benefits at the rate of two hundred sixty-two and 50/100 dollars ($262.50) for the period from February 9, 1981 to March 23, 1981.

Defendant pay accrued amounts in a lump sum.

Defendant pay claimant mileage expenses in the amount of one hundred twenty and 40/100 dollars ($120.40).

Defendant pay interest pursuant to section 85.30 as amended.

Defendant pay costs of this action.

Defendant file a final report when this award is paid.

Signed and filed this 5th day of September, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JIMMIE Z. McGENNIS, Claimant, vs. BROWER CONSTRUCTION COMPANY, Employer, and CHUBB GROUP OF INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 720406 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 abitration brought by Jimme Z. McGennis, claimant, against Brower Construction Company, employer, and Chubb Group of Insurance Companies, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an allegd injury of September 9, 1982. It came on for hearing on April 6, 1984 at the Woodbury County Courthouse in Sioux City, Iowa. It was considered fully submitted at that time. Claimant's request to offer additional evidence from Dr. Blume is denied. Industrial Commissioner Rule 500-4.31 does not permit the taking of evidence after the time of hearing.

The industrial commissioner's file contains a first report of injury received December 17, 1982.

At the time of hearing the parties stipulated that claimant was earning $9.26 per hour.

The record in this matter consists of the testimony of claimant; John Chicoine, D.C., Horst G. Blume, M.D., William Paul Isgreen, M.D., John Bunch, Terry Thiele, Jim Regenscheid, Jim Hawthorne, Chris Godbersen, Mary McGennis, and Thelma Wolf; claimant's exhibits 1 through 7, bills from Marian Health Center; claimant's exhibit 8, a bill from Robert C. Larimer,M.D.; claimant's exhibit 9, a bill from Woodbury Anesthesia Group; claimant's exhibit 10, a bill from Dr. Chicoine; claimant's exhibit 11, a bill from Robert M. Whiteside, oral surgeon; claimant's exhibits 12 through 15, receipts from Greenville Pharmacy; claimant's exhibit 16, a bill from R. J. P. McCarthy, D.C.; claimant's exhibit 17, a bill from Dr. McCarthy; claimant's exhibit 18, a bill from Dr. Blume; claimant's exhibit 19, a bill from Central Laboratory Facility; claimant's exhibit 20, a bill from Sioux City Chiropractic Association; claimant's exhibit 21, a report from Dr. Blume with bills dated February 16, 1984; claimant's exhibit 22, reports from Dr. Chicoine; claimant's exhibit 23, hospital records; claimant's exhibit 24, a letter from Dr. Blume dated June 10, 1983; claimant's exhibit 25, the curriculum vitae of Dr. McCarthy; claimant's exhibit 26, a report and bill from Dr. McCarthy; claimant's exhibit 27, the deposition of Dr. McCarthy; claimant's exhibit 28, a list of medical expenses and mileage; claimant's exhibits 29 through 31, x-rays; claimant's exhibit 32, a CT scan; claimant's exhibits 33 and 34, x-rays; claimant's exhibits 35 and 36, CT scans; claimant's exhibit 37, the curriculum vitae of Dr. Blume; claimant's exhibit 38, a report from Dr. Isgreen; defendants' exhibit A, answers to interrogatories; defendants' exhibit B, records from the Woodbury County District Court; defendants' exhibit C, a report from Alan W. Bronson, D.C.; defendants' exhibit D, a report from Dr. Blume dated July 14, 1981; defendants' exhibit E, a report from Dr. Blume dated October 6, 1981; defendants' exhibit F, a report from Dr. Blume dated June 10, 1983; defendants' exhibit G, a series of correspondence between the claimant and the Iowa Industrial Commissioner; defendants' exhibit H, a medical report from Dr. Katz; defendants' exhibit I, a report from Dr. Katz; defendants' exhibit J, an outpatient visit of November 13, 1982; defendants' exhibit K, reports from John J. Dougherty, M.D.; defendants' exhibit L, correspondence between claimant's counsel and defendants' counsel regarding medical treatment; defendants' exhibit M, an x-ray; defendants' exhibit N, payroll records; defendants' exhibit O, a report from Dr. Isgreen; and defendants' exhibit P, the deposition of claimant. Defendants' objections to claimant's exhibits 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; whether or not there is a causal relationship between claimant's injury and any disability he may now suffer; whether or not claimant is entitled to temporary total, healing period or permanent partial disability benefits; and whether or not claimant is entitled to benefits under Iowa Code section 85.27. The defendants have raised the affirmative defense of notice.

STATEMENT OF THE CASE

Claimant's testimony is taken from that given at the time of hearing and that in his deposition. His answers to interrogatories also were offered.

Sixty-three year old married claimant, father of one child, testified to an eighth grade education. He has taken some adult education courses. He said that he has been a member of Laborers Local 427 since May 10, 1968. Claimant's only work in the prior nine months before beginning work for defendant was mowing up to thirteen yards once a week or every other week at a rate of $5 or $10 per lawn for a total during the year of $862.

Claimant indicated he worked for defendant employer in 1981 cleaning, sweeping and washing streets; tacking driverways; operating a roller; driving trucks; using a jackhammer and raising manholes. In 1982 he started work on September 8 and was sweeping driveways and picking up barricades.

Claimant explained his activities on September 9, 1982 and the circumstances surrounding his injury thusly: His first assignment was to sweep water off the streets. Then he cut weeds off the curb. He worked with another person taking pins off a truck. He had a sharp pain in his lower back and hip. He thought this "just only pointed up to the injury." He cleaned a curb for the curb machine. When he started uphill with John Bunch, he noticed he could not walk uphill because he would "always want to sit down" and "[i]t would always keep pulling me down." He told Bunch there was something "fishy," but neither asked for medical attention. The two were riding in one of defendant employer's trucks. He climbed on top of the sideboard. Terry Thiele told him to jump and he did. Thiele asked him if he hurt himself; and he replied, "Well, nothing hurts, so I must not have done anything." He felt discomfort in his back, legs and teeth. Claimant claimed that he first reported his injury to McKennah on September 13, 1982. McKennah looked for an accident report. When he could not find any forms, he said he would tell the office.

Claimant decided to go the chiropractor after work to see if he had been injured or if he was really suffering from old age. He said:

> The only way I could relieve it is pinch my hand over this one left leg and stand just like the pitcher in a baseball game leaned over up to about 30 minutes. Then it seemed like it would relieve itself. Then I could proceed on going to work again. (McGennis dep., p. 17 ll. 20-24)

He saw Dr. Chicoine, whom he had picked from the phonebook, on October 18, 19 and 20 and made an appointment to return on October 21; however, when he could not get excused by the foreman, he did not go back to the doctor. He did see Dr. Chicoine on November 1 and saw him for a series of times thereafter. He

thought overall he had missed six days of work because of his back during 1982. Claimant said that he took as high as nine Excedrin each day and experienced dizziness.

Claimant recollected pulling a cord in his arm when he was working for the railroad. He was first treated by Dr. Bronson and then by Dr. Dougherty who had him take physical therapy including heat treatments on his neck. Claimant said he was seen by Dr. Larimer who treated him for his sinuses with sulfa drugs which he thought later caused the mumps.

He had a cold and flu in November and he was confined to the hospital. Up until that point he worked each day he was asked to work. He took two aspirin at two hour intervals. He said that lighter duty such as using a broom to sweep or a blow hose or driving a truck did not bother him. Lifting heavy barricades or dragging a hose would trigger his pain. Liniment and a heating pad gave him relief.

Regarding giving notice to the company, claimant testified:

A. Outside of when I was told by the chiropractor to stay off the job, that's when I had brought attention to Regenscheid. And Regenscheid, why, he said, "You have to fill out an accident report." I said, "I had spoken to Stew two weeks ago, and he said he was going to get the papers to fill them out. But," I said, "he's been rushing here and rushing there, so I suppose he never" -- He says, "There isn't any file. So you come back tomorrow. And I'll get the papers, and you better make out an accident report."

Q. Did you do that?

A. Yes.

Q. All right.

A. And then two days later, why, Jim Hawthorne from Brower's, he said -- he's a safety man. He said that he had an accident report in his office. And he wanted to know any more details, how it actually happened, what came about. And I told him that I'd jumped from the truck. And he said -- Well, he said, "That's our biggest trouble down here at the plant. Everybody gets in a goddamn big hurry." And he said, "There's been a lot of injuries, and it still keeps on." He says, "I want to get away from this." He said, "I wanted to find out just how this came about," so --

Q. When did you talk to Hawthorne?

A. I think it was about the 3rd of November.

Q. What did you tell him?

A. I told him that I jumped from the truck and that I'd been under Dr. Chicoine's care. Of course, he said that he wished that I'd brought it to his attention around the 18th when I first went to Dr. Chicoine. And, of course, at that time he said that -- I asked him, I said, "Well, have you got a company doctor that I can take my treatments through?" And he said, "No, except Dr. Chicoine is a doctor." In fact, he said, "I think you'll be entitled to a week's compensation for being off and going to Dr. Chicoine."

So -- But then later on he made a deal with Dr. Chicoine that I could do light duty. And so he put me out, and that's when I caught the cold. The first day was warm on a Saturday afternoon. That wasn't bad. Sunday morning I'd had mittens. I changed the gloves. My feet got cold, and I was just about ready to go home. It was too daggone cold on Military Road. (McGennis dep, p. 27 ll. 5-25; p. 28 ll. 1-20)

Claimant recalled that later on when he was flagging a pickup truck hit his stop sign and the sign hit his cheek. After this incident he was told by Dr. Chicoine that he should see a dentist. He went to the hospital emergency room where he could not find a dentist. He was given an antibiotic and he also tried dry gin which he said cured his sore throat but which he later learned neutralized the antibiotic. He was subsequently hospitalized. He testified:

Q. Did Dr. Larimer tell you you had to have your teeth removed because of working outside?

A. No. He only told me that I'd had infection in my system.

Q. Your teeth were rotten?

A. Well, he was figuring. But later on he reiterated, he said, "Well, you didn't tell me you stood out in the cold and got chilled and caught the flu," so --

....

Q. Dr. Larimer's not a dentist, is he?

A. No, no.

Q. He didn't tell you that your problems with your teeth had anything to do with your work, did he?

A. Well, all he came to is that I'd caught cold; and that's what brought on the infection. He figured that, "You actually caught cold in your one cavity that you had in your tooth, see, and that's" -- (McGennis dep., p. 34 ll. 12-19; p. 35 ll. 12-19)

Claimant asserts that he asked his employer for medical help. He was sent to Dr. Dougherty whom he told of his discomfort which included low back pain and tingling numbness in the left foot. Claimant said he was unable to do things around the house such as lift garbage, mow grass, carry groceries or stand for more than thirty minutes. He reported Dr. Dougherty's saying that there was nothing further to be done. The doctor told him that he could go back to work. Thereafter, he reported to work in what he thought was February.

After he was seen by Dr. Dougherty, claimant went to his attorney to see about further medical care. At that point, he was referred to Dr. Isgreen. He made the same complaints to Dr. Isgreen as he had made to Dr. Dougherty. He asked for treatment, but Dr. Isgreen provided only an examination.

Claimant asserted that he continued to have trouble with his back and legs. He called Dr. Isgreen to try to get treatment. He was offered an appointment in May of 1984. He later acknowledged that he could have had an appointment on June 24. He denied that medication was prescribed until July 8, 1983. He found the medication ineffective. He sought advice from his attorney who told him he could consult a physician on his own at his own peril. Claimant agreed that the insurance carrier had told him he could go to Dr. Dougherty or Dr. Isgreen.

Claimant went to Dr. Blume and incurred bills.

On September 26 and 27, 1983 claimant worked at light duty with earnings of $6.50 per hour. When he filled out an application he wrote that he had a hernia and also listed bad pain in his back and legs. He was permitted to go on the job. On the second day he got in at 7:00 a.m. although he was supposed to be there at 5:00. He asked to be sent to the doctor. He was discharged.

Claimant expressed an inability to get himself into condition. If he tries to lift more than fifteen to twenty pounds, he has a sharp pain in his lower back and legs. Leg spasms and numbness come on if he stands too long. He gets pain in his hip and low back, and he must sit down. He will be bothered all day unless he can get a drug to keep his pain down. He estimated his ability to sit at ninety minutes (only forty-five minutes in a soft chair) and to stand without moving at forty-five minutes.

Claimant claimed that he has carried newspapers for his son since 1978. An auto is used to assist with delivery. For this work claimant and his son are paid a dollar per month per customer. Although he had made a claim against the paper for compensaton, he subsequently learned that he was an independent contractor. He said that no actual claim was acted upon.

Regarding the histories he gave to the doctors, claimant said that he would have supplied any information for which he was asked, but that if he was not asked he did not tell. He indicated that he had told Dr. Blume of past medical treatment and of straining his back in September of 1979. Claimant said that he told Dr. McCarthy he had no prior back trouble because he was healed. He explained his failure to tell Dr. Chicione because he had no prior back problems before going to work for defendant employer. He did not report the auto accident. He did not tell Dr. Chicoine about his teeth because the doctor did not ask.

As to his accident in February of 1981, claimant stated that he was waiting at an intersection when his car was struck from behind. Although he once speculated the car was traveling forty miles an hour, he later was told the speed was eight miles per hour. Claimant alleged that this incident was minor in that he remained able to work and was working by July 14, 1981. He testified that after he commenced working he had no complaints and his pain diminished to a degree that he was able to climb sixty-five feet in the air without trouble in his back or legs. His lawsuit relating to that matter is still pending. In spite of information from his doctors to the contrary, claimant insisted that the injury was only to his neck. He claimed that he still has headaches and that Dr. Blume continues to treat his neck. He admitted telling Dr. Blume of pain in his right leg, but he believed the doctor to be in error for recording low back or left leg pain. He did not understand at that time that he had either spondylosis or preexisting problems. Claimant asserted that Dr. Bronson was wrong in reporting his having muscle spasms in his low back because spasms occurred in his neck only.

Claimant recalled an incident in September of 1979 in which he climbed a tree, slipped down and landed on his seat. He hurt his buttocks and had pain and crippling in both his legs. He saw Dr. Bronson until he was healed. He denied treatment by Dr. Katz. He made a claim against the insurance carrier on his son's paper route.

He denied injury to his low back or any other ill-effect

after he slipped and fell in a parking lot. He was unable to remember back strain on each of four dates in September of 1979 or in June of 1980, but he recalled a back strain on September 9, 1979 when he was lifting paper bags. He said that he had sciatica for four months thereafter. He denied injury to his low back in January 1980. His recollection was refreshed as to a June 1980 incident.

Claimant saw Dr. Katz in December of 1981 and March of 1982.

Claimant acknowledged some exaggeration in a letter he sent to the industrial commissioner. He justified the exaggeration by saying he believed it would merit him better attention.

Claimant claimed that after his injury he first went to Dr. Katz. He did not list Dr. Katz in his answers to interrogatories--an omission which led him to say he was making no demand for any expenses with Dr. Katz except for a blood test. He claimed that Dr. Katz would not restrict his work.

Claimant testified that he missed October 18, 19 and 20 because of back and leg pain which he seemingly related to dragging a hose and using an air compressor. He alleged that the pain he had was stronger than in 1979 as that pain was over in four months.

Claimant made claim for the problem with his teeth because he jumped from the truck, worked in the cold and was slapped in the face by a sign. Claimant agreed that he had not seen a dentist since 1948 when one broke one of the teeth he was extracting. Claimant denied that he made no complaints of his back at the time of his hospitalization for his teeth. He asserted that he told the nurse of radiating pain. He said that he had asked for Dr. Blume at the time he was hospitalized, but he was given Dr. Larimer who did not call in a specialist and who said only good morning and goodbye. Claimant understood from Hawthorne that hospital bills would be paid.

As to his hospital admission in January of 1984, claimant said that a deputy industrial commissioner had refused to rule on whom his doctor should be. He admitted that he knew the insurance carrier would pay only if it were ordered to do so.

Claimant has received social security retirement benefits since February 1983.

John Bunch, who was in the back of the truck on September 9, 1982, testified that claimant did not tell of being injured that day, but that he learned of the injury later and told claimant to report to the foreman. He did not think the truck was eight feet tall, but he said it might be eight feet high if it were full. A measurement from the top of the box to the pavement would be six to eight feet.

Bunch said that everyone in the crew complained and that claimant complained no more than usual. He thought claimant had missed some work after his injury. As he recalled, the construction season ended late that year.

Terry Thiele, who was riding inside the truck carrying claimant and Bunch, estimated the distance from the top of the box to the pavement at seven or eight feet. He thought claimant jumped from a lift four to five and a half feet from the ground rather than the top of the truck. He asserted that claimant had been told where to get out rather than to jump. He recalled hearing something like the expression of air when claimant jumped. He asked claimant if he was okay and he believed claimant replied that he thought so.

Thiele believed claimant mentioned his teeth after the jump, but not his back. The witness did not know of claimant's missing work because of his back.

Jim Regenscheid did not recall prescriptions from Dr. Chicoine nor did he remember a slip from the doctor. He said that after someone is hurt a release is necessary before a return to work can be effectuated. He recollected trying to find out where claimant was and learning that claimant was seeing a doctor. He was told by Jim Hawthorne that claimant could do light duty. There was flagging to be done and claimant was called. He did not come in because he had an appointment. When he was next called, he did come to work and spent three days as a flagperson.

Regenscheid denied that he ever went to his truck for an accident report or that he gave claimant a report to fill out.

Regenscheid likewise denied that claimant had been refused employment because of his injury. Rather, he said, that the project was finished and he noted that after mid-November claimant drew unemployment. While he admittted he could have had a conversation with claimant in September of 1983, he denied having told him there was no work for a person with a bad back and legs.

Jim Hawthorne, who has been employed by defendant employer since May of 1979, testified to talking with Dr. Chicoine to see what claimant's condition was and to learning that claimant could do light work. Hawthorne stated that he first realized claimant was claiming injury on November 1.

The witness said claimant did not return to work after his hospitalization. In any event, the construction season ended the following Monday and it was mid-May or June before it started again.

Chris Godberson, friend of claimant's, testified to being told by claimant he had been hurt.

Mary McGennis, claimant's spouse, testified that claimant told her of his jump from the truck and she recalled his limping. She gave him a heating pad. She stated that he is unable to do heavy lifitng and that he continues to have trouble with his back and legs. She denied that claimant could shovel snow.

She also denied that claimant had low back problems before September 9, 1982.

Thelma Wolf, an employee of the Sioux City Journal, testified that claimant was paid insurance benefits for falls or lifting incidents on September 2, 1979; September 9, 1979; September 16, 1979; January 9, 1980; March 5, 1980; June 1, 1980; and December 15, 1981.

Payroll records show claimant worked 12 1/4 hours on the day of his injury and 11 hours the following day. In the next week he worked 33 hours. From September 19 to September 25 he put in 66 3/4 hours. The following week he had 45 1/2. In October he worked a total of 200 1/4 hours. The first week in November he labored 6 1/2 hours; the second 23. His last work was done on November 11.

Records from the Woodbury County District Court show claimant brought suit against Gary Nichols and R. H. Nichols for $50,000 resulting from injuries he suffered in an accident of February 16, 1981. In answers to interrogatories in that suit, he listed an injury of September 9, 1982 of a misaligned vertebra in the low back and a pinched sciatic nerve which resulted when he jumped down. He also reported an illness thusly: "November 1981--I froze on the job and caught a cold that turned into flu and infection set into teeth and was hospitalized." Claimant stated that the accident of February 16, 1981 gave him back and neck pain. This pain seemingly changed to the head, neck and ears. Claimant indicated that he was making claim for bodily injury, medical expenses, future medical expenses, permanent physical injury, loss of earnings, loss of income, future loss of earnings, future loss of income, and loss of future earning capacity among other things. Claimant described his accident thusly:

> My body was projected into seat and my head thrown back over seat. My reading glasses were on dash before being struck (not needed for driving) and afterwards they were on the shelf by the back window. I could not manipulate my hands to open the door and the defendant opened the door. He inquired why I did not come out of vehicle. I could smell alcohol on his breath. I replied my head and neck pains and and asked him to call the police. But he said he did not want the dummies here. He would show his credentials for me to write up. I got back in my car and drove it over so as not to block traffic. He drove his car into the parking lot.

Offered into evidence were a series of documents relating to an injury alleged to his hips and lower spine which occurred in September 1979. In a letter to the industrial commissioner dated December 27, 1980 claimant asserted that the injury "developed into sciatic nerve" necessitating daily treatments.

A statement from Aaron L. Katz, D.O., reports his treatment of a left sacroiliac subluxation which occurred on June 15, 1980.

Allen W. Bronson, D.C., examined claimant on February 16, 1981 and diagnosed a traumatic strain of the cervical and lumbar spinal regions complicated by residual muscle spasm and myofascitis. He treated the condition with manipulation, spinal intersegemental traction and high frequency diathermy. As of March 16, 1981 he was unable to determine if permanency would result.

Dr. Katz treated claimant on December 17, 1981 for a low back strain which resulted from an accident of December 16, 1981.

Records from the Marian Health Center show claimant was seen in the emergency room on November 13, 1982 with complaints of an infected tooth causing pain to his upper lip and the left side of his face as well as a headache. Claimant was given medication and instructed to apply hot packs to his face.

Claimant was admitted to the hospital on November 14, 1982 after he had been seen in the emergency room for an episode of facial cellulitis. Claimant's history was characterized as "rather indefinite," but he told of slipping, falling from a truck, and bruising his left hip in August; and he traced his facial difficulties to that incident. On examination, claimant had erythema and edema in the right malar area which was tender. His dental repair was described as atrocious with "no really functional teeth" and only occasional stubs and snags. He had a right inguinal hernia and three eschars with surrounding erythema on his left hip. Examination of the mandible and maxillae showed dissolution of the peridonal membrane with extensive caries. Reflexes and sensation in the extremities were physiological. X-rays of the left hip showed no evidence of fracture, dislocation of distructive process, but some traumatic arthritis was seen. There were three eschars on the left hip which were surrounded by erythema.

Claimant was started on medication. Later nine upper and seven lower teeth were excised with alveolectomies and removal of bilateral mandibular tori. Claimant's hip also was treated.

On November 16 claimant complained of low back pain radiating to his left hip. More specifically, on November 22 claimant complained of aching in his left leg which started from his ankle and went up the front of his leg to his thigh.

On December 7, 1982 Robert C. Larimer, M.D., expressed the opinion that claimant's hospitalization in November of 1982 was due to the infection in his teeth. He explained that claimant's burns were "very superficial and responded very quickly to simple therapy." He did not anticipate residual disability.

Claimant was placed in the hospital on January 30, 1984 because of back pain which was greater on the left than the right. Claimant was having low back pain from shoveling snow. Pain was in the right leg from the right buttock to the anterior thigh and posterior calf. A metrizamide CT scan and myelogram were done. There was lumbar disc pathology with bony hypertrophy of the posterior and superior vertebral bodies of L4/5 and L5/S1 with lumbar spinal stenosis at L4/5 and encroachment of the nerve root canal bilaterally with no filling of the nerve roots. The CT scan showed encroachment of the lumbar spinal canal at L4/5 particularly on the left with severe spinal stenosis as well as encroachment of the nerve root canal at the level of L4/5 with hypertrophy of the facet joint.

In addition to diagnoses relating to claimant's back acromegaley and varicose veins were diagnosed.

Claimant was seen on February 1, 1984 with heat and swelling under both eyes.

John Chicoine, D.C., first saw claimant on October 18, 1982 at which time claimant came to his office in an antalgic position. He was bent at the waist and holding his left leg. His spine was x-rayed. Pain was induced by extension, right and left rotation and left lateral flexion. Claimant told of a recent injury of September 9, 1982 when he jumped from a truck. He had no immediate pain, but the following day he had trouble walking.

On examination Dr. Chicione found marked muscle spasm of the left sacroiliac musculature, left hamstrings, gastrocemius and solaris muscles. There was a positive Lasegue's test indicative of a lumboscacral lesion. A positive Braggards' confirmed a positive Lasegue's for sciatic neuritis. The Trendelenburg showed weakness in the gluteus medius on the left. Fabere-Patrick showed restriction of the left hip. Positive leg lowering indicated disc compression at the lumbosacral joint. A neurological examination revealed a decrease in the patellar reflex. X-rays showed mild osteophytic spurring in the area of L4-L5. Claimant gave no history of any similar condition or of an accident.

Claimant was seen for thirty visits during which he was given chiropractic adjustment to increase motion, ultrasound and muscle stimulation therapy. It was the doctor's opinion that the fall out of the truck did cause a lumbar disc protrusion with pain down the left leg. He estimated claimant's permanent disability at fifteen percent of the whole person based on the AMA Guides. As claimant gave no history of prior problems, no portion of the rating was assessed to those. He charged $707 for his treatment of claimant. Those charges have been paid. He suggested that claimant will need two chiropractic adjustments each month for the remainder of his life.

Claimant was seen on March 29, 1984. His last visit prior to that time was April 11, 1983. At the time of the more recent examination the left patellar reflex was absent. There was loss of flexion. The Lasegue's and Fabere-Patrick produced pain. The absence of the patellar reflex was indication to the doctor that the nerve supply was shut off. The examiner was unaware of whether or not it had been absent before September 9, 1982. He admitted knowing whether or not the Fabere-Patrick was positive before September 9, 1982 would be important. The chiropractor operated on the assumption that the test had been negative.

Dr. Chicoine said that his usual practice is to get a history, but as claimant was in severe pain no really good past history was established. The witness did not think that a review of prior x-rays would have been helpful in determining claimant's prior condition. He claimed that often a disc will heal over; however, he acknowledged that a past disc injury sometimes will be evident on x-ray. He looked at an x-ray taken in his office on October 18, 1982 and said that lipping and osteophytic spurring were preexisting. He stated it was difficult to judge how long osteophytic changes had been present. He saw no suggestion of trauma from the prior six weeks. He agreed that a CT scan would provide a more refined reading.

John J. Dougherty, M.D., orthopedist, examined claimant on April 26, 1983 at which time claimant complained of lower back, left hip and left leg pain with difficulty walking around and standing. Claimant gave a history of falling eight feet from a truck and landing on his feet. He had no pain. The following afternoon when he attempted to pick up some heavy pins, he felt his knees were going to buckle. When he was shoveling mud he felt pain in his back and hip. The doctor also was told of the automobile accident in 1981. Claimant said both he hurt mostly his neck and not his back and that his back hurt as badly as his neck but that he got no treatment for it.

Claimant was observed to walk slowly without a limp. He was able to walk on his toes and his heels. Squatting bothered his back. Forward bending and extension bothered him. Claimant's right leg was shorter than the left. Claimant was tender over the greater trochanter. Straight leg raising was done bilaterally to 70 to 75 degrees. Hamstrings were tight. Sensation was intact in the lower extremities. There was posterior thigh tenderness on the right. Hip motion was decreased and abduction caused discomfort. There was tenderness in the low back on both sides.

X-rays were interpreted as showing in the dorsal spine an old kyphosis and an old wedging of several vertebrae with degenerative changes. There was a scoliosis to the right. There was some narrowing at L5/S1. There were sclerotic changes in the upper portion of L4, spurring at L3-4 and at L4-5. There was increased lordosis at L3-4. The left pelvis was down 3/8 of an inch. Early degenerative changes were seen in the left knee.

Dr. Dougherty made these diagnoses: lumbosacral sprain superimposed upon an increased lordosis with some degenerated discs and with some degenerative arthritis, a scoliosis to the left in the lumbar spine with an increased lordosis; increased kyphosis; old multiple wedged vertebra, with degenerative arthritis and a scoliosis to the right in the dorsal spine; slightly shortened right lower extremity; obesity; early degenerative arthritis of the medial joint compartments of both knees; bilateral tight hamstrings; and possible lumbar disc syndrome.

The doctor questioned whether any further treatment was needed, however, he proposed consideration of electromyography to see if there were changes suggestive of radiculopathy.

Dr. Dougherty thought claimant could work if there was a job available. He did not think claimant had permanent disability.

Claimant returned on June 3, 1983. He was able to heel toe walk and to squat "pretty good." He was able to forward bend almost to the floor. Right and left lateral bending was restricted. There was a minimal decrease in the reflex of the left knee. Claimant's Achilles also were decreased. Straight leg raising was to 75 to 80 degrees. The hamstrings were tight. He was tender in the posterior hip area on the left, in the left gluteus, and over the sacrum and coccyx. There was no reflex muscle spasm.

X-rays of the sacrum and coccyx looked "okay" although there was a questionable fracture of the distal sacrum and probably arthritis in the sacrococcygeal joint.

Horst G. Blume, M.D., first saw claimant on June 5, 1981 as a result of pain he was suffering from a car accident of February 16, 1981. Claimant reported his car's being struck in the right rear by another car traveling forty miles per hour. He had low back pain which was worse on the right than the left and which extended into the right buttock, hip and leg and to a lesser degree to the left leg. Straight leg raising on both sides was to 65°. The physician did not know that claimant had been to an osteopath and chiropractor prior to coming to him.

Claimant had a moderate kyphosis of the thoracic spine, some local tenderness at T11/12 and at L4/5 centrally and paravertebrally. Both iliosacral joints were tender to palpation. Lumbar x-ray showed spondylosis with no significant narrowing of disc interspaces. An MMPI disclosed no major psychological components. Among the doctor's impressions were post-traumatic low back pain with irritation of the lumbosacral nerve roots with no motor or sensory deficit except for a hemihypalgesia and hypesthesia on the left. The doctor suspected preexisting lumbar spondylosis-spondylarthrosis.

Claimant was seen on July 14, 1981 with complaints of low back pain with radiation to the right calf, neck pain and headaches. Some irritation of the ramidorsalis of the posterior nerve roots of the intervertebral joints from T3 to T7 on the left side was present. The doctor proposed a nerve block with Marcaine and Depo-Medrol to be followed by a denaturation procedure.

When Dr. Blume saw claimant on May 5, 1983, claimant gave a history of falling from a truck and landing on both feet. He had no pain immediately, but later when he was picking something up, he had sharp constant pain which was exaggerated by activity which went into both hips and legs, but not into his feet. He told the doctor that he had been to Dr. Chicione whose treatment had helped only temporarily.

On examination, Dr. Blume found localized tenderness in the cervical spine and the occipital area which he rated at 30 percent impairment of the cervical area. There was bilateral tenderness at L4/L5 and L5/S1. Straight leg raising produced pain on the left. Straight leg raising was accomplished on the right at 70 degrees with no pain. Motion of both hips was bilaterally impaired.

Dr. Blume expressed the opinion that the condition he saw on May 5, 1983 was a result of claimant's accident on September 9, 1982 which aggravated the preexisting low back and cervical spine condition. The doctor indicated he had reviewed the history of claimant's other accidents.

When claimant was seen on June 7, 1983, he complained of pain in the left leg in the area of the shin bone. He was more

tender on the left than the right. There was a sensory deficit in the lateral aspect of the leg. Straight leg raising on the right was to 75 degrees. There was no pain on the left. Claimant complained of a headache. A CT scan and myelogram were suggested to claimant.

In a letter dated June 10, 1983, Dr. Blume wrote: "I do believe that the accident on September 9, 1982, caused an aggravation of his low back condition because he had some low back pain with radicular pain into both legs after the accident on February 16, 1981, and at the present time the pain is mainly in the left leg."

On August 9, 1983 claimant reported no lower back pain, but muscle spasms three to four times a day. He experienced a pressure sensation over the low back and a burning and itching in his legs. Claimant spoke of left leg pain and a dullness over the anterior portion of the thigh. He had a headache in the back of his head. There was no back pain at 70 degrees. There was no indication that claimant needed surgery.

Claimant made similar complaints when he was seen on August 25, 1983. Straight leg raising was to 70 degrees on the left with pain on the anterior aspect of the right thigh and the posterior aspect of the right leg as well. There was no local tenderness in the iliosacral joint.

Approximately a month later claimant complained of pain in both legs and calves, trouble utilizing the strength in his legs, difficulty climbing, night pain radiating from his buttocks into his legs, low back pain, and pain and headaches with varying positions of the head. Findings remained the same.

Claimant's complaints were essentially the same in November.

On January 3, 1984 Dr. Blume reviewed claimant's history. Straight leg raising produced pain at 70 degrees on the left and at 60 degrees on the right. There was pain in the hip joint and local tenderness over the left buttock. Low back pain was concentrated on the right side. There was some sensory deficit in the S1 distribution in both legs. The left foot jerk was absent. There was mild tenderness on dorsiflexion of both feet. Claimant was told to have a CT scan and a myelogram.

Both were conducted on January 30, 1984. The myelogram, according to the doctor's letter of February 16, 1984, showed lumbar disc pathology with bony hypertrophy of the posterior superior vertebral bodies of L4-5 and L5-S1 with lumbar spinal stenosis at L4-5 and encroachment of the nerve root canal bilaterally with no filling of the nerve roots, especially at the level of L4-5. Findings in the cervical area included encroachment. The findings were related to bony hypertrophy and disc pathology. The CT scan showed encroachment at L4 on the left, severe spinal stenosis and some displacement of the cauda equina nerve root. There was also disc pathology with encroachment of the nerve root canal at the level of L5-S1 on the right. After these tests, Dr. Blume told claimant he would have to have a decompression and widening of the canal.

On a February 9, 1984 follow-up visit, claimant's main agonies were left leg and hip pain with a crawling sensation in the left leg. There was weakness in the left leg and claimant was dragging his left foot. He continued to complain of a headache and occasional confusion. There was a sensory deficit in his left foot and lower leg. There was bilateral impairment of claimant's hip joint.

Dr. Blume declared claimant disabled from working by his September 9, 1982 accident. He suggested that claimant not engage in strenuous physical activity.

Dr. Blume felt that claimant's condition worsened after September 9, 1982. He agreed that complaints of pain are subjective, but he pointed out that claimant's complaints have been quite constant with pain initially more on the right than on the left, then more on the left than the right after September 9, 1982 and now more on the right than the left again.

The doctor's charges were $1,375. He said that claimant would need to be seen every two to three months and would need medication to reduce pain. He might, at a later time, require surgery.

No pain medication was being prescribed for claimant. In 1981 an anti-inflammatory and a muscle relaxant were ordered.

The witness acknowledged the importance of an accurate history. Claimant had told him only of the February 16, 1982 auto accident but he knew that claimant fell out of a tree in 1979. He thought claimant's last work was November 12, 1982.

Dr. Blume has diagnosed a pituitary adenoma which is responsible for claimant's acromegaly.

William Paul Isgreen, board certified neurologist, saw claimant at the request of defendants' counsel on June 24, 1983 for evaluation and to provide whatever care might be needed. Although he told claimant he was willing to provide care, claimant did not return for any follow-up treatment.

Dr. Isgreen, who had independently reviewed other items in claimant's medical history, recorded a history from claimant of a fall from a tree which resulted in aching in his buttocks and legs; a fall on ice or in mud with discomfort for five months and the rear end accident which gave claimant a whiplash. Claimant told him of jumping off the truck on September 9, 1982, of having pain the next day which increased over time and flashed down the left leg and of working with varying difficulty until October 18 when he sought chiropractic treatment. Claimant's continuing to work was seen as significant in that the physician said one would ordinarily expect difficulty rather immediately.

Claimant complained of pain of an unpredictable nature which might come on as he was doing nothing or as he was walking. He was bothered by his left calf and thigh, but he was unaware of any weakness. He apparently was able to walk the three mile paper route and to mow lawns. He also spoke of trouble with his tooth and the burn on his hip. Claimant was taking Fiorinal 3 and Flexeril as well as Feldene on an erratic instead of a daily basis.

On examination, Dr. Isgreen found claimant "more worn" than the usual sixty-two year old. His higher cortical functions were appropriate. Cranial nerve examination was unremarkable. Volitional movement of the neck was limited laterally. There was decreased mobility of his spine. There was no evidence of muscle spasm. Straight leg raising was accomplished to ninety degrees bilaterally without pain and without radiation. There was no tenderness to percussion of the back. Claimant walked with a peculiar posture. Sensory examination resulted in non-physiologic findings. Reflexes were symmetrical but sluggish.

The neurologist found no evidence of physical injury to claimant as a result of his fall in 1982. Neither did he find a causal connection between claimant's complaints and his history. Rather, he viewed claimant's condition as one of a longstanding nature. He said that evidence of the fall of September 9, 1982 necessitating future medical care for claimant would be meager or nonexistent. He did not think any restriction on claimant's activity other than what common sense would dictate would be necessary. It was his experience that stenotic problems may respond either to activity or to non-activity. However, the physician agreed that pain in the back which claimant had would be compatible with the jump off truck. He thought that claimant's condition might or might not have been aggravated by the jump.

Dr. Isgreen concluded that claimant has degenerative changes, spondylitic disease and spinal stenosis resulting from progressive changes and giving the claimant the symptoms he experienced in his legs. The doctor felt that the cost of a myelogram was warranted in claimant's case and he had reviewed the myelographic findings. He seemingly agreed with the official interpretation, but he saw no thread to connect permanent impairment to the September 9, 1982 injury.

Dr. Isgreen reported calling claimant on July 9, 1983 and prescribing medication for him. He instructed claimant to let him know if the medication helped. He indicated he was willing to treat claimant, but with a condition such as clamant has not many treatments are helpful and the cooperation of the patient is important. He expressed an intent to try a different drug in the event the first preparation failed to help claimant.

As possible modalities of treatment for claimant, the doctor listed a steroid flood, physical therapy, a pain clinic or a TENS. He found claimant stoic about pain. He did not think that claimant was malingering and he believed that claimant legitimately hurts.

Dr. Isgreen approved testing done by Dr. Blume. He said that he made recommendations to those who sent claimant to see him, but not to claimant himself. His letter of June 24, 1983 suggests a CT scan, myelogram and an EMG.

The doctor found claimant's saying that he had pain was consistent with what could be seen on the CT scan; however, he cautioned that claimant did not get his present state through one incident. He noted that claimant worked for six weeks after his alleged injury.

John P. McCarthy, D.C., a diplomate of the American Board of Chiropractic Orthopedists, first saw claimant on September 21, 1983 at which time he complained of low back pain radiating to the front of the spine; a worse problem with his left calf; paresthia into the legs bilaterally and difficulty walking, squatting, sitting, pushing, pulling, or lifting. Claimant gave a history of jumping from the back of a truck and landing flat on his feet immediately experiencing pain in his back. The next day he had low back pain when he lifted a box of pins weighing 150 to 200 pounds. Claimant also told of previous back problems--a lumbar disc problem--for which he had sought chiropractic treatment. He reported sliding down a tree and landing on his buttocks in 1979 and an injury to his arm in 1974. The doctor understood that claimant had been released as cured from previous treatment.

Claimant told of being treated by Dr. Chicoine on October 18, 1982, returning to work, doing some pulling and having some pain in his legs. Claimant apparently initally was sent to Dr. McCarthy for the purpose of receiving a disability rating. No authorization was provided by the insurance carrier.

On examination, claimant was 5' 9 1/2" tall and weighed 231 pounds. His gait was slow and there was slight pelvic tilt to the right. Palpation of the spine produced tenderness in the right thoracic spine and also in the lower lumbar spine bilaterally. There was moderate spasm in the right thoracic spine. Thoraco-lumbar flexion was 65°. Thoraco-lumbar extension was 10°.

There was dull pain with all motions and sharp pain with left lateral flexion.

Neurologically, the patellar reflex on the left was diminished. The L2 and L3 lumbar and L3-L4 knee extensors were not quite normal. Deep palpation produced moderate pain into the lumbosacral area to the right calf and some discomfort on the anterior thigh and left calf. There was decreased sensation to vibration along the L3-L4 dermatome and a slight sensation change to temperature along the L3-L4 dermatome on the area down the front of the thighs. Straight leg raising was positive producing discomfort. Gaenslen's maneuver and Lasegue's also resulted in lumbar and low back pain respectively. Ely's test brought on bilateral anterior thigh pain.

In viewing claimant's x-rays, the doctor saw a disc derangement in the lateral flexion films. More specifically, he referred to a right spinous rotation away from concavity and toward convexity which was thought indicative of the fact that the motor unit between L3 and L4 was not functioning properly. A narrowing of the disc space on the right between L3 and L4 also was believed to be present. Degenerative changes were seen throughout the lumbar spine which the doctor said were of a duration of six months or very definitely could be as much as six years.

Dr. McCarthy diagnosed an initial acute traumatic sprain/strain complex of the lumbar spine with associated disc involvement resulting in lumbar spondolytic arthrosis with associated disc derangement and radiating neuralgia and bilateral radiating paresthesia. The chiropractor also concluded that the conditions he found were related to claimant's injury of September 9, 1982 and that claimant had not reached maximum medical improvement. Chiropractic manipulation in conjunction with physical therapy was commenced and continued to December 1, 1983. The doctor said that from the time of claimant's injury to his last treatment was sufficient healing time for a soft tissue injury. However, he did not find claimant responding to his treatment in a satisfactory manner and therefore referred him for further consultation and perhaps more aggressive therapy.

The doctor acknowledged the importance of an accurate history. He said that an inaccurate history would not necessarily change his opinion in claimant's case although it possibly could. He was not aware of claimant's being treated since 1981 by Dr. Blume, but he did know claimant was treated by Dr. Blume as a result of a rearend accident which he thought resulted in a whiplash or a cervical injury. He was unaware of a pending lawsuit. He did not know if claimant had any limitation of motion in the low back as a result of the 1981 injury. He was unaware that claimant had bilateral radicular pain in the lower extremities after his automobile accident of February 16, 1981 or that claimant had been hospitalized under Dr. Larimer's care. He did not know whether claimant was placed under any restrictions as a result of the accident. The doctor said that if claimant had parathesia into his lower extremities and trouble with squatting, lifting and bending, then there would be inconsistency in what he had been told by claimant.

Dr. McCarthy did not find claimant's complaint of pain from five to ten seconds at a time numerous times each day exceptional. He said that claimant's slumped posture, slow gait and right pelvic shift would be something of a longstanding nature and would not give rise to particular disability, but would indicate some spinal problems. He also thought the curvature of the thoracic spine seen on x-ray was an anatomical change due to time. He agreed that someone with claimant's history possibly could have had limitation of motion in his low back before September 9, 1982.

Two ratings were given, one at three percent and one at two percent. Sensory and muscle strength abnormalities were not included in the ratings which were based on L3-L4 limitation, a muscle strength abnormality and a depressed patellar reflex. In further explanation, he said:

> No, I am not saying that this disc derangement did not predate December 9, 1982. [sic] In my opinion more than likely this was there. It is the fact that this was activated and now is symptomatic and expressive is why it warrants an impairment rating. (McCarthy dep., p. 52 ll. 2-6)

Overall, his rating based on the AMA Guides was ten percent. He explained:

> A. I'm not talking heavy labor or anything. It's my opinion from the case hitory that I took, from the examination that I did and the findings that I was able to assimilate from what the patient has related to me that he became symptomatic and expressive of these problems after the accident of September 9th, 1982, and, therefore, the rating that I gave of ten percent whole man taking into consideration the ranges of motion and the disc derangement would reflect that.
>
> Q. And if your -- the history provided to you in respect to symptomatology course of treatment both before and after the alleged accident were materially incorrect, your opinion would accordingly be changed?
>
> A. My opinion could be changed, because it would demonstrate the difference in the residuals that I've just talked about. (McCarthy dep., p. 62 ll. 7-21)

A thermogram was done in September of 1983 which was interpreted as normal when one side was compared to the other. This indicated, according to the expert, no acute area of musculo-ligamentis involvement and no particular nerve fiber distribution involved.

Dr. McCarthy explained spondolytic arthrosis as being an abnormality of the joint facets. He referred to the actual disc derangement he found in claimant's spine as a dysarthria of the L3-L4 motor unit.

The doctor made a diagnosis of lumbar spondolytic arthrosis with associated disc derangement and radiating neuralgia.

Offered into evidence were a series of letters between claimant's various attorneys and defendants' counsel regarding claimant's medical care and examination.

The first letter of April 14, 1983 informs claimant's counsel defendants "will not be responsible for payment of any such examination or evaluation being undertaken prior to securing the necessary approval from the Industrial Commissioner's office."

A letter of May 10, 1983 from defense counsel notifies claimant's attorney that Dr. Dougherty is being authorized to provide care with appointments to be made by counsel. A copy of that letter was sent to claimant return receipt requested. The receipt was part of the evidence as well.

On June 6, 1983 claimant's counsel wrote to say Dr. Dougherty could do nothing for claimant and suggested that he be seen by Dr. Blume. Defendants then authorized an appointment with Dr. Isgreen.

A letter from claimant's attorney dated July 25, 1983 shows the parties were negotiating settlement and indicates claimant's desire to doctor only with Dr. Blume.

In an August 29, 1983 letter defendants' counsel expresses the understanding that Dr. Isgreen's office is prepared "to offer treatment to Mr. McGinnis [sic] to the extent that it is medically necessary or warranted."

On December 29, 1983 claimant's present counsel wrote for permission for claimant to be evaluated by Dr. Blume with the evaluation to include a myelogram, a CT scan, a blood test and other appropriate tests. In a response of January 5, 1984 defendants' attorney refused to authorize hospitalization for testing. He expressed the feeling that defendants had fulfilled their obligation under Iowa Code section 85.39.

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).

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).

Claimant, who has admitted a tendency to exaggerate, gave histories with some variation. A conglomerate of testimony is that he experienced pain earlier in the day on September 9, 1982 and prior to his jump from the truck. Subsequent to the jump, he felt discomfort although the timing of that discomfort ranged from his saying it came on immediately to asserting it came on the following day after a lifting episode. After the incident claimant sought chiropractic treatments and took aspirin at two hour intervals. Claimant's first documented visit to a chiropractor occurred on October 18 when he saw Dr. Chicoine after working for ten and one-half hours.

Terry Thiele testified that he saw claimant jump from a truck and heard a sound that led him to inquire if claimant was all right.

Dr. Chicoine took a history of a jump from a truck. On

examination, he found marked muscle spasm in the left sacroiliac musculature and left hamstring. Dr. Blume took a history of a fall from a truck after which claimant landed on his feet and had no immediate pain. Later when he tried to pick something up he had pain into both hips and legs. Dr. Blume attributed the condition he found in claimant on a May 5, 1983 to an aggravation of his preexisting condition by the accident of September 9, 1982. Dr. Dougherty took a history of the September 9, 1982 fall with some variation. Dr. Isgreen took a history substantially like that given at other times. He was unable to say whether or not claimant's condition was aggravated by the jump from the truck. Dr. McCarthy was told of claimant's having immediate pain in his back after the jump. He also was informed of pain occurring the next day.

The record viewed as a whole supports the finding that claimant had an injury on September 9, 1982 which arose out of and in the course of his employment.

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.

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.

Claimant testified that he spoke to both Regenscheid and Hawthorne. He thought he talked to Hawthorne on November 3, 1982, and indeed the first report signed by Hawthorne carries that date. Hawthorne's testimony was that he first learned claimant was claiming a work injury on November 1, 1982. Defendants had notice of claimant's injury and their affirmative defense must fail.

The very difficult question in this case is that of causal connection.

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).

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. 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, 255 Iowa 1112, 125 N.W.2d 251; Yeager, 253 Iowa 369, 112 N.W.2d 299; Ziegler, 252 Iowa 613, 106 N.W.2d 591.

At the outset the undersigned must say that in spite of some propensity for exaggeration and dramatization on claimant's part, she believes claimant has pain. The condition of his back is bad. However, the Iowa Supreme Court has said that administration of the Iowa Workers' Compensaton Act "cannot be made to depend on the whim or sympathetic sentiment of the current administration or presiding judge." Bulman v. Sanitary Farm Dairies, 247 Iowa 488, 494, 73 N.W.2d 27, 33 (1955).

Claimant himself evidenced a certain degree of insight into his condition when he said that he decided to go to the doctor to see if there were something wrong with him or if he were just suffering from old age. Dr. Isgreen described claimant as more worn than the usual sixty-two year old.

Claimant had several incidents with his back for which he received treatment prior to September 9, 1982. Claimant was paid insurance benefits for falls and lifting incidents in 1979 through 1981. Claimant had injury to his hips and lower spine in September of 1979. He was treated for a left sacroiliac subluxation in June of 1980. In February of 1981 after an automobile accident he was diagnosed as having traumatic strain of the cervical and lumbar region. Claimant stated in documents relating to a suit filed as a result of that accident that he had back and neck pain. In December of 1981 he was treated for a low back sprain resulting from an accident on December 16, 1981.

When claimant was seen by Dr. Blume in June following the February 1981 accident, he had low back pain which was worse on the right and which extended into the right buttocks and lower extremities. There was pain on the left to a lesser degree. He had a hemihypalgesia and hypesthesia on the left. The doctor suspected a preexisting lumbar spondylosis-spondylarthrosis.

After claimant's jump from the truck he continued to work with substantial hours of overtime.

Claimant was admitted to the hospital in November of 1982 at which time nine upper and seven lower teeth were excised with alveolectomies and removal of bilateral mandibular tori. Claimant did complain during the hospitalization of low back pain radiating into his left hip and of aching in his left leg. Claimant testified that he had not had dental care since 1948. Neither medical evidence from Dr. Larimer nor any other medical evidence in the file relates claimant's dental treatment and hospitalization to his claimed injury of September 9, 1982 or to any other work incident.

It must, of course, be kept in mind that 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, 251 Iowa 375, 101 N.W.2d 167. 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, 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., 252 Iowa 613, 620, 106 N.W.2d 591.

Claimant went to Dr. Chicoine in mid-October. Dr. Chicoine found muscle spasm of the left sacroiliac musculature and left hamstrings. He took no history of claimant's having prior problems. He noted that lipping and osteophytic spurring seen on x-rays were preexisting and he saw no suggestion of trauma in the prior six weeks.

Dr. Blume did not see claimant until May 5, 1983. He took a history of no immediate pain following a fall from a truck, but of pain later when claimant lifted something. That pain went into both hips and legs. Claimant had tenderness in the cervical area and in the low back. Dr. Blume testified at hearing that he felt claimant's accident of September 9, 1982 aggravated a preexisting low back and cervical condition. In a letter, however, he spoke of aggravation of only the low back. Over the course of claimant's treatment symptoms returned to the right side. Dr. Blume, who knew of some of claimant's prior injuries, declared it difficult to assess what percentage of impairment resulted from the accident of September 9, 1982 but that claimant did have permanent disability resulting from that accident.

Dr. Dougherty knew of claimant's automobile accident in 1981. Claimant told him both that he hurt mostly his neck and that he hurt his back as badly as his neck. He reported no treatment to the back. X-rays showed sclerotic changes in the upper portion of L4 and spurring at L3-4 and L4-5. Dr. Dougherty did not think claimant had a permanent disability.

Dr. Isgreen, a board certified neurologist who reviewed various items of claimant's medical history, examined claimant on June 6, 1983 at which time he was unable to find evidence of physical injury as a result of the September 9, 1982 fall. He could not connect claimant's complaints and his history. He concluded that claimant has degenerative changes, spondylitic disease and spinal stenosis resulting from progressive changes.

Dr. McCarthy knew of two of claimant's previous injuries and of what he thought was a whiplash. He determined that the conditions he found in claimant on September 21, 1983 were attributable to claimant's injury of September 9, 1982. The doctor thought claimant continued to be in healing period and he commenced treating him, but he decided by December that claimant was not responding. Dr. McCarthy acknowledged that at least some of claimant's problems were attributable to conditions of a longstanding nature and that a person with claimant's history could have had limitations before September 9, 1982. But, he believed that claimant's condition had been aggravated by the accident.

Claimant had back trouble well before September 9, 1982. Claimant had pain in his back and both lower extremities after his automobile accident in early 1981. Dr. Chicoine makes a causal relationship between the jump from the truck and a disc protrusion with pain down the left leg which accounted for permanent disability. The doctor related some of that percentage to the absence of the left patellar reflex. Dr. Blume noted a deformity in the patellar area on the right more than the left in July of 1981. There was spondylarthritic change in the left knee joint as well. In light of Dr. Chicoine's inaccurate history, little weight can be given to his testimony regarding causation.

Dr. Blume had some familiarity with claimant's prior condition and he makes a causal connection and finds some permanent disability resulting from the September 9, 1982 injury. That opinion, however, is counterbalanced by that of Dr. Dougherty who found no permanent disability and who did not see a need for treatment as well as by the opinion by Dr. Isgreen, a board certified neurologist, expected that if claimant's back problems were going to be attributable to the jump of September 9, 1982 they would have come on rather immediately. He found claimant's continuing to work significant. Dr. Isgreen felt that claimant has spinal stenosis and degenerative disease and he viewed the incident of September 9, 1982 as being "no more fateful than any other."

Dr. McCarthy, who saw claimant more than a year after his injury, relates the condition he found to the September 9, 1982 incident. After treating claimant for a time normally considered necessary for a soft tissue injury, claimant was referred for more aggressive therapy. Dr. McCarthy's testimony, like that of Dr. Chicoine, is clouded by what he did not know about claimant.

Claimant's burden is a preponderance of the evidence which means the greater weight of the evidence; i.e., the evidence of superior influence or efficacy. Bauer v. Reavell, 219 Iowa 1212, 260 N.W. 39 (1935). Claimant has not carried his burden of showing the disability he now suffers is causally connected to his injury of September 9, 1982.

Although claimant has not established entitlement to any permanent disability as a result of his injury, it is necessary to see whether or not he might be paid temporary total disability.

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.

Dr. Chicoine treated claimant from October until April 11, 1983. There is no medical evidence as to whether or not claimant was able to work during that period, and there is evidence that he was working some portion of that time. Dr. Dougherty saw claimant late in April at which time claimant's symptomatology was primarily on the right instead of the left, and Dr. Dougherty thought claimant could work if a job were available. The record fails to establish claimant's entitlement to temporary total disability.

The remaining issue is whether or not claimant can be awarded 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.

Defendants argue that medical care sought by claimant has been unauthorized. Defendants have not acknowledged liability for an injury in this case and in the absence of such an acknowledgement cannot control the medical care. That rule is well established by agency decisions. Barnhart v. MAQ, Inc., I Iowa Industrial Commissioner Report 16 (Appeal Decision 1981); Holbert v. Townsend Engineering Company, 32 Biennial Report of the Industrial Commissioner 78 (1975).

Claimant offered a number of bills at the time of hearing. Payment of $707 to Dr. Chicoine, which appears to have been paid, will be awarded. Mileage also will be awarded for thirty-two trips to Dr. Chicoine's office.

Bills from claimant's hospitalization in November 1982 will not be ordered paid. Claimant's treatment at that time was primarily for an infection in his badly decayed teeth. That diseased condition was unrelated to his injury of September 9, 1982. Whatever care was given to his hip burns was minor. For the same reason charges from Dr. Larimer, Woodbury Anesthetic Group and Robert M. Whiteside will not be allowed.

Dr. Isgreen, the doctor selected by defendants for both evaluation and treatment, suggested electromyography, a CT scan and a myelogram, and that suggestion agreed with testing proposed by Dr. Blume. Dr. Dougherty also mentioned electromyography. Charges relating to those evaluations will be ordered paid by defendants and include electromyography and nerve conduction velocity studies performed and interpreted by Dr. Blume and claimant's hospitalization in early 1984 at the Marian Health Center.

A charge for medication ordered by Dr. Isgreen will be allowed as well.

With the exceptions of the charges discussed above, those incurred after Dr. Chicoine ceased treating claimant in April of 1983 will not be allowed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is sixty-three (63) years of age.

That claimant has an eighth grade education.

That claimant has been a member of the laborers union for a number of years.

That claimant jumped from defendant employer's truck on September 9, 1982, landed on his feet and subsequently had back and leg pain.

That defendants' safety director knew claimant was claiming an injury in November of 1982.

That claimant's trouble with his teeth is not related to his injury of September 9, 1982.

That claimant had not had dental care since 1948 prior to November 1982.

That claimant was admitted to the hospital on November 14, 1982 at which time nine upper and seven lower teeth were excised.

That claimant was treated for a left sacroiliac subluxation in June of 1980.

That on February 16, 1981 claimant had injury to both his cervical and lumbar spine in an automobile accident.

That on December 17, 1981 claimant was treated for a low back strain resulting from an accident of December 16, 1981.

That claimant was admitted to the hospital in January of 1984 for testing and evaluation.

That claimant incurred expenses as a result of his hospitalization in January of 1984.

That claimant has pain.

That claimant has spinal stenosis and degenerative disease.

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 on September 9, 1982.

That claimant has failed to establish by a preponderance of the evidence a causal relationship between his injury of September 9, 1982 and any disability he now may suffer.

That claimant has failed to establish entitlement to weekly benefits.

That claimant has established entitlement to payment of certain medical expenses.

That defendants have failed to establish by a preponderance of the evidence the affirmative defense of notice.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay the following medical expenses:

Dr. Chicoine	$ 707.00
Headache and Pain Control Center, P.C.	185.00
Marian Health Center	1,880.26
Greenville Pharmacy	5.45

That defendants pay claimant mileage for thirty-two (32) trips to Dr. Chicoine's office.

That defendants pay costs of these proceedings including a seventy-five dollar ($75.00) report charge from Dr. McCarthy.

Signed and filed this 31 day of August, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TED M. McINTOSH,

Claimant,

vs.

LAUHOFF GRAIN COMPANY,

Employer,

and

AETNA LIFE AND CASUALTY CO.,

Insurance Carrier,
Defendants.

File No. 500982

A P P E A L

D E C I S I O N

FILED

AUG 17 1984

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a proposed decision filed December 30, 1983 wherein it was determined in a bifurcated review-reopening proceeding filed February 11, 1983 that claimant's disability was to the body as a whole and he was entitled to have his impairment rated industrially. Appeal was earlier taken on this issue but was dismissed as interlocutory.

The record on appeal consists of the transcript of the January 24, 1983 proceeding; claimant's exhibits 1 through 11; defendants' exhibit A; and the briefs and filings of the parties on appeal.

ISSUES

Defendants state the issues as:

1. Whether there was substantial evidence to sustain the Deputy Industrial Commissioner's finding of fact that claimant sustained an injury to the body as a whole.

2. Whether the Deputy Industrial Commissioner erred in his conclusion of law that claimant is entitled to compensation for industrial disability.

REVIEW OF THE EVIDENCE

The parties stipulate that the applicable rate of compensation is $151.52 per week. It is further agreed that the healing period ended on August 18, 1981. (Transcript, page 5)

The first report of injury filed June 23, 1978 indicates that claimant suffered a broken left hip on June 21, 1978 while working as a loader for defendant employer. Claimant was admitted to Mercy Hospital that same day and was seen by James A. Cousins, M.D., an orthopedic surgeon. (Claimant's Exhibit 3) A diagnosis was made of a fracture of the neck of the left femur. Surgery to reduce the fracture was performed and four Knowles pins were placed across the fracture site. (Cl. Ex. 3) Dr. Cousins saw claimant in follow-up over the next four months and reported that on October 23, 1978, claimant was "limping considerably." His x-rays showed good early healing of the fracture. Dr. Cousins reported that on December 21, 1978 claimant had full range of motion without discomfort and no identifiable limp. (Cl. Ex. 3) Dr. Cousins' report indicates that claimant was warned that complications could result from the fracture.

> The prognosis of this type of injury has been explained to the patient from the beginning and he understands that with a fracture of this nature, the head of the femur occasionally looses its blood supply and during a period of eighteen months occasionally and sometimes two years, one can only then diagnose a "dead head". On his last visit, I reminded him of this and also pointed out that there was no evidence of this yet on the x-rays, but should he have any discomfort during the ensuing year, that he should come in for a check up x-ray. Also, if he got any stiffness or loss of motion during this same period, one would suspect the above problem and x-ray. (Cl. Ex. 3)

Claimant was seen by David W. Minard, M.D., an orthopedic surgeon, on April 3, 1979 with complaints of stiffness and aching pain in his left hip. (Cl. Ex. 4) Dr. Minard found a well healed fracture but made a guarded prognosis due to the likelihood of aseptic necrosis of the head of the femur. (Cl. Ex. 4) Claimant consulted Ronald K. Miller, M.D., an orthopaedic surgeon in October of 1980. Dr. Miller scheduled a bone scan and tomograms after x-rays revealed flattening of the dome of the femoral head and increased bone density, signs associated with avascular necrosis. (Cl. Ex. 5) The additional testing results led to a recommendation of a total hip replacement. (Cl. Ex. 10, pp. 9-10) The surgery was performed on November 11, 1980. (Cl. Ex. 10, p. 12) Dr. Miller described the procedure as removing the head, or ball, of the femur and implanting a prosthetic devise. A socket is then constructed in the acetabulum. (Cl. Ex. 10, p. 10) Dr. Miller explained:

> On the other side of the hip joint, what we do is we have to go in and if there is any cartilage remnants left in there, we have to scrape those out. And then once we get down to bone, we use a little round device like this (indicating) with cutters on it, which looks somewhat like a cabbage grater, and it's put on a piece of power equipment, put into the acetabulum. It rotates at a high rate of speed and just grinds out a perfect half-circle, and depending upon what size cup that you want to use, we can either use a smaller or larger or we actually have a third size -- there's actually five sizes of these. We can pretty much size them to the patient. Once we have reamed this and prepared it, then we make some large and small holes in here, put some glue in here, put a cup in, hold it and then it is essentially cemented in, in about ten minutes the cement is hardened.
>
> Q. What is the composition of the socket?
>
> A. It's what they call a high-density polyethylene. It's a very, very durable, very tough material. (Cl. Ex. 10, pp. 10-11)

Dr. Miller dismissed claimant from the hospital on November 18, 1980 and continued to see him in monthly follow-up. (Cl. Ex. 10, pp. 12-13) On July 28, 1982 Dr. Miller reported:

> With respect to Ted McIntosh, we would rate this as an injury to the leg. In view of the significance of the problem we would rate this as 100% disability to the leg. However, in view of the long term problems and complications, this gentleman probably should have a permanent impairment rating to total body. Impairment should be in the range of 50 possibly 70% depending upon the results of the implant and one thing or another. This would be either at the higher or lower number. (Cl. Ex. 9)

On November 15, 1982 claimant was examined by John L. Connolly, M.D., chairman of the orthopaedic department of the University of Nebraska Medical Center. Dr. Connolly reported:

> When I examined him he said he had occasional pain and shaking in the hip joint with long standing and felt the hip was still weak when he walked for long periods of time. He could walk without an aid but did have a slight Trendelenberg limp. He stood with his pelvis level and had essentially no leg length discrepancy. There was a well healed scar over the posterior lateral aspect of the left hip. No flexion contractures were evident and range of

motion on the left side was limited compared with the right, to 30 degrees less flexion and 15 degrees less rotation and abduction. He had very minimal discomfort on full range of motion in this hip joint. There is also evidence of atrophy of the thigh muscle. Decreased quadriceps strength on gross testing on the left side compared with the right.

In reply to your specific inquiry about the functional impairment; in my estimation, based on this man's relatively good hip function, is that he does have a loss of approximately 40% of hip function of funcion of the lower extremity and this would translate into approximately 20% overall functional impairment of his entire body. This is my best estimation of his residual problem based on standard assessment. (Defendants' Ex. A)

APPLICABLE LAW

Section 85.34(2)(o), Code of Iowa, 1977 provides: "The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred twenty weeks."

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 21, 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).

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton, 253 Iowa 285, 110 N.W.2d 660; Dailey, 233 Iowa 758, 10 N.W.2d 569.

ANALYSIS

Defendants argue on appeal that claimant's injury entitles him only to compensation for a scheduled member. They contend he has failed to show that his disability extends beyond the loss of function of the left leg.

The statutory definition of a leg is the area below the "hip joint." Any point of involvement above the "hip joint" subjects disability determination to whole body consideration. It is the disability, not the injury, that is compensated.

Dr. Miller has testified that the surgical procedure to replace claimant's left hip joint involved constructing a new socket in the acetabulum. He describes the acetabulum as an area "on the other side of the hip joint," that is, a part of the pelvis. Because the surgical procedure resulting from the work injury involved an area which extends beyond the left extremity, claimant's impairment is to the body as a whole, and a determination of industrial disability was appropriate. As the other matters were not in dispute on this appeal they are adopted as part of this final agency decision.

FINDINGS OF FACT

1. On June 21, 1978 claimant suffered a work injury to the femoral neck of the left leg.

2. Deterioration of the femur head led to corrective surgery.

3. On November 11, 1980 Dr. Miller replaced claimant's left hip joint.

4. The surgery involved constructing a new socket in the acetabulum.

5. The acetabulum is an area of the body extending beyond the hip joint.

6. The surgical procedure has extended claimant's disability to the body as a whole.

7. As a result of the work injury claimant is entitled to compensation for an industrial disability.

8. Claimant had a healing period until August 18, 1984.

9. Claimant has not returned to work since his hip replacement surgery.

10. Claimant walks with a limp, uses a cane, cannot bend or stoop, has difficulty keeping his balance and has difficulty performing routine activities such as carrying groceries, walking and climbing stairs.

11. Claimant has completed seven grades of school.

12. Claimant has worked as a heavy laborer throughout his career and has received no specialized training other than on-the-job training.

13. Claimant has been depressed since his job injury.

14. Claimant is receiving social security disability benefits.

15. Claimant is 57, married and has two dependent grandchildren.

16. Claimant contacted the state vocational rehabilitation service and the service found claimant was not a good candidate for rehabilitation citing his age, lack of education, possible depression and his injury as factors in such decision.

17. Claimant has a functional impairment of 50 to 70 percent of the body as a whole.

18. Claimant traveled a total of 204 miles in seeking medical care.

CONCLUSIONS OF LAW

WHEREFORE, the decisions of the deputies are affirmed.

Claimant has established that his injury of June 21, 1978 is the cause of the disability on which he now bases his claim.

Claimant is entitled to healing period benefits from the injury date to October 7, 1981.

Claimant has sustained his burden of showing he has a disability to the body as a whole and is entitled to a determination of industrial impairment.

Claimant is entitled to permanent partial disability resulting from his injury of June 21, 1978 of seventy-five percent (75%).

Claimant is entitled to mileage expenses at the stipulated rate of twenty cents ($.20) per mile.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant permanent partial disability for three hundred seventy-five (375) weeks at a rate of one hundred fifty-one and 52/100 dollars ($151.52) with those payments to commence October 7, 1981. Defendants are given credit for any amounts already paid.

That defendants pay any accrued amounts in a lump sum with interest pursuant to Iowa Code section 85.30 as amended.

That defendants pay claimant mileage expenses as set out in claimant's exhibit 13 totaling two hundred and four (204) miles at the stipulated rate of twenty cents ($.20) per mile.

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

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

Signed and filed this 17 day of August, 1984.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEROY B. MCKEE,	:	
Claimant,	:	File No. 627574
vs.	:	A P P E A L
SECOND INJURY FUND OF IOWA,	:	D E C I S I O N
Defendant.	:	

FILED
JUL 25 1984
IOWA INDUSTRIAL COMMISSIONER

Claimant appeals from a decision denying him commutation of future benefits to be paid by the Second Injury Fund of Iowa.

ISSUE

May future benefits to be paid by the Second Injury Fund be commuted?

STATEMENT OF THE CASE

Claimant was adjudged permanently totally disabled by appeal decision dated July 19, 1982, and was awarded lifetime benefits. The first three hundred (300) weeks are payable by his employer, Wilson Foods, and the remaining benefits are payable by the Second Injury Fund (hereinafter "the Fund") commencing January 10, 1988. Claimant then petitioned to commute the future benefits payable by the Fund.

Claimant who has a seventh grade education and no additional training, testified to his preference for a commutation saying; "I prefer to have my money instead of - you know what I mean - waiting on it while I'm living, so if something would happen to me, my wife could have something, and I could put it in certificates or draw interest on it." Claimant acknowledged he had invested $20,000 in a certificate when he received $28,000. The remainder of the money was used for an Eastern trip, new clothes, helping out a daughter with her schooling, paying off some small bills and installing central air conditioning.

Claimant claimed that his house and cars are paid for and that he owes no money. He sometimes provides his children with money when they need it.

Claimant reported that he has "probably $7,000 in the credit union." Regarding plans for the money he wishes to get through the commutation, he has been anticipating investing about $40,000 at 9 3/4 to 9 1/2% interest.

Although claimant denied being treated by any doctor for physical problems, he complained that he can't walk very far or lift. Beginning in late 1980 claimant commenced receiving no pension from his former employer.

APPLICABLE LAW AND ANALYSIS

Commutations are governed by Iowa Code section 85.45, which provides, in relevant part, as follows:

> 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. (emphasis added)

The basis of commutation is set out in section 85.47 as follows:

> When the commutation is ordered, the industrial commissioner shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest at the rate provided in section 535.3 for court judgments and decrees. Upon the payment of such amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which the liability of the employer under any agreement, award, finding, or judgment shall be discharged of record. (emphasis added)

Iowa Code section 85.61(1) provides the definition of employer for purposes of the Workers' Compensation Act as follows: "'Employer' includes and applies to any person, firm, association, or corporation, state, county, municipal corporation, school corporation, area education agency, township as an employer of volunteer firemen only, benefited fire district and the legal representatives of a deceased employer."

Iowa Code section 85.64 discusses the Second Injury Fund in detail:

> 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 disablity involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Iowa Code section 85.67 relates to the administration of the Fund:

> The treasurer of state shall be charged with the conservation of the assets of the second injury fund, and the collection of contributions to the fund. The attorney general shall appoint a staff member to represent the treasurer of state and the fund in all proceedings and matters arising under this division. In making an award under this division, the industrial commissioner shall specifically find the amount the injured employee shall be paid weekly, the number of weeks of compensation which shall be paid by the employer, the date upon which payments out of the fund shall begin, and, if possible, the length of time the payments shall continue. (emphasis added)

The Second Injury Fund is a unique entity created and financed by the Second Injury Compensation Act--Iowa Code sections 85.63 through 85.69--with a purpose of encouraging the hiring of handicapped persons by making the current employer responsible only for the amount of disability occurring under the employment as if there were no preexisting disability. Because the Fund is created by statute, the statute must be carefully examined.

"Employer" is very specifically defined by the law in section 85.61. The sections, 85.45 and 85.47, relating to commutations, as well as section 85.67, contain the word "employer." Definite terms cannot be broadened through indefinite construction. Brugioni v. Saylor Coal Co., 198 Iowa 135, 138, 197 N.W. 470, 471 (1924). As there is nothing in the Act establishing the Fund which speaks of commutation and as the Fund is not an employer, no commutation of benefits can be allowed.

Our neighboring jurisdiction of Illinois addressed the problem here presented in Moreland v. Industrial Commissioner, 47 Ill.2d 273, 265 N.E.2d 161 (1970). Moreland was permanently, totally disabled and entitled to benefits from the Special Fund. When Moreland petitioned for commutation of Special Fund benefits, his petition was denied by the commission on the basis that it had no jurisdiction to order a lump sum payment of Special Fund benefits. That decision was reversed by the circuit court. On remand the petition was denied on not being in the best interest of the parties and more specifically that granting the payment would deplete the Special Fund.

The Illinois statute makes reference to benefits awarded being paid on a monthly basis. It contains provisions similar to those in Iowa Code section 85.67. The Illinois Supreme Court determined that the limitations of the Special Fund controlled the general provisions. The relevant statutory provisions governing Fund are described by the court as follows:

> The provision of the Act which establishes the Special Fund provides: "It is considered always appropriate for the purposes of disbursements as provided in Section 8, paragraph (f), of this Act, and shall be paid out and disbursed as therein provided and shall not at any time be appropriated or diverted to any other use or purpose." (Citations omitted) As heretofore noted, paragraph (f) of Section 8, under which petitioner was awarded a pension, provides in part: "Such pension shall be paid monthly." Also, it further provides: "In its award the Commission or the Arbitrator shall specifically find . . . the date upon which the pension payments commence and the monthly amount of the payments. . . . The Treasurer shall 30 days after the date upon which payments out of this Special Fund have begun as provided in the award, and every month thereafter, mail to the injured employee, or at the option of the State Treasurer, to some bank in the county in which he resides for delivery to him, a check or draft payable out of the Special Fund, for all compensation accrued to that date at the rate fixed in the award. . . . The Special Fund is appropriated for the purpose of making payments according to the terms of the awards. (Citation omitted)

In rejecting a lump sum payment against Fund, the Illinois Court stated:

> We believe it is clear from the provisions above

that the Special Fund may only be disbursed according to the terms provided for awards under paragraph (f) of Section 8. With regard to petitioner's pension, the award necessarily provided for monthly payments. These specific limitations as to awards and payments of pensions from the Special Fund must be held controlling as against the general provision in Section 9 for lump sum payments (citations omitted). This is particularly true when it is considered that we must read the Act as a whole, and adopt the practical interpretation which was intended by the Legislature. (Citations omitted) The Special Fund is maintained by limited assessments against those employers liable for an award due to an employee's death or loss of a member (citation omitted). The Fund is designed to maintain a balance between $150,000.00 and $250,000.00; the balance is examined twice yearly, and the Funds' receipts cease whenever the balance reaches the maximum amount. (Citation omitted) As the Circuit Court noted in its opinion, the Fund would be rapidly depleted and unable to continue payments of pensions if lump sum payments were allowed. Further, we believe the policy of protecting the employee is better served by the interpretation we adopt, for it seems unlikely that the lump sum payment provision was intended to embrace the Special Fund, the payments from which are always made to totally disabled persons. . . . We therefore conclude that the Legislature did not intend in Section 9 to grant the Industrial Commission jurisdiction to consider petitions for lump sum payments of pensions from the Special Fund." (Emphasis added)

Although the Iowa legislature may not have been as specific as Illinois in indicating that Fund benefits are to be paid "monthly," it did specifically provide that payments could be made from the Fund only "after the expiration of the full period provided by law for the payments thereof by the employer." Iowa Code section 85.64. All other arguments cited by the Illinois Supreme Court including the purpose and method of financing the Fund are applicable to the Second Injury Fund of Iowa. Based on these considerations, the Illinois Supreme Court refused to imply a right to lump sum commutation against the Fund without specific legislative authority despite its application to employers.

Claimant argues that the reference to employer in section 85.45(2) is irrelevant as that subsection is not involved in this case. It is a part of section 85.45, however, which gives rights to employees under certain circumstances and to employers under certain circumstances. No rights are extended to the Second Injury Fund by this section. A fortiori no remedies against the Fund should be implied. The Second Injury Fund is a publicly held and administered fund part of the purpose of which is to make periodic payments to qualifying individuals so they will not become needy of other public welfare benefits. Periodic payment best insures this purpose.

Whether or not a commutation would be in the best interest of claimant is subject to question. At least one method of computation might not be in claimant's best interest in that commutation of the distal end of the benefits period would carry a heavier discount factor than ten percent.

By statute fund benefits are not payable until after expiration "of the full period provided by law for payments thereof by the employer." Conceivably if a commutation were possible, it might not be granted until those benefits come due in January of 1988.

FINDINGS OF FACT

1. Claimant is 62 years of age.

2. Claimant has a seventh grade education.

3. Claimant's children are grown.

4. Claimant has functional limitations of both upper and both lower extremities.

5. Claimant desires a commutation.

6. Claimant wishes the commutation to have money for his spouse, to invest, and to pay attorney fees.

7. Claimant is an adequate money manager.

8. Claimant owns his house and cars.

9. Claimant has money in a certificate of deposit in the credit union.

10. Claimant is not being treated by a doctor.

11. Claimant receives social security.

12. Claimant has been found permanently and totally disabled.

13. Claimant will commence receiving benefits through the Second Injury Fund Compensation Act on January 10, 1988.

14. The Second Injury Compensation Act contains no reference to commutations.

15. The Second Injury Compensation Act is not an employer as defined by Iowa Code section 85.61(1).

CONCLUSIONS OF LAW

That no commutation of benefits awarded under the Second Injury Compensation Act can be allowed to claimant.

The decision of the deputy should be affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That defendant pay costs of the original proceeding pursuant to Industrial Commissioner Rule 500-4.33.

That claimant pay any costs of his appeal.

Signed and filed this 25 day of July, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUSANO MEJORADO, Claimant, vs. CATERPILLAR TRACTOR CO., Employer, Self-Insured, Defendant.	:	File No. 438551 A P P E A L D E C I S I O N

FILED
SEP 28 1984
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from a proposed decision in review-reopening wherein claimant was awarded benefits based upon a finding of 36 percent industrial disability. The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1 through 5; defendant's exhibits A through C; and the briefs and filings of the parties. A motion to dismiss defendant's appeal was filed by claimant on June 8, 1984 and was denied by the industrial commissioner in a June 21, 1984 ruling.

ISSUES

The issues on appeal appear to be:

1. Whether or not claimant must show a change in condition for review-reopening consideration following the filing of a memorandum of agreement under Iowa Code section 86.13.

2. Whether or not the evidence supported a finding of an industrial disability of 36 percent of the body as a whole.

REVIEW OF THE EVIDENCE

The parties stipulate that August 21, 1975 is the date of original injury, and that January 1, 1982 is the commencement date for the additional permanent partial disability. The parties further agree that claimant's applicable rate of compensation is $160 per week. (Transcript, pages 3-5) Defendant's final report of claim activity filed April 28, 1980 indicates the date of last payment to claimant was April 21, 1980. Claimant's petition in review-reopening was filed on August 2, 1982.

Claimant was 53 years old at the time of the hearing. (Tr.,

p. 30) He is married and has two minor children. Claimant completed eight years of school and later took courses in welding and basic machine operation. (Tr., p. 28) His previous job experience included foundry and rout work in a machine shop. Claimant began working for defendant in 1967 on a radial drill. (Tr., pp. 28-29) He was later transferred to running a grinder and performed this work for four years. Claimant testified that his duties required bending and lifting tasks. (Tr., pp. 29, 37-38) Defendant's first report of injury filed August 28, 1975 indicates that claimant was operating the grinder when he was struck by a piece that flew out of the machine. The injury is described as a "[l]aceration of transverse cervical artery, vein and part of the brachial plexus." (Employer's First Report of Injury) Claimant testified the injury involved the nerves and muscles of the right side of his neck. Surgery was performed. (Tr., p. 30) As a result of the injury claimant no longer had the skill or use of his arm to do grinding work. (Tr., p. 38) When he returned to employment he was re-assigned to work in the tool crib. (Tr., p. 31)

In January of 1980 claimant was evaluated at the Industrial Injury Clinic with a chief complaint of pain and loss of strength in the right arm and hand. Claimant also complained of pain in the right and left shoulders. (Defendant's Exhibit B) The assessment report, compiled in part by J. C. Sarnecki, M.D., indicates that claimant's medical history included a home injury to the back in 1967. The pertinent results of the physical examination were reported as follows:

> Neck - reveals normal range of motion rotating right and left 75 degrees, forward to the chest, extension is 75 degrees and side bending of 40 degrees. He has a large, well healed scar extending from the inferior sternum up to the base of the neck where it goes off to the right and is well healed and nontender. His carotid pulses are good bilaterally and there are no bruits audible over the carotid pulses.
>
> Musculosketetal Examination: Brief, low back examination reveals normal gait, normal posture except for a small degree of right thoracic scoliosis. He has no abnormal tilt to the pelvis. He walks with a normal gait, walks on his heels and toes, can bend forward and touch his toes. Deep tendon reflexes are intact. Examination of the upper extremities reveals that he is right-handed and writes with his right hand. He has external rotation of the shoulders - right over left - 20/45, internal rotation 25/75, abduction at the shoulders is full bilaterally, adduction is full. Biceps circumference is 12 inches/12 inches.
>
> Forearm circumference is 10 1/4 inches/10-3/4 inches. There is decreased strength in the right biceps and in the supinators of the hand to go along with this. Grasp, wrist flexors and extensors are intact. The deltoid muscle strength was equal bilaterally. Internal rotators of the right shoulder are slightly weaker than the left but have good strength. External rotators are equal bilaterally at the shoulder. The supinators are distinctly weak on the right and active supination is limited to approximately 15 degrees while passive supination is at 75 degrees. The wrist extension on the right is slightly weaker than the left but has good strength. The biceps is perhaps the weakest muscle group but is still rated at a 4+ strength on the right compared to the left. Brachial radialis again is an active muscle group but is weaker than the opposite side. The biceps reflex is absent on the right, present on the left. Triceps is present bilaterally. Brachial radialis reflex is present on the left but not on the right. Right elbow supination is 75 degrees/90 degrees. Sensory examination reveals a hypesthesia of the thumb and index finger. The volar and radial aspect of the forearm up to the shoulder on the right, normal sensation on the left. Pulses and Adson test are normal.
>
> ....
>
> Chest X-rays were obtained on 1-8-80 and interpreted by R. F. Douglas, M.D. Radiologist. The patient has had a sternal-splitting chest incision with multiple wire sutures in place and there are multiple surgical clips in the lower right neck as well. The cardiovascular silhouette is normal and the lungs are clear.
>
> Cervical Spine films were obtained on 1-8-80 and interpreted by R. F. Douglas, M.D. Radiologist. The vertebra are in alignemnt [sic]. The bodies and processes appear intact. Disc spaces are preserved. The right transverse process of C7 is long but no true cervical rib formation is noted.
>
> Right Shoulder films were obtained on 1-8-80 and interpreted by R. F. Douglas, M.D. Radiologist. Views of the right shoulder show very minimal hypertrophic change from degenerative disease but no other abnormality is noted.
>
> Lumbar Spine films were obtained on 1-8-80 and interpreted by R. F. Douglas, M.D. Radiologist. The vertebra are in alignemnt [sic] with slight apparent tilt to the right. The posterior elements of L5 are somewhat rudimentary but otherwise the bodies and processes appear intact throughout the lumbar spine. The L4-5 disc space is a little thin with minimal hypertrophic change at this level. Minor hypertrophic changes are present at several other levels with no other abnormality noted. Thus in Dr. Douglas' opinion there are degenerative changes in the lumbar spine. (Def. Ex. B)

A 25 percent permanent partial disability was determined, and counseling for pain management was recommended. The degenerative arthritis found in claimant's shoulder and back was not believed to have been aggravated nor accelerated by the industrial injury. (Def. Ex. B) In February of 1983 claimant was examined by Richard T. Beaty, D.O., who reported that claimant had signs and symptoms of a possible herniated disc at L4-5, unrelated to the work injury. Dr. Beaty assigned a disability of eight percent to the lumbar spine. The doctor determined an impairment of 30 percent to the C-6 nerve root which involved the "upper extremity from the cervical spine to the tips of the fingers..." (Cl. Ex. 1)

In April of 1983 claimant was examined by Gay R. Anderson, M.D., who reported:

> We have a man who has sustained a significant injury to the right brachial plexus with an upper plexus injury with permanent deficits as evidenced by atrophy, weakness, sensory deficits which in turn lead to a reduction in co-ordination and sensory feedback and therefore loss of efficiency, both in terms of power and fine definitive movement. This produces both outright reductions in strength on the neuromuscular strength loss basis as well as deficits because of lack of normal sensory feedback. This is not readily visible on cursory inspection of this individual, but is quite evident on more detailed neurologic testing, as already mentioned.
>
> I have explained this to the individual and we have discussed some of the psychosocial factors involved, which are quite common after such an injury. I think he understands that it is human nature that others from time to time may take a dim view of his performance pattern in light of what they can see. Other [sic] the other hand, he was reassured he did have some deficits. (Def. Ex. A)

Dr. Anderson determined a permanent partial disability to the right shoulder of 25 percent.

Claimant testified he is now working in a different crib and is not required to do heavy lifting. He stated he is right handed and cannot pick up a gallon of milk with his right hand without using his left hand to assist. He is unable to rotate his palm upwards. (Tr., pp. 32-39) He stated his arm hurts and also gets numb. Drugs have been prescribed for the pain but he doesn't like to take them. (Tr., p. 34) Claimant stated he liked to do mechanical work but now finds it difficult to work on cars. (Tr., p. 35) He has applied for automotive work with defendant but was sent back to the crib job after a trial period in automotives. (Tr., p. 36)

Claimant has lifting restrictions of 20 pounds and has been told to ask someone to help him if he has to lift something heavy. (Cl. Ex. 4; Tr., p. 45) Claimant admitted he didn't like to ask for help from the other workers. (Tr., p. 47)

Loren Snyder, employee benefits supervisor for defendant, testified that letters are used to classify labor grade and pay, L representing the highest classification. Mr. Snyder stated that claimant's labor grade changed from G to D after his injury. Claimant's previous job as a grinder operator was a G grade and claimant's present work as a tool crib attendant is a D-2 grade. Mr. Snyder stated that in March of 1980 a G-2 earned $9.84 per hour and a D-2 earned $9.48 per hour. At the time of the hearing a G-2 earned $12.46 an hour and a D-2 earned $12.08. (Tr., pp. 6-12) The witness stated that the highest labor grade for a crib tool attendant is D-2. Prior to the injury, claimant, as a grinder operator, could have gone on to the highest level, L, if he met the qualifications and physical ability. (Tr., p. 13) Mr. Snyder recalled that the 31 percent figure of disability which was paid to claimant in April of 1980 was determined from the 25 percent disability reported by the Industrial Injury Clinic added to the percentage of wage differential between the G and D classification. Mr. Snyder stated claimant's foreman had reported claimant does work without prompting, knows his job and gives extra effort. (Tr., p. 17) Claimant has not had a promotion or increase in earnings for merit since March of 1980. (Tr., p. 12)

APPLICABLE LAW

Iowa Code section 86.13 provides:

> If the employer and the employee reach an agreement in regard to the compensation, a memorandum thereof shall be filed with the industrial commissioner by the employer or the insurance carrier, and unless the commissioner shall, within twenty days, notify the employer or the insurance carrier and

employee of his disapproval of the agreement by certified mail sent to their addresses as given on the memorandum filed, the agreement shall stand approved and be enforceable for all purposes, except as otherwise provided in this and chapters 85 and 87.

Iowa Code section 86.34 states in part:

Any award for payments or agreement for settlement made under this chapter where the amount has not been commuted, may be reviewed by the industrial commissioner or a deputy commissioner at the request of the employer or of the employee at any time within three years from the date of the last payment of compensation made under such award or agreement, and if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded or agreed upon.

A memorandum of agreement settles that an employment relationship existed at the time of injury and that the injury arose out of and in the course of employment, leaving open for adjustment the question of extent of disability. Freeman v. Luppes Transport Co., Inc., 227 N.W.2d 143 (Iowa 1975).

The modification of an award would depend upon a change in the condition of the employee since the award was made. Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940).

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 21, 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).

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).

ANALYSIS

This appeal arises, in part, over the question of whether a memorandum of agreement constitutes "an agreement" such that a change of condition must be demonstrated by the claimant to support review consideration by this agency. Defendant contends that an agreement for settlement had been reached by the parties; defendant had paid claimant weekly benefits equivalent to a disability of 31 percent; and that the filing of the memorandum of agreement constituted the only formal requirement of an agreement within the meaning of Iowa Code section 86.13.

The filing of a memorandum of agreement, as the deputy correctly points out, is a unilateral action on the part of the employer which establishes that an employer-employee relationship existed at the time of the injury and that said injury arose out of and in the course of employment. Under the provisions of Iowa Code section 86.34, the industrial commissioner may, upon application, review the terms of the agreement if the benefit amount has not been commuted and the request for review is filed within three years of the date of the last payment of benefits.

By the filing of the memorandum, defendant has established solely that an employment relationship existed at the time of the August 28, 1975 injury and that claimant's injury arose from work activities. The extent of disability was not established. See Freeman, 227 N.W.2d 143 (Iowa 1975). Since claimant's weekly benefits have not been commuted and his request for review was timely, his application was properly before the deputy.

We come now to the question of change of condition as a contingency of review. Had there been an actual agreement for settlement between the employer and employee, in other words, a written instrument of agreement signed by both parties, a showing of change of condition by claimant would be required for a review-reopening proceeding. Equally, had the payment of benefits derived from an award determined by prior adjudication of his claim, a change of condition would have to be demonstrated to support a modification of that award. No settlement papers are on file with this agency and a benefit award based on a determination of disability has not been made by this agency. Therefore, the deputy's finding that a showing of changed condition was not a part of claimant's burden was correct.

Defendant's second issue on appeal contests the extent of industrial disability found by the deputy. Claimant, who is right handed, has incurred a severe injury to the upper right brachial plexus which has resulted in neurological impairment to the area between the cervical spine and the fingers of the right hand. Claimant suffers from pain and loss of coordination and gripping strength. Three doctors have determined an impairment rating of between 25 and 30 percent. Although defendant has commendably sought to provide claimant with light duty work that is within his physical limitations, claimant's labor grade classification, and earnings, have been downgraded since the industrial injury. Claimant's only areas of specialized training beyond eighth grade were welding and basic machine operation, both of which would require the manual dexterity and coordination in which claimant is now deficient. At age 53 with minimal formal education, he is not a likely candidate for successful vocational retraining. There is little doubt that as a result of his functional limitations, claimant's ability to compete for better paying positions has been impeded and his earnings potential diminished. In view of the foregoing considerations, the deputy's finding of 36 percent industrial disability was reasonable and just.

FINDINGS OF FACT

1. Claimant is 53 years old and has an eighth grade education.

2. Claimant is married with two minor children.

3. Claimant's only specialized training has been in welding and basic machine operation.

4. Claimant's previous work experience was in machine shop operations.

5. Claimant began working for defendant in 1967.

6. Claimant was operating a grinder on August 28, 1975 when he was injured.

7. Claimant incurred a serious injury to the right brachial plexus and underwent surgery.

8. Claimant has neurological impairment between the cervical spine and the fingers of the right hand.

9. Claimant suffers from pain and loss of coordination and strength of the right shoulder and right extremity.

10. Claimant is right handed.

11. Claimant has a permanent functional impairment of 25 to 30 percent of the right shoulder and right extremity.

12. At the time of the industrial injury claimant worked as a grinder in a G labor grade classification.

13. After the injury, claimant was re-assigned to a light duty position which has a D grade classification.

14. At the time of the hearing a D-2 earned $.38 less an hour than a G-2.

15. Claimant's ability to compete for a higher wage position is hindered by his functional impairment.

16. A memorandum of agreement was filed by defendant.

17. Claimant was paid weekly benefits totaling 31 percent of the body as a whole.

18. Claimant's benefits have not been commuted.

19. No settlement papers have been filed with this agency.

20. There has been no prior adjudication as to the extent of claimant's disability.

21. Claimant's applicable rate of compensation is $160.00 per week.

CONCLUSIONS OF LAW

WHEREFORE it is found:

That it is unnecessary for claimant to show a change of condition as his benefits have not been commuted and there has been no prior award or agreement for settlement.

That as a result of claimant's injury on August 21, 1975 he has a permanent partial industrial disability of thirty-six percent (36%).

THEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant permanent partial disability benefits at the rate of one hundred sixty dollars ($160.00) per week for an additional twenty-five (25) weeks commencing on January 1, 1982.

That defendant pay the accrued amount in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30.

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

That defendant file a final report in ninety (90) days.

Signed and filed this 28 day of September, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EULIS MOAK,	:	
Claimant,	:	File No. 671044
vs.	:	
HOLMAN ERECTION CO.,	:	REVIEW -
Employer,	:	REOPENING
and	:	DECISION
THE HOME INSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	AUG 1 1984
		IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Eulis Moak, claimant, against Holman Erection Co., employer, and Home 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 May 18, 1981. It came on for hearing on June 28, 1984 at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file contains a first report of injury received May 29, 1981. A final report shows the payment of fifty-seven weeks and six days of weekly benefits.

At the time of hearing the parties stipulated to a rate in the event of an award of $353.00. The conversion date for a change from healing period to permanent partial disability was alleged by claimant to be June 27, 1982.

The record in this matter consists of the testimony of claimant and of Carol Schmit; claimant's exhibit 1, the deposition of Thomas R. Lehmann, M.D.; claimant's exhibit 2, a series of medical and vocational reports; claimant's exhibit 3, a letter from Joy Magisana dated March 8, 1982; claimant's exhibit 4, an orientation manual for ironworkers; claimant's exhibit 5, a notice of decision from the Illinois Industrial Commission; defendants' exhibit A, the deposition of John E. Sinning, Jr., M.D.; defendants' exhibit B, the deposition of J. R. Lee, M.D.; defendants' exhibit C, records from a hospitalization of July 5, 1979; defendants' exhibit D, a letter from Thomas R. Lehmann, M.D., dated October 17, 1983; defendants' exhibit E, notes from physical therapy; defendants' exhibit F, notes from Dr. Sinning; defendants' exhibit G, a letter from Dr. Sinning dated May 17, 1983; defendants' exhibit H, a letter from Dr. Sinning dated May 10, 1982; defendants' exhibit I, a letter from Byron W. Rovine, M.D., dated February 22, 1982; defendants' exhibit J, a letter from Dr. Rovine dated January 26, 1982; defendants' exhibit K, a letter from Patick G. Campbell, M.D., dated January 20, 1982; defendants' exhibit L, a letter from Frank I. Russo, M.D., dated September 3, 1981; and defendants' exhibit M, a series of medical records. Objections made at the time of hearing were considered in evaluating the evidence.

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 permanent partial disability benefits.

STATEMENT OF THE CASE

Forty-eight year old married claimant who attended a vocational high school for three and one-half years and recently obtained a GED, testified to work experience in sales with vacuum cleaners and shoes while he was in high school. When he left high school, he worked in a box factory where he made boxes and labored as a shipping clerk. He had another shipping job before going into the service for four years. He functioned as a laborer mixing mortar for a time before going into ironwork. He is now a journeyman ironworker.

Claimant described the circumstances surrounding his injury on May 18, 1981 as follows: He arrived for his 8:00 o'clock shift at 7:30. He was doing detail work which involved welding and fitting up. At about 9:30 he was up sixty feet on a stairway on a beam eight to ten inches wide. He was working with a coemployee. It was necessary to lift a 400 pound beam so that it could be clamped and welded. He had lifted heavy things all his life. When he got the beam in the air, he felt pain in the middle of his back and down his legs which seemed like an explosion. He grabbed a diagonal beam. His coworker helped him to a platform and onto the stairway. He laid down for ten to fifteen minutes.

He told his supervisor about the incident at break time. He finished work which was light duty welding, but he had trouble going upstairs and moving his back.

When he got home his pain was down through his back and into his shoulders. He was up at 6:00 o'clock and had coffee. His spouse assisted him with dressing. He drove his truck to work where he talked to his steward and to the superintendent.

He has done no ironwork since May 18, 1981. He has seen a number of doctors including a chiropractor and a psychiatrist.

Claimant asserted that he has applied for employment at many places including department stores, auto parts shops, motor companies and fast food restaurants. He has been looking for sales work which he said vocational rehabilitation evaluations indicated would be a good choice for him.

Claimant has done twenty-seven hours of work twice a month to pay for his rent and food stamps. He described the work as light including such things as carrying messages, picking up papers and mowing lawns for fifteen to twenty minutes at a time. He did not feel he is in condition to do ironwork. He has tried to put on his ironworker belt, but he cannot walk far while he wears it. He estimated the weight of the belt at forty pounds. He said that he used to be able to lift in excess of 200 pounds. Now he can lift thirty-five or forty pounds if everything is just right. He indicated that to be able to do ironwork one must be able to climb and must be alert for the strenuous work which may necessitate constant bending. His rate of pay for ironworking was in excess of $16.00 per hour.

As to present complaints claimant listed pain in the middle of his back and into his buttocks and legs with some numbness. He asserted that he has sharp, shooting, excruciating pain down his legs which troubles his sleep. Lying in a curled position relieves his pain which is aggravated by stair climbing, twisting or prolonged sitting or standing. He alleged that he is unable to afford medical care at the present.

Claimant acknowledged having some trauma to his back and legs in 1979 and having surgery in April of that year to replace his aorta. He said that after this replacement the trouble with his legs and back cleared.

Claimant, who said that Dr. Chamany was the first physician to whom he was sent by his employer, testified that he told the doctor what had happened. He denied being told that he could return to light work and that when he said there was no light work, he was told to wait a week and then go back. He admitted having seen Dr. Willhite in March. He said that Dr. Lee gave him no instructions about working. He agreed that he had not told Dr. Sinning of the 1979 injury. He asserted that Dr. Sinning told him to discontinue physical therapy when it hurt him. He thought Dr. Lehamnn found trouble with his range of motion.

Claimant recalled meeting with Dr. Sinning and a rehabilitation

specialist. It was his understanding that Dr. Sinning was returning him to work of his choosing, and he denied being told he could return to work without limitations.

Carol Schmit, R.N., who was in April of 1982 employed by a private rehabilitation company, testified to monitoring medical care in industrial injury cases. Claimant was referred to her by the insurance carrier. She had an initial discussion with him on April 18, 1982 at which time she sought to reassure him about his back. Prior to that visit she had reviewed medical reports from the physicians involved in his treatment.

She said that claimant indicated to her that he wished a job paying more than $15.00 per hour and that he wished to go to Iowa City for back surgery.

Schmit accompanied claimant when he went to Dr. Sinning's office. She said that her goal was to be sure claimant understood that there was no organic injury to his back. She said that the doctor who placed no physical limitations on claimant suggested that claimant return to work or undertake a retraining program.

The witness who had not seen the medical reports from Dr. Lehmann said it would be possible to have pain without evidence of it on either x-ray or CT scan and that claimant was possibly experiencing subjective pain.

A decision from the Illinois Industrial Commission dated June 18, 1979 awarded temporary total compensation with the finding: "[T]hat the disabling condition is temporary and has not reached a permanent condition."

An orientation manual for the International Associaton of Bridge, Structural and Ornamental Iron Workers and a career brief regarding ironworkers were offered in evidence. The latter contains this discussion of personal qualifications:

> Because iron workers and riggers do considerable climbing, reaching, balancing, bending, and stooping, aspirants should be in good physical conditon. At least average strength and full use of their arms, legs, and back are required. They should also possess good balance and agility and be able to work at heights since they are required to work on high platforms, ladders, steel girders, etc. Good spatial and form perception, normal eyesight, and above average eye-hand-foot coordination are important traits.
>
> Emotional stability, good judgment, and a willingness to observe safety practices are necessary. These workers must also be able to follow oral and written instructions and work cooperatively with other members of construction crews.

In November of 1983 claimant enrolled for a complete vocational evaluation. Claimant's counselor found him unwilling to start at the bottom in terms of either seniority or pay. The counselor felt claimant should get into a work situation as opposed to pursuing formal training as there was concern over claimant's academic background and particularly his math skills.

Recommendation was made for claimant to seek work as an assembler or as a production machine operator. Claimant wished to look for work in sales and that desire was found feasible if he had an employer who would provide charts for math assistance.

Claimant's evaluators noted that claimant could sit for long periods when he was doing things he enjoyed. His tendency to moralize, rationalize, intellectualize and project was seen as possibly interfering with his ability to hold a job.

As a part of his evaluation a psychological profile was obtained. The Wechsler Adult Intelligence Scale was administered. Subtests in the verbal area were average except for arithmetic skills which was low average. Three of five of the performance subtests suggested high average capabilities including environmental awareness and the ability to differentiate essential from non-essential details; planning skills and the ability to follow sequential logic in interpreting social situations; and the ability to make use of parts--whole relationships in the assembly of familiar objects. His full scale I.Q. was 98.

Claimant ranked in the eightieth percentile on the Raven Standard Progressive Matrices.

An early medical report shows claimant was admitted to the hospital on July 5, 1979 for back and right lower extremity pain which began with an injury of April 9. He also reported a hospitalization for back pain and a fractured back sixteen years before.

William Hanigan, M.D., saw claimant in consultation and gave an impression of probable ischemic neuropathy involving the right sciatic nerve. He suggested a vascular surgery consult because he doubted a sciatic radiculopathy from cord compression.

Frank S. Willhite, D.C., saw claimant on March 2, 1981. Claimant's movement in the low back area was slow and deliberate and he complained of extreme tenderness in the low back particularly in the right sacroiliac area. Claimant gave a history of a fall in 1980 in which he landed on his right hip.

Claimant was described as "almost completely symptom free" when he was seen on May 20, 1981 and gave a history of being blown by a high wind as he lifted a heavy piece of steel. Pain radiated into his left hip and leg. Claimant then gave a history of a fall in 1963 that resulted in thirty-six fractures. Tenderness was found along the erector spinae muscles on both the right and left. Dr. Willhite diagnosed an acute traumatic subluxation strain and sprain of the sacroiliac joints with consequent effusion, splinting muscle spasms and sacral radiculitis and attending left extension sciatic neuralgia. He estimated claimant's healing time at from two to four months.

On August 7, 1981 Dr. Willhite wrote that claimant had an acute moderate contusion subluxation strain and sprain of the cervical spine with a consequential myositis and lower cervical radiculagia and an acute moderate subluxation strain and sprain of the sacroiliac joints with resultant effusion, splinting muscle spasm and radiculalgia. The doctor predicted that claimant would be unable to return to work until his pain subsided.

J. R. Lee, M.D., board certified orthopedic surgeon, saw claimant on June 25, 1981 at the request of an adjusting company. Claimant gave a history of injuring his back when he attempted to lift a diagonal beam and pulled a muscle resulting in both pain and numbness in both legs. Claimant was treated by Dr. Willhite, a chiropractor.

On examination, claimant's shoulders and pelvis were level. His spine was straight, but there was severe localized tenderness in the lower back. Claimant responded consistently with pain of a diffuse nature. Heel toe walking was normal. Claimant's back motion was somewhat restricted by discomfort. Claimant had tenderness in the lower lumbar area when he was percussed while lying on his stomach. The Faber test was normal which indicated to the doctor that no pain was coming from the hip joint.

Dr. Lee diagnosed a lumbar strain. He anticipated claimant's problem would resolve and claimant would not have any functional deficit.

John E. Sinning, M.D., board certified orthopedic surgeon, first saw claimant on August 26, 1981 in consultation with Dr. Chamany. Claimant gave a history of lifting a 400 pound girder on May 18, 1981 and feeling a sudden sharp tearing in his low back. He had gradually increasing pain and was seen by Dr. Chamany and by a chiropractor. He complained of pain present at all times and aggravated by any activity. The pain in his right leg went into his calf, but not his foot. Coughing and sneezing aggravated the pain. Claimant told the doctor of serious injuries in a fall in 1963. He did not speak of an injury in April of 1979 when he had back and right lower extremity pain.

Although claimant protected his back, his range of motion was normal. Straight leg raising was stopped at 70 degrees because of hamstring tightness. There was generalized tenderness over the back with some irritability of the muscles and some spasm which the doctor said was an indication of tightness in the muscle. Dr. Sinning reviewed x-rays and found them normal with no evidence of fracture or arthritis.

The doctor's impression was of a low back injury of a nonspecific nature. Claimant was sent to Dr. Russo for testing.

Frank I. Russo, M.D., saw claimant and reported his findings in a letter dated September 3, 1981. Claimant denied any significant previous problems with his low back. On examination, the doctor found mild tenderness over the spinous processes of the lower lumbar spine and some tenderness on palpation in the lumbar paraspinal muscles of the right sacroiliac. Range of motion was 75 percent of normal. Back complaints occurred with straight leg raising at 75 degrees on the left and 65 degrees on the right. Reflexes were symmetrical. Electromyography and nerve conduction were normal.

Claimant was next seen by Dr. Sinning on September 17, 1981 and referred to Dr. Campbell. He also was started on physical therapy.

Patrick C. Campbell, M.D., saw claimant on October 1, 1981 and found him suffering from a psychogenic pain disorder including a differential diagnosis of malingering. Apparently in light of claimant's condition appearing to improve and claimant's indicating that he was making progress, no psychiatric intervention was recommended. Dr. Campbell suggested that if improvement should not continue, intense psychiatric evaluation and treatment should be pursued.

Claimant returned to Dr. Sinning on October 15, 1981 and told the doctor physical therapy had been stopped. Claimant had pain with hyperextension of his back. Physical therapy was reinstated and claimant returned for reevaluation on October 29, 1981. Claimant told the doctor that his back was aggravated by lifting and by walking and that he had pain into his right leg. There was some limitation on bending to the left.

Dr. Sinning viewed claimant's myelogram and his CT scan as normal. He agreed that neither the myelogram nor the CT scan can show pain.

On January 14, 1982 claimant said that he had been trying to do some work and some lifting, but that he was having pain across his low back. X-rays were taken to enable comparison on flexion. On this examination Dr. Sinning thought claimant had reached a point of maximum recovery, but at the request of the

claimant he arranged for him to be seen by Dr. Rovine, a neurosurgeon.

Byron W. Rovine, M.D., reported his findings in a letter dated January 26, 1982. He reviewed the myelogram and CT scan and determined that there was nothing in either study which could be compatible with an extruded disc.

On examination claimant's left Achilles was only a trace. Dr. Rovine indicated "a number of factitious findings." The doctor did not find claimant's problems to be organic, but he was unable to determine whether claimant was malingering or whether his symptoms were on a functional or hysterical basis.

Dr. Rovine arranged for claimant to be seen by an internist for heart irregularities and asked him to undertake "a very mild postural exercise program." Zomax and Valium were prescribed.

Claimant was seen for follow-up at which time his complaints were essentially the same. Claimant's mild cardiovascular problems were not found related to or influenced by his back. Claimant's range of motion was normal. Claimant's reflexes were inexplicitly "virtually absent" in all extremities. Again, Dr. Rovine was unable to find clinical evidence of disc protrusion or radiculopathy. The doctor anticipated claimant's making a complete recovery.

When claimant saw Dr. Sinning on March 12, 1982 the doctor discussed with him reports from Drs. Campbell and Rovine. Claimant asked at this time for exploratory surgery. The doctor said his aim was to get claimant back to work and away from his disabled state.

Dr. Sinning obtained a further report from Dr. Campbell dated April 26, 1983 in which the doctor wrote: "It appears that Mr. Moak has a condition not attributable to a mental disorder, but a focus of attention and examination called malingering."

Dr. Sinning met with the rehabilitation specialist. He placed no restrictions on claimant's working and he found no functional impairment. He recommended that claimant either begin work or retraining.

Dr. Sinning saw claimant on May 11, 1983 and found good extension and strength. At claimant's request, arrangements were made for him to be seen in Iowa City as he retained an interest in having surgery. The orthopedic surgeon said that claimant was in the same physical condition in 1983 as he was in 1981. More specifically, note was made of the lack of nerve deterioration, atrophy in the legs, loss of reflexes and normal range of motion without stiffness. Claimant was able to do a "good prompt situp".

In spite of claimant's description to him of an inability to walk while wearing his ironworker's tool belt, Dr. Sinning believed claimant could return to work as an ironworker. He placed no restrictions on claimant, but on a form dated May 14, 1982 he indicated claimant himself could best determine his weight restrictions.

Dr. Sinning said that although claimant's history and claimant's complaints of pain were consistent, the inconsistency in claimant's case occurred when there was no objective evidence of something being wrong.

Thomas R. Lehmann, M.D., orthopedic surgeon who specializes in lower back pain, saw claimant on referral from Dr. Sinning. Claimant gave a history of low back pain coming on after claimant lifted a heavy iron beam. The pain was burning in nature and radiated down both legs being worse on the right than the left. The pain was worsened by walking, coughing and sneezing and decreased by lying on the side. The doctor did not recollect being told of a sudden sharp tearing pain, but he had a letter from Dr. Russo which so indicated.

X-rays, a myelogram and CT scan were reviewed. No evidence was seen of significant deformity, a surgical lesion, a herniated disc or significant bony stenosis. The doctor agreed that those tests would not show a muscle or soft tissue problem.

On examination, claimant had increased low back pain on bending backwards. There was no restriction on straight leg raising. Reflexes in the knee and ankle were equal on both sides which was consistent with claimant's not having a neurological problem. There was no abnormality in sensory testing.

Dr. Lehmann expressed the opinion that claimant had neither muscular nor neurological deficiencies. A five percent permanent partial impairment was assigned based on the doctor's "experience in making similar ratings in the past and the total evaluation of his history, his physical and his radiographic findings." Later the doctor seemed to agree that the rating also was attributable to pain and limitaton of extension of the spine. He acknowledged the rating was based on subjective findings. Dr. Lehmann was unable to rule out the possibility of claimant's problem being either real or psychological or that of a malingerer.

Dr. Lehmann assigned a fifty pound weight limitation and diagnosed chronic disabling low back pain of unknown etiology in a medical sense. Dr. Lehmann did not recommend that claimant return to ironwork nor did he recommend any further treatment.

APPLICABLE LAW AND ANALYSIS

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

Claimant seemingly had severe injury to his back in the early 1960's. In 1979 he was hospitalized for back and right lower extremity pain. His Achilles reflex was diminished bilaterally at that time. Prior to his May 1981 fall, claimant had been getting chiropractic treatments for low back pain particularly in the right sacroiliac area.

When claimant was seen by Dr. Willhite after the incident of May 18, 1981, he complained of pain radiating into his left hip and leg. A diagnosis of trouble in the sacroiliac joints was made. A cervical problem was found later in the summer.

Dr. Lee, board certified orthopedic surgeon, found pain and numbness in both legs when he saw claimant in June. He diagnosed a lumbar strain and anticipated claimant's problem would resolve without a functional deficit.

By the time claimant was seen by Dr. Sinning in August, pain had moved to the right leg and into the calf, but not the foot. Claimant had normal range of motion and his troubles seemed to be attributable to muscle tightness. Claimant's x-rays were normal. Dr. Sinning started claimant on physical therapy and claimant stopped it. A myelogram and a CT scan were normal. Dr. Sinning has placed claimant under no restrictions and has found no impairment. On May 11, 1983 claimant's extension was found to be good.

Dr. Russo, physiatrist, did not know claimant had a prior history of back complaints. He found tenderness in the paraspinal muscles of the right sacroiliac. Electrical studies show no evidence of nerve or muscle damage.

One of the differential diagnoses made by Dr. Campbell, psychiatrist, when he saw claimant in October of 1981 was psychogenic pain disorder which he recommended treating with intensive psychiatric evaluation and treatment if claimant failed to improve.

Dr. Rovine, neurosurgeon, noted absence of the Achilles on the left and "a number of factitious findings." Claimant's range of motion was normal.

Dr. Lehmann, orthopedic surgeon, found limitation on extension which produced pain and he assigned an impairment rating.

Claimant's burden is a preponderance of the evidence which means the greater weight of evidence; i.e., the evidence of superior influence or efficacy. Bauer v. Ravell, 219 Iowa 1212, 260 N.W. 39 (1935).

Aspects of claimant's case are perplexing. His complaints of pain have been persistent. By not doing ironwork he is staying from a job which pays a high hourly rate. The sole medical evidence, however, which is supportive of his claim comes from an evaluating physician who saw claimant once and who found an abnormality which has not been present at other times. It is questionable whether or not Dr. Lehmann knew of claimant's prior back complaints.

While some weight can be given to the opinion of Dr. Lehmann, his testimony is outweighed by other medical evidence. Dr. Sinning vigorously has pursued every possible avenue in attempting to help claimant. Claimant has been sent to top notch practitioners in the area of physiatry, psychiatry and neurology. None of those doctors have found a condition related to claimant's injury which resulted in permanent impairment. Claimant has had extensive testing including electrical studies, a CT scan and a myelogram. None of those have revealed abnormalities. Claimant looks healthy and vigorous and has no nerve deterioration, atrophy in the legs or loss of reflexes.

Additionally, claimant had back and right lower extremity pain in 19 9 for which he was hospitalized. Before his fall in May, he had been undergoing chiropractic treatments. His initial treatment after the May incident was for complaints of his left hip and leg. Claimant's subsequent complaints have been of the right side.

Overall, claimant fails in carrying his burden of proving that his injury of May 18, 1981 is a cause of any disability he now may suffer.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-eight (48) years of age.

That claimant recently has obtained a GED.

That claimant worked as a salesperson while he was in high school.

That claimant's work experience before he commenced iron-

working was as a box maker, shipping clerk and laborer.

That claimant is a journeyman ironworker.

That claimant was injured on May 18, 1981 as he lifted a beam on his job site.

That claimant has done no ironwork since May 18, 1981.

That claimant continues to complain of pain in his back, buttocks and legs which is aggravated by activity.

That claimant underwent a complete vocational evaluation.

That claimant fractured his back in the early 1960's.

That claimant was hospitalized on July 5, 1979 for back and right lower extremity pain.

That claimant had chiropractic treatments for his low back and right sacroiliac pain in March of 1981.

That claimant was treated for pain radiating into his left hip and leg when he was seen in May of 1981.

That when claimant was seen by Dr. Sinning in August of 1981 pain was on the right side.

That electrical studies showed no evidence of nerve or muscle damage.

That claimant had a normal mylegram and normal CT scan.

That claimant has no nerve deterioration, atrophy in the legs or loss of reflexes.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed by a preponderance of the evidence to establish that his injury of May 18, 1981 is a cause of disability on which he now bases his claim.

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 1 day of August, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ESTHER MONTEZ, Claimant, vs. HEINZ, USA, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 738212 A R B I T R A T I O N D E C I S I O N E 06

INTRODUCTION

This is a proceeding in arbitration brought by Esther Montez, claimant, against Heinz, USA, 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 her employment on July 22, 1982. It came on for hearing on June 26, 1984 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 August 10, 1983.

At the time of hearing the parties stipulated that claimant's injury arose out of and in the course of her employment, that all medical bills have been paid, and that the rate of compensation in the event of an award is $199.58.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, a letter from F. Dale Wilson, M.D., dated December 2, 1983; defendants' exhibit A, a letter from William Catalona, M.D., dated July 18, 1983; defendants' exhibit B, a monthly report and bill from Dr. Catalona dated June 7, 1983; defendants' exhibit C, a monthly report and bill from Dr. Catalona dated March 28, 1983; defendants' exhibit D, a monthly report and bill from Dr. Catalona dated March 3, 1983; defendants' exhibit E, an operative report from August 3, 1982; defendants' exhibit F, a letter from Dr. Catalona dated August 12, 1983; defendants' exhibit G, a letter from Dr. Catalona dated October 17, 1983; and defendants' exhibit H, a letter from Duane A. Willander, M.D.

ISSUES

The issues in this matter are whether or not claimant is entitled to healing period benefits and permanent partial disability.

STATEMENT OF THE CASE:

Thirty-three-year-old right-handed claimant who is providing support for her three children, testified to being a high school graduate and spending a year at the art institute in Chicago where she studied commerical art. Her work experience prior to beginning work for defendant employer has been primarily as a sales clerk and secretary. Her work for defendant employer commenced in August of 1981.

She recalled the circumstances surrounding her injury on July 22, 1982 thusly: She was inspecting cans by using her hands to tear them down. She had taken a counter reading. As she was crossing the floor, she fell over a pallet and landed on her hands. She reported to her supervisor and then was sent to first aid where her hands and ankle were wrapped.

She then saw Dr. Catalona who also wrapped her hands. Later, on August 3, 1982, he did outpatient surgery on her right wrist. She was able to return to work on August 5, 1982 with a restriction for one-handed work. She was given a can sorter job in which she picked up one can at a time and inspected it for defects.

After about six weeks she was moved to cleanup and then to production.

In February of 1983 the cyst returned when claimant was working on the machine line pulling a bar to move cans into position. She saw Dr. Catalona again who put her back on light duty, drained her hand and then undertook a second outpatient surgery in June of 1983. After five days she was released to return to work. She was not to use her right hand.

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She was placed back on can sorting which she did until the cans ran out in January of 1984. She then sorted lids until she hurt her shoulder. Because of restriction from the shoulder and hand, she was sent home and was not working at the time of the hearing.

Claimant currently complains of pain on the top of her hand

and wrist which comes on with constant use, lifting or heavy pressure and may last an hour or one or two days; swelling in the top of the hand from heavy use which may last a day; decreased grip and numbness with constant use which may last an hour or a day. She also claimed that she is bothered mentally by her inability to do things she used to do. She noted that writing causes pain. She takes no medication at present. She last saw Dr. Catalona a month and a half prior to the hearing for her shoulder. She denied any other injuries to her hands or shoulders.

Claimant has collected no unemployment.

Medical records show claimant underwent excision of a ganglion cyst on the dorsum of her right wrist on August 3, 1982. Dr. Catalona diagnosed claimant's condition as a strain secondary to hard use at work.

In January of 1983 claimant's cyst was back. It subsequently was removed on June 21, 1983. Claimant was to return to one-handed work on June 27, 1983.

On July 18, 1983 Dr. Catalona wrote: "She seems to have chronic irritation of her tendons by repetitive work which she is required to do. She may very well develop another ganglion cyst since this condition is chronic and very likely to recurrences."

In a letter dated August 12, 1983 Dr. Catalona wrote that claimant had no permanent impairment resulting from excision of the cyst.

When claimant was seen in September, she had very slight fine crepitus on finger flexion and extension. On September 16, 1983 Dr. Catalone noted: "Told her discomfort is related to repetitive use of her hand at work & that if she wishes complete relief she should consider chg. jobs."

F. Dale Wilson, M.D., general surgeon, saw claimant in December of 1983 and took a history of her fall and treatment by Dr. Catalona. Claimant complained of pain over the back of her hand and going up into her forearm, swelling with overusage, some numbness and tingling in the fingers, trouble lifting weight, loss of grip, and inablility to rotate the wrist. She also noted a decrease in activity.

On examination there was tenderness in the center of the scar over the tendons. Sensation was intact. Finger and elbow motions were satisfactory. With motion pain occurred over the dorsum of the wrist and in the extensor tendons of the second and third fingers. Dorsiflexion was 60°; palmar flexion was 65°; lateral movement in was 22°; lateral movement out was 32°; rotation in was 85°; rotation out was 65°. Finger motion, the pinch test and nerves were satisfactory. There was loss of grip strength on the right.

Dr. Wilson diagnosed residual tendonitis of the extensor tendons of the wrist with limited wrist motion and swelling and weakness of hand grip. As restrctions he suggested minimal weight lifting of one to two pounds, minimal push-pulling, minimal rotation, no jerking, and avoidance of repeated trauma. He recommended claimant's employment as an inspector.

Dr. Wilson rated claimant's "functional disability" at thirteen percent of which one and three percent were given to loss of motion in the right upper extremity, two percent to pain and seven percent to weakness in grip strength.

Duane A. Willander, M.D., board certified orthopedic surgeon, examined claimant on February 2, 1984 and took a history of claimant's falling and having a synovial cyst and then a second. Claimant told of moving a box with her left arm and then having pain in her left shoulder.

On examination there was minimal restriction of motion of the right wrist. There was palpable tenderness in the trapezius of the left shoulder and restriction of active motion. There was weakness in grip on the right. Ranges of motion in the right and left wrist were as follows:

	Right	Left
Flexion	60	75
Extension	70	80
Radial Deviation	25	30
Ulnar Deviation	60	60

Dr. Willander expressed the opinion that claimant's condition is not permanent and stationary and that rehabilitation be used to restore her grip and range of motion. Claimant was advised to continue use of her splint.

APPLICABLE LAW AND ANALYSIS

The two issues to be decided in this matter are claimant's entitlement to healing period and her entitlement to permanent partial disability benefits.

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 85.35, 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.

Claimant had surgery on June 21, 1983. She was released for and did return to work on June 27, 1983. She is entitled to healing period for her time off work.

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).

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).

Claimant continues to complain of pain, swelling, decreased grip and numbness. Dr. Catalona assigned no permanent impairment rating, but he noted that claimant's condition is chronic and likely to recur. Dr. Willander seemed to feel that the condition was not permanent because rehabilitation could restore claimant's grip and range of motion. It is important to keep in mind that permanent means for an indefinite and indeterminable period. Wallace v. Brotherhood of Locomotive Firemen & Engineers, 230 Iowa 1127, 1130, 300 N.W. 322, 324 (1941). Gardener v. New England Mutual Life Insurance Company, 218 Iowa 1094, 1104, 254 N.W. 287, 292 (1934). Claimant has not been receiving any physical therapy.

Both Drs. Wilson and Willander mentioned weakness, grip strength and loss of motion. The undersigned believes that claimant has some minimal impairment to her hand. Elam v. Midland Mfg., II Industrial Commissioner Report 141 (App. Dec. 1981). See Iowa Code section 85.34(2)(l). There is neither a lack of impairment as Dr. Catalona finds nor an impairment as high as that assessed by Dr. Wilson. Claimant will be awarded six percent of the hand or eleven and four-tenths weeks of permanent partial disability.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is right-handed.

That claimant commenced work for defendant employer in August of 1981.

That claimant injured her right wrist when she fell on her employer's premises on July 22, 1982.

That claimant had an excision of a ganglion cyst on the dorsum of her right wrist on August 3, 1982.

That claimant returned to work at a one-handed job on August 5, 1982.

That claimant's cyst returned and was again removed on June 21, 1983.

That claimant was released for one-handed work on June 27, 1983.

That claimant's present complaints include pain, swelling,

decreased grip and numbness.

That claimant has loss of grip strength and minimal loss of motion.

That claimant has some permanent partial impairment to her hand.

That claimant is not working at the present time due to a combination of restrictions to both her hand and her shoulder.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has shown entitlement to healing period benefits from June 21, 1983 through June 26, 1983.

That claimant has established permanent partial disability to her hand in the amount of six percent (6%).

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant healing period benefits from June 21, 1983 through June 26, 1983 at a rate of one hundred ninety-nine and 58/100 dollars ($199.58).

That defendants pay unto claimant eleven and four-tenths (11 4/10) weeks of permanent partial disability at a rate of one hundred ninety-nine and 58/100 dollars ($199.58).

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 6 day of July, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD E. MORTENSON,	:	
Claimant,	:	FILE NO. 704962
	:	R E V I E W -
vs.	:	R E O P E N I N G
JOHN MORRELL & COMPANY,	:	D E C I S I O N
Employer,	:	SEP 20 1984
Self-Insured,	:	
Defendant.	:	IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening filed by the claimant, Ronald E. Mortenson, against John Morrell & Company, his employer and holder of a certificate of self-insurance, as contemplated by section 87.11, Iowa Code, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on April 2, 1982. This matter was heard in the courthouse at Storm Lake, Iowa on March 22, 1984 and was considered as fully submitted on April 19, 1984 commensurate with the filing of the defendant's brief and argument.

The record in this matter consists of the live testimony of the claimant, his spouse and Clarence Tuininga, together with the testimony of Dr. Charles B. Carignan, Jr., M.D., claimant's current attending physician, together with claimant's exhibits 1 through 5 and 8 through 11 inclusive. The answers to the interrogatories filed by the defendant are made a part of these proceedings as well as the evidentiary depositions of Albert D. Blenderman, M.D., Brian R. Ford, M.D., and Ronald L. Linscheid, M.D.

The parties stipulated that the claimant's weekly rate of entitlement shall be $247.74 per week in the event of recovery. The parties further stipulated that the transportation expenses incurred by the claimant will be paid and that the medical bills introduced by the claimant through his exhibits 8 through 11 are fair and reasonable.

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

Claimant, 47 years of age, married with two dependent children, has been an employee of the defendant since 1966. Claimant testified that he underwent surgery for carpal tunnel syndrome at the Mayo Clinic in 1977 following a 1976 work related episode. This occurrence was handled under the group accident and health policy and the claimant accepted vacation benefits in substitution of his time away from work during the pendancy of his healing period following the 1977 surgery. Claimant also sustained a traumatic injury in 1979 resulting in a week's hospitalization.

Claimant became a patient of Allan Techacek, M.D., who released him to return to employment on September 26, 1982 at which point claimant's benefits for total temporary disability were discontinued. Defendant suspended operations at its plant during this time frame and sent the claimant to Brian R. Ford, M.D., who arranged for referral of the claimant to the Mayo Clinic where on December 9, 1982 Ronald L. Linscheid, M.D., performed a decompression of the median nerve in claimant's proximal forearm. Claimant was discharged as having reached a point of maximum recovery following the surgery on January 24, 1983. Claimant testified that he sought employment opportunities thereafter and accepted a position with a parking lot maintenance firm in Spirit Lake in March of 1983, but that he was unable to perform the work assigned due to the vibrations he experienced as a sweeper truck operator. Defendant reopened its operations in August of 1983 and, based upon seniority, claimant was recalled to resume employment which at the time of the hearing he was performing. Claimant testified that he has exercised his bumping privileges and seeks duties at the defendant's place of business that he is in a position to perform. Claimant finds that he is unable to clean the rails as part of his new duties as a member of the night clean-up crew due to the physical requirements of having to work overhead. Claimant further testified that since his surgery he has felt the need for additional medical care and has become a patient of Dr. Carignan. Defendant, in its brief, suggests that the claimant's claim for permanent partial disability is restricted to 10 percent of his right upper extremity. Claimant suggests that his disability extends into the shoulder entitling the claimant to consideration of an impairment to the body as a whole. Therein appears to be the cutting issue in this matter.

The evidentiary deposition of Dr. Brian Ford indicates that prior to surgery the claimant was having substantial difficulty with his right upper extremity. Dr. Ford makes no mention in his deposition or in his reports concerning neck or shoulder problems. However, the operating surgeon at Mayo Clinic, Dr. Linscheid, testified that complaints were made by the claimant concerning constant chronic pain in the shoulder area. Dr. Linscheid expressed the opinion that there was no impairment of the shoulder area.

Dr. Ford's assessment of a 32 percent impairment indicates the presence of some difficulty. Claimant's voluntary activities since his return to work and his attempt to seek lighter duty with the defendant accepting a 20 percent reduction in wages indicates to the undersigned that there does exist a chronic pain in his left shoulder. The testimony of Dr. Carignan who testified live and whose medical opinion is given the greater weight in these proceedings, based upon his physical findings, indicates a limitation of abduction and internal rotation resulting in a 15 percent functional impairment of the body as a whole. Dr. Carignan also testified that the claimant is on a regularly scheduled therapy program at the Dickinson County Memorial Hospital at his direction. It is apparent that the claimant requires this therapy so as to enable him to continue in his duties for the defendant employer.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 2, 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).

In applying the foregoing legal principles to the case at hand, it is clear that the claimant has sustained the burden of proof by establishing that his current medical abnormality is causally related to the work episode of April 2, 1982 which is under review. It is further clear, based upon the foregoing, that the claimant's disability extends up beyond his upper extremity and into the shoulder thereby requiring a determination of the claimant's impairment of the body as a whole.

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. * * * *

This claimant, age 47, commensurate with his voluntary reduction of 20 percent in wages and in continuing his employment with the assistance of physical therapists has established that he has a functional impairment of 15 percent of the body as a whole. Based upon the foregoing legal principles, it is found that the claimant has sustained an industrial disability of 25 percent of the body as a whole. Therefore, after taking into consideration all of the credible evidence contained in this record into account, the following findings of fact are made:

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

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

3. That the claimant sustained a carpal tunnel syndrome in 1976.

4. That the claimant was hospitalized for a week due to trauma due to work connected trauma in 1979.

5. That the claimant has a functional impairment of 15 percent of the body as a whole.

6. That the claimant has, through his bumping privileges, sought and obtained lighter duty.

7. That claimant's voluntary change in employment duties has resulted in a 20 percent reduction in his wages. That the claimant has sustained an industrial disability of 25 percent of the body as a whole.

8. That the claimant was unable to perform acts of gainful employment from June 3, 1982 to and including January 23, 1983 for a period of 33 3/7 weeks.

THEREFORE, IT IS ORDERED that the defendant pay the claimant a period of temporary total disability beginning on June 3, 1982 and ending January 23, 1983 or a period of thirty-three and three-sevenths (33 3/7) weeks at the stipulated weekly rate of two hundred forty-seven and 74/100 dollars ($247.74). Defendant will receive credit for those voluntary payments previously made.

IT IS FURTHER ORDERED that beginning on January 24, 1983 defendant pay claimant a period of one hundred twenty-five (125) weeks permanent partial disability at the stipulated rate of two hundred forty-seven and 74/100 dollars ($247.74) together with statutory interest from the date due.

IT IS FURTHER ORDERED that the defendant pay the following medical expenses:

Kenneth D. Van Wyk, L.P.T.	$170.00
Dickinson County Memorial Hospital	92.00
Dr. C. B. Carignan, Jr., M.D.	151.00
Joe Borge Bak, D.C.	33.00

Costs in accordance with the Iowa Industrial Commissioner Rule 500-4.33 are charged to the defendant.

Defendant is ordered to file a current activities report in twenty (20) days from the date of this proceeding.

Signed and filed this 28 day of September, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM A. NUNEMANN, Claimant, vs. TONE BROTHERS, INC., Employer, and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 685768 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a proposed decision in review-reopening wherein claimant was awarded benefits based upon a finding of a five percent industrial disability. The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1 through 12, 14 through 18, and 20 through 23; the depositions of claimant, Robert J. Foley, M.D., and David J. Wilson, D.O. (a duplicate of claimant's exhibit 7); and the briefs and filings of the parties.

ISSUES

Appellant states the issues on appeal as:

1. An award of five percent industrial disability does not fairly compensate William Nunemann for the effects this injury has upon his earning capacity, and is not supported by the record.

2. The deputy industrial commissioner's finding of fact that William Nunemann has no permanent partial impairment is not supported by the record.

3. Strong policy considerations require that in arriving at an award of industrial disability, the deputy industrial commissioner must compensate the claimant fairly for the future and not simply for the present state of the injury.

4. It was error for the deputy industrial commissioner to unduly emphasize the fact that the employer retained William Nunemann in its labor force when arriving at the industrial disability award.

REVIEW OF THE EVIDENCE

The parties stipulate that the rate of compensation is $188.86 per week. (Transcript, page 3) They further agree that the wage differential between claimant's former and present jobs is $.62 less per hour. (Tr., p. 49)

Claimant was 56 years old at the time of the hearing. He is married and has three children. (Tr., p. 6) Claimant quit high school in the eleventh grade and has had no subsequent training or formal education. He served in the army with the paratroopers for two years and has worked primarily in general labor occupations that require lifting and physical strength. He has also worked as a cook and a rag processor in a woolen mill. (Tr., pp. 18-20) Most of claimant's previous jobs paid minimum wages. (Tr., p. 38) In February of 1970 claimant began working for defendant employer as a mill operator. (Tr., pp. 8, 21) Claimant testified his job was to assemble the mill parts, weigh the spice product, and pour it in the hopper for mixing or grinding. His duties included driving a forklift to move loaded bins of 1200-1300 pound weights from one point in the processing to another. (Tr., pp. 21-22) Claimant was the working foreman in the mill room and was responsible for overseeing the work and keeping talley reports. (Tr., pp. 34-35)

On October 29, 1981 claimant was loading bags of white pepper on the forklift. As he lifted a 180 pound bag to pour the pepper, he felt a pain on his right side in the groin area. (Tr., pp. 9-11) Claimant testified he finished pouring the bag and reported the injury to his foreman. He was then sent to the office and an appointment was made to see Robert J. Foley, M.D. (Tr., pp. 11-12) Dr. Foley's diagnosis was right inguinal hernia. (Foley Deposition, p. 4) Claimant then saw his own doctor, Richard W. Evans, D.O., and was admitted to Des Moines General Hospital on November 9, 1981. (Tr., p. 12; Claimant's Exhibit 14)

On November 13, 1981 a right inguinal herniorrhaphy was performed by David J. Wilson, D.O. (Cl. Ex. 14) Claimant was seen in followup through November and December of 1981 and was released to return to work on January 18, 1982. (Cl. Exs. 3, 14) Following examination by Dr. Foley, it was recommended that since claimant had suffered previous hernias, a permanent weight restriction of 50 pounds be imposed. (Cl. Ex. 9) Claimant's answers to interrogatories indicate he suffered a compensable double hernia injury in 1968 while working for a different employer. (Interrogatory #7) Claimant testified that he had

surgery following the injury and returned to his regular work duties without restrictions. (Tr., pp. 15-16) A work qualification form dated February 2, 1970 indicates claimant was examined for employment with defendant employer and was found to be physically qualified to work. (Cl. Ex. 22)

Claimant testified that he returned to his old job in the mill room in January 1982 but was told by his supervisors he could no longer do his former work due to the 50 pound weight restriction. (Tr., p. 23) Claimant was given a dexterity test and then told he would have to go on the line in the packing room. Claimant stated he made $.62 an hour less on the new job. (Tr., pp. 23-25) Claimant testified the fast, steady pace of the line caused pain in the area of the hernia, particularly with lifting and bending activities. (Tr., p. 26) He was again seen by Dr. Wilson in April of 1982 with a complaint of pain in the right inguinal area. (Cl. Ex. 3) Dr. Wilson believed the discomfort in the area was aggravated by long periods of standing or lifting and recommended that claimant be limited to light duties for an additional 30-60 days. (Cl. Ex. 3) Claimant testified he bid on a job as a logo labeler and has been working in the labeling department ever since. His duties involve labeling bottles and boxes, packing, and lifting boxes of between 30-60 pounds. (Tr., pp. 7-8, 27, 44) Claimant stated he had been satisfied with his old job and testified he would go back to milling but for the weight restriction. (Tr., p. 45) He bid on a forklift driving job, but there was a 110 pound weight restriction on it. (Tr., p. 28) Claimant stated that with the weight restriction placed on him, there were no better jobs he could do. (Tr., p. 45)

Dr. Wilson reported in February of 1983 that he was unable to determine a physical impairment rating on claimant:

> As you know, the guides to evaluation of permanent impairment, published by the American Medical Association and disability evaluation in the Social Security handbook for physicians, neither give guidance as to the area of inpairment [sic] rating. For this reason, I am unable to place a numerical value on the extent of Mr. Nunemann's physical impairment. However, I am aware of the fact that his job has required him to do a great deal of heavy lifting, and I can easily state that a second hernia such as Mr. Nunemann has suffered will significantly affect his ability to undertake this type of work. (Cl. Ex. 1)

Dr. Wilson noted that claimant had a previous inguinal repair, and the incidence of a recurring inguinal hernia increased the likelihood of future difficulties if claimant continued heavy lifting duties. Dr. Wilson recommended a permanent weight restriction of no more than 20-30 pounds of lifting. (Cl. Ex. 1) Dr. Foley testified by deposition that the two hernias claimant has experienced have contributed equally to his present restriction. (Foley Dep., p. 9) Dr. Foley found that claimant had no permanent defect other than "an increased likelihood of developing another hernia in the future should he continue to do heavy lifting." (Foley Dep., p. 10)

Claimant testified that since his October 1981 injury he is unable to do the work at home that he once did. He cited an example of now finding it difficult to change a tire because of the lifting involved. He also no longer chops wood for his fireplace. (Nunemann Dep., pp. 27-28) Claimant stated that when he has pain in the area of the injury, he takes Tylenol and hot showers after work and relaxes until the pain goes away. (Tr., p. 32)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 29, 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).

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).

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).

Industrial disability may be awarded in a case where the claimant has no apparent functional impairment but is precluded from performing his prior job, if the situation results in a probable reduction of earning capacity. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (1980).

ANALYSIS

Claimant argues on appeal that his work injury has resulted in a permanent partial impairment. He contends that the lifting restrictions imposed as a result of the injury have resulted in decreased earnings and will impede future employment opportunities. In addressing this question, the distinction between impairment and disability must be noted. A permanent impairment is a medical condition resulting in a functional abnormality or loss, as determined by a physician. It is an objective measurement of function and does not consider factors of age, sex or employability. A permanent disability is not a purely medical condition but represents an actual or presumed reduction in ability to engage in employment because of impairment, which may or may not be combined with consideration of other factors.

In the instant case, there is no medical evidence of a functional impairment. Neither Dr. Wilson nor Dr. Foley determined that claimant was permanently physically impaired as a result of the hernia injury: Dr. Wilson was unable to assign an impairment rating to claimant, and Dr. Foley found no indication of a "permanent defect."

However, as a result of the work injury, lifting restrictions have been recommended, not because claimant is physically unable to lift, but as a preventative measure to subsequent reinjury. It was this restriction which caused the claimant to be transferred to other employment and formed the basis of the deputy's finding of industrial disability. The court in Blacksmith, 290 N.W.2d 348, indicated that the loss of earnings caused by job transfer for reasons related to work injury justified a finding of industrial disability. Because claimant should not lift in excess of 20-30 pounds, as recommended by the treating physician, he has been transferred to a light duty job which pays less than his former work in milling. Thus the lifting restriction has resulted in an actual loss of earnings for claimant, and an analysis of industrial disability factors is proper.

Claimant suggests that the fractional amount of this earnings loss (approximately eight percent) should translate into an equivalent percentage of industrial disability. Earning loss is only one factor considered in arriving at a rate of industrial disability. In determining the degree of disability, the deputy correctly weighed considerations of claimant's present job and wages, his age, education and work experience and found that claimant had incurred a five percent industrial disability. Claimant's contention that his award was decreased as a reward to defendant employer for providing work within claimant's lifting restrictions is a misconstruction of the effect of continued earnings upon compensation benefits. If, in a circumstance where there is no permanent functional impairment following a work injury, the employee continues to work and receive wages, the impact of the injury on the worker in terms of lost earnings is necessarily diminished, and the extent of the industrial disability is lessened. In that sense, the employer benefits from its efforts to retain the employee. Review of the language of the proposed decision finds the deputy's analysis of the factors in the claim to have been appropriate and without undue emphasis on the actions of defendant employer.

Claimant's final issue on appeal concerns the question of a compensation award that encompasses future events. Claimant has been fully and justly compensated for the disability as determined by the evidence presented. Should claimant incur subsequent injury due to work activities, or should he lose his employment as a result of his lifting restrictions, he may apply for the opportunity to present evidence in support of a change in his award. Claimant has asserted that employment termination by defendant employer after the expiration of Iowa Code section 85.26(2) is a realistic possibility. There is no evidence in the record to support this assertion, and benefits cannot be awarded on the basis of unsubstantiated predictions of employer conduct once the jurisdictional time period of this agency has elapsed.

FINDINGS OF FACT

1. Claimant is 56 years old and has completed ten years of formal schooling.

2. Claimant's work experience has been in minimum wage, general labor positions.

3. Claimant sustained a hernia injury on October 29, 1981 while engaged in work activity for defendant employer.

4. Claimant's injury was repaired and he returned to work.

5. Claimant had previously suffered a hernia injury while employed elsewhere.

6. Claimant has lifting restrictions of 20-30 pounds to prevent re-injury.

7. Claimant has no functional impairment as a result of the work injury.

8. Claimant was re-assigned to a light duty job within his lifting restriction.

9. Claimant's transfer resulted in an hourly wage loss of $.62.

10. Claimant has incurred a five percent industrial disability as a result of his injury and subsequent lifting restrictions.

11. Claimant's rate of compensation is $188.86 per week.

CONCLUSIONS OF LAW

WHEREFORE, claimant has sustained his burden of proof that he incurred a work-related injury which resulted in an industrial disability of five percent. Claimant has failed to sustain his burden of showing that he sustained a permanent impairment as a result of the work injury.

THEREFORE, the proposed decision of the deputy is affirmed.

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of twenty-five (25) weeks at the rate of one hundred eighty-eight and 86/100 dollars ($188.86) per week, accrued payments to be made in a lump sum together with statutory interest to begin as of the date of this decision.

Costs of this action are taxed against defendants.

Defendants are to file a final report upon completion of payments.

Signed and filed this 28th day of September, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENT ODEKIRK,	:	
Claimant,	:	File No. 708027
vs.	:	REVIEW-
WILSON FOODS CORPORATION,	:	REOPENING
Employer, Self-Insured, Defendant.	:	DECISION

FILED
AUG 17 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Kent Odekirk, claimant, against Wilson Foods Corporation, self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on October 21, 1981. It came on for hearing on August 10, 1984 at the Iowa County Courthouse in Marengo, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received July 20, 1982. On August 10, 1982 a memorandum of agreement was received. A final report shows the payment of healing period benefits and weekly benefits totaling nine percent of the right upper extremity.

At the time of hearing the parties stipulated to a rate in the event of an award of $261.70.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, report expense from Leland G. Hawkins, M.D.; claimant's exhibit 2, medical report expense from David C. Naden, M.D.; claimant's exhibit 3, reports from John R. Walker, M.D., and James E. Crouse, M.D.; claimant's exhibit 4, a report with accompanying documents from Richard F. Neiman, M.D.; claimant's exhibit 5, medical records from Dr. Naden; claimant's exhibit 6, hospital records from an admission of January 4, 1982; claimant's exhibit 7, hospital records from a hospital admission of May 13, 1980; claimant's exhibit 8, a deposition of Dr. Walker; claimant's exhibit 9, report expenses from Dr. Walker; defendant's exhibit A, records from Dr. Hawkins; defendant's exhibit B, a report from Dr. Neiman; defendant's exhibit C, records from an electro-physiologic analysis; defendant's exhibit D, records from Dr. Naden; defendant's exhibit E, a report from Dr. Crouse; defendant's exhibit F, records from a hospital admission of January 4, 1982; and defendant's exhibit G, records from a hospitalization of May 13, 1980.

ISSUES

The sole issue in this matter is whether or not claimant is entitled to further permanent partial disability benefits.

STATEMENT OF THE CASE

Thirty-one year old right-handed married claimant, father of seven children who has completed high school and two years of college, commenced work for defendant on September 10, 1979. His first task was cutting out eyelids in the hog kill. He moved to cutting off tainted meat from condemned heads.

In May of 1980 he had surgery in his right wrist area which was performed by Dr. Naden, resulting in a W-shaped scar from his wrist about five inches up the arm and keeping him off work for five to six weeks. He was sent to popping kidneys--work which did not entail the use of a knife. His arm remained sore in this period.

In November of 1980 he began ham boning which he described as follows: Hams are on a conveyor. When a ham is taken off the belt, the fat is removed using a knife in the right hand. The ham is rolled over. The knife then is used to separate the ham into three pieces. After two weeks on ham boning claimant was shifted to skinning hams which he did off and on in alteration with ham boning depending on where he was needed.

He noted the beginning of trouble with swelling in his right forearm in the scar area. His elbow hurt. His hand began to go numb. He saw the company doctor who sent him to Dr. Hawkins who did an EMG. He returned to work but he continued to have numbness, pain and loss of grip.

Surgery was done on January 5, 1982. Subsequent to the operation he still had loss of strength, numbness and an inability to straighten his arm. After being off six months, he went back to ham boning which he was able to do. After a week's work, claimant entered the hospital for forty-two days of treatment for an unrelated condition.

When claimant returned to work he went to the sausage department where he helped pack bologna, hot dogs and lunch meat for four months. He was able to do this work and he was bothered only by heavy lifting. He tried to go back to ham boning, but he had trouble with his elbow and his grip gave out. Eventually, he was restricted from ham boning by his doctor. Claimant said he was having trouble with both reaching and straightening out his arm. It was necessary for him to move his entire body to reach.

Claimant was placed on the belly vat packing hams where he was to hang hams on a tree to be moved to the smokehouse. Claimant testified he was unable to do the work because he could not extend his arms; therefore, he was medically released from the department.

Claimant's next position was back on the kill floor removing tainted meat from condemned heads. He was able to do the work for a time, but he had pain in his elbow which shot to his hand and also to his shoulder. Additionally, he experienced numbness and weakness.

He moved to dropping bungs--work which he did from May of 1983 to November of 1983. He related: A hog comes down the conveyor. A knife with a ten inch blade is used to cut out the anus by making three cuts. Claimant felt weakness in the arm and elbow. Claimant was able to do the work when the chain was moving at a slower pace, but when it was speeded up, he was unable to keep pace.

Claimant asserted that he grew tired of being in pain all the time. In November of 1983 a job was posted in dry salt which claimant signed for. A majority of the time he is using a hose to clean up equipment to get it ready for government inspection each day. For a brief period each six months he trims beef, a job he attempts to avoid. Claimant expressed the feeling that he has a good job which he likes.

Claimant characterized his arm as fifty percent better; however, he still has problems with it when he uses it for strenuous work. He has numbness from his elbow up into his shoulder and down into his hand. He experiences loss of grip and loss of strength. He had none of these troubles before his elbow difficulties developed.

Claimant acknowledged ability to participate in some sporting activities including bowling with a tournament placement. Claimant claimed he bowls from his shoulder rather than his arm and that he does not bowl without pain.

Claimant differentiated between the examination he had by Drs. Walker and Hawkins. Dr. Walker was seen in November of 1983 at which time claimant was working at dropping bungs. Dr. Walker used instruments to measure both his motion and his strength. He took x-rays and spent forty-five to sixty minutes in his examination.

Dr. Hawkins saw him on February 27, 1984. He shook claimant's hand and inquired about his health. He held claimant's arm in

the air and told him he was going to take x-rays. Claimant estimated the time of his examination at three minutes. No instruments were used to measure motion. His reflexes were not checked. He denied that the doctor took the history shown in his notes and denied that they discussed his present job. Claimant was unable to remember what he had told the nurse. Claimant asserted that he was sensitive in his scar area at the time of Dr. Hawkins' examination.

David C. Naden, M.D., saw claimant on April 25, 1980 at which time he had tendonitis of the extensor tendon of the thumb, wrist and dorsum of the right forearm. The doctor recommended at that time moving claimant to a different job and waiting three to six months to see what happened.

Claimant returned on May 5, 1980 with redevelopment of inflammation of the synovial tissue of the extensor mechanism of the right forearm.

Claimant was admitted to the hospital on May 13, 1980 with significant swelling and crepitation with dorsiflexion and extension of the right thumb. There was inflammation of the extensor carpi radialis longus and brevis. Dorsiflexion and plantar flexion in the wrist were restricted. Dr. Naden performed a synovectomy and exploration of the dorsal wrist area and release of the first dorsal compartment fiberosseous sheath along with removal of an accessory tendon and septum.

Claimant was seen postoperatively and in early June he was placed in a splint. Claimant was released to return to work on June 23, 1980.

Dr. Naden saw claimant on November 2, 1981 following an acute flare-up of tendonitis. Claimant also complained of intermittent numbness in the ulnar distribution of the right hand. A different job was suggested.

On August 26, 1982 Dr. Naden evaluated claimant's impairment at five percent of the right hand. Claimant's wrist flexion was 40/80; his extension, 70/80; and his grip, 70 or 80/100. Claimant was mainly concerned at this time with loss of motion and weakness in his hand and wrist.

Leland G. Hawkins, M.D., saw claimant on November 25, 1981 at which time claimant reported having numbness in his right little and ring fingers for about a year, as well as a twenty pound grip differential between the right and left hand. He told the doctor of swelling in the area of his incision. On examination, no sensory loss was found. Claimant had good function of the tendons. Electromyography was ordered.

Claimant was found to have an ulnar neuropathy at the elbow level. Claimant was admitted to the hospital on January 4, 1982. The following day an anterior transposition with medial epicondylectomy was done.

Claimant was taken out of his sling in late January and started on elbow exercises in early February. Later biceps and triceps exercises were added. Claimant had continuing inability to straighten his elbow. X-rays were taken on March 26, 1982 which were interpreted as showing new bone formation like a myositis ossificans over the medial epicondyle.

When claimant was released for work, he was instructed to return to a job which would not require complete extension.

Claimant was referred for electrophysiology which was carried out on November 15, 1982. That testing was assessed as showing "[m]ild to moderate right ulnar neuropathy at elbow level without evidence for deterioration when compared to the prior study in December 1981, and with some evidence of improvement by EMG." A second interpretation was "[n]o conclusive evidence for right carpal tunnel syndrome with only one minimal abnormal value, namely the median distal motor latency."

In a letter dated December 7, 1982 Dr. Hawkins wrote:

> If you evaluate the function of loss of motion that he has in his elbow, the ossification over the medial joint line, you would obtain about a 5 percent disability on the elbow region and the ulnar nerve and then if you were to add the loss of sensation in the hand and weakness that the patient has, one would bring this loss up to about 11 percent of the extremity as measured at the elbow. This would be my disability rating for this patient.

Dr. Hawkins last saw claimant on February 27, 1984. He noted that claimant was working with a hose rather than a knife. He found full extension and flexion of the hand, full flexion of the upper extremity, a seven to ten degree deficiency in extension and full pronation and supination. His gross grip was equal and his reflexes were "fine." The doctor gave claimant a four percent permanent impairment rating for loss of motion which he increased ten percent to allow consideration of claimant's continued fatigue and sensitivity.

Albert R. Coates, M.D., saw claimant on February 14, 1983 for an evaluation. Claimant complained of difficulty extending his arm and weakness in the arm. Claimant was described as having fair intrinsic function, good sensation in the hand and forearm and mild diffuse weakness of grip and pinch on the right. Passive range of motion was 27 to 135 degrees in the right elbow and 0 to 62 degrees in the right wrist. Dr. Coates' rating was 14 percent of the right arm.

In a letter dated March 15, 1983 Dr. Coates explained that his "14 percent was a total impairment, hence any previous permanency that he [claimant] derived from this injury should be deducted from this."

Richard F. Neiman, M.D., examined claimant on July 6, 1983 and took a history of difficulty beginning as a lump in the forearm which was diagnosed as tendonitis and treated surgically. After that claimant had surgery for an ulnar nerve block. Claimant complained of numbness and weakness.

On examination, there was some weakness in the triceps. Dr. Neiman found no evidence of ulnar neuropathy or carpal tunnel compression.

John R. Walker, M.D., board certified orthopedic surgeon, saw claimant on November 3, 1982 and took a history of claimant's beginning to develop swelling in his right wrist, numbness in his right hand and swelling and numbness over the forearm in April of 1980. He reported that Dr. Naden removed a cystic type of lesion and rated claimant's permanent partial disability at five percent of his hand. Post surgery, claimant had worsening of the numbness and loss of grip. In October of 1980 claimant had trouble handling his knife.

In October of 1981 an EMG was done. An operation was performed in January of 1982 and thereafter claimant was unable to extend his arm. He had physical therapy post surgery. Claimant returned to work in the sausage department, but his elbow hurt with lifting and his whole hand began to get numb.

Claimant complained of an inability to fully straighten his elbow, swelling over his scar, frequent numbness in the right hand and poor grip on the right.

On examination, claimant's blood pressure was slightly elevated. The reflexes of the upper extremity were not physiological with the left triceps more active than the right. The Tinel sign was markedly positive which Dr. Walker said was a sign of nerve irritation. Percussion caused pain, numbness and tingling radiating down the forearm and into the hand. Claimant lost fifteen degrees of extension. His grip was 70 on the right and 110 on the left.

X-rays of the right wrist were normal. There was a calcification behind the medial epicondyle.

Dr. Walker concluded claimant had an ulnar nerve neuritis on the right and a residual problem with scarring in the area of the flexor tendon of the wrist in the forearm and above the wrist. The doctor assigned an impairment rating of 27 percent of the right upper extremity. The doctor prescribed vitamin B.

Claimant was seen on January 17, 1983 by Dr. Crouse who felt claimant had carpal tunnel syndrome and needed further surgery. Dr. Walker was unsure whether Dr. Crouse thought the nerve involved in the carpal tunnel was the median or the ulnar.

On November 2, 1983 claimant returned with complaints of an inability to straighten his right elbow, swelling over his incisional area, right elbow pain which increased with twisting and lifting or straining and increased numbness of the right hand. Claimant's numbness had increased and localized to two little fingers and the long finger on the right hand. Claimant reported quitting the ham boning operation.

On examination, claimant's grip was 64 on the right and 82 on the left. Claimant had minimal restriction of flexion and extension of his right wrist with subjective numbness in the ulnar aspect of the right hand. Tips of the ulnar fingers were numb and painful. Dr. Walker felt this was a little increase in the ulnar nerve problem. Claimant's reflexes had improved to the point where they were equal and active.

The physician raised claimant's impairment from 27 to 29 percent and agreed the increase was on the basis of subjective complaints. Dr. Walker suggested continuing vitamin B. He did not advise carpal tunnel surgery. He thought there was "very good possibility" that claimant had some entrapment of the median and possibly the ulnar nerve.

James E. Crouse, M.D., reported his findings in a letter dated January 17, 1983. Among claimant's complaints at that time were inability to fully extend the right elbow, discomfort in the medial aspect of the right elbow, numbness in the right hand, and weakness in the right upper extremity.

Claimant's elbow was tender. Range of motion was minus 28 degrees extension and 140 degrees flexion. There was tenderness in the area of the elbow scar. Grip strength was slightly decreased on the right. There was no atrophy; reflexes were brisk. Both the Phalen's and Tinel's were positive. There was swelling in the area of claimant's first surgery.

Dr. Crouse concluded a carpal tunnel release would relieve numbness in the hand and weakness of the grip. Using the orthopedic manual and based on limitation of elbow motion, tenderness about the elbow and numbness in the upper extremity, he assigned a rating of "approximately 15% of the upper extremity."

APPLICABLE LAW AND ANALYSIS

The sole issue in this matter is claimant's entitlement to permanent partial disability benefits resulting from his October 21, 1981 injury.

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).

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).

Claimant's impairment is to his dominant extremity. He continues to complain of difficulty from his elbow up into his shoulder and down into his hand. He claims loss of grip strength.

In assessing the amount of claimant's permanent partial disability, it is necessary to decide what weight is to be given to the ratings of Dr. Hawkins, Coates, Walker and Crouse.

Dr. Hawkins might under some circumstances be entitled to greater weight because of his familiarity with claimant's condition over the course of his treatment. Dr. Hawkins did the more recent evaluation of claimant and his assessment was made after claimant moved to the dry salt area where he was working with a hose rather than a knife. The doctor's rating was ten percent.

Dr. Coates did an evaluation in which he measured both grip strength and range of motion. He arrived at a rating of fourteen percent and indicated that any previous permanency should be deducted.

Dr. Walker evaluated claimant on two occasions. His history was slightly inaccurate based on Dr. Hawkins' notes in that he thought claimant was kept in a sling for eight weeks and that physical therapy was not instituted until later. Dr. Walker first assigned 27 percent and later raised that to 29 percent. Dr. Walker used instruments to measure both grip and motion.

Dr. Crouse also made specific measurements in doing his assessment which yielded a fifteen percent rating based on the orthopedic guide with specific reference to limitation of elbow motion, tenderness about the elbow and numbness in the upper extremity.

Claimant at the time of hearing indicated his dissatisfaction of Dr. Hawkins' examination because it was more summary and was not done with instruments as Dr. Walker's was done. Dr. Hawkins was familiar with claimant's case and did not need to spend as much time in his evaluation. Dr. Walker, on the other hand, had a slight inaccuracy in his history. In balance, there are factors to recommend each impairment rating. Equal weight is being given the opinions of each of the four physicians. Giving equal weight to each rating results in a 15 3/4 percent rating to claimant's right upper extremity which entitles him to 39.375 weeks of permanent partial disability.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-one (31) years of age.

That claimant is right-handed.

That claimant started work for defendant on September 10, 1979.

That in May of 1980 claimant had a synovecomy and exploration of the dorsal wrist area and release of the first dorsal compartment fiberosseous sheath along with removal of an accessory tendon and septum.

That on January 5, 1982 claimant had an anterior transposition of the ulnar nerve with medial epicondylectomy.

That claimant was taken out of his sling on January 27, 1982 and started on exercises.

That claimant has done various jobs since his surgery.

That claimant has been restricted from ham boning and from hanging hams.

That claimant's present job in dry salt entails use of a hose rather than use of a knife.

That claimant presently complains of numbness from his elbow up into his shoulder down into his hand and of loss of grip and of strength.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established entitlement to permanent partial disability benefits for thirty-nine point three seven five (39.375) weeks as a result of his injury of October 21, 1981.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant thirty-nine point three seven five (39.375) weeks of permanent partial disability benefits at a rate of two hundred sixty-one and 70/100 dollars ($261.70).

That defendant be given credit for amounts previously paid.

That defendant pay amounts due and owing in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30.

That defendant pay costs pursuant to Industrial Commissioner Rule 500-4.33 including report expenses from Dr. Walker of forty-five dollars ($45.00) and from Dr. Hawkins of thirty-five dollars ($35.00).

That defendant file a final report in ninety (90) days.

Signed and filed this 11 day of August, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENT ODEKIRK,	:	
Claimant,	:	File No. 632958
vs.	:	R E V I E W -
WILSON FOODS CORPORATION,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
AUG 17 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Kent Odekirk, claimant, against Wilson Foods Corporation, self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on March 6, 1980. It came on for hearing on August 10, 1984 at the Iowa County Courthouse in Marengo, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received April 16, 1980. On May 2, 1980 a memorandum of agreement was received. A final report shows the payment of healing period benefits and permanent partial disability of five percent of a right hand as well as the payment of medical expenses.

At the time of hearing the parties stipulated the rate in the event of an award should be $197.89.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, report expense from Leland G. Hawkins, M.D.; claimant's exhibit 2, medical report expense from David C. Naden, M.D.; claimant's exhibit 3, reports from John R. Walker, M.D., and James E. Crouse, M.D.; claimant's exhibit 4, a report with accompanying documents from Richard F. Neiman, M.D.; claimant's exhibit 5, medical records from Dr. Naden; claimant's exhibit 6, hospital records from an admission of January 4, 1982; claimant's exhibit 7, hospital records from a hospital admission of May 13, 1980; claimant's exhibit 8, a deposition of Dr. Walker; claimant's exhibit 9, report expenses from Dr. Walker; defendant's exhibit A, records from Dr. Hawkins; defendant's exhibit B, a report from Dr. Neiman; defendant's exhibit C, records from an electrophysiologic analysis; defendant's exhibit D, records from Dr. Naden; defendant's exhibit E, a report from Dr. Crouse; defendant's exhibit F, records from a hospital admission of January 4, 1982; and defendant's exhibit G, records from a hospitalization of May 13, 1980.

ISSUES

The sole issue in this matter is whether or not claimant is entitled to further permanent partial disability benefits.

STATEMENT OF THE CASE

Thirty-one year old right-handed married claimant, father of seven children who has completed high school and two years of college, commenced work for defendant on September 10, 1979. His first task was cutting out eyelids in the hog kill. He moved to cutting off tainted meat from condemned heads.

In May of 1980 he had surgery in his right wrist area which was performed by Dr. Naden, resulting in a W-shaped scar from his wrist about five inches up the arm and keeping him off work for five to six weeks. He was sent to popping kidneys--work which did not entail the use of a knife. His arm remained sore in this period.

In November of 1980 he began ham boning which he described as follows: Hams are on a conveyor. When a ham is taken off the belt, the fat is removed using a knife in the right hand. The ham is rolled over. The knife then is used to separate the ham into three pieces. After two weeks on ham boning claimant was shifted to skinning hams which he did off and on in alteration with ham boning depending on where he was needed.

He noted the beginning of trouble with swelling in his right forearm in the scar area. His elbow hurt. His hand began to go numb. He saw the company doctor who sent him to Dr. Hawkins who did an EMG. He returned to work but he continued to have numbness, pain and loss of grip.

Surgery was done on January 5, 1982. Subsequent to the operation he still had loss of strength, numbness and an inability to straighten his arm. After being off six months, he went back to ham boning which he was able to do. After a week's work, claimant entered the hospital for forty-two days of treatment for an unrelated condition.

When claimant returned to work he went to the sausage department where he helped pack bologna, hot dogs and lunch meat for four months. He was able to do this work and he was bothered only by heavy lifting. He tried to go back to ham boning, but he had trouble with his elbow and his grip gave out. Eventually, he was restricted from ham boning by his doctor. Claimant said he was having trouble with both reaching and straightening out his arm. It was necessary for him to move his entire body to reach.

Claimant was placed on the belly vat packing hams where he was to hang hams on a tree to be moved to the smokehouse. Claimant testified he was unable to do the work because he could not extend his arms; therefore, he was medically released from the department.

Claimant's next position was back on the kill floor removing tainted meat from condemned heads. He was able to do the work for a time, but he had pain in his elbow which shot to his hand and also to his shoulder. Additionally, he experienced numbness and weakness.

He moved to dropping bungs--work which he did from May of 1983 to November of 1983. He related: A hog comes down the conveyor. A knife with a ten inch blade is used to cut out the anus by making three cuts. Claimant felt weakness in the arm and elbow. Claimant was able to do the work when the chain was moving at a slower pace, but when it was speeded up, he was unable to keep pace.

Claimant asserted that he grew tired of being in pain all the time. In November of 1983 a job was posted in dry salt which claimant signed for. A majority of the time he is using a hose to clean up equipment to get it ready for government inspection each day. For a brief period each six months he trims beef, a job he attempts to avoid. Claimant expressed the feeling that he has a good job which he likes.

Claimant characterized his arm as fifty percent better; however, he still has problems with it when he uses it for strenuous work. He has numbness from his elbow up into his shoulder and down into his hand. He experiences loss of grip and loss of strength. He had none of these troubles before his elbow difficulties developed.

Claimant acknowledged ability to participate in some sporting activities including bowling with a tournament placement. Claimant claimed he bowls from his shoulder rather than his arm and that he does not bowl without pain.

Claimant differentiated between the examination he had by Drs. Walker and Hawkins. Dr. Walker was seen in November of 1983 at which time claimant was working at dropping bungs. Dr. Walker used instruments to measure both his motion and his strength. He took x-rays and spent forty-five to sixty minutes in his examination.

Dr. Hawkins saw him on February 27, 1984. He shook claimant's hand and inquired about his health. He held claimant's arm in the air and told him he was going to take x-rays. Claimant estimated the time of his examination at three minutes. No instruments were used to measure motion. His reflexes were not checked. He denied that the doctor took the history shown in his notes and denied that they discussed his present job. Claimant was unable to remember what he had told the nurse. Claimant asserted that he was sensitive in his scar area at the time of Dr. Hawkins' examination.

David C. Naden, M.D., saw claimant on April 25, 1980 at which time he had tendonitis of the extensor tendon of the thumb, wrist and dorsum of the right forearm. The doctor recommended at that time moving claimant to a different job and waiting three to six months to see what happened.

Claimant returned on May 5, 1980 with redevelopment of inflammation of the synovial tissue of the extensor mechanism of the right forearm.

Claimant was admitted to the hospital on May 13, 1980 with significant swelling and crepitation with dorsiflexion and extension of the right thumb. There was inflammation of the extensor carpi radialis longus and brevis. Dorsiflexion and plantar flexion in the wrist were restricted. Dr. Naden performed a synovectomy and exploration of the dorsal wrist area and release of the first dorsal compartment fiberosseous sheath along with removal of an accessory tendon and septum.

Claimant was seen postoperatively and in early June he was placed in a splint. Claimant was released to return to work on June 23, 1980.

Dr. Naden saw claimant on November 2, 1981 following an acute flare-up of tendonitis. Claimant also complained of intermittent numbness in the ulnar distribution of the right hand. A different job was suggested.

On August 26, 1982 Dr. Naden evaluated claimant's impairment at five percent of the right hand. Claimant's wrist flexion was 40/80; his extension, 70/80; and his grip, 70 or 80/100. Claimant was mainly concerned at this time with loss of motion and weakness in his hand and wrist.

Leland G. Hawkins, M.D., saw claimant on November 25, 1981 at which time claimant reported having numbness in his right little and ring fingers for about a year, as well as a twenty pound grip differential between the right and left hand. He told the doctor of swelling in the area of his incision. On examination, no sensory loss was found. Claimant had good function of the tendons. Electromyography was ordered.

Claimant was found to have an ulnar neuropathy at the elbow level. Cl imant was admitted to the hospital on January 4, 1982. The following day an anterior transposition with medial epicondylectomy was done.

Claimant was taken out of his sling in late January and started on elbow exercises in early February. Later biceps and triceps exercises were added. Claimant had continuing inability to straighten his elbow. X-rays were taken on March 26, 1982 which were interpreted as showing new bone formation like a myositis ossificans over the medial epicondyle.

When claimant was released for work, he was instructed to return to a job which would not require complete extension.

Claimant was referred for electrophysiology which was carried out on November 15, 1982. That testing was assessed as showing "[m]ild to moderate right ulnar neuropathy at elbow level without evidence for deterioration when compared to the prior study in December 1981, and with some evidence of improvement by EMG." A second interpretation was "[n]o conclusive evidence for right carpal tunnel syndrome with only one minimal abnormal value, namely the median distal motor latency."

In a letter dated December 7, 1982 Dr. Hawkins wrote:

> If you evaluate the function of loss of motion that he has in his elbow, the ossification over the medial joint line, you would obtain about a 5 percent disability on the elbow region and the ulnar nerve and then if you were to add the loss of sensation in the hand and weakness that the patient has, one would bring this loss up to about 11 percent of the extremity as measured at the elbow. This would be my disability rating for this patient.

Dr. Hawkins last saw claimant on February 27, 1984. He noted that claimant was working with a hose rather than a knife. He found full extension and flexion of the hand, full flexion of the upper extremity, a seven to ten degree deficiency in extension and full pronation and supination. His gross grip was equal and his reflexes were "fine." The doctor gave claimant a four percent permanent impairment rating for loss of motion which he increased ten percent to allow consideration of claimant's continued fatigue and sensitivity.

Albert R. Coates, M.D., saw claimant on February 14, 1983 for an evaluation. Claimant complained of difficulty extending his arm and weakness in the arm. Claimant was described as having fair intrinsic function, good sensation in the hand and forearm and mild diffuse weakness of grip and pinch on the right. Passive range of motion was 27 to 135 degrees in the right elbow and 0 to 62 degrees in the right wrist. Dr. Coates' rating was 14 percent of the right arm.

In a letter dated March 15, 1983 Dr. Coates explained that his "14 percent was a total impairment, hence any previous permanency that he [claimant] derived from this injury should be deducted from this."

Richard F. Neiman, M.D., examined claimant on July 6, 1983 and took a history of difficulty beginning as a lump in the forearm which was diagnosed as tendonitis and treated surgically. After that claimant had surgery for an ulnar nerve block. Claimant complained of numbness and weakness.

On examination, there was some weakness in the triceps. Dr. Neiman found no evidence of ulnar neuropathy or carpal tunnel compression.

John R. Walker, M.D., board certified orthopedic surgeon, saw claimant on November 3, 1982 and took a history of claimant's beginning to develop swelling in his right wrist, numbness in his right hand and swelling and numbness over the forearm in April of 1980. He reported that Dr. Naden removed a cystic type of lesion and rated claimant's permanent partial disability at five percent of his hand. Post surgery, claimant had worsening of the numbness and loss of grip. In October of 1980 claimant had trouble handling his knife.

In October of 1981 an EMG was done. An operation was performed in January of 1982 and thereafter claimant was unable to extend his arm. He had physical therapy post surgery. Claimant returned to work in the sausage department, but his elbow hurt with lifting and his whole hand began to get numb.

Claimant complained of an inability to fully straighten his elbow, swelling over his scar, frequent numbness in the right hand and poor grip on the right.

On examination, claimant's blood pressure was slightly elevated. The reflexes of the upper extremity were not physiological with the left triceps more active than the right. The Tinel sign was markedly positive which Dr. Walker said was a sign of nerve irritation. Percussion caused pain, numbness and tingling radiating down the forearm and into the hand. Claimant lost fifteen degrees of extension. His grip was 70 on the right and 110 on the left.

X-rays of the right wrist were normal. There was a calcification behind the medial epicondyle.

Dr. Walker concluded claimant had an ulnar nerve neuritis on the right and a residual problem with scarring in the area of the flexor tendon of the wrist in the forearm and above the wrist. The doctor assigned an impairment rating of 27 percent of the right upper extremity. The doctor prescribed vitamin B.

Claimant was seen on January 17, 1983 by Dr. Crouse who felt claimant had carpal tunnel syndrome and needed further surgery. Dr. Walker was unsure whether Dr. Crouse thought the nerve involved in the carpal tunnel was the median or the ulnar.

On November 2, 1983 claimant returned with complaints of an inability to straighten his right elbow, swelling over his incisional area, right elbow pain which increased with twisting and lifting or straining and increased numbness of the right hand. Claimant's numbness had increased and localized to two little fingers and the long finger on the right hand. Claimant reported quitting the ham boning operation.

On examination, claimant's grip was 64 on the right and 82 on the left. Claimant had minimal restriction of flexion and extension of his right wrist with subjective numbness in the ulnar aspect of the right hand. Tips of the ulnar fingers were numb and painful. Dr. Walker felt this was a little increase in the ulnar nerve problem. Claimant's reflexes had improved to the point where they were equal and active.

The physician raised claimant's impairment from 27 to 29 percent and agreed the increase was on the basis of subjective complaints. Dr. Walker suggested continuing vitamin B. He did not advise carpal tunnel surgery. He thought there was "very good possibility" that claimant had some entrapment of the median and possibly the ulnar nerve.

James E. Crouse, M.D., reported his findings in a letter dated January 17, 1983. Among claimant's complaints at that time were inability to fully extend the right elbow, discomfort in the medial aspect of the right elbow, numbness in the right hand, and weakness in the right upper extremity.

Claimant's elbow was tender. Range of motion was minus 28 degrees extension and 140 degrees flexion. There was tenderness in the area of the elbow scar. Grip strength was slightly decreased on the right. There was no atrophy; reflexes were brisk. Both the Phalen's and Tinel's were positive. There was swelling in the area of claimant's first surgery.

Dr. Crouse concluded a carpal tunnel release would relieve numbness in the hand and weakness of the grip. Using the orthopedic manual and based on limitation of elbow motion, tenderness about the elbow and numbness in the upper extremity, he assigned a rating of "approximately 15% of the upper extremity."

APPLICABLE LAW AND ANALYSIS

The sole issue in this matter is claimant's entitlement to further permanent partial disability benefits. Claimant previously has been paid for five percent of a hand.

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).

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).

Claimant testified that after his surgery he had soreness in his arm. Post surgery, he developed a condition which resulted in the anterior transposition of his ulnar nerve as well as a

medial epicondylectomy. Immediately prior to his first surgery, claimant's complaints were of inflammation in the synovial tissue of the extensor mechanism of the right forearm. The postoperative diagnoses for claimant's condition were synovitis of the extensor tendons of the right forearm and DeQuervian's disease. An incision was made in the forearm. The doctor worked in the area of the abductor to the thumb and extensor. Surgery also was done in the area of the extensor carpi radialis brevis and longus. Dr. Naden's final diagnoses were of "[s]tenosing tenosynovitis of the first dorsal compartment of the right wrist" and "[s]ynovitis of the extensor tendons of the dorsum of the right arm." Dr. Naden's evaluation included checking motion of the wrist and grip strength of the hand. Claimant's concern at that time, according to the doctor's notes, was loss of motion and weakness in the right hand and wrist. Dr. Naden's rating was to the hand.

This case is complicated by the subsequent development of trouble in claimant's right elbow. Although there is some evidence, for instance the location of the scar, that claimant has disability to his arm as a result of his March 6, 1980 injury, claimant's burden is a preponderance. The evidence does not allow a finding of impairment to the right arm as opposed to the right hand. As defendant has paid the five percent impairment found by Dr. Naden, no additional award can be made in this decision.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That is claimant is thirty-one (31) years of age.

That claimant is right-handed.

That claimant started work for defendant on September 10, 1979.

That prior to surgery claimant had inflammation of the synovial tissue of the extensor mechanism of the right forearm.

That in May of 1980 claimant had a synovectomy, an exploration of the dorsal wrist area and release of the first dorsal compartment fiberosseous sheath along with removal of an accessory tendon and septum.

That the postoperative diagnoses for claimant were synovitis of the extensor tendons of the right forearm and DeQuervian's disease.

That on January 5, 1982 claimant had an anterior transposition of the ulnar nerve and a medial epicondylectomy.

That claimant presently complains of numbness from his elbow up into his shoulder and down into his hand and of a loss of grip and of strength.

That when claimant was seen by Dr. Naden in August of 1982 his main concern was of loss of motion and weakness of his right hand and wrist.

That Dr. Naden assessed claimant's impairment to his hand.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has shown entitlement to permanent partial disability relating to his injury of March 6, 1980 of five percent (5%) of a hand and that amount has been paid by defendant.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That defendant pay costs pursuant to Industrial Commissioner Rule 500-4.33 including the ten dollar ($10.00) fee for a report from Dr. Naden.

Signed and filed this 17 day of August, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANTHONY E. PALMER, Claimant, vs. NORWALK COMMUNITY SCHOOL DISTRICT - LAKEWOOD ELEMENTARY SCHOOL, Employer, and EMPLOYERS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	FILED AUG 3 1984 IOWA INDUSTRIAL COMMISSIONER File No. 482030 R E M A N D D E C I S I O N

INTRODUCTION

This matter was remanded by the Polk County, Iowa, district court to the industrial commissioner. Prior to that, a proposed agency decision awarded benefits to the conclusively presumed dependents of Dian Palmer, the deceased employee. On December 29, 1981, a final agency decision by the undersigned deputy industrial commissioner denied benefits for claimants because they had not shown a causal connection between the work and the death.

Claimants appealed to the district court and ther pplied for leave to present additional evidence, stating th r. Donald J. Tesdall would clarify his testimony about the causal relationship and that there was new evidence available to the medical community which was not available at the time of the hearing of October 1, 1980. A remand was ordered February 4, 1983 as follows:

1. That this cause is hereby remanded to the Industrial Commissioner for presentation of the evidence sought to be presented by the Petitioner's Application for Leave to Present Evidence.

2. That such evidence will be accepted by the Industrial Commissioner or other qualified person designated by him.

3. That upon presentation of such additional evidence, the Industrial Commissioner may either: (1) modify its prior decision by reason of such additional evidence, or (2) affirm its previous decision.

4. That in either event, the Industrial Commissioner shall file with this Court any such additional evidence as well as any modifications, new findings or decision.

5. That the Industrial Commissioner shall notify by mail, all parties involved of any new findings or dec.sion.

Once again under the provisions of §86.3, Code of Iowa, the commissioner appointed the undersigned deputy industrial commissioner to issue the final agency decision on appeal in this matter.

Defendants also moved to be allowed to present additional evidence, which motion was denied by the undersigned as not being included in the remand order. However, upon application to the district court, that court ruled in defendants favor as follows: "The Court, after reviewing the respective parties briefs, hereby sustains the Respondent's application to present additional to the extent that said evidence is to rebut any new evidence which the Petitioner introduces under Judge Bergeson's order granting the Petition [sic] application for leave to present additional evidence."

As a result of the foregoing, three depositions were taken: The discovery deposition of Dr. Donald Tesdall, the evidentiary deposition of Dr. Tesdall, and the evidentiary deposition of Dr. Alexander Ervanian. The record for this remand decision is considered to be the two evidentiary depositions (those of Dr. Tesdall of August 30, 1983 and of Dr. Ervanian of November 9, 1983) plus the exhibits attached to those depositions. Also, the original record has been reviewed, and the new evidence has been reviewed along with the original evidence, all of which has been considered in reaching this remand decision.

EVIDENCE PRESENTED

The facts and circumstances have been summarized in the past, but, in light of the new evidence, they should again be reviewed.

The deceased, Dian E. Palmer, was a lady 31 years old, married and with a family who did part-time custodial work at the employer's school. On November 29, 1977, she and her four-year-old son, Scott Palmer, went to the school where she

intended to do her work. She could not open the school doors and was angry because of that. She went on to the school grounds to lower the flag but died before doing anything else.

The only eye witness, four-year-old Scott Palmer, testified at the hearing when he was seven years old:

> [S]he tried--she went to try the front door-- Well, she opened--she tried to open the back door and that wouldn't work; and she tried to open the front and it wouldn't work.
>
> Q. Do you know why the back door wouldn't open?
>
> What did she try to do?
>
> A. She hit it with her-- She went like that (indicating' and hit it, and then she went to the front.
>
> Q. Now, did she put the key in the lock?
>
> A. Yes, she tried.
>
> Q. And she couldn't get it to turn; is that what happened?
>
> A. (The witness nodded affirmatively.)
>
> Q. Did she tell you at any time that she was hurt; that she felt bad?
>
> A. No, but she said she had pains.
>
> Q. When did she say that?
>
> A. When-- She said she wanted to go over to the flagpole and take it down; and after she hit it, she started getting pains.
>
> Q. After she hit what?
>
> A. That door.
>
> Q. Did she say where it hurt?
>
> A. (The witness nodded negatively.)
>
> Q. What did you do after you left the door?
>
> A. She got kind of dizzy and she hit the flagpole on her head and started walking over and she fell in the grass.
>
> Q. Then what did you do?
>
> A. Her purse was out in front of her and her glasses, and all that, and I stayed up there, and I had her purse on my stomach so no one would grab it if someone came.
>
> Q. Di you stay with her then?
>
> A. (The witness nodded affirmatively.)
>
> Q. Did someone find you later?
>
> A. No-- Yes. A little bit later my grandpa came up. (Tr., pp. 7-8 11. 7-25 and 1-15)
>
> Q. Scotty, did your mom get real mad at the door?
>
> A. Uh-huh.
>
> Q. I didn't hear what you said.
>
> A. Uh-huh. (Tr., p. 11 11. 9-12)

Donald Tesdall, M.D., testified that he is a diplomate of the American Board of Family Practice. (Dr. Tesdall's prior testimony was by deposition of January 23, 1981. References to Dr. Tesdall's testimony in the matter of this remand will be found in a deposition of August 30, 1983.) Dr. Tesdall testified (Dep., 7-12) as to decedent's problems with chest pain. The first complaint was on November 19, 1975 and was believed by Dr. Tesdall to be due to anxiety. Then, although Dr. Tesdall did not see her, she also complained of chest pain at the emergency room of Lutheran Hospital in Des Moines on November 23, 1975. Dr. Tesdall said that the diagnosis at that time was costochondritis (inflammation of the rib cartilage).

Dr. Tesdall again saw decedent for chest pains on December 1, 1976 at which time she was improved, however. She was hospitalized at Lutheran Hospital from January 27 to February 9, 1976 for nausea and vomiting. At that time the diagnoses were "probably duodenal ulcers, tension headaches and reactive depression." (Tesdall dep., p. 8 11. 20-21) Dr. Tesdall saw decedent again in August 1976 because of nausea, vomiting and occasional chest pain. She was hospitalized from November 10 to December 1, 1976 for depression, muscle contraction, headaches and acute gastritis. Dr. Tesdall again saw decedent on August 10, 1977 for depression and difficulty in sleeping. At that time, decedent was started back on antidepressants and had been referred to a psychiatrist. The medication was stated to be Elavil (Tesdall dep., p. 10 1. 15). Decedent was hospitalized again because of nausea and vomiting September 6 to 11, 1977. The diagnoses were "[a]bdominal pain and vomiting secondary to gastritis, mixed anxiety, distressive reactions, tension headaches, incomplete emptying of the bladder secondary to medication side effects." (Tesdall dep., p. 10-11 1. 25 and 1-3)

Dr. Tesdall saw decedent on October 24, 1977 for depression, headaches and abdominal pain and on November 1, 1977 "in the emergency room at Lutheran because of chills, shortness of breath and dry, non-productive cough. At that time she also complained of substernal chest pain with the coughing." (Tesdall dep., p. 11 11. 17-21)

Dr. Tesdall was extensively examined and cross-examined on the question of the cause of Dian Palmer's death. In essence, his testimony in the deposition of August 30, 1983 firmly shows that he was of the opinion that a causal relationship existed between Dian Palmer's work activities on November 29, 1977 and her death.

With respect to his prior testimony of January 23, 1981, he stated: "I felt the most likely reason for her death was coronary artery spasm which had triggered ischemia, which had triggered some type of electrical phenomena, which resulted in ventricular fibrillation." (Tesdall dep., p. 12 11. 21-14) He also stated with respect to his prior testimony: "I remember mentioning anger but having the possibility -- I stated that anger does increase adrenalin. It makes it more likely to get angina. That was my statement at that time on page 34." (Tesdall dep., p. 14 11. 9-12)

Dr. Tesdall was then asked "in retrospect," as to the cause for her prior chest pains: "Yes. I believe that she has had chest pain intermittently ever since 1975 and a lot of times those chest pains were associated with abdominal pains and I guess I probably passed them off as emotional rather than real, as far as organic basis." (Tesdall dep., p. 14 1. 24, p. 15 11. 16-20) Then, Dr. Tesdall was asked his present opinion as to the cause of death:

> A. I feel that she had coronary artery spasm resulting in ischemia resulting in ventricular fibrillation.
>
> Q. What was the ultimate result in your opinion of that ventricular fibrillation?
>
> A. I feel that the anger that she had of not being able to get into the school triggered the episode.
>
> Q. Doctor, based upon the Dian Palmer woman's history, your examination and treatment of her as her treating physician, do you have an opinion based upon a reasonable medical certainty as to the cause of the coronary artery spasm?
>
> A. Yes, sir. The anger I feel was the cause of the coronary spasm.
>
> Q. Again, Doctor, based upon Dian Palmer's history, your examination and treatment of her as her treating physician and your education and experience since the date of her death, do you have an opinion which you could express for us today based upon a reasonable medical certainty as to whether or not she suffered from coronary artery spasm prior to the date of her death?
>
> A. I believe she hadn't, but she had episodes of spasm which is called primzmetal, . . . (Tesdall dep., pp. 17-18 11. 22-25 and 1-21

On cross-examination, Dr. Tesdall conceded there was no objective evidence which would show a coronary spasm, arrhythmia or an ectopic beat and that the autopsy does not show a cause of death. (Tesdall dep., p. 27 11. 5-9 and p. 29 11. 4-9) Dr. Tesdall also assumed from his understanding of the facts that decedent complained of chest pain just prior to her demise. (Tesdall dep., p. 33 1. 8 and p. 34 1. 10)

Alexander Ervanian, M.D., a specialist in pathology and in nuclear medicine, testified on behalf of defendants. With respect to the cause of death, he testified:

> Q. Doctor, after reviewing the medical examiner's report, the depositions of Drs. Wooters and Lacsina, and the autopsy protocol, which was included, are you able to say, with reasonable medical certainty, the cause of death in Dian Palmer?
>
> A. No.
>
> Q. Why do you say that?
>
> A. There is no defined cause of death in that autopsy.
>
> Q. Apart from the autopsy, is there any way to say, with reasonable medical certainty, the cause of death in Dian Palmer?
>
> A. No.

Q. Do you have reasons for saying that?

A. Yes.

Q. What are your reasons?

A. Dian's death was not observed. We don't know the method of her clinical death. We have no clinical information on her, nothing in the autopsy to indicate how she died. (Ervanian dep., pp. 7-8 ll. 15-25 and 1-7)

He stated that Dr. Tesdall was "uncommonly certain that death was caused by coronary spasm. In order to buttress that viewpoint, he has given some articles in reference to it." (Ervanian dep., p. 9 ll. 19-21) With respect to those articles, which are a part of the record, Dr. Ervanian testified:

A. They were-- As a matter of fact, when I read these articles, they were quite to the contrary to what Dr. Tesdall said for a variety of reasons. He selected small portions out of some of these articles to indicate coronary spasm plays a role in sudden death. He totally ignored these articles in his testimony--those portions which talk about coronary spasm and indicate that coronary spasm, if it causes death, is always related to coronary atherosclerosis. The autopsy in this case clearly indicates this woman did not have coronary atherosclerosis. There are other areas of these articles that indicate the kind of patient who gets coronary spasm, symptoms associated with coronary spasm. None of these existed in the patient involved in this case, Dian Palmer.

Q. Was there any evidence at the time of autopsy, Doctor, of coronary atherosclerosis in Dian Palmer?

A. None. (Ervanian dep., pp. 11-12 ll. 19-25 and 1-11)

On cross-examination, Dr. Ervanian was asked about the possibility of pure coronary vasospasm, that is, without atherosclerosis. He testified that such vasospasm is rare but conceded that "rare" means a possibility. (Ervanian dep., p. 35 ll. 10-16)

Then, again testifying on cross-examination as to the cause of Dian Palmer's death, Dr. Ervanian testified:

Q. In the absence of atherosclerosis, is there any better cause of death known to you than the one that Dr. Tesdall expressed? Is there any more probable in your opinion?

A. God, I don't know. I just don't know. I really don't know because anything more probable or more likely--I don't have the remotest idea of why that patient died. I've been in that position more than once. I think most pathologists have been. There is a well known residue of cases that even after the most exhaustive examination you don't know why they died. Sometimes you're just stuck with that. (Ervanian dep., pp. 52-53 ll. 24-25 and 1-9)

ISSUES PRESENTED

Claimant states the issues:

I. The testimony of Dr. Alexander Ervanian, M.D. is not within the scope of the "limited remand" pursuant to IOWA CODE Section 17A.19(7).

II. The additional testimony of Dr. Donald J. Tesdall, M.D., conclusively establishes by a preponderance of the evidence that Dian Palmer's death arose out of, and in the course of her employment with the Defendant, Lakewood Elementary School.

APPLICABLE LAW

Section 17A.19(7), Code of Iowa, states:

In proceedings for judicial review of agency action a court may hear and consider such evidence as it deems appropriate. In proceedings for judicial review of agency action in a contested case, however, a court shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by Constitution or statute to the agency in that contested case proceeding. Before the date set for hearing a petition for judicial review of agency action in a contested case, application may be made to the court for leave to present evidence in addition to that found in the record of the case. If it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision in the case by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decision with the reviewing court and mail copies of the new findings or decisions to all parties.

The remand order has been stated above.

Claimant must show that Dian Palmer's death 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 (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

Claimant's first issue concerns the scope of the testimony of Dr. Ervanian, claimant arguing that Dr. Ervanian's testimony should not be allowed to "controvert the existing record." (Claimant's brief, p. 6) Defendants obvious purpose in eliciting the testimony of Dr. Ervanian was to controvert the testimony of Dr. Tesdall, and that seemed to be within the scope of the district court ruling which allowed defendants to present further evidence. Therefore, the evidence in the deposition has been taken as a part of the record and considered along with the other evidence in reaching this decision. Claimant's objection to the testimony on pages 9, 10 and 14 of the Ervanian deposition are hereby overruled.

The second issue recited by claimant encompasses most of the issue that occasioned this remand. The issue may be somewhat differently stated: Whether or not the evidence of Drs. Tesdall and Ervanian, when considered along with all the other evidence, should occasion a change in the prior decision of the undersigned. It should be said, first, that this is a case wherein one is basically dependent on the opinion of the experts. The learned articles which have been made a part of the record are informative, as far as they go, but it is the experts' opinions with respect to those articles, and otherwise, that determine the case.

Dr. Tesdall's new deposition is persuasive evidence and, standing alone, could turn the case in favor of the claimant. However, looking at the prior record, one sees that Paul From, M.D., a qualified internist, was unable to state a cause of death (From dep., p. 13 l. 18), and that Emanuel Lacsina, M.D., a pathologist and autopsy suregeon in this case stated that no single gross anatomic finding could explain the cause of death. (Lacsina dep., p. 4 ll. 7-9) Also, Richard Wooters, M.D., the Polk County medical examiner testified that the diagnosis of cardiac arrhythmia simply meant that the heart stopped because of a problem with electrical activity in the heart:

The cause of death that I listed on the death certificate was cadiac arrhythmia. In this particular case it was more of an exclusion--diagnosis by exclusion. In other words, the autopsy revealed no apparent anatomical cause of death. There were no signs of injuries. There was no obvious heart attack or brain hemorrhage, the things that one can--tangible, visible things that one can connect with a natural cause of death; therefore, I concluded by process of elimination that the cause of death was cardiac arrhythmia, which simply means that the electrical activity of the heart goes amiss and results in stoppage of the heart, and death. (Wooters dep., p. 6 ll. 1-12)

Further, Dr. Ervanian is firmly of the opinion that there was no causal relationship between the work and the death. Since, in the prior decision, one has already discounted the opinion testimony of Dr. Garfield, the psychologist, there are three pathologists and one internist all of whom firmly deny a causal relationship; on the other hand Dr. Tesdall believes that the relationship exists. Considering the array of expert testimony and the undoubted conclusion that the autopsy simply did not show the cause of death, one must find that no causal relationship exists.

One final point needs to be made. Dr. Tesdall stated that his opinion was at least in part based on the fact that decedent had chest pain (Tesdall dep., p. 33 l. 8). As Dr. Tesdall recognizes (Tesdall dep., p. 34 ll. 9-12), that history could only have come from the deceased's son, Scott Palmer. A thorough examination of the boy's testimony reveals that the deceased did not state the location of her pain. (Tr., p. 8 ll. 3-4) Of course, an expert's opinion which is based upon an incomplete history is not binding upon this deputy industrial commissioner. Bodish v. Fischer, Inc., 257 Iowa 516, 522, 133 N.W.2d 867 (1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128 (1967). It seems that Dr. Tesdall was working with a very sketchy and incomplete history, as were all the other doctors. His assumption that decedent had chest pains before she died was unwarranted, especially in light of the fact that her medical history showed prior serious abdominal pains as well as chest pains.

Finally, claimant in his brief argues that where an employee is found dead in a place where he or she might reasonably be located because of the performance of his or her duties, there is a presumption that the death arose out of the employment. (Citations omitted) None of the parties to this case point out that the Iowa court has specifically rejected that doctrine. Sparks v. Consolidated Ind. Coal Co., 195 Iowa 334, 190 N.W. 593 (1922). See also Bushing v. Iowa R & L Company, 208 Iowa 1010, 226 N.W. 719 (1929). Thus, no presumption that the death arose out of the employment operates in claimant's favor.

Dian Palmer's death indeed was tragic and unfortunate, but claimant has the burden of proof to show a causal relationship between the work and the death and has been unable to do so in this case.

ADDITIONAL FINDING OF FACT

The evidence taken upon remand by the order of the district court shows that Dr. Tesdall was of the opinion a causal relationship existed between the work and the death of Dian Palmer, whereas Dr. Ervanian was of a contrary opinion.

Dr. Tesdall's opinion was based in part upon an erroneous assumption that decedent complained of chest pain before her death, whereas the record shows she only complained of pain.

When the testimony of Dr. Tesdall is compared to that of Drs. From, Ervanian, Lacsina, and Wooters, it is concluded the cause of the death of Dian Palmer is unknown.

CONCLUSION OF LAW

WHEREFORE, the previous decision of the undersigned deputy industrial commissioner is hereby confirmed.

Signed and filed this 3rd day of August, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAROLD J. PERDUE, Claimant, vs. WAUSAU HOMES, INC., Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 447698 A P P E A L D E C I S I O N FILED JUL 27 1984 IOWA INDUSTRIAL COMMISSIONER

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 a review-reopening decision.

The record on appeal consists of the transcript; claimant's exhibits 1 through 7, inclusive; and defendants' exhibit 1 through 3, 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

A review-reopening decision ordered defendants to pay claimant for a 95 percent disability to the body as a whole for industrial purposes for a period of 475 weeks.

Claimant states the issues thus: "A. Issue one - Is the claimant permanently and totally disabled? B. Issue two - Has the healing period terminated?"

Defendants, who did not appeal, argue that the award should be reduced by 100 weeks. They also argue that claimant did not bring up the healing period issue in the hearing process and should be precluded from doing so now. Defendants' argument that the award should be reduced 100 weeks is a part of the overall issue of claimant's disability and will be considered as a part thereof. As for the healing period argument, although not brought up prior to the appeal, it will be considered briefly because the review for this final agency decision is de novo.

EVIDENCE PRESENTED

Claimant was injured on February 3, 1976 while working on a construction project. A wall weighing almost 1,000 pounds flipped over and struck claimant on the shoulder blades.

At the time of his discharge from the hospital on May 7, 1976, the final diagnoses were made: 1. Cauda equina lesion due to fracture dislocation of L-1, incomplete motor and sensory. 2. Neurogenic bowel and bladder. 3. Bladder stones.

Claimant has been treated at the Craig Hospital in Englewood, Colorado. The postoperative diagnoses of September 2, 1980 stated:

1. Fracture dislocation, T-12, L-1, status post Harrington Rod fixation and fusion.

2. Paraparesis [a slight degree of paralysis, affecting the lower extremities], L-4 last fully preserved motor segment with distal sparing and saddle anesthesia, L-3 last fully preserved sensory.

3. Neurogenic bladder, previously reported as being flaccid.

4. Neurogenic sphincter, previously reported as being hyperactive.

5. Status post suprapubic cystotomy.

On April 22, 1982, the Craig Hospital discharge diagnoses stated:

1. L-4 paraparesis with incomplete motor preservation of L-5 and S-1, secondary to fracture of T-12, L-1, 1976.

2. Neurogenic bowel and bladder, lower motor neuron type with suprapubic cystostomy.

3. Status post Harrington rod instrumentation and fusion with right iliac donor graft site.

The above summaries serve to show that claimant was seriously injured and continued to have grave difficulties.

Robert A. Hayne, a qualified neurosurgeon, testified that claimant could not perform "work requiring his walking about in a reasonable fashion, that type of work, would not be possible for him to carry out." (Dep., p. 15 ll. 3-6) Also, in a letter of January 13, 1983, Dr. Hayne stated that claimant has "a 100% industrial disability."

Robert J. Blommer, M.D., a qualified internist, testifed that he saw claimant on several occasions from 1976 onward and that he agreed with the neurological evaluation by Dr. Hayne. Dr. Blommer did not go so far as to say, however, that he agreed with Dr. Hayne's assessment of the disability. (Dep. p. 18 ll. 5-20)

Nancy Cobble, M.D., of the C.N.S. Medical Group of Englewood, Colorado, gave claimant an impairment rating of 79 percent and an "industrial" rating of 100 percent. (Letter, September 8, 1982) Further, the parties stipulated that if Dr. Cobble were called upon to explain the industrial rating "she would state that claimant is unable to return to the type of work claimant was performing at the time of his injury." (Claimant's exhibit 2)

Claimant returned to work for the employer, first as a wire letterer and then in quality control, which work continued until March 1, 1980 when the plant closed and left claimant without work. After a period of unemployment, claimant was employed by Job Service in October 1980, which involved working in an office. That job was terminated because funding was restricted by the Federal Government.

At the time of the hearing, claimant was employed as a production worker for Universal Rundle. He describes his work as follows: "I install whirlpool baths. They take what looks like a regular bathtub and they drill holes in it, and we hook up air lines and water lines to it to make a whirlpool out of it." (Tr., p. 57 ll. 1-4)

Three vocational experts testified that claimant was employable: Pat MacClean, a vocational counselor at Indian Hills Community College (Tr., p. 7 ll. 21-23), Paul Halferty, a consultant with the Rehabilitation Education Service Branch of the Iowa Department of Public Instruction (Tr., p. 114 ll. 8-14) and Patricia McCollom, who has her own company, Management Consulting Rehabilitation Services (Tr., p. 119 ll. 13-14).

Claimant's brief, pages 7-9, contains a good summary of claimant's version of his present condition:

He can walk with help. He uses a cane. He needs two canes, but gets by with one. He has braces on both of his ankles and legs which he wears all the time, except when he takes them off at night. He

has to sleep with his feet hanging over the edge of the bottom of the bed. He has crow's feet. His toes curl and his feet hurt all the time. Occasionally, he must have his legs and the bottoms of his feet massaged, which is done by his wife. The muscles tighten so badly. He has lost his sense of balance. It is difficult for him when he goes outside the house because there is nothing to grab hold of if he's going to fall. He drives a car with hand controls. He has no control of his bowels whatever. If he eats the wrong food, he could have a bowel movement in his clothes and never know it. Every night between 10 P.M. to midnight, he has to go through his bowel program. He puts on a rubber glove and takes a jar of vaseline and with his finger stimulates the muscle that opens. This is done by inserting the finger into the rectum. This will cause a bowel movement. This is the only time that his bowels move unless he has diarrhea. He carries a medical bag with him all the time in the car. He carries a catheter pack consisting of rubber gloves, vaseline, a 4-inch gauze piece to put around the catheter where it goes into his body. The bladder empties into a bag which is fastened to his leg. On one occasion, he ruptured the bag when he caught it on the desk and poked a hole into it. He had to go home to change it. This catheter goes right into his abdomen, right below the navel. There is an opening where this catheter goes into his body. It is inserted into the bladder and this is the way his bladder is emptied. This empties into the bag strapped onto his leg during the day. At night, he has a large bag that hooks on the side of the bed. It has to be emptied frequently. He is required to drink eight ounces or more of water an hour. If he drinks quite a lot of water, he has to change this bag about every 10 minutes. He is required to drink this large amount of water, so as to keep the bladder clean and prevent infection. He changes the catheter once a month, but sometimes as often as every two weeks. He has to drink so much water that it has gotten so it doesn't taste good. He always changes his catheter if he is going out of town, so things won't happen while he is gone. However, there are times when he just can't get it done. He gets very depressed. Before the accident, he was active, but he is not so anymore. He has pain and discomfort 24 hours a day. It is severe at times. Claimant's condition is worse in hot weather. He has to drink so much water that that is about all he gets done, is just drink. The hotter it gets, the worse it is. He has been warned against being burned because he doesn't have any sensation and can't tell if he is being burned. The same is true about cold. He never goes outside on a winter day, unless it's to get right into the car and go somewhere. He has to have the car warmed up. He can't feel the cold in his legs or feet. The doctors say that his feet could freeze and he would never know it. (Tr. p. 34-45)

APPLICABLE LAW

Claimant has the burden to prove 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 claimant's inability, because of his injury, to engage in employment for which he is fitted.

Section 85.34(1), The 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.

When a disability or impairment can be determined, a disability award can be made; thus, healing period ends when no further improvement is anticipated. Thomas v. Knudson & Son, Inc., Ia. App., April 28, 1984, to be published per order of May 25, 1984.

ANALYSIS

It is clear from the above recited evidence that claimant received a very serious injury. Since he has received ratings of permanent impairment and there is no real evidence of any anticipated improvement, it is clear that the healing period has ended.

The award in the review-reopening decision clearly reflects that claimant is only somewhat able to work and that his possibilties are extremely limited. Although claimant is only 41 years of age, has a high school certificate, good experience, and good motivation to return to work, his severe functional impairment leaves him with a very insecure future.

It should be noted that the doctors' evidence which stated claimant was 100 percent industrially disabled invades the province of the industrial commissioner in that no foundation was laid for these doctors' expertise in vocational matters. That evidence, however, has some weight in that it underscores the seriousness of claimant's situation. The fact that claimant has vigorously attempted to regain a position in the work force and has succeeded is to his credit but cannot diminish the seriousness of the situation. The foregoing remarks show the high level of disability; however, claimant argues that the disability should be 100 percent for lifetime benefits.

As long as claimant is a productive member of the work force, he can hardly be classified as permanently and totally disabled. Therefore, it is concluded that claimant's disability is still partial. It is noted that claimant has since filed a review-reopening petition, claiming permament total disability and that he could not continue his prior work because of his injuries. That is an issue which must be decided on evidence presented at a later time. The only evidence before the undersigned deputy at this time is that taken at the hearing, which clearly shows claimant retained some industrial capacity. Considering everything, then, the permanent partial disability award of 95 percent (475 weeks) is proper.

FINDINGS OF FACT

1. While working for the defendant employer on February 3, 1976, a wall fell on claimant, severely injuring him.

2. Discharge diagnoses of April 22, 1982 show claimant's remaining physical problems:

> 1. L-4 paraparesis with incomplete motor preservation of L-5 and S-1, secondary to fracture of T-12, L-1, 1976.
>
> 2. Neurogenic bowel and bladder, lower motor neuron type with suprapubic cystostomy.
>
> 3. Status post Harrington rod instrumentation and fusion with right iliac donor graft site.

3. Claimant returned to work with the employer in 1977 and worked until 1980 when the local plant was closed. He was able to work for a time with Job Service of Iowa and at the time of the hearing was employed at Universal Rundle.

4. As a result of his injuries, claimant has a very serious permanent impairment.

5. In the matter of recuperation, claimant has got as good as he is going to get.

6. At the time of the hearing, claimant was 41 years of age and had a high school certificate. Claimant was in the Navy, managed a filling station, worked on the road gang of a railroad, and worked part-time in a truck stop. He was employed by the employer Wausau Homes in 1965 and eventually became a crew supervisor.

CONCLUSIONS OF LAW

On February 3, 1976, claimant sustained an injury which arose out of and in the course of his employment and which resulted in a permanent partial disability for industrial purposes of ninety-five (95) percent.

Claimant's healing period has ended.

The proper compensation rate if one hundred forty-seven dollars ($147) per week.

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of four hundred seventy-five (475) weeks at the rate of one hundred forty-seven dollars ($147) per week, accrued payments to be made in a lump sum together with statutory interest from January 25, 1984 in case any payments have not been paid.

Costs of this proceeding are taxed against defendants.

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

Signed and filed this 27th day of July, 1984.

Barry Moranville

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUBY PICKARD,

Claimant,

vs.

ROGER BAILEY, d/b/a 13th STREET INN,

Employer,

and

MARYLAND CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 690612

A P P E A L

D E C I S I O N

FILED

AUG 30 1984

IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed January 27, 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 consists of the transcript; claimant's exhibits A through L and N through S, and defendants' exhibits 1 through 5, all of which evidence was considered in reaching this final agency decision.

Claimant states the issue in her brief: "The hearing officer erred when he failed to give proper weight and consideration of the evidence in the determination of the claimant's total disability."

The decision by the hearing deputy is very thorough and well-reasoned. Therefore, the findings of fact, conclusions of law and order are adopted herein.

FINDINGS OF FACT

1. Claimant is a married female who was 59 years of age at the time of hearing.

2. On January 13, 1980, claimant was employed by Roger Bailey in his business of the 13th Street Inn.

3. On January 13, 1980 while leaving the employer's premises, she fell down a flight of stairs.

4. The immediately apparent injuries of claimant sustained consisted of a chipped tooth, skinned knees and pain in her lower extremities.

5. Claimant reported the fall to her employer the next regular work day.

6. Claimant continued to work until August, 1982 without losing any time from work attributable to the fall.

7. Claimant suffers from degenerative arthritis of her spine which was diagnosed in 1974.

8. Claimant suffers from adult onset diabetes, varicose veins and obesity which all pre-dated 1980.

9. Claimant's fall did not injure or materially aggravate the diabetes, obesity or varicose veins.

10. Subsequent to the fall, claimant began experiencing pain in her right ankle.

11. No identifiable impairment of claimant's right ankle has been identified except degenerative changes which are not shown to be related to the fall of January 13, 1980.

12. Claimant presently complains of pain in her left lower extremity and lower back.

13. Claimant suffered identifiable traumas in an auto accident and a fall in a bathtub.

14. Claimant has a protrusion of her L4-5 disc on the left which probably encroaches on the L5 nerve root.

15. Claimant is permanently partially impaired as a result of the impairment in her back.

16. No objective evidence exists which makes claimant's present back impairment more likely to be a result of her fall at work than a result of one of the other identified traumas, her normal day-to-day activities or the normal progression of her degenerative disease.

17. Claimant has difficulty accurately identifying the onset, source and severity of the various symptoms from which she presently suffers.

18. The opinion of Dr. Hayne concerning the cause of claimant's present back impairment is based upon what claimant related to him concerning the onset and severity of her symptoms.

19. Claimant's fall did result in an aggravation of her preexisting spinal degenerative arthritis.

20. The aggravation from the fall caused a temporary flare up of symptoms but has not been shown to have altered the nature or course of claimant's degenerative arthritis in any manner.

21. Claimant sustained temporary injuries in the fall which required medical care but did not sustain any permanent impairment or temporary disability as a result of the fall at work.

22. Medical care provided by Drs. Johnson, Stayskal, Sheldahl, Hughes and the care provided by Dr. Thomas on January 16, March 18 and September 4, 1980 were all for treatment of the injuries sustained by claimant in the fall at work. Such services were reasonably necessary and appropriate for the injuries sustained and the amount of the charges arising from those services is reasonable.

23. The services rendered by Dr. Hayne and Iowa Methodist Medical Center were primarily in the nature of evaluation and treatment for claimant's underlying degenerative arthritis. Accordingly, the services were not reasonably necessary for treatment of any injuries sustained by claimant in her fall at work.

24. Claimant's petition was filed Jauary 13, 1983.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter and parties of this proceeding.

On January 13, 1980, claimant sustained an injury arising out of and in the course of her employment when she fell.

The injuries sustained by claimant in the fall were temporary in nature and did not result in any permanent impairment or any permanent disability.

The charges incurred by claimant in receiving medical treatment for the injuries she sustained in the fall total the sum of $275.00.

Claimant did not lose any time from work in order to entitle her to temporary disability compensation.

Claimant is not entitled to permanent partial disability compensation.

This action was commenced in a timely manner and is not barred by any statute of limitation.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant the sum of two hundred seventy-five and no/100 dollars ($275.00) in accordance with section 85.27 of the Code of Iowa and any amount incurred by claimant for repair of her chipped tooth.

IT IS FURTHER ORDERED that defendants pay the costs of this proceeding consisting of the cost of service of the original notice, the reporting fees for depositions and an expert witness fee in the amount of fifty and no/100 dollars ($50.00) for the deposition of Dr. Hayne, and fifty-five and no/100 dollars ($55.00) for the cost of obtaining two medical reports in accordance with Iowa Industrial Commissioner Rule 500-4.33.

Signed and filed this 30th day of August, 1984.

Barry Moranville

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUBY PICKARD,

Claimant,

vs.

ROGER BAILEY, d/b/a 13TH STREET INN,

Employer,

and

MARYLAND CASUALTY CO.,

Insurance Carrier,
Defendants.

FILE NO. 690612

A R B I T R A T I O N

D E C I S I O N

FILED

MAR 20 1984

INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Ruby Pickard, claimant, against Roger Bailey, d/b/a 13th Street Inn, employer and Maryland Casualty Company, insurance carrier. Claimant's petition alleges that she sustained a compensable injury to the body as a whole on January 16, 1980 and seeks an award of permanent total disability, payment for an elevated toilet seat, chair and bed and all other available benefits which flow from a determination of a work-related injury. The evidence referred the claim to January 13, 1980.

The hearing commenced February 10, 1984 and the case was considered fully submitted at the conclusion of the hearing on that date.

The record in this proceeding consists of the testimony of Ruby Pickard, Nancy Kay Jones and Roger Bailey; claimant's exhibits A through L and N through S; and defendants' exhibits 1-5.

ISSUES

The issues are whether or not claimant sustained an injury arising out of and in the course of her employment; whether or not any such injury is causally connected to the disability which claimant alleges and the nature and extent of any such disability. Further issues are whether the action was timely commenced in view of Iowa Code section 85.26 and also whether or not the employer shall be held responsible for payment of the medical expenses incurred by claimant. It was stipulated that in the event of an award, the applicable weekly rate would be $90.76.

REVIEW OF EVIDENCE

Claimant testified that she was born December 16, 1924, is married, that she completed the ninth grade of school and had no other formal training.

Claimant testified that on Saturday evening, January 12, 1980, she was working her customary shift and that when leaving, a few minutes after 12:00 midnight on Sunday morning, she fell while going out the front door and landed "in a pile" on the sidewalk. She stated that she immediately suffered excruciating pain from the waist down, skinned her knees and lost her glasses. She further described her injuries to include a chipped tooth and stated that her hands were sore. She reported being very shook up and that she required assistance from the cook, David Pickett, who was there at the time she fell. Claimant testified that she knew she had fallen after 12:00 midnight which actually would have been Sunday morning because she looked at the clock when it was a few minutes before midnight and that she did a few other things before going outside, where she subsequently fell. Claimant stated that the steps belonged to the 13th Street Inn and that the sidewalk where she landed probably belongs to the city.

Claimant testified that she went to work on Tuesday, the next regular work day, as there was no one who could take her place. She testified that her employer did not have a sick leave policy and simply did not authorize absence from work for any reason.

Claimant stated that she had worked at the 13th Street Inn for more than 11 years and prior to that, had operated her own cafe for 11 years. She stated that all of her work experience was in restaurant and cafe operations. She described herself as the night manager at the 13th Street Inn and that her duties included keeping order, tending bar and locking up. She recalled her hours as starting at about 4:00 p.m. and running until closing which varied from 11:00 to 12:00 unless they were unusually busy. She related that after closing, she would clean up by vacuuming, scrubbing down the bar and floors and stocking up the coolers with beer for the next day. She related that this took approximately one hour.

Claimant testified that she first sought medical treatment from David L. Thomas, M.D., on what she believed was the Wednesday following the injury. She stated that she delayed seeking treatment because she felt that she would start feeling better, but that by Wednesday the pain in her back was still bothering her. Claimant then described a course of obtaining medical treatment and/or evaluation for her back pain which also included Edward C. Stayskal, D.C., O. Landis Johnson, D.O., E. W. Sheldahl, D.O., John W. Hughes, M.D., J. Watts, M.D., Austin Corbett, M.D., University Hospitals at Iowa City, Iowa, Mayo Clinic in Rochester, Minnesota and finally culminating with Robert A. Hayne, M.D. Claimant related that she called upon Dr. Hayne without referral from any other physician because the others could not tell her what was wrong.

Claimant testified that the pain in her back had continued to worsen after the fall over a period of time and that she treated it with aspirin and non-prescription medications. She related that in August, 1982, the pain in her back was shooting into her left leg and that bending to put things into the cooler at work caused excruciating pain. She stated that both Dr. Hayne and Dr. Corbett advised her against bending and recommended that she avoid anything which aggravated her back. Among the things she was to avoid were standing in one place or walking for very long. She related that she was not to lift anything other than her own weight or maybe up to 10 pounds if it did not pull on her back. Claimant stated that she still has pain from her back all the time and that she takes medication for the pain when she feels she needs it. She related that before seeing Dr. Hayne, she took as many as 20 aspirin per day and that she now uses extra-strength Tylenol and Ascriptin. Claimant presented a cane which she now uses in walking and states that she can no longer walk in the shopping center, dance or walk in general which were things that she formerly did. She stated that she cannot do the work which she formerly did at the 13th Street Inn.

Claimant stated that she feels her back problems are related to the fall because she felt good before the fall. She stated that she would have kept working and would not have retired until age 62 or later if it were not for her back problems. She stated that the only time she had any back pain prior to the fall was related to bladder infection and that such pain was different and in a different area.

Claimant testified that after the fall she continued to work full shifts every day she was scheduled until August, 1982 when she decided not to return to work after seeing Dr. Corbett during her vacation. Her back pain was the underlying reason.

Claimant testified that all the medical expenses contained in exhibit Q were incurred for treatment of her back and that all of her calls with Dr. Thomas were for her back and that her back pain was discussed on most visits although possibly not all. Claimant stated that her varicose veins were no problem until she fell and that when she saw Dr. Sheldahl prior to January, 1980, it was for pneumonia.

Claimant related that on January 7, 1981, she was a passenger in a pickup which was hit in the side by an oncoming vehicle and that the impact slid her over against her husband. She related being transported by ambulance to the hospital where she was seen and released. She stated that she had not commenced any litigation as a result of that accident.

Claimant related that while staying at the Holiday Inn in Rochester, Minnesota, she fell in the bathtub, scraped her back and banged her head behind the left ear. The motel management transported her to the hospital and x-rays were taken. She filed a claim against the motel and collected around $600.00.

In 1972, claimant related that she fell on the ice near the laundromat in Marshalltown and as a result of such, she filed a lawsuit and collected money which was essentially enough to pay her medical expenses. At that time, her name was Ruby Castell.

Claimant also related that in 1964 she slipped in the Hy-Vee Food Store for which she pursued a claim and received a settlement in an amount sufficient to pay her medical bills and some business expenses. At the time of that incident, her name was Ruby Frost.

Claimant also related an incident where she was struck in the head by a box of curtain rods in the Wards store for which she filed a lawsuit seeking $25,000, but that the suit was eventually settled for $600.00.

Claimant stated at the hearing that she was not seeking any compensation for the injury to her right ankle, only her back. Claimant also stated that the claim contained in exhibit 3 is reduced to the elevated toilet seat only and that she no longer seeks payment for a chair or bed. Claimant admitted that her employer had not complained about her job performance prior to the time she ceased working.

Nancy Kay Jones testified that she is 38 years old and the claimant's daughter. She related that she sees claimant almost daily and has since 1976. The witness stated that prior to January of 1980, claimant's primary hobby was walking at the shopping mall, but that since then, claimant has quit going out and around as frequently and that the change has occurred gradually. Jones stated that she and claimant's husband now do most of claimant's housework.

Jones also stated that she frequently visited at the 13th Street Inn when her mother worked there and that she noticed a difference in claimant's activities consisting primarily of reduced moving about in the establishment and having other employees do things which claimant formerly did herself.

Roger Bailey testified that he has owned the 13th Street Inn in Marshalltown, Iowa for eight years and that he was previously an employee of the Inn for 20 years. He described the Inn as a restaurant and tavern that serves beer but no other alcoholic beverages. He stated that he has known claimant for 20 or 30 years.

Bailey testified that the Inn was open Tuesday through Saturday from 8:00 a.m. until 11:00 p.m. and that he worked there daily arriving at approximately 7:20 a.m. and staying until approximately 6:30 or 7:00 p.m. He stated that claimant usually arrived by 4:30 p.m. and that he would see claimant at work five days each week during the times both were at the Inn. He described claimant's duties as consisting of operating the bar, register and overseeing the place.

Bailey stated that claimant did all work that was asked of her, made no complaints and that he did not notice any physical problems which slowed her work after the fall. He testified that he did not observe any difference in her work performance after January of 1980 from what it had been previously.

Bailey related that claimant had advised him that she had fallen on the next work day after the fall and that he reported it to his insurance carrier. He related that claimant described her injuries as to her knees, a chipped tooth and broken glasses. He stated that claimant never requested additional medical treatment nor presented any bills or claims for medical treatment. He stated that she said she was going to get her glasses and tooth fixed and assumed that she would go to a doctor if she felt she needed to see one.

Bailey denied ever telling claimant that she would lose her job if she missed work and stated that she could have a job if she came back. He was emphatic in stating that she was not fired.

Bailey also stated that he had no indication that claimant was not coming back to work after the August shutdown of the establishment until the day prior to reopening when her husband came in, gave him some keys, and told him that the claimant was in Iowa City and was going to lose a leg. Bailey later realized that the keys he received were not the proper ones and he called claimant's residence and was surprised when claimant answered. He stated that claimant's other daughter, Sandy, brought the correct keys in the next day and told him that claimant was going to have her leg taken off.

Bailey was questioned concerning whether or not claimant claimed a back injury at the time and he stated that if the first report of injury listed injuries to claimant's hip and back, that the only explanation he could give was that it must have been put there by the insurance agent.

Exhibit A is the report made by Joseph D. Hall, M.D., of the results of a March 8, 1983 CT scan of the lumbar spine. It notes bulging of the disc at the L3-4 level which he feels is not affecting the nerve roots and a herniation at the L4-5 disc on the left with possible encroachment on the L5 nerve roots.

Exhibit B is a report of David L. Thomas, M.D., dated January 26, 1982. He relates treating claimant for her fall commencing January 16, 1980. He declined to make a disability rating and stated that the injuries from her fall cannot be separated from her other disease processes. He related seeing claimant a number of times and that on several of these, she made no complaint regarding her back.

Exhibit C consists of the clinical notes made by Dr. Thomas in his treatment of claimant commencing with March 17, 1977 and running through an unidentified date in 1982. The last four pages of the exhibit were copied in such a manner that the month of some entries is not shown. Remarkable entries include the entry of November 26, 1979 which indicates low back pain which was diagnosed as a possible urinary tract infection and was treated with an antibiotic, apparently successfully. An entry of January 16, 1980 refers to claimant's fall at work and notes only abrasions of both knees.

An entry of January 22, 1980 relates a phone call with complaints of pain in both knees and back. It appears that a prescription for Equanil was issued. An entry dated December 31, 1979 relates a similar prescription.

On March 18, 1980 another complaint of generalized pain including claimant's low back is noted. Full range of motion of claimant's hips and knees is also noted. The diagnosis entered is degenerative arthritis and bursitis.

An entry dated April 24, 1980 indicates claimant has been feeling well lately with no complaints. In the intervening time until August 28, 1980, there is record of a series of treatments for a varicose vein in claimant's interior left thigh.

On August 28, 1980, claimant, by phone call, reported discomfort in her buttock and left leg since a fall. She was seen on September 4, 1980 in relation to the complaints.

An entry dated December 10, 1980 indicates claimant is feeling well and on December 15, 1980 claimant makes a telephone complaint of problems with her hips. On December 19, 1980, Dr. Thomas notes a phone call with Dr. Hughes noting tenderness over the sacroiliac joint.

An entry on January 8, 1981 noted an emergency room visit on January 7 with multiple contusions and strain.

An entry on the eleventh page of exhibit C identified as May 27, 1981 indicates low back pain which was treated with an antibiotic. An entry dated June 4, 1981, immediately following, notes on recheck that the low back pain has improved and claimant is feeling better. The subsequent entry dated December, 1981 shows claimant to be asymptomatic.

The entry of July 27, 1981 reports complaints of pain in claimant's right ankle since falling at the 13th Street Inn and a request for complete evaluation at Mayo Clinic. The diagnosis shown is arthritis of the right ankle and scheduling at Mayo Clinic.

An entry identified as (illegible) again notes arthritis in the right ankle with a diagnosis of degenerative arthritis in that ankle.

The notes list several entries dealing with claimant seeking opinions concerning claimant's vision problems with the first entry regarding such being dated July 11, 1977 as a referral to Wolfe Eye Clinic and continuing to an entry on the last page of the exhibit which follows the entry dated November 3, 1981. The entry dealing with the curtain rod box at Wards striking claimant is dated August 13, 1979 indicating that the box had struck her on that day.

The notes also reflect a continuing course of treatment for varicose veins with the first note dated April 12, 1979 and the last note of that condition being contained in the first entry on the last page of the exhibit.

Exhibit D is the report of Edward D. Stayskal, D.C., wherein he reports seeing claimant April 12, 15, 18 and 22, 1980. The report relates claimant's fall and complaints of pain from the waist down and across the shoulders. The x-rays taken reveal "a mild left rotaryscoliosis of the lumbar spine with compensatory curves of the thoracic and cervical spine, resulting in a balanced spine...". He related an abnormal positioning at the C7-T1 and mild lipping and spurring of the anterior portions of L2, 3 and 4. The range of motion was found to be within normal limits. The report relates that claimant seemed improved on April 18 but that on April 22 she complained of pain in her left leg and discontinued treatments. He relates charges of $109.00 for x-rays, $79.00 for the examination and adjustment of April 12 and three office calls at $10.00 each which computes to a total of $218.00. He opines that the fall could have caused "a commotio [sic] of the spinal column causing the lumbar and thoraco-cervical regions to become symptom expressive at that time and affecting the lower extremities." He declines to make any comments regarding current disability or future treatment.

Exhibit E is a report of John W. Hughes, M.D., dated December 19, 1980. The history relates the fall at work and a denial of radiating pain down either of claimant's thighs or legs. The examination indicates that claimant moves fairly easily and complains of discomfort over the area of the left sacroiliac joint. Straight leg raising is negative. X-rays were reviewed and showed no evidence of any significant traumatic episode.

Exhibit F is a report from Dr. Hughes dated January 29, 1980. The history relates the fall and examination shows claimant to move with ease. Straight leg raising is negative. The report states, "I find nothing about this patient which indicates she has done anything but skin up both of her knees in the fall, ..."

Exhibit G is a radiology report from Jeffrey H. Watters, M.D., dated February 20, 1983 which finds moderate spurring at the L3-L4 interspace anteriorally and to a lesser extent at other levels. The findings are those of early degenerative lumbar spondylosis. Exhibit H is a handwritten report from O. Landis Johnson, D.O. He relates claimant's fall at work and phlebitis in the left leg developing January 17, 1980. This course of treatment is shown as a number of osteopathic treatments with gradual improvement and reduced sciatic inflammation. It relates that as of February 2, 1982, claimant was still suffering from low back and ankle pain and that the Mayo Clinic reports arthritis in the ankle affecting circulation of the right ankle and leg. He relates that claimant is still under his care.

Exhibit I is a report of R. A. Hayne, M.D., dated February 21, 1983. The history relates the fall and complaints of continued low back pain extending into the left lower extremity. The pain is shown as constant. Strength and coordination of the lower extremities is shown as normal. Sensation is normal, station and gait are not remarkable. From those findings, he suspects a possible herniated lumbar disc at the L4-5 interspace on the left. Attached to that report as the second page is the EMG report. The report shows no evidence of lumbar radiculopathy but does indicate mild peripheral neuropathy.

Exhibit J is the deposition of Robert A. Hayne, M.D. In it, he relates that he saw claimant without a referral from any other physician on February 14, 1983, and that he admitted her to Methodist Hospital on February 20, 1983. He confirms that the EMG showed results within normal limits, that the spurring at the L4-5 interspace is indicative of degenerative arthritis and that the myelogram did not show any defect but that in approximately 20 percent of the cases where a herniated disc exists, the myelogram can fail to reveal that defect. He related that the CT scan demonstrates the outermost aspect of a disc and that claimant's CT scan revealed a protruded disc

between the fourth and fifth lumbar segments. Dr. Hayne related that encroachment of the L5 nerve would cause pain in the low back and lower extremity on the side of the encroachment, that the complaints of pain in claimant's back and right leg were consistent with a herniated disc as was tenderness over the sacroiliac joint. Dr. Hayne related that his final diagnosis was that claimant suffered from a protruded intervertebral disc at the L4-5 interspace on the left side. He related that straight leg raising tests are somewhat subjective but that most patients with a ruptured disc will have limitations on straight leg raising and that a negative result goes a long way towards negating a herniated disc. He states that it his opinion that there is a causal relationship between the onset of claimant's symptoms and the accident and also that the symptoms claimant described are related to the protrusion of the intervertebral disc at the L4-5 interspace with encroachment on the L5 nerve root. He further opines that claimant's fall aggravated the preexisting degenerative arthritis in her lumbar spine.

Dr. Hayne rated claimant as having a 20 percent permanent partial disability of the body based upon complaints of pain and the evidence on the computerized scan in the lumbar region of a protruded intervertebral disc at the 4th lumbar interspace

Dr. Hayne went on to relate that a hospital bed would be of no advantage to claimant and that the June, 1983 entry in Dr. Thomas' records appears to be a urinary tract infection which produces pain similar to the pain from a ruptured lumbar disc.

Dr. Hayne goes on to relate that a fall in a bathtub could cause a herniated disc as could an auto accident or even normal day to day activities.

Exhibit K is claimant's discharge summary from Methodist Medical Center which is merely cumulative of the previous reports of the normal EMG, normal myelogram and the x-rays showing degenerative lumbar spondylosis.

Exhibit L is the report of David L. Thomas, M.D., dated February 23, 1982. In it he relates that claimant has had underlying joint disease for many years and that he is confident that her hips and ankles were involved prior to her fall. He opines that the fall probably aggravated the arthritis but did not cause it. He relates that claimant has many problems and that it is difficult to say how much is from the degenerative arthritis and how much it was aggravated by the fall.

Exhibit N is the deposition of O. Landis Johnson, D.O. In it, he relates that he had not seen any x-rays of the claimant and provided symptomatic treatment. He had diagnosed claimant as having arthritis. Dr. Johnson opined that a fall would aggravate a preexisting arthritic condition. He further related that at the time he treated claimant, she had a sciatic nerve inflammation and that his treatment had extended from November 12, 1980 through April 4, 1982.

Exhibit O is a report of Robert A. Hayne, M.D., dated March 29, 1983. In it he notes that when he saw claimant on March 14, 1983 she stated that she felt she could "live" with the pain. Otherwise, it is cumulative of his deposition.

Exhibit P is claimant's deposition which was taken June 17, 1982. At page 44 she indicates that the only sources of pain she is concerned with are the pains in her right ankle and in her right hip. She indicates that about a week or two prior to taking the deposition, she changed from Dr. Thomas to Dr. Watts due to dissatisfaction with the way Dr. Thomas had handled her husband's referral to Mayo Clinic in August, 1981. She related that she had to cut her trip to Mayo short because of the failure to have an appointment for her husband and that she came directly home and "had it out" with Dr. Thomas. Pages 52 through 55 show some inconsistency regarding whether claimant "had it out" with Dr. Thomas in February, 1982 or in August, 1981. Claimant relates that she saw Dr. Sheldahl in Clemons right after the fall at work and that her husband had used him as a doctor previously.

Claimant related that in the collision of a little car with the pickup in which she was riding, that she bumped her head but sustained no other injuries of significance. She stated that it totaled out the other car and did about $1,200.00 of damage to the pickup. She related that there was no litigation concerning that accident. Claimant went on to describe her fall at the Holiday Inn in Rochester on August 26, 1981.

Exhibit Q consists of the medical expenses for which claimant seeks reimbursement.

Exhibit R consists of costs which claimant requests be assessed against defendants.

Exhibit S is handwritten records from University Hospitals in Iowa City, Iowa. They note that claimant expresses low back pain and right ankle pain. The history shows that claimant related her complaint to the fall at work and indicates that she related that in the fall she abraded both knees with a result of acute lower back pain. It relates that the knee pain slowly resolved over the following months but that the lumbar spine pain continued. The pain was characterized as a dull aching which extended into the buttocks and posterior thigh. In giving the history, claimant denied numbness or weakness and indicated that the back pain has recently become less prominent and better localized to the left lumbosacral area and that there is no longer a radicular quality. Claimant further related that the back pain has been overshadowed by right ankle pain which also manifested itself in 1981. The ankle pain is described as dull, aching and continuous but it becomes progressively worse with activity through the course of the day. The pain is associated with ankle swelling, discoloration and stiffness. Claimant denied any previous history of inflammatory arthritis in joints other than her right shoulder.

Physical examination showed a warm, tender, swollen right ankle with surrounding varicosities. Reflexes showed some abnormalities. In the impressions listed on the fifth page of the exhibit, it states, "No evidence that presenting symptoms aggravated or precipitated by trauma." The last page of the exhibit relates that the right ankle etiology is unclear but that traumatic etiology is doubtful. It further relates positive straight leg raising on the right, possible lumbar disc disease and an assessment that further evaluation would not be done in view of the mild nature of symptoms and lack of neurological deficits.

Defendants' exhibit 1 is the deposition of Scott B. Neff, D.O., which diagnoses claimant as having degenerative osteoarthritis in the lumbar spine. He found no neurological abnormalities and did not feel that claimant's right ankle and back pain were related directly or indirectly to the fall at work which she described to him. In referring to deposition exhibit E at page 4, Dr. Neff related that the CT scan is a relatively new invention and that if scans were done on 100 people who had no symptoms that 20 percent to 25 percent would show an abnormality. He related that the CT scan should not be relied upon without other clinical evidence. He related that numerous people have a bulging disc associated with the passage of time and as a result of the normal degenerative process. He related that degenerative disease occurs in everyone with passage of time. Dr. Neff stated that if an injury to the back occurs as a result of trauma, that the symptoms will usually begin within hours and if the disc has ruptured to the extent that it impinges on a nerve, that the patient will begin to complain of pain in the leg in 30 days. He stated that if a disc ruptures, the muscles become tight and stretching the nerve worsens the pain. A negative result from straight leg raising establishes that the nerve is not being stretched.

Dr. Neff indicated that there was no need for any of the three items listed in deposition exhibit G which are the elevated toilet seat, chair and bed. He felt that claimant had a five percent impairment of the body as a whole due to her back. Dr. Neff went on to relate that the degree of spondylosis he saw on claimant's x-rays would have taken 10 to 15 years to occur and that a fall could have aggravated the degenerative arthritis. He confirmed that an encroachment on the left L5 nerve root would result in pain in the buttock on the left side and that if the pressure were significant, the pain would radiate down the leg, below the knee, into the front part of the calf and to the inside of the foot.

His deposition included exhibits A-K. Deposition exhibits A and B are the records of Drs. Thomas and Hayne which had previously been referred to in this decision.

Deposition exhibit B contains five pages of records from Dr. Hughes which contain his office notes of January 29 and December 19, 1980 which are already in the record as separate exhibits. A report to Arthur Cloud, M.D., dated December 21, 1972 is included which indicates marked varicosities in both lower extremities and a situation in the nature of claimant making complaint of severe pain yet ambulating easily. The fifth page is a report from Dr. Hayne to Dr. Cloud dated December 8, 1964 wherein Dr. Hayne had seen claimant for a cervical strain.

Exhibit C is what appears to be a report from Michael J. Hogan, M.D., concerning claimant's evaluation at the Mayo Clinic in August of 1981. It discloses spinal x-rays with normal results.

Exhibit D is a report from Austin Corbett, M.D., addressed to J. Watts, M.D., dated September 6, 1982. It relates positive straight leg raising of the right leg at 70 degrees suggesting possible lumbar disc disease. Attached is a letter from Dr. Corbett to claimant's attorney dated November 1, 1982 wherein he states that he cannot attribute any of claimant's problems to her fall at work. Attached is also another letter to claimant's counsel dated November 12, 1982 stating that he did not direct claimant to cease work and again stated that he was not able to estimate the nature and severity of claimant's alleged disability.

Deposition exhibit F consists of several pages, the first of which is an x-ray report dated September 17, 1981 showing normal interspaces, no evidence of compression and some muscle spasm with splinting of the body to the right. Page two is an x-ray report dated November 15, 1972 which shows straightening of the lumbar spine but no evidence of fracture. Page three is an x-ray report dated August 8, 1974 which shows arthritic degenerative changes, osteoporosis and slight scoliosis to the right. Pages four through sixteen are the notes of claimant with Dr. Thomas and are essentially cumulative.

Exhibit G is a report of Scott B. Neff, D.O., dated June 2, 1983, which is consistent with his deposition in that he does not ascribe the bulging disc seen on the CT scan to the fall and finds her problem to be essentially degenerative disease due to age, chronic long term activity and obesity.

Exhibit H is a curriculum vitae of Scott B. Neff, D.O.

Exhibit I is a diagram showing nervation in the skin. Exhibit J is another copy of the report and charges from Dr. Johnson. Exhibit K is a copy of the letter which introduced claimant to Dr. Neff.

Defense exhibit 2 is a copy of the first report of injury.

Exhibit 3 is a request by claimant for the elevated toilet seat, chair and bed as prosthetic devices and medical aids.

Exhibit 4 appears to be receipts from Dr. Sheldahl covering the period of August 21, 28 and September 10, 1979. The person from whom payment was received appears to be Mrs. M. Pickard. The receipts seem to indicate that the payment was for osteopathic treatment.

Defendants' exhibit 5 is a copy of the original notice and petition filed in the Iowa District Court for Marshall County by claimant against Montgomery Ward and Company.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on January 13, 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 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 (1955).

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 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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 13, 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 (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).

Compensation for aggravation of a pre-existing condition is limited to the extent of the aggravation and DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777 (Iowa 1971).

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 limitation period of section 85.26 (1) does not begin to run until the employee discovered or in the exercise of reasonable diligence should have discovered the nature, seriousness and probable compensable character of the injury. Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980).

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); Buda v. Fulton, 157 N.W.2d 336 (Iowa 1968); Reserve Ins. Co. v. Johnson, 150 N.W.2d 632, 260, Iowa 740 (1967).

ANALYSIS

The first report of injury, exhibit 2, relates an injury date of January 12, 1980. Exhibit C, the notes of David C. Thomas, M.D., on the sixth page record the fall as occurring in the early a.m. of January 13, 1980. Claimant surely could not have anticipated any problem with the statute of limitations when she initially saw her doctor three days after she fell. It is therefore found that claimant sustained an injury on January 13, 1980. The petition was filed in this proceeding on January 13, 1982 and as such was timely filed within the provisions of section 85.26 (1) of The Code of Iowa.

Claimant's complaints revolve around alleged injuries to her lower back, varicose veins and right ankle. At the hearing, claimant stated that she was not seeking compensation based upon her right ankle. The report of Austin Corbett, M.D., dated September 6, 1982 and in the record as deposition exhibit D to Dr. Neff's deposition confirms the lack of any causal connection. No medical evidence exists which connects claimant's right ankle problems to the fall. Claimant has failed to establish any work-related injury to her right ankle.

A report of Dr. Thomas dated June 14, 1982 appears as deposition exhibit A-14 to the deposition of Dr. Neff. In that report, Dr. Thomas expresses his opinion that claimant's varicose veins existed prior to the fall and that the fall did not aggravate them. Reference to deposition exhibit F of that same deposition on page 6 by an entry dated June 17, 1975 notes the statement, "She does have rather marked varicose veins as in the past, but there is no indication of phlebitis at this time." There is no medical evidence in the record which relates any problem with claimant's varicose veins to her fall injury. The opinions of Dr. Thomas expressed in the June 14, 1982 report are adopted by the undersigned. Claimant suffered no work-related injury to her varicose veins.

The evidence is conflicting concerning whether or not claimant sustained an injury to her back on January 13, 1980. Such an injury could be an aggravation of preexisting degenerative arthritis or a new, separate and distinct injury to her back independent from degenerative arthritis.

Aggravation of a preexisting condition, like any other injury, can range in severity from a minor irritation with no long term effect to a major trauma resulting in permanent impairment.

The record clearly shows that claimant suffered from degenerative arthritis in her back long before the fall of January 13, 1980. Dr. Thomas explains her preexisting arthritis in his report dated February 8, 1982 which appears in the record as deposition exhibit A-12 to the deposition of Scott B. Neff, D.O. The x-ray report of Drs. Heise and Schultz dated August 8, 1974 which appears as deposition exhibit F-3 to Dr. Neff's deposition confirms the prior existence of the disease. Prescriptions for Butazolidan Alka, an anti-inflammatory arthritic medication appear in 11 of the 12 pages of clinical notes which comprise part of Neff deposition exhibit F. It would be highly unlikely for claimant to make the complaints which would result in the issuance of such a prescription if she were not then having arthritic pain.

Claimant has sought damages for a fall near a laundromat, for a slip in a grocery store, for a fall in the bathtub at a motel, and for being hit on the head by a box of curtain rods. She has previously made complaints which were excessive in relation to the objective clinical findings as shown in the report of John W. Hughes, M.D., and the report of Robert A.

Hayne, M.D., which appear in the record as deposition exhibits B-4 and B-5 of Dr. Neff's deposition. Claimant sought $25,000 from Montgomery Ward as shown by exhibit 5 alleging loss of vision when, in fact, she had only sustained minor injuries. Exhibit C clearly shows that claimant's loss of vision is the result of diabetes and that it pre-dated August 13, 1979, the date she was struck by the box of curtain rods. At the hearing, claimant testified that the fall in the bathtub in Rochester, Minnesota in August of 1981 resulted only in a scrape on her back, yet she sought damages from the motel for what she claimed at hearing to be a minor injury. It is difficult to believe that the motel would have paid $600.00 as compensation for a scrape on the back unless claimant were voicing complaints of a more serious injury.

The medical records in this case as a whole show claimant to have had frequent contact with various providers of medical care, sometimes seeing more than one simultaneously for the same condition without any coordination between the two providers. Claimant was seeing Dr. Thomas and concurrently seeing Edward C. Stayskal, D.C., at one point and Dr. Thomas and O. Landis Johnson, D.O., concurrently at another time. While apparently under the care of J. Watts, M.D., claimant referred herself to Dr. Hayne. Claimant has been evaluated through referrals to Mayo Clinic and University Hospitals. The first doctor to relate her back condition to the fall and the first doctor to affix a disability rating was Dr. Hayne in February, 1983. The record reflects that claimant has not sought further evaluation or treatment since. Dr. Hayne essentially confirmed the previous course of treatment and did not initiate any changes except for a change in pain medication. Claimant testified at the hearing that she called Dr. Hayne because she was in great pain, yet after being evaluated and rated by Dr. Hayne, she decided that she could live with the pain as is shown in exhibit O. Claimant appears to have difficulty identifying the onset of symptoms and the severity of her ailments.

A review of the exhibits in this case shows that x-rays have failed to show a herniated disc or other evidence of trauma at any time, only degenerative changes. It appears that the degenerative process has now progressed to the point of early spondylosis or fusion as shown in exhibit G. Early degenerative arthritis or spondylolysis is not to be confused with early spondylosis.

The second page of exhibit I reports nerve conduction studies performed February 22, 1983 which showed no evidence of lumbar radiculopathy, only a mild peripheral neuropathy affecting the back of claimant's calf and the outside of her foot.

Exhibit A is the result of the CT scan taken March 8, 1983 which states:

> There is generalized bulging of the disc at the L 3-1 level which does not appear to be impenging [sic] on the nerve roots. There is protusion of the L 4-5 disc on the left and to the neural foramen at the L 4-5 level. The fusion appears to be below the exit of the L 4 nerve roots. The herniation is noted to be just above the L 5 pedicle and probably encroaches on the left L5 nerve root. No definite evidence of other significant abnormality.
>
> Impression: Herniation at the L4-5 disc on the left with probable encroachment on the L5 nerve rootlets.

A report from Dr. Hayne, which appears in the record as exhibit K dated February 22, 1983 reads: "Lumbar spine X-ray showed marginal osteophytic spurring of the L-3, 4 interspaces anteriorly. These findings were those of early degenerative lumbar spondylosis. A myelogram was performed and this was a normal lumbar myelogram. An EMG of the lower extremities showed evidence of mild neuropathy. An EKG was normal."

Straight leg raising tests were performed by Dr. Hughes in January and December of 1980 and by Dr. Neff in June, 1983, all with negative results. In August, 1982, Austin Corbett, M.D., found a positive result on the right leg when he was examining claimant regarding her complaints concerning her right ankle. Such results are found in deposition exhibit D-1 to Dr. Neff's deposition and also on the last page of claimant's exhibit S.

A review of exhibits J and I leads one to conclude that there is no single test which can independently be relied upon to detect or negate a ruptured disc. Both doctors Hayne and Neff agree that surgery is not advisable for this claimant in view of her weight and diabetes. Their recommendations concerning limitation of claimant's activities due to her back condition are not greatly different.

Claimant fell on January 13, 1980 and had significant identifiable traumas on April 7, 1981 and August 26, 1981. An auto accident which totaled one vehicle and does $1200.00 of damage to another would require a significant impact. A fall in a bathtub which involves striking the back is also a significant trauma. Dr. Hayne stated at pages 49 and 50 of exhibit J that either of those two events, or even claimant's day to day activities, could rupture a disc.

Dr. Stayskal does not address the issue of permanent impairment and states the possibility of a relationship between the fall and claimant's back condition as he saw it in early 1980.

Dr. Johnson confirmed that arthritis can be aggravated by a fall but did not address claimant's degree of impairment or express an opinion concerning whether or not claimant's present ailments can be related to the fall on January 13, 1980.

Exhibit C is a report of Dr. Thomas dated February 23, 1982 in which he states:

> It is my opinion that Ruby Pickard has had underlying joint disease for many years. Although it was not specifically referrable to hips or ankles at that time, based on past experience I am confident that there was disease present prior to her fall. The injury probably aggravated the arthritis. I do not think that it caused the arthritis.
>
> Mrs. Pickard has many problems, all of which can aggravate the discomfort she feels in her body, specifically varicose veins, diabetes, and obesity as well as the degenerative arthritis. With a multifactorial problem it is difficult to say just how much is arthritis or just how much was aggravated by the fall.

Degenerative arthritis is a progressive disease which generally worsens with the passage of time. Claimant was taking Butazolidin prior to the fall. She continued to perform her regular job for more than two and a half years after the fall. Claimant's weight is a significant factor which probably increased the rate of degeneration of her disc and resultingly her symptoms. It appears that the fall probably did aggravate claimant's preexisting spinal degenerative arthritis. The extent of that aggravation is the true issue in this case.

Drs. Hayne, Neff, Thomas, Johnson, Corbett and Stayskal all recognize the possibility that claimant's fall may be a source of claimant's present symptoms. Only Dr. Hayne is willing to identify the fall as a probable cause of claimant's back condition.

The opinion of Dr. Thomas, claimant's treating physician, is given great weight in this proceeding. His opinion is corroborated by Dr. Neff. They specifically decline to relate claimant's present condition to the fall of January 13, 1980. The undersigned adopts their opinions. The opinion of Dr. Hayne is rejected as it is based upon an incomplete and incorrect history, highly dependent upon claimant's description of her symptoms and the onset of her symptoms, which have been found to be unreliable.

Claimant has failed to establish that the fall of January 13, 1980 is a cause of the back problem from which she now suffers. It is unnecessary to determine whether or not her disc is actually ruptured or the degree of her impairment and any resulting disability.

Claimant did, however, sustain a fall and is entitled to compensation in a form of payment of the medical expenses incurred in treating the injury she sustained in that fall. Claimant is entitled to payment for broken glasses, a chipped tooth and the medical care provided by Dr. Thomas for her knees. It is difficult to identify the precise point at which claimant ceased receiving medical treatment for the injury itself as opposed to her other medical conditions. Clearly, some of her medical care was prompted primarily by other medical problems and such are not compensable. Based upon the nature of the examination and treatment as well as the proximity and time to the date when claimant fell, it is found that the charges from Dr. Hughes, d/b/a Marshalltown Orthopedics, P.C., in the amount of $100.00; charges from Dr. E. W. Sheldahl in the amount of $32.00; and the charges from Dr. Stayskal in the amount of $109.00 were incurred in providing reasonable medical care for claimant's injuries. A review of the charges from Dr. Thomas when exhibit Q is compared with exhibit C shows that the only charges for care related to the fall were those entered January 16, March 18, and August 4, 1980. These total $34.00.

The charges from Dr. O. Landis Johnson in the amount of $160.00 covering the period of November 12, 1980 through April 4, 1982 and consisting of 14 osteopathic treatments appear, to be the last treatments which can rationally be related to an aggravation of claimant's degenerative arthritis arising from the fall of January 13, 1980. In actuality, the point at which the treatments ceased to be related to the fall and reverted to treatment of the underlying disease probably occurred at some point during that course of treatment but in the absence of a showing of such, the undersigned finds that treatment of the injury from the fall ran until claimant ceased treatment with Dr. Johnson.

The expenses incurred with Iowa Methodist Medical Center and Dr. Hayne have not shown themselves to be in the form of treatment for the fall and resulted only in treatment for claimant's underlying disease. In view of the remoteness from the time of the fall and the lack of a permanent impairment from the fall those charges are not the responsibility of the employer.

FINDINGS OF FACT

1. Claimant is a married female who was 59 years of age at the time of hearing.

2. On January 13, 1980, claimant was employed by Roger Bailey in his business of the 13th Street Inn.

3. On January 13, 1980 while leaving the employer's

premises, she fell down a flight of stairs.

4. The immediately apparent injuries claimant sustained consisted of a chipped tooth, skinned knees and pain in her lower extremities.

5. Claimant reported the fall to her employer the next regular work day.

6. Claimant continued to work until August, 1982 without losing any time from work attributable to the fall.

7. Claimant suffers from degenerative arthritis of her spine which was diagnosed in 1974.

8. Claimant suffers from adult onset diabetes, varicose veins and obesity which all pre-dated 1980.

9. Claimant's fall did not injure or materially aggravate the diabetes, obesity or varicose veins.

10. Subsequent to the fall, claimant began experiencing pain in her right ankle.

11. No identifiable impairment of claimant's right ankle has been identified except degenerative changes which are not shown to be related to the fall of January 13, 1980.

12. Claimant presently complains of pain in her left lower extremity and lower back.

13. Claimant suffered identifiable traumas in an auto accident and a fall in a bathtub.

14. Claimant has a protrusion of her L4-5 disc on the left which probably encroaches on the L5 nerve root.

15. Claimant is permanently partially impaired as a result of the impairment in her back.

16. No objective evidence exists which makes claimant's present back impairment more likely to be a result of her fall at work than a result of one of the other identified traumas, her normal day-to-day activities or the normal progression of her degenerative disease.

17. Claimant has difficulty accurately identifying the onset, source and severity of the various symptoms from which she presently suffers.

18. The opinion of Dr. Hayne concerning the cause of claimant's present back impairment is based upon what claimant related to him concerning the onset and severity of her symptoms.

19. Claimant's fall did result in an aggravation of her preexisting spinal degenerative arthritis.

20. The aggravation from the fall caused a temporary flare up of symptoms but has not been shown to have altered the nature or course of claimant's degenerative arthritis in any manner.

21. Claimant sustained temporary injuries in the fall which required medical care but did not sustain any permanent impairment or temporary disability as a result of the fall at work.

22. Medical care provided by Drs. Johnson, Stayskal, Sheldahl, Hughes and the care provided by Dr. Thomas on January 16, March 18 and September 4, 1980 were all for treatment of the injuries sustained by claimant in the fall at work. Such services were reasonably necessary and appropriate for the injuries sustained and the amount of the charges arising from those services is reasonable.

23. The services rendered by Dr. Hayne and Iowa Methodist Medical Center were primarily in the nature of evaluation and treatment for claimant's underlying degenerative arthritis. Accordingly, the services were not reasonably necessary for treatment of any injuries sustained by claimant in her fall at work.

24. Claimant's petition was filed January 13, 1983.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter and parties of this proceeding.

On January 13, 1980, claimant sustained an injury arising out of and in the course of her employment when she fell.

The injuries sustained by claimant in the fall were temporary in nature and did not result in any permanent impairment or any permanent disability.

The charges incurred by claimant in receiving medical treatment for the injuries she sustained in the fall total the sum of $275.00.

Claimant did not lose any time from work in order to entitle her to temporary disability compensation.

Claimant is not entitled to permanent partial disability compensation.

This action was commenced in a timely manner and is not barred by any statute of limitation.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant the sum of two hundred seventy-five and no/100 dollars ($275.00) in accordance with section 85.27 of The Code of Iowa and any amount incurred by claimant for repair of her chipped tooth.

IT IS FURTHER ORDERED that defendants pay the costs of this proceeding consisting of the cost of service of the original notice, the reporting fees for depositions and an expert witness fee in the amount of fifty and no/100 dollars ($50.00) for the deposition of Dr. Hayne, and fifty-five and no/100 dollars ($55.00) for the cost of obtaining two medical reports in accordance with Iowa Industrial Commissioner Rule 500-4.33.

Signed and filed this 30th day of March, 1984.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRIAN C. POINDEXTER,
Claimant,
vs.
GRANT'S CARPET SERVICE,
Employer,
and
MILBANK INSURANCE COMPANY,
Insurance Carrier,
Defendants.

File No. 715129

A P P E A L

R U L I N G

FILED
AUG 10 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

Plastic Surgery Institute, P.C. [P.S.I.] appeals from a proposed ruling of the deputy filed April 17, 1984 wherein P.S.I. was found to lack standing as a party in a workers' compensation claim.

In response to an application for determination of reasonableness of medical fees filed by defendants in the above captioned action, Plastic Surgery Institute, P.C., alleged assignee of the injured worker's medical costs at issue, filed an appearance and initiated discovery proceedings. Defendants filed a resistance to and motion to quash notice of the taking of a deposition by P.S.I., partly on the basis that the treating physician(s) was not a party to the action. P.S.I. filed a response and on March 27, 1984 requested a ruling on defendants' resistance and motion to quash and on P.S.I.'s response.

APPLICABLE LAW

Section 85.20, Code of Iowa, provides:

The rights and remedies provided in this chapter, chapter 85A or chapter 85B for an employee on account of injury, occupational disease or occupational hearing loss for which benefits under this chapter, chapter 85A or chapter 85B are recoverable, shall be the exclusive and only rights and remedies of such employee, the employee's personal or legal representatives, dependents, or next of kin, at

common law or otherwise, on account of such injury, occupational disease, or occupational hearing loss against:

1. his or her employer; or

2. any other employee of such employer, provided that such injury, occupational disease, or occupational hearing loss arises out of and in the course of such employment and is not caused by the other employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.

Section 85.26(4) states: "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."

Iowa Industrial Commissioner Rule 500-4.35 provides:

The rules of civil procedure shall govern the contested case proceedings before the industrial commissioner unless the provisions are in conflict with these rules and chapters 85, 85A, 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."

The burden rests upon the claimant to establish by a preponderance of the evidence the right to compensation. Webb v. Iowa-Nebraska Coal Co., 198 Iowa 776, 200 N.W.225 (1924).

The claimant must present sufficient evidence to prove a causal connection between the conditions which were the subject of medical treatment and the claimant's work injury. Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978). Where there is no stipulation as to the reasonableness or necessity of medical services, the industrial commissioner may make a finding on the evidence as to whether the medical services were necessary. Polson v. Meredith Publishing Co., 213 N.W.2d 520, 525 (Iowa 1973).

The injured worker has the burden of proving his expenses. Upon so proving, he should be reimbursed and may then deal with his creditors for such expenses. A determination requiring payment of bills to parties owed rather than the worker could give rise to numerous collateral issues, particularly if reasonableness of the charges had to be determined. Boyer v. Service Distributors, Inc., 366 Mich. 319, 115 N.W.2d 101 (1962).

The injured worker is the only proper party plaintiff to sue for benefits. Bank of Jena v. Clark, 413 So.2d 281 (La.App. 1982).

An instrument assigning a workers' compensation award can vest in the assignee but does not confer any right to maintain an action against the employer or its insurance carrier. Rhea v. Park, 211 Tenn. 589, 366 S.W.2d 765 (1963).

The workers' compensation act is to be given liberal construction, but any authority to be given to a physician to proceed under the act against an employer for payment for services rendered an injured employee must come by legislative mandate, and cannot come by judicial interpretation. Wynne v. Pawtuxet Valley Dyeing Co., Inc., 224 A.2d 612 (R.I. 1966).

ANALYSIS

Appellant is a professional corporation seeking payment of medical costs incurred by Brian Poindexter, the injured worker. Appellant contends that Mr. Poindexter has executed a valid assignment of his workers' compensation medical benefits to the corporation, and it thus has an economic interest that renders it an indispensable party to the claim.

The dispute arises from a petition and accompanying application for determination filed by the employer and insurance carrier which questioned the reasonableness of medical fees which were submitted in conjunction with a work injury. A previously filed memorandum of agreement has established an employment relationship between Poindexter and Grant's Carpet Service, and that the injury arose out of and in the course of employment. The employer's final report indicates that healing period and permanent partial disability benefits have been paid.

It is established law that the claimant has the burden of proving his claim for benefits. By the filing of a memorandum of agreement, the injured worker is relieved of a showing that the injury was work related, but his burden of proving medical costs remains. If the injured employee seeks payment of medical benefits and the costs are in dispute, it is his responsibility, by statute, to initiate a proceeding which gives him the opportunity to prove his claim against the employer. He must show that the medical costs are causally related to the work injury and that they are reasonable and necessary. No party can make this showing for him, and the employer is under no obligation to render payment until the worker has sustained his burden.

In the instant case, no claim for medical payment has been filed by Brian Poindexter. Review of the applicable statutory provisions reveals no statutory authority which gives P.S.I. standing to proceed under compensation law directly against the employer. The Iowa Supreme Court in Brauer v. J. C. White Concrete Co., 253 Iowa 1304, 115 N.W.2d 702 (1962) ruled that a party who rendered medical or hospital services could assert a claim therefor before the industrial commissioner. The legislature acted with utmost celerity to overturn the holding of the Iowa Supreme Court in the Brauer decision in the session of the general assembly immediately after the filing of the decision. They enacted: "No claim or proceedings for benefits shall be maintained by any person other than the injured employee his dependent or his legal representative, if entitled to benefits." Acts of the Regular Session 60 GA (1963), Chapter 87, §3.

This provision remains in the law today in the same form (although with gender reference corrected) as Code of Iowa section 85.26(4).

Although appellant, like any creditor, has a financial interest in expediting a determination of payment due, such interest does not confer standing to participate in an action that has not properly been initiated or to attempt to relieve a potential claimant of his rightful burden of proof by initiating a discovery proceeding against the employer and the insurer. The deputy was correct in finding that P.S.I. is not a party to this action and has no standing to sue in claimant's name.

Incidental to this finding, it should be noted that the courts have generally denied the right of assignees to sue under workers' compensation statutes. The spirit and intent of the act is perceived as setting forth a relatively personal proceeding between the employee and the employer, and no provision is intended for outside parties, regardless of interest, to seek a remedy through compensation laws. Where assignability of payments has been at issue, the majority position in other jurisdictions has been to deny standing to a third party.

WHEREFORE, on the basis of the foregoing considerations, it is found:

1. That P.S.I. is not a party to this proceeding.

2. That the injured worker has not initiated a claim for the payment of medical benefits, and an application for determination of the reasonableness of medical fees is not properly before this agency.

THEREFORE, the decision of the deputy is affirmed. Further, the action commenced by the defendants is dismissed.

Signed and filed this 10 day of August, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LORETTA KAY REYNA,

Claimant,

vs.

JOHN DEERE DAVENPORT WORKS,

Employer,
Self-Insured.

File No. 718533

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED
AUG 15 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Loretta Kay Reyna, claimant, against John Deere Davenport Works, self-insured employer, defendant, to recover benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of her employment on November 3, 1982. It came on for hearing on July 12, 1984 at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted at that time.

A first report of injury was received on November 12, 1982.

At the time of hearing defendant acknowledged an injury to claimant's two feet on November 3, 1982. The parties agreed that the rate in the event of an award is $250.62.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, a letter from Robert W. Milas, M.D., dated August 10, 1979; claimant's exhibit 2, a letter from Dr. Milas dated August 17, 1979; claimant's exhibit 3, a letter from Frank I. Russo, M.D., dated August 14, 1979; claimant's exhibit 4, a note from Dr. Russo dated September 13, 1979; claimant's exhibit 5, a preadmission physical by Dr. Milas from September 1979; claimant's exhibit 6, a surgery report of September 28, 1979; claimant's exhibit 7, notes from defendant's medical department; claimant's exhibit 8, a weekly indemnity request form; claimant's exhibit 9, a disability notice; claimant's exhibit 10, a weekly indemnity request form; claimant's exhibit 11, an insurance form; claimant's exhibit 12, an insurance form; claimant's exhibit 13, notes from defendant's medical department; claimant's exhibit 14, notes from the medical department; claimant's exhibit 15, notes from Harold J. Jersild, M.D., from 1980; claimant's exhibit 16, notes from the medical department; claimant's exhibit 17, a letter from Marvin L. Skoglund, M.D., dated February 24, 1983; claimant's exhibit 18, office notes

from Dr. Skoglund; claimant's exhibit 19, a letter from Maud Karlsson, M.D., dated February 17, 1983; claimant's exhibit 20, notes from the medical department; claimant's exhibit 21, an inpatient admission record; claimant's exhibit 22, a readmission note from Dr. Skoglund; claimant's exhibit 23, a list of restrictions; claimant's exhibit 24, records from a hospital admission of November 3, 1982; claimant's exhibit 25, records from claimant's readmission on December 22, 1982; claimant's exhibit 26, a report from Barry Lake Fischer, M.D., dated July 7, 1983; claimant's exhibit 27, a letter and accompanying notes from Dr. Skoglund dated September 21, 1983; claimant's exhibit 28,a report from Irwin T. Barnett, M.D., dated September 16, 1983; claimant's exhibit 29, a letter with notes from Dr. Skoglund dated October 12, 1983; claimant's exhibit 30, a combined medical report and statement; claimant's exhibit 31, a letter from Dr. Skoglund dated December 7, 1983; claimant's exhibit 32, a letter from Dr. Fischer dated February 6, 1984; and claimant's exhibit 33, statement of payments from defendant. The parties filed briefs.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and any disability she now may suffer and whether or not claimant is entitled to permanent partial disability benefits.

STATEMENT OF THE CASE

Forty-two year old married claimant, who commenced work for defendant on May 16, 1977, testified to having had disc surgery and as of November 1982 carrying a thirty-five pound weight restriction with instructions to lift with the knees. At that time she was able to do her work and to do overtime.

Claimant recalled the circumstances surrounding her injury of November 3, 1982 thusly: She was working the second shift. She was on a high rise. She had a box in her hand. One of her feet went through a pallet and a few inches to the floor. Her foot was caught. The other foot snapped. She fell hitting her knee and buttocks. She asked a coworker to call an ambulance. She lost consciousness. She was taken to the hospital where she was x-rayed. She decided it would be better for her to be hospitalized in Illinois. She was taken to a hospital there where she saw Dr. Skoglund who did surgery on her left foot and put casts on both legs.

She was off work until April 4, 1983 at which time she went back with special provisions made for an ambulance to pick her up, take her to her work station and then return her. She was to work with her feet elevated and to have handicapped parking. She worked, but she did no overtime.

On October 1, 1983 her left knee went out and she experienced bad pain. She had an arthrogram which was negative and then she started therapy. Dr. Skoglund continues to observe the knee. She returned to work on February 6, 1984 and she has been working steadily. She asserted that she has been unable to do overtime, but she did not know whether or not overtime had been available. Her current restrictions are no lifting, pushing or pulling over ten pounds; no excessive reaching, twisting or bending; and no prolonged standing or walking. She functions as as a crib attendant issuing supplies to other workers. Her wage is $11.72 per hour.

Claimant alleged that her condition changed beginning in January of 1984 in that she is having trouble with the way she walks and in that her upper back, lower back, tail bone and both legs and feet are bothering her. In addition to walking differently from the way she had before, she also sits differently. Her feet swell during the day and swelling is worse although her condition, she said, is the same as when she was last seen by Dr. Fischer.

She stated that she must have special shoes with a bar below the arch and special hose. She puts on the stockings before she gets out of bed. She is unable to wear tennis shoes or high heels although she had on a tennis-type shoe the day of the hearing. Her current medications are Dolobid and Parafon Forte.

Claimant declared her life very restricted. After she works forty hours she is troubled with swelling. She no longer skis, skates, gardens or dances. Company functions are not attended. She hires someone for portions of her housework.

Claimant reported a problem with Dr. Skoglund's being unavailable when she wishes to see him. She asserted that Dr. Skoglund had x-rayed her knee from the time of the accident.

Claimant acknowledged two surgeries to her left foot, one in 1981 and one in 1982 because of a plantar wart problem. She did not think she was under any restrictions as a result of these surgeries.

Beginning in February 1979 claimant was seen in the medical department for low back complaints with spasm on the left. Claimant was placed on light duty for a time. She spoke of her left knee "being floppy." In July of that year she complained of a sore left ankle with swelling and mild soreness in the right ankle as well. In August claimant voiced complaints of the sacral and paraspinous region which was diagnosed as a lumbosacral strain.

Following a laminectomy, claimant was released for work on January 3, 1980 with restrictions of no excessive bending or stooping and no lifting over forty pounds.

In February of 1981 she had a wedge osteotomy of the left fourth metatarsal. Later in the year she had pain in the right buttocks which radiated down her leg on one occasion and pain in the left buttocks which was aggravated by certain activity. Claimant was diagnosed as having low back pain with possible disc involvement, a cervical neck sprain and residual condition. Her weight limitation was reduced to thirty pounds.

Claimant continued to have back complaints into 1982 and also recounted tenderness over the bottoms of her feet after surgery. Early in the year her weight limitation was raised to thirty-five pounds. In March her ankle jerk was absent on the left. Two weeks of work were missed in April because of low back pain. Her ankle jerks were bilaterally equal at that time.

Claimant had additional surgery for the depressed metatarsal of her left foot in September of 1982. When claimant presented her return-to-work slip for November 1, 1982 she had been seen by Dr. Milas for her back only a few days before.

After her return to work in April of 1983 claimant continued to complain of swelling, particularly in her left ankle. In June claimant was walking with a limp. Her restrictions of no prolonged standing or walking over thirty minutes remained. She was to elevate her foot when sitting.

In a letter dated August 10, 1979 Robert W. Milas, M.D., referred to claimant's having lumbar pain radiating to the right lower extremity. Claimant's lumbar motion was moderately limited. One of the doctor's impressions was lumbosacral pain of unknown etiology. X-rays of the lumbosacral spine were normal. Dr. Milas thought claimant's complaints were of a muscular ligamentous nature and he recommended a physiatrist.

Claimant was seen by Frank I. Russo, M.D., who found deep tendon reflexes at the knees and ankles brisk and symmetrical. There was no gross muscular atrophy in the lower extremities. Electromyography and nerve conduction studies of the right lower extremity were normal.

Claimant was placed on outpatient therapy, but she continued to have complaints of pain radiating down the right lower extremity to the ankle. There was a slight decrease in the right ankle jerk. Electromyography was compatible with an S1 radiculopathy.

Claimant was hospitalized on September 19, 1979. A myelogram was done followed by a lumbar laminectomy at L5, S1.

Claimant was treated by Dr. Jersild in 1980 for cervical radiculitis.

Claimant was seen by Dr. Jersild in March of 1982 with low back complaints with radiation into her left lower extremity. Deep tendon reflexes of the ankle were dulled and there was mild sensitivity in the left sciatic notch. Straight leg raising was not restricted. Dr. Jersild thought claimant had an exacerbation of lumbar degenerative disc disease. Claimant appears to have returned to work on April 5, 1982.

Hospital records show claimant was admitted to the hospital on November 3, 1982 after a fall at work with a sprain of her right ankle, a trimalleolor dislocation and fracture of the left ankle. Open reduction of both the medial and lateral malleoli was undertaken. Claimant gave a history of prior laminectomy three years before, recurrent low back pain, and elevation of the fourth metatarsal.

Claimant had no tenderness to palpation in the sacrum, coccyx or lumbar spine. Straight leg raising was negative and claimant's sensory and motor functions were intact. Examination of the knee and hip were within normal limits. X-rays of the coccyx and and sacrum showed acute anterior angulation of the distal half of the distal sacral segment which was interpreted as representing either older or recent bone trauma.

Claimant returned to the hospital on December 22, 1982 for removal of the screw from the lateral aspect of her left ankle. No sensory deficit was found in either ankle.

By January 4, 1983 claimant had 75 percent motion in her right ankle and she was ready to start full weight bearing on both sides with support of crutches.

When claimant was seen at the end of February she had tightness in her left ankle and tenderness over the plantar aspect of the left foot where she had previously had plantar warts removed.

A month later claimant had full motion in the right ankle and motion 75 percent of normal on the left.

Claimant was seen in April after she had returned to work. Because of swelling in the left ankle, Jobst stockings were prescribed. The following month the doctor thought claimant should consider work with less walking or working only part of the day.

In July claimant had complaints of both her feet and her back. She had metatarsalgia in both feet with callus formation over the fifth metatarsal head. Back x-rays showed narrowing of the disc space at L4-5. Metatarsal pads and arches were ordered

for claimant's shoes. Range of motion on the next visit was full on the right and 85 percent on the left.

Approximately six weeks later claimant was complaining of pain in her buttocks, left hip and thigh and right leg cramps at night. X-rays showed degenerative arthritis in the lumbar spine. The left knee was normal.

When claimant was seen on October 12, 1983 she told the doctor of a blackout when she got out of bed. She complained of severe pain on the anteriolateral aspect of the left knee. An arthrogram was normal. Knee motion was full with no crepitation. Dr. Skoglund was unable to explain claimant's pain which he found to be a sprain syndrome. Claimant was provided with outpatient therapy, exercise and given Naprosyn.

In a letter of December 7, 1983 Dr. Skoglund provided the following ranges of motion: Right ankle dorsiflexion 0°, plantar flexion 45°; left ankle dorsiflexion 0°, plantar flexion 35°. He determined an impairment of seven percent in the right lower extremity and nine percent of the left lower extremity. He converted those to three and four percent of the whole person and then to fifteen percent of the whole person.

Barry Lake Fischer, M.D., examined claimant on June 11, 1983. He took a history of an injury to claimant's right ankle, a fracture to her left ankle and trauma to her back in a fall on November 3, 1982. Claimant's complaints were pain, soreness and stiffness over both sides of her lower back and pain into both legs; weakness in the left foot; and pain, soreness and stiffness in both ankles with swelling.

On examination claimant had bilateral lumbosacral and paravertebral tenderness and spasm to palpation and pressure which radiated to both sides and down the posterior aspect of both legs with bilateral sciatic radiation of spasm. There was tenderness to palpation and pressure over both ankles. There was swelling of the left malleolar area. Ranges of motion in the ankles were as follows:

	Normal	Right	Left
Flexion	35	35	20
Extension	10	10	5
Inversion	35	25	10
Eversion	10	5	5

Dr. Fischer concluded that claimant had permanent partial disability to both legs of 30 percent with additional industrial loss of 35 percent to the left foot and seven percent to the right.

Dr. Fischer saw claimant for reexamination on February 3, 1984. Her complaints were unchanged and she added pain in the left knee since the injury and pain, soreness and stiffness in the upper back. Dr. Fischer's findings regarding claimant's ankle were the same. He noted that a gait disturbance and loss of normal mobility in the ankle had led to a left knee syndrome. In addition to the rating he had previously given, he found disablity in the upper back with a cumulative injury of 40 percent of the whole person.

Irwin T. Barnett, M.D., reported the results of his examination in a letter dated September 16, 1983. Claimant gave a history of hurting both ankles and her left knee and buttocks. She complained of pain in the left knee and to the buttocks, both legs and lumbar spine and tail bone. She told of nerve damage to the right leg which had worsened since surgery. She told the doctor of swelling in both ankles which was worse on the left.

There was muscle spasm along the lumbar spinal musculature. The Achilles reflex was diminished on the right and absent on the left. The patellar reflexes were brisk and intact. There was some shortening of the right leg, swelling in the left knee and ankle and atrophy in the right knee cap and thigh. The doctor suspected chondromalacia in the knee.

Ranges of motion in the ankles were as follows:

	Normal	Right	Left
Inversion	35	30	10
Eversion	15	5	0
Plantar Flexion	15	5	0
Dorsiflexion	35	25	10

X-rays of the left knee showed soft calcification. X-rays of the left ankle showed a small fragment of bone at the distal end of the external malleolus. On one view a defect of the navicular tarsal bone was seen.

Among Dr. Barnett's diagnoses were residuals of a low back injury with bilateral sciatic nerve root irritation, residuals of a soft tissue ligamentous and cartilage injury of the left knee, a fracture of the left fibula involving the external and internal malleolus, a fracture of the fourth metatarsal, a defect in the upper surface of the navicular tarsal bone and residual of a soft tissue ligimentous injury to the right foot and ankle. He attributed the atrophy of the left calf and thigh to the claimant's favoring of the left leg.

Dr. Barnett concluded claimant "has a major loss of use of the man as a whole."

APPLICABLE LAW AND ANALYSIS

The first issue to be considered is one of a causal connection.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 3, 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).

Defendant seemingly does not seriously contest impairment to claimant's lower extremities. It is rather claimant's contention that impairment extends into the body which is the subject of dispute. As defendant points out, a doctor's recitation of history is not sufficient to prove medical causation.

Claimant was seen in defendant's medical department as early as February 1979 with back complaints which occurred periodically thereafter. She had a laminectomy and a weight restriction was imposed. She was seen for back complaints a few days prior to her November fall at which time she also spoke of left-sided back pains sometimes radiating toward the knee.

When claimant was hospitalized following the accident, she had no tenderness to palpation in her coccyx or lower spine. Straight leg raising was negative. Sensory and motor functions were intact. Claimant had a contusion of the buttocks and on November 12 had some pain in the left sacroiliac. On x-ray there was angulation of the distal half of the distal sacral segment which was interpreted as either old or recent trauma. No clarification appears in the record.

Claimant again complained of her back in July of 1983. X-rays showed narrowing at L4-5. Subsequent x-rays revealed degenerative arthritis. Dr. Skoglund, who has been claimant's treating physician, confines her impairment to the lower extremities. His letter of September 21, 1983 reports "back pain probably related to her previous surgery by Dr. Milas." He specifically deliniates a separate impairment rating to the back due to the 1979 injury.

Dr. Fischer's evaluation may be somewhat tainted by the accuracy of his history in that he assumed injury to both ankles and to claimant's back. The doctor reviewed x-rays of claimant's lumbar spine and characterized the changes he saw as laminectomy changes.

Dr. Barnett's history also contains some deficits in that he assumed that a bruised tailbone and nerve damage to the right leg which has worsened since surgery presumably to the right. He attributed claimant's muscle spasms to active low back disease, but he also wrote that disc pathology "can be result of aggravation of trauma." Later he stated: "Apparently she had two injuries here, to account one for the back injury and one for the leg injury."

Claimant's burden is preponderance and in light of claimant's preexisting back condition, she must show a causal relationship between her fall in November of 1982 and her current back complaints. She does not preponderate on that point. However, the record clearly establishes impairment to claimant's lower extremities attributed to her injury of November 3, 1982.

The remaining issue is claimant's entitlement to permanent partial disability.

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).

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).

Iowa Code section 85.34(2)(s) 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 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 medicaly 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 had injury to both lower extremities in a single incident. 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. Skoglund used the A.M.A. Guides to evaluate claimant's impairment. He measures impairment to each lower extremity and converts each to body as a whole. Applying the combined value results in a seven percent impairment of the whole person. Dr. Fischer claimant's evaluating physician, initially assigned a thirty percent permanent partial impairment to both legs with an additional industrial loss of thirty-five percent to the left foot and seven percent industrial loss to the right foot. Dr. Barnett assesses a "major loss of use of the man as a whole."

The greatest weight in this decision is being given to the evidence presented by the treating physician. Lemon v. Georgia Pacific Corporation, I Iowa Industrial Commissioner Report 204 (Appeal Decision 1981); Clement v. Southland Corporation, I Iowa Industrial Commissioner Report 56 (1981). Dr. Skoglund, in addition to being the treating physician, determines claimant's functional impairment and refrains from assigning industrial disability. Assessment of industrial disability is beyond the scope of expert medical testimony. Wright v. Walter Kidde Co., 33 Biennial Report of the Industrial Commissioner 237 (Appeal Decision 1977). Dr. Fischer, who evaluated claimant, has not provided a pure impairment rating. It is important to note that the impairments referred to by Dr. Skoglund convert to seven percent of the whole person. The whole person impairment is not achieved by combining the three and the four percent. The whole person impairment is multiplied times 500 weeks. Using that calculation, claimant is entitled to thirty-five weeks of permanent partial disability benefits.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-two (42) years of age.

That claimant was seen for back complaints as early as February of 1979 and for periodic back complaints thereafter.

That prior to her injury of November 1982 claimant had disc surgery and had a weight limitation of thirty-five (35) pounds.

That claimant while working at her employer's premises had an accident resulting in spraining of her right ankle and a trimalleolar dislocation and fracture of the left ankle.

That claimant had surgery on her left foot and casts placed on both legs.

That claimant was returned to work on April 4, 1983 with special provisions made for her disability.

That claimant subsequently missed some work with left knee pain.

That claimant has been working steadily since February 6, 1984.

That claimant is restricted from lifting, pushing or pulling over ten (10) pounds; excessive reaching, twisting or bending and prolonged standing or walking.

That claimant wears special shoes and stockings and takes medication.

That claimant complained of ankle swelling and soreness in 1979.

That claimant complained of her left knee in 1979.

That claimant had two surgeries to her left foot--one in 1981 and one in 1982 due to plantar warts.

That claimant's foot surgeries prior to November 1982 resulted in no restriction.

That claimant has impairment to each lower extremity attributable to her injury of November 3, 1982.

That claimant has degenerative arthritis in her spine.

That claimant does not have increased impairment to her back traceable to her injury of November 3, 1982.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence a causal relationship between her injury of November 3, 1982 and her present disability to her lower extremities.

That claimant has shown entitlement to thirty-five (35) weeks of permanent partial disability benefits attributable to her injury of November 3, 1982.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant thirty-five (35) weeks of permanent partial disability benefits at a rate of two hundred fifty and 62/100 dollars ($250.62).

That defendant pay amounts due and owing in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30.

That defendant pay costs pursuant to Industrial Commisioner Rule 500-4.33.

That defendant file a final report in ninety (90) days.

Signed and filed this 13 day of August, 1984.

Judith Ann Higgs

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BLANCHE M. RINEHART,	:	
Claimant,	:	
vs.	:	FILE NO. 601858
THUNDERBIRD RESTAURANT, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	FILED
AID INSURANCE SERVICES,	:	AUG 24 1984
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner dated June 18, 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 review-reopening decision.

The record consists of the transcript; claimant's exhibits 1 through 14, 16 and 17, 19 through 26, and 28 through 46; and defendants' exhibits A through O, inclusive, all of which evidence was considered in reaching this final agency decision.

ISSUES

Claimant states the issues on appeal:

1. Did the Deputy Commissioner error in his Decision finding that the Claimant failed to prove by a preponderance of evidence that the cause of her disability is the injury of June 10, 1979.

2. Did the Deputy Commissioner error in his Decision disallowing medical expenses other than for Drs. Lund and Andre.

EVIDENCE PRESENTED

Claimant argues that her disability is connected to her injury of June 10, 1979. That argument at bottom is based upon the opinion of Larry E. Phipps, D.C., as brought out on direct examination, which is opposed to the opinions of Robert A. Morantz, M.D., and M. W. Andre, M.D. The review-reopening decision found that the opinions of Drs. Morantz and Andre were more reliable for four reasons: (1) They were the treating physicians and both were neurosurgeons; (2) Dr. Phipps was not given a complete history; (3) The motor impairment rating of Dr. Phipps was inaccurate; and (4) Dr. Phipps impairment rating was based on claimant's subjective complaints as opposed to the essentially objective data used by the two neurosurgeons. A review of the entire record discloses that the hearing deputy's conclusion in this respect is proper, and it will be adopted.

Claimant's argument that certain medical expenses should have been awarded fails because claimant did not show that the employer or insurance carrier authorized the care. Under §85.27, The Code, the employer clearly has the choice of treatment, and without authorization by the employer or insurance carrier, no award can be made.

Wherefore, the review-reopening decision filed March 20, 1984 is hereby adopted as the final agency decision.

FINDINGS OF FACT

1. On June 10, 1979 claimant fell at work when she tripped over an electrical cord.

2. As a result of her fall claimant was off work from June 10, 1979 until October 1979.

3. It was medically indicated that claimant could return to work on September 11, 1979.

4. Claimant was authorized to seek treatment from Dr. Lund and Dr. Andre.

5. Defendants paid claimant temporary total disability from June 10, 1979 to September 11, 1979.

6. Claimant did not suffer any permanent disability as a result of her fall.

7. Defendants have paid all authorized medical expenses.

CONCLUSIONS OF LAW

Claimant has failed to prove by a preponderance of the evidence that the cause of her disability is the injury of June 10, 1979.

Claimant has failed to prove by a preponderance of the evidence that she was authorized to receive medical treatment from anyone other than Drs. Lund and Andre.

ORDER

THEREFORE, claimant shall take nothing further from these proceedings.

Pursuant to Industrial Commissioner Rule 500-4.33, defendants are ordered to pay the costs of the attendance of the certified shorthand reporter. Claimant shall pay all remaining costs.

Signed and filed this 24th day of August, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BLANCHE M. RINEHART,	:	
Claimant,	:	
vs.	:	File No. 601858
THUNDERBIRD RESTAURANT, INC.,	:	R E V I E W -
Employer,	:	R E O P E N I N G
and	:	FILED
AID INSURANCE SERVICES,	:	MAR 20 1984
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Blanche M. Rinehart, claimant, against Thunderbird Restaurant, Inc., employer, and AID Insurance Services, insurance carrier, for the recovery of further benefits as the result of an injury on June 10, 1979. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed in this proceeding is $94.50. A hearing was held before the undersigned on February 29, 1984. The case was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Larry E. Phipps, D.C., Eldon Zinc, Rebecca L. Madison, Bonnie L. Stanley, Roger Romig, Danny R. Abrahams; claimant's exhibits 1 through 14, 16, 17, 19 through 26, 28 through 35, 37 through 43, 45 and 46; and defendants' exhibits A through O.

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 she is now basing her claim; the extent of temporary total, healing period and permanent partial disability benefits to which she is entitled and authorization for medical benefits pusuant to §85.27, Code of Iowa.

EVIDENCE PRESENTED

Claimant testified she is 49 years old, married, and a resident of Kansas City, Kansas. She revealed that she is not presently employed and contends she has not been employed for at least two years.

Claimant stated that on June 10, 1979 she was an employee of the Thunderbird Restaurant in Marshalltown, Iowa. She explained that on that day she suffered an injury at the restaurant when she tripped and fell over an electrical cord. She indicated that she fell face forward and extended her arms to break the fall. Claimant added that immediately after the fall she felt stunned, her hands were stinging and there were shooting pains across her shoulder and into her neck and head. She stated that she sat down in a chair for awhile and then went home.

Claimant advised that when she got home that day her hands and arm were in so much pain that her daughter had to open the door for her. She stated that she went inside and laid down on the couch with a heating pad on her neck, but later applied cold packs. She indicated that the pain continued through the night and because of it she was unable to sleep. She further indicated that it was necessary for her daughter to help her move around.

Claimant testified that on the next day she went to see Axel T. Lund, M.D. She recalled that she saw Dr. Lund two or three times after which he felt he could do little to help. Claimant stated that Dr. Lund then referred her to a neurosurgeon, M.W. Andre, M.D.

It was claimant's recollection that she first saw Dr. Andre in June or July 1979. Claimant contended that Dr. Andre did not examine her neck or shoulder blades. She also stated that Dr. Andre did not provide her with any form of treatment. Claimant testified that she continued to see Dr. Andre on several occasions, and in August 1979 he sent her to Iowa Methodist Hospital for a cervical myelogram and an electromyographic examination. She stated that after the examination Dr. Andre came to her hospital room and said there was nothing wrong so she could go home. Claimant revealed that sometime during this period she was receiving physical therapy. She indicated that she continued physical therapy and seeing Dr. Andre until late September 1979.

Claimant alleged that she left Iowa in September 1979 and returned to Kansas City because she was no longer receiving workers' compensation benefits, she was unable to work and thus she could not support herself. She admitted, however, that upon her return to Kansas, she became employed at Nicholl Bros., Inc. Claimant said this employment commenced in October 1979 and continued into May 1980. Claimant testified that she left Kansas in May 1980 and returned to Iowa. She stated that she lived with her sister and brother-in-law in Des Moines. She recalled that she found employment in Des Moines with Victoria Cleaners and this job lasted from August 1, 1980 until the middle of September 1980. She added that she was next employed from the middle of September 1980 until the latter part of October of that year at Charles Todd Uniforms. She said she then left Iowa and returned to her husband in Kansas.

Claimant testified that upon her return to Kansas she obtained employment with Crest Quality Cleaners in Kansas City. She revealed that this employment continued from November 1, 1980 through September 29, 1981. Claimant alleged she has not worked since that time. She further alleged that she left Kansas at that time to hire an attorney for her workers' compensation case. According to claimant she was in Iowa from September 1981 until July 1982 to accomplish the goal of hiring an attorney. It was her testimony that she stayed this length of time because it was convenient and she couldn't afford long distance telephone calls to the lawyer.

Claimant testified that she began to experience trembling in her upper extremities in late 1980 or early 1981. She attributed this trembling to her injury. Claimant revealed, however, that she did not see a doctor concerning her injury until she consulted Robert A. Morantz, M.D., in November 1981. She stated that Dr. Morantz maintains his office in Kansas City. She explained that Dr. Morantz also had a cervical myelogram and electromyographic examination conducted and found no neurological dysfunctions. Claimant indicated that Dr. Morantz referred her to Steven Waldman, M.D., at the Menorah Medical Center in Kansas City, Missouri. She stated that she received several spinal injections at this center. Claimant said she was given medication for pain and trembling.

Claimant testified that she next consulted Donald E. Tyler, M.D., in December 1982. According to claimant, Dr. Tyler did not treat her or prescribe medication.

Claimant testified that she returned to Dr. Andre in the winter of 1982. Claimant stated that Dr. Andre scheduled a CAT scan to be done in Minneapolis, Minnesota. She recalled that this was done in March 1983.

Claimant said that the last doctor she had seen was Larry E. Phipps, D.C., whom she saw in December 1983 for evaluation purposes. Claimant believed that the examination given by Dr. Phipps was more extensive than any previous examinations she received.

Claimant alleged that she has been in continuous, agonizing pain since June 10, 1979. She further alleged that because of this pain it was impossible for her to earn a living to support herself so she has been forced to live off her family in Iowa. Claimant offered little explanation why her husband in Kansas could or would not support her.

On cross-examination, claimant admitted that she suffered a prior work related injury to her right arm in 1974. She related that as a result of the injury she was off work six to eight weeks.

Claimant revealed that some of her trips to Iowa from Kansas City were because of domestic problems with her husband. She recalled that at sometime in 1980 or 1981 she filed for a dissolution of marriage from her husband while she was in Marshalltown. Claimant continued to insist that she was in Iowa from September 1981 to July 1982 for the sole purpose of hiring a lawyer, but admitted that during this time she was driving to Kansas City for medical attention.

Eldon Zinc testified he is a resident of Laurel, Iowa and has known claimant for 32 years. He stated that he had seen her on occasion after June 10, 1979. It was Mr. Zinc's recollection that he first noticed claimant's trembling about six months ago. He remembered that claimant had been in his home about a month before the hearing at which time she appeared to be shakey and in a lot of pain. He revealed, however, that claimant was at his home a year ago and was not trembling and was not complaining of back problems.

Rebecca Madison testified that she is claimant's daughter. She related claimant's condition when claimant came home from the Thunderbird Restaurant on June 10, 1979. It was Mrs. Madison's recollection that claimant began the trembling immediately after the accident. She stated that claimant had lived with her on occasion since 1979 and she observed that claimant always appeared to be suffering severe pain. She added that since the accident she had not seen claimant perform any physical activity other than walking and sitting.

On cross-examination, Mrs. Madison opined that based on her observations of claimant it would not have been possible for claimant to have worked more than one week at a time since June 1979. She did not believe claimant had worked in Kansas City after the accident and could not recall having ever been told by claimant of any such employment. She admitted that she conferred with claimant numerous times by telephone while claimant was in Kansas City.

Bonnie Stanley testified she is claimant's sister. She stated that claimant has lived with her on several occasions since 1979. She stated that it was her observation that claimant always appeared to be in severe pain and was unable to do most of the activities she did before June 1979. Mrs. Stanley adamantly rejected the suggestion that claimant could have worked for as long as six months after the accident in 1979. She asserted that claimant may have worked for a week, but it was not possible for her to have worked for more than a week or so.

Danny Abrahams testified he was claimant's son. He stated that the first time he observed claimant after the accident was in 1982. He recalled that at that time she appeared to be in severe pain. He testified that he drove claimant to Minneapolis, for the CAT scan test and that according to his observations riding in an automobile greatly aggravated her pain.

Roger Romig testified he is claimant's brother-in-law. He recalled that claimant lived with him and his wife from June to October 1980. He thought she worked for a couple of weeks during that time, but stated that he did not believe claimant has worked since then and would be surprised if she had. He further testified that when claimant left for Kansas City in October 1980 she drove herself.

Larry E. Phipps, D.C., testified that he is a practitioner of chiropractic in Marshalltown, Iowa. He stated that he has been engaged in the practice of chiropractic for 20 years. He further stated that he has attended numerous seminars on soft tissue injuries. He also proffered his membership in several professional organizations. Dr. Phipps advised that he has a general chiropractic practice with an emphasis on patients with chronic problems.

Dr. Phipps stated that his initial contact with claimant was on December 19, 1983. He conducted an examination on December 20, 1983. Dr. Phipps explained that the examination consisted of the following: First, a complete history was obtained from claimant. X-rays were taken and then claimant was given an orthopedic and neurological examination. Dr. Phipps outlined the procedure he used for the orthopedic and neurological examination. He stated that he went through a range of motion and strength test with claimant. He revealed that he conducted a pinwheel test; deep tendon reflex; checked the cranial nerves; palpation; vital signs; weight; heart sounds and eye, ear and nose.

According to Dr. Phipps, claimant's range of motion was within the lower range of normal limits. He stated that claimant's range of motion was sufficient to preclude a finding of impairment on that basis.

Dr. Phipps reviewed the x-rays he had taken of claimant's cervical and thoracic spine. Dr. Phipps opined that the x-rays showed some mild degenerative changes at C-4, 5 and 6 where the peripheral nerves come out of the intervertebral foramen. Also, that there was marked scoliotic change in the mid and upper thoracic regions from C-7 to T-3. Finally, Dr. Phipps testified that there was a definite flattening of the normal cervical kyphosis.

Dr. Phipps expressed his opinion that claimant was suffering from chronic post-traumatic bilateral sprain/strain of the upper thoracic and cervical spine. He concluded that this problem was the result of claimant's fall in June 1979.

Dr. Phipps also concluded that claimant was presently suffering from a functional disability equal to 75 percent of her body as a whole. He stated that this rating was arrived at through the application of chapter two of the 1977 copywrite edition of the American Medical Association's Guides to the Evaluation of Permanent Impairments. (Hereinafter referred to as the guide.)

On cross-examination, Dr. Phipps conceded that he inadvertently utilized lower muscle strength grades in calculating the motor impairment than those which he had in fact obtained as a result of his examination. As a consequence, he admitted that the motor impairment rating he had established was higher than it should have been. Dr. Phipps was uncertain how much lower the rating would have been, but pointed out that even if it was completely disregarded the sensory impairment rating of 52 percent was valid. The doctor testified that he arrived at the 52 percent sensory impairment rating by applying chapter two of the guide on the peripheral spinal nerves, though he was aware claimant had no known dysfunction of the peripheral spinal nerves. It was his opinion that chapter two of the guide was appropriate whether or not there was actual dysfunction of the nerves. Dr. Phipps further testified that he based his sensory impairment rating exclusively on the claimant's statements to him concerning the nature and extent of her pain.

Finally, Dr. Phipps testified that he was unaware of claimant's 1974 injury to her right arm. He admitted that the injury was not included in the history given to him by claimant. It was Dr. Phipps' opinion that this injury very likely could have caused nerve damage through scarring and that it would be a factor to consider in evaluating claimant's present disability.

Defendants' exhibit "O" was admitted into evidence which is a copy of chapter two of the guide upon which Dr. Phipps calculated claimant's disability rating. Chapter two states in relevant part:

> This "Guide" provides criteria for evaluating permanent impairment resulting from dysfunction of the various peripheral spinal nerves.
>
> ....
>
> In evaluating pain associated with peripheral spinal nerve disorders the physician should consider: (1) how the pain interferes with the individual's performance of the activities of daily living, eg, annoys but is forgotten during activity, or interferes with activity, or prevents activity, or causes outcries as well as preventing activity; (2) to what extent the pain follows the dermatome distribution (see p. 56); and (3) to what extent the description of the pain indicates that it is caused by the peripheral spinal nerve impairment, ie, the pain should correspond to other aspects of disturbance in the involved nerve or nerve root. Subjective complaints of pain which cannot be substantiated along these lines are not considered within the scope of this guide.

Defendants also submitted several medical reports into evidence. Exhibit C is a copy of a medical report from Robert A. Morantz, M.D. Dr. Morantz's report recites claimant's contention that her problems arose from the work injury. It also says claimant believed she had several tumors of her nerves. X-rays showed a "swan neck," with questionable osteoarthritis. A myelogram was performed which was normal. Several documents were introduced from M. W. Andre, M.D. Neither Dr. Morantz nor Dr. Andre found any permanent neurological damage to claimant. Defendants' exhibit E is a report from Dr. Andre which establishes that claimant was released to return to work on September 11, 1979.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 10, 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).

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.

Section 85.27, The Code, provides in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury.

ANALYSIS

The report and findings of Dr. Phipps will be rejected and the findings of Drs. Morantz and Andre are accepted as having greater reliability. The report of Dr. Phipps is rejected for the following reasons. First, he was not the treating physician. Second, he was not given a full and complete history of claimant's prior injuries to her arm. Third, by his own admission his motor impairment rating is not accurate. Fourth, his sensory impairment rating was based entirely on claimant's subjective complaints which chapter two of the AMA Guide is not designed to rate.

The reports of Drs. Morantz and Andre are accepted as having greater reliability because they were treating physicians. Also, each is a neurosurgeon having particular expertise in evaluation of peripheral nerve and spinal injuries. Finally, each of the doctors based their opinions on substantially objective diagnostic tests.

Claimant was watched closely during this proceeding. It was sad to observe her obvious inability to face her family and friends as they testified about her inability to work, in apparent ignorance of the fact that claimant had worked off and on for at least 21 months after her injury.

While it is clear that claimant is suffering from some form of malady it is not clear that this malady was caused by the June 10, 1979 injury.

Finally, claimant did not establish that any of the medical care other than that of Dr. Andre was authorized by defendants. Defendants have continued to pay for the services of Dr. Andre and claimant has offered no justification for incurring the medical expenses she did. Clearly, claimant was not dissatisfied with Dr. Andre since she was engaging his services as late as 1983. In addition, she has failed to establish an emergency situation which would have required immediate attention.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, based upon the evidence presented and principles of law above stated the following findings of fact and conclusions of law are made:

FINDINGS OF FACT:

1. On June 10, 1979 claimant fell at work when she tripped over an electrical cord.

2. As a result of her fall claimant was off work from June 10, 1979 until October 1979.

3. It was medically indicated that claimant could return to work on September 11, 1979.

4. Claimant was authorized to seek treatment from Dr. Lund and Dr. Andre.

5. Defendants paid claimant temporary total disability from June 10, 1979 to September 11, 1979.

6. Claimant did not suffer any permanent disability as a result of her fall.

7. Defendants have paid all authorized medical expenses.

CONCLUSIONS OF LAW:

Claimant has failed to prove by a preponderance of the evidence that the cause of her disability is the injury of June 10, 1979.

Claimant has failed to prove by a preponderance of the evidence that she was authorized to receive medical treatment from anyone other than Drs. Lund and Andre.

ORDER

THEREFORE, claimant shall take nothing further from these proceedings.

Pursuant to Industrial Commissioner Rule 500-4.33, defendants are ordered to pay the costs of the attendance of the certified shorthand reporter. Claimant shall pay all remaining costs.

Signed and filed this 20th day of March, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SCOTT R. ROSS,
Claimant,
vs.
LAND O'LAKES, OAKLAND DIVISION,
Employer,
Self-Insured,
Defendant.

FILE NO. 745340

A R B I T R A T I O N

FILED

AUG 15 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Scott R. Ross against Land O'Lakes, Oakland Division, a self-insured employer. Claimant alleges that he sustained an injury arising out of and in the course of his employment on or about March 17, 1983. He alleges that the injury occurred as a result of repetitive use of his right upper extremity.

The hearing commenced June 22, 1984 at the Pottawattamie County Courthouse in Council Bluffs, Iowa. Claimant appeared in person and with his attorney Timothy O'Grady. Defendant appeared through its counsel James Thorn. The case was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of claimant, Nancy Finegan and Ray Oslund. Also admitted into evidence were joint exhibits A through Q and claimant's exhibits 1 through 6.

ISSUES

The issues presented by the parties at the time of hearing are whether claimant sustained an injury arising out of and in the course of his employment; whether there is a causal connection between any disability which claimant exhibits and his employment; a determination of the nature and extent of any disability which is causally connected to claimant's employment; and a determination of claimant's entitlement to benefits.

Defendants raised as a defense a lack of notice of injury under the provisions of Code section 85.23.

It was stipulated by the parties that in the event of an award the correct rate of compensation is $235.87 per week. It was also stipulated that the employer has paid all of claimant's medical expenses incurred for treatment of the alleged injury.

REVIEW OF THE EVIDENCE

Scott R. Ross testified that he is 22 years of age, married with one minor child and that he graduated from high school in 1979. He denied any other formal education.

Claimant described his prior medical history as having twice been treated on an outpatient basis for motorcycle accidents which resulted in a broken leg on one occasion and lacerations on another. He described his general health as good and denied any inpatient hospitalization.

Claimant related that he has previously worked as a laborer and forklift operator and a mason's assistant. He denied that any of these activities caused any problem or discomfort in his collarbone area even though such involved lifting weights of as much as 40 pounds on a regular basis and occasionally as much as 75 pounds.

Claimant testified that he commenced work with Land O'Lakes October 7, 1981 trimming meat from between ribs. This work required lifting approximately 10 pounds. After approximately six months he was assigned removing arm bones which required lifting approximately 40 pounds. After approximately eight months at that position he was assigned to removing neck bones from chucks which required lifting in the range of 50 to 100 pounds.

On March 17, 1983 claimant contacted the plant nurse complaining of pain and popping in his right collarbone area. He testified that he had noticed the sensation approximately two weeks earlier and that it had been fairly constant since that time. He denied having that sensation prior to March, 1983. Claimant was seen by Charles L. Pigneri, D.O., and was referred on to Timothy C. Fitzgibbons, M.D.

While treating with Dr. Fitzgibbons claimant was placed on light duty. He continued to work until the plant closed in May, 1984. Claimant has now obtained work as a press operator at the Red Oak Forge where he is required to lift weights of approximately 20 pounds at a rate of approximately 150 times per hour.

Claimant testified that since March, 1983 his collarbone pops out of joint on strenuous activity. He stated that such causes a loss of strength but no loss of control. He described the sensation as catching and painful and stated that it is accompanied by swelling. He stated that it slows him down and caused him difficulty in keeping up with the production line at Land O'Lakes. He related that the collarbone continues to bother him while working at the forge and that it was bothering him at the time of hearing. Claimant testified that, while he was unemployed following the Land O'Lakes plant closing, the condition of his collarbone remained the same.

Claimant testified that he sought other jobs before commencing work at the forge. He has inquired about work in areas other than general labor and has looked into vocational rehabilitation.

Claimant testified that he first consulted an attorney in regard to this matter approximately six months after seeing Dr. Fitzgibbons and stated that he was called upon by an adjuster approximately two months after March 17, 1983.

Nancy Finegan testified that she was formerly employed as a plant nurse by Land O'Lakes. She identified exhibit O as nursing station records maintained by another former employee in the nursing department.

Ray Oslund testified that he was claimant's lead foreman at Land O'Lakes. He testified that at the end of April, 1984, claimant's name was not on the light duty list.

Exhibits A through E are records of claimant's prior medical history centering upon the treatment he received following motorcycle accidents. There is no indication in the records of any injury to his sternoclavicular joints.

When Dr. Fitzgibbons saw claimant on March 18, 1983, it was his impression that claimant had a chronic subluxation of both sternoclavicular joints, more marked on the right, with recent irritation and swelling secondary to his work at Land O'Lakes. (Deposition page 5) He related that claimant could remember no other specific trauma, other than the work he did at Land O'Lakes as the source of the problem. Dr. Fitzgibbons was of the opinion that claimant had a predisposition to sternoclavicular subluxation as a result of a developmental abnormality and that such preexisted claimant's work at Land O'Lakes. (Dep. pp. 22 & 23) He expressed the opinion that claimant would not have developed symptoms of pain, swelling and popping if he had been performing sedentary work and that claimant should not continue to do strenuous upper body labor. (Dep. pp. 13 & 14)

Dr. Fitzgibbons rated claimant as having a permanent impairment of 10 percent of the body as a whole as a result of his condition, with the impairment rating being based on the pain and swelling and limitation of function which claimant exhibited, not directly to the dislocation itself. (Dep. pp. 17, 18, 35 & 36)

At page 15 of his deposition the following discussion occurred:

Q. I believe you testified that you would expect him to continue to have trouble if he continued to do strenuous upper body work.

A. Uh-huh.

Q. Would his condition deteriorate further from what it is if he continued to do strenuous upper body work?

A. I think it would be an excellent chance that that would happen, yes.

Ronald K. Miller, M.D., as shown in exhibit M, found claimant to have an impairment of four percent of the whole body of which approximately 50 percent was based upon claimant's preexisting problems and anatomy and 50 percent upon aggravation caused by his job. He went on to state:

> I think it is interesting that the natural history of these types of problems certainly in conjunction with the occupation would predispose this gentleman to a recurrance of his symptoms if he engages in similar type hard forceful activities. This is simply not a matter of problems relating to Land O Lakes but a matter of defective anatomy.

APPLICABLE LAW AND ANALYSIS

Under the provisions of section 85.23 of the Code of Iowa an employee is required to give an employer notice of the occurrence of a work related injury within 90 days from the date of the occurrence of the injury. This requirement does not apply if the employer, through its representatives, has sufficient knowledge of the injury to cause a reasonably conscientious manager to believe that the potential for a compensation claim exists. Robinson v. Department of Transp., 296 N.W.2d 809, 811 (Iowa 1980). Exhibit O shows that on March 17, 1983 the employer's nurse was aware of claimant's problem and of the referral to Dr. Fitzgibbons. Exhibit F is a report from Dr. Fitzgibbons dated March 30, 1983 which indicates that claimant's condition was related to his employment. The same holds true with exhibit I which is dated May 18, 1983. These reports are certainly sufficient to cause a reasonably conscientious manager to realize that the potential for a compensation claim existed. Defendant's notice defense must fail.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on March 17, 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.

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 (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 claimant has the burden of proving by a preponderance of the evidence that the injury of March 17, 1983 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).

Drs. Fitzgibbons and Miller agree that claimant had an anatomical abnormality which preexisted his employment at Land O'Lakes. They also agree that the strenuous labor which claimant performed at Land O'Lakes caused claimant to become symptomatic. They agree that claimant has a permanent impairment arising from his condition. Dr. Miller states that approximately 50 percent of the impairment which he assigned is a result of claimant's strenuous activities at Land O'Lakes. Dr. Fitzgibbons believes that claimant's condition will deteriorate further if he continues to perform strenuous upper body work. Claimant testified that he was asymptomatic prior to his work at Land O'Lakes but that later, during an extended period of inactivity when he was unemployed, his symptoms did not completely subside.

Claimant's developmental abnormality gave him an increased susceptibility to injury. His problem was medically confirmed, and he has been left in a condition which is worse than that from which he started. The change occurred in a relatively short span of time and cannot be said to be merely the natural changes which come about as a result of a life which has been devoted to labor and hard work. It is therefore found and concluded that claimant did sustain an injury arising out of and in the course of his employment with Land O'Lakes on or about March 17, 1983.

Both doctors have found a permanent impairment and claimant's own testimony establishes that he has not returned to his former state of health even though he has changed jobs and experienced a period of inactivity. This supports that he has sustained a permanent impairment and some degree of permanent disability. The opinions concerning the amount of permanent impairment range from four percent to ten percent.

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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

Claimant's change of employment cannot be related to the injury. Since the employer's plant closed it became necessary for him to seek other employment, the same as other employees. He was able to work until the plant closed and was able to find employment shortly thereafter. Claimant is young and has a high school education. At hearing he appeared to be of at least average intelligence and did not exhibit any propensities which would render him unemployable. There is no evidence in the record of loss of control or loss of range of motion. There is no indication that the injury which he suffered has resulted in industrial disability which is significantly different from his physical impairment. It is therefore found and concluded that the amount of claimant's disability which is related to the injury, when measured industrially, is 7 1/2 percent.

The evidence in this case does not show whether claimant missed any work as a result of the injury except for those occasions when he received medical care. The record does not reflect whether or not claimant was paid during those absences. There having been no healing period under the provisions of section 85.34(1), it is concluded that compensation for claimant's permanent partial disability should begin effective March 18, 1983.

The allowable costs under Industrial Commissioner Rule 500-4.33 are as follows: Rex M. Blair & Associates $169.00; witness fees for the deposition of Timothy C. Fitzgibbons, M.D., in the amount of $150.00 as limited by Code section 622.72 and $175.00 for the cost of obtaining medical reports from Dr. Fitzgibbons. The balance of the items contained in claimant's exhibits 1 through 6 exceed the scope of the agency rule and cannot be assessed against the defendant.

FINDINGS OF FACT

1. Claimant is a resident of the State of Iowa and his place of employment for defendant was in the State of Iowa.

2. Claimant was injured on March 17, 1983 as a result of repetitious strenuous movement of his right upper extremity. The injury was in the nature of an irritation of tissues arising from a subluxation of claimant's right sternoclavicular joint.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD E. SANDELIN,	:	
	:	FILE NO. 450186
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	F I L E D
POLK COUNTY, IOWA,	:	R E O P E N I N G
	:	D E C I S I O N
Employer,	:	AUG 14 1984
Self-Insured,	:	
Defendant.	:	IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Donald E. Sandelin, claimant, against Polk County, Iowa, the self-insured employer, to recover benefits under the Iowa Workers' Compensation Act as a result of injuries he sustained on January 1, 1976 and February 28, 1976.

This matter came on for hearing before the undersigned deputy industrial commissioner in Des Moines, Iowa on October 28, 1983 at which time the record was considered fully submitted.

The record in this matter, based upon the undersigned's notes, consists of the oral testimony of the claimant, his spouse, Ronald Woods, Markay Soll, Stephen Foles, Bill Mackin and Ralph Baker, together with claimant's exhibits 1 through 12 and defendant's exhibits A through H.

The issues in this matter are: (a) whether the claimant's injuries of January 1, 1976 and February 28, 1976 arose out of and in the course of his employment with the defendant; (b) the extent of claimant's functional impairment and; (c) the extent of, if any, claimant's resulting industrial disability.

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

Claimant, age 50 on the date of his injuries, was an employee of the defendant, Polk County, Iowa. He began his employment with defendant during 1973 at which time he was hired in the capacity of a bailiff in the Polk County Courthouse and was so employed in such capacity at the time of his injuries.

In his first injury, that of January 1, 1976, he slipped on the steps coming from a judge's bench in the Polk County Courthouse. He struck his shoulder and his hip against a cement railing and was hospitalized for a period of time. The second injury of February 28, 1976 occurred while he was escorting an unruly spectator out of a courtroom at which time the spectator struck the claimant across the neck and ribs.

The duties of a bailiff required claimant to assist the court in whatever matters the court deemed fit and appropriate. In the first incident he was required to be in the location he was in for the assistance of a prisoner. In regards to the second injury it was required of him to remove the unruly spectator. These two acts fell within the claimant's duties as bailiff.

A medical report from Robert A. Hayne, M.D., submitted by claimant, indicates that an x-ray examination of the cervical spine by James McMillan and Associates was done on November 15, 1976 which showed an inter-body fusion to have been carried out between the 4th and 5th cervical segments and between the 5th and 6th cervical segments. A final diagnosis of residual effects of a herniated disc between the 4th and 5th segments and between the 5th and 6th cervical segments on the right side treated with surgery was made. Dr. Hayne continued in his report to indicate that claimant's condition in the cervical spine had been aggravated by the trauma which he received on February 28, 1976. A diagnosis of a probable seizure disorder characterized by episodes of loss of consciousness without aura was also made.

Robert C. Jones, M.D., in a medical report, also submitted by claimant, established a physical impairment figure of 15 percent to the body as a whole. Thomas A. Carlstrom, M.D., prepared a report which was submitted by defendant whereby he rated claimant as having a one to two percent impairment to the body as a whole.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of January 1, 1976 and February 28, 1976 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).

In applying the foregoing legal principles to the case at hand, it is apparent that the claimant has sustained his burden of proof.

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,

3. At the time of injury claimant was employed by Land O'Lakes working as a neck boner.

4. Claimant lost no time from work as a result of the injury but did require medical care. Following the injury claimant returned to work on March 18, 1983.

5. Claimant presently exhibits permanent functional impairment in the range of from four percent to ten percent of the body as a whole, of which approximately one-half is attributable to the injury and one-half to the preexisting abnormality.

6. Claimant is 22 years of age, married and has one dependent child.

7. Claimant's normal rate of earning with the defendant employer was $376.73 per week resulting in a rate of compensation of $235.87 per week.

8. Claimant received medical care or evaluation from Drs. Pignęri, Fitzgibbons and Miller, the cost of which has been paid by the employer.

9. At the present time claimant experiences a popping and catching sensation accompanied by discomfort when he engages in strenuous activity with his upper right extremity. He is presently employed.

10. Claimant graduated from high school but has no further formal education.

11. Claimant has work experience as a forklift operator and mason's assistant as well as his packinghouse work and work as a press operator in his current position.

12. Claimant appears to have the intelligence and emotional stability to be regularly employed, and he appears well motivated.

13. Following the injury claimant remained at work with the defendant until its plant closed, and he has since found other suitable work although at a lesser wage.

14. The underlying condition of claimant's sternoclavicular joint preexisted his work with Land O'Lakes, but the work caused an irritation of the tissues surrounding that joint whenever subluxation occurred, resulting in permanent impairment and disability.

15. Claimant incurred fees for the attendance of a court reporter and transcription at the deposition of Timothy C. Fitzgibbons, M.D., in the amount of $169.00, witness fees payable to Dr. Fitzgibbons in the amount of $250.00, of which $150.00 may be allowed as a witness fee and fees for medical reports to Dr. Fitzgibbons in the amount of $175.00.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and of its parties.

The irritation of claimant's sternoclavicular joint resulting from the repetitious strenuous activity he engaged in with his employment with Land O'Lakes constitutes a personal injury.

As a result of the injury claimant sustained on or about March 17, 1983, he has sustained a permanent partial disability of 7 1/2 percent when the same is measured industrially.

Claimant is entitled to recover costs in the total amount of $494.00 under the provisions of Industrial Commissioner Rule 500-4.33.

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant thirty-seven and one-half (37 1/2) weeks of compensation for permanent partial disability at the rate of two hundred thirty-five and 87/100 dollars ($235.87) per week commencing March 18, 1983. Said entire amount is now past due and owing and defendant shall pay the same in a lump sum together with interest pursuant to section 85.30 of the Code of Iowa.

IT IS FURTHER ORDERED that defendant pay the costs of this action in the amount of four hundred ninety-four and no/100 dollars ($494.00) pursuant to Industrial Commissioner Rule 500-4.33.

IT IS FURTHER ORDERED that defendant file a final report within twenty (20) days from the date of this decision.

Signed and filed this 15th day of August, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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 applying the foregoing to the case under review, it is concluded that this 50 year old former bailiff has sustained an industrial disability of 30 percent of the body as a whole. Claimant is of an age and background that does realistically operate against a new vocational area in light of his existing functional impairment.

Dr. Jones, in his report, states:

> The problem in this man is that I am afraid to let him go back to his original job because of his slight build and the question of a man with such a build and in such a job as a baliff [sic] trying to fend off the slings of the fortunes that may befall him in such a job following his experience since my operation in September. It would be far better if he could be adapted to a different kind of work, such work to entail less possibility of fisticuffs with the public. I think that his actions as stated were obviously work-related.

It is further clear that based upon the opinion of Dr. Jones, claimant's current medical difficulties are casually connected to his February 28, 1976 injury.

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

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

2. That the claimant sustained two admitted industrial injuries on January 1, 1976 and February 28, 1976, respectively.

3. That the claimant was paid a healing period from March 3, 1976 until July 2, 1978 for a period of 12 5/7 weeks.

4. That the claimant has found employment as a mobile home park manager and that his healing period has been fully paid by the defendant employer.

5. That the claimant cannot return to his former occupation of court bailiff.

6. That the claimant has sustained an industrial disability of 30 percent of the body as a whole due to his cervical instability.

THEREFORE, IT IS ORDERED that defendant pay claimant a period of permanent partial disability of a one hundred fifty (150) week duration at the agreed rate of one hundred two and 99/100 dollars ($102.99) per week in a lump sum together with legal interest beginning on July 3, 1978.

Costs are charged to the defendant who is further directed to file a final report within twenty (20) days from the date that this decision becomes final.

Signed and filed this 14 day of August, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD A. SCHAER, Claimant, vs. CITY OF MASON CITY, Employer, and UNITED STATES FIDELITY & GUARANTY COMPANY, Insurance Carrier, Defendants.	File No. 629318 R E V I E W - R E O P E N I N G D E C I S I O N

FILED
JUL 24 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Donald A. Schaer, claimant, against City of Mason City, employer, and United States Fidelity & Guaranty 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 January 22, 1980. It came on for hearing on January 4, 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 received March 4, 1980. A memorandum of agreement was filed on the same date. A final report shows the payment of ten weeks and five days of healing period benefits and four percent of the right lower extremity as well as medical benefits.

At the time of hearing the parties stipulated to a rate in the event of an award of $168.10.

The record in this matter consists of the testimony of claimant, Sharon Schaer, Charles B. Hammen, Eugene Kleinow and Myron Langhoff; claimant's exhibit 1, a letter from Robert E. McCoy, M.D., dated January 24, 1980; claimant's exhibit 2, a letter dated April 18, 1980 from Dr. McCoy with accompanying notes; claimant's exhibit 3, notes from Dr. McCoy; claimant's exhibit 4, notes from Dr. McCoy; claimant's exhibit 5, a letter from Dr. McCoy dated October 20, 1981; claimant's exhibit 6, a letter from Dr. McCoy dated November 30, 1981; claimant's exhibit 7, a letter dated June 17, 1983 from Dr. McCoy; claimant's exhibit 8, a letter from Dr. McCoy dated July 8, 1983; claimant's exhibit 9, records from North Central Correctional Facility; claimant's exhibit 10, records from Anamosa; claimant's exhibit 11, a letter from Dr. McCoy dated August 3, 1983; claimant's exhibit 12, unpaid medical expenses; claimant's exhibit 13, report expenses; claimant's exhibit 14, mileage expenses; claimant's exhibit 15, a statement to Job Service; defendant USF&G's exhibit A, an employee attendance record; and defendant USF&G's exhibit B, an attendance record. The record in the prior hearing of January 9, 1980 was reviewed in its entirety although it is not set out in detail herein.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and his disability; and whether or not claimant is entitled to further permanent partial disability relating to his injury of January 22, 1980.

STATEMENT OF THE CASE

Forty-four year old married claimant recalled having a hearing on January 8, 1980. Claimant said that his first back injury was in January of 1969 while he was working for the sanitation department. He denied any injuries prior to that time. He fell flat on his back. He had surgery and returned to work. A claim for compensation was resolved with a special case settlement. It was his understanding he was paid disability for the injury. In 1976 he had another injury while working for the water department. He and another employee were carrying a water tapping tool. He had a pop in his back. He was not hospitalized, but he was treated with bed rest and medication. By the time of a 1978 injury to his left knee he was back at the sanitation department. He was classified as a driver, but he still picked up garbage In May of 1979 he had back pain and went off work. A short time after his January 8, 1980 hearing he had an additional injury.

He remembered: He was working in sanitation picking up garbage. It was "real icy." He went down on his right kneecap. He called Dr. McCoy who drained blood from his knee and then did surgery. He was placed in a full leg cast. He was off work and received temporary total disability payments from January 22, 1980 to April 6, 1980.

At the time of his return to work he was placed in a garage on light duty. He went back on the garbage truck when he was given clearance by the doctor. Claimant reported that he got along well except for some problems with his back which he

relieved by having his helper drive and he picked up the garbage.

He denied any injury during the time from April 7, 1980 to August 4, 1980. Rather he said that his back had started hurting "out of the clear blue sky." He had a burning sensation in his back. He was off work from August 4, 1980 to October 9, 1980 because of his back. He took sick leave and vacation to keep defendant employer from learning of his trouble.

In October claimant went back to driving a garbage truck and loading and unloading. He worked until he had left knee surgery in March of 1981. Surgery which had been scheduled for later was moved up when his knee locked as he was working. Claimant received weekly benefits from March 16, 1981 to August 9, 1981. He was in a full leg cast. Claimant acknowledged removing his cast on three separate occasions, but he did not feel his actions extended his healing time.

When he was released to return to work he was under no specific restrictions by Dr. McCoy. He anticipated returning to the garbage truck. He took some vacation time. On his resumption of work, he was sent to be a parking lot attendant. He had some forewarning of this in that he got a letter from defendant employer while he was on vacation. He asserted that he did not consent to the change and that he wished to be a garbage driver. As a parking lot attendant he sat for most of the time. The sitting bothered his back and he got up and walked and stood. If the machine was not working, he noted times. He collected money. The parking lot job paid $3.35 per hour. He lost benefits because although he worked forty hours he was considered part-time help. As a garbage worker he did not need to be on the job for forty hours. Work as a garbage driver gave him $7.28 per hour, a day and one-half sick leave each month, a paid vacation and paid life and health and accident insurance.

When a heavy equipment job opened he applied. The union tried to help him. Dr. McCoy was sent a description of the job, but claimant was not hired. A water meter job also became available. Again, the union helped and a letter was sent to Dr. McCoy who decided claimant could lift a 200 pound meter with help.

Claimant grew disgusted with defendant employer and filed a civil rights complaint which was later administratively closed.

Claimant worked the parking lot job until December 1, 1981 at which time he was suspended until he went to trial on criminal charges. As a result of that trial he was found guilty and served a year before being paroled.

Claimant claimed no new injuries from the time he went to work as a parking lot attendant or while he was incarcerated. He indicated that while he was in jail his back bothered him from time to time and he took Anacin. In April of 1983 his back tied up and he had trouble getting out of bed. He was given Motrin to take as he needed it.

In May of 1983 he came home to his family and began looking for employment. He testified that he has put down his injuries and his criminal charges on his applications. He had some part-time work until October. Beginning in late October he started part-time work as a cutting torch operator. His work provides him with no benefits and an hourly rate of $5.00. He averages close to thirty hours. The job necessitates standing and bending. The iron which he cuts is picked up by a machine. He takes pills for his pain and tries to keep it out of his mind.

As to his present condition with his back, claimant complained of pain from the beltline down into the buttocks on the right and sometimes on the left which bothers him at night. He has some cramping. Any activity can bring on pain. On comparing his difficulties he has now with those experienced before January of 1980, he said that his pain is more frequent and requires use of two Motrin tablets whereas before one would suffice, or he would walk off the problem, or it would be relieved by Anacin. His pain does not go into his lower leg.

Claimant also compared his left leg condition as it is at present and as it was presurgery in March of 1981. Popping in his left knee is about the same or perhaps more. He considered the surgery unsuccessful in that his knee is worse now than before. Moving too fast will cause the knee to buckle.

The right knee is less trouble. It still pops, but it does not catch as catching was helped by the surgery. Overall, his right knee remained close to the same.

Claimant said that he has not been paid mileage since January of 1980.

Claimant admitted having a part-time salvage business in which he went around and picked up junk and old cars. While he agreed that lifting was necessary, he said that he had special methods for doing it and that things were not as heavy because they were cut into pieces. After his release from prison he worked at this for a while, but since he got the job in October he has not had the time. He recalled that his earnings from this before his prior hearing in January of 1980 averaged $100 weekly. His children now help with pickup.

Claimant recalled that he worked on stock cars until September of 1981. By using special equipment he is able to work on his own vehicles.

Claimant denied that either work on stock cars or in his salvage business aggravated his condition.

Claimant insisted he could labor as a garbage worker by living with his back or as a meter repairperson if he had extra help with lifting meters.

Claimant asserted the city was responsible for his criminal acts. Claimant acknowledged a prior incident with another child for which he sought help. He had a discussion about moving to the water meter repairperson's job on okay from his doctor. The doctor said the work would be all right, but claimant did not know that the city agreed to this change until after his suspension. Dr. McCoy approved on November 30, 1981. Claimant was incarcerated on December 1, 1981. Claimant recalled having been told by his union representative that he would not be given the water meter job. He commenced drinking at 10:00 a.m. and later assaulted his daughter. He denied being told by the city after his arrest that should he be found not guilty he could have the water meter job. Instead, he said he was told by Kleinow that he would not work for the city again.

Claimant testified that he has not contacted any of his former supervisors since his release from prison as he did not think it would do any good.

Claimant alleged his entitlement to compensation from August 8, 1980 to October 9, 1980 as he was off for back pain. Claimant denied his being off was related to any incident while working on his personal car or a stock car. During this period he took some vacation in August. He said that he stayed home except for a few days in Missouri.

Claimant completed ninth grade. His work experience prior to beginning work for defendant had been loading bread and fertilizer, doing various jobs for a cement company with one job as a monitor, operating a forklift, and laboring and driving a truck for a construction company.

A review of records seems to show claimant was off work from August 1 until August 15, 1980. Beginning on August 18, 1980 claimant took vacation through September 5, 1980. He took sick leave the week of September 8 and then went on light duty on September 14.

In 1981 claimant took vacation the week of March 9. He seemingly drew compensation from March 17, 1981 until August 9, 1981. It appears he may have worked in garbage for about eight days. He took vacation from August 24 until September 15, 1981 wnen he was moved to parking lot attendant.

Sharon Schaer, claimant's spouse, a nurse's aide, who was separated from him from December 1, 1981 until he got out of prison, testified that although claimant has not called the doctor and has not complained, she is aware of his having frequent back problems by the way he walks and bends. She massages his back and gives him medication. It was her opinion that he has had a gradual worsening of his condition since his hearing in 1980. She reported claimant's spending time in bed when he is off work.

Schaer was unaware of any nonwork injury.

Regarding claimant's knees, she claimed that the popping sound which was present before is now louder. Claimant's feet are cold.

The witness recalled that when claimant was changed from garbage work to the parking lot he was angry and became withdrawn. He also commenced drinking heavily. She asserted that this was new for him as he had been only a social drinker. Drinking was not involved in the first assault with one of their children.

Charles Hammen, who has been employed with the city for thirteen and one-half years, testified to the circumstances surrounding claimant's attempt to move to the water department: The water department had a job available on October 6, 1981. Normal procedure was to post the job. Thereafter, employees wishing to make application could apply. After a two week posting period, the job would be offered to the senior employee or the person with the most time working for the city.

Claimant filed an application on October 7. An investigation was made of claimant's physical capabilities to perform the work. Dr. McCoy was contacted.

Claimant was not terminated until May 4, 1982 after his sentencing. The water department vacancy was filled on May 10, 1982. If claimant had been acquitted, he would have gotten the job as the senior applicant. The union was relied upon to make claimant aware that the water meter job was being kept open.

Myron Langhoff, sanitation foreman for the city of Mason City since 1967, testified to being responsible for claimant's attendance records. According to those records claimant returned to light duty on Septmeber 14, 1980 in the street department where he was paid at the same rate. He explained that if claimant kept his compensation check the city made up the difference between sick leave and vacation pay. Employees are permitted to build up to 120 days of sick leave. There is no reimbursement for the accrued sick leave. In August of 1980 claimant took sick pay and vaction and then sick pay again. He said that claimant took compensation in August and September of 1980.

Langhoff recalled having been told by claimant he had an operation coming up in March of 1981. The witness did not know whether it would be covered by workers' compensation.

Eugene Kleinow, currently police chief for Mason City, testified to being an administrative captain in September of 1981 and to being supervisor of the parking lot attendants. He acknowledged knowing both that claimant had been arrested and had been temporarily suspended. He denied telling claimant that he would not work for the city again and said that he would not have had the authority to do so. He stated that he had nothing to do with the award of the water meter job.

Robert E. McCoy, M.D., performed an arthroscopy on both of claimant's knees on January 16, 1980 and found evidence of degenerative arthritis of the medial compartment on the left and to a somewhat lesser degree on the right. There was no evidence of a meniscal tear. In a letter dated January 24, 1980 Dr. McCoy proposed that claimant undergo a high tibial osteotomy on the left "to transfer the center of maximum weight bearing from the medial side of the knee, where his severe degenerative arthritis is, to the lateral compartment of the knee joint which has been relatively spared from the severe degenerative arthritis." He anticipated that degenerative arthritis on the right would progress at a slower rate, but that eventually he would need the high tibial osteotomy on the right as well. The doctor wrote: "In retrospect it would seem that the episodes of increasingly frequent injury to his knees with symptoms of popping and giving way of the knees have been associated with and probably caused by his gradually increasing degenerative arthritis of both knees."

Dr. McCoy recorded an injury to the right knee on January 22, 1980 when claimant slipped on ice while he was on his garbage route. As a result of the slip he sustained a fracture of the lateral portion of the patella. After an arthroscopy a fragment of the patella was removed. The doctor stated that this injury was "completely unrelated to his [claimant's] previous knee difficulties."

Claimant was released for work on April 7, 1980. He worked for two days and then commenced having pain in the right lower lumbar area. Discomfort decreased during the day. Medication was prescribed. Dr. McCoy related claimant's symptoms at that time to his back and not his knee.

On August 8, 1980 claimant visited the doctor using one crutch and complaining of severe back pain in the lower midline. More specifically, the pain was in the lumbosacral joint area and the sacral area in the midline. There was no radiation, but motion was painful. The right ankle jerk was absent. Straight leg raising on the right at 20° caused pain which increased on sciatic stretch. Straight leg raising to 35° on the left caused pain without positive sciatic stretch. Dr. McCoy thought claimant had nerve root irritation based on mild disc protrusion and consented to claimant's having complete bed rest at home.

When claimant came back the next week, he spoke of trying to find lighter work with the city in the water or street departments. Claimant was found to be improved with negative straight leg raising. He was moved to increasing ambulation and partial bed rest with no bending or lifting.

The doctor was visited by two persons from the city--Myron Langhoff and Robert Sceffler. According to the doctor's notes, the two expressed concern regarding claimant's ability to tolerate work as a garbage man. Dr. McCoy agreed that claimant would be better off doing lighter work.

On August 26, 1980 the physician wrote of recommending claimant being given lighter work, but he noted that as of yet there was no lighter work available through the city.

When claimant was seen on October 7, 1980, he reported working at the city garage doing maintenance work on a temporary basis. Claimant thought he was able to return to garbage collecting. An inch of atrophy was found in claimant's right thigh. Emphasis was placed on claimant's doing his leg exercises to overcome the atrophy.

In early 1981 claimant's main complaint was of low back pain with episodes of subjective numbness in his posterior right thigh. X-rays of the knee compared to those taken in 1979 before his injury showed no progression of degenerative arthritis. Permanent partial impairment of the function of claimant's right lower extremity was rated at four percent.

In March of 1981 claimant underwent a valgus type high tibial osteotomy on the left. There was some problem with keeping claimant in his cast, but claimant gradually progressed to weight bearing. He was to return to work on August 6, 1981.

When claimant was seen on October 3, 1981 he told the doctor of his transfer to parking lot attendant. Claimant returned on October 20, 1981 with a job description for the water meter repairperson. After reviewing the description which apparently included the ability to lift 200 pounds with the assistance of tools and another worker, Dr. McCoy concluded claimant's condition would be compatible with performing the work if it was done infrequently. A letter was written on October 20, 1981 which so indicated. The doctor anticipated claimant would be able to tolerate squatting and kneeling to install meters and to do intermittent lifting of meters weighing sixty to sixty-five pounds. It seems that a description of the job of heavy equipment operator also was reviewed and that position was found less appropriate.

Medical information from the men's reformatory indicates that when claimant was evaluated in September of 1982 he was given a bedboard. He took no medication and apparently told his evaluator he had learned to live with his discomfort. In December claimant was given Tylenol for back and knee pain.

Early in 1983 claimant was given a knee wrap. In April claimant had an episode of low back pain. Motrin was given. Claimant was subsequently allowed to use his back brace.

A status report from May 1983 notes that claimant was working with no restrictions before April 14, 1983 when he had an episode of back pain. He made no knee complaints to that date.

Claimant was reevaluated by Dr. McCoy on June 17, 1983. Claimant's complaints were of low back aches across the lower lumbar spine for which he took Motrin, wore a lumbosacral belt and walked; snapping, popping and tenderness in the right knee with the primary problem in the lateral parapatellar area; and occasional popping in the left knee.

On examination claimant had a slight list to the left. He bent forward to within eight inches of touching the floor with pain in the lumbosacral joint area. The right ankle jerk which had been absent since the 1969 surgery was absent. Combined straight leg raising to 85° caused a feeling of pulling in the low back. There was a varus deformity of 60° on the right knee and a valgus of 10° on the left. Varus on the right was viewed as abnormal. Tenderness to palpation was present over the lateral facet of the right patella. X-rays of the lumbar spine showed no further narrowing at L5-S1 in comparison with the films taken in May of 1980. There was slight Schmorl's Node formation at D12-L1 and at D11-D12. There was no progression of narrowing in the medial joint line in the right knee when it was viewed with films taken in January of 1981. X-rays of the left knee taken in May of 1983 evidenced narrowing of the medial joint space.

In a letter dated July 8, 1983 Dr. McCoy reviewed his prior ratings of claimant's impairments noting that on February 21, 1980 he gave a fifteen percent impairment to the left lower extremity and eight percent to the right lower extremity with the latter attributable to degenerative arthritis; an additional four percent to the right lower extremity resulting from the patellar fracture of January 22, 1980; five percent of the whole man related to a 1969 disc problem; and five percent of the whole man because of the 1976 injury. His present impairment ratings are set out thusly:

> I would estimate his permanent partial impairment of function of the whole man from his back at 15% of which I would estimate 3% to be related to further work injury. I think his permanent partial impairment of function of the left lower extremity was diminished by his high tibial osteotomy to about 12%, which has remained the same to the present time. I think that the permanent partial impairment of function of the right lower extremity has increased from the 12% rating I previously gave to 15% at the present time.

The doctor explained his increase in the permanent partial impairment rating as follows:

> In April of 1980 he was seen for low back pain apparently aggravated by work and in August of 1980 he was having fairly severe pain again which made it necessary for him to be off work from August until October of 1980. As a result of that episode of low back pain, I recommended to his employer that he be given lighter work. It was because with the episode of August 1980, his condition changed to the extent that I felt permanent arrangements should be made for lighter work. That I felt his permanent partial impairment of function rating as a result of work related back problems should be increased by 3% over the previous rating as it had not been felt prior to that that any long term modification of his work activities should be made. I feel that since his status at that time required a change in his recommended work designation further impairment of function had been incurred as a result of back aggravation at work.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 22, 1980 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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).

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).

Claimant testified that his right knee has remained much the same since his surgery.

When claimant was seen on October 7, 1980 he had no pain in his knee, but occasional crepitus. He did have some atrophy on the left. The doctor suggested he do exercises. In January of 1981 claimant's impairment was rated at four percent of the right lower extremity.

Dr. McCoy saw claimant in June of 1983 to reevaluate the right knee. Claimant complained of snapping and popping and of tenderness in the patella area which prevented his kneeling. X-rays taken at that time showed irregularity of the patella laterally from the previous patella fracture. Dr. McCoy increased his rating of the right lower extremity by three percent.

Iowa Code section 85.34(2)(o) provides:

> The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred twenty weeks.

Claimant will be awarded an additional 6.6 weeks permanent partial disability to his right lower extremity.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant injured his right knee in January of 1980.

That claimant's knee injury was treated with surgery.

That claimant had a four percent (4%) permanent impairment to his right lower extremity in January of 1981 which was attributable to his January 1980 injury.

That claimant had degenerative arthritis in his knee prior to the injury.

That claimant has been paid for four percent (4%) of a right lower extremity.

That based on x-ray findings, Dr. McCoy has increased his rating to the right lower extremity by three percent (3%).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence a causal relationship between his injury of January 22, 1980 and his present disability to his right lower extremity.

That claimant has established entitlement to an additional six and six tenths (6.6) weeks of permanent partial disability to his right lower extremity.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant six and six-tenths weeks of permanent partial disability benefits at a rate of one hundred sixty-eight and 10/100 dollars ($168.10).

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay Dr. McCoy fourteen dollars ($14.00)

That defendants pay North Iowa Medical Center fifty-nine and 50/100 dollars ($59.50).

That defendants pay drug charges with Medical Arts Pharmacy of twelve and 50/100 dollars ($12.50).

That defendants pay the following milage expenses:

3 trips to Dr. McCoy totaling 30 miles at $.18 per mile.
1 1/2 trips to Dr. McCoy totaling 15 miles at $.20 per mile
1/2 trip to Dr. McCoy totaling 5 miles at $.24 per mile.

That defendants pay one-fourth (1/4) of the costs of the proceedings on January 4, 1983 pursuant to Industrial Commissioner Rule 500-4.33 including twenty-seven and 50/100 dollars ($27.50) for report expenses from Dr. McCoy.

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

Signed and filed this 24 day of July, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD A. SCHAER, Claimant, vs. CITY OF MASON CITY, Employer, and UNITED STATES FIDELITY & GUARANTY COMPANY, Insurance Carrier, Defendants.	:	File No. 753618 R E V I E W - R E O P E N I N G D E C I S I O N FILED JUL 24 1984 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Donald A. Schaer, claimant, against the city of Mason City, employer, and United States Fidelity & Guaranty 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 May 18, 1979. It came on for hearing on January 4, 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 received April 17, 1980. A final report shows the payment of nine weeks and five days of temporary total disability as well as medical expenses.

At the time of hearing the parties stipulated that the rate was fixed by the prior decision at $156.47.

The record in this matter consists of the testimony of claimant, Sharon Schaer, Charles B. Hammen, Eugene Kleinow and Myron Langhoff; claimant's exhibit 1, a letter from Robert E. McCoy, M.D., dated January 24, 1980; claimant's exhibit 2, a letter dated April 18, 1980 from Dr. McCoy with accompanying notes; claimant's exhibit 3, notes from Dr. McCoy; claimant's exhibit 4, notes from Dr. McCoy; claimant's exhibit 5, a letter from Dr. McCoy dated October 20, 1981; claimant's exhibit 6, a

letter from Dr. McCoy dated November 30, 1981; claimant's exhibit 7, a letter dated June 17, 1983 from Dr. McCoy; claimant's exhibit 8, a letter from Dr. McCoy dated July 8, 1983; claimant's exhibit 9, records from North Central Correctional Facility; claimant's exhibit 10, records from Anamosa; claimant's exhibit 11, a letter from Dr. McCoy dated August 3, 1983; claimant's exhibit 12, unpaid medical expenses; claimant's exhibit 13, report expenses; claimant's exhibit 14, mileage expenses; claimant's exhibit 15, a statement to Job Service; defendant USF&G's exhibit A, an employee attendance record; and defendant USF&G's exhibit B, an attendance record. The record in the prior hearing of January 9, 1980 was reviewed in its entirety although it is not set out in any detail herein.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and his disability; and whether or not claimant is entitled to permanent partial disability relating to his injury of May 18, 1979.

STATEMENT OF THE CASE

Forty-four year old married claimant recalled having a hearing on January 8, 1980. Claimant said that his first back injury was in January of 1969 while he was working for the sanitation department. He denied any injuries prior to that time. He fell flat on his back. He had surgery and returned to work. A claim for compensation was resolved with a special case settlement. It was his understanding he was paid disability for the injury. In 1976 he had another injury while working for the water department. He and another employee were carrying a water tapping tool. He had a pop in his back. He was not hospitalized, but he was treated with bed rest and medication. By the time of a 1978 injury to his left knee he was back at the sanitation department. He was classified as a driver, but he still picked up garbage. In May of 1979 he had back pain and went off work. A short time after his January 8, 1980 hearing he had an additional injury.

He remembered: He was working in sanitation picking up garbage. It was "real icy." He went down on his right kneecap. He called Dr. McCoy who drained blood from his knee and then did surgery. He was placed in a full leg cast. He was off work and received temporary total disability payments from January 22, 1980 to April 6, 1980.

At the time of his return to work he was placed in a garage on light duty. He went back on the garbage truck when he was given clearance by the doctor. Claimant reported that he got along well except for some problems with his back which he relieved by having his helper drive and he picked up the garbage.

He denied any injury during the time from April 7, 1980 to August 4, 1980. Rather he said that his back had started hurting "out of the clear blue sky." He had a burning sensation in his back. He was off work from August 4, 1980 to October 9, 1980 because of his back. He took sick leave and vacation to keep defendant employer from learning of his trouble.

In October claimant went back to driving a garbage truck and loading and unloading. He worked until he had left knee surgery in March of 1981. Surgery which had been scheduled for later was moved up when his knee locked as he was working. Claimant received weekly benefits from March 16, 1981 to August 9, 1981. He was in a full leg cast. Claimant acknowledged removing his cast on three separate occasions, but he did not feel his actions extended his healing time.

When he was released to return to work he was under no specific restrictions by Dr. McCoy. He anticipated returning to the garbage truck. He took some vacation time. On his resumption of work, he was sent to be a parking lot attendant. He had some forewarning of this in that he got a letter from defendant employer while he was on vacation. He asserted that he did not consent to the change and that he wished to be a garbage driver. As a parking lot attendant he sat for most of the time. The sitting bothered his back and he got up and walked and stood. If the machine was not working, he noted times. He collected money. The parking lot job paid $3.35 per hour. He lost benefits because although he worked forty hours he was considered part-time help. As a garbage worker he did not need to be on the job for forty hours. Work as a garbage driver gave him $7.28 per hour, a day and one-half sick leave each month, a paid vacation and paid life and health and accident insurance.

When a heavy equipment job opened he applied. The union tried to help him. Dr. McCoy was sent a description of the job, but claimant was not hired. A water meter job also became available. Again, the union helped and a letter was sent to Dr. McCoy who decided claimant could lift a 200 pound meter with help.

Claimant grew disgusted with defendant employer and filed a civil rights complaint which was later administratively closed.

Claimant worked the parking lot job until December 1, 1981 at which time he was suspended until he went to trial on criminal charges. As a result of that trial he was found guilty and served a year before being paroled.

Claimant claimed no new injuries from the time he went to work as a parking lot attendant or while he was incarcerated. He indicated that while he was in jail his back bothered him from time to time and he took Anacin. In April of 1983 his back tied up and he had trouble getting out of bed. He was given Motrin to take as he needed it.

In May of 1983 he came home to his family and began looking for employment. He testified that he has put down his injuries and his criminal charges on his applications. He had some part-time work until October. Beginning in late October he started part-time work as a cutting torch operator. His work provides him with no benefits and an hourly rate of $5.00. He averages close to thirty hours. The job necessitates standing and bending. The iron which he cuts is picked up by a machine. He takes pills for his pain and tries to keep it out of his mind.

As to his present condition with his back, claimant complained of pain from the beltline down into the buttocks on the right and sometimes on the left which bothers him at night. He has some cramping. Any activity can bring on pain. On comparing his difficulties he has now with those experienced before January of 1980, he said that his pain is more frequent and requires use of two Motrin tablets whereas before one would suffice, or he would walk off the problem, or it would be relieved by Anacin. His pain does not go into his lower leg.

Claimant also compared his left leg condition as it is at present and as it was presurgery in March of 1981. Popping in his left knee is about the same or perhaps more. He considered the surgery unsuccessful in that his knee is worse now than before. Moving too fast will cause the knee to buckle.

The right knee is less trouble. It still pops, but it does not catch as catching was helped by the surgery. Overall, his right knee remained close to the same.

Claimant said that he has not been paid mileage since January of 1980.

Claimant admitted having a part-time salvage business in which he went around and picked up junk and old cars. While he agreed that lifting was necessary, he said that he had special methods for doing it and that things were not as heavy because they were cut into pieces. After his release from prison he worked at this for a while, but since he got the job in October he has not had the time. He recalled that his earnings from this before his prior hearing in January of 1980 averaged $100 weekly. His children now help with pickup.

Claimant recalled that he worked on stock cars until September of 1981. By using special equipment he is able to work on his own vehicles.

Claimant denied that either work on stock cars or in his salvage business aggravated his condition.

Claimant insisted he could labor as a garbage worker by living with his back or as a meter repairperson if he had extra help with lifting meters.

Claimant asserted the city was responsible for his criminal acts. Claimant acknowledged a prior incident with another child for which he sought help. He had a discussion about moving to the water meter repairperson's job on okay from his doctor. The doctor said the work would be all right, but claimant did not know that the city agreed to this change until after his suspension. Dr. McCoy approved on November 30, 1981. Claimant was incarcerated on December 1, 1981. Claimant recalled having been told by his union representative that he would not be given the water meter job. He commenced drinking at 10:00 a.m. and later assaulted his daughter. He denied being told by the city after his arrest that should he be found not guilty he could have the water meter job. Instead, he said he was told by Kleinow that he would not work for the city again.

Claimant testified that he has not contacted any of his former supervisors since his release from prison as he did not think it would do any good.

Claimant alleged his entitlement to compensation from August 8, 1980 to October 9, 1980 as he was off for back pain. Claimant denied his being off was related to any incident while working on his personal car or a stock car. During this period he took some vacation in August. He said that he stayed home except for a few days in Missouri.

Claimant has completed ninth grade. His work experience prior to beginning work for defendant had been loading bread and fertilizer, doing various jobs for a cement company with one job as a monitor, operating a forklift, and laboring and driving a truck for a construction company.

A review of records seems to show claimant was off work from August 1 until August 15, 1980. Beginning on August 18, 1980 claimant took vacation through September 5, 1980. He took sick leave the week of September 8 and then went on light duty on September 14.

In 1981 claimant took vacation the week of March 9. He seemingly drew compensation from March 17, 1981 until August 9, 1981. It appears he may have worked in garbage for about eight days. He took vacation from August 24 until September 15, 1981 when he was moved to parking lot attendant.

Sharon Schaer, claimant's spouse, a nurse's aide, who was separated from him from December 1, 1981 until he got out of prison, testified that although claimant has not called the doctor and has not complained, she is aware of his having

frequent back problems by the way he walks and bends. She massages his back and gives him medication. It was her opinion that he has had a gradual worsening of his condition since his hearing in 1980. She reported claimant's spending time in bed when he is off work.

Schaer was unaware of any nonwork injury.

Regarding claimant's knees, she claimed that the popping sound which was present before is now louder. Claimant's feet are cold.

The witness recalled that when claimant was changed from garbage work to the parking lot he was angry and became withdrawn. He also commenced drinking heavily. She asserted that this was new for him as he had been only a social drinker. Drinking was not involved in the first assault with one of their children.

Charles Hammen, who has been employed with the city for thirteen and one-half years, testified to the circumstances surrounding claimant's attempt to move to the the water department: The water department had a job available on October 6, 1981. Normal procedure was to post the job. Thereafter, employees wishing to make application could apply. After a two week posting period, the job would be offered to the senior employee or the person with the most time working for the city.

Claimant filed an application on October 7. An investigation was made of claimant's physical capabilities to perform the work. Dr. McCoy was contacted.

Claimant was not terminated until May 4, 1982 after his sentencing. The water department vacancy was filled on May 10, 1982. If claimant had been acquitted, he would have gotten the job as the senior applicant. The union was relied upon to make claimant aware that the water meter job was being kept open.

Myron Langhoff, sanitation foreman for the city of Mason City since 1967, testified to being responsible for claimant's attendance records. According to those records claimant returned to light duty on Septmeber 14, 1980 in the street department where he was paid at the same rate. He explained that if claimant kept his compensation check the city made up the difference between sick leave and vacation pay. Employees are permitted to build up to 120 days of sick leave. There is no reimbursement for the accrued sick leave. In August of 1980 claimant took sick pay and vaction and then sick pay again. He said that claimant took compensation in August and September of 1980.

Langhoff recalled having been told by claimant he had an operation coming up in March of 1981. The witness did not know whether it would be covered by workers' compensation.

Eugene Kleinow, currently police chief for Mason City, testified to being an administrative captain in September of 1981 and to being supervisor of the parking lot attendants. He acknowledged knowing both that claimant had been arrested and had been temporarily suspended. He denied telling claimant that he would not work for the city again and said that he would not have had the authority to do so. He stated that he had nothing to do with the award of the water meter job.

Robert E. McCoy, M.D., performed an arthroscopy on both of claimant's knees on January 16, 1980 and found evidence of degenerative arthritis of the medial compartment on the left and to a somewhat lesser degree on the right. There was no evidence of a meniscal tear. In a letter dated January 24, 1980 Dr. McCoy proposed that claimant undergo a high tibial osteotomy on the left "to transfer the center of maximum weight bearing from the medial side of the knee, where his severe degenerative arthritis is, to the lateral compartment of the knee joint which has been relatively spared from the severe degenerative arthritis." He anticipated that degenerative arthritis on the right would progress at a slower rate, but that eventually he would need the high tibial osteotomy on the right as well. The doctor wrote: "In retrospect it would seem that the episodes of increasingly frequent injury to his knees with symptoms of popping and giving way of the knees have been associated with and probably caused by his gradually increasing degenerative arthritis of both knees."

Dr. McCoy recorded an injury to the right knee on January 22, 1980 when claimant slipped on ice while he was on his garbage route. As a result of the slip he sustained a fracture of the lateral portion of the patella. After an arthroscopy a fragment of the patella was removed. The doctor stated that this injury was "completely unrelated to his [claimant's] previous knee difficulties."

Claimant was released for work on April 7, 1980. He worked for two days and then commenced having pain in the right lower lumbar area. Discomfort decreased during the day. Medication was prescribed. Dr. McCoy related claimant's symptoms at that time to his back and not his knee.

On August 8, 1980 claimant visited the doctor using one crutch and complaining of severe back pain in the lower midline. More specifically, the pain was in the lumbosacral joint area and the sacral area in the midline. There was no radiation, but motion was painful. The right ankle jerk was absent. Straight leg raising on the right at 20° caused pain which increased on sciatic stretch. Straight leg raising to 35° on the left caused pain without positive sciatic stretch. Dr. McCoy thought claimant had nerve root irritation based on mild disc protrusion and consented to claimant's having complete bed rest at home.

When claimant came back the next week, he spoke of trying to find lighter work with the city in the water or street departments. Claimant was found to be improved with negative straight leg raising. He was moved to increasing ambulation and partial bed rest with no bending or lifting.

The doctor was visited by two persons from the city--Myron Langhoff and Robert Sceffler. According to the doctor's notes, the two expressed concern regarding claimant's ability to tolerate work as a garbage man. Dr. McCoy agreed that claimant would be better off doing lighter work.

On August 26, 1980 the physician wrote of recommending claimant being given lighter work, but he noted that as of yet there was no lighter work available through the city.

When claimant was seen on October 7, 1980, he reported working at the city garage doing maintenance work on a temporary basis. Claimant thought he was able to return to garbage collecting. An inch of atrophy was found in claimant's right thigh. Emphasis was placed on claimant's doing his leg exercises to overcome the atrophy.

In early 1981 claimant's main complaint was of low back pain with episodes of subjective numbness in his posterior right thigh. X-rays of the knee compared to those taken in 1979 before his injury showed no progression of degenerative arthritis. Permanent partial impairment of the function of claimant's right lower extremity was rated at four percent.

In March of 1981 claimant underwent a valgus type high tibial osteotomy on the left. There was some problem with keeping claimant in his cast, but claimant gradually progressed to weight bearing. He was to return to work on August 6, 1981.

When claimant was seen on October 3, 1981 he told the doctor of his transfer to parking lot attendant. Claimant returned on October 20, 1981 with a job description for the water meter repairperson. After reviewing the description which apparently included the ability to lift 200 pounds with the assistance of tools and another worker, Dr. McCoy concluded claimant's condition would be compatible with performing the work if it was done infrequently. A letter was written on October 20, 1981 which so indicated. The doctor anticipated claimant would be able to tolerate squatting and kneeling to install meters and to do intermittent lifting of meters weighing sixty to sixty-five pounds. It seems that a description of the job of heavy equipment operator also was reviewed and that position was found less appropriate.

Medical information from the men's reformatory indicates that when claimant was evaluated in September of 1982 he was given a bedboard. He took no medication and apparently told his evaluator he had learned to live with his discomfort. In December claimant was given Tylenol for back and knee pain.

Early in 1983 claimant was given a knee wrap. In April claimant had an episode of low back pain. Motrin was given. Claimant was subsequently allowed to use his back brace.

A status report from May 1983 notes that claimant was working with no restrictions before April 14, 1983 when he had an episode of back pain. He made no knee complaints to that date.

Claimant was reevaluated by Dr. McCoy on June 17, 1983. Claimant's complaints were of low back aches across the lower lumbar spine for which he took Motrin, wore a lumbosacral belt and walked; snapping, popping and tenderness in the right knee with the primary problem in the lateral parapatellar area; and occasional popping in the left knee.

On examination claimant had a slight list to the left. He bent forward to within eight inches of touching the floor with pain in the lumbosacral joint area. The right ankle jerk which had been absent since the 1969 surgery was absent. Combined straight leg raising to 85° caused a feeling of pulling in the low back. There was a varus deformity of 60° on the right knee and a valgus of 10° on the left. Varus on the right was viewed as abnormal. Tenderness to palpation was present over the lateral facet of the right patella. X-rays of the lumbar spine showed no further narrowing at L5-S1 in comparison with the films taken in May of 1980. There was slight Schmorl's Node formation at D12-L1 and at D11-D12. There was no progression of narrowing in the medial joint line in the right knee when it was viewed with films taken in January of 1981. X-rays of the left knee taken in May of 1983 evidenced narrowing of the medial joint space.

In a letter dated July 8, 1983 Dr. McCoy reviewed his prior ratings of claimant's impairments noting that on February 21, 1980 he gave a fifteen percent impairment to the left lower extremity and eight percent to the right lower extremity with the latter attributable to degenerative arthritis; an additional four percent to the right lower extremity resulting from the patellar fracture of January 22, 1980; five percent of the whole man related to a 1969 disc problem; and five percent of the whole man because of the 1976 injury. His present impairment ratings are set out thusly:

> I would estimate his permanent partial impairment of function of the whole man from his back at 15%

of which I would estimate 3% to be related to further work injury. I think his permanent partial impairment of function of the left lower extremity was diminished by his high tibial osteotomy to about 12%, which has remained the same to the present time. I think that the permanent partial impairment of function of the right lower extremity has increased from the 12% rating I previously gave to 15% at the present time.

The doctor explained his increase in the permanent partial impairment rating as follows:

In April of 1980 he was seen for low back pain apparently aggravated by work and in August of 1980 he was having fairly severe pain again which made it necessary for him to be off work from August until October of 1980. As a result of that episode of low back pain, I recommended to his employer that he be given lighter work. It was because with the episode of August 1980, his condition changed to the extent that I felt permanent arrangements should be made for lighter work. That I felt his permanent partial impairment of function rating as a result of work related back problems should be increased by 3% over the previous rating as it had not been felt prior to that that any long term modification of his work activities should be made. I feel that since his status at that time required a change in his recommended work designation further impairment of function had been incurred as a result of back aggravation at work.

APPLICABLE LAW AND ANALYSIS

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 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 appeal decision filed December 30, 1980 contains these findings:

That claimant sustained an injury which arose out of and in the course of his employment on May 18, 1979 which resulted in claimant's entitlement to temporary total disability compensation and that claimant did not sustain permanent partial disability as a result of the May 18, 1979 injury.

That as a result of the injury of May 18, 1979 claimant is entitled to three and three-sevenths (3 3/7) weeks temporary total disability at the rate of one hundred sixty-five and 47/100 dollars ($165.47) per week (May 22, 1979 through June 10, 1979).

The undersigned does not find that claimant has established entitlement to any permanent partial disability relating to the May 18, 1979 incident in this matter. Dr. McCoy's letter of July 8, 1983 contains this reference: "On May 18, 1979, he re-injured his back. He made a phone call to Dr. Hoover on May 29, 1979, but was not seen by anyone in our office at that time and we have no record of that episode, though I understand he was off work for 3 weeks and 3 days at that time." No other evidence is contained in the record to causally relate any disability claimant now has with the incident of May 18, 1979.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant had an injury to his back in 1969 which resulted in surgery.

That claimant had an injury to his back in June of 1976 which was treated conservatively.

That claimant had an episode of back pain in May of 1979 which resulted in his being off work.

That claimant had a prior hearing in this matter which resulted in his being paid three and three-sevenths (3 3/7) weeks of temporary total disability relating to the May 1979 injury.

That claimant experienced some back pain which he was able to work out but no new injury between April of 1980 and August of 1980.

That claimant attempted to keep defendant employer from learning he was having back trouble.

That following a knee surgery in the spring of 1981 claimant was made a parking lot attendant in September of 1981.

That sitting as a parking lot attendant bothered claimant's back.

That claimant continues to take medication for back pain.

That claimant continues to have back pain and cramping which can be brought on by any activity.

That claimant's back pain has increased since January of 1980.

That claimant was placed on complete bedrest because of back complaints in August of 1980.

That claimant's employment was terminated by defendant employer when he was sent to prison.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to prove by a preponderance of the evidence a causal relationship between his injury of May 18, 1979 and any disability he now may suffer.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay Dr. McCoy fourteen dollars ($14.00) and North Central Medical Center forty-one and 05/100 dollars ($41.05).

That defendants pay charges for one-half (1/2) trip to Dr. McCoy's office of five (5) miles at twenty-four cents ($.24) per mile.

That defendants pay one-fourth (1/4) of the costs of the proceedings on January 4, 1984 pursuant to Industrial Commissioner 500-4.33 including report expenses of twenty-seven and 50/100 dollars ($27.50).

Signed and filed this 24 day of July, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD A. SCHAER,	:	
Claimant,	:	File No. 454602
vs.	:	
CITY OF MASON CITY,	:	REVIEW-
Employer,	:	REOPENING
and	:	DECISION
IOWA KEMPER INSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	JUL 24 1984
		IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Donald A. Schaer, claimant, against the city of Mason City, employer, and Iowa Kemper Insurance Company, insurance carrier, defendants, to recover additional benefits under the Iowa Workmen's Compensation Act for an injury arising out of and in the course of his employment on June 4, 1976. It came on for hearing on January 4, 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 received July 2, 1976. A memorandum of agreement was received at the the same time. Prior litigation in this matter was resolved with an agreement for settlement under which claimant was paid twenty percent permanent partial disability, eleven and three-sevenths weeks of healing period benefits and medical expenses.

At the time of hearing the parties agreed that the rate was fixed by the prior decision in this matter at $126.90 per week.

The record in this matter consists of the testimony of claimant, Sharon Schaer, Charles B. Hammen, Eugene Kleinow and Myron Langhoff; claimant's exhibit 1, a letter from Robert E. McCoy, M.D., dated January 24, 1980; claimant's exhibit 2, a letter dated April 18, 1980 from Dr. McCoy with accompanying notes; claimant's exhibit 3, notes from Dr. McCoy; claimant's exhibit

4, notes from Dr. McCoy; claimant's exhibit 5, a letter from Dr. McCoy dated October 20, 1981; claimant's exhibit 6, a letter from Dr. McCoy dated November 30, 1981; claimant's exhibit 7, a letter dated June 17, 1983 from Dr. McCoy; claimant's exhibit 8, a letter from Dr. McCoy dated July 8, 1983; claimant's exhibit 9, records from North Central Correctional Facility; claimant's exhibit 10, records from Anamosa; claimant's exhibit 11, a letter from Dr. McCoy dated August 3, 1983; claimant's exhibit 12, unpaid medical expenses; claimant's exhibit 13, report expenses; claimant's exhibit 14, mileage expenses; claimant's exhibit 15, a statement to Job Service; defendant USF&G's exhibit A, an employee attendance record; and defendant USF&G's exhibit B, an attendance record. The record in the prior hearing of January 9, 1980 was reviewed in its entirety.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury of June 4, 1976 and his disability; and whether or not claimant is entitled to further permanent partial disability relating to that injury.

STATEMENT OF THE CASE

Forty-four year old married claimant recalled having a hearing on January 8, 1980. Claimant said that his first back injury was in January of 1969 while he was working for the sanitation department. He denied any injuries prior to that time. He fell flat on his back. He had surgery and returned to work. A claim for compensation was resolved with a special case settlement. It was his understanding he was paid disability for the injury. In 1976 he had another injury while working for the water department. He and another employee were carrying a water tapping tool. He had a pop in his back. He was not hospitalized, but he was treated with bed rest and medication. By the time of a 1978 injury to his left knee he was back at the sanitation department. He was classified as a driver, but he still picked up garbage. In May of 1979 he had back pain and went off work. A short time after his January 8, 1980 hearing he had an additional injury.

He remembered: He was working in sanitation picking up garbage. It was "real icy." He went down on his right kneecap. He called Dr. McCoy who drained blood from his knee and then did surgery. He was placed in a full leg cast. He was off work and received temporary total disability payments from January 22, 1980 to April 6, 1980.

At the time of his return to work he was placed in a garage on light duty. He went back on the garbage truck when he was given clearance by the doctor. Claimant reported that he got along well except for some problems with his back which he relieved by having his helper drive and he picked up the garbage.

He denied any injury during the time from April 7, 1980 to August 4, 1980. Rather he said that his back had started hurting "out of the clear blue sky." He had a burning sensation in his back. He was off work from August 4, 1980 to October 9, 1980 because of his back. He took sick leave and vacation to keep defendant employer from learning of his trouble.

In October claimant went back to driving a garbage truck and loading and unloading. He worked until he had left knee surgery in March of 1981. Surgery which had been scheduled for later was moved up when his knee locked as he was working. Claimant received weekly benefits from March 16, 1981 to August 9, 1981. He was in a full leg cast. Claimant acknowledged removing his cast on three separate occasions, but he did not feel his actions extended his healing time.

When he was released to return to work he was under no specific restrictions by Dr. McCoy. He anticipated returning to the garbage truck. He took some vacation time. On his resumption of work, he was sent to be a parking lot attendant. He had some forewarning of this in that he got a letter from defendant employer while he was on vacation. He asserted that he did not consent to the change and that he wished to be a garbage driver. As a parking lot attendant he sat for most of the time. The sitting bothered his back and he got up and walked and stood. If the machine was not working, he noted times. He collected money. The parking lot job paid $3.35 per hour. He lost benefits because although he worked forty hours he was considered part-time help. As a garbage worker he did not need to be on the job for forty hours. Work as a garbage driver gave him $7.28 per hour, a day and one-half sick leave each month, a paid vacation and paid life and health and accident insurance.

When a heavy equipment job opened he applied. The union tried to help him. Dr. McCoy was sent a description of the job, but claimant was not hired. A water meter job also became available. Again, the union helped and a letter was sent to Dr. McCoy who decided claimant could lift a 200 pound meter with help.

Claimant grew disgusted with defendant employer and filed a civil rights complaint which was later administratively closed.

Claimant worked the parking lot job until December 1, 1981 at which time he was suspended until he went to trial on criminal charges. As a result of that trial he was found guilty and served a year before being paroled.

Claimant claimed no new injuries from the time he went to work as a parking lot attendant or while he was incarcerated. He indicated that while he was in jail his back bothered him from time to time and he took Anacin. In April of 1983 his back tied up and he had trouble getting out of bed. He was given Motrin to take as he needed it.

In May of 1983 he came home to his family and began looking for employment. He testified that he has put down his injuries and his criminal charges on his applications. He had some part-time work until October. Beginning in late October he started part-time work as a cutting torch operator. His work provides him with no benefits and an hourly rate of $5.00. He averages close to thirty hours. The job necessitates standing and bending. The iron which he cuts is picked up by a machine. He takes pills for his pain and tries to keep it out of his mind.

As to his present condition with his back, claimant complained of pain from the beltline down into the buttocks on the right and sometimes on the left which bothers him at night. He has some cramping. Any activity can bring on pain. On comparing his difficulties he has now with those experienced before January of 1980, he said that his pain is more frequent and requires use of two Motrin tablets whereas before one would suffice, or he would walk off the problem, or it would be relieved by Anacin. His pain does not go into his lower leg.

Claimant also compared his left leg condition as it is at present and as it was presurgery in March of 1981. Popping in his left knee is about the same or perhaps more. He considered the surgery unsuccessful in that his knee is worse now than before. Moving too fast will cause the knee to buckle.

The right knee is less trouble. It still pops, but it does not catch as catching was helped by the surgery. Overall, his right knee remained close to the same.

Claimant said that he has not been paid mileage since January of 1980.

Claimant admitted having a part-time salvage business in which he went around and picked up junk and old cars. While he agreed that lifting was necessary, he said that he had special methods for doing it and that things were not as heavy because they were cut into pieces. After his release from prison he worked at this for a while, but since he got the job in October he has not had the time. He recalled that his earnings from this before his prior hearing in January of 1980 averaged $100 weekly. His children now help with pickup.

Claimant recalled that he worked on stock cars until September of 1981. By using special equipment he is able to work on his own vehicles.

Claimant denied that either work on stock cars or in his salvage business aggravated his condition.

Claimant insisted he could labor as a garbage worker by living with his back or as a meter repairperson if he had extra help with lifting meters.

Claimant asserted the city was responsible for his criminal acts. Claimant acknowledged a prior incident with another child for which he sought help. He had a discussion about moving to the water meter repairperson's job on okay from his doctor. The doctor said the work would be all right, but claimant did not know that the city agreed to this change until after his suspension. Dr. McCoy approved on November 30, 1981. Claimant was incarcerated on December 1, 1981. Claimant recalled having been told by his union representative that he would not be given the water meter job. He commenced drinking at 10:00 a.m. and later assaulted his daughter. He denied being told by the city after his arrest that should he be found not guilty he could have the water meter job. Instead, he said he was told by Kleinow that he would not work for the city again.

Claimant testified that he has not contacted any of his former supervisors since his release from prison as he did not think it would do any good.

Claimant alleged his entitlement to compensation from August 8, 1980 to October 9, 1980 as he was off for back pain. Claimant denied his being off was related to any incident while working on his personal car or a stock car. During this period he took some vacation in August. He said that he stayed home except for a few days in Missouri.

Claimant has completed ninth grade. His work experience prior to beginning work for defendant had been loading bread and fertilizer, doing various jobs for a cement company with one job as a monitor, operating a forklift, and laboring and driving a truck for a construction company.

A review of records seems to show claimant was off work from August 1 until August 15, 1980. Beginning on August 18, 1980 claimant took vacation through September 5, 1980. He took sick leave the week of September 8 and then went on light duty on September 14.

In 1981 claimant took vacation the week of March 9. He seemingly drew compensation from March 17, 1981 until August 9, 1981. It appears he may have worked in garbage for about eight days. He took vacation from August 24 until September 15, 1981 when he was moved to parking lot attendant.

Sharon Schaer, claimant's spouse, a nurse's aide, who was

separated from him from December 1, 1981 until he got out of prison, testified that although claimant has not called the doctor and has not complained, she is aware of his having frequent back problems by the way he walks and bends. She massages his back and gives him medication. It was her opinion that he has had a gradual worsening of his condition since his hearing in 1980. She reported claimant's spending time in bed when he is off work.

Schaer was unaware of any nonwork injury.

Regarding claimant's knees, she claimed that the popping sound which was present before is now louder. Claimant's feet are cold.

The witness recalled that when claimant was changed from garbage work to the parking lot he was angry and became withdrawn. He also commenced drinking heavily. She asserted that this was new for him as he had been only a social drinker. Drinking was not involved in the first assault with one of their children.

Charles Hammen, who has been employed with the city for thirteen and one-half years, testified to the circumstances surrounding claimant's transfer to the water department: The water department had a job available on October 6, 1981. Normal procedure was to post the job. Thereafter, employees wishing to make application could apply. After a two week posting period, the job would be offered to the senior employee or the person with the most time working for the city.

Claimant filed an application on October 7. An investigation was made of claimant's physical capabilities to perform the work. Dr. McCoy was contacted.

Claimant was not terminated until May 4, 1982 after his sentencing. The water department vacancy was filled on May 10, 1982. If claimant had been acquitted, he would have gotten the job as the senior applicant. The union was relied upon to make claimant aware that the water meter job was being kept open.

Myron Langhoff, sanitation foreman for the city of Mason City since 1967, testified to being responsible for claimant's attendance records. According to those records claimant returned to light duty on Septmeber 14, 1980 in the street department where he was paid at the same rate. He explained that if claimant kept his compensation check the city made up the difference between sick leave and vacation pay. Employees are permitted to build up to 120 days of sick leave. There is no reimbursement for the accrued sick leave. In August of 1980 claimant took sick pay and vaction and then sick pay again. He said that claimant took compensation in August and September of 1980.

Langhoff recalled having been told by claimant he had an operation coming up in March of 1981. The witness did not know whether it would be covered by workers' compensation.

Eugene Kleinow, currently police chief for Mason City, testified to being an administrative captain in September of 1981 and to being supervisor of the parking lot attendants. He acknowledged knowing both that claimant had been arrested and had been temporarily suspended. He denied telling claimant that he would not work for the city again and said that he would not have had the authority to do so. He stated that he had nothing to do with the award of the water meter job.

Robert E. McCoy, M.D., performed an arthroscopy on both of claimant's knees on January 16, 1980 and found evidence of degenerative arthritis of the medial compartment on the left and to a somewhat lesser degree on the right. There was no evidence of a meniscal tear. In a letter dated January 24, 1980 Dr. McCoy proposed that claimant undergo a high tibial osteotomy on the left "to transfer the center of maximum weight bearing from the medial side of the knee, where his severe degenerative arthritis is, to the lateral compartment of the knee joint which has been relatively spared from the severe degenerative arthritis." He anticipated that degenerative arthritis on the right would progress at a slower rate, but that eventually he would need the high tibial osteotomy on the right as well. The doctor wrote: "In retrospect it would seem that the episodes of increasingly frequent injury to his knees with symptoms of popping and giving way of the knees have been associated with and probably caused by his gradually increasing degenerative arthritis of both knees."

Dr. McCoy recorded an injury to the right knee on January 22, 1980 when claimant slipped on ice while he was on his garbage route. As a result of the slip he sustained a fracture of the lateral portion of the patella. After an arthroscopy a fragment of the patella was removed. The doctor stated that this injury was "completely unrelated to his [claimant's] previous knee difficulties."

Claimant was released for work on April 7, 1980. He worked for two days and then commenced having pain in the right lower lumbar area. Discomfort decreased during the day. Medication was prescribed. Dr. McCoy related claimant's symptoms at that time to his back and not his knee.

On August 8, 1980 claimant visited the doctor using one crutch and complaining of severe back pain in the lower midline. More specifically, the pain was in the lumbosacral joint area and the sacral area in the midline. There was no radiation, but motion was painful. The right ankle jerk was absent. Straight leg raising on the right at 20° caused pain which increased on sciatic stretch. Straight leg raising to 35° on the left caused pain without positive sciatic stretch. Dr. McCoy thought claimant had nerve root irritation based on mild disc protrusion and consented to claimant's having complete bed rest at home.

When claimant came back the next week, he spoke of trying to find lighter work with the city in the water or street departments. Claimant was found to be improved with negative straight leg raising. He was moved to increasing ambulation and partial bed rest with no bending or lifting.

The doctor was visited by two persons from the city--Myron Langhoff and Robert Sceffler. According to the doctor's notes, the two expressed concern regarding claimant's ability to tolerate work as a garbage man. Dr. McCoy agreed that claimant would be better off doing lighter work.

On August 26, 1980 the physician wrote of recommending claimant being given lighter work, but he noted that as of yet there was no lighter work available through the city.

When claimant was seen on October 7, 1980, he reported working at the city garage doing maintenance work on a temporary basis. Claimant thought he was able to return to garbage collecting. An inch of atrophy was found in claimant's right thigh. Emphasis was placed on claimant's doing his leg exercises to overcome the atrophy.

In early 1981 claimant's main complaint was of low back pain with episodes of subjective numbness in his posterior right thigh. X-rays of the knee compared to those taken in 1979 before his injury showed no progression of degenerative arthritis. Permanent partial impairment of the function of claimant's right lower extremity was rated at four percent.

In March of 1981 claimant underwent a valgus type high tibial osteotomy on the left. There was some problem with keeping claimant in his cast, but claimant gradually progressed to weight bearing. He was to return to work on August 6, 1981.

When claimant was seen on October 3, 1981 he told the doctor of his transfer to parking lot attendant. Claimant returned on October 20, 1981 with a job description for the water meter repairperson. After reviewing the description which apparently included the ability to lift 200 pounds with the assistance of tools and another worker, Dr. McCoy concluded claimant's condition would be compatible with performing the work if it was done infrequently. A letter was written on October 20, 1981 which so indicated. The doctor anticipated claimant would be able to tolerate squatting and kneeling to install meters and to do intermittent lifting of meters weighing sixty to sixty-five pounds. It seems that a description of the job of heavy equipment operator also was reviewed and that position was found less appropriate.

Medical information from the men's reformatory indicates that when claimant was evaluated in September of 1982 he was given a bedboard. He took no medication and apparently told his evaluator he had learned to live with his discomfort. In December claimant was given Tylenol for back and knee pain.

Early in 1983 claimant was given a knee wrap. In April claimant had an episode of low back pain. Motrin was given. Claimant was subsequently allowed to use his back brace.

A status report from May 1983 notes that claimant was working with no restrictions before April 14, 1983 when he had an episode of back pain. He made no knee complaints to that date.

Claimant was reevaluated by Dr. McCoy on June 17, 1983. Claimant's complaints were of low back aches across the lower lumbar spine for which he took Motrin, wore a lumbosacral belt and walked; snapping, popping and tenderness in the right knee with the primary problem in the lateral parapatellar area; and occasional popping in the left knee.

On examination claimant had a slight list to the left. He bent forward to within eight inches of touching the floor with pain in the lumbosacral joint area. The right ankle jerk which had been absent since the 1969 surgery was absent. Combined straight leg raising to 85° caused a feeling of pulling in the low back. There was a varus deformity of 60° on the right knee and a valgus of 10° on the left. Varus on the right was viewed as abnormal. Tenderness to palpation was present over the lateral facet of the right patella. X-rays of the lumbar spine showed no further narrowing at L5-S1 in comparison with the films taken in May of 1980. There was slight Schmorl's Node formation at D12-L1 and at D11-D12. There was no progression of narrowing in the medial joint line in the right knee when it was viewed with films taken in January of 1981. X-rays of the left knee taken in May of 1983 evidenced narrowing of the medial joint space.

In a letter dated July 8, 1983 Dr. McCoy reviewed his prior ratings of claimant's impairments noting that on February 21, 1980 he gave a fifteen percent impairment to the left lower extremity and eight percent to the right lower extremity with the latter attributable to degenerative arthritis; an additional four percent to the right lower extremity resulting from the patellar fracture of January 22, 1980; five percent of the whole man related to a 1969 disc problem; and five percent of the whole man because of the 1976 injury. His present impairment ratings are set out thusly:

I would estimate his permanent partial impairment of function of the whole man from his back at 15% of which I would estimate 3% to be related to further work injury. I think his permanent partial impairment of function of the left lower extremity was diminished by his high tibial osteotomy to about 12%, which has remained the same to the present time. I think that the permanent partial impairment of function of the right lower extremity has increased from the 12% rating I previously gave to 15% at the present time.

The doctor explained his increase in the permanent partial impairment rating as follows:

In April of 1980 he was seen for low back pain apparently aggravated by work and in August of 1980 he was having fairly severe pain again which made it necessary for him to be off work from August until October of 1980. As a result of that episode of low back pain, I recommended to his employer that he be given lighter work. It was because with the episode of August 1980, his condition changed to the extent that I felt permanent arrangements should be made for lighter work. That I felt his permanent partial impairment of function rating as a result of work related back problems should be increased by 3% over the previous rating as it had not been felt prior to that that any long term modification of his work activities should be made. I feel that since his status at that time required a change in his recommended work designation further impairment of function had been incurred as a result of back aggravation at work.

APPLICABLE LAW AND ANALYSIS

Previous litigation in this matter was settled with an agreement for settlement which allowed claimant, among other things, twenty percent permanent partial industrial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 4, 1976 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

Claimant's testimony in the first hearing was that following the 1976 injury he had pain into his right leg which was worse than what he experienced in 1979. At the time of that 1980 hearing he was experiencing pain down his right leg from time to time.

Reports from Dr. Masters offered in the first proceeding traced claimant's difficulties from the 1976 injury through his surgery. Dr. Masters described claimant's injury in 1976 as "acute aggravation of a chronic lumbar subluxation complex with related etiology of surgical intervention."

Dr. Walker examined claimant in February of 1979 and expressed the opinion:

We are dealing with an entirely different situation here than what he had originally. He has not hurt the lumbar spine or the discs in any way but what he has is a chronic, moderately severe sprain of the right sacroiliac joint. He has point tenderness here and the sciatic nerve stretching tests are all negative but the pelvic torsion tests reproduce the pain in the right sacroiliac joint.

Dr. Adams' letter of November 29, 1979 offered in the first proceeding states:

I feel that the back condition that he had with an injury in 1969 that resulted in surgery turned out all right and that he did get a good result. He did return to his regular work, and he has been compensated for any residual disability that he has as a result of that injury. I feel that any back sprains and back trouble that he has had since that time are a natural course of the problem that he's had, particularly in view of the kind of work that he is doing. I do not feel that any increase in disability in his back has occurred since 1969 as a result of any injures that he has had. I think that he will continue to occasionally have some minor trouble with his back if he continues to do heavy work, in all kinds of weather, and may have to occasionally wear his belt.

In a letter dated September 5, 1978 Dr. McCoy recounted his treatment of claimant:

On April 16, 1969, Mr. Schaer underwent removal of a herniated intervertebral disc at L5-S1 on the right. This was as a result of a work injury which occurred in his work as a garbage man. Apparently he was not covered by Iowa Kemper at that time. He did well after that surgery and returned to work in July of 1969. He returned to work in May of that year and did well until June of 1976 which was the next time I saw him for his back. He did well, that is, until he felt something pop in his low back while lifting on the job on 6/4/76. He returned to work for the Street Department, I believe, on about 8/23/76 and subsequently did well and did not have a lot of trouble until September 1978. He began going to a chiropractor one to two times a month in about September of 1977. Though I feel he would have been entitled to a permanent partial impairment rating after his initial episode of trouble in 1969, I think that he did well until 1976 and that that injury should therefore be considered as the cause of his exacerbation at that time even though it is recognized that a disc space never returns to normal after the disc has been removed or after there has been an extrusion of a disc fragment.

A prior letter offered additional explanation:

I think that his problem is with pain originating at the level of his previous disc herniation where the shock-absorbing function of the disc which herniated is not normal. He irritates himself in this area fairly easily. Twisting and prolonged sitting seem to be particularly aggravating to him. However, he seems to be getting by at work in spite of his symptoms. I think that he should avoid bending and particularly lifting when bending as much as possible though in his occupation this is not particularly avoidable.

Dr. McCoy's notes in April of 1980 refer to "discomfort in the right lumbar area without particular radiation." Again in August the pain was a few inches to the right of the mid-line with no "particular radiation into his lower extremities." The doctor thought claimant had "nerve root irritation on the basis of mild disc protrusion."

Evidence offered in the present case includes a letter from Dr. McCoy of June 17, 1983 which refers only to the injury of 1969:

Mr. Schaer has three basic problems. One is low back pain, which is the residual of difficulty which arose from an injury while at work as a garbage man on January 20, 1969, and which eventuated in his requiring a right partial hemilaminectomy at L5-S1 on the right with removal of a protruding disc fragment at L5-S1 on the right on April 16, 1969. The sort of back symptoms that he is having at the present time are with low backache intermittently felt across his lower lumbar spine area for which he wears a lumbosacral belt and walks as an exercise. These modalities usually bring about improvement, but this is not always the case.

A letter from Dr. McCoy of July 8, 1983 refers to incidents in 1969, 1976 and 1979:

Mr. Schaer has been followed in this office since January of 1962 and had no history of back trouble until his injury of January of 1969 when he slipped on the ice while at work and had difficulty which eventually led to his undergoing right partial hemilaminectomy at L5-S1 on the right on April 16, 1969. On June 4, 1976, he injured his back while at work when he had back pain while lifting. He was off work until August 3, 1976, at that time. On May 18, 1979, he re-injured his back. He made a phone call to Dr. Hoover on May 29, 1979, but was not seen by anyone in our office at that time and we have no record of that episode, though I understand he was off work for 3 weeks and 3 days at that time.

That same letter makes reference to pain in April and August of 1980 but does not relate that pain to the 1969, 1976 or 1979 incidents:

In April of 1980 he was seen for low back pain apparently aggravated by work. In August of 1980 he was having fairly severe pain again and it was necessary for him to be off work again until October of 1980.

Dr. McCoy seemingly views the pain in April as an aggravation brought on by work.

Dr. McCoy's most recent letter states:

In April of 1980 he was seen for low back pain apparently aggravated by work and in August of 1980 he was having fairly severe pain again which made it necessary for him to be off work from August until October of 1980. As a result of that episode of low back pain, I recommended to his employer that he be given lighter work. It was because with the episode of August 1980, his condition changed to the extent that I felt permanent arrangements should be made for lighter work. That I felt his permanent partial impairment of function rating as

a result of work related back problems should be increased by 3% over the previous rating as it had not been felt prior to that that any long term modification of his work activities should be made. I feel that since his status at that time required a change in his recommended work designation further impairment of function had been incurred as a result of back aggravation at work.

The causation issue in this case is complicated by the fact of a remote surgery in 1969, an incident in 1976 to which claimant wishes to relate his present disability and a temporary aggravation in 1979.

In 1936 the Iowa Supreme Court attempted to supply some guidance for sorting through this type of case in Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936):

> The question of whether the disability sustained by the employee shall be attributed to the first accident or to the later accidents depends on whether or not the disability sustained was caused by a change in the original condition, or by a recurrence of the original injury, or by an independent and subsequent cause. If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for.

More recently the court in DeShaw v. Energy Manufacturing Co., 192 N.W.2d 777, 780 (Iowa 1971) established this rule:

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

Clearly and unquestionably the claimant had back problems in April and August of 1980. Clearly and unquestionably his back trouble in August led to concern by claimant, his doctor and his employer. That concern prompted adjustments in claimant's work. Where those adjustments in claimant's work fit into the total picture in this case is just not clear. Claimant's symptomatology in 1976 included radiating pain. That is not a current symptom. Dr. McCoy's recent report of June refers only to the 1969, his July letter in a nebulous way to 1969, 1976 and 1979, and his August letter only to the April and August 1980 incidents.

The undersigned is unable to attach claimant's present disability to his 1976 injury. Viewing the record as a whole does not allow claimant to preponderate. There are too many incidents and there is too little specificity in the medical evidence.

As claimant has failed to preponderate on the causation issue, discussion of an increase in the industrial disability is unnecessary.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant had a prior hearing in this matter.

That claimant's prior litigation resulted in an agreement for settlement fixing his industrial disability at twenty percent (20%).

That claimant had an injury to his back in 1969 which resulted in surgery.

That claimant's injury in June of 1976 was also to his back and was treated conservatively.

That claimant had a subsequent injury to his left knee on March 17, 1978 which resulted in permanent impairment in his left lower extremity.

That claimant had a subsequent episode of back pain in May of 1979 which resulted in his being off work slightly less than a month.

That claimant had a subsequent injury to his right knee in January of 1980 which was surgically treated and which resulted in a permanent impairment in his right lower extremity.

That claimant was able to return to his garbage truck after his injury to his right knee.

That claimant was off work from August 4, 1980 to October 9, 1980.

That claimant attempted to keep defendant employer from learning that he was having back trouble.

That claimant was off work for knee surgery from March to August of 1981.

That claimant was released to return to work without restrictions.

That claimant was made a parking lot attendant in September of 1981.

That sitting as a parking lot attendant bothered claimant's back.

That work as a parking lot attendant paid three and 35/100 dollars ($3.35) per hour with no benefits.

That claimant's work as a garbage driver paid seven and 28/100 dollars ($7.28) per hour and provided him with additional benefits as well.

That claimant applied for a job as heavy equipment operator which he did not get.

That claimant also applied for a job as a water meter repairperson.

That Dr. McCoy believed that claimant could do the water meter repairperson's job.

That claimant worked as a parking lot attendant until December 1, 1981 at which time he was suspended.

That claimant was terminated by the city after he was sentenced to prison.

That claimant was incarcerated until May of 1983.

That at the time of the present hearing claimant was working as a cutting torch operator with an hourly rate of five dollars ($5.00) and no benefits.

That claimant continues to take medication for the back pain.

That claimant continues to have back pain and cramping which can be brought on by any acitivity.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish a causal relationship between his present disability and his injury of June 4, 1976.

the evidence his entitlement to any further permanent partial disability or any further healing period attributable to his injury of June 4, 1976.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay the following expenses:

Dr. McCoy	$14.00
North Iowa Medical Center	41.05

That defendants pay onto claimant mileage for one-half (1/2) visit to Dr. McCoy's office totaling five (5) miles at a rate of twenty-four cents ($.24) per mile.

That defendants pay one-quarter (1/4) of the costs of the proceedings on January 4, 1984 pursuant to Industrial Commissioner Rule 500-4.33 to include the cost of report expenses totaling twenty-seven and 50/100 dollars ($27.50).

Signed and filed this 24 day of July, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD A. SCHAER,

Claimant,

vs.

CITY OF MASON CITY,
Employer,
and
UNITED STATES FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

File No. 753619

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED
JUL 24 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Donald A. Schaer, claimant, against City of Mason City, employer, and United States Fidelity & Guaranty 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 17, 1978. It came on for hearing on January 4, 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 received April 17, 1980. In an appeal decision filed December 30, 1980 defendants were ordered to pay 26.4 weeks of permanent partial disability. A final report shows payment of 21 weeks of healing period benefits and 26.4 weeks of permanent partial disability for twelve percent of the left lower extremity.

The rate as fixed by the decision on appeal is $152.77.

The record in this matter consists of the testimony of claimant, Sharon Schaer, Charles B. Hammen, Eugene Kleinow and Myron Langhoff; claimant's exhibit 1, a letter from Robert E. McCov, M.D., dated January 24, 1980; claimant's exhibit 2, a letter dated April 18, 1980 from Dr. McCoy with accompanying notes; claimant's exhibit 3, notes from Dr. McCoy; claimant's exhibit 4, notes from Dr. McCoy; claimant's exhibit 5, a letter from Dr. McCoy dated October 20, 1981; claimant's exhibit 6, a letter from Dr. McCoy dated November 30, 1981; claimant's exhibit 7, a letter dated June 17, 1983 from Dr. McCoy; claimant's exhibit 8, a letter from Dr. McCoy dated July 8, 1983; claimant's exhibit 9, records from North Central Correctional Facility; claimant's exhibit 10, records from Anamosa; claimant's exhibit 11, a letter from Dr. McCoy dated August 3, 1983; claimant's exhibit 12, unpaid medical expenses; claimant's exhibit 13, report expenses; claimant's exhibit 14, mileage expenses; claimant's exhibit 15, a statement to Job Service; defendant USF&G's exhibit A, an employee attendance record; and defendant USF&G's exhibit B, an attendance record. The record in the prior hearing of January 9, 1980 was reviewed in its entirety although it is not set out in any detail herein.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and his disability; and whether or not claimant is entitled to further permanent partial disability relating to his injury of March 17, 1978.

STATEMENT OF THE CASE

Forty-four year old married claimant recalled having a hearing on January 8, 1980. Claimant said that his first back injury was in January of 1969 while he was working for the sanitation department. He denied any injuries prior to that time. He fell flat on his back. He had surgery and returned to work. A claim for compensation was resolved with a special case settlement. It was his understanding he was paid disability for the injury. In 1976 he had another injury while working for the water department. He and another employee were carrying a water tapping tool. He had a pop in his back. He was not hospitalized, but he was treated with bed rest and medication. By the time of a 1978 injury to his left knee he was back at the sanitation department. He was classified as a driver, but he still picked up garbage. In May of 1979 he had back pain and went off work. A short time after his January 8, 1980 hearing he had an additional injury.

He remembered: He was working in sanitation picking up garbage. It was "real icy." He went down on his right kneecap. He called Dr. McCoy who drained blood from his knee and then did surgery. He was placed in a full leg cast. He was off work and received temporary total disability payments from January 22, 1980 to April 6, 1980.

At the time of his return to work he was placed in a garage on light duty. He went back on the garbage truck when he was given clearance by the doctor. Claimant reported that he got along well except for some problems with his back which he relieved by having his helper drive and he picked up the garbage.

He denied any injury during the time from April 7, 1980 to August 4, 1980. Rather he said that his back had started hurting "out of the clear blue sky." He had a burning sensation in his back. He was off work from August 4, 1980 to October 9, 1980 because of his back. He took sick leave and vacation to keep defendant employer from learning of his trouble.

In October claimant went back to driving a garbage truck and loading and unloading. He worked until he had left knee surgery in March of 1981. Surgery which had been scheduled for later was moved up when his knee locked as he was working. Claimant received weekly disability benefits from March 16, 1981 to August 9, 1981. He was in a full leg cast. Claimant acknowledged removing his cast on three separate occasions, but he did not feel his actions extended his healing time.

When he was released to return to work he was under no specific restrictions by Dr. McCoy. He anticipated returning to the garbage truck. He took some vacation time. On his resumption of work, he was sent to be a parking lot attendant. He had some forewarning of this in that he got a letter from defendant employer while he was on vacation. He asserted that he did not consent to the change and that he wished to be a garbage driver. As a parking lot attendant he sat for most of the time. The sitting bothered his back and he got up and walked and stood. If the machine was not working, he noted times. He collected money. The parking lot job paid $3.35 per hour. He lost benefits because although he worked forty hours he was considered part-time help. As a garbage worker he did not need to be on the job for forty hours. Work as a garbage driver gave him $7.28 per hour, a day and one-half sick leave each month, a paid vacation and paid life and health and accident insurance.

When a heavy equipment job opened he applied. The union tried to help him. Dr. McCoy was sent a description of the job, but claimant was not hired. A water meter job also became available. Again, the union helped and a letter was sent to Dr. McCoy who decided claimant could lift a 200 pound meter with help.

Claimant grew disgusted with defendant employer and filed a civil rights complaint which was later administratively closed.

Claimant worked the parking lot job until December 1, 1981 at which time he was suspended until he went to trial on criminal charges. As a result of that trial he was found guilty and served a year before being paroled.

Claimant claimed no new injuries from the time he went to work as a parking lot attendant or while he was incarcerated. He indicated that while he was in jail his back bothered him from time to time and he took Anacin. In April of 1983 his back tied up and he had trouble getting out of bed. He was given Motrin to take as he needed it.

In May of 1983 he came home to his family and began looking for employment. He testified that he has put down his injuries and his criminal charges on his applications. He had some part-time work until October. Beginning in late October he started part-time work as a cutting torch operator. His work provides him with no benefits and an hourly rate of $5.00. He averages close to thirty hours. The job necessitates standing and bending. The iron which he cuts is picked up by a machine. He takes pills for his pain and tries to keep it out of his mind.

As to his present condition with his back, claimant complained of pain from the beltline down into the buttocks on the right and sometimes on the left which bothers him at night. He has some cramping. Any activity can bring on pain. On comparing his difficulties he has now with those experienced before January of 1980, he said that his pain is more frequent and requires use of two Motrin tablets whereas before one would suffice, or he would walk off the problem, or it would be relieved by Anacin. His pain does not go into his lower leg.

Claimant also compared his left leg condition as it is at present and as it was presurgery in March of 1981. Popping in his left knee is about the same or perhaps more. He considered the surgery unsuccessful in that his knee is worse now than before. Moving too fast will cause the knee to buckle.

The right knee is less trouble. It still pops, but it does not catch as catching was helped by the surgery. Overall, his right knee remained close to the same.

Claimant said that he has not been paid mileage since January of 1980.

Claimant admitted having a part-time salvage business in which he went around and picked up junk and old cars. While he agreed that lifting was necessary, he said that he had special methods for doing it and that things were not as heavy because they were cut into pieces. After his release from prison he worked at this for a while, but since he got the job in October he has not had the time. He recalled that his earnings from this before his prior hearing in January of 1980 averaged $100 weekly. His children now help with pickup.

Claimant recalled that he worked on stock cars until September of 1981. By using special equipment he is able to work on his own vehicles.

Claimant denied that either work on stock cars or in his salvage business aggravated his condition.

Claimant insisted he could labor as a garbage worker by living with his back or as a meter repairperson if he had extra help with lifting meters.

Claimant asserted the city was responsible for his criminal acts. Claimant acknowledged a prior incident with another child for which he sought help. He had a discussion about moving to the water meter repairperson's job on okay from his doctor. The doctor said the work would be all right, but claimant did not know that the city agreed to this change until after his suspension. Dr. McCoy approved on November 30, 1981. Claimant was incarcerated on December 1, 1981. Claimant recalled having been told by his union representative that he would not be given the water meter job. He commenced drinking at 10:00 a.m. and later assaulted his daughter. He denied being told by the city after his arrest that should he be found not guilty he could have the water meter job. Instead, he said he was told by Kleinow that he would not work for the city again.

Claimant testified that he has not contacted any of his former supervisors since his release from prison as he did not think it would do any good.

Claimant alleged his entitlement to compensation from August 8, 1980 to October 9, 1980 as he was off for back pain. Claimant denied his being off was related to any incident while working on his personal car or a stock car. During this period he took some vacation in August. He said that he stayed home except for a few days in Missouri.

Claimant has completed ninth grade. His work experience prior to beginning work for defendant had been loading bread and fertilizer, doing various jobs for a cement company with one job as a monitor, operating a forklift, and laboring and driving a truck for a construction company.

A review of records seems to show claimant was off work from August 1 until August 15, 1980. Beginning on August 18, 1980 claimant took vacation through September 5, 1980. He took sick leave the week of September 8 and then went on light duty on September 14.

In 1981 claimant took vacation the week of March 9. He seemingly drew compensation from March 17, 1981 until August 9, 1981. It appears he may have worked in garbage for about eight days. He took vacation from August 24 until September 15, 1981 when he was moved to parking lot attendant.

Sharon Schaer, claimant's spouse, a nurse's aide, who was separated from him from December 1, 1981 until he got out of prison, testified that although claimant has not called the doctor and has not complained, she is aware of his having frequent back problems by the way he walks and bends. She massages his back and gives him medication. It was her opinion that he has had a gradual worsening of his condition since his hearing in 1980. She reported claimant's spending time in bed when he is off work.

Schaer was unaware of any nonwork injury.

Regarding claimant's knees, she claimed that the popping sound which was present before is now louder. Claimant's feet are cold.

The witness recalled that when claimant was changed from garbage work to the parking lot he was angry and became withdrawn. He also commenced drinking heavily. She asserted that this was new for him as he had been only a social drinker. Drinking was not involved in the first assault with one of their children.

Charles Hammen, who has been employed with the city for thirteen and one-half years, testified to the circumstances surrounding claimant's transfer to a parking lot attendant: The water department had a job available on October 6, 1981. Normal procedure was to post the job. Thereafter, employees wishing to make application could apply. After a two week posting period, the job would be offered to the senior employee or the person with the most time working for the city.

Claimant filed an application on October 7. An investigation was made of claimant's physical capabilities to perform the work. Dr. McCoy was contacted.

Claimant was not terminated until May 4, 1982 after his sentencing. The water department vacancy was filled on May 10, 1982. If claimant had been acquitted, he would have gotten the job as the senior applicant. The union was relied upon to make claimant aware that the water meter job was being kept open.

Myron Langhoff, sanitation foreman for the city of Mason City since 1967, testified to being responsible for claimant's attendance records. According to those records claimant returned to light duty on Septmeber 14, 1980 in the street department where he was paid at the same rate. He explained that if claimant kept his compensation check the city made up the difference between sick leave and vacation pay. Employees are permitted to build up to 120 days of sick leave. There is no reimbursement for the accrued sick leave. In August of 1980 claimant took sick pay and vaction and then sick pay again. He said that claimant took compensation in August and September of 1980.

Langhoff recalled having been told by claimant he had an operation coming up in March of 1981. The witness did not know whether it would be covered by workers' compensation.

Eugene Kleinow, currently police chief for Mason City, testified to being an administrative captain in September of 1981 and to being supervisor of the parking lot attendants. He acknowledged knowing both that claimant had been arrested and had been temporarily suspended. He denied telling claimant that he would not work for the city again and said that he would not have had the authority to do so. He stated that he had nothing to do with the award of the water meter job.

Robert E. McCoy, M.D., performed an arthroscopy on both of claimant's knees on January 16, 1980 and found evidence of degenerative arthritis of the medial compartment on the left and to a somewhat lesser degree on the right. There was no evidence of a meniscal tear. In a letter dated January 24, 1980 Dr. McCoy proposed that claimant undergo a high tibial osteotomy on the left "to transfer the center of maximum weight bearing from the medial side of the knee, where his severe degenerative arthritis is, to the lateral compartment of the knee joint which has been relatively spared from the severe degenerative arthritis." He anticipated that degenerative arthritis on the right would progress at a slower rate, but that eventually he would need the high tibial osteotomy on the right as well. The doctor wrote: "In retrospect it would seem that the episodes of increasingly frequent injury to his knees with symptoms of popping and giving way of the knees have been associated with and probably caused by his gradually increasing degenerative arthritis of both knees."

Dr. McCoy recorded an injury to the right knee on January 22, 1980 when claimant slipped on ice while he was on his garbage route. As a result of the slip he sustained a fracture of the lateral portion of the patella. After an arthroscopy a fragment of the patella was removed. The doctor stated that this injury was "completely unrelated to his [claimant's] previous knee difficulties."

Claimant was released for work on April 7, 1980. He worked for two days and then commenced having pain in the right lower lumbar area. Discomfort decreased during the day. Medication was prescribed. Dr. McCoy related claimant's symptoms at that time to his back and not his knee.

On August 8, 1980 claimant visited the doctor using one crutch and complaining of severe back pain in the lower midline. More specifically, the pain was in the lumbosacral joint area and the sacral area in the midline. There was no radiation, but motion was painful. The right ankle jerk was absent. Straight leg raising on the right at 20° caused pain which increased on sciatic stretch. Straight leg raising to 35° on the left caused pain without positive sciatic stretch. Dr. McCoy thought claimant had nerve root irritation based on mild disc protrusion and consented to claimant's having complete bed rest at home.

When claimant came back the next week, he spoke of trying to find lighter work with the city in the water or street departments. Claimant was found to be improved with negative straight leg raising. He was moved to increasing ambulation and partial bed rest with no bending or lifting.

The doctor was visited by two persons from the city--Myron Langhoff and Robert Sceffler. Acording to the doctor's notes, the two expressed concern regarding claimant's ability to tolerate work as a garbage man. Dr. McCoy agreed that claimant would be better off doing lighter work.

On August 26, 1980 the physician wrote of recommending claimant being given lighter work, but he noted that as of yet there was no lighter work available through the city.

When claimant was seen on October 7, 1980, he reported working at the city garage doing maintenance work on a temporary basis. Claimant thought he was able to return to garbage collecting. An inch of atrophy was found in claimant's right thigh. Emphasis was placed on claimant's doing his leg exercises to overcome the atrophy.

In early 1981 claimant's main complaint was of low back pain with episodes of subjective numbness in his posterior right thigh. X-rays of the knee compared to those taken in 1979 before his injury showed no progression of degenerative arthritis. Permanent partial impairment of the function of claimant's right lower extremity was rated at four percent.

In March of 1981 claimant underwent a valgus type high tibial osteotomy on the left. There was some problem with keeping claimant in his cast, but claimant gradually progressed to weight bearing. He was to return to work on August 6, 1981.

When claimant was seen on October 3, 1981 he told the doctor of his transfer to parking lot attendant. Claimant returned on October 20, 1981 with a job description for the water meter repairperson. After reviewing the description which apparently included the ability to lift 200 pounds with the assistance of tools and another worker, Dr. McCoy concluded claimant's condition would be compatible with performing the work if it was done infrequently. A letter was written on October 20, 1981 which so indicated. The doctor anticipated claimant would be able to tolerate squatting and kneeling to install meters and to do intermittent lifting of meters weighing sixty to sixty-five pounds. It seems that a description of the job of heavy equipment operator also was reviewed and that position was found less appropriate.

Medical information from the men's reformatory indicates that when claimant was evaluated in September of 1982 he was given a bedboard. He took no medication and apparently told his evaluator he had learned to live with his discomfort. In December claimant was given Tylenol for back and knee pain.

Early in 1983 claimant was given a knee wrap. In April claimant had an episode of low back pain. Motrin was given. Claimant was subsequently allowed to use his back brace.

A status report from May 1983 notes that claimant was working with no restrictions before April 14, 1983 when he had an episode of back pain. He made no knee complaints to that date.

Claimant was reevaluated by Dr. McCoy on June 17, 1983. Claimant's complaints were of low back aches across the lower lumbar spine for which he took Motrin, wore a lumbosacral belt and walked; snapping, popping and tenderness in the right knee with the primary problem in the lateral parapatellar area; and occasional popping in the left knee.

On examination claimant had a slight list to the left. He bent forward to within eight inches of touching the floor with pain in the lumbosacral joint area. The right ankle jerk which had been absent since the 1969 surgery was absent. Combined straight leg raising to 85° caused a feeling of pulling in the low back. There was a varus deformity of 60° on the right knee and a valgus of 10° on the left. Varus on the right was viewed as abnormal. Tenderness to palpation was present over the lateral facet of the right patella. X-rays of the lumbar spine showed no further narrowing at L5-S1 in comparison with the films taken in May of 1980. There was slight Schmorl's Node formation at D12-L1 and at D11-D12. There was no progression of narrowing in the medial joint line in the right knee when it was viewed with films taken in January of 1981. X-rays of the left knee taken in May of 1983 evidenced narrowing of the medial joint space.

In a letter dated July 8, 1983 Dr. McCoy reviewed his prior ratings of claimant's impairments noting that on February 21, 1980 he gave a fifteen percent impairment to the left lower extremity and eight percent to the right lower extremity with the latter attributable to degenerative arthritis; an additional four percent to the right lower extremity resulting from the patellar fracture of January 22, 1980; five percent of the whole man related to a 1969 disc problem; and five percent of the whole man because of the 1976 injury. His present impairment ratings are set out thusly:

> I would estimate his permanent partial impairment of function of the whole man from his back at 15% of which I would estimate 3% to be related to further work injury. I think his permanent partial impairment of function of the left lower extremity was diminished by his high tibial osteotomy to about 12%, which has remained the same to the present time. I think that the permanent partial impairment of function of the right lower extremity has increased from the 12% rating I previously gave to 15% at the present time.

The doctor explained his increase in the permanent partial impairment rating as follows:

> In April of 1980 he was seen for low back pain apparently aggravated by work and in August of 1980 he was having fairly severe pain again which made it necessary for him to be off work from August until October of 1980. As a result of that episode of low back pain, I recommended to his employer that he be given lighter work. It was because with the episode of August 1980, his condition changed to the extent that I felt permanent arrangements should be made for lighter work. That I felt his permanent partial impairment of function rating as a result of work related back problems should be increased by 3% over the previous rating as it had not been felt prior to that that any long term modification of his work activities should be made. I feel that since his status at that time required a change in his recommended work designation further impairment of function had been incurred as a result of back aggravation at work.

APPLICABLE LAW AND ANALYSIS

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

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).

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).

Claimant at the time of hearing considered a surgery in March of 1981 as unsuccessful and expressed the opinion that his knee is worse now than before. He claimed that moving too fast will cause his knee to buckle. At the time of hearing claimant made little complaint regarding his right knee.

Dr. McCoy made findings which were just opposite. When he reevaluated claimant's knee in June of 1983 he reported that although claimant had occasional popping in his left knee he was "not particularly troubled by it." Dr. McCoy did a tibial osteotomy on the left. Claimant took off his cast a few days after surgery. X-rays at that time showed his staples to be secure. X-rays revealed maintenance of position the next time claimant removed his cast. After his third removal he still had good position. Dr. McCoy has not changed his impairment rating to the left lower extremity. In a letter dated July 8, 1983 he wrote: "As you know, in a deposition on February 21, 1980, I stated that I felt he had 15% permanent partial impairment of the left lower extremity from his knee and 8% permanent partial impairment of the right lower extremity from the degenerative arthritis of his right knee....I think his permanent partial impairment of function of the left lower extremity was diminished by his high tibial osteotomy to about 12%, which has remained the same to the present time."

No additional award of benefits can be made to claimant regarding injury to his left lower extremity as medical evidence from Dr. McCoy fails to show any increase in impairment.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant injured his left knee in March of 1978.

That claimant had a prior hearing in this matter.

That claimant's prior litigation resulted in his being awarded benefits for twelve percent (12%) of his left lower extremity.

That claimant had surgery to his left knee in March of 1981.

That claimant received healing period payments from March 16, 1981 to August 9, 1981.

That claimant was released to return to work on August 6, 1981 without restrictions.

That claimant has difficulty with his knees buckling.

That arthroscopy showed degenerative arthritis in the medial compartment of claimant's left knee in January of 1980.

That in February of 1980 claimant was given an impairment rating of fifteen percent (15%).

That after the surgery in 1981 claimant's impairment was lowered to twelve percent (12%).

That claimant's impairment to his left lower extremity was unchanged at the time of Dr. McCoy's evaluation in June of 1983.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant is not entitled to additional permanent partial disability as a result of his injury of March 17, 1978.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay one-quarter (1/4) of the charge for office visits to Dr. McCoy in May and June of 1983, or fourteen dollars ($14.00).

That defendants pay North Iowa Medical Center forty-two and 50/100 dollars ($42.50) for x-ray charges.

That defendants pay the following mileage expenses for visits to Dr. McCoy: 1 trip of 10 miles at $.18 cents per mile; 9 trips at $.20 per mile; 2 trips at $.22 per mile; and 5 miles at $.24 per mile.

That defendants pay one-quarter (1/4) of the expenses in this matter pursuant to Industrial Commissioner Rule 500-4.33 including twenty-seven and 50/100 dollars ($27.50) reported expenses with Dr. McCoy.

Signed and filed this 24 day of July, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWIN SCHARF,
Claimant,
vs.
CITY OF FORT DODGE,
Employer,
and
ROYAL INSURANCE COMPANY,
Insurance Carrier,
Defendants.

File No. 729303
APPEAL
DECISION

FILED
JUL 23 1984
IOWA INDUSTRIAL COMMISSIONER

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 5, and defendants' exhibits A and B, all of which evidence was considered in reaching this final agency decision.

Neither side filed briefs.

The result of this final agency decision will modify the review-reopening decision.

The record shows that claimant hurt his hand in the injury under consideration here, that of April 1, 1980. The review-reopening decision shows that the hearing deputy took the opinions of John D. Birkett, M.D., and Samir R. Wahby, a qualified orthopedic surgeon, both treating physicians, over that of William R. Boulden, a qualified orthopedic surgeon, an examining physician. It would seem that the opinions of the treating physicians would in this case be more valuable than that of an examining physician and therefore there is no compelling reason to change the award.

The order in the review-reopening decision appointed Samir Wahby, M.D., as claimant's physician; however, §85.27, The Code, provides that the employer has the choice of doctor. Since claimant has presented no issue of choice of doctor, no order will be made.

The findings of fact, conclusion of law and order are those of the undersigned.

FINDINGS OF FACT

1. That the claimant, Edwin Scharf, was employed by the City of Fort Dodge, Iowa, as a custodian on April 1, 1980.

2. That on that date claimant hurt himself at work when he fell backwards into a window well.

3. That as a result of said work injury, claimant sustained a permanent partial impairment to his right arm of 50 percent.

4. That the claimant sustained six weeks of healing period for which he has been paid weekly compensation at the rate of $107.70 per week, which weekly rate has been stipulated.

5. That the claimant is in need of future medical care.

CONCLUSION OF LAW

That claimant sustained an injury which arose out of and in the course of his employment which resulted in permanent partial disability to the right arm of fifty (50) percent, entitling him to benefits for ninety-five (95) weeks at the rate of one hundred seven and 70/100 dollars ($107.70).

ORDER

IT IS THEREFORE ORDERED that the defendants pay unto the claimant ninety-five (95) weeks of permanent partial disability at the rate of one hundred seven and 70/100 dollars ($107.70) per week beginning on July 28, 1983 being the date that Dr. Boulden concluded that claimant had a functional impairment of the right hand.

Legal interest is to accrue on this award from July 28, 1983.

Defendants are further ordered to pay all the unpaid medical expenses incurred by the claimant as necessary to treat the injury under review.

Costs are taxed against defendants.

Defendants shall file a activity report upon payment of this award.

Signed and filed this 23rd day of July, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWIN SCHARF,
Claimant,
vs.
CITY OF FORT DODGE,
Employer,
and
ROYAL INSURANCE COMPANY,
Insurance Carrier,
Defendants.

File No. 729303
NUNC PRO TUNC
ORDER

FILED
JUL 26 1984
IOWA INDUSTRIAL COMMISSIONER

On July 23, 1984 the undersigned deputy industrial commissioner reached a final agency decision in the above captioned case. An error was made in No. 3 of the Findings of Fact and in the Conclusion of Law.

WHEREFORE, Finding of Fact No. 3 and Conclusion of Law should read as follows:

3. That as a result of said work injury, claimant sustained a permanent partial impairment to his right hand of 50 percent.

That claimant sustained an injury which arose out of and in the course of his employment which resulted in permanent partial disability to the right hand of fifty (50) percent, entitling him to benefits for ninety-five (95) weeks at the rate of one hundred seven and 70/100 dollars ($107.70).

Signed and filed this 26th day of July, 1984.

Barry Moranville
BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY SENN,

Claimant,

vs.

ROBERT J. ELLIOTT, INC.,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurance Carrier,
Defendants.

File No. 612460

A P P E A L

D E C I S I O N

FILED

AUG 8 1984

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a proposed decision in review-reopening wherein claimant was awarded temporary total and permanent partial disability benefits based upon a work-related injury. Certain medical expenses were also awarded claimant.

The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1 through 8; defendants' exhibit 1; the deposition testimony of Sinesio Misol, M.D.; and the briefs and filings of all parties on appeal.

ISSUES

Claimant states the issues as:

> The deputy industrial commissioner in his decision failed to rule upon claimant's issue at hearing regarding whether or not the claimant was entitled to additional benefits in 1980 when his workers' compensation benefits were terminated on January 17, 1980 without prior written notice or knowledge.
>
> Claimant has sustained a high degree of industrial disability as a result of the injuries arising out of and in the course of his employment on October 20, 1979 and the deputy erred in finding that there was no permanent-partial disability to the claimant as regards his back injuries.

REVIEW OF THE EVIDENCE

Claimant was unmarried and 31 years old at the time of the hearing. He has 11 1/2 years of formal schooling and a G.E.D. (Transcript, page 8) He spent six months in the Marine Corp and completed a course in gas station mechanics. He worked in dry ice delivery until 1972 and then went to truck driving school for his Iowa road license. (Tr., pp. 9-13) For the next few years claimant drove 18-wheeler trucks for various employers. His duties included loading, unloading and hauling to the East Coast. (Tr., pp. 13-19) He earned approximately $200 a week at a rate of 9-10 cents a mile. (Tr., pp. 16-17) Claimant began working for defendant employer in August of 1979. He hauled perishables to the East Coast and did loading and unloading. Claimant stated he was paid on a percentage basis and earned approximately $400 a week. (Tr., p. 19) On October 20, 1979 claimant was injured while attempting to turn a crank for a dolly on a semitrailer. Claimant drove his load to Des Moines and went to the hospital to be x-rayed. (Tr., pp. 20-22) Claimant testified he had no fractures and was referred to his family doctor. He consulted P. E. Coggeshell, D.C., and was treated with manipulation, heat and ultrasound on his neck and back. (Tr., p. 22, Claimant's Exhibit 3) Claimant returned to driving for a short period and again saw Dr. Coggeshell for pain in his chest, arm and shoulder. He was referred by defendant employer to William Reinwasser, D.O., who noted the impression of "substantial functional overlay" in claimant's complaints. (Tr., pp. 23-25; Defendants' Ex. 1) Claimant was then referred by Dr. Reinwasser to Sinesio Misol, M.D., an orthopedic specialist, on November 30, 1979. (Tr., p. 25, Cl. Ex. 4) He was treated on a complaint of upper back pain and was released to work on January 17, 1980. (Cl. Ex. 4) Dr. Misol testified he believed that claimant had improved sufficiently to return to driving a truck. (Misol Deposition, p. 11) Claimant testified he was still in pain and did not return to work. He was told by defendant employer he no longer had a job. His benefits were terminated in January and claimant stated he called Mrs. Nehring at the insurance company to find out why. He was told his payments had been cut off. Claimant then returned to the care of Dr. Coggeshell. (Tr., pp. 27-28) On March 24, 1980 claimant filed an original notice and petition with the industrial commissioner indicating benefits had been cut off and claimant was unable to work.

Claimant continued to receive chiropractic treatment and in June of 1980 consulted Stuart Winston, M.D., a neurosurgeon. (Tr., p. 32; Def. Ex. 1) Dr. Winston found no neurological signs and indicated a diagnosis of cervical myofascial strain. Dr. Winston indicated claimant's prognosis for his back complaint was excellent and no permanent disability was anticipated. (Def. Ex. 1) Dr. Winston's report indicates that claimant felt he was ready to return to work. (Def. Ex. 1) Claimant had physical therapy during the summer and was improved by July 23, 1980. (Def. Ex. 1) Claimant babysat for his sister and did not look for other work until the summer or fall of 1981. (Tr., pp. 33-34) He had a job driving without loading or unloading duties for approximately three months and then saw Dr. Misol in October 1981 with a complaint of pain in the right shoulder, arm and between the shoulder blades. (Tr., pp. 35, 59; Misol Deposition, p. 13) Dr. Misol testified claimant then had an impairment of ten percent of the shoulder. (Misol Dep., p. 21) Surgery to explore the joint was scheduled for December 1981. (Misol Dep., p. 17) When claimant failed to keep the appointment, Dr. Misol cancelled the surgery and referred claimant to Jerome G. Bashara, M.D., an orthopaedic surgeon. (Tr., p. 36; Cl. Ex. 5) On December 21, 1981 Dr. Bashara performed a resection arthroplasty of the right shoulder AC joint. On January 4, 1982 Dr. Bashara determined a five percent permanent partial physical impairment of the body as a whole as a result of the work injury. (Cl. Ex. 5) Claimant testified that following the surgery his shoulder was better, but he continued to suffer pain in his chest, rib and shoulder blades. (Tr., p. 38) He was referred by Dr. Bashara for evaluation at the University of Iowa surgical department. The results of the examination were normal except that claimant had "discomfort to great resistance to abduction of the shoulder on the right." (Def. Ex. 1) It was indicated that claimant could return to truck driving with lifting restrictions of 25-50 pounds with no bending, stooping or twisting. (Def. Ex. 1) Claimant testified he still has muscle spasms between his shoulder and pain in the rib area. (Tr., pp. 38-39) He has applied at Vocational Rehabilitation and a few trucking companies but has not found work. (Tr., p. 39) Claimant testified he uses a Taylor back brace and a TENS unit which were prescribed by the Iowa City clinic. (Tr., p. 39)

Donald Shoeman, retired general manager of defendant employer, testified that claimant was told to see the company doctor when claimant first reported his injury. (Tr., pp. 67-69) Mr. Shoeman testified claimant brought in a release to work on November 1 and immediately took a round-trip load. On the second load, claimant took the advance payment but didn't drive the load. Mr. Shoeman did not see claimant until the following December. He testified claimant, at that time, wanted to settle the $150 he owed but said nothing about a physical problem. (Tr., pp. 69-71) Mr. Shoeman stated that drivers receive extra pay if they do their own loading or unloading and that most drivers don't do their own loading duties. (Tr., pp. 72-73) Mr. Shoeman believed he would want to get a doctor's opinion before hiring a driver who had the physical restrictions that claimant has. (Tr., p. 79)

The claim activity form filed February 13, 1982 indicates claimant's rate of compensation is $216.34 per week.

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 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 claimant has the burden of proving by a preponderance of the evidence that the injury of October 20, 1989 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 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

Claimant was receiving compensation benefits in January of 1980 when he was seen by Dr. Misol in followup. Dr. Misol has testified he believed claimant could return to his driving duties and released him to work effective January 17, 1980. Evidentially, defendant insurer terminated the compensation payments in accordance with the date of the work release, and claimant had to call the insurance company's office to find out what had happened to his benefit payments.

The Auxier ruling equates compensation benefits to a property right which may not be taken away without due process of law. Due process requires a procedure of notification, and the Auxier decision makes mandatory a minimal 30 day notice of payment termination unless the recipient has returned to work. The evidence supports a finding that claimant did not receive the required notice by defendant insurer and had not returned to work. Therefore, additional benefits are due claimant. With regard to the duration of benefit period, the purpose of the Auxier notice provision is to warn the recipient so that he may initiate action if he disputes the termination reasons. Claimant's petition filed March 24, 1980 evinces that he was aware of his rights and exercised those rights by initiating an action. Claimant is entitled to an additional benefit period from January 17, 1980 to March 24, 1980.

Claimant's second issue on appeal argues for a finding of industrial disability in excess of 15 percent. Since his injury, claimant has returned to truck driving on at least two occasions. While he has some restrictions which would limit him from loading and unloading, he has been able in the past to secure driving work which did not entail these duties, and Mr. Shoeman has indicated that such loading activities are a source of extra income to drivers rather than a requirement of the job. Dr. Winston did not anticipate that claimant's back complaint would result in a permanent condition. Dr. Bashara, who performed the shoulder surgery, has determined a physical impairment of five percent of the body as a whole, which represents a relatively small amount of functional limitation. At least three of claimant's doctors have discharged him to return to work, and none have reported that he is unable to resume driving duties. Even though claimant was not employed at the time of the hearing, there is no evidence that his earning potential as an experienced driver has been significantly diminished as a result of his disability. For these reasons, the deputy's finding of 15 percent industrial disability is accepted as correct.

FINDINGS OF FACT

1. Claimant is 31 years old and has a G.E.D.

2. Claimant's work experience has been primarily in driving 18-wheeler trucks.

3. Claimant's disability benefits were terminated on January 16, 1980 without notice.

4. Claimant was not working at that time.

5. Claimant filed an original notice and petition of his claim for additional benefits on March 24, 1980.

6. Claimant has a permanent impairment of five percent of the body as a whole as a result of the October 20, 1979 work-related injury.

7. There was no medical finding of permanency with regard to claimant's back.

8. Claimant has lifting, bending and twisting restrictions.

9. Claimant has previously worked as a driver without performing loading and unloading duties.

10. Claimant has been released to return to truck driving.

11. Claimant has an industrial disability of 15 percent as a result of his work-related injury.

12. The applicable rate of compensation is $216.34 per week.

13. Previous findings of the deputy with regard to temporary total and permanent partial disability benefits, as well as medical costs payable by defendants, which were not at issue on appeal, are incorporated in this decision.

CONCLUSIONS OF LAW

WHEREFORE, it is found:

Claimant is entitled to additional benefits as a result of defendants' failure to timely notify him of the termination of benefits. The benefit period extends from the date of termination of compensation payments, January 16, 1980 to the date claimant's petition was filed with this office on March 24, 1980, a period of nine and three-sevenths (9 3/7) weeks.

Claimant is entitled to permanent partial disability benefits based upon a finding of 15 percent industrial disability.

THEREFORE, the decision of the deputy is affirmed in part and modified in part.

ORDER

THEREFORE, it is ordered:

Defendants are to pay unto claimant an additional nine and three-sevenths (9 3/7) weeks of disability benefits at a rate of two hundred sixteen and 34/100 dollars ($216.34) per week as a result of the termination without notice of compensation payments.

As found in the proposed decision, defendants are to pay unto claimant twenty-five and six-sevenths (25 6/7) weeks of temporary total disability benefits at a rate of two hundred sixteen and 34/100 dollars ($216.34) per week. Defendants are also ordered to pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at a rate of two hundred sixteen and 34/100 dollars ($216.34) per week.

Defendants are to reimburse claimant for the following medical expenses:

Mercy Hospital	$ 828.00
Iowa Sickroom Supply Co., Inc.	477.36
Iowa Methodist Medical Center	190.00
Neuro-Associates, P.C.	140.00
Radiology & Nuclear Medicine, P.C.	125.00
Iowa Lutheran Hospital	92.95
University Hospitals	115.00
Northwest Community Hospital	2,756.00
Dr. Bashara	925.00
Drug Town	64.42
Franklin Drug	10.25
City Drug	24.95
Drug Mart	10.23
Dahl's Pharmacy	12.85
Whitaker Pharmacy Co.	4.80

Defendants are to be given credit on these amounts if 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 defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendants shall file a final report upon payment of this award.

Signed and filed this 8 day of August, 1984.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NORMAN L. SHAFFER,

Claimant,

vs.

ROBERT G. TALBOT CO., INC.,

Employer,

and

MISSION INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILE NO. 698907

A R B I T R A T I O N

D E C I S I O N

FILED

AUG 24 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Norman L. Shaffer, claimant, against Robert G. Talbot Co., Inc., employer, and Mission Insurance Company, insurance carrier.

Claimant alleges that he sustained a compensable injury to his back on November 5, 1981 and seeks compensation for permanent disability, healing period and medical benefits under section 85.27 of the Code of Iowa.

The hearing commenced on June 18, 1984 at the Pottawattamie County Courthouse in Council Bluffs, Iowa with Michael G. Trier, Deputy Industrial Commissioner presiding. Claimant appeared in person with his attorney Robert Kohorst and defendants appeared through their attorney Scott H. Peters. The case was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimony of Norman L. Shaffer; claimant's exhibits 1, 2, 4, 5, 6, 7 and 9; and defendants' exhibits A and B.

ISSUES

The issues presented by the parties at the time of hearing are whether a causal connection exists between the injury claimant sustained on November 5, 1981 and any disability with which he may presently be afflicted. There is also an issue concerning the determination of claimant's entitlement to benefits for temporary total disability, healing period and/or permanent disability. The parties also identified claimant's entitlement to benefits under the provisions of section 85.27 of the Code of Iowa as an additional issue in the case. It was stipulated that claimant's rate of compensation is $221.77 per week in the event of an award. The defendants admitted that claimant was injured on the job on November 5, 1981. Claimant's exhibits 3 and 8 were not received into evidence when they were offered. There is no showing in the file or otherwise that either of those exhibits was ever delivered to defendants in any fashion. Even though a copy of exhibit 3 appears in the agency file of this matter, there is no indication that it was ever delivered to either of the defendants.

REVIEW OF THE EVIDENCE

Claimant testified that he is 52 years of age and was born November 3, 1931. He stated that he presently resides at Irwin, Iowa and that on November 5, 1981 he resided at Route 1, Hancock, Iowa.

Commencing at page 5 of claimant's deposition he related that he quit school in the tenth grade, worked on a farm until age 17, worked as a coal miner for approximately a month and then learned how to drive a truck. He stated that he entered the army where he served for more than 13 years during which time he was a drill instructor and a mechanic. Upon leaving the army in 1964, he became a truck driver and stated that such was the main type of work he had done since, except for some on-the-job training as a dispatcher and for one occasion when he managed a bar and motel in New York State for approximately eight months.

Claimant described his medical history as generally uneventful except for a low back injury incurred in a truck wreck in 1953 while he was in the army as related commencing at page 48 of his deposition. He also described an accident in 1973 which occurred in a similar fashion to the accident which is the subject matter of this case and produced similar symptoms. He reported that he underwent surgery and was off work approximately eight months. At page 16 of his deposition the following conversation occurred:

A. They operated on me. They took out--cut out something, L5 or L4.

Q. Could it possibly have been part of the disc material at L4, L5?

A. Yes, sir.

Claimant went on to state that he was paid workers' compensation through the State of North Carolina for his healing period of approximately eight months. He related that he was rated as having a 20 percent disability for which he was paid additional compensation. (Exhibit A, pages 16 and 17)

Claimant stated that after he had healed from the 1973, injury he returned to work and was virtually asymptomatic until the injury of November 5, 1981.

Claimant testified that he began working for the defendant employer approximately 10 months prior to the date of injury. He stated that his job was to drive a truck delivering produce from California primarily to Iowa and Minnesota and then, on the return trip, to deliver meat from Iowa back to California.

Claimant stated that on November 5, 1981 he had gone to the John Morrell plant in Sioux City, Iowa to have meat loaded onto the trailer. He stated that while alighting from the tractor he had mud on his feet and slipped. He stated that his left hand was on the handrail of the tractor and, that when his foot slipped off the first step, he slapped his body against the truck. Claimant stated that he felt immediate pain in his left leg and that he reported it to his employer shortly thereafter. He reported taking some aspirin. He stated that he finished loading the truck and went to a motel in Sioux City, Iowa where he was met by another driver sent by the employer. Claimant stated that he quit as he refused to drive with another driver, particularly since the employer had recently terminated the services of his spouse who had been his co-driver. He turned the truck over to the other driver.

Claimant testified that the pain in his left hip got worse over the night and that on the next day he sought treatment from Charles L. Pigneri, D.O. He stated that after a series of treatments his condition had not significantly improved and that he was referred to Maurice P. Margules, M.D. Claimant described his symptoms at that time as very bad pain in the left hip which ran down to the foot. He stated that part of his foot was numb. Claimant testified that Dr. Margules recommended surgery but that defendant insurance carrier denied liability and that he, claimant, could not pay for the recommended surgery.

Claimant testified that he applied for social security disability in 1982 and was awarded the same in December, 1982 as shown by exhibit 4. Claimant stated that he has not worked since November 5, 1981 and that the social security benefits have been his only source of income.

Claimant testified that he has been evaluated by Dr. Ayres in Atlantic, Iowa, Michael Egger, M.D., in Council Bluffs, Iowa, E. B. Weis, Jr., M.D., in Omaha, Nebraska, Dr. Myer at Manning, Iowa, and David B. McClain, D.O., in Des Moines, Iowa.

Claimant testified that during 1982 the bottom of his foot felt numb and his leg grew smaller. He stated that his condition was unchanged during 1983 and that now, in 1984, he is learning to live with it. He stated that he experiences a pulling sensation and pain in the calf of his left leg running from the heel up past the hip to an area on the left side of his lower back slightly below the belt line. He stated that he had no prescription medication on a regular basis prior to the injury, but that he has been on codeine since 1981 following the injury and still sees Dr. Myer. He stated that he has incurred ulcers during the last two years. He confirmed that Dr. Margules recommended surgery but that Drs. Myer and McClain advised against surgery and that none is presently scheduled. He stated that he has no more evaluations scheduled for his social security disability benefits and that no proceedings which could result in their termination are presently pending.

Claimant stated that he does not feel he could work in his present condition. He stated that he could not lift and cannot sit or stand for any substantial length of time. He stated that around his home he does the dishes and that he formerly did vacuuming, but discontinued such upon the advice of his doctors. He stated that this matter has caused a lot of mental problems for him and that he now has problems with his nerves and fights with his wife more frequently. He also related that he takes Triavil and Tagamet on a daily basis.

Claimant denied hearing any doctors speak to him about degenerative joint disease.

Claimant's exhibit 1 indicates that he was examined on July 25, 1980 by Ronald I. Peterson, M.D., who found him qualified to work as a truck driver at that time.

Claimant's exhibit 2, a report from Jennie Edmundson Memorial Hospital and Dr. Margules, the first page of the exhibit is a discharge summary for a period of hospitalization from January 23 until Janury 28, 1982. The neurological evaluation performed by Dr. Margules found weakness of plantar flexion of the left foot, decreased sensitivity to pain in the lateral aspect of the left foot within the cutaneous distribution of the S1 nerve root and marked spasm of the paravertebral lumbar musculature. The impression at the conclusion of the neurological evaluation stated:

> ...The patient's history and findings are those of an acute radicular compression of the S1 root on the LEFT, most likely due to an acute disc herniation at the L5-S1 interspace due to trauma sustained in an accidental fall from a truck on the 5 of November, 1981 in Sioux City, Iowa.

The discharge summary stated:

X-ray studies of the lumbar spine were obtained and were found to be normal except for narrowing of the L5,S1 interspace compatible with the previous surgery at this level. Electromyographic studies were performed showing evidence of a normal study. Metrizamide lumbodorsal myeloradiculography on 1/26/82 revealed evidence of a defect at the L4,L5 interspace indicating the presence of a disc herniation at this level on the LEFT....

...

FINAL DIAGNOSIS: Herniated lumbar disc, acute, due to trauma, L4,L5 interspace, LEFT, sustained in an accidental fall in Sioux City, Iowa on November 5, 1981.

Claimant's exhibit 6 constitutes charges from Manning General Hospital for physical therapy in the total amount of $113.40. Exhibit 7 is a bill from Dr. McClain in the amount of $140.00 for an evaluation and x-rays.

Exhibit 9 is the deposition of Robert G. Talbot wherein he acknowledges that claimant reported the injury to him on November 5, 1981. Defendants' exhibit B is the deposition of E. B. Weis, Jr., M.D., including deposition exhibits 1, 2 and 3. They related that claimant was examined by Dr. Weis on October 5, 1983. As shown in deposition exhibit 3 the examination revealed:

...With the patient dressed in a hospital gown, he is noted to have a normal station and gait while walking across the examining room floor. He does seem to have some difficulty with his left ankle, but he is able to walk on his heels and toes without difficulty and inverts and everts his feet while standing showing good muscle strength about the feet and ankles. He is able to bend forward with difficulty until his fingertips are about 4 inches from the floor. He is able to bend backwards until his spine makes an angle of 40 degrees with the vertical. He is able to bend to the right and to the left until his spine makes an angle of 40 degrees with the vertical. With the patient supine on the table, he has negative straight leg raising signs on both sides. With the patient prone on the table, there are normal ankle reflexes and no tenderness to palpation in the posterior calf, thigh, popliteal area, trochanteric area, buttock, iliolumbar, or paraspinal region on either side. There is a well healed scar of surgery in the midline low back.

Review of the x-rays of the lumbosacral spine shows the degenerative joint disease at L-5, S-1 with narrowing and a vacuum sign. There is additional evidence of degenerative joint disease on the lateral views of the spine at L-4-5 level.

I have reviewed the records by Dr. Margules when he had a myelogram in January of 1982 and note Dr. Margules' diagnosis of herniated disc at L-4-5 and at L-5, S-1. Dr. Margules apparently relies on the finding of sensory abnormality in the distribution of the left S-1 nerve root as a major part of his diagnosis. Dr. Margules states a decreased ankle jerk on the left of 1+ compared to 3+ on the other side and that is certainly not my finding at the present time.

Dr. Weis went on to state that in his opinion claimant's problem was degenerative joint disease and that surgery was not indicated.

The operative report from the myelogram conducted during claimant's January, 1982 hospitalization states: "Evidence of a defect noted at the L5-S1 interspace on the LEFT, and also evidence of a midline disc herniation noted at the L4-L5 interspace."

At page 14 of exhibit B, Dr. Weis opined that claimant's degenerative joint disc disease had been in existence for five to ten years. He went on to state:

A. Degenerative joint disease is an organic disease. It's not caused by a specific event of trauma. It may result as secondary to trauma. In this particular case there was no evidence of any trauma.

Q. You found no evidence that the disease was related to a fall in '81, for example?

A. Nothing explicit.
(Ex. A, p. 14)

With regard to his diagnosis the following conversation occurred:

Q. Did you find any evidence whatsoever of injury or illness that might have been attributed to the fall he described in 1981?

A. Nothing explicit.

Q. Doctor, do I understand correctly that it is possible that a fall such as Mr. Shaffer described to you may cause a lighting up of a degenerative joint disease?

A. Well, certainly you see a lot of people with degenerative joint disease who have car crashes or falls, or different kinds of traumatic events who have a lot of complaints of discomfort secondary to that. That's true. It's a condition that is subject to a lot of inflammatory changes when excited by excess physical activity such as might be associated with some traumatic event.

Q. How long in your experience do those inflammatory changes normally last?

A. Well, most back pain problems secondary to basically arthritis are, you know, 95 per cent of them are over in three months, certainly four months. I would expect him to be as recovered as he would ever be in three months.

Q. Do you have an opinion, then, Doctor, based on a reasonable degree of medical certainty as to whether Mr. Shaffer had an existing degenerative joint disease in November of 1981?

A. That would be two years before I saw him. Yes, I have an opinion.

Q. What is your opinion?

A. He certainly had an existing degenerative joint disease at that time.

Q. And do you have an opinion based on a reasonable degree of medical certainty as to whether assuming he did have a fall of some sort as he described to you in '81, as to whether he may have had some inflammatory symptoms resulting from that fall?

A. The question again--he had--I would expect him to have. He had the degenerative joint disease at that time and any significant fall would probably make it worse, yes.

Q. And what is your opinion as to how long those symptoms would be normally expected to last?

A. As I said before, in 95 per cent of the cases, they would be over in three months.

Q. Do you have an opinion at this time, Doctor, based on a reasonable degree of medical certainty as to whether Mr. Shaffer at this time has any injury or illness which would be attributable solely to the fall of 1981?

A. I have an opinion.

Q. What's your opinion?

A. That is nothing that's going on at the present time that's not related primarily to his degenerative joint disease.

Q. And the way I phrased the question was solely. If you take the same question and I say that is in any way attributable to the fall of 1981, what would your opinion be?

A. I can't rule out the possibility that the fall made the arthritis a little bit worse, but nothing other than that. I see no explicit changes such as fractures, or dislocations, or any of the normal traumatic changes that would indicate any direct injury at that time.

Q. Do you have an opinion, Doctor, based on a reasonable degree of medical certainty as to whether Mr. Shaffer has suffered any permanent injury as a result of the fall in 1981?

A. I have an opinion.

Q. What is that?

A. I don't think there is anything that's going on with that man that is related to his injury in '81.
(Ex. B, pp. 15-17)

Concerning the possibility of a herniated lumbar disc, the following conversation occurred:

Q. Based on your consideration of Dr. Margules' EMG finding, based on your physical examination, your x-rays and your testing, did you find any evidence whatsoever to support a conclusion of traumatically related herniated lumbar disc?

A. I did not.
(Ex. B, p. 53)

ANALYSIS AND APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 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).

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).

Dr. Margules indicates that claimant suffered a herniated disc as a result of the injury. Dr. Weis disagrees and is of the opinion that the injury caused only a temporary aggravation of a preexisting degenerative disc disease with no permanent impairment resulting from the injury. Dr. Margules recommends surgical intervention. Dr. Weis does not due to his impression that the problem is degenerative disc disease and not a herniated lumbar disc. Claimant was apparently evaluated by Dr. McClain in August, 1983. According to claimant's testimony Dr. McClain did not recommend surgical treatment. Dr. Myer, with whom claimant is still treating, does not recommend a surgical remedy. The reasons why Drs. McClain and Myer do not recommend surgery are not a part of the record in this case. Surgery is a frequently used procedure for treatment of a herniated disc. It is generally not used, however, for treatment of degenerative arthritis. Claimant had also testified that he did not undergo surgery because of a lack of ability to pay its cost. He also testified that he is now eligible for medicare, but that surgery is not presently scheduled.

It appears likely that claimant has suffered from degenerative arthritis for several years as indicated by Dr. Weis. It also appears that he does exhibit indications of disc herniation. Disc protrusion from degenerative arthritis is not entirely dissimilar from disc herniation. There is no indication that claimant has seen Dr. Margules since January, 1982. It also appears likely that claimant may have disc protrusion at the L4-L5 level as indicated by the myelogram. It is therefore found and concluded that claimant did not suffer disc herniation at the L4-L5 level as a result of the November 5, 1981 injury. The opinion of Dr. Margules is rejected in favor of that of Dr. Weis as being more consistent with the apparent recommendation of Drs. McClain and Myer.

There is no direct medical evidence in the record which indicates that point at which further significant improvement from the injury was not anticipated. Claimant's testimony indicates that he has been essentially stable since shortly after the injury. Dr. Weis indicated that an aggravation of degenerative arthritis generally resolves in three or four months. Where no improvement is anticipated, no healing period benefits are payable. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (1981). Claimant's medical care has been in the nature of maintenance and little in the record beyond the testimony of Dr. Weis indicates that any improvement of claimant's condition has ever occurred. It is therefore found and concluded that claimant's recovery ended February 5, 1982, a period of approximately 90 days following the date of the injury as indicated by Dr. Weis.

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).

Dr. Weis found no permanent impairment arising from the injury. No other expression of expert medical opinion with regard to the amount of impairment resulting from the injury is in the record of this case. It seems reasonable to conclude that claimant's condition is that of degenerative arthritis as aggravated by the accident of November 5, 1981.

According to claimant's testimony he was asymptomatic prior to the injury but, immediately after it occurred, be began experiencing severe pain which has continued until the time of hearing. From the record it appears that claimant was, in fact, steadily employed as an over-the-road truck driver prior to November 5, 1981. He has not been so employed since. The x-rays clearly show an abnormality which could be the source of a significant degree of discomfort. The amount of pain which a person endures is not readily measured or evaluated. There are indications in this case that claimant may have ulterior motives and that his condition is not as bad as he purports it to be.

The fact remains that claimant was sufficiently asymptomatic prior to the date of injury to be steadily employed, but that he has since undergone significant financial hardship without returning to regular employment. Dr. Weis could not rule out the possibility that the injury made the arthritis worse.

It is found and concluded that the injury changed the course of claimant's underlying degenerative arthritis resulting in continuing pain which has reduced or impaired claimant's ability to be gainfully employed. Claimant's injury was to the body as a whole and has suffered a permanent reduction in his earning capacity and actual earnings. He has sustained an industrial disability under the rule of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Claimant's military background indicates a considerable degree of supervisory experience. He has a considerable amount of experience in the trucking industry and an introduction to work as a dispatcher. Claimant's formal education is limited and he is now 52 years of age. Claimant's medically demonstrated physical condition is not such as would normally be expected to remove a person from all forms of gainful employment. Claimant appeared at hearing and appeared capable of engaging in sedentary activity. Nevertheless, his overall disability, when measured in industrial terms, is moderately high. A large portion of that disability is attributable to the 1973 injury which occurred in North Carolina. A portion is also attributable to his underlying degenerative disc disease. It is found and concluded that claimant sustained an industrial disability as a result of the November 5, 1981 injury which is 10 percent of total disability.

Defendants contend that the expenses incurred with Manning General Hospital and Dr. McClain were unauthorized. If the employer denies the compensability of an injury it cannot guide the medical treatment. Barnhart v. M.A.Q., Inc., 1 Iowa Industrial Commissioner Report 16 (App. Decision 1981). The defense on that ground must, accordingly, fail as it was not until time of hearing that defendants indicated a change from the position taken in their answer, namely that liability was denied. It appears, however, that Dr. McClain provided no treatment, only evaluation, and as such, his charges are not the responsibility of the employer. There is nothing in the record which relates the charges from Manning General Hospital to the injury other than claimant's statement that such was indicated by Dr. Myer. An employer is responsible only for medical care that is reasonably necessary for treatment of the injury. Such is a matter of expert medical testimony which was not introduced in this case. Accordingly, defendants will not be ordered to pay the charges from Manning General Hospital shown on claimant's exhibit 6.

FINDINGS OF FACT

1. Claimant is a resident of the State of Iowa and was injured on November 5, 1981 at Sioux City, Iowa when he slipped while getting out of a truck.

2. At the time of injury claimant was employed by Robert G. Talbot Company, Inc., as a truck driver.

3. Following the injury claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of the injury from November 5, 1981 until February 5, 1982 when claimant reached the point that it was medically indicated that further significant improvement from the injury was not anticipated.

4. The injury claimant sustained did not result in permanent impairment from an orthopedic standpoint, but did result in indefinitely continuing pain which reduces claimant's employ-ability, earnings and earning capacity.

5. Claimant is 52 years of age, married and has one dependent child.

6. In accordance with the stipulation of the parties, claimant's rate of compensation is $221.77 per week.

7. Claimant incurred medical expenses with Dr. McClain in the amount of $140.00 and with Manning General Hospital in the amount of $113.40, but such were not shown to be for treatment of the injury claimant sustained on November 5, 1981.

8. Claimant presently experiences pain commencing slightly below the belt line on the left side of his back and extending into his foot. He is restricted in his ability to bend, lift and move.

9. Claimant dropped out of school during the tenth grade and has no further formal education except for that provided while in the army.

10. Claimant's work experience includes truck driving, motel and bar management, dispatching, general farm laborer and supervisory experience through his position as a sergeant in the army.

11. Claimant does not appear highly motivated to return to work and has not sought vocational rehabilitation or employment on a meaningful basis.

12. Claimant suffers from degenerative disc disease but the injury of November 5, 1981 caused a worsening of the disease which has not completely subsided. He has not returned to his pre-injury condition.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and of its parties.

The injury claimant sustained to his back on November 5, 1981 arose out of and in the course of his employment with Robert G. Talbot Company, Inc.

The injury claimant sustained on November 5, 1981 resulted in industrial disability which is 10 percent of total disability.

Claimant's healing period began November 6, 1981 and ended February 5, 1982, both dates inclusive.

Defendants are not responsible for the bills claimant incurred with Dr. David B. McClain in the amount of $140.00 or with Manning General Hospital in the amount of $113.40 as the same are not shown to have been incurred for treatment of the injury claimant sustained.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant thirteen and one-seventh (13 1/7) weeks of compensation for healing period at the rate of two hundred twenty-one and 77/100 dollars ($221.77) per week commencing November 5, 1981.

IT IS FURTHER ORDERED that defendants pay claimant fifty (50) weeks of compensation for permanent partial disability at the rate of two hundred twenty-one and 77/100 dollars ($221.77) per week commencing February 6, 1982. The entire amount is now past due and owing and defendants shall pay the same in a lump sum. Defendants shall receive credit against the award of permanent partial disability made herein by the amount of overpayment of healing period benefits.

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 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 24th day of August, 1984.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUSTIN SHIELDS,	:	
	:	File Nos. 686045
Claimant,	:	719905
	:	
vs.	:	R E V I E W -
	:	
QUAKER OATS,	:	R E O P E N I N G
	:	
Employer,	:	A N D
	:	
and	:	A R B I T R A T I O N
	:	
IDEAL MUTUAL INSURANCE COMPANY,	:	D E C I S I O N
	:	
Insurance Carrier,	:	F I L E D
Defendants.	:	

INTRODUCTION

JUL 24 1984

This matter came on for hearing at the Juvenile Court facility for Linn County at Cedar Rapids, Iowa on November 16, 1983. The case was fully submitted at that time.

This case involves two separate actions:

1. File No. 686045 is an action in review-reopening. A review of the commissioner's file reveals that an employers first report of injury was filed on November 3, 1981. A notice of voluntary payment was filed on December 9, 1981. A memorandum of agreement was filed on December 21, 1981 calling for the payment of $232.82 in weekly compensation. A final report was filed at that time indicating that claimant had been paid five weeks of temporary total disability.

2. File No. 719905 is an action in arbitration. A review of the commissioner's file reveals that an employers first report of injury was filed on November 30, 1982. The claim was subsequently denied.

The record consists of the testimony of the claimant, Marylou Pierce, Warren Feerer, David Norton and Richard Callis; claimant's exhibits 1 through 12; defendants' exhibits A through K; and defendants' answers to claimant's interrogatories 2, 6 and 10.

ISSUES

The issues for resolution are:

1) Whether claimant sustained an injury arising out of and in the course of employment on November 17, 1982;

2) Whether there is a causal connection between the injuries and the condition;

3) The nature and extent of disability for both injuries;

4) The rate of compensation for the alleged injury of November 17, 1982;

5) Whether medical care was authorized for the November 17, 1982 injury;

6) Whether defendants should receive credit pursuant to section 85.38, Code of Iowa; and

7) Whether claimant is entitled to additional compensation pursuant to section 86.13, Code of Iowa;

STATEMENT OF THE EVIDENCE

Claimant, presently age 42, was employed by Quaker Oats in 1961. Claimant was given a company physical on hire. He first was employed in the package department where his duties included cleanup and packing dog food products. He ran the machine which wraps the familiar Quaker Oats cereal for a period of two or three years. He then became a package maker tender and had to supply containers to others. He next was a round operator and was responsible for two or three lines. He worked on a couple of other jobs before becoming a syrup line operator. A conveyor would bring empty syrup bottles to the claimant and he would dump these on a conveyor. The bottles cleaned, filled, capped, labeled and packed. Seven people in all worked on the line.

Claimant testified that he was working the day shift on November 17, 1982. Claimant testified that he ordinarily worked from 7:00 a.m. to 3:00 p.m. Monday through Friday. Additionally, claimant testified that he was required to report in at 4:00 a.m. each Monday. Claimant testified that he slipped on the floor on November 17. He did not fall completely and caught himself before falling. Claimant testified that he exclaimed at the time that he hoped he had not hurt his back again. He continued to work and finished the shift. Claimant testified that after work he felt a dull ache in his back. Claimant testified that at the time he thought the injury was severe, and later thought the severity of pain would decrease. He finished the week.

On Saturday night, claimant testified that he experienced severe back pain when he woke up to relieve himself in the middle of the night. Claimant had trouble sleeping the rest of the night. Claimant applied heat and slept on the floor. He did not sleep well Saturday or Sunday. Claimant testified that he called into work between 3:00 and 4:00 a.m. (he was due in at 4:00 a.m.). Claimant testified that he spoke with a woman in the office. He never heard from Mr. Sutphen even though he left the message for Mr. Sutphen to call. Claimant testified that he called the general foreman later in the day. Claimant indicated that he told the foreman that he would see the company doctor if he was able to get in his car to drive to see the company doctor. Claimant testified that he called the company nurse and was told to come in on Wednesday. Claimant was unable to travel on Tuesday. The records of the employer indicate that on November 23, 1982 claiamant presented himself to the defendants for examination. Claimant was placed on the nonoccupational benefits plan. The form indicates that claimant slipped at work. Claimant testified that he saw Dr. Basler, the company physician. Dr. Basler gave muscle relaxants to the claimant. Follow-up examination indicated that claimant was not progressing satisfactorily so claimant was referred to Leland G. Hawkins, M.D., an orthopedic surgeon. X-rays showed no evidence of fracture, but showed thinning of the disc space between L2-3. Examination revealed restriction of motion in the lumbar spine. He had positive straight leg raising at about thirty degrees on he right side and a weak knee reflex on the right side. Dr. Hawkins diagnosed claimant as having lumbar nerve root irritation. Dr. Hawkins recommended a week's rest.

On January 3, 1983 claimant returned to Dr. Hawkins and showed tenderness when walking. Knee reflexes were symmetrical. Straight leg raising was positive at about sixty degrees. Dr. Hawkins recommended a CT scan.

Claimant obtained the CT scan, and it showed no abnormality from L3 to the S1 level. There was no evidence of disc protrusion. He diagnosed claimant as having severe degenerative disc disease at the L2-3 level. Claimant remained off work until February 1983. The record indicates that he missed work then from February 24, 1983 through April 3, 1983. Claimant was then off a handful of days through the date of the hearing.

Claimant testified that he is still in constant pain. He can perform no quick movements. Claimant also testified that he used to play softball and golf, but now can only participate sparingly in these activities, if at all. Claimant testified that he had many prior back injuries which are clearly evident from reading the medical evidence submitted. Claimant had had injuries both at home and at work.

Claimant testified that he hurt his back in October 1981 when he slipped at work. Claimant was admitted to the hospital and was hospitalized for about five days. Claimant was com-

plaining of low back pain. X-rays taken prior to the hospitalization were normal. The hospitalization proceeded with physical therapy. The diagnosis was lumbar sprain.

On cross-examination, claimant indicated that he had had back problems for some time. He testified that he had his first back injury in 1968. Claimant indicated that he is doing his job to the satisfaction of his superiors. Claimant indicatd that his position is important in the running of the line. He inferred that substandard performance would be noticed. Claimant testified that his job now is easier than before because new machinery has been installed. Claimant testified that at the time of the hearing he has been able to work. Claimant testified that he didn't report the injury because he did not think the injury was serious when it occurred.

Marylou Pierce has been employed by Quaker Oats for 29 years. She is a coemployee and worked in the same area as the claimant on November 17, 1982. She testified that she saw claimant slip and catch himself on that date.

On cross-examination, the witness testified that she is a friend of claimant, but has no contact with claimant other than at the work site.

On redirect examination, she indicated that the insurance company never contacted her to obtain a statement.

Richard M. Callis testified that he was employed by Quaker Oats for seventeen years. He was there on November 17, 1982 when claimant slipped. He stated claimant did not fall and heard claimant exclaim that he hurt his back. The witness testified on cross-examination that he was contacted by supervisory personnel sometime after the incident. He described the events, but did not repeat the utterance made by the claimant.

Warren Feerer is the packing department manager at Quaker Oats and as such is claimant's supervisor. The witness testified that he first became aware of claimant's injury on November 23, 1982. He stated that Mr. Callis' version of what was said in the interview was changed. Mr. Ferrer testified that claimant was nearby at the time the conversation between Callis and Feerer occurred. The witness testified that several unanswered calls were made to the claimant on Novemer 22 and 23, 1982 and that the phone was not answered.

On cross-examination, the witness testified that he was aware of the long history of back problems experienced by the claimant. He testified that he made no writing concerning his conversation with Callis and testified from memory. He did not talk to Marylou Pierce until after the claimant had returned to work.

David Norton was in possession of a number of documents which were received into evidence. He recalled the answers to interrogatories which he answered. He did not place Marylou Pierce's name in the answer to the question regarding the identity of persons having knowledge of the circumstances. The witness testified that Crawford and Company made the ultimate decisions is this case, although the witness offered his opinion if it were asked.

Dr. Hawkins testified by way of deposition in this case. He, of course, treated claimant for the 1981 injury. He testified that a further injury occurred in 1982. He noted that the L2-3 disc space had not been narrowed on the 1981 x-rays, but had been narrowed on the 1982 x-rays. Dr. Hawkins indicated that the change had been going on, but he could not relate this to the November 17, 1982 injury. (Hawkins dep. p. 15) He noted also that these changes were not consistent with any of the many prior injuries. (Hawkins dep. p. 16)

> Q. Okay. Then excluding what we might learn from further films indicating the present status of the L2-3 level, in your opinion does he carry presently any permanent impairment of function?
>
> A. He does because of the narrowing that he has that we can visualize on his X ray. He has a permanent impairment in his back due to degenerative disk disease, which has been aggravated by an incident that we originally talked about on somewhere around October of 1981. It would seem to me that the natural timing of that would be that the -- something happened to him during that period of time that changed from the time that I originally saw him until the time that I saw him a year later. So I relate it to that particular period of time.
>
> Q. But you likewise allow that what you see is consistent with the traumatic event, the fall in 1981?
>
> A. Yes.

Dr. Hawkins wrote a letter to claimant's counsel on November 14, 1983:

> As you recall, following our deposition we were going to see Mr. Shields, and we saw him on July 18, 1983. You have copies of those notes. It is my feeling because of the presence of degenerative disc disease that is present in this man and his presence of continued symptoms, that the patient has a 3 percent permanent disability rating related to the lumbar spine.

APPLICABLE LAW

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

2. Claimant has the burden of proving by a preponderance of the evidence that he received injuries on October 22, 1981 and November 17, 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. 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).

4. The claimant has the burden of proving by a preponderance of the evidence that the injuries of October 22, 1981 and November 17, 1982 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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, 257 (1963).

6. Section 85.27, Code of Iowa, provides that the employer provide medical care to injured employees. The employer has the right to choose the care.

7. Section 85.36, Code of Iowa, provides the method of gross weekly wage. The rate of compensation is ascertained from the gross weekly wage.

8. The last unnumbered paragraph of section 86.13, Code of Iowa, provides that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award additional benefits up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

ANALYSIS

Based on the foregoing principles, it is found that claimant sustained an injury on October 22, 1981 as evidenced by the filing of the memorandum of agreement. Further, it is found that claimant sustained a separate injury at work on November 17, 1982.

The lay evidence, specifically that of the two lay witnesses, was particularly convincing in bolstering claimant's version of the events in November 1982. It is concluded that claimant sustained an injury arising out of and in the course of employment on November 17, 1982. The quoted portion of Dr. Hawkins' deposition indicates that claimant has degenerative disc disease, which was aggravated by the 1981 injury. The finding by Dr. Hawkins is specifically adopted in this.

Although the medical record with regard to the effect of the 1982 injury is unclear, the finding is hereby made that the injury was temporary in nature. Dr. Hawkins put all permanency on the 1981 injury. By process of exclusion and with the knowledge that Dr. Hawkins was the treating physician for both injuries, it is concluded that the Novemer 1982 injury caused no permanent partial disability. It is concluded, however, that claimant is entitled to temporary total disability compensation for this injury. However, the setting of permanent partial disability compensation for the first injury is necessary. Claimant is presently age 42 years of age and has a high school education. He has been employed at Quaker Oats for virtually all of his working life. He complains of pain and has been given a diagnosis of disc disease which is verified by x-rays. Considering the fact that claimant has returned to work, the claimant will be awarded permanent partial disability in the amount of five percent of the body as a whole.

The next item that must be resolved is the temporary total disability compensation to be awarded for the November 17, 1982 injury. Claimant seeks to be compensated from November 22, 1982 through February 6, 1983; February 12, 14, 24 and 25, 1983; and February 28, 1983 through April 1, 1983. These periods total 16 2/7 weeks.

The record (defendants' exhibit D) indicate that claimant's gross wages for the thirteen weeks prior to injury was $4,903.11. The average gross weekly wage for claimant is $377.00. The documentary evidence given by defendants is given greater weight than the testimonial evidence of claimant. Claimant is single and entitled to three income deductions. The rate should be $227.67.

Defendants indicate that any care offered for the November 17, 1982 injury is unauthroized. The right of choice of medical care has a concomitant duty of payment for the care. In order to avail oneself of the unauthorized medical allegation one must offer medical care which is designed to treat the injury. The medical bills will be paid as submitted by claimant.

Defendants have paid certain weekly indemnity pursuant to an accident and health plan. Defendants will be given credit pursuant to section 85.38, Code of Iowa.

Claimant has also sought additional compensation for the alleged unreasonableness of defendants in denying the compensability of the November 17, 1982 injury. Claimant has a point. Claimant's witnesses may have had some insignificant variance in details as to the amount of flexion of the slip, but all evidence adduced indicated that the claimant did slip. This, in itself, makes the denial unreasonable because no other contrary evidence was shown. The unreasonableness was not severe, and was not of such patent quality to warrant any award of more than the ten percent hereby awarded. This additional ten percent will attach to the temporary total disability awarded.

FINDINGS OF FACT

1. Claimant was employed by Quaker Oats on October 22, 1981.

2. Claimant hurt his back while working on October 22, 1981.

3. Defendants filed a memorandum of agreement concerning an October 22, 1981 injury.

4. Claimant sustained a permanent partial disability of five percent (5%) of the body as a whole as a result of the October 21, 1981 injury.

5. Claimant was employed by Quaker Oats on November 17, 1982.

6. Claimant slipped while walking at work on November 17, 1982.

7. Claimant did not sustain permanent disability because of the injury of November 17, 1982.

8. Claimant was disabled from acts of gainful employment on November 22, 1982 through February 6, 1983; February 12, 14, 24 and 25, 1983; and February 28, 1983 through April 1, 1983. The disablement was caused by the injury of November 17, 1982.

9. Claimant incurred certain reasonable medical expenses which were caused by the injury of November 17, 1982.

10. The stipulated rate of compensation for the October 1981 inury is two hundred thirty-two and 82/100 dollars ($232.82).

11. The gross weekly wage for the November 1982 injury is three hundred seventy-seven dollars ($377.00).

12. Defendants paid group plan payments to claimant following the November 17, 1982 injury.

13. Defendants' denial of benefits for the November 17, 1982 injury was unreasonable. The extent of the unreasonableness was not severe and held to the extent of ten percent (10%) within the meaning of section 86.13, Code of Iowa.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by Quaker Oats on October 22, 1981 and November 17, 1982.

3. Claimant sustained an injury arising out of and in the course of employment on October 22, 1981.

4. Defendants will be ordered to pay unto claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of two hundred thirty-two and 82/100 dollars ($232.82) per week.

5. Claimant sustained an injury arising out of and in the course of employment on November 17, 1982.

6. Defendants will be ordered to pay unto claimant sixteen and two-sevenths (16 2/7) weeks of temporary total compensation at the rate of two hundred twenty-seven and 67/100 dollars ($227.67) per week.

7. An additional ten percent (10%) of the healing period compensation due will be awarded to the claimant pursuant to section 85.13, Code of Iowa.

8. Defendants will be ordered to pay the following medical and allied expenses:

Fifth Avenue Surgical	$ 70.00
Linn County Orthopedist	378.00
Mercy Hospital	330.00
Cedar Rapids Radiologists	40.00
Dr. Johnson	30.00
Mileage	25.92

9. Defendants will receive credit for amounts paid pursuant to section 85.38, Code of Iowa.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of two hundred thirty-two and 82/100 dollars ($232.82) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant sixteen and two-sevenths (16 2/7) weeks of temporary total disability compensation in this case at the rate of two hundred twenty-seven and 67/100 dollars ($227.67) per week.

IT IS FURTHER ORDERED that defendants pay an additional ten percent (10%) of the amount awarded in temporary total disability compensation pursuant to section 86.13, Code of Iowa.

IT IS FURTHER ORDERED that defendants pay unto claimant the following medical expenses:

Fifth Avenue Surgical	$ 70.00
Linn County Orthopedists	378.00
Mercy Hospital	330.00
Cedar Rapids Radiologists	40.00
Dr. Johnson	30.00
Mileage	25.92

Defendants will receive credit for amounts paid as contemplated by section 85.38, Code of Iowa.

Interest on the permanent partial disability hereby awarded will accrue from the date of this decision.

Interest on all other amounts awarded will accrue from the date the payments become due.

Costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendants shall file a final report upon payment of this award.

Signed and filed this 24th day of July, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOREN T. SIMPSON,

Claimant,

vs.

CLINTON CORN PROCESSING CO.,

Employer,

and

COMMERCIAL UNION INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 702615

A R B I T R A T I O N

D E C I S I O N

FILED

AUG 20 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Loren T. Simpson, claimant, against Clinton Corn Processing Company, employer, and Commercial Union Insurance Companies, insurance carrier, for benefits as a result of an injury on April 9, 1981. On April 13, 1983 this case was heard by the undersigned.

The record consists of the testimony of claimant, Ema Simpson; claimant's exhibits 1 through 13; and defendants' exhibits A through C. The parties stipulated that claimant's rate is $247.80 per week.

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; whether the action is one under chapter 85 or chapter 85A, of the Code; whether claimant sustained an injury arising out of and in the course of his employment within the meaning of section 85A.8, of the Code; whether claimant sustained any injurious exposure occasioned by the nature of his employment within the meaning of section 85A.8; whether claimant's alleged disease is incidental to the employer's business; whether claimant is disabled within

the meaning of section 85A.4 and section 85A.5, of the Code; whether claimant has sustained any aggravation of a preexisting disease or infirmity within the meaning of section 85A.7(4); whether claimant's disease is due to a hazard of the employment which is characteristic thereof and peculiar to the employment within the meaning of section 85A.12, of the Code; whether claimant provided proper notice within the meaning of section 85A.18, of the Code.

FACTS PRESENTED

Claimant testified regarding being sprayed by oil at work and smelling fumes all the time in a room of 120 degrees but continuing to work. Claimant stated he had no problems with asthma prior to working in this room. Claimant testified that on Easter Sunday of 1981, while at home, he experienced his first problem with shortness of breath. Claimant stated he talked to fellow employees about the fumes. Claimant revealed that on January 12, 1983 he had surgery on a lung.

Ema Simpson, claimant's wife, testified that claimant had a hearing problem since childhood; attended the school for the deaf; and signs with his hands. Mrs. Simpson stated that her husband worked for defendant employer for over 30 years. Mrs. Simpson disclosed that in 1969 claimant was hospitalized for a heart condition and gave up his under-a-pack-a-day smoking habit. She stated that claimant also did part-time farm work and worked as a janitor for the Clinton School System for a period of seven years.

Mrs. Simpson testified that on April 19, 1981, which was Easter Sunday, they were having a big dinner at their home when claimant became pale and started having problems with breathing and talking. Mrs. Simpson stated that claimant was hospitalized on three different occasions and did not improve. She indicated that in the summer of 1981 claimant returned to work and did janitorial type work. Mrs. Simpson testified that they went on a vacation and upon returning, was told that claimant could not return to work. While on vacation, claimant's condition had become worse while attending a fair. Mrs. Simpson stated that claimant hasn't returned to work for anyone in any manner.

Mrs. Simpson disclosed that both medical bills and disability benefits were paid by defendants and that they didn't talk about workers' compensation. She testified that they first became aware of a possible workers' compensation claim after talking to their tax attorney in January of 1982.

On cross-examination Mrs. Simpson stated that claimant told his physician about an incident at work involving being sprayed by insulating oil. Mrs. Simpson testified that claimant would just be covered with oil after working in the area. Later in her testimony Mrs. Simpson stated that in July of 1981 claimant indicated he knew fumes and dust at work caused him problems.

Dale Glen Wulf, M.D., who testified by way of deposition, indicated he is a family practitioner and that in April of 1981 he saw claimant in an emergency room. Claimant was experiencing shortness of breath, dyspnea, cough and wheezing. Dr. Wulf disclosed that the history given by claimant indicated he had problems with shortness of breath which developed initially at work. Dr. Wulf revealed that he knew of no prior problems that claimant may have had with breathing. Dr. Wulf testified that on May 4, 1981 claimant gave a history of being exposed to oils and fumes at work. Claimant was again seen on May 16, 1981 and was instructed to take medication and rest at home. Claimant continued to be seen by doctors. Dr. Wulf opined that claimant's condition is permanent in nature. Dr. Wulf stated:

> Q. Can you give us an opinion as to the degree of functional impairment he has as related to the body as a whole?
>
> A. Well, I wouldn't give a specific percentage. In talking informally with this gentleman and his wife, he has good days and bad days. On a good day he can do considerably more than on a bad day. Unfortunately, when a person is applying for employment, they expect you to have a good day five days a week from Monday through Friday. So this impairs him tremendously in looking for employment. And he has found that exposure to dust; to the grasses outside, such as in his garden; and other contaminants within the area do increase his shortness of breath, things that apparently did not happen to him years ago when he worked on a farm and things of that nature.
>
> Q. As far as shortness of breath is concerned, other than just the gasping and the wheezing how else does this affect Mr. Simpson in doing physical tasks?
>
> A. Well, certainly the shortness of breath and discomfort associated with it is like running the four-minute mile and not being able to rest afterwards.
>
> Q. Does it actually prevent him from being able to perform some physical tasks?
>
> A. I think that any type of heavy labor, that he would not be able to do. Light work that he could do at his own pace on days that he is feeling good, yes. He is not totally disabled from everything.
>
> Q. What, in your opinion, doctor, is the probable cause of this shortness of breath; this asthmatic condition?
>
> A. Well, from prior history and from what limited exposure I've had with the gentleman prior to April of '81, his respiratory problem apparently does not exist prior to that time. There was history of exposure to fumes, et cetera, at work for the several weeks prior to his hospitalization. Cause and effect relationships certainly may exist in that respect. He has been out of that environment since that time. He is still having problems of one -- of a similar nature with exposure to other types of irritants. I think it's logical to assume that the initial insult of injury, the precipitating event, has caused him to have a reaction to more general respiratory irritants than just what he was exposed to, apparently, at work.

Dr. Wulf opined that in December of 1981 or January of 1982 claimant reached maximum recovery.

Steven Wanzek, M.D., who testified by way of deposition, indicated that he saw claimant on September 10, 1981 while he was a fellow associate in the area of pulmonary medicine at the University of Iowa Hospitals. Dr. Wanzek took a history from claimant and examined him. Claimant's examination was essentially normal except for a noted irregular rhythm of his heart. Dr. Wanzek indicated that claimant was not having problems at that time. Dr. Wanzek disclosed that he was unable to test substances at defendant employer's plant to see if they triggered or caused claimant's asthma. Tests on claimant did show that claimant has asthma. Dr. Wanzek opined that by history the substances at work triggered claimant's asthma. Dr. Wanzek stated:

> Q. Doctor, is Mr. Simpson's reversible airways disease or his asthma, is that a permanent condition?
>
> A. I would say that he has a permanent susceptibility to bronchial hyperreactivity which is a form of asthma, yes.
>
> Q. And having that condition, how does it limit Mr. Simpson if at all?
>
> A. By his history it limited him substantially in that he became significantly more short of breath after being at the work place. And if that history is borne out, that would represent a significant limitation secondary to the asthma.
>
> Q. For the record, would you tell us in what regards a person such as Mr. Simpson having an asthmatic attack is limited? What can't he do or how does this affect him?
>
> A. It depends somewhat on the severity, but with the severity he described to me he would be unable, I would think, to perform the usual sorts of activities required of a laborer.
>
> Certainly by history he was limited even in the ability to being able to get his breath at rest which would make it impossible for him to do, I would say, any heavy work certainly or any other activity.

Dr. Wanzek disclosed that they recommended claimant avoid what would appear to be the precipitants of his asthma.

On cross-examination Dr. Wanzek stated:

> Q. When we talk about precipitating asthma in the sense that you just used that term, would the exposure to oil cause the asthmatic reaction?
>
> A. It would lead to exacerbation of an underlying predisposition. The other thing it can be is in a select population lead to so-called small airways dysfunction. I think for our purposes that's something different that doesn't apply here.

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 April 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).

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

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

Claimant has met his burden in proving he received an injury arising out of and in the course of his employment with defendant employer on April 9, 1981. It is apparent from the testimony of Dr. Wanzek and Dr. Wulf that claimant has an asthmatic condition which was triggered by the fumes and conditions at claimant's employment. That does not mean that the materials at work caused the asthma but claimant's work aggravated his prior condition. This is supported by the history given by claimant and his wife. It is apparent that there is some small discrepancies in the testimony of claimant and his wife but the undersigned finds both claimant and his wife credible.

The greater weight of evidence supports a finding that claimant's condition was the result of a traumatic incident or incidents over a couple of days and is not an occupational disease under chapter 85A of the Code. Again it should be indicated that claimant's asthma was not caused by his work but aggravated by it.

Defendants argue that they did not receive proper notice of the injury which claimant now complains. The testimony of claimant stands uncontradicted. Claimant stated he talked to the foreman about the problems. From the evidence presented it is determined that defendants had actual knowledge of claimant's injury.

Claimant has met his burden in proving he has permanent impairment as a result of his injury on April 9, 1981. Although no percentage of functional impairment was given, it is clear that claimant's injury increased his propensity towards having asthmatic attacks. Although no rating of impairment was given, one must remember that functional impairment is only one of the factors in determining a person's industrial disability.

Claimant is 58 years old and has an eighth grade education. Claimant has had a hearing problem since childhood and signs with his hands. Claimant also has a preexisting heart condition. Claimant worked for defendant employer for 32 years and at the time of his injury was working insulating pipes. Claimant also has experience farming and in the area of janitorial work. The physicians have indicated that claimant should not return to work which requires heavy lifting or work around fumes or dust. Claimant's ability to find new work is affected by his hearing problem and his eighth grade education. At the same time it does not appear that claimant has a great amount of motivation to attempt to find further employment. Based on all the evidence presented it is determined that claimant has an industrial disability of 70 percent as a result of his injury of April 9, 1981.

In his deposition Dr. Wulf opined that claimant reached maximum recovery in December of 1981 or January of 1982. It is determined that claimant reached maximum recuperation on December 31, 1981.

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 about April 9, 1981 claimant worked in a room which contained oil fumes.

FINDING 2. The oil fumes triggered an asthma attack.

FINDING 3. Claimant had no previous asthma attacks.

FINDING 4. Claimant has since had other asthmatic attacks even when not working.

FINDING 5. Claimant's work did not cause claimant's asthma.

CONCLUSION A. The oil fumes that claimant was exposed to aggravated an underlying predisposition that claimant had for asthma.

FINDING 6. Claimant's foreman was aware of the conditions claimant was working under as well as claimant's breathing problems.

FINDING 7. Claimant told his foreman about the oil fumes.

CONCLUSION B. Defendants had actual knowledge of claimant's injury.

FINDING 8. As a result of the aggravation to his condition claimant has permanent impairment.

FINDING 9. No percentage of impairment has been given.

FINDING 10. Claimant is fifty-eight (58) years old and has an eighth grade education.

FINDING 11. Claimant is hearing impaired.

FINDING 12. Claimant has a prior heart condition.

FINDING 13. Claimant worked for defendant employer for thirty-two (32) years and has experience farming and doing janitorial work.

FINDING 14. At the time of his injury claimant was insulating pipes.

FINDING 15. As a result of the aggravation claimant should avoid heavy lifting and working around fumes or dust.

FINDING 16. Claimant is not presently well motivated to return to work.

CONCLUSION C. As a result of his injury, claimant has an industrial disability of seventy percent (70%).

FINDING 17. Claimant reached maximum improvement on December 31, 1981.

FINDING 18. Claimant has not returned to work.

CONCLUSION D. Claimant is entitled to healing period benefits until December 30, 1981.

THEREFORE, defendants are to pay unto claimant twenty-seven and three-sevenths (27 3/7) weeks of healing period benefits at a rate of two hundred forty-seven and 80/100 dollars ($247.80) per week and three hundred fifty (350) weeks of permanent partial disability benefits at a rate of two hundred forty-seven and 80/100 dollars ($247.80) per week.

Defendants are to reimburse claimant for the following medical expenses.

Medical Associates	$ 1,591.00
University of Iowa Hospitals	516.50
St. Joseph Mercy Hospital	10,100.40

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 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 this 20th day of August, 1984.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JIMMY J. SMITH, Claimant, vs. WAYNE COUNTY, Employer, and FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 620570 A P P E A L D E C I S I O N

FILED
AUG 27 1984
IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 27, 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 decision.

The record consists of the transcript; claimant's exhibits 1 through 6; and defendants' exhibits A through K, 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.

The hearing deputy awarded payment of 125 weeks at the rate of $158.74 per week for permanent partial disability plus healing period. The award was in "arbitration" but should have been styled in review-reopening. Claimant appealed and later made a motion for enlargement of time in which to file his brief, but that motion was denied because it was received after the brief was due.

Although no briefs have been filed, this decision is de novo and the entire record has been examined. A review of the record shows the findings of fact and conclusions of law of the hearing deputy are correct, and they are adopted, as is the order. Because this final agency decision adopts the proposed agency decision, there is no need to rule on defendants' motion filed August 1, 1984.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant injured his back in the course of his employment on December 4, 1979.

Claimant is forty-two (42) years old.

Claimant has completed the seventh grade.

Claimant has had in the field training and is certified as a dragline operator.

Claimant has worked as a manual laborer, a saw miller, an auto mechanic, a bulk truck driver, a bulldozer operator, and welder as well as a dragline operator.

Claimant has had difficulty sitting, standing, walking and lifting since his injury.

Claimant's healing period runs from his injury date to October 20, 1982.

Claimant has refused recommended surgery to correct a suspected herniated disc.

Claimant has not returned to work since his injury.

Claimant was terminated by his employer January 10, 1981.

Claimant has not returned to any gainful employment since his injury.

Claimant earned five and 48/100 dollars ($5.48) per hour and worked a forty-five (45) hour week when injured.

Claimant's earning capcity has been reduced by between nine percent (9%) and thirty-one percent (31%) as a result of his injury.

Claimant has a functional impairment of fifteen percent (15%) of the body as a whole as a result of his injury.

Claimant's weekly compensation rate is one hundred fifty-eight and 74/100 dollars ($158.74).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his injury of December 4, 1979 is the cause of the disability on which he now bases his claim.

Claimant is entitled to permanent partial disability resulting from his injury of twenty-five percent (25%) of the body as a whole.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for one hundred twenty-five (125) weeks at the rate of one hundred fifty-eight and 74/100 dollars ($158.74).

Defendants pay claimant healing period benefits from his injury date to October 20, 1982 at the rate of one hundred fifty-eight and 74/100 dollars ($158.74).

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30 as amended from March 30, 1984.

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 27th day of August, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JIMMY J. SMITH, Claimant, vs. WAYNE COUNTY, Employer, and FARMERS ALLIANCE MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 620570 A R B I T R A T I O N D E C I S I O N

FILED

MAR 30 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Jimmy J. Smith, against his employer, Wayne County, and its insurance carrier, Farmers Alliance Mutual Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury claimant sustained December 4, 1979.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on November 28, 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 December 19, 1979.

The record in this case consists of the testimony of the claimant, Jimmy J. Smith, of claimant's wife, Barbara Ann Smith; of Todd F. Hines Ph.D; of Marian S. Jacobs; of claimant's exhibits 1 through 5; and of defendants' exhibits A through K. Rulings reserved on specific exhibits and other evidence are made in the review of the evidence. It is noted that neither party filed a witness list before hearing.

At the time of hearing, the parties stipulated that, in the event permanent partial disability benefits are awarded, claimant's healing period should end October 20, 1982, and that claimant's medical expenses are fair and reasonable.

ISSUES

The issues to be resolved are:

1. The nature and extent of claimant's injury.

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 these.

4. The rate of weekly compensation if an award is made.

REVIEW OF THE EVIDENCE

Claimant testified in his own behalf. Claimant is 42 years old, married and has two children with his present wife. He has three children of a previous marriage to whom he has a court-ordered child support obligation of forty dollars per month. Two of these children are under age 18. Claimant completed seventh grade and has not received a GED. His only other training is as a dragline operator. Claimant is a certified dragline operator. To obtain his certification, claimant underwent two years of infield training (1000 hours).

Claimant first testified concerning his work experience and his beliefs as to his current limitations. Claimant's work experience includes working in the foundry at Maytag, working as a saw miller, working as an auto mechanic, driving a bulk gas truck, and operating a bulldozer.

Claimant stated he had worked as a dragline operator for Central Paving for five years before beginning his employment with Wayne County. He drove dragline and fixed truck tires when paving was impossible. He also shoveled rock and put in new cable. To install the cable, claimant had to climb 10 or 15 feet and pull the cable through the machine. The cable is approximately 130 to 150 feet long and weighs 100 pounds. Truck tires were changed by breaking the sides down. Claimant reported doing that requires considerable strength.

Claimant stated it was sometimes necessary to work three or four hours without a break while running the dragline. This involves sitting in the machine while using the legs and back in drag operation. Claimant stated he cannot sit longer than 15 minutes without pain.

Claimant reported that his work as an auto mechanic also required physical strength and the ability to crawl and lie under the vehicle. Claimant stated he cannot lie on his back for more than 20 minutes without pain.

Claimant reported he cannot sleep or lie prone unless he puts a pillow on his chest. If he does so, he can lie prone for 30 to 40 minutes.

Claimant recited that work as an auto mechanic often requires carrying, lifting, or pulling of fifty or more pounds. He stated at times he has difficulty carrying a gallon of milk. Claimant also had accompanied his former employer on auto buying trips to Chicago. He now reports difficulty in riding more than 10 miles. Claimant can drive a car provided he uses the arm rest for support and provided he stops every 40 to 50 miles.

Claimant believes he could neither function as a mechanic nor as a truck driver with his current limitations. Claimant recited that his foundry job had required that he stand and walk throughout an eight hour work day. He now has difficulty walking for one-half hour.

Claimant recited he was hired by Wayne County in September 1978 as a dragline operator. He also built bridges, welded, ran a jackhammer, loaded tubing, and ran the air tamper. Claimant believes he could run an air tamper today. He reported he cannot weld since he cannot handle the heavy objects involved and cannot sit long enough to make a steady bead. Claimant recited the Wayne County dragline is difficult to operate since it is non-hydraulic and, therefore, requires foot operation of the pedals. Claimant believes he could neither operate the dragline nor repair cable with his present problems.

Claimant stated he told Todd F. Hines, Ph.D., that he could work as a small engines or gun repairer. Claimant explained that he has always had an interest in guns and consequently this was the only employment idea he could come up with. Claimant has not looked into gunsmithing but to discuss it with a gunsmith in Centerville. The gunsmith told claimant he would need a federal license in order to work as a smith. Consequently, claimant did two gun repairs and stopped. He has a gun repair license application but has not applied for the license. Claimant has attempted to sell his personal firearms through newspaper ads, but has not been able to do so.

Claimant uses a cane. Claimant has lost 10 pounds since his injury.

Claimant reported he "kept time" when his foreman was on vacation but otherwise has done no book work. Claimant is unaware of any way he could make a living working at home. He is uncertain he could earn enough repairing guns to make it worth his while.

Claimant next testified concerning his injury. Claimant stated that on the injury date he was cutting steel beams to the right length of a bridge with a torch. He ran out of gas and went to refill at the truck. While climbing off the truck, he caught his overshoe on an object and fell onto his feet. Claimant recites "he hung onto the beams" for the rest of the day but did not directly seek medical attention because there had been "so much hollering" about co-workers getting injured. He called Keith A. Garber, M.D., the following day. The doctor recommended hospitalization. Claimant stayed home and rested in bed, however. The following morning he entered the hospital.

Claimant has been treated with Serax and Percodan. His dosage at the time of the hearing was approximately equal to his dosage on initial injury. Dr. Garber has remained claimant's treating physician though claimant has seen other physicians at defendants' direction. Claimant refused defendants' request he travel to Minnesota for treatment. Claimant opined Minnesota was "a long ways and they do the same procedure in Des Moines." Claimant refused defendants' request he see a vocational rehabilitation specialist in 1983. Claimant explained he had already seen two rehabilitation counselors and did not feel that seeing a third would do any good.

On cross-examination claimant reported Dr. Garber referred him to John H. Kelley, M.D., in Des Moines when claimant showed no improvement. Claimant first saw Dr. Kelley on February 11, 1980. Dr. Kelley advised claimant he could return to work by late March 1980. Claimant reports he tried to pull weeds at home and had severe pain and, therefore, did not attempt a work return. In May 1980, Dr. Kelley ordered a myelogram and subsequently advised claimant to undergo a laminectomy. Claimant sought a second opinion from Richard A. Brand, M.D., in Iowa City. Claimant then was referred to William R. Boulden, M.D., and Thomas Bowers, L.P.T., by the insurer. Dr. Boulden apparently advised claimant by letter (Defendants' exhibit C) that surgery would relieve his back pain and would give him a 90 percent chance to return to normal functioning. Claimant stated the doctor characterized the surgery as exploratory. Claimant explained he would rather live with his pain than have surgery "come out the way they have indicated it might come out."

Claimant states he has not been able to return to work since his December 4, 1979 injury. He remained on the employer's payroll with full benefits through January 10, 1981, however. His benefits expired January 30, 1981.

Claimant has applied for disability benefits; he has consulted with state vocational rehabilitation; he has not consulted with Job Service or otherwise sought employment since his injury. Claimant underwent evaluation at the Des Moines Mercy Evaluation Center. He consulted with vocational rehabilitation specialists at that time but refused defendants' request of a private consultation. Claimant has sought no schooling in the past year.

He stated he considered registering for a four hour per week gunsmithing school but did not do so since the school began the evening of the day of the hearing.

On redirect examination, claimant stated he feared surgery "would not come out." Defendants' objection to claimant's report of remarks made by his Iowa City doctors as hearsay and his motion to strike that answer is sustained.

Defendants' objection to claimant's query as to whether any examining physicians were opposed to surgery on the grounds that the best evidence regarding the medical facts is the medical records, is sustained.

Claimant recited only Dr. Kelley has released him to return to work. Claimant's hourly rate of compensation was $5.48 per hour. He worked a 45 hour week with 40 hours regular time and five hours overtime.

On recross-examination, it was established that claimant's exhibit 4, claimant's pay vouchers, do not reflect the number of hours claimant worked or the hourly wage paid claimant during each pay period.

Barbara Ann Smith testified in her husband's behalf. She substantiated claimant's injury of December 4, 1979, and that he has had pain since that time. She stated that before his injury date claimant did not indicate back pain.

Todd P. Hines, Ph.D., was the first witness called by the defendants. Dr. Hines is a clinical psychologist whose work emphasis is in industrial labor accidents. He works in consultation with physicians and with the Mercy Vocational Rehabilitation Center and the Mercy Pain Center. Claimant's objection to Dr. Hines' oral testimony on the grounds it was an attempt to change the evidence contained in Dr. Hines' written report, is overruled. Claimant's objection to the doctor's testimony on the grounds claimant was unaware the doctor would be a witness is also overruled. The record reveals claimant originally intended to call the doctor as a witness.

Dr. Hines stated that psychological factors such as fear, depression and anger aggravate claimant's pain. He opined that the ability to work is highly significant to claimant and claimant's fear of an inability to work increases claimant's muscle tension and therefore, increases his pain. Dr. Hines saw claimant in four private counseling sessions from August 27, 1982 to October 15, 1982. The doctor felt that, by the last session, claimant was not showing evidence of the depression cited in the earlier Mercy Evaluation Center report and that claimant showed evidence of having formulated a workable plan for dealing with his life. Claimant apparently rejected both the idea of surgery and the idea of pain center treatment. Claimant wanted to start a small town gunsmithing business and put the whole experience behind him. The doctor then stated he had been somewhat uncomfortable with claimant's position since claimant at times protects himself with denial. Therefore, the doctor opined that the test for claimant's status would be whether it remained stable over time.

Dr. Hines opined that claimant's psychological condition stabilized in 1982. He stated that four percent of claimant's fifteen percent functional impairment rating from Mercy related to claimant's underlying psychological problems. The doctor opined that by October 1982, claimant had no functional impairment related to psychological problems.

On cross-examination, the witness stated he had spent a total of eight hours with claimant and opined that claimant's psychological reactive process regarding pain only emerged after claimant's December 1979 injury and its sequela.

Ms. Marian S. Jacobs next appeared for defendants. Ms. Jacobs is a vocational consultant who has appeared before this agency on numerous occasions. Her qualifications are well known to the undersigned and set out in defendants' exhibit 1 so will not be delineated here.

Claimant's counsel objected to this witness' presence in the hearing during claimant's testimony. Defendant's counsel stated the witness' inability to examine claimant prior to hearing made it imperative that she be present during claimant's testimony. Claimant had refused examination by the witness. Claimant's objection is overruled. Claimant then objected to the witness' testimony as a whole. Pursuant to section 17A.14(1), claimant's objection is overruled and the evidence is admitted for whatever probative value it may have.

The witness described the channels she used to evaluate claimant's vocational potential as well as the employment possibilities now available to claimant. She opined that claimant might find employment in small engine repair work since he lives within the Lake Rathbun area. Work as a sewer for a luggage manufacturer is also available in Corydon. The witness stated the company is willing to make adaptions for weight restrictions. Small engine repair work may also be available in Des Moines. Small engine repair would pay between minimum wage and $6.00 per hour; the luggage job $5.50. Gun repair would pay between $4.00 and $4.50 per hour. Self-service gas attendant would pay between $3.50 and $4.00 per hour. Claimant could earn approximately $8,420 per year performing the limited aspects of auto repair he can perform. Claimant could also perform entry level office work paying between $3.35 and $5.17 per hour. The witness stated that these are realistic job possibilities for claimant.

Claimant objected to questions concerning the witness' opinion as to claimant's job possibilities and marketable skills on the grounds of hearsay, relevancy, lack of foundation and untimely presentation of this witness' written report to claimant. The objections are overruled. From the record, it appears claimant's own non-cooperativeness contributed to the lateness of the report.

The witness stated that had claimant not been injured and remained in his pre-injury work, he would now be earning approximately $5.47 to $6.73 per hour. The jobs claimant now could perform within his 20 pound weight restriction pay between $4.00 and $7.00 per hour with an average wage of $5.95 per hour. This is approximately nine percent less than claimant would be earning had he had no injury. The witness opined that while claimant can no longer work as either a dragline operator, welder, or general laborer, he has marketable skills in that he has mechanical aptitudes, good hand eye coordination and numerical skills.

On cross-examination, the witness admitted her findings were based on the limitations stated in Dr. Brand's deposition and those found through the Valpar testing at Mercy. She acknowledged that her inability to observe claimant first hand was a handicap in preparing the report. The witness did not consider that claimant's primary problem is his subjective pain nor did she consider the effect of the drugs he must take.

Claimant was called on rebuttal. Defense counsel objected to claimant's testimony as to whether he had been told he was being considered for the job of foreman as hearsay. The objection is sustained.

Claimant's exhibit 1 is certain medical reports relative to claimant. Generally the evidence established claimant suffers pain in his back and both legs. James E. Laughlin, M.D., diagnosed "a radicularopathy [sic] probably of the S5 [sic] nerve root and most likely at his age due to back strain, subsiding disc syndrome and advised a laminectomy. A lumbar myelogram performed in April 1980 revealed a defect at L5-S1 on the left. Dr. Brand opined that claimant might have a slight herniated disc, but felt that, while later surgery could not be ruled out, that as of May 1980 conservative treatment remained appropriate. Dr. Boulden noted claimant's symptoms were compatible with herniated nucleus pulposus possibly at the L5-S1 level in the left side. Electromyographic study of June 3, 1980 showed very mild suspicion of S1 nerve root pressure involvement on the left side. Thomas W. Bower, L.P.T., opined such was "not totally indictive [sic] of a heriated [sic] disc at S/1."

A June 26, 1980 letter of Dr. Boulden to claimant states:

> In reference to doing surgery on your back, the indication for doing surgery is to try and relieve your pain in your back and down your leg. If there is a disc present, partial removal of this should give you a 90 percent chance of returning back to normal function with relief of most of your discomfort. There is always that 10 percent chance that the surgery would not benefit you but it should not make you any worse and it should not leave you with any chance of paralysis.
>
> Therefore, in conclusion, the reason to enter in an operative intervention is for relief of pain and that is something that you have to answer in your own mind whether you can live with the pain the way it is, at the present time, or if you desire to have surgical [sic] to try and relief [sic] the pain. We would only take out only [sic] part of the disc and not the whole disc so that you would have a good functioning back if everything went successful [sic].

A September 10, 1980 letter of Dr. Garber to whom it may concern states claimant is currently totally disabled, and has been since December 1979 and will be for an undetermined time. A September 23, 1980 letter of Dr. Boulden to Farmers Alliance Mutual Insurance Co. states the doctor's belief that if claimant were in the right mental frame, surgery could be beneficial to him. The doctor then assigns claimant a disability of 10 percent of the lumbar spine and states this would be claimant's permanent partial impairment rate with or without surgery.

A December 7, 1980 letter of Dr. Garber to Farmers Alliance recites as regards claimant:

> As far as his physical status is concerned, he absolutely is in no shape to try to do any kind of work. I do not see how he is going to improve unless he has some surgical intervention to relieve the pressure on the nerve-root that is causing his problems. Until that is done, I think he is totally permanently disabled.

Dr. Brand's clinical notes from his reexamination of claimant in 1981 note the impression that claimant suffers chronic low back pain but without evidence of nerve root involvement. A June 24, 1982 letter of Dr. Garber to claimant's counsel restates the doctor's opinion that claimant remains totally disabled. Claimant's exhibit 2, likewise, is a March 11, 1983 Garber letter to claimant's counsel stating claimant's condition is unchanged and he is totally disabled.

Claimant's exhibit 3 is the deposition of Dr. Garber taken April 29, 1983 on defendants' behalf. Dr. Garber expressed the belief that claimant fears he will be crippled by surgery and that claimant is concerned that no one can give him an absolute guarantee that he is going to be 100 percent functional after surgery. He stated pain is claimant's primary limiting symptom and that this is his disabling factor. The doctor reported he had done no range of motion studies in assigning claimant his total disability rating. The doctor stated the rating was based on claimant's verbal statements and the doctor's knowledge of claimant's prior work history as well as the conclusions from the Mercy Occupational Evaluation Center Report. The doctor stated the impairment rating he made does not reflect purely a percentage of functional impairment. The docotor acknowledges he doesn't know how to judge functional impairment.

Claimant's exhibit 5 is a termination notice to claimant from Wayne County dated January 6, 1981. Claimant's exhibit 6 is a statement of fringe benefits recieved by full-time permanent county employees effective January 1, 1974.

Defendants' exhibit A through E are medical reports duplicating reports in claimant's exhibit 1. Defendants' exhibit F is an August 18, 1983 letter of Todd F. Hines, Ph.D., to defendants' counsel. The letter reports Dr. Hines' findings as related in his oral testimony. Defendants' exhibit G is certain medical reports relative to Dr. Garber's treatment of claimant. These establish that claimant's left shoulder problems were not related to his low back injury and that the Moduretic and Hygroton were prescripted for claimant's hypertension and not for conditions related to claimant's injury.

Defendants' exhibit H is the report of the Medical Occupational Evaluation Center concerning claimant. The report is undated but concerns examinations made December 7-10, 1981. The psychological report of Dr. Hines of December 9, 1981 recites:

> Mr. Smith presents psychological patterns which are very likely significant in the cause and exacerbation of his symptoms, as well as in his understanding and acceptance of treatment options. He has a strong fear response which he attempts to control through denial. His self-concept had been centrally built upon his ability to perform heavy work and to demonstrate his worth and his masculinity through the successful display of strength and mastery of tools and machines. The loss of this ability through injury has generated a fear which paralyzes him; as he fears increasing pain and disability he brings an acute focus to symptom monitoring which serves to heighten his pain experience, which then drives his fear higher and the process becomes circular....These processes are reactive to the accident and related sequelae and do not represent a condition existing prior to his injury except for some latent anger potentiated by these circumstances.
>
> Mr. Smith does have limited vocational training potential. He functions verbally near the low end of the normal range of intelligence, with low educational achievement and less than average capacity for abstract thought. Logical problem solving is not a strength. However, he does operate solidly within the average range of intelligence on performance measures of cognitive skills. He has good eye-hand coordination and he can analyze problem situation when a trial and error, "hands-on" solution mode is available to him. His numerical skills, particularly in concept as opposed to operation, are better than average. He is not academically oriented and he has avoided educational situations as a function of his self-image and as a result of school failure earlier in his life.

Under the "Evaluator's Observations," G. Patrick Weigel, M.A., notes:

> [Claimant] has an 8th grade education with no GED and no post-high school training. He is a non-veteran. He does have considerable work experience as a crane operator, and was evidentally [sic] in line for a bridge crew foreman job at the time of his accident. He impressed us as being very sincere and truly desiring to return to the world of work in whatever capacity he could. However, it is our impression that until something medically is done to resolve his back problem, return to work efforts will be seriously hampered.

The synopsis of the evaluation states claimant has a functional impairment of 15 percent as a result of his December 4, 1979 injury. Eleven percent of the impairment was attributed to limitation of motion and four percent to aggravation or development of an underlying psychological problem.

Claimant's objection to defendants' exhibit J, certain letters to Ms. Mary Weibel of claimant's and defendants' counsel are overruled. The letters simply reveal that claimant refused defendants' request that he see an independent vocational rehabilitation consultant after his evaluation at the Center.

Defendants' exhibit I is the curriculium vitae of Marian S. Jacobs. Claimant's objection to defendants' exhibit K on the grounds of its lack of timeliness is overruled. Defendants' exhibit K is the disability report concerning claimant prepared by Marian S. Jacobs for Rehabilitation Resources. Of significance are the post-injury earning capacity ratings given claimant. Within Dr. Brand's limits, claimant is estimated to have experienced a nine percent decrease in earning capacity as a result of his injury. Within claimant's self-evaluated limits, claimant is estimated to have experienced a 31 percent decrease in earning capacity as a result of his injury.

APPLICABLE LAW AND ANALYSIS

At the time of hearing, the parties indicated that an initial dispute exists as regards the nature and extent of claimant's injury. Discernment of the unresolved issue here requires a more subtle mind than that of the undersigned. Claimant's petition notes that claimant's legs and back were affected by his injury. The evidence presented at hearing also establishes that claimant's injury manifests itself in back pain which radiates into his extremities. There is evidence in the record which indicates claimant may suffer a psychological overlay with attendant severe subjective pain as a result of his original injury. Such evidence does not preponderate as to severity, however. Claimant's injury as established by the credible medical evidence consists of a possible herniated disc at the L5-S1 level.

Next we must decide whether a causal relationship exists between claimant's injury and his current disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 4, 1979 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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 sustained his burden of proving a causal connection between his injury and his disability. While the medical evidence presented largely relates to claimant's clinical symptomatology and diagnosis and not to the question of causal relationship, both claimant and his witness testified that claimant had not suffered disabling back and leg pain before his injury. Likewise, prior to his injury, claimant had engaged in meaningful employment and other life activities which his back pain now limits. Dr. Hines reported that claimant's psychological response which likely aggravates his subjective pain developed after claimant's injury. No evidence was presented indicating claimant suffered significant back pain or life limitations prior to his injury. It is likely, therefore, that claimant's current disability relates to his December 1979 injury.

The nature and extent of claimant's benefits must now be decided.

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).

The disability ratings given claimant are varied. Dr. Boulden stated claimant had sustained a ten percent functional impairment of the lumbar spine with or without surgery. Mercy ascribed claimant a 15 percent functional impairment and attributed four percent of such to claimant's underlying psychological problems which, contrary to Dr. Hines' testimony, appeared not to have resolved successfully at time of hearing. Dr. Garber opines that claimant is totally disabled but admits his opinion cannot

properly be translated into functional impairment ratings. Ms. Jacobs has opined that claimant's lost earning capacity as a result of his injury is nine percent if Dr. Brand's restrictions are utilized and 31 percent if claimant's self-imposed restrictions are utilized. While not a disability rating, the latter is of some significance in determining claimant's industrial disability.

Claimant has only a seventh grade education and no GED. His only specialized training is as a dragline operator though he also has functioned as an auto mechanic and a welder. He cannot work in any of these occupations with his current problems. (That claimant's life restrictions might be reduced should he undergo surgery will not be determinative in regard to claimant's industrial disability. Claimant's refusal to have surgery results from a sincere and reasonable fear of its consequences and he shall not be penalized for it. See Stufflebean v. City of Fort Dodge, 233 Iowa 438, 9 N.W.2d 281 (1943).)

It appears that a number of claimant's skills and aptitude could be transferred to vocations within his limitations were he inclined to so transfer them. However claimant is still a relatively young man with approximately one-half of his adult work life before him and such a skill transfer would serve him well. Yet, claimant's limited education and limited retrainability and his continued pain may reduce his vocational opportunities despite those skills he possesses. When these factors are weighed in balance it appears claimant has sustained permanent partial disablity of 25 percent of the body as a whole.

The parties have stipulated that claimant's healing period ended October 20, 1982. Claimant is entitled to healing period benefits from his injury date until that date.

Claimant's rate of weekly compensation must be determined. Section 85.36 provides:

> 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:

Subsection 1 of section 85.36 provides that the weekly earnings of an employee paid on a biweekly pay period basis are one-half of the biweekly gross earnings.

Section 85.61(12) defines "gross earnings" as follows: "'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."

Industrial Commissioner Rule 500-8.2(85) states as regards "overtime:"

> The word "overtime" as used in section 85.61(12) of the Code means amounts due in excess of the straight time rate for overtime hours worked. Such excess amounts shall not be considered in determining gross weekly wages within section 85.36 of the Code. Overtime hours at the straight time rate are included in determining gross weekly earnings.

Claimant received a wage of $5.48 per hour; he worked 40 hours per week at his regularly hourly wage and an additional 5 hours at an "overtime" rate. The payroll warrants claimant's exhibit 4, establish claimant was paid on a biweekly pay period basis. Claimant may not be credited for overtime amounts in determing his gross earnings. Therefore, claimant's gross earnings are determined by multiplying by 90 his regular hourly wage of $5.48 per hour, dividing the result by two, and then determining the number of exemptions to which claimant is entitled. Claimant't gross earnings under this formula are $246.60. Under section 85.61(10) claimant's rate is determined by the maximum number of exemptions for actual dependency to which he is entitled under the Internal Revenue Code of 1954 and under chapter 422 The Code. Claimant has made no showing that his two minor children of his first marriage are his actual dependents. Therefore, claimant is entitled to four actual exemptions only. Claimant's weekly rate of compensation is $158.74.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant injured his back in the course of his employment on December 4, 1979.

Claimant is forty-two (42) years old.

Claimant has completed the seventh grade.

Claimant has had infield training and is certified as a dragline operator.

Claimant has worked as a manual laborer, a saw miller, an auto mechanic, a bulk truck driver, a bulldozer operator, and welder as well as a dragline operator.

Claimant has had difficulty sitting, standing, walking and lifting since his injury.

Claimant's healing period runs from his injury date to October 20, 1982.

Claimat has refused recommended surgery to correct a suspected herniated disc.

Claimant has not returned to work since his injury.

Claimant was terminated by his employer January 10, 1981.

Claimant has not returned to any gainful employment since his injury.

Claimant earned five and 48/100 dollars ($5.48) per hour and worked a forty-five (45) hour week when injured.

Claimant's earning capacity has been reduced by between nine percent (9%) and thiry one percent (31%) as a result of his injury.

Claimant has a functional impairment of fifteen percent (15%) of the body as a whole as a result of his injury.

Claimant's weekly compensation rate is one hundred fifty-eight and 74/100 dollars ($158.74).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his injury of December 4, 1979 is the cause of the disability on which he now bases his claim.

Claimant is entitled to permanent partial disability resulting from his injury of twenty-five percent (25%) of the body as a whole.

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for one hundred twenty five (125) weeks at the rate of one hundred fifty-eight and 74/100 dollars ($158.74).

Defendants pay claimant healing period benefits from his injury date to October 20, 1982 at the rate of one hundred fifty-eight and 74/100 dollars ($158.74).

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to 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 30th day of March, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BETTY ASHER STARK,

Claimant,

vs.

VEGAS CORPORATION d/b/a CAMELOT CLEANERS,

Employer,

and

LAMAIR-MULOCK-CONDON COMPANY,

Insurance Carrier,
Defendants.

File No. 509268

A P P E A L

R U L I N G

FILED

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IOWA INDUSTRIAL COMMISSIONER

Claimant appeals from a February 15, 1984 ruling of the deputy wherein claimant's motion for imposition of sanctions was denied.

Claimant's request for sanctions centers around the proposed medical report of Robert J. Roberts, M.D., Ph.D., which defendants have filed notice of intent to offer into evidence at the arbitration proceeding. The history of the filings of the parties regarding this report is as follows:

In a letter from defendants' counsel to claimant's counsel filed March 22, 1983, claimant was advised that defendants had engaged an expert in Iowa City and, following receipt of the current medical report from claimant's expert, a time could be arranged for the taking of the deposition of defendants' medical expert. On May 4, 1983 claimant filed a request for production of books and documents, and on June 18, 1983 defendants filed a resistance to claimant's motion, contending that the requested materials were not subject to discovery. On May 6, 1983 the parties were ordered to update their answers to interrogatories and exchange medical reports by June 17, 1983. Neither party complied with the order, and on August 3, 1983 defendants made application for imposition of sanctions barring the evidence and testimony of claimant's medical expert, Mark Thoman, M.D. Claimant failed to respond to the application and to the subsequent order by this agency extending the deadline and directing claimant to produce the report of Dr. Thoman under threat of sanctions. Following notice by defendants in September of 1983 that claimant had still not complied, the record was closed to evidence by Dr. Thoman.

On December 13, 1983 defendants filed a notice of intent to offer the medical report of Dr. Roberts and on the following day filed a supplemental answer to interrogatory, adding information on Dr. Roberts to claimant's request for authorities consulted. On January 6, 1984 claimant filed supplemented answers to defendants' interrogatories. On January 25, 1984 claimant moved for imposition of sanctions and protective order excluding evidence and testimony by Dr. Roberts for the reason that defendants had concealed his identity and the substance of his evaluation. Defendants filed a resistance on February 3, 1984, and claimant filed a reply on February 10, 1984. In a ruling of February 15, 1983, the deputy denied claimant's motion for sanctions.

On appeal, claimant requests that the evidence of Dr. Roberts be excluded or, in the alternative, that the bar to evidence from claimant's own medical expert be removed. The question of Dr. Thoman's participation in the action has been fully considered in two previous rulings and again on appeal. It will not be reviewed.

The record reveals that as early as March of 1983, claimant's counsel was advised by letter that defendants had engaged "an expert in Iowa City" and that arrangements could be made for the taking of his deposition. If claimant did not avail herself of this opportunity to depose the expert, neither did she, in the ensuing months, file a motion for production of the expert's report. Claimant now argues surprise and active concealment by defendants of the identity of the expert and the substance of his evaluation. In the absence of evidence in the record that claimant at any time after March sought to discover the expert's information, claimant's contentions are without support. Although defendants filed the updated interrogatory just prior to the scheduled hearing, so did claimant. In fact, the discovery proceedings have been characterized by foot-dragging on both sides when agency directives have sought to hasten the progression of the claim, and the comments by the deputy of the dilatory tactics evinced by the parties are well taken. Despite claimant's allegations to the contrary, there is no evidence of bias or prejudice on the part of the deputy. Her actions were proper and her ruling is appropriate.

THEREFORE, the proposed ruling of the deputy is affirmed. Claimant's motion for imposition of sanctions and protective order is denied.

Signed and filed this 30 day of August, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JEFFREY K. STEVENS,

Claimant,

vs.

JOHN MORRELL & COMPANY,

Employer,
Self-Insured,
Defendants.

File No. 673390

R E V I E W -

R E O P E N I N G

D E C I S I O N

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IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Jeffrey K. Stevens, claimant, against John Morrell & Company, a self-insured employer, for the recovery of further benefits as a result of an injury on December 17, 1980. A hearing was held before the undersigned on May 29, 1984. The case was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant and Dennis L. Howrey; claimant's exhibits 1 through 4, 6 and 7; and defendant's exhibits A and B. Defendant's objection to claimant's exhibit 5 is sustained for the reason that exhibit 5 was not timely exchanged and delivered to the defendant as required by Industrial Commissioner Rule 500-4.17. Claimant's motion to reopen the record is overruled.

ISSUES

The issues presented by the parties at the time of the hearing are whether there is a causal relationship between the injury and the disability upon which the claimant is basing his claim; the extent of temporary total or healing period and permanent partial disability benefits to which he is entitled; and the claimant's rate of compensation.

EVIDENCE PRESENTED

Claimant testified he is married, has two children and is 29 years of age. He is a graduate of Estherville High School but has had no additional training other than some brief training as a mechanic for John Deere and Company. Claimant stated that he started to work for John Morrell & Company at Estherville, Iowa, in August of 1974. He advised that he has been employed in a number of positions with John Morrell & Company and was so employed until the plant closed in 1982.

Claimant reported that he was working in the boning room at John Morrell & Company in December of 1980. He stated that he began to notice increasing pain in his right and left wrist with the greater pain being in the right wrist. He advised that on December 17, 1980 he reported this matter to his foreman, Dan Lloyd, and the company nurse. He stated that he was referred to the company doctor who prescribed medication and soaking of the wrist. When this failed to help his situation, he requested permission to seek his own physician who advised that claimant consult a specialist. Claimant testified that pursuant to this advice he consulted William Follows, M.D., an orthopedic surgeon in Spencer, Iowa.

Claimant further testified that in June 1981, Dr. Follows suggested that he take five to six weeks off work to give his wrist an opportunity to heal. He stated that he was off work from June 12, 1981 to July 19, 1981 during which time he received workers' compensation benefits. Claimant indicated that he returned to work but continued to be bothered with the symptoms soon after his return. Again, his right hand was causing him more problems than his left. He stated that he worked until August 10, 1981.

Claimant advised that he returned to Dr. Follows and on August 14, 1981 Dr. Follows performed surgery on his right wrist. Claimant testified that he was off work until September 13, 1981 during which time he received workers' compensation benefits. Claimant testified that he returned to work on September 14, 1981 with a work restriction. Claimant said he was not to be doing any type of knife work but his foreman placed him on this type of job anyway. Claimant stated that he was in fact unable to continue with this type of job so he spoke with the personnel manager who had him removed from the knife job. Claimant added that he returned to work on September 15, 1981 for a half day but had to quit to go see the doctor. He was again off work from September 17 to October 4, 1981. Claimant said that he returned to work under restriction on October 5, 1981 and continued with the restriction until December 15, 1981. At that time claimant suffered an unrelated injury and was again off work until April 25, 1982. He said he returned to work on Apr.. 26, 1982 for two weeks and then took his vacation. At the end of the vacation the John Morrell plant was closing and claimant was given the option to take a layoff, go to Sioux Falls, South Dakota, or take his severance pay.

Claimant reported that he continued to have problems with his left hand so Dr. Follows scheduled a second surgery on the left hand. Claimant indicated that the defendant objected to the second surgery and requested a second opinion. Claimant advised that pursuant to request he was seen and examined by W. P.

Cooney, M.D., at the Mayo Clinic in Rochester, Minnesota. Claimant revealed that as a result of his examination at the Mayo Clinic a controversy ensued between the doctors over whether or not a second surgery should be performed. Claimant advised that eventually a second surgery was performed in April 1983. As a result of this surgery, claimant stated he was unable to work from April 25, 1983 to June 25, 1983. During this time claimant stated he was unable to receive unemployment compensation due to his inability to be certified for employment.

Claimant testified that he applied to the John Morrell plant for employment in August of 1983 when it was reopened, but he was not rehired. He advised that others had been rehired who had taken their severance pay. Claimant stated that he made employment applications at numerous locations in the northwest Iowa area but did not obtain employment until February 1984. Claimant stated that he is presently employed at the Arts Way Manufacturing Company on a full-time basis but does miss a considerable amount of work due to continued problems with his wrists. Claimant advised that he continues to be under medical care.

Claimant testified that prior to his injury he was actively involved in a number of activities including bowling, softball and other sports. He contended that since his injury he has been unable to engage in these activities and stated that he often suffers from pain in his wrists. Claimant did admit that since his injury he has become a member of a ski patrol at Holiday Mountain.

Dennis L. Howrey testifed that he is the personnel manager for John Morrell & Company and has been with the company for six years. He stated that claimant was not rehired because of prior problems with his work performance and not because of the carpal tunnel syndrome which he had suffered. He stated that the primary reason for the company's decision not to rehire the claimant was claimant's poor attitude at work and the large number of job changes which claimant had requested over the years. Mr. Howrey advised that claimant had filed a complaint with the Iowa Civil Rights Commission as a result of their decision not to rehire him claiming discrimination on the basis of his handicap.

Mr. Howrey testified that claimant first reported only a problem with his right hand in December 1980 and that no complaint was made regarding the left hand until August of 1981. He further testified that claimant's compensation rate was based on the 13 weeks prior to the date claimant first was off work as the result of his injuries and that holiday pay paid to claimant during the 13 weeks was excluded in calculating the average weekly wage of the claimant. He stated that claimant terminated his employment with John Morrell & Company on May 28, 1982.

Claimant exhibits 1, 4 and 6 are some medical reports from Dr. William Follows. In a letter dated July 2, 1982 to claimant's attorney, Dr. Follows states that he first saw the claimant in June 1981 at which time claimant had a three month history of problems with numbness in his hands, more in the right hand than the left one. A diagnosis of carpal tunnel syndrome was made and when conservative treatment failed to achieve an appropriate degree of relief, surgery was performed on August 14, 1981 to decompress the median and ulnar nerves. Claimant apparently made a satisfactory recovery with some difficulty shortly after he returned to work; however, the symptoms gradually subsided. According to the report, claimant reported in November 1981 that he was suffering from similar symptoms on the left wrist. Dr. Follows recommended a second surgery for decompression of the median nerves on the left; however, a second opinion was obtained prior to surgery. As a result of the second opinion, surgery was delayed until April 1983. Finally claimant's exhibit 1 is an insurance form signed by Dr. Follows which states that claimant is suffering from a 10 percent impairment to the right hand and five percent impairment to the left hand.

Claimant's exhibit 3 contains medical reports from William P. Cooney, M.D., an orthopedic surgeon with the Mayo Clinic in Rochester, Minnesota, dated January 6, May 27, and August 26, 1982. In his report of January 6, 1982 Dr. Cooney related claimant's history of problems with his right and left wrist. According to that history, claimant's problem with his left wrist did not begin until shortly after the surgery on his right hand in September 1981. Dr. Cooney opined that claimant had a work-stress overuse syndrome affecting both the right and left wrists. He believed that the carpal tunnel release performed by Dr. Follows obtained a reasonably good result. It was his opinion that the mostly likely cause of claimant's problems were the work he performed for John Morrell & Company.

Dr. Cooney's letter of May 27, 1982 reports on a follow-up examination of the claimant on May 13, 1982. At that time claimant was continuing to suffer with pain in both his left and right wrists; however, he was still working for John Morrell & Company. Dr. Cooney recommended to the claimant that it would be necessary for him to change his work activities because continued employment in the manner which he had been employed would result in continued symptoms. He indicated that conservative treatment should be continued.

In a letter dated August 26, 1982 to Dr. Follows, Dr. Cooney again exressed his opinion that claimant would best benefit from conservative treatment as opposed to surgery. He did admit, however, that if the claimant failed to respond to conservative treatment then surgery should be once again considered as a possibility.

Claimant's exhibits 2 and 7 are copies of reports from John J. Dougherty, M.D., an examining physician on behalf of the employer. Dr. Dougherty examined claimant following his first surgery on the right hand and estimated that claimant had an approximate 10 percent impairment to the right upper extremity as a result of the injury. Dr. Dougherty examined claimant prior to the carpal tunnel release on the left wrist and thus no opinion is expressed as to the functional impairment on the left.

APPLICABLE LAW

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

The 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). 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).

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

An injury to the wrist (an injury limited to the radius and ulna) is compensable as an injury to the hand under Iowa Workers' Compensation Law. Klam v. Millard Manufacturing, II Industrial Commissioner Report 141 (1981).

"The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." (Section 85.36).

Section 85.61(11)(12) states:

"Spendable weekly earnings" is that amount remaining after payroll taxes are deducted from gross weekly earnings.

"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 84.34(2)(1)(s) states:

Such compensation shall be based upon the extent of such disability and upon the basis of eighty percent per week of the employee's average weekly spendable earnings, but not more than a weekly benefit amount, rounded to the nearest dollar, equal to sixty-one and one-third percent of the state average weekly wage paid employees as determined by the Iowa department of job service under the provisions of section 96.3 and in effect at the time of the injury, provided that as of July 1, 1975; July 1, 1977; July 1, 1979; and July 1, 1981, the maximum weekly benefit amount rounded to the nearest dollar shall be increased so that it shall equal ninety-two percent, one hundred twenty-two and two-thirds percent, one hundred fifty-three and one-third percent, and one hundred eighty-four percent, respectively, of the state average weekly wage as determined above; provided that no employee shall receive as compensation less than thirty-six dollars per week, except if at the time of his injury his earnings are less than thirty-six dollars per week, then the weekly compensation shall be a sum equal to the full amount of his weekly earnings; and for all cases of permanent partial disability such compensation shall be paid as follows:

For the loss of a hand, weekly compensation during one hundred ninety weeks.

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.

ANAYSIS

Claimant alleges in his petition injuries to his arms and wrists on December 17, 1980. It is clear, however, from the first report of injury filed in this matter and from the history given to the doctors by the claimant that the December 17, 1980 injury involved only his right hand. The greater weight of the evidence presented indicates the claimant did not have any problems with his left wrist until November 1981. Thus, each injury must be dealt with separately rather than as two injuries occurring simultaneously. The injury to the left wrist was tried by the consent of the parties and on prejudice results to defendant from considering them separately. The first issue involves the injury to the right wrist on December 17, 1980.

Although the defendant argues that the claimant's rate of compensation should be calculated from the date he was first off work as a result of the injury, the code is quite clear in stating that the rate of compensation shall be calculated from the time of the injury. In the instant case the injury to the right wrist first manifested itself on December 17, 1980. Accordingly the rate of compensation should be calculated based on the 13 week average immediately prior to December 17, 1980. In addition, it is clear that claimant is entitled to have his holiday pay calculated in determining the rate of compensation. The holiday pay is a regular recurring payment and not an irregular bonus nor could it be termed overtime or premium pay. Accordingly, claimant is correct in his assertion that the basis of his rate of compensation should be the 13 weeks prior to his injury of December 17, 1980 and that the holiday pay he received during that period of time should be included in calculating the average. Claimant's average weekly wage then immediately prior to his injury is $500.38. The value of claimant's fringe benefits should not be included as the fringe benefits are not a part of claimant's spendable earnings. Claimant's rate of compensation is therefore $291.61 based upon the workers' compensation benefit schedule of July 1, 1980 and four exemptions.

Claimant has established a causal relationship between his injury of December 17, 1980 and the permanent partial impairment that he now has in his right wrist. Although Dr. Dougherty found an impairment to the right upper extremity, greater weight will be given to the treating physician, Dr. Follows, who found that claimant's impairment was to the right hand in the amount of 10 percent.

The record establishes that claimant received an injury to his left wrist in November of 1981. As with the right wrist, it was Dr. Cooney's opinion that this injury was the result of claimant's work and overuse of the wrist on the job. There is little evidence regarding the causal relationship between the injury and the disability of five percent which Dr. Follows noted on the insurance form. In this case, however, claimant's lay testimony can be relied upon to establish the causal connection when viewed on the record as a whole and with the comments of the treating and examining physicians. The greater problem in connection with the left wrist injury is determining the healing period as a result of the injury and subsequent surgery. There is absolutely no medical evidence which establishes that claimant was unable to work as a result of the injury or the subsequent surgery. It is apparent, however, even to the most casual observer that claimant must have lost some time from work as a result of the injury and surgery to his left wrist. Claimant's contention was that he was unable to work from April 25, 1983 until June 25, 1983. No explanation has been offered as to why the healing period on the left wrist was greater than that on the right even though the impairment to the left wrist was less than that to the right. Accordingly, claimant will be allowed healing period benefits for the left wrist for the same period of time that he was allowed benefits for the right wrist, a period of four weeks and four days. The five percent impairment rating given to claimant's left hand by Dr. Follows is indeed lacking in several respects particularly with respect to history or the basis upon which the rating was made. Defendant, however, stated in their brief that claimant should be paid five percent for the impairment to the left wrist and it will be so ordered.

Claimant has failed to submit any evidence on which to base a compensation rate for the injury to the left wrist which occurred in November of 1981. Defendant did present exhibit A which contains the 13 week average for claimant for the period prior to June 13, 1981. Since this 13 week average is closer in time to the date of the injury than the 13 weeks found in December of 1980, it will be adopted to determine claimant's rate of compensation with respect to the injury of the left wrist. Accordingly, the 13 week average for the November 1981 injury to the left hand will be found to be $430.67. Thus based upon the workers' compensation benefit scheduled dated July 1, 1981, claimant's rate of compensation with respect to the left wrist injury is found to be $258.50.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On December 17, 1980 claimant suffered an injury to his right wrist while at work.

2. Claimant had continuing problems with his right wrist which caused him to be off work from June 12 to July 19, 1981 during which time he was paid workers' compensation at the rate of $286.11.

3. As a result of injury and continued problems, claimant underwent carpal tunnel surgery on his right wrist on August 14, 1981.

4. As a result of his injury and the surgery on his right wrist, claimant was off work from August 13 to September 13, 1981 during which time claimant was paid workers' compensation at the rate of $286.11.

5. Claimant's injury and subsequent surgery to his right wrist resulted in a permanent impairment to his right hand of 10 percent.

6. Claimant's average gross weekly wage in the 13 weeks prior to his injury of December 17, 1980 was $500.38.

7. Claimant is married and has two children.

8. In November 1981 claimant suffered an injury to his left wrist while at work.

9. Claimant had continuing problems with his left wrist which resulted in carpal tunnel surgery to his left wrist on April 28, 1983.

10. As a result of his injury and surgery on his left wrist, claimant was unable to work from April 25, to May 29, 1983.

11. Claimant's injury and subsequent surgery of his left wrist resulted in a permanent impairment to the left hand of five percent.

12. Claimant's average gross weekly wage in the nearest known 13 weeks prior to his injury of November 1981 was $430.67.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

On December 17, 1980 claimant received an injury to his right wrist which arose out of and in the course of his employment.

There is a causal relationship between claimant's injury and a ten (10) percent impairment to his right hand.

Claimant's rate of compensation for the injury of December 17, 1980 is two hundred ninety-one and 61/100 dollars ($291.61).

In November 1981 claimant received an injury to his left wrist which arose out of and in the course of his employment.

There is a causal relationship between claimant's injury and a five (5) percent impairment to his left hand.

Claimant's rate of compensation for the injury of November 1981 is two hundred fifty-eight and 50/100 dollars ($258.50).

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant ten (10) weeks of compensation for healing period at the rate of two hundred ninety-one and 61/100 dollars ($291.61) for the injury of December 17, 1980 and nineteen (19) weeks for permanent partial disability to the right hand at the same rate. Defendant is to be given credit for payments previously made. Accrued payments shall be made in a lump sum together with statutory interest.

IT IS FURTHER ORDERED that defendant pay unto claimant four and four-sevenths (4 4/7) weeks of compensation for healing period at the rate of two hundred fifty-eight and 50/100 dollars ($258.50) for the injury of November 1981 and nine and one-half (9 1/2) weeks for permanent partial disability to the left hand at the same rate. Accrued payments shall be made in a lump sum together with statutory interest.

Costs of this action are taxed to the defendant.

Defendant shall file a claim activity report upon completion of this award.

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

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS THOMPSON,

Claimant,

vs.

KWIK SHOP,

Employer,

and

HOME INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 693818

A P P E A L

D E C I S I O N

FILED

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IOWA INDUSTRIAL COMMISSIONER

Defendants appeal from an arbitration decision in which claimant was held to have received an injury on January 8, 1982 arising out of and in the course of his employment resulting in permanent partial disability to his left arm. The record on appeal consists of the transcript of the arbitration proceeding together with claimant's exhibits 1 through 3 and defendants' exhibit A and the briefs and arguments of the parties on appeal.

ISSUES

As gleaned from the appellants' appeal brief, the issues succinctly stated appear to be:

1. Whether the deputy erred in finding an injury arising out of an in the course of employment?

2. Whether the rate of compensation was determined correctly?

STATEMENT OF THE CASE

Evidence germane to the issues on appeal is:

Claimant commenced employment with defendant Kwik Shop as a sales clerk on a part-time basis in June 1980. During the same period he worked full time for Armstrong Tire and Rubber Company as a quality control foreman.

On January 8, 1982 claimant worked at Armstrong from 3 p.m. to 11 p.m. After leaving Armstrong, claimant went to Kwik Shop for the avowed purpose of checking the work schedule to see when he was to work. Claimant arrived at Kwik Shop "somewhere between 11:15 and 11:30." The schedule had not been posted the previous evening when claimant was working. It was claimant's responsibility to find out when he was to work.

While at the Kwik Shop claimant purchased a bottle of pop. After purchasing the pop claimant left the Kwik Shop and went to his car in the parking lot where he was accosted by two men in ski masks who took him behind the building and battered him. They then set fire to his car. Claimant was not robbed.

Claimant earned $24,100 in the year preceding the incident in his full time employment with Armstrong (Transcript, page 7, line 16) and $5,400 (Tr., p. 7, l. 9) or $5,400.96 (Tr., p. 48, l. 10) in his part-time employment with Kwik Shop.

While claimant was at the Kwik Shop on January 8 he performed no actual work. He indicated he had been threatened by customers before. The store had been robbed on more than one occasion in the prior two years. Claimant had, on occasion, taken deposits to the bank when the manager was on vacation.

APPLICABLE LAW

Code section 85.3(1) states in part: "Every employer, not specifically excepted by the provisions of this chapter, shall provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment,..."

Code section 85.61(6) provides:

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

It 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."

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 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).

Code section 85.36(10) states:

> If an employee 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 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

The parties present other figures in their briefs as the wages from the two employments. These figures cannot be found in the evidence and are therefore unacceptable for determining a rate. It is unfortunate that the parties could not stipulate to the rate under both of their theories so this dilemma would not have occurred. At the time of the incident claimant was married with three dependent children.

Although there were allegations claimant played video games while at the Kwik Shop, these were denied by claimant. The allegations were contained in defendants' exhibit A (accident report) which also indicated the incident occurred around 12:30 a.m. on January 9, 1982. Neither the persons listed in the report as witnesses nor the person filling out the report were available to corroborate its contents. The employer's accident report (Defendants' Exhibit A) is of dubvious value as the ambulance report which is a part of the medical records listed as claimant's exhibit 1 indicates that claimant's vital signs were being tested by the emergency medical technicians at 11:55 p.m., January 8, 1982 and the outpatient registration at Iowa Methodist Medical Center indicates he was admitted at 12:10 a.m., January 9, 1982.

Claimant's allegations that he went to the Kwik Shop to check the schedule, bought some pop and left, stand unrebutted by competent evidence.

Claimant's employment with defendant Kwik Shop was on a part-time basis and his wage is therefore determined by dividing his wages from all employments during the twelve calendar months preceding the injury. According to the testimony in the record this would be $24,100 + $5,400.96 = $29,500.96 ÷ 50 = $590.02. Rounded to the nearest dollar, the average weekly wage would be $590. Claimant was married with three dependent children at the time of the injury which entitles him to a compensation rate of $335.02 per week.

FINDINGS OF FACT

1. Claimant was employed by defendant Kwik Shop on January 8, 1982 as a part-time employee.

2. Claimant was employed full time at Armstrong Tire and Rubber Company in Des Moines.

3. Claimant worked at the defendant Kwik Shop on the evening of January 7, 1982. The schedule for work of the following week had not been posted.

4. After finishing his shift at Armstrong at 11:00 p.m. on January 8, 1982, claimant went to the defendant Kwik Shop.

5. The principal reason for the trip by claimant was to ascertain his scheduled working hours for the following week.

6. The Kwik Shop trip was a deviation from claimant's normal route home.

7. Claimant was assaulted and battered upon leaving the interior of the defendant Kwik Shop while still on the premises of defendant.

8. Claimant sustained a serious injury which was inflicted by unknown assailants.

9. No personal reason for said assault has been shown.

10. Claimant earned twenty-nine thousand five hundred and 96/100 dollars ($29,500.96) from all employment in 1981. Claimant made less from Kwik Shop than the usual weekly earnings of the regular full time adult convenience store worker.

11. Claimant lost time at defendant Kwik Shop, but lost no time at Armstrong.

12. Claimant sustained a five percent (5%) permanent partial impairment to the right arm.

13. Claimant incurred medical expenses because of the injury.

CONCLUSIONS OF LAW

1. Claimant was employed by defendant Kwik Shop on January 8, 1982.

2. Claimant sustained an injury arising out of and in the

course of employment with defendant Kwik Shop on January 8, 1982.

3. Claimant is not entitled to be paid healing period benefits.

4. Claimant is entitled to be paid twelve and one-half (12 1/2) weeks of permanent partial disability compensation.

5. The rate of compensation is three hundred thirty-five and 02/100 dollars ($335.02) per week.

6. The following medical expense will be ordered to be paid:

Des Moines Orthopaedic Surgeons, P.C. $1,190.00

WHEREFORE, the proposed arbitration decision is affirmed in part and modified in part.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant twelve and one-half (12 1/2) weeks of permanent partial disability compensation at the rate of three hundred thirty-five and 02/100 dollars ($335.02) per week.

That defendants pay the following approved medical expense:

Des Moines Orthopaedic Surgeons, P.C. $1,190.00

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from the date payments become due.

That costs are taxed to defendant pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 30 day of August, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL L. THOMPSON,
Claimant,
vs.
ELVIEW-STEWART SYSTEMS COMPANY,
Employer,
and
HARTFORD CASUALTY INSURANCE,
Insurance Carrier,
Defendants.

File No. 698501
A P P E A L
D E C I S I O N

FILED
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IOWA INDUSTRIAL COMMISSIONER

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 fall at work which occurred on December 15, 1981.

The record on appeal consists of the transcript of the arbitration hearing which contains the testimony of claimant and Clifford King; claimant's exhibits 1 through 18 (excluding 17); defendants' exhibits 1 through 6; and the briefs and filings of all parties on appeal.

ISSUES

The issues on appeal as stated by defendants are:

A. Did claimant sustain an injury on December 15, 1981 which arose out of and in the course of his employment?

B. If claimant sustained an injury on December 15, 1981, is there a causal connection between the injury and the disability on which he bases his claim?

C. If claimant sustained an injury on December 15, 1981 and there is a causal connection between the injury and the disability on which he bases his claim, what is the extent of disability?

REVIEW OF THE EVIDENCE

Claimant was fifty-six years old at the time of hearing. He is married and has four children. Claimant is a high school graduate who was born on a farm and has lived on a farm for most of his life. He began his career as a farmer in 1950 but quit farming after three years because the money he earned was not enough to support his family. (Tr., pp. 4-6)

Claimant testified that in approximately 1954, he embarked on a career in the construction field. He began his career as a carpenter, but as the years progressed, rose to the position of job superintendent for large construction projects. (Tr., pp. 7-11)

In 1981 he accepted employment with defendant, Elview-Stewart Company as a job superintendent. (Tr., pp. 11-12)

Claimant testified that on December 15, 1981 he slipped and fell on a patch of ice while walking from the job trailer to the lower level of the building. (Tr., p. 12) Claimant immediately felt pain in his right shoulder and neck area and a few days later he also felt pain in his lower back. (Tr., p. 13)

Clifford King was a laborer at the construction site on December 15, 1981. King testified that he heard but did not see the claimant fall. King testified that it took the claimant a little while to get off the ground. (Tr., pp. 98-100) King also testified that while claimant may have slowed down in his work after the fall, claimant continued to supervise the construction project as long as he (King) worked as a laborer on the project. (Tr., pp. 101-102)

Claimant testified that he did not fill out an accident report at the time of his injury but did report the injury to his employer a day or two later. (Tr., pp. 14-15)

Claimant testified that prior to his fall in December 1981, he had only missed two days of work in the previous eight or nine years. (Tr., p. 17) Prior to December 1981 he did experience occasional back pain for which he had been treated by Hugh D. Howard, D.O. (Tr., pp. 17-19) He also experienced some shoulder tiredness but no pain or hindrance to his work. (Tr., p. 20)

Claimant he first saw Dr. Howard after the fall on February 8, 1982. (Tr., p. 30)

In his narrative report dated March 14, 1983, Dr. Howard noted that he had seen the claimant in his office on two occasions prior to the incident of December 1981. (Claimant's Exhibit 5) On December 1, 1980 claimant had complained of pain in his right hip radiating to his right leg. Examination at that time showed tenderness and restricted range of motion of the lumbar spine and right hip. Claimant was started on anti-inflammatory medication. (Cl. Ex. 5)

The report revealed that on December 8, 1980 claimant was reexamined at which time he was showing considerable improvement in the pain, tenderness, and range of motion. (Cl. Ex. 5)

On February 8, 1982, Dr. Howard's report stated that claimant complained of pain, tenderness, and restricted range of motion of both shoulders. He also complained of a recurrence of pain in his low back and left leg. Claimant was restarted on anti-inflammatory medication and advised against lifting. (Cl. Ex. 5)

Reexamination on February 15, 1982 showed that claimant was improving but continued to have discomfort in his low back, legs, and shoulders. (Cl. Ex. 5)

In mid-February, 1982, claimant went to see John A. Eilers, a chiropractor, complaining of a pinched nerve due to "old age." At the hearing, when questioned on cross-examination why he made such a statement claimant explained:

Q. Why didn't you tell Doctor Eilers that you injured yourself?

A. Well, Doctor Eilers and I are old friends and kidded back and forth when he was working for me a year earlier. I didn't anticipate filing a claim yet and I just blurted out to him what first thing came, I expect.

Q. Well, you didn't blurt this out, you wrote this down.

A. I was talking to him at the time.

Q. Didn't you write it down?

A. Well, yes, I wrote it down.

Q. It says, "Complaint: Pinched nerve in back," doesn't it?

A. Yes, it does.

Q. And that is your writing?

A. Yes, it is.

Q. Does it mention any problems of shoulders or neck?

A. No it doesn't.

Q. Were you having problems with your shoulders and neck at that time?

A. Yes, I was.

Q. Why didn't you mention it to him?

A. Because I was trying to get the relief from my back.

Q. How did it happen? It says, "Old age." Did you write that down?

A. Yes, I did.

Q. You were just joking with Doctor Eilers?

A. I don't recall writing it down, but he is a friend. He isn't somebody that I didn't know and he had worked with me. (Tr., pp. 71-72)

Claimant testified that on March 1, 1982 he was referred to Stuart R. Winston, M.D., a neurosurgeon, by a friend and Dr. Howard. (Tr., p. 32) At that time claimant was complaining of a slow back pain and pain into the lower extremities as well as some numbness. (Cl. Ex. 13)

In his progress report, Dr. Winston stated:

> Considering his occupation and presentation of difficulty I would think that he probably has a substrate of spondylosis in the lumbosacral spine with chronic recurrent lumbosacral strain. I cannot rule out, in view of his untreated hypertension and cardiac murmurs, etc., the fact that he might harbor some type of vascular phenomenon related to the aorta giving similar symptomatology. (Cl. Ex. 13)

Claimant continued to see Dr. Howard until May 21, 1982. (Tr., pp. 30-21; Cl. Ex. 1) During this period, Dr. Howard advised him to avoid heavy lifting and to avoid continuous bending, twisting, and standing. (Cl. Exs. 10, 11, and 12)

Claimant testified that both Dr. Howard and Dr. Winston told him that "the only way to get over the back pain, take some time off and let it heal." (Tr., p. 37) Claimant testified that on April 30, 1982 he requested and was granted a leave of absence from defendant employer. He sought employment from his employer approximately one month later and was told that there was no work. (Tr., p. 38)

Claimant testified that in the fall of 1982, he went to work as a carpenter for a neighbor. The job involved the building of an additional two rooms on the house. (Tr., p. 39)

Claimant testified how his injury affected his work:

Q. Can you hammer nails with your left arm?

A. Yes. Not as good as I could with my right, but I can do it.

Q. Would you use your right arm or your left arm to do the nailing or would you do nailing?

A. Yes, I did nailing. Anything over my head I have to use my left arm, but down in front of me and below I can use my right arm.

Q. Would you do any lifting on that job?

A. In construction there is always some lifting, yes.

Q. How heavy would the lifting be that you would do?

A. There was three or four of us most of the time and there was very little lifting. He had a forklift for his tractor and a bucket on the front of it and everything was done as easily as possible.

Q. Did the lifting that you did do affect the way you felt?

A. If I lifted too much it would, yes.

Q. How would it affect you?

A. Oh, I would have back pains.

Q. On that job were you able to take time off if you weren't feeling up to par?

A. Yes.

Q. Did you take time off when you weren't feeling up to par?

A. Yes. There are some cases I worked half days.

Q. Why was that?

A. I was not feeling up to par. My shoulder or my back or something was hurting. I took time off to keep from aggravating it more.

Q. But was it because of your shoulder and your back?

A. Yes. (Tr., pp. 39-41)

Claimant testified the job took three weeks and he was paid $600. (Tr., p. 41) He worked on and off for the remainder of the winter remodeling the inside of the same neighbor's home for about $500. (Tr., pp. 41-42) In March 1983, he and his wife built a closet and an acoustical-type ceiling in the home of another individual and was paid $475. (Tr., p. 42) In early April 1983 he and his wife put a back porch on the home of another individual and were paid approximately $1,000. (Tr., p. 43)

On April 5, 1983 claimant was examined by Martin Rosenfeld, D.O., an orthopaedic surgeon, complaining of lumbar spine, bilateral lower extremity distress, cervical spine, and upper right extremity distress. (Cl. Ex. 6) The orthopaedic examination revealed:

> Orthopaedic examination of the low back revealed straight leg raising to be positive at sixty-five (65) to seventy (70) degrees bilaterally. Sciatic stretch signs were noted to be positive. Ankle reflexes were satisfactory. Forearm flexion-extension power was satisfactory bilaterally. The right shoulder is noted to abduct to approximately one hundred ten (110) degrees with normal abduction on the left. It was noted that Mr. Thompson has weakness on forced abduction and is unable to keep the arm abducted against resistence. Cervical spine motion revealed decreased sidebending bilaterally. Sensory reflexes of the upper extremities were noted to be equal and active bilaterally. Radiographic studies of the cervical spine revealed early degenerative changes present. Studies of the lumbar spine revealed marked degenerative changes, spondylosis, lipping and spurring throughout the entire lumbar region. Studies of the right shoulder revealed acromio-clavicular arthritis to be present. (Cl. Ex. 6)

It was Dr. Rosenfeld's impression that there was "chronic lumbosacral strain with underlying degenerative disc disease and lumbar spondylosis. Rotator cuff tear on the right. Cervical sprain and spondylosis." (Cl. Ex. 6)

Dr. Rosenfeld recommended that claimant obtain an arthrogram of his right shoulder in order to examine the need of a rotator cuff repair and A-C joint arthroplasty. (Cl. Ex. 6)

Finally, it was Dr. Rosenfeld's opinion that claimant has reached maximum medical improvement to the cervical and lumbar regions, and that:

> I feel he has most probably sustained a permanent partial impairment to the lumbar region in the amount of fifteen (15) percent and to the cervical region in the amount of five (5) percent with impairment to the right shoulder in the amount of ten (10) percent. It is most doubtful Mr. Thompson will be able to return to construction type of work in other than a supervisory type position, however being familiar with the construction business, I would feel he most probably at times would be doing manual labor himself and I do not feel he is capable to tolerating this situation. (Cl. Ex. 6)

On May 5, 1983 claimant was examined by Thomas A. Carlstrom, M.D., a neurosurgeon. Dr. Carlstrom found that claimant had a "mildly diminished range of motion of his low back with mild to moderate paravertebral muscle spasm." (Cl. Ex. 8) It was Dr. Carlstrom's opinion that:

> Mr. Thompson's low back and neck symptoms are related to a myofascial strain which he evidently suffered during the fall on the ice in 1981. I see no reason to pursue the workup any further and have no further suggestions regarding his treatment. I do believe he has sustained a permanent partial disability, that being approximately 3-4% of the body as a whole, based on diminished range of motion of his back and neck, and this is based on the AMA criteria. I do not believe he will tolerate further employment which requires heavy lifting. (Cl. Ex. 8)

Claimant testified that from the middle of May 1983 until the time of the hearing he has been employed as a general superintendent for his daughter's home near Ankeny. (Tr., p. 44) His present work is different than his job as a superintendent for a big construction company because "I can set my own pace." (Tr., p. 46) He hasn't applied for a job at large construction firms because he doesn't feel he can be on his feet eight hours a day. (Tr., p. 46)

Claimant testified that in the past year he has performed some farming on a part-time basis and the pain in his shoulders, back, and legs have subsided since leaving the employ of Elview-Stewart Company, in May of 1982. (Tr., pp. 51-52) He is no longer taking prescribed medication for his pain. (Tr., p. 52)

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 "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 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 December 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).

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).

ANALYSIS

The record clearly indicates that on December 15, 1981 claimant received an injury which arose out of and in the course of his employment. Claimant testified that his fall occurred as he walked down a steep incline and slipped on a patch of ice. This incident is fully corroborated by the testimony of a co-worker, Clifford King.

Defendants contend on appeal that claimant has failed to establish a causal connection between the work-related injury and the resultant disability because claimant did not give a consistent history to each doctor. This decision will not rely fully upon the claimant's testimony regarding his slip and fall in December of 1981. Sufficient supplemental evidence exists in the way of the narrative reports of Dr. Howard and the testimony of Clifford King to support a causal connection between claimant's injury and his disability. Dr. Howard stated in his report that prior to December 15, 1981 claimant had visited his office on two occasions. During the examination, claimant complained of pain in his right hip radiating to his right leg. At that time claimant received an anti-inflammatory medication. When claimant returned for a reexamination, Dr. Howard saw considerable improvement in the pain, tenderness, and range of motion. Claimant's present complaints of pain not only include the above mentioned symptoms, but also now include pain to his shoulder and neck. Further, Clifford King testified that prior to his injury, claimant worked right along side the rest of the men. However, King noticed claimant had slowed down a bit after the fall. The documented medical reports of Dr. Howard and the testimony of Clifford King are sufficient corroboration to establish a causal connection between the industrial injury and claimant's subsequent disability.

The nature and extent of that disability is the third issue that defendants raise on appeal.

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).

At the time of the industrial injury, claimant was earning $611.20 a week in a full time position which required physical dexterity and strength. The record indicates that claimant was able to perform such work tasks without restrictions. Following the injury, claimant became limited by pain in his ability to lift his right arm above his head or lift heavy objects. The pain is now continuous in his back and the pain is further aggravated by prolonged sitting, standing, or walking on hard concrete or other hard surfaces.

Dr. Rosenfeld determined a rating of 25 percent impairment of the body as a whole as a result of permanent partial disability to the lumbar region in the amount of 15 percent, and the to the cervical region in the amount of five percent with impairment to the right shoulder in the amount of five percent. Dr. Carlstrom determined a rating of three to four percent permanent partial impairment of the body as a whole. Dr. Howard determined a 25 percent permanent partial impairment of the body as a whole. Both Dr. Howard and Dr. Rosenfeld have reported that claimant should avoid any lifting.

Claimant has shown that he still can perform construction type work, but not of the same caliber as he did before his injury. A construction employer would have to be flexible regarding the inconsistent hours claimant would be able to work. Considering the elements of industrial disability it is found that the deputy's finding that claimant is disabled to the extent of 15 percent of the body as a whole was warranted.

The deputy's determination of the healing period must also be affirmed. The record clearly indicates that claimant was granted a leave of absence on April 30, 1982. As such, commencement of healing period was May 1, 1982. The record further shows that it wasn't until September of October 1982, that claimant returned to construction type work. Defendants' point is well taken that claimant failed to seek any medical attention after May 1982. However, the record does indicate that both Dr. Howard and Dr. Rosenfeld advised claimant that rest would be the best treatment. The deputy's finding that claimant returned to work on October 1, 1982 will be adopted.

The stipulated medical expenses are found to be related to the injury.

FINDINGS OF FACT

1. Claimant was 56 years old at the time of the hearing.

2. Claimant's previous work experience has included farming, carpentry, and work superintendent.

3. Claimant became employed by defendant employer in 1981.

4. On December 15, 1981 claimant fell while working.

5. As a result of this fall, claimant injured his back, shoulder, and neck.

6. Claimant did not seek medical treatment until February 8, 1982.

7. Claimant was granted a leave of absence from work on April 30, 1982.

8. Claimant was not rehired by defendant employer in May or

June of 1982.

9. Claimant found construction type employment on October 1, 1982.

10. Claimant reached maximum medical recuperation on September 30, 1982.

11. Claimant's disability is 15 percent of the body as a whole.

12. The medical expenses are fair and reasonable.

13. The rate of compensation is $335.99 per week.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proof in establishing a causal connection between the December 15, 1981 industrial injury and the resulting disability. Claimant is entitled to permanent partial disability benefits based upon a finding of an industrial disability of 15 percent.

The healing period terminated September 30, 1982.

WHEREFORE the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That the defendants pay unto claimant twenty-one and five-sevenths (21 5/7) weeks of healing period compensation at the rate of three hundred thirty-five and 99/100 dollars ($335.99) per week.

That defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of three hundred thirty-five and 99/100 dollars ($335.99) per week.

That the defendants pay the following medical expenses:

Dr. Howard	$ 87.00
Neuro Associates (x-rays)	100.00
Westroads Drug	76.24
Drug refill	15.00
Des Moines General Hospital (x-rays)	70.00

That interest shall accrue on this award pursuant to section 85.30, Code of Iowa, from the day payment became due.

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 28 day of September, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD TSCHIRGI, Claimant, vs. FOODS, INC., Employer, and MARYLAND CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 670214 R E V I E W - R E O P E N I N G D E C I S I O N

FILED
AUG 23 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the office of the Iowa Industrial Commissioner in Des Moines, Iowa, on December 8, 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 May 18, 1981. A memorandum of agreement calling for the payment of $298.04 in weekly compensation was filed on July 30, 1981. A final report was filed on December 8, 1983 indicating that claimant had been paid 44 weeks of temporary total disability compensation. The record consists of the testimony of the claimant, Robert Hand, Mary Foster and Robert Snyder; the deposition of William R. Boulden, M.D.; claimant's exhibit 1 through 5; and defendants' exhibit A through G.

ISSUES

The issues for resolution are:

1) Whether there is a causal connection between the injury and the disability; and

2) The nature and extent of disability.

REVIEW OF THE EVIDENCE

Claimant, age 42, testified that he has weighed between 190 pounds and 210 pounds. At the time of the injury he was married and had three children at home. He attended high school at Des Moines Technical and testified that he was an above average student in school. Following school he worked at a number of stores in the bakery. In 1963 he became employed by Dahl's, a local food chain. Claimant advanced to become a manager after a period of eight to ten years. Claimant testified that he remained in management until August 1981, when he became an hourly employee. Claimant testified that as an hourly employee he was required to be in at 5:00 a.m. Claimant testified that as manager of the West Des Moines facility he was required to order all ingredients and schedule all employees.

Claimant stated that in August 1981 he was paid $26,000 a year as a manager. His normal work day was from 4:00 a.m. to 1:00 or 2:00 p.m. Claimant testified that he worked over 48 hours per week. Claimant indicated that his family health insurance plan was completely paid by his employer. He had a pension plan and unlimited sick leave. As an hourly employee, claimant testified that he is required to pay for his own insurance and is limited to five days of sick leave a year. The accrued sick leave is not allowed to be carried forward. Although there is no difference in the pension plan claimant testified that there is no plan available for stock purchase by hourly employees. Claimant testified that the salary of a manager was from $28,000 to $29,000 at the time of hearing. Claimant stated that he had one meeting with a superior regarding his performance.

Claimant testified that on May 12, 1981 he hurt his back at work at about 4:30 a.m. Claimant had been lifting, bending and twisting and hurt his back while lifting. Claimant started having low back and left leg pain. Claimant saw Darrell D. Brown, D.O., his family physician, later in the day. He was diagnosed as having acute lumbar myofascitis with acute sciatica.

Claimant was admitted to Des Moines General Hospital on May 15, 1981. Claimant was complaining of acute lumbar pain radiating to the mid portion of the thigh and the back of the left lumbar area with some right lumbar radiation. Examination revealed a radiculopathy, acute low back syndrome, acute dysfunction of the lumbosacral area and marked pain on left straight leg raising. At the time of admission he had focal tenderness in the lumbosacral area. On May 25, 1981 claimant was taken to surgery where he had a manipulation under anesthesia using the flexion technique which did give him a marked improvement in the range of motion. Claimant's condition did not improve. Claimant was examined by Martin S. Rosenfeld, D.O., a Des Moines orthopedist. His records indicated that claimant had a herniated lumbar disc. A myelogram was planned and was conducted on May 26, 1981. The conclusion was that there was very faint evidence to suggest possible left lateral root truncation on one of the obliques, confirmed neither on lateral nor AP views. A CT of the area was

planned to rule out occult disc herniation. This study showed hypertrophy of the articular facets bilaterally at the L-3, L-4 level without obvious evidence of disc herniation. The findings were more compatible with the diagnosis of spinal stenosis localized to the L3/4 region rather than obvious disc herniation.

Claimant was examined by Michael J. Stein, D.O., a Des Moines neurologist, on May 27, 1981. Neurological examination showed that claimant favored the left leg. He was able to hop fairly well on both of his legs. Patellar and Achilles jerks were bilaterally intact. He had fairly good strength in both lower extremities. There was no focal weakness, atrophy or muscle wasting. Straight leg raising was equivocally positive on the left and negative on the right. Percussion of the spine did not reveal any focal tenderness. The claimant was able to touch his toes and bend at the knees. Pinprick and light touch were entirely normal in both lower extremities. Dr. Stein was not overly impressed with the myelographic study. Claimant received Flexeril, Dalmane and Zomax. At the time of discharge on June 3, 1981 claimant had shown marked improvement, had some clinical symptoms of pain and somatic dysfunction in the lumbar area.

Claimant testified that on August 1, 1981 he went to the Dahl's office and spoke to Bob Hand, the president, who informed claimant that he was being moved from his position as manager because he had missed too much time. The claimant was given a job which paid $9.60 an hour.

Claimant still had back pain and was admitted to the hospital on August 21, 1981. Claimant's chief complaint was weakness in the left leg with pain so bad that he could not stand on his feet. Claimant's pain was relieved by lying down. During the hospitalization claimant received a repeat EMG which was normal. There was an equivocal CT scan. Claimant was given traction, hot packs and physical therapy. Claimant was discharged from the hospital on August 31, 1981. The discharge diagnoses were acute lumbodorsal myofascitis, chronic lumbar strain syndrome, and acute secondary sciatic neuropathy.

In November 1981 claimant was told to see William R. Boulden, M.D., a Des Moines orthopedist. Dr. Boulden examined claimant and found him to be tender in the left sacroiliac joint area as well as in the left sacral notch area. He had a positive straight leg raising on the left made worse with Lasegue's maneuver. The deep tendon reflexes were equal and symmetrical in the knees and ankles. There was some great toe extensor weakness on the left side as compared to the right side. The lumbar spine films showed some L5-S1 narrowing. Dr. Boulden thought claimant had symptoms compatible with a herniated nucleus pulposis. Dr. Boulden caused claimant to be hospitalized for a lumbar venogram which occurred on November 10, 1981. On the following day Dr. Boulden wrote a letter in which he expressed his conclusion that claimant did not have disc pathology based upon the normal venogram. On November 24, 1981 Dr. Boulden wrote a letter in which he stated that he did not feel that claimant was ready to return to work.

Claimant testified that he slipped and fell on Thanksgiving 1981. Dr. Boulden had claimant admitted to the hospital in January 1982. A myelogram was taken and was interpreted as normal.

Claimant was released to return to work in March 1981. The job to which claimant returned was that of a baker. Dr. Boulden wrote a report dated March 16, 1982 indicating that claimant had not sustained any "new" permanent partial impairment from this injury.

Claimant testified that after he had returned to work for a week, he was off for five to six weeks. Claimant testified that before the 1981 injury he had two hernia operations and an abcess in the throat. He testified that all of the physical problems which he has had since the injury are referrable to claimant's back. Claimant testified that he had back problems for about ten to twelve years prior to 1979. Claimant testified that he was only off a day or so each time he strained his back. He testiifed that he went to see Dr. Brown about two to four times a year. Claimant testified that he had no leg pain when these strains occurred.

Claimant testified that in January 1979 he was hospitalized for back pain. He was off work for six to eight weeks and he returned to work as a bakery manager. The record indicates that claimant was hospitalized from January 24, 1979 through February 9, 1979. The discharge diagnoses were acute lubosacral strain, acute paravertebral myofascitis and nerve root syndrome. This last diagnosis was supported with a finding of radiation of pain into the lower left extremity.

Claimant was again admitted to the hospital in late April 1980 after claimant felt a pop in his back when he was giving his wife a cup of coffee. The claimant was hospitalized on April 29, 1980 and discharged on May 9, 1980. There was x-ray evidence of discogenic disease at the L5, S1 level. Treatment consisted of osteopathic manipulative therapy, physical therapy, hot packs, muscle relaxers and pain medication. Claimant returned to his job as a manager without apparent difficulty. Claimant stated that no one spoke of his injury upon his return.

Claimant testified that when he returned to work in May 1980 his supervisors did not speak to him regarding his back difficulties. He testified that he was able to carry on his assignments and had no problems with his back. Claimant testified that his work now requires him to be at work at 5:00 a.m. His duties commence with taking slabs of dough from a cooler. Claimant testified that he now uses his legs more than his back in lifting. He did the job slower. He uses a cart. He indicated that he doesn't sleep well even though he has a waterbed. He performs various chores around the house more slowly. Claimant stated that if he is on his feet for an extended period he experiences pain, particularly in the left hip. Claimant testified that he is slow and stiff upon awakening.

On cross-examination, claimant indicated that he had a number of jobs which were not mentioned on direct examination. Claimant testified that he drove a truck for a sandwich shop, sold insurance and other products. He also had some experience as a butcher and as a cook. He was last employed by an employer other than Dahl's in 1978. Claimant had had part-time jobs with other employers.

Claimant testified that while he was employed as a manager of the bakery, subordinate employees would do the heavy lifting. Claimant indicated that as manager he was required to stay longer and sometimes perform physical labor. He performed physical labor, but the amount done was voluntary.

Claimant testified that it was "mutually agreed" that claimant come back as an hourly employee. Claimant also indicated that there was some evidence that he may have said originally that he hurt his back lifting at home.

Robert Hand, president of Dahl's, testified that he discussed store attendance records with the store manager prior to 1981. He stated that the chain has one bakery manager who is paid by the hour. He also indicated that claimant's manager is receiving less per hour than claimant is, apparently because the manager works more hours. The witness testified that sometime in July 1981 "we" made the decision that claimant would be relieved of his position as manager and placed claimant back in a journeyman's position. Claimant was employed at the Fleur Drive store as a relief worker. The witness testified that the only difference in fringe benefits between hourly employees and salaried employees concerned full payment of family medical insurance for salaried employees. Apparently, only a portion is paid for hourly workers.

On cross-examination, the witness testified that claimant had average managerial abilities, and that this consideration along with the time lost by claimant dictated the decision to reduce claimant to an hourly employee. However, the witness readily admitted that absenteeism was the factor which caused the removal.

On redirect examination, the witness indicated that claimant's attendance at the time of hearing was satisfactory.

On recross-examination, the witness testified that an effort is made to keep overtime expense of journeymen down.

Mary Foster is a baker for Dahl's and used to be supervised by claimant. She testified that the lifting required on the job was not necessarily heavy, but more repetitive in nature. She testified that claimant stated that he had hurt his back on May 12, 1981 before work.

On cross-examination, the witness testified that claimant was customarily at work before the others and that she did not know what claimant had done to hurt his back. She indicated that quite a bit of twisting was involved in the job.

Robert Snyder has been a baker for 35 years and has been with Dahl's for 21 years. He is now senior bakery manager. The witness testified that he fills in as a substitute when another manager is absent. The witness stated that some knowledge of pricing and other items included in retail marketing are necessary. He testified that claimant has been a satisfactory employee. He stated that he observed no favoring or different lifting by claimant.

Claimant was examined by Jerome G. Bashara, M.D., a Des Moines orthopedist on March 17, 1983. Physical examination showed some mild lumbar paraspinous muscle spasms and moderate lumbar lordoses. Motion of the lumbar spine was restricted to about 80 percent of normal. There was marked tenderness at the L5-S1 interspace posteriorly. Straight leg raising was positive on the right at 50 degrees and on the left at 40 degrees. Dr. Bashara reviewed a number of the diagnostic tests taken including a CT scan which showed a herniated lumbar disc at L5-S1. He thought claimant had a permanent partial impairment of five percent of the body as a whole. He thought claimant had aggravated a preexisting condition. Dr. Bashara thought about two percent of the permanent impairment was related to work-related injuries prior to May 12, 1981. He thought the remaining three percent was related to the May 12, 1981 injury. In his deposition Dr. Bashara testified that eight percent of the impairment was related to the May 12, 1981 injury. (Dep. p. 12)

Dr. Boulden, of course, treated claimant. He also testified by way of deposition in this case. He stated that claimant had a CT scan which showed a facet tropism at the L5, S-1 facet joint junction. There was also a ventral disc at L5, S1. Dr. Boulden attached great import to this last diagnosis since the symptoms related with this type of ruptured disc included lack of bladder and bowel control. Dr. Boulden felt that as of December 1982 claimant had an impairment of the lumbar spine of ten percent. He thought the claimant aggravated a preexisting

condition which was aggravated temporarily. He thought claimant could become a surgical candidate in the future. He thought claimant could return to his duties as a baker so long as "he uses the proper back mechanics." There was some question as to whether the diagnosis of the CT scan was correct. He did not think claimant permanently aggravated his condition in the injury.

APPLICABLE LAW

1. Sections 85.3, 85.20 and 86.17 confer jurisdiction on 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 May 12, 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).

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).

4. Section 85.34(1), Code of Iowa, regulates the payment of healing period in cases of permanent disability. It 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.

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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257.

ANALYSIS

Based on the foregoing principles, it is hereby found that claimant has established his claim by a preponderance of the evidence. Although defendants raised some question as to the occurrence of the injury, it is noted that a memorandum of agreement was filed and that I do not have the power to set this agreement aside. The record indicates that claimant had preexisting problems and it is found that claimant had a preexisting condition which was aggravated by employment. Dr. Boulden agrees with this finding.

The fighting issue of this case is whether claimant sustained a permanent partial disability as a result of the injury. Dr. Boulden testified that any aggravation was temporary. The evidence given by Dr. Boulden is somewhat to the contrary. The discrepancy between the opinions of these two fine professionals concerns their area of expertise. It was quite enlightening, particularly in regard to the tremendous diagnostic advances which have been made. The Supreme Court of Iowa has, in a long line of cases, indicated that the term of disability means loss of earning capacity and not mere functional disability. Diederich v. Tri-City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935). The refinement has been made to the inclusion of an employer's refusal to give any sort of work to a claimant as an element to be considered in the assessment of permanent partial industrial disability.

The record reveals that claimant was discharged from his manager's job and returned to the classification of a journeyman. Although much was made of claimant's high rate of pay and other matters, the fact remains that journeymen work to be managers rather than the other way around. Claimant was removed from the manager's position because he was losing too much time. He was losing too much time because he was hurt on the job. This entitles claimant to be awarded permanent disability. Claimant is in his low 40's and has a high school education. He has a number of job experiences and the exercise of the claimant's supervisory skills has been lessened. Claimant is disabled to the extent of ten percent of the body as a whole.

The next item which will be discussed is claimant's entitlement to further healing period compensation. The final report which was filed on December 8, 1983 indicates that claimant was paid 44 weeks of compensation, representing the period from the time of injury until March 16, 1983. Claimant returned to work on a part-time basis until May 1982. In the interim, his pay was supplemented. Claimant should not and will not be awarded further healing period. He has been fully compensated within the meaning of the law. The parties stipulated that the rate of compensation in the event of an award was $298.04.

FINDINGS OF FACT

1. Claimant was employed by defendant Foods, Inc. on May 12, 1981.

2. Claimant hurt his back lifting flour at work on May 12, 1981.

3. Claimant had prior back problems.

4. Claimant aggravated a preexisting back problem while lifting at work.

5. Defendants filed a memorandum of agreement concerning a May 12, 1981 injury.

6. Claimant left his employment as a manager because he was missing too much time from work.

7. Claimant was missing considerble time from work because of the injury.

8. Claimant sustained permanent partial disability to the extent of ten percent of the body as a whole because of the injury of May 12, 1981.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by Foods, Inc. on May 12, 1981.

3. Claimant sustained an injury arising out of and in the course of employment on May 12, 1981.

4. Defendants will be ordered to pay unto claimant fifty (50) weeks of permanent partial disability compensation at the rate of two hundred ninety-eight and 04/100 dollars ($298.04) per week.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant fifty (50) weeks of permanent partial disability compensation at the rate of two hundred ninety-eight and 04/100 dollars ($298.04) per week.

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from the date of this decision.

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

Costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 23rd day of August, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL VANDERWEST,

Claimant,

vs.

MICHAEL K. MCNEAL d/b/a MYCO LIGHT AND SIGN SERVICE,

Employer,
Defendant.

FILE NO. 739900

A R B I T R A T I O N

FILED ON

AUG 17 1984

IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in arbitration brought by the claimant, Michael Vanderwest, against Michael K. McNeal d/b/a Myco Light and Sign Service, his employer, as the result of an industrial injury which occurred on July 26, 1983.

This default matter was heard in Des Moines, Iowa on August 13, 1984 pursuant to an order of July 17, 1984 wherein this matter was set for hearing. Defendant failed to appear.

The record in this matter consists of the oral testimony of the claimant together with his exhibits 1 and 2.

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

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

2. That on July 26, 1983 claimant was an employee of the defendant.

3. That on July 26, 1983 claimant sustained an industrial injury which arose out of and in the course of his employment activities.

4. That as a result of the industrial fall, claimant sustained a fracture to his left leg and left arm.

5. That the claimant was unable to resume acts of gainful employment until January 15, 1984.

6. That the claimant's wage was $4.50 per hour for a normal 40 hour week.

7. That claimant is single with no dependents.

8. That claimant's gross weekly wage of $180.00 entitles him to a weekly entitlement of $116.19.

9. That the claimant incurred medical expenses necessary to treat these injuries which remain unpaid as of the date below. (Claimant's exhibit 1)

10. That as a result thereof, claimant has sustained a functional impairment of 50 percent of his left leg.

11. That the claimant is in need of future medical care.

12. That claimant's benefits have been unreasonably delayed.

THEREFORE, IT IS ORDERED that the defendant pay the claimant a healing period of twenty-four and six-sevenths (24 6/7) weeks at the weekly rate of one hundred sixteen and 19/100 dollars ($116.19) together with statutory interest from the date due.

DEFENDANT IS FURTHER ORDERED to pay claimant a one hundred ten (110) week period of permanent partial disability beginning on January 16, 1984 at the weekly rate of one hundred sixteen and 19/100 dollars ($116.19) together with statutory interest from the date due.

DEFENDANT IS FURTHER ORDERED to pay to the claimant the sum of eight thousand four hundred thirty-four and 46/100 dollars ($8,434.46) in reimbursement of medical expenses incurred as reasonable and necessary to treat the injury.

DEFENDANT IS FURTHER ORDERED to pay the following medical expenses:

University Medical Center	$ 100.00
City of Des Moines	45.00
Quik Care	61.00 (paid)
Northwest Community Anesthesiologists	499.75
Orthopedic Associates, P.C.	1,870.75
	$2,576.50
Northwest Hospital	5,857.96
TOTAL MEDICALS	$8,434.46

IT IS FURTHER ORDERED that defendant pay the claimant a 50 percent penalty in the sum of three thousand one hundred ninety and no/100 ($3,190.00) in discharge of claimant's additional entitlement by virtue of section 86.13 due to unreasonable delay since the claimant has received no entitlements since the date of injury. There being no costs, none are assessed. Defendant is also ordered to file a final report when due.

Signed and filed this 17 day of August, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES L. VEACH,

Claimant,

vs.

WOLFF TRANSPORTATION CO.,

Employer,

and

HAWKEYE SECURITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 483516

A P P E A L

D E C I S I O N

FILED

AUG 15 1984

IOWA INDUSTRIAL COMMISSIONER

Defendants appeal from a review-reopening decision in which claimant's cause of action was determined not barred by the statute of limitations due to equitable estoppel and awarded an increase in industrial disability. The record on appeal consists of the transcript of the review-reopening proceedings together with claimant's exhibits 1 through 17 and 24 and defendants' exhibits 18 through 23; and the briefs and arguments of the parties on appeal.

ISSUE

The issue on appeal is limited to whether there was error in finding defendants were estopped from asserting the bar of the statute of limitations contained in section 86.26, Code of Iowa.

STATEMENT OF THE CASE

Evidence germane to the issue on appeal is: Claimant stated that he had been employed with defendant as a delivery person. He suffered an injury to his back on October 17, 1977 when he slipped and fell on his back while delivering an appliance. He was compensated for this injury and following his recovery he returned to work for defendant. Because of pain and the heavy lifting required on his job, he left his employment in July 1979.

As a result of his October 17, 1977 injury he was paid permanent partial disability benefits equal to a five percent industrial disability. He was last paid disability benefits on or about May 7, 1979.

In early 1982 he began to believe that his disability was greater than five percent and decided he should reopen the previous workers' compensation claim. On February 4, 1982 he wrote Hawkeye Security Insurance Company and requested them to reopen his case. A copy of this letter was admitted into evidence as claimant's exhibit 3. Claimant said he received a response from the insurance company by letter dated February 10, 1982. A copy of this letter was admitted as claimant's exhibit 4. He took no further action until April 30, 1982. He sent another letter to the insurance carrier. This letter was admitted as claimant's exhibit 5. Claimant wrote a letter dated May 3, 1982 to the Iowa Industrial Commissioner. The letter was admitted as claimant's exhibit 6. Claimant believed that the statute of limitations would expire on May 7, 1982.

The insurance carrier finally made contact with him when they called his home and spoke to his wife on May 5, 1982. Shortly after May 3, 1982 someone from the industrial commissioner's office called him and advised him to consult an attorney. Shortly thereafter he went to consult with an attorney. The attorney would not take his case because the law firm represented Hawkeye Security Insurance Company. He then obtained the services of Mr. Coyle. He had no further contact with the insurance carrier after May 5, 1982.

Janet Veach testified she is the claimant's wife. She stated that she was at home on May 5, 1982 when she received a call from defendants' adjuster, Tom Donahue. She indicated that Mr. Donahue told her he was calling in response to claimant's letter of April 30, 1982. She advised that Mr. Donahue requested additional information about the claim so she gave him the claim number and policy number. According to Mrs. Veach, Mr. Donahue indicated there had been a problem with the computer and that someone from the insurance carrier would be contacting claimant soon.

Charles Bramstedt testified he is a claims supervisor for Hawkeye Security Insurance Company and as such was the supervisor over claimant's file. Mr. Bramstedt stated that as a follow-up to Mr. Donahue's call to Mrs. Veach he called her on May 6, 1982. He advised her that claimant had to file with the industrial commissioner's office by May 7, 1982. He revealed that after the notice of payment dated May 7, 1979, claimant's file was sent to Des Moines and placed in storage. He stated that the first time he knew of claimant's request for additional benefits was from the letter of April 30, 1982.

Claimant introduced copies of numerous documents and letters, the relevant portions of which are set out below.

Claimant's exhibit 1, "Employer's Report of Benefits Paid" dated May 7, 1979:

10. EMPLOYEE NOTIFICATION:

Copy of this form sent to employee on 5-7-79

Iowa Law allows for reopening of any claim for additional compensation within three years of the last payment of compensation. Should you have questions regarding payments or feel additional compensation is due contact insurer named above.

If a request for additional compensation is refused a petition for review-reopening must be properly initiated with the Iowa Industrial Commissioner within three years of the last payment of compensation. The three year limitation provision does not apply to expenses for reasonable and necessary health care services for treatment of the original injury. (Also received as defendants' exhibit 22)

Claimant's exhibit 3, a letter dated February 4, 1982 from claimant to Hawkeye Security Insurance Company:

I would like to reopen this claim (copy attached), and have my back re-evaluated.

Also, I am enclosing a copy of a letter of which you were sent a copy to substantiate a claim of the summer of 1978. I never received any correspondence from you concerning this claim. Therefore, I am going to pursue this claim along with the reopening of the other claim.

If I am sent to a doctor for re-evaluation, I prefer not to be sent to Dr. R. Scott Cairns. Due to a personality conflict, I do not believe I could get a just evaluation. I do not believe his original evaluation was just.

Claimant's exhibit 4, a letter dated February 10, 1982 from Hawkeye Security Insurance Company to claimant:

We are in receipt of your letter dated February 4, 1982.

This file has been shipped to our Home Office in Des Moines. As of this date we have sent for your file and as soon as we receive the file in our office, one of our adjusters will be in contact with you.

Claimant's exhibit 5, a letter dated April 30, 1982 from claimant to Hawkeye Security Insurance Company:

Your letter of February 10, 1982, stated that one of your adjustors would contact me. However, as of this date, no adjustor has. It seems to me that you have had ample time to get my file and contact me. I would like to know just when you plan on taking care of this claim.

Claimant's exhibit 6, a letter dated May 3, 1982 from claimant to the Iowa Industrial Commissioner:

I am sending you copies of correspondence pertaining to my back claim. I don't seem to be getting any response from Hawkeye-Security Ins. Co.

I wrote them 4 February 1982 to reopen my claim but they have not contacted me. So, now I am writing them again and sending you a copy. The dealine for reopening the claim is 7 May 1992.

Would you be able to expedite this matter for me?

Claimant's exhibit 24 is a file memo from the claim file of Hawkeye Security Insurance Company. This memorializes a telephone conversation between claims adjuster Tom Donahue and claimant's wife. It is dated May 4, 1982 and states that at that time claimant's file was in the home office. It further states that the information was given to Bob Holden, a regional claim manager.

Defendants introduced exhibit 23 which is a copy of a check dated May 2, 1979 to claimant from Hawkeye Security Insurance Company. It is stamped paid at Des Moines, Iowa, May 8, 1979. The only other legible date appearing on the check is an "Ok" dated May 9, 1979. The check is payable through the Central National Bank and Trust Company, Des Moines, Iowa.

APPLICABLE LAW

Section 85.26(2) and (3), The Code, 1977, as amended provides:

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

Notwithstanding the terms of chapter 17A, the filing with the industrial commissioner of the original notice or petition for an original proceeding or an original notice or petition to reopen an award or agreement of settlement provided by section 86.13, for benefits under the workers' compensation or occupational disease law shall be the only act constituting "commencement" for purposes of this statutory section.

The date of payment within section 85.26(2), The Code, is the date on which a claimant receives the instrument of payment for workers' compensation benefits. Hulen v. S. S. of Iowa, Ltd., 34th Biennial Report of the Industrial Commissioner, 144 (1979).

"Estoppel" in its broadest sense is a penalty paid by one perpetrating wrong by known fraud or by affirmative act which, though without fraudulent intent, may result in legal fraud on another. Black's Law Dictionary, 4th Ed., 1968, p. 649.

A claimant may also plead equitable estoppel in a workers' compensation case. In order to prevail on the theory of equitable estoppel, the claimant must establish four essential elements: (1) false representation or concealment of material facts; (2) lack of knowledge of the true facts on the part of the person to whom the representation or concealment is made; (3) intent of the party making the representation that the party to whom it is made shall rely thereon; (4) reliance on such fraudulent statement or concealment by the party to whom made resulting in his prejudice. Paveglio v. Firestone Tire & Rubber Co., 167 N.W.2d 636, 638 (Iowa 1969). See Secrest v. Galloway, 239 Iowa 168 (1948) and Mousel v. Bituminous Material and Supply Co., 169 N.W.2d 763, 768 (Iowa 1969).

In Dierking v. Bellas Hess Superstore, 258 N.W.2d 312, 315, 316 (Iowa 1977), the Iowa Supreme Court adopted the following statement concerning the term "false representation":

"* * *In its generic sense, a false representation is anything short of a warranty which produces upon the mind a false impression conducive to action. 37 C.F.S. Fraud §8. Ordinarily however, the representation must be definite, and mere vague, general, or indefinite statements are insufficient, because they should, as a general rule, put the hearer upon inquiry, and there is no right to rely upon such statements."

Further, a person cannot claim concealment if he has knowledge. Gruener v. City of Cedar Falls, 189 N.W.2d 577, 581 (Iowa 1971).

A party alleging equitable estoppel must be excusably ignorant of the true facts. S & M Finance Company of Fort Dodge v. Iowa State Tax Commission, 162 N.W.2d 505, 510 (Iowa 1968). (emphasis added) Thus, the party alleging this theory must establish either his lack of knowledge or means of knowledge of the real facts. Dierking, 258 N.W.2d 312, 316.

The third element of equitable estoppel is that the party against whom it is urged knowingly took a position with the intention that it be acted upon, and relied thereon by the party urging the estoppel to his prejudice. Dierking, 258 N.W.2d 312, 316; Ames Trust and Savings Bank v. Reichardt, 254 Iowa 1272, 1280, 121 N.W.2d 200, 204; Holden v. Construction Machinery Company, 202 N.W.2d at 335-336. One is presumed to intend the natural consequences of his own acts. Terry & Rosenberg v. American Insurance Co., 202 Iowa 1291, 211 N.W. 716.

Finally, equitable estoppel requires a showing of prejudicial reliance by the party asserting the theory. This requires that the party prove either a substantial benefit to the party against whom it is asserted or a substantial detriment to himself as a result of having been misled or induced to act or fail to act. State v. Raymond, 254 Iowa 828, 836, 119 N.W.2d 135 (Iowa 1963). Reliance, however, must be reasonable. Dierking, 258 N.W.2d 312, 317.

A party asserting estoppel has the burden to establish all essential elements thereof by clear, convincing and satisfactory proof. Nothing else will suffice. Holden, 202 N.W.2d 335, 355; Holsteen v. Thompson, 169 N.W.2d 554, 558-559 (Iowa 1969); Janssen v. North Iowa Conf. Pen., Inc. of Methodist Church, 166 N.W.2d 901, 906-907 (Iowa 1969).

An application for arbitration is not a formal pleading and is not to be judged by the technical rules of pleading. Nor is the same conformity of proof to allegation necessary as in ordinary actions. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 373-374, 112 N.W.2d 299, 301-302; Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 1177, 38 N.W.2d 161, 163. The same is true of an application for review-reopening. Cougean v. Quinn Wire & Iron Works, 164 N.W.2d 848 (Iowa 1969).

ANALYSIS

It is not possible on this record to say precisely when the statute of limitations on claimant's cause of action expired. In any event, the statute would not have extended his cause of action beyond May 7, 1982.

Claimant's contention is that defendants should be equitably estopped from asserting the statute of limitations. His burden is indeed heavy. He must prevail, if at all, by clear, convincing and satisfactory proof.

Claimant alleges that paragraph 10 implies that as a prerequisite to filing a petition with the Iowa Industrial Commissioner an employee must first contact the insurer and be refused additional compensation.

The insurer's letter of February 10, 1982 not only contained a promise that an adjuster would be in contact with claimant, it contained a representation, to wit: "[a]s of this date we have sent for your file..." The record discloses that claimant's file was not requested from the home office until May 4, 1982.

While it is evident that the defendants made a misrepresentation of fact, the question remain whether or not it was a material fact. Certainly, if the insurer had not told claimant that he would be contacted by an adjuster after the file had been received, it would not be so. Here, however, receipt of the file was a condition precedent upon which the adjuster would contact claimant. In addition, it is clear that the insurer decided to deny claimant additional benefits within two days of when they actually sent for the file. It is reasonable to assume therefore that had the file been sent for on February 10, 1982, as was represented, a denial would have been made long before May 6, 1982. Clearly receipt of the file was material to the insurer since they would not contact claimant until it had been received and thus material to the claimant as well.

The misrepresentation is material because it re-enforces the alleged ambiguity contained in paragraph 10 of the Form 5 in favor of the implication that Iowa law required a refusal by the insurer before filing a petition. While claimant may not rely solely on any ambiguities or vagueness of that form, when the insurer acts in such a way as to indicate that they were fulfilling their duty under the law by sending an adjuster to review the claim, his reliance becomes more reasonable and more justified. Claimant has established by clear and convincing evidence that the defendants made a misrepresentation of material fact to him.

Claimant must next establish that he lacked knowledge or the means to obtain knowledge of the real facts. Obviously, claimant lacked the knowledge of whether or not the insurer did send for his file in Des Moines. It is equally obvious that he lacked the means to find out since the insurer was the only entity which had his records. Knowledge of the true facts in this case was wholly within the province of the insurance company. While it is true that claimant was told of the error after he wrote his letter of April 30, 1982, it is also true that by that time his rights were already in serious jeopardy and he was not informed of the error until May 4, 1982. Claimant need not establish both lack of knowledge and means of knowledge, but either of the two. The evidence is clear that he had no knowledge that the insurer had not sent for his file.

The third essential element claimant must establish is that the defendants knowingly took a position with the intent that it be acted upon and relied upon by the claimant to his prejudice. A false statement, even if the maker of the statement believes it to be true, which is intended to be relied upon by the hearer of the statement would meet the requirements of equitable estoppel. In fraud it must be shown that the maker of the statement knew or had reason to know the statement was false.

The evidence does establish that Hawkeye Security Insurance Company intended for claimant to rely upon the letter of February 10, 1982 and to believe that they had undertaken steps to review his case. Intent that he should rely upon the letter, however, is not enough. There must be a specific intent that he should rely upon it to his prejudice.

Nothing in the letter itself suggests that it was the insurer's intention that claimant should rely upon it to allow the statute of limitations to run. At the time the letter was sent there was almost three months left before the statute of limitations expired. The letter makes no promise that additional benefits would be paid and does not suggest that he should not proceed with his legal remedies until he heard from them. All of the representations to claimant must be considered though in order that justice be done. Clearly, claimant was led to believe that the purpose of an adjuster contacting him would be to pay or deny additional benefits, which would be consistent with the statements in paragraph 10, Form 5 that a petition should be filed after a request had been denied. This is a fair and logical inference of the words and acts of Hawkeye Security Insurance Company.

Intent is seldom if ever capable of direct proof. It is presumed, however, that one intends the natural consequences of his own acts. Claimant was told that if he wanted additional benefits to contact the insurer and if his request was denied to file a petition with the industrial commissioner. Claimant was told by the insurer, in response to his request for additional benefits, that his file had been sent for and he would be contacted. The insurer did not send for his file and did not contact him until it was virtually impossible for him to meet the limitations time period. The natural consequence of these acts is prejudice to the claimant.

Much of the foregoing discussion is also applicable to the discussion of reliance. Reliance must always be reasonable and claimant must show care and diligence in protecting his rights as well as prejudice. Certainly the claimant has shown prejudice. The statute of limitations has expired and he can no longer maintain his cause of action. The reasonableness of his reliance and the degree of care and diligence which he exercised to protect his rights are the essential questions.

Claimant's letter of February 4, 1982 to the insurance carrier demonstrates that he first sought to assert his rights well before the statute of limitations expired. There is no evidence in the record that the insurance carrier had failed to fulfill its promises to claimant in the past. Claimant was therefore justified in believing that the insurance carrier had done and would do what they definitely and unambiguously said in their response to him of February 10, 1982. In addition, claimant sought to follow up on the promise in his letter of April 30, 1982 which was also before the statute of limitations expired. Finally, he sought assistance from the industrial commissioner's office. Claimant's letter dated May 3, 1982 to the industrial commissioner could infer two things. One, that claimant knew his right to maintain a claim expired on May 7, 1982. If this were the case, he did not rely on any representations of the insurer. It can also be inferred, however, that claimant was merely asking that the insurer respond to his request within the "deadline for reopening the claim..." so he could maintain a claim. The better inference, based on the record as a whole, is the second. If this be the case, claimant was relying upon the letter of February 10, 1982 and the notice contained in paragraph 10, Form 5.

In light of the exhibits and testimony in this record, it is fair to say that claimant's actions were reasonable. Claimant is not a person trained in the law. He had not found it necessary to utilize an attorney during the original action. Both the words and conduct of the insurance carrier were consistent with the representations made by them. The fact that he could have done other things or taken other action than he did, does not detract from the fact that what he did was reasonable under the circumstances. Claimant must be judged as a reasonably prudent man acting in the graver and more serious affairs of life, he is not burdened with having to exercise every conceivable option available to him.

Claimant has established by clear and convincing evidence each of the elements of equitable estoppel. Defendants should not be allowed to defeat his claim on the basis of the statute of limitations.

As for claimant not specifically pleading estoppel, paragraph 9 and the attachments of claimant's application for review-reopening makes it sufficiently clear that claimant intended to defeat defendants' defense of the statute of limitations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, based upon the evidence presented the following findings of fact are made:

1. On October 17, 1977 claimant slipped and fell while delivering an appliance for his employer.

2. As a result of claimant's fall, he injured his back.

3. As a result of the back injury, claimant suffered a five percent (5%) functional impairment of his body as a whole.

4. As a result of his injury, claimant was off work from October 17, 1977 until November 20, 1977.

5. Claimant was paid compensation from October 18, 1977 until November 20, 1977.

6. Claimant was paid compensation for permanent disability based upon a five percent (5%) disability of the whole man.

7. The last date of payment of compensation to claimant was between May 2, 1979 and May 8, 1979.

8. Claimant filed his petition for review-reopening on June 4, 1982.

9. It is more than three years from May 8, 1979 to June 4, 1982.

10. On May 7, 1979 defendants sent claimant a notice which contains a vague and ambiguous statement of Iowa law.

11. On February 10, 1982 defendants sent a letter to claimant containing a false statement that his file had been requested and that an adjuster would be contacting him. Said statement was material.

12. Claimant did not know his file had not been requested.

13. It was the intent of the insurance carrier that claimant rely upon the statement to his prejudice.

14. Claimant reasonably relied upon the statement which

resulted in his prejudice.

15. Claimant is fifty (50) years old.

16. As a result of his injury, claimant has suffered a loss of earning capacity.

17. Claimant is well motivated to work.

18. As a result of his injury, claimant has suffered a disability for industrial purposes of fifteen percent (15%).

19. Claimant was not authorized to incur medical expenses with Dr. Besler.

20. Claimant's rate of compensation is one hundred fourteen and 52/100 dollars ($114.52) per week.

WHEREFORE, based upon the above findings of fact and principles of law it is concluded:

On October 17, 1977 claimant suffered an injury arising out of and in the course of his employment.

Claimant's disability is causally connected to his injury.

Claimant's claim was filed after the expiration of the statute of limitations.

Claimant has established by clear and convincing evidence that defendants should be estopped from asserting the statute of limitations.

Claimant has failed to prove he was authorized to obtain medical treatment from Dr. Besler.

WHEREFORE, the review-reopening decision is affirmed.

ORDER

THEREFORE, defendants are ordered to pay unto claimant seventy-five (75) weeks of compensation for permanent partial disablity at the rate of one hundred fourteen and 52/100 dollars ($114.52) per week to be paid in a lump sum together with statutory interest.

Defendants are to be given credit for twenty-five (25) weeks of compensation previously paid.

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

A final report of payments is to be filed upon completion of this award.

Signed and filed this 15 day of August, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS G. VORE, Claimant, vs. FARBER BAG & SUPPLY CO., Employer, and UNITED FIRE & CASUALTY COMPANY, Insurance Carrier, Defendants.	FILE NO. 673959 R E V I E W - R E O P E N I N G FILED JUL 24 1984 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Dennis G. Vore, claimant, against Farber Bag & Supply Co., employer, and United Fire & Casualty Company, insurance carrier. Claimant alleges that he sustained a back injury on June 12, 1981.

The hearing commenced May 24, 1984 at the Iowa County Courthouse in Marengo, Iowa with the claimant appearing in person with his attorney, James A. Jackson, and with the defendants appearing through their attorney, Lewis Pfeiler. The case was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of claimant, his spouse, Cheryl Vore, and claimant's exhibits 1 and 2.

ISSUES

The issues presented by the parties at the time of hearing are a determination of the nature and extent of any disability which is related to the injury which claimant sustained and a determination of the benefits to which claimant is entitled. It was stipulated that the correct rate of compensation is $185.87 per week, that claimant reached maximum improvement from the injury on October 13, 1982 and that the charges for medical services rendered were fair and reasonable. Claimant presented two medical bills, the first being $100.00 to St. Anthony Hospital of which $50.00 had been paid by claimant and the balance was unpaid. The second was in the amount of $24.38 for medication. Defendants' counsel agreed to have the same paid and consented to the order entered in this matter directing payment thereof. A memorandum of agreement was filed February 11, 1983.

REVIEW OF THE EVIDENCE

Claimant testified that he was born December 20, 1953, is married and has a nine month old child. He resides at Belvedere, Illinois. Claimant graduated from high school in 1972 in the top 25 percent of his class. After high school he joined the marines for six months but was discharged due to his inability to adjust to military life which claimant stated was actually an inability to perform pull-ups.

Upon his return from the service claimant worked for approximately a year at St. Joseph Hospital performing maintenance and sterilizing rooms. He attended one semester in the life science program at Rock Valley Jr. College in Rockford, Illinois. He has worked for approximately six months at a plastic bag factory where he supervised three workers and the operation of machines. He worked five years as a carpet installer and finally commenced work with Farber Bag in 1979. Claimant's duties while working at Farber Bag were predominately truck driving in a five state area which included loading and unloading bales of burlap bags which weighed as much as 450 pounds. He stated that his average work week was approximately 60 hours spread over five and one-half days for which he was paid a salary of $300.00 weekly.

Claimant denied having any numbness in his legs prior to the injury of June 12, 1981. He stated that he bruised his upper back sledding several years earlier, had played football in high school where he suffered an injury to his arm and that he was able to serve in the marines without problems except for the inability to perform pull-ups.

Claimant stated that on June 12, 1981 he was working with a co-worker lifting a 450 pound bale of bags onto the truck when he felt a pull in his back. He reported the injury to David Farber, vice president of the employer corporation which was owned by Frank Farber. Claimant related that the bale was approximately waist high when he felt a pulling and stabbing pain which was a sensation he had not previously experienced. He stated that he knew something was wrong but did not know what. David Farber directed him to take it easy for the rest of the day and he did so. After returning home he stated that he got stiffer and sorer as the night progressed and that by the following morning he could get out of bed only by rolling himself out. He stated that he phoned David Farber and sought treatment with Daniel J. Guler, D.C., in Cuba City, Wisconsin. X-rays were taken and two weeks of massage and bed rest was prescribed. Claimant stated that he began to feel better and that he went back to work on July 1 or 2, a Thursday and that he

took Friday off at Frank Farber's direction. Claimant stated that he returned to work the following Monday and by 11:00 a.m. he was bent over and could not stand. Frank Farber transported claimant to R. Scott Cairns, M.D., who placed claimant in the hospital for 10 days during which time he received conservative treatment, which hospitalization was followed by a month of bed rest at home. Claimant stated that a myelogram was performed on August 31, 1981 and that surgery had been recommended by Dr. Cairns. Claimant sought a second opinion from Forrest H. Riordan, III, M.D., who confirmed the recommendation for surgery. Claimant testified that surgery was scheduled but that he then cancelled it due to the uncertainty of the insurance company paying the cost. It also appears from claimant's testimony and from the office notes of Dr. Cairns, particularly the entries dated September 22, 1981 through September 24, 1981, that the physician patient relationship between claimant and Dr. Cairns had deteriorated to the point that Dr. Cairns recommended that claimant seek treatment elsewhere. Claimant had also been seen by W. J. Robb, M.D., who also confirmed the adviseability of surgical treatment. Claimant stated that Dr. Cairns released him to return to work without restrictions in late September, 1981.

With the employer's consent claimant then began receiving his treatment from Dr. Riordan and on April 28, 1982 a lumbar laminectomy was performed. Claimant denied experiencing any trauma or injury to his lower back during the intervening time between June 12, 1981 and the date he underwent surgery. Claimant stated that he recuperated for approximately six months following surgery and was given a light duty release. He stated that he contacted the employer and was advised that they had no work which would fit within the limitations which had been medically imposed.

Claimant described his pre-injury health as excellent. After the injury he stated that he could not sit or stand very long and that he experienced pain in his back, down his legs and that they sometimes alternated between the right and left legs. He stated that surgery provided incomplete relief. It has eliminated all major spasms and the sharp pains which he previously experienced in his legs and back. He stated that his back is not now as strong as it was, that he has occasional episodes of sporadic pain which he estimated to occur approximately three days per month. He stated that his activities are now limited in that he no longer runs, bowls, camps, or performs a number of other recreational activities in which he had engaged prior to the injury.

Since suffering the injury claimant stated that he has received unemployment for approximately six months and that the family has been receiving aid to dependent children benefits since September, 1983. He stated that he is dissatisfied with being unemployed and would like to get back to work as he desires more income.

Claimant stated that he has sought rehabilitative services and would like to engage in some form of computer science. He estimates the expenses of training for such a program would be approximately $23,040.00 when tuition and fees and all living expenses are considered for the length of the course which he desires to undertake. Claimant stated that the lifting and bouncing of driving a truck would prohibit him from engaging in that type of employment and that the carrying of rolls of carpet and stretching carpet would prohibit him from engaging in laying carpet as an occupation. He stated that he has performed a great deal of job seeking both in person and by telephone. He stated that most of the jobs he had sought, as listed on exhibit 2, were in stores and places where he could work without further injuring his back. He stated that jobs were not available and that his back had not generally been discussed with any of the potential employers.

Claimant stated that at the present time he would be unable to engage in any form of employment which required climbing stairs for an extended time, standing in a stationary position, walking on irregular surfaces or being exposed to cold weather.

Claimant stated that on June 12, 1981 he weighed approximately 225 pounds. He confirmed that his doctors have recommended that he lose weight and that Dr. Riordan recommended that he should weigh approximately 215 pounds. He stated that he presently weighs 255 pounds and has lost seven pounds on a recent diet. He testified that he presently does perform exercises and walks approximately two or three miles per day.

Claimant also related that in the past he had operated a drill press and worked as a metal pourer which positions he described as requiring little lifting. He stated that he has the ability to tune-up a car, rebuild carburetors, change brakes and install universal joints. He related that when working at Farber Bag he also performed limited inventory control work. He stated that he has taught himself typing and can type approximately 10 words per minute. He stated that he felt he could also work as a salesman, store clerk, office worker, bank teller or receiving clerk.

Claimant admitted experiencing some backaches while working at Farber Bag prior to June 12, 1981, but stated that they were not the same as what he experienced on June 12, 1981. He denied telling his employer that his backaches were the result of a siedding accident.

Claimant stated that he did not try to work when he was given a full release by Dr. Cairns as he knew he was not well and feared further injury even though no doctor had advised him that working would further injure his back.

Claimant related being evaluated at Glenwood Park Evaluation and Treatment Center and stated that he felt that a fairly good report had been issued as a result of it.

Claimant admitted that when he initially applied for unemployment he advised them that the minimum salary he was willing to accept was $300.00 per week. He also stated that an employer could not legally deny him a job due to his physical condition as such would be discriminatory.

Cheryl Vore testified that she had also previously worked for Farber Bag and had been laid off in mid-March, 1982 even though a recently hired employee, doing the same work as she was performing, was not laid off at that time. She confirmed claimant's complaints of discomfort and related that he has difficulty getting up after playing with the baby on the floor at their home. She stated that the claimant is not a complainer.

Claimant's exhibit 1 consists of a number of medical reports. The reports of Drs. Cairns, Robb and Riordan consistently diagnosed a herniated disc. The only reports in the record following claimant's surgery are from Dr. Riordan. In his report dated August 17, 1983 Dr. Riordan states that claimant's injury has eliminated him from most types of driving work. In his report dated July 14, 1983 he assesses a five percent functional disability to claimant.

The psychological report dated September 19, 1983 from Glenwood Park Evaluation and Treatment Center concludes that claimant possesses above average intelligence and has the ability to perform college level academic work. It related that claimant is strong willed, confident and competent and relatively well adjusted except for some transitional stress due to his lack of employment.

APPLICABLE LAW AND ANALYSIS

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). It does not establish the nature or extent of disability. It does not establish a causal connection between the injury and disability. Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (Iowa 1975).

Claimant must prove by a preponderance of the evidence that a causal connection exists between the injury of June 12, 1981 and the disability of which he now complains. 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. However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867, 870 (1965), and 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). The surgeon's report from Dr. Cairns which appears in exhibit 1 bearing the date of "3-25-8 [sic]", at lines five and six indicate that the injury arose from lifting bales of burlap. There is no medical opinion expressed in the evidence of this case which specially addresses the issue of the cause for claimant's herniated disc and the resulting disability. The events of June 12, 1981, as described by claimant at hearing and as related in the various medical reports, are the type of thing commonly seen as a cause for a herniated disc. The only evidence in the record regarding the same is that immediately prior to the incident claimant was free from pain and that following the incident the onset of symptoms was immediate and severe. It would be very unusal for claimant to have been able to perform all of his work activities prior to June 12, 1981 if the condition had existed at that time. The existence of the herniated disc is well documented medically and surgical correction appears to have been reasonably successful. Under the facts of this case a causal connection is found to exist between the injury of June 12, 1981 and the disability of which claimant now complains.

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. * * * *

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).

Claimant's functional impairment does restrict him from engaging in many types of employment. Fortunately for claimant he is but 30 years of age and of above average intelligence. He appears to have the capacity to move into a sedentary position. His present education extends to only one semester beyond high school, but he is motivated to seek further education and has made the initial efforts necessary to begin the educational process.

Claimant has not followed the medical directives to lose weight, however, the weight problem only arose subsequent to the injury. Claimant's discomfort could possibly be reduced by loss of weight. His failure to follow the medical directives is not so blatant, however, as to have had a major effect upon the success of the medical care for his injury. A functional impairment of five percent as assessed by Dr. Riordan is actually a good result for a laminectomy patient. There is no particular indication in the record of this case which indicates that claimant's failure to lose weight had a significant effect upon his recovery. By stipulation of the parties claimant reached the point of maximum significant medical improvement from the injury on October 13, 1982. Such is consistent with the report of Dr. Riordan bearing that same date as contained in exhibit 1. Since that time claimant had, up to the time of hearing, remained off work for more than 18 months, an unusually inordinate amount of time even in light of the state of the economy. The file reflects that during a part of the time he received weekly compensation benefits. Thereafter he received unemployment benefits and he now receives aid to dependent children benefits. During that same period of time claimant and his spouse have had a child and have spent a great deal of time together with neither of them being employed outside the home. Claimant has sought employment at a number of places, all without success. The employer had no position in which it could place him due to the physical restrictions imposed by Dr. Riordan. It is clear that claimant has sustained a permanent partial disability of the body as a whole and, when measured in industrial terms, the same is found and concluded to be 25 percent.

Under the provisions of section 85.27 of the Code of Iowa a claimant is entitled to reimbursement of only those medical expenses which he has paid from his own funds. Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890, 894 (Iowa App. 1983). At commencement of the hearing the only medical expenses in issue were a bill in the amount of $100.00 from St. Anthony Hospital and charges in the amount of $24.38 for medication from some undisclosed source or sources. It was related that claimant had paid $50.00 of the bill at St. Anthony Hospital. It was not disclosed with certainty as to whether or not the bill for medication had been paid. Defendants will be ordered to pay the unpaid balance of $124.38 by reimbursing claimant for the portion thereof which he has personally paid and by paying the balance to the provider of the service.

FINDINGS OF FACT

1. Claimant was injured on June 12, 1981 at Dubuque, Iowa while loading a bundle of bags onto a truck.

2. At the time of injury claimant was employed by defendant employer working as a truck driver.

3. Following the injury claimant was medically incapable of performing work in employment substantially similar to that which he performed at the time of the injury, and he reached the point of maximum significant medical improvement on October 13, 1982.

4. The injury caused a permanent functional impairment of five percent of claimant's body as a whole.

5. Claimant is 30 years of age, married and has a nine month old child.

6. Prior to the injury claimant was earning $300.00 per week in return for approximately 60 hours of work per week, resulting in an average hourly wage of approximately $5.00 per hour. Claimant's rate of compensation is $185.87 per week.

7. Claimant is a high school graduate and has attended one semester of college. He desires to enroll in a course which will qualify him for a career in the computer industry.

8. Claimant's work experience includes truck driving and carpet installation which he probably could not readily perform due to his injury. Claimant is also experienced as a drill press operator, metal pourer and has some supervisory experience, all of which would not be limited by his present physical condition. He has the ability to successfully complete college level courses.

9. Claimant seems presently motivated to return to employment. His motivation is, however, of somewhat recent origin due to the low income provided by the aid to dependent children program. His motivation is also directed at obtaining a good paying job, and he is not willing to engage in employment which provides a lower rate of compensation than what he enjoyed while working for the defendants.

10. The medical expenses of $100.00 incurred at St. Anthony Hospital and $24.38 for medication were incurred for care of the injury claimant sustained and the amount charged for that care is fair and reasonable.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and of its parties.

The injury claimant sustained to his back on June 12, 1981 arose out of and in the course of his employment with Farber Bag & Supply Co.

As a result of that injury, claimant sustained a permanent partial disability of 25 percent of the body as a whole which entitles him to 125 weeks of compensation at the rate of $185.87 per week.

The medical expenses in the amount of $124.38 as related at hearing are the responsibility of the defendants under the provisions of section 85.27 of the Code of Iowa.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the rate of one hundred eighty-five and 87/100 dollars ($185.87) per week commencing October 13, 1982. Defendants shall pay all installments thereof which are now due and owing in a lump sum. Defendants shall receive credit for any overpayment of healing period benefits.

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 one hundred twenty-four and 38/100 dollars ($124.38) representing claimant's medical expenses with St. Anthony Hospital and for medication by paying to claimant the amount thereof which he has previously paid and by paying the balance to the provider of the care and services.

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 24th day of July, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS E. WALSH,	:	
Claimant,	:	File No. 671515
vs.	:	
KAY DEE FEED COMPANY,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
MARYLAND CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

FILED
JUL 31 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Dennis Walsh, claimant, against Kay Dee Feed Company, employer, and Maryland Casualty Company, insurance carrier, defendants to recover benefits under the Iowa Workers' Compensation Act for an injury allegedly arising out of and in the course of his employment on May 28, 1981. It came on for hearing on February 2, 1984 at the Woodbury County Courthouse in Sioux City, Iowa. It was considered fully submitted with the filing of the stipulation as to rate on February 10, 1981.

The industrial commissioner's file shows a first report of injury received on June 3, 1981. A denial of compensability was received on August 10, 1981.

The parties have stipulated to the fairness of medical expenses and to a rate of $199.98.

The record in this matter consists of the testimony of claimant; Daniel Vernon Weakley; Richard Edward Preuhs and Clarence D. Pippett; claimant's exhibit A, medical records from Gary R. Carlton, M.D.; claimant's exhibit B, a letter from James H. Walston, M.D., dated December 8, 1981; claimant's exhibit C, a letter from John J. Dougherty, M.D., dated May 14, 1982; claimant's exhibit D, a bill from Marian Helath Center; claimant's exhibit E, a bill from Eckman Neurological Associates, P.C.; claimant's exhibit F, a statement from Siouxland Surgical Associates; claimant's exhibit G, a statement from Orthopaedic Associates of Sioux City, P.C.; claimant's exhibit H, a statement from Thomas L. Tiedeman, D.D.S.; claimant's exhibit K, prescription bills; claimant's exhibit L, a statement from Area Ambulance Service; claimant's exhibit M, a payroll stub for the period ending May 29, 1981; defendants' exhibit 1, a report from claimant's admission on May 28, 1981; defendants' exhibit 2, a series of reports from Dr. Carlton; defendants' exhibit 3, a letter from Dr. Dougherty dated May 14, 1982; defendants' exhibit 4, medical records regarding claimant's hospitalization of May 28, 1981; defendants' exhibit 6, the deposition of Mitchell Watters; defendants' exhibit 7, the deposition of Pruehs; defendants' exhibit 8, the deposition of claimant; defendants' exhibit 9, records from the Monona County District Court; and defendants' exhibit 10, additional records from the Monona County District Court. Defendants' objections to claimant's exhibit I and J are sustained. Claimant's objections to defendants' exhibit 4, 7 and 8 are overruled. Claimant's objection to defendants' exhibit 5 is sustained.

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 may suffer; whether or not claimant is entitled to temporary total disability; and whether or not claimant is entitled to benefits under Iowa Code section 85.27. Defendants have raised a defense pursuant to Iowa Code section 85.16(2).

STATEMENT OF THE CASE

Claimant's testimony was offered live at hearing and also through his deposition.

Twenty-eight year old married claimant, father of four daughters and a high school graduate with additional training in sales, testified that he started work for defendant employer in 1976 in the warehouse. In 1978 he was promoted to sales.

Claimant denied any prior injuries to his back or neck, but he had a previous on-the-job injury when his hand was cut by a power saw. He admitted to having been arrested for and pleading guilty to an OMVUI charge some time before the accident for which he makes claim.

Claimant described his work at the time of the accident as going out and servicing customers and finding new prospects for dealers in his particular assigned area. He claimed his hours varied; and although he was usually home with his family in the evening, he was sometimes out overnight. His last call would be between four and five o'clock because many businesses close about that time. He said that "in situations" it was his practice to take out prospects and wine and dine them. He believed he averaged taking four or five clients out in a month's time. He recorded amounts he spent so that he would be reimbursed. Meals and drinks for customers were included with his meals rather than as entertainment. He reviewed expense records and thought lunches on April 29, 1981; on May 4, 1981 and on May 18, 1981 were probably for someone in addition to himself. Claimant was questioned:

> Q. Would you say it was unusual for you personally to take a customer to lunch or dinner?
>
> A. No.
>
> Q. Did you do that on a number of occasions?
>
> A. Yes.
>
> Q. Was your employer aware that you were taking customers to lunch?
>
> A. Yes.
>
> Q. Did you ever have any discussion with your employer about that fact?
>
> A. Just a meeting, you know, all of us together. (Walsh dep., p. 55 ll. 16-25; p. 56 l. 1)

Later he was asked:

> Q. Did you ever have any discussion with anybody in the company about the fact that you occasionally took customers out for meals?
>
> A. I don't know.
>
> Q. It was common knowledge that that was part of your job?
>
> A. Yeah.
>
> Q. Did anybody from the company ever tell you not to take customers out and pay for their meals?
>
> A. No. (Walsh dep., p. 56 ll. 17-25)

Claimant was paid a weekly draw of $250 as well as commission.

Claimant recalled the events of May 29, 1981 thusly: It was a short work week because of the holiday and a sales meeting. He was working faster and putting in longer hours to cover the territory he normally covered in one week in three days. He left home at roughly 7:00 a.m. He was driving a company van in good working order which was kept by him at his house and which he said he was free to use unless he was going on a long trip. He kept the vehicle in the evening and on weekends. The company paid for gas unless the van was used for personal purposes. He went to the office although he was not required to do so to see if there were phone messages and to see if there were orders to be noted and taken with him. He indicated to his spouse when he left he would be late. He stopped in Carroll at around three o'clock for lunch and to call on customers. He made his last stop between six and seven o'clock at the farm of Virgil Rank which was located between Denison and Schleswig. Rank had been his personal friend for three or four years, but he did not stop at his house on this occasion for personal reasons. He initially met Rank through his work for defendant employer. He had seen Rank's influence on his son, John, and it was John who was the target customer and who would write the checks. Although the father and son live close together, he went to the father's house because it was on the highway. Rank himself had been out of the livestock business for about a year. Rank had not bought anything from him prior to this time. Claimant had, however, worked with a dealer to sell products to Rank's son. In addition to seeing Rank about defendant employer's product, he also purchased propane tanks for his personal use which he took home with him. He had a can of beer with Rank and then he suggested they go to Denison where he had probably two more beers which he paid for. He drove Rank home and left the Rank farm between 8:15 and 8:30 p.m. He was in a hurry and exceeded the speed limit. He traveled a good dry paved road that was familiar to him as he drove into the sun which made it difficult for him to see where he was going. He was tired and fell asleep. He went off the road. He had burns, cuts and bruises and underwent removal of the spleen.

Claimant admitted that as a result of the accident he received a ticket for speeding; but he denied getting an OMVUI citation, and he did not remember one for failure to have his vehicle under control. He agreed that alcohol can make one drowsy and that he could not operate a motor vehicle while intoxicated. He paid a fine for speeding.

Claimant recalled seeing Dr. Dougherty after his release from the hospital because he was having neck pain. He found he could not turn his head. He asked Dr. Dougherty for a second opinion, but he did not remember what doctor he saw. He also checked with his family physician. Claimant did not believe that he has any permanent impairment resulting from his injury.

He did not feel he was capable of going back to work in August of 1981 and he did not suggest an alternative date. He

reported that he got a letter from defendant employer in July terminating his employment. He started his own feed business with his spouse beginning on December 8, 1981.

Claimant denied ever having been disciplined or penalized for any misconduct at work. Neither had he been suspended. He stated that he received five or six work-related speeding tickets each year. He said that the business expenses he submitted always were approved by Pruehs.

Claimant described his present condition as good. He is troubled only by a tooth which becomes infected from time to time. He attributed this difficulty to a torn lip which occurred in the accident.

Claimant disagreed that it was contrary to company policy to approach producers and asserted that it could be done whenever a salesperson so desired.

Claimant admitted it was possible he stopped in Schleswig probably to go to the bathroom, but he did not recall doing so. He did not notice anyone following him and he felt he had control of his vehicle. He had no recollection of crossing the center line, going off the shoulder or running anyone off the road. He acknowledged that he might have been speeding.

Claimant testified that he does not know his limit when it comes to alcohol. He characterized himself as an average drinker at the time of the accident and he said that he could not handle a motor vehicle if he had nine or ten beers today.

The testimony of Richard H. Pruehs was offered live at the hearing and also through his deposition.

Forty-four year old Pruehs, manager of the veterinary division of defendant employer who sets policy for both office management and personnel, testified that company salespersons sell animal health products to veterinary clinics, dealers and on rare occasions to farmers of substantial size. Regarding the manner which customers are obtained he said:

> From various methods, either the -- if the salesman is taking over a territory, it would have been the existing customers. Otherwise, the salesman can be prospecting on his own, or will hear about them from other customers; or he may pick up lists of dealers from feed companies that are actively selling feed and animal health related products; or we have a list of all the veterinarians in the area that we travel, and they're suggested that they call on them. (Pruehs dep., p. 9 ll. 8-15)

While salespersons are free to sell to dealers and veterinarians, a direct customer account would need to be discussed so as not to jeopardize the dealer structure. Part of the reason salespersons do not recruit customers is because of limited time.

Pruehs stated that claimant received a salary and a commission based on profitability. Claimant also had use of the company vehicle which was to be utilized primarily in traveling his territory although a fifty mile personal venture would not be questioned. Extensive use such as for a vacation would require permission. He described the van as in fine shape and he said it would be the salesperson's responsibility to care for the vehicle.

The witness recalled the events surrounding the accident: He got two calls from claimant's spouse asking if he had heard from claimant. He received a call in the evening from the hospital in regard to whether chemicals in the van were harmful. He went to the hospital where he saw claimant's spouse and mother. Later he went and talked to a patrolman.

Pruehs said that prior to the accident he had conversation with claimant which he verified by letter regarding deterioration in claimant's sales performance. The letters and discussion were preliminary to placing claimant on probation. He reported that claimant's termination was strictly a business decision based on claimant's performance. He acknowledged seasonal fluctuations in the business, but he claimed profitability was the same year round.

Pruehs testified that in his time working as a salesperson in northwest Iowa he very, very seldom took customers out for a meal. He approved expenses of his salespersons. He did not remember asking claimant if he were taking customers out for meals or being told by claimant he was doing so. While he thought some salespersons probably engaged in this practice, he said it would not be normal policy.

The witness stated that when it came to selling to producers size dictated whether or not he would deal directly. He himself had visited producers and had made sales to them.

Pruehs thought it would be unusual for claimant to be gone after 6:00 o'clock based on the calls he had received from claimant's spouse.

The witness said it was possible he had met Rank at an appreciation dinner which included a show to allow customers selected by the salespersons to see what products the company had to offer. He declared that he had seen claimant intoxicated at a hamburger cookout which he sponsored when the company introduced a new product. He said that drinking on the job had not been discussed in any of the monthly sales meetings at which alcohol might be served after hours. He stated that employees were told alcohol was not condoned. He had never instructed his salespersons to buy alcohol during working hours, but the salespersons might choose to do so.

Clarence D. Pippett, a former sales manager for the company until March or April 1981, testified that he was familiar with the duties of a salesperson and that it was acceptable to take customers out for dinner and drinks. He agreed that intoxication was not acceptable.

Twenty-six year old Mitchell Watters, a deputy sheriff with the Osceola County Sheriff's Department who was trained through the Iowa Law Enforcement Academy testified to working under contract for the town of Schleswig. He had special course training in dealing with drunk drivers in 1979 and again in 1982, and he had training in accident investigation at the academy. He indicated he had made over a dozen arrests with drunken drivers.

On May 28, 1981 he was employed by Crawford County doing routine patrol in Schleswig from 8:00 p.m. to 4:00 a.m. He recollected an accident on that day as follows: It occurred in Monona County around 8:45 and involved a single van. He had previously seen the van come into Schleswig at a high rate of speed but lost sight of it. He went to lock up the post office and observed the van sitting next to a bowling alley and lounge near a rear side door. He saw claimant in the van as he locked the post office and then watched him leave town at a high rate of speed. Claimant turned on E16 heading west. He pursued claimant for more than ten miles and noted that he drove left of center going up a hill in a no passing zone and that he hit the left hand shoulder. The day was clear and dry and visability was not impaired. He was flagged down by a motorist two and one-half miles out of Schleswig and told that a van had almost run her off the road. He estimated the speed of the van at over seventy miles per hour and he thought the van hit the left side of the road five or six times, but he saw the wheels leave the road only once or twice. The van also went off the right shoulder. No other vehicles were encountered. The van went into the ditch. A trooper arrived.

It was Watter's opinion that claimant operated his vehicle in a reckless manner at an unreasonable rate of speed and was intoxicated. He did not remember seeing any beer cans or liquor bottles in the van, but he had not inventoried the contents.

Records from the Monona County District Court show claimant pled guilty to a reduced charge of public intoxication and to failure to maintain control of his vehicle.

Daniel Vernon Weakley, a microbiologist and registered medical technologist, testified that he is contacted from time to time by law enforcement officers to take blood samples. His procedure is to go to the place where the sample is to be taken and to get permission from the patient if the patient is in condition to give it. Permission is obtained from the doctor in the case of an unconscious person. He then sterilizes his instruments and the area from which a sample is to be taken. Sanitation is carried out by using iodine and water as some other substance could affect the blood alcohol reading. Instruments are purchased in a sterile condition. A label is prepared showing the time of the sampling. After the sample is taken it is distilled.

Specifically, in claimant's case, Weakley was called to draw blood which he did at 10:59 p.m. The sample he obtained was taken to the lab and locked up for analysis on the next working day. Claimant's blood was found to contain 179 milligrams of ethyl alcohol per 100 cc's of blood.

Weakley calculated the number of drinks he thought claimant must have had by using among other things claimant's sex, body build, the time he started drinking, the time he stopped and the concentration when the sample was withdrawn. Based on twelve ounce cans of beer, he thought claimant would have drunk a little less than twelve cans. He gave the rate of elimination of alcohol as fifteen milligrams per hour with excretion occurring in urine, breath and sweat. He proposed that claimant's blood alcohol at the time of the accident would have been around 210 milligrams. It was his opinion that an individual with a reading of 80 milligrams would be impaired in the operation of a motor vehicle.

The witness who did not recognize claimant was unsure if he had obtained permission from him. He acknowledged that it is possible a person with abrasions might be treated with a substance containing alcohol. He also agreed that other substances such as isopropyl alcohol, methyl alcohol, isotone or small chain keotone could have an additive affect.

Medical records show claimant was brought to the hospital in an incoherent and disoriented state. He had a laceration from the left mental region overlying the mandible up to the left lower lip. His neck was supple. There was a large abrasion on the left side of the chest with imbedded foreign debris. The abdomen was scaphoid with hypoactive bowel sounds and consistent abdominal rectus muscle spasm and rigidity. There were abrasions on the extremities. X-rays of the cervical spine showed reversal of normal curvature but no obvious fractures or dislocations. Paracentesis was performed. The claimant underwent an exploratory laparotomy and repair of the laceration on his chin. He also had a splenectomy. He was discharged from the hospital on June

6, 1981 with final diagnoses of ruptured spleen, laceration of the chin, deep abrasion of the back and concussion.

John J. Dougherty, M.D., first saw claimant on June 26, 1981 with complaints of his neck and back and more particularly of difficulty turning his head and numbness in his entire right hand at first and later in his little finger only. Claimant was examined and x-rayed. There was a little wedging of D-12 and L-1, minimal scoliosis in the upper dorsal and lumbar spine to the left and questionable narrowing at C4-5 and 5-6. Later tomograms showed a small bony fragment in the posterior spinous process of T-1 which the doctor felt was old. The numbness in the left little finger was attributed to a possible traumatic ulnar neurosis which seemed to be subsiding. An EMG was suggestive of a mild left ulnar neuropathy.

Claimant asked for referral for a second opinion. He was referred to Dr. Nitz, but according to Dr. Dougherty's file was not seen by the doctor. He then was referred to a group of doctors who refused to examine for a second opinion. At the time of his last examination of claimant--October 9, 1981--the doctor did not think claimant had any permanent partial disability. He suggested in August that claimant attempt to return to work.

James H. Walston, M.D., saw claimant on October 16, 1981 and took a history of "a lot of neck and cervical injuries" as well as a fracture of the first thoracic vertebra. Claimant complained of neck pain and stiffness which was present most of the time and of numbness in the left arm and leg. On examination the physician found some spasm and limitation of motion. Claimant was seen again on November 2, 1981 at which time he still complained of neck and back pain. He was advised to continue with muscle relaxants and pain medication. Claimant was told he could return to work on November 16, 1981. The doctor wrote: "Apparently, Dr. Dougherty had not told him he could go back to work, but he was anxious to return to work, and I did not see that any further inactivity would do much help to his condition, and I felt he had received optimal benefit from the medical treatment he has received to date." He expressed the possibility of permanent disability to the neck and thoracic spine of ten percent of the body as a whole.

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).

The problem in this matter is primarily one of whether or not claimant was in the course of his employment when he was in his accident. Defendants argue that claimant left the course of his employment when he went to visit Virgil Rank. Perusal of claimant's expense reports does not reveal a common practice of claimant's entertaining in the evening. Claimant also said he usually made his last sales call between 4:00 and 5:00. No determination needs to be made regarding whether or not claimant's visit to Rank was for personal or business reasons. The time to focus on is the time of claimant's accident. Even if he left the course of his employment to visit Rank, at the time of his injury he was in the course. See Pohler v. T. W. Snow Construciton Co., 239 Iowa 1018, 33 N.W.2d 416 (1948); Barrus v. Vitalis Truck Lines, I Iowa Industrial Commissioner Report 17 (1980); Wood v. Cummings & Co., 33 Biennial Report of the Industrial Commissioner 31 (Review Decision 1974) (District Court Aff'd); Owen v. Owen Construction Co., 32 Biennial Report of the Industrial Commissioner 37 (Review Decision 1974).

Claimant's accident occurred as he was on route to his home in a company's supplied van using fuel paid for by the company. See Pribyl v. Standard Electric Co., 246 Iowa 333, 67 N.W.2d 438 (1954); Davis v. Bjorenson, 229 Iowa 7, 293 N.W. 829 (1940). As a traveling employee, claimant was routinely in the course of his employment until he reached his home. See Heissler v. Strange Brothers Hide Co., 212 Iowa 848, 237 N.W. 343 (1931). Any deviation which might have occurred when he visited Rank ended when claimant began his trip home.

Claimant clearly had injuries as a result of his accident.

Defendants have raised the affirmative defense of intoxication. Iowa Code section 85.16 provides in part:

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

The 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.

Claimant argues that defendant employer's knowledge, encouragement and condonation of drinking in solicitation of customers and in conduct of company business should estop defendants from raising the intoxication defense. The undersigned agrees that there is evidence to show that drinking was a part of some business activities of defendant employer. Acceptance of drinking, however, is a far cry from approval of drunkenness. Presumably, the employee will avoid intoxication in order to carry on business in a responsible manner. Claimant cites section 34.35 of the Larson treatise. Specific language from that section is: "Even in a case in which the intoxication defense might otherwise apply, the employer may be estopped to assert it if he helped to cause the episode." 1A Larson, The Law of Workmen's Compensation, section 34.35 (1982). Defendant employer did not cause the episode of intoxication involved with claimant's injury.

The Iowa Supreme Court has dealt with the intoxication defense in several cases. Claimant cites Lamb v. Standard Oil v. Standard Oil, 250 Iowa 911, 96 N.W.2d 730 (1959). Lamb's duties were somewhat similar to claimant's herein, but the situtation surrounding his injury was vastly different in that his accident occurred on icy roads in foggy conditions. Birch v. Malvern Cold Storage Co., 230 Iowa 357, 297 N.W. 818 (1941) presents another factor sometimes found in intoxication cases--that of faulty equipment. In the more recent case of Farmers Elevator Co. v. Manning, 286 N.W.2d 174 (1979) there was question as to whether nor not claimant actually was intoxicated as there were two witnesses who said claimant had too much to drink and five who said he was not drunk.

In this case, although claimant claimed that he had only three beers, Deputy Watters, who had special training in spotting intoxicated drivers, concluded claimant was intoxicated. Claimant pled guilty to both the charge of failure to maintain control of his vehicle and to a charge of public intoxication. At the time of his initial medical treatment, claimant had an odor of alcohol; he was incoherent; he was disoriented in all three spheres. Weakley, a registered medical technologist, found 179 mm. of ethyl alcohol per 100 cc.'s of blood. Clearly, claimant was intoxicated.

There is no evidence of equipment failure or trouble with the road surface. The accident occurred well after 8:30 in the evening. Claimant said visability driving into the western sun was poor. Watters did not testify to any difficulty with visability.

The remaining thread on which this case hangs is claimant's assertion that he fell asleep. Claimant testified:

> Q. When you drink alcohol, does it tend to make you tired?
>
> A. Oh, yes.
>
> Q. Drowsy?
>
> A. Yeah. (Walsh dep., p. 29 l. 25; p. 30 ll. 1-3)

Then he said:

> Q. What's the last thing you can remember?
>
> A. A. Just going off the road. (Walsh dep., p. 32 ll. 2-3)

Later he stated:

> Q. Do you remember anything that evening after your vehicle left the road?
>
> A. No.
>
> Q. What is the last thing you do remember?
>
> A. The last thing prior to having the accident?
>
> Q. Yes.
>
> A. Just going off the road and started going, that's it.
>
> Q. Did you fall asleep?
>
> A. Yeah, to the best of my knowledge. Then when it was too late, I realized it. (Walsh dep., p. 51 ll. 7-17)

Claimant's testimony was at times evasive and at other times a matter of selective recall. Had claimant been straightforward, candid and direct on such matters as the amount he had to drink, his stop in Schleswig, his passing another vehicle or his pleading guilty to public intoxication, the undersigned might

have been inclined to accept claimant's allegation that he fell asleep. Whether that would have helped his case, however, is questionable in that he testified alcohol makes him tired and drowsy. She must note that only claimant's testimony supports that he had worked excessively long hours. The behavior of claimant's spouse in calling Pruehs not once but twice suggests that claimant's being late was not a common occurrence. Based on the record reviewed as a whole, this deputy industrial commissioner must conclude that claimant's intoxication was the proximate cause of his accident on May 28, 1981.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant started work for defendant employer in the warehouse in 1976.

That claimant was promoted to sales work in 1978.

That claimant in the week of his injury was trying to cover a territory he ordinarily covered in a week and three days.

That claimant left home at 7:00 a.m. on the day of his accident.

That claimant was driving a company van powered with gas purchased by the company.

That claimant called on Virgil Rank on May 28, 1981.

That claimant purchased propane tanks for his personal use from Rank.

That claimant drank beer with Rank at his farm and in Denison.

That at the time of claimant's accident weather conditions were clear and dry.

That at the time of claimant's accident he was traveling on a good road surface.

That immediately prior to claimant's accident he was driving erratically.

That at the time of his initial medical treatment claimant had an odor of alcohol, was incoherent and was disoriented in all three spheres.

That claimant post-accident had one hundred seventy-nine (179) milligrams of ethyl alcohol per one hundred (100) cc.'s of blood.

That claimant was intoxicated at the time of his accident.

That claimant's testimony in this matter had been less than candid.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant was in the course of his employment at the time of his accident on May 28, 1981 and that claimant received injuries arising out of that accident.

That defendants have established the affirmative defense of intoxication.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That each party pay costs of producing its own evidence.

That defendants pay the cost of the certified shorthand reporter's appearance at the hearing.

Signed and filed this 31 day of July, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CRAIG T. WHEELER,	:	
Claimant,	:	File No. 728727
vs.	:	R E V I E W -
SWIFT INDEPENDENT PACKING,	:	R E O P E N I N G
Self-Insured, Employer, Defendant.	:	D E C I S I O N

FILED
JUL 27 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Craig Wheeler, claimant, against Swift Independent Packing, self-insured, employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on March 2, 1983. It came on for hearing on July 18, 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 21, 1983. A final report shows the payment of eight weeks and four days of weekly benefits as well as of medical expenses.

At the time of hearing the parties stipulated to a rate of $201.78; to a conversion date in the event permanency should be found of May 1, 1983 and to the injury being confined to the left lower extremity.

The record in this matter consists of the testimony of claimant, Mary Louise Wheeler, Robert Steven Long, Tony Paul Harris, Gail Upton and Robert W. Hoffmann, M.D.; claimant's exhibit A, a report from Walter B. Eidbo, M.D., dated February 3, 1984; defendant's exhibit 1, an employee exit interview; defendant's exhibit 2, a series of medical records; defendant's exhibit 3, information from claimant's current employer; defendant's exhibit 4, medical reports from Dr. Hoffmann and Walter J. Riley, M.D.; and defendant's exhibit 5, claimant's answers to interrogatories.

ISSUE

The sole issue in this matter is whether or not claimant is entitled to permanent partial disability.

STATEMENT OF THE CASE

Twenty-four year old claimant, a high school graduate, testified to serving four years with the navy chalking and chaining planes, driving a tractor and directing airplanes. When he got out of the navy, he worked as a diesel mechanic doing transmission work at $3.35 per hour and then as a marine mechanic with earnings of $4.00 per hour. His job prior to commencing work for defendant employer was mowing lawns.

Claimant worked for about six months before his injury. His job had been jacking meat from one rail to another one beef at a time; lugging beef weighing from 150 to 200 pounds and loading three to four trucks a day, and cutting tenders which was making cuts in the side of beef and removing a portion.

Claima t recalled the circumstances of his injury thusly: He was cutting tenders. He went to push the meat down the line. He stuck a knife in his upper thigh making a deep cut an inch wide. His coemployees worked to stop the bleeding. He went to the nurse who gave him oxygen and then to the hospital where he spent three days.

His wound was sutured and wrapped with an ace bandage. His care was taken over by Dr. Hoffmann. On a post-surgery visit he saw Dr. Riley instead of Dr. Hoffmann. Dr. Riley opened his wound and drained out blood.

He continued to have pressure in his groin area, pain and swelling in his leg. His mother called Dr. Hoffmann and then his father talked with someone about him. He was returned to the hospital. While he was in the hospital he was given pain medication and blood. On the third day of his hospitalization he was given spinal anesthesia and his leg was reopened. Eventually, he had general anesthesia and two incisions were made--a seven inch cut on the upper thigh and a three or four inch incision in the groin area. Post-surgery, he felt "great" as he could tell he was going to get better.

He commenced therapy. He was told to exercise. He tried running, but he found it was too soon after his injury.

Claimant was released to return to work and he was sent back to cutting tenders, but he also worked on the back line pushing meat down the rail. His leg hurt after work. He developed diarrhea, and as he could not get off the line to go the bathroom, he terminated his work.

Eventually, he got work with an insurance company. At first

this was part-time work cleaning carpets and functioning in security. Then he moved to a clerical job in which he is presently employed. He fills orders for forms by packing boxes. Sometimes he loads vans. Fifty-five pounds is the heaviest amount he is required to lift and most of his lifting is in the twenty pound range. He started at a salary of $4.90. He now earns $5.24 per hour. He has not lost time from work for problems with his leg. He was earning $7.00 plus per hour at the time of his injury. He claimed he would be unable to return to work with defendant because his leg is not strong enough to enable him to carry meat on his back. At the time claimant was called to begin work for the insurance company he was planning to take a test to apply for a mail carrier job.

Claimant described himself as very active prior to the injury doing such things as water skiing, golfing and playing softball. He still golfs, but he has some pain with walking. He has been unable to get up on water skis. He does some jogging, but it hurts to run. He said that most of his jogging was done right after he left defendant and he did not keep it up for long. He reported trying to sprint seventy-five yards and quitting because he was hurt. He tried filling in for someone on a baseball team, but he was unable to do so. He stated that after his release he did walk at a rate of three miles a day.

Claimant's present complaints are of numbness on the side of his thigh, scar deformity, pain shooting through his leg when his left foot hits the ground, loss of strength and occasional pain below his knee. He declared that his left leg is noticeably smaller. He did not think that he has used his left leg less than his right. He denied any subsequent injuries to his left leg, knee or foot.

Claimant did not recall ever having his leg measured prior to his injury. He had not seen a report from Dr. Hoffmann dated November 28, 1983, but he could not remember telling the doctor he had a full and complete return of strength. He denied jogging at that time, but he said that he had been walking.

Mary Louise Wheeler, claimant's mother with whom he lived both before and after his injury, testified that before his accident claimant was active and had no restrictions on anything he did. Post-injury, there was decrease in activity. She recalled the sprinting incident in which claimant was running with an older brother, stopped "like dead in the water" and rubbed his left leg. She denied that claimant has jogged regularly since the injury.

She said that claimant is not a whiner, but that he will sometimes say his leg hurts. He rubs his left thigh. He mentions sharp pain in the area of his numbness.

Robert Steven Long, currently supervisor on the kill floor and loading and transfer foreman and claimant's supervisor at the time of claimant's injury, testified that on claimant's return to work he did not complain of an inability to do the work to which he was assigned. Long recalled that he and claimant had a discussion of the work which would be performed in an effort to build up claimant's leg. Claimant's primary duty was to be railing off cattle off the back wall which the witness said meant checking tags on the carcasses and moving them to a particular rail. Claimant also did some trimming of tenders. Claimant was not used to lug beef which could be as heavy as 200 pounds both because the work was so heavy and because claimant was not a particularly good beef lugger.

Long was unaware of any hesitancy on claimant's part to do knife work, of his having diarrhea or of his going to Harris to quit.

Tony Paul Harris, personnel manager for defendant, testified to knowing claimant as a good employee and to familiarity with the circumstances surrounding his quitting work: Claimant came to his office to advise him of his resignation. He was fearful of knives and concerned about further injury. He felt his supervisor's attitude was gruff. At no time did he indicate an inability to do the job. He did not mention diarrhea.

Gail Upton, who appeared pursuant to a subpoena and who is claimant's present supervisor at the insurance company, testified to claimant's complaining of his left leg after he attempted to play ball with some relatives. She was not aware of any complaints regarding his doing his job which entails infrequent lifting of fifty to fifty-five pounds. Neither did she know of his having lost any time because his leg was bothering him.

Upton declared that claimant is a good employee whom the company intends to keep.

Records from claimant's current employer show claimant was hired for part-time maintenance work on July 26, 1983. On August 15, 1983 he moved to full-time work as a supply clerk.

Robert W. Hoffmann, M.D., board certified general surgeon, testified to seeing claimant on March 2, 1983 when he was hospitalized with a stab wound to the upper thigh. Claimant's leg was swollen. He had some pain. There was discoloration in the subcutaneous tissue. He thought at that time that claimant's bleeding had been controlled reasonably well. However, in retrospect, he decided there might have been undertreatment.

Walter J. Riley, M.D., saw claimant in Dr. Hoffmann's absence on March 15, 1983 and found pain and swelling in the left thigh and down to the knee. He did an incision and drainage with evacuation of 15 to 20 cc.'s of dark blood.

Dr. Hoffmann explained that when the knife went into claimant's leg it cut through a muscle. In doing a repair the muscle bleeders are not tied off because they ordinarily quit bleeding with applied pressure. When claimant continued to have swelling, pain and discoloration, he was rehospitalized for an exploration of his wound and with the thought of potentially tying off muscle bleeders. Claimant's blood count was low; therefore, no surgery was performed until the third day of claimant's hospitalization.

An incision was made. The sole scrub nurse working with the doctor was not strong enough to perform the maneuvers that needed to be done. Dr. Hoffmann found injury to a major artery. He called Dr. Riley for muscle power. An incision was made in the medial aspect of the thigh and a second was made in the groin so that the femoral artery could be looped. The deep femoral artery which had been perforated by the tip of claimant's knife was sutured in a manner to retain a good lumen. This repair stopped the bleeding. Muscle bleeders had closed off as they were expected to do.

After surgery claimant got along well. His swelling decreased and his range of motion increased. By the time claimant was seen on April 26, 1983 his wound had healed. He had gained strength, but his left leg was still weaker than the right. Claimant was sent to alternative productive duty with return to regular work set for May 19, 1983. It was the surgeon's plan that claimant should be on unrestricted duty for three weeks in an attempt to ascertain if claimant could do his regular bid job although the doctor did not know what that job was.

Claimant was reevaluated on July 18, 1983 at which time the doctor learned he had worked three days, developed diarrhea and terminated. Claimant did not say that he quit because of any problems with his leg. Claimant was found to be markedly improving in muscle power. His scar area was becoming supple. Claimant was tender in the quadricep. An area of paresthesia remained. Claimant reported playing golf and jogging, but his leg was not strong enough for water-skiing.

Claimant was seen on November 21, 1983 at the request of the insurance company. Claimant told the doctor of his new job and that he had been walking and playing golf and had increased his jogging to a mile a day. Claimant continued to have a 17 by 13 cm. area of numbness over the lateral portion of his thigh which the surgeon said was not an area of true anesthesia, but rather one of distorted feeling. He anticipated claimant would regain some feeling, but it would not be of a discretionary type. He found claimant's strength to be full and complete and recorded claimant's reporting the return of his full strength.

It was Dr. Hoffmann's opinion that the continuity of the artery had been reestablished and that once the muscles had healed there would be no functional permanent partial disability. He said that the paresthesia would have nothing to do with the actual function of the leg. He disagreed with Dr. Eidbo's finding of permanency. Dr. Hoffmann acknowledged that he did not examine claimant before his injury. He pointed out that a half inch of atrophy is a very small amount and that an amount that size could be derived from tension on the tapemeasure or the location of the measurement. The witness admitted the possibility claimant had atrophy in his leg caused by the injury, but he did not think that was the situation in claimant's case. He believed claimant as capable of working now as before the injury. He assessed claimant's motivation as good and recognized it as a factor.

The physician found claimant's objective complaints expressed at this time likely to occur. He said that a person's dominant upper and lower extremities would be on the same side.

Walter D. Eidbo, M.D., saw claimant on January 20, 1984 and took a subjective history which was somewhat similar to that given at the time of hearing and in the medical evidence. On examination, the doctor found an area of altered sensation in the lateral thigh. Dr. Eidbo thought that claimant had lacerated both his femoral vessel and a nerve. The left thigh was one half inch smaller than the right.

Dr. Eidbo assessed a rating of ten to fifteen percent based on atrophy, weakness, scar deformity and paresthesia in the thigh of which eight to twelve percent was related to the scarring.

APPLICABLE LAW AND ANALYSIS

The sole issue in this matter is whether or not claimant is entitled to any permanent partial disability.

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).

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).

At the first glance this appears to be a case in which the evaluating physician finds permanent impairment and the treating physician finds none. Dr. Eidbo, the evaluator, finds permanent disability of ten to fifteen percent of which eight to twelve percent is attributable to "scar deformity and unsightly appearance of his scars." Scarring per se is compensable only when it involves the head or face. Iowa Code section 85.34(2)(t). Scarring also may be compensable when it restricts motion and thereby impairs function. There is nothing in the record to indicate claimant has restriction of motion; therefore, the eight to twelve percent rating assigned to scarring must be discounted.

The first apparent area of agreement between Dr. Eidbo and Dr. Hoffmann is that claimant has paresthesia, but Dr. Hoffmann said this condition would not interfere with the function of claimant's leg. He disagreed with Dr. Eidbo's finding of one-half inch atrophy in claimant's nondominant lower extremity which he said could be due to tension on the tapemeasure or the location of the measuring tape. However, he recognized the possibility that claimant could have atrophy in his leg. Claimant's own testimony was that the leg is smaller. Dr. Hoffmann's assessment of seemingly equal strength in claimant's legs was based in part on claimant's own statement. Dr. Hoffmann's testimony and his most recent letter of April 17, 1984 imply anticipation of improvement in strength in claimant's leg. He wrote: "I am sure that in years to come Mr. Wheeler's leg will be as strong as the opposite leg and that actually no decrease in function will result [emphasis added]." It is noted permanency does not mean forever, but rather for an indefinite and indeterminate period. Wallace v. Brotherhood of Locomotive Firemen & Engineers, 230 Iowa 1127, 1130, 300 N.W. 322, 324 (1941); Gardener v. New England Mutual Life Insurance Co., 218 Iowa 1094, 1104, 254 N.W. 287, 292 (1934).

Claimant expressed a number of subjective complaints which Dr. Hoffmann heard at the time of claimant's testimony and which he acknowledged were likely in a person with claimant's injury. Claimant's testimony of inability to do certain things and current complaints was substantiated by his mother.

The record viewed as a whole supports a minimal functional impairment to claimant's leg in the amount of three percent.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-four (24) years of age.

That claimant is right-handed.

That claimant's work for defendant included jacking meat, lugging beef and cutting tenders.

That on March 2, 1983 claimant stuck his left thigh with a knife as he was cutting tenders on his employer's premises.

That claimant was hospitalized twice and eventually underwent a surgical repair.

That claimant returned to alternative productive duty for defendant for a brief time and then terminated his employment for reasons unrelated to his injury.

That claimant is now working full time for an insurance company in a clerical position.

That claimant's recreational activities have been curtailed by his injury.

That claimant's current complaints are of numbness on the side of his thigh, deformity from his scar, shooting pain through his left leg when his left foot hits the ground, loss of strength on the left and a decrease in the size of his left leg.

That claimant has not had any injury to his left leg, knee or foot since his injury of March 2, 1983.

That Dr. Hoffmann, claimant's treating physician, repaired the deep femoral artery by making two incisions.

That claimant has no functional impairment as a result of scarring.

That claimant has minimal functional impairment to his left lower extremity of three percent (3%).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established entitlement to permanent partial disability of his left lower extremity of three percent (3%).

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant six point six (6.6) weeks of permanent partial disability at a rate of two hundred one and 78/100 dollars ($201.78).

That defendant pay unto claimant the amount due and owing in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30.

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

That defendant file a final report in thirty (30) days.

Signed and filed this 21 day of July, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE WHITE,	:	
Claimant,	:	File Nos. 728915
	:	739059
vs.	:	
	:	A R B I T R A T I O N
J. I. CASE,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	FILED
Defendant.	:	
	:	SEP - 6 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the Bicentennial Building in Davenport, Iowa on December 20, 1983 at which time the record was closed.

This litigation involves two files:

1. File 728915 involves an alleged injury of March 9, 1983. An employers first report of injury was filed on March 22, 1983. No payments were made.

2. File 739059 involves an alleged injury of July 14, 1983. An employers first report of injury was filed on July 26, 1983. A final report was filed August 19, 1983 revealing that claimant was paid three days of compensation.

The record consists of the testimony of the claimant; the depositions of John Thomas Johnson, D.O., and Hyman J. Hirshfield; claimant's exhibits 1 through 19; defendant's exhibits 1 through 18; and the answers to interrogatories 7, 25 and 26.

ISSUES

The issues for resolution are:

1) Whether claimant received an injury which arose out of and in the course of employment;

2) Whether there is a causal connection between the alleged injuries and the disability.

3) Whether certain medical expenses were related to the injuries; and

4) The nature and extent of the disability.

STATEMENT OF THE EVIDENCE

Claimant now 44, started working with J. I. Case in October 1972. Claimant testified that he was employed in rework. Claimant's job was putting in "belly pans," which are protective shields to protect engines and transmissions.

Claimant testified that while so employed on March 9, 1983 he was attempting to put up a transmission dolly for a transmission shield. The transmission shield started to fall and claimant was hit in the forehead. At that time claimant felt pain in his back. Claimant was trying to keep the shield from falling. Claimant testified that the injury occurred about 2:00 p.m. Claimant testified that he notified his supervisor of the incident and that coemployees had seen the incident. Claimant cleaned up the work site and went home at the normal time. Claimant testified that the pain became worse and worse. Claimant testified that he didn't want to be off so he did not see the plant nurse. Claimant went to work the following day and reported the incident to his supervisor who sent him to first aid. Claimant testified that the nurse wrote down the information given and that she caused claimant to be sent to the hospital in the company van. There was a dispute even at that time as to the compensability. claimant testified that he was refused medical attention at the hospital because of this.

Claimant went to see John Johnson, D.O., his family physician, on March 10, 1983. Dr. Johnson noted that claimant had low back and sciatic pain. Claimant was admitted to the hospital on March 19, 1983. Claimant was treated by Anthony D'Angeleo, Jr., D.O., a Davenport orthopedic surgeon.

His initial physical examination revealed a height of 5'11" and a weight in excess of 350 pounds. Full range of motion was noted about the cervical spine although pain developed at the limits of motion. There was tenderness along the cervical spinus processes. There was tenderness to palpation about the lower thoracic region and along the course of the lumbar spine. Mild paravertebral spasm was noted in the lumbar region. There was decreased flexion of the lumbar spine secondary to pain. Gait was slow and hesitant, secondary to low back pain. Claimant was unable to walk on the toes of the left foot secondary to back and left lower extremity pain. In the supine position straight leg raising was positive at 30° bilaterally for low back pain. Radiographs of the cervical, thoracic and lumbar spine revealed degenerative changes at the cervical spine in the area of C-4 through C-7. Thoracic and lumbar spine films were unremarkable. The initial assessment was that of acute exacerbation of thoracolumbar sprain and strain and an acute cervical sprain and strain. A CT scan was conducted on March 22, 1983. It did not show any evidence of spinal stenosis or stenosis of the lateral recesses. Claimant was treated with bedrest, physical therapy, analgesia and muscle relaxers.

Claimant continued to see Dr. D'Angelo after his release from the hospital.

On June 9, 1983 claimant reported persistent symptoms of pain about the upper extremities with weakness. He had improved range of motion in the neck. He also had occasional pain in both lower extremities. Examination revealed full range of motion of the cervical spine and upper extremities. It was suggested that claimant return to work on June 13, 1983, but claimant did not do so. Claimant then was treated by Gerald H. Goettsch, D.O. Claimant finally did return to work on July 11, 1983.

On July 14, 1983 claimant was hit on the top of his head by a belly pan at work. Claimant saw Charles Fesenmeyer, M.D., at the hospital. Physical examination showed that claimant refused to open his eyes even with urging. There was some tenderness over the left parietal area of the skull with possible soft feeling in this area. It was quite tender. There was no open wound, bleeding or bruise.

Claimant saw Dr. Goettsch on July 19, 1983. Claimant was complaining of vertigo. Neurological examination was negative. A fasting glucose test was conducted and the result was 107, with normal values being 70 to 100.

Claimant was examined by Hyman J. Hirshfield, M.D., a Chicago internist, on May 24, 1983. Dr. Hirshfield noted that there was tenderness to palpation and pressure over the cervical, trapezius and rhomboid, upper and middle and lower paravertebral thoracic muscles bilaterally. There was impairment of motility of the neck. Flexion was at 30 degrees. Extension was 10 degrees. Lateral rotation was 40 degrees on each side. Lateral bending was 20 degrees on each side. There was impairment of motility of both arms at the shoulder. Abduction was 100 degrees on each side. Adduction was 30 degrees. External rotation was 20 degrees.

There was bilateral lumbosacral and paravertabral tenderness on palpation and pressure. Claimant flexed forward 30 degrees and could not extend backwards. Lateral bending was limited to 20 degrees on each side. Straight leg raising was 40 degrees on each side. Dr. Hirshfield took x-rays which showed osteophytic spurring at C4, C5 and C6 with some reduction of the height of the body at C5. He came forth with the following diagnosis:

> This patient sustained injury to the cervical thoracic and lumbosacral area with resultant bilateral lumbosacral strain with impairment of motility of both legs in straight leg raising.
>
> Impairment of motility of the lumbosacral spine in all parameters.
>
> Strain injury cervical, trapezius and rhomboid and upper, middle and lower paravertebral thoracic muscles bilaterally with associated myositis and impairment of motility of the neck and impairment of motility of both arms.
>
> There was reduction in vertebral height of the body of C5 which may be consistent with trauma.

The claimant was examined by Paul W. Moen, M.D., on August 30, 1983 at the request of the employer. Dr. Moen's letter (claimant's exhibit 6) indicates that the primary purpose of the visit was a discussion of a gastric bypass. The back injury was only mentioned in passing. Claimant had symptoms of shortness of breath, palpitations and sleep apnea which were unrelated to the injury in Moen's opinion.

Claimant testified that just before the injury of March 9, 1983 his back felt fine. Since the injury claimant indicated that he has failing eyesight, shoulder pain and a deteriorating sex life. On March 9, 1983 claimant was married with five children. He completed the eighth grade. He has been a farmer and a maintenance worker. He was, at all times, an unskilled laborer. He used to play basketball but cannot any longer. At the time of hearing, he was on long-term disability.

On cross-examination, claimant testified that he was off from June 17, 1982 to February 13, 1983 for a back strain. Claimant also strained his back in 1982 when he fell down and slid while shoveling snow. Claimant testified that he saw a chiropractor in 1981. Claimant also admitted to prior back problems in 1975, 1976, 1978 and 1980. In January 1980 he had chest pains and it was thought that claimant had had a heart attack. At the time of hearing, claimant complained of being short of breath after climbing a flight of stairs. Claimant also experienced some dizziness. He was taking medicine to stabilize his high blood pressure. Claimant stated that he cannot work. He testified that he goes to the spa regularly.

On redirect examination, claimant indicated that when he returned to work in July 1983 he still had pain and went back because the doctors told claimant to return to work.

Claimant testified on recross-examination that he was forced back to work in July 1983 by the doctors. Claimant asserted that the employer forced the doctors to issue return-to-work slips. Claimant stated that when Dr. Johnson released him to return to work in July 1983 his back was just as bad as when he was first hurt.

The following statement concerning causation was made by Dr. D'Angelo, who first saw claimant on June 6, 1983.

> It is my opinion that Mr. White is suffering from a cervical and lumbar sprain and strain. He is without physical signs of nerve root impairment. Mr. White is also suffering from exogenous obesity, and I feel this substantially contributes to problems about the cervical and lumbar spine. I would expect gradual improvement of symptoms although they may persist on a diminishing basis for as long as eight to twelve months. I am unable to state if symptoms will ever entirely resolve. It is my opinion that present difficulties are in part secondary to an injury sustained while at work on 3/9/83. Specifically, I feel cervical symptoms were sustained at the time of the work injury as per history obtained from patient. I believe the lumbar spine complaints are long standing in nature, but were exacerbated by the 3/9/83 injury.

Dr. Johnson and Dr. Hirshfield testified by way of deposition in this case. Dr. Johnson testified that he first treated claimant for a back condition in 1980. He treated him again in 1982. Dr. Johnson testified that claimant had had a heart attack before and that he again treated claimant in early 1983 when claimant fell.

In March 1983 claimant was hospitalized and Dr. Johnson was the treating physician. He turned the case over to Dr. D'Angelo while retaining a certain amount of control. He, therefore, disagreed with Dr. D'Angelo's assessment that claimant return to work in the spring of 1983. Claimant saw Dr. Johnson on June 14, 1983 and at that time was complaining of back pain, but Dr. Johnson released claimant to return to work on June 21, 1983 without restriction.

On cross-examination, Dr. Johnson testified that claimant's condition was permanent and that it had been substantially worsened because of the March 9, 1983 injury. He thought the injury worsened the disc disease. (Johnson dep, p. 29)

Dr. Hirshfield also testified by way of deposition. He examined claimant on May 24, 1983. His findings have been discussed above. He testified that the arthritis or osteophytic conditions could be caused by trauma. (Hirshfield dep., p. 15) He testified that claimant had a 20 percent impairment to the body as a whole. Dr. Hirshfield had earlier written a letter

indicating that impairment was 30 percent of the body as a whole. Dr. Hirshfield testified that the impaired range of motion measurements were made in relation to a normal man and not one with claimant's weight.

The record indicates that claimant was absent from work for back problems in 1975 (one month period and another two week period), 1977 (five months), 1978 (about two months ending early in 1979), 1979 (about three weeks), 1980 (four months), 1981 (six weeks and another period of a month), and 1982 (four months). Additionally, claimant missed work from June 1982 through February 1983.

APPLICABLE LAW

1. Sections 85.3, 85.20 and 86.17, 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 injuries on March 9, 1983 and July 14, 1983 arising 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. 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.

4. The claimant has the burden of proving by a preponderance of the evidence that the injuries of March 9, 1983 and July 14, 1983 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).

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, 257 (1963).

ANALYSIS

Based on the foregoing principles, it is found that claimant established that he sustained injuries arising out of and in the course of his employment. The record fairly indicates that claimant aggravated a preexisting condition in both cases. Claimant's history of prior back problems has been well documented.

The problem that presents itself at the point is what disability claimant has. Is claimant's disability temporary or permanent? To which injury do the disabilities attach and in what degree?

The record supports a finding consistent with the opinion advanced by Dr. D'Angelo. This finding is that claimant sustained a lumbar strain and sprain which aggravated claimant's preexisting condition, at least for the lower back injury. Thus, temporary total disability compensation will be awarded for the first injury. Dr. Hirshfield's examination occurred earlier and, as aptly pointed out by the employer, did not include a complete recapitulation of claimant's medical history. This examination occurred at a time earlier than Dr. D'Angelo's report. Additionally, Dr. D'Angelo's status as a treating physician leads me to the conclusion that claimant should be found to have sustained an injury arising out of and in the course of employment on March 9, 1983 and that claimant sustained an aggravation of a preexisting condition because of this injury. The aggravation did not cause permanent partial disability. Accordingly, claimant will be awarded temporary total disability compensation from March 10, 1983 through July 10, 1983 (17 4/7 weeks) at the stipulated rate of $318.35.

The second injury occurred the week claimant returned to work. Factually, the July 14, 1983 injury was a separate and distinct event. The amount of medical evidence relating to the second injury is scarce. The initial examination by Dr. Fesenmeyer has been discussed above. Dr. Moen examined claimant in a cursory manner, with the main focus of the examination being gastointestinal in nature.

The record fairly indicates that claimant again sustained an injury which arose out of and in the course of employment in the nature of an aggravation of a preexisting condition. The record indicates that claimant returned to work on July 21, 1983 (see final report). Claimant was only paid three days of compensation because he had not surpassed the one week limit for full payment of temporary total disability compensation.

The record is scant regarding events following the July 14 injury, but claimant testified that he went on long-term disability in October 1983. There is no record that I can find to substantiate further lost time past July 1983. Claimant testified that he started receiving benefits pursuant to long-term disability. One would presume that claimant was not being paid disability while working. While there may have been evidence that the resultant absence from work in October 1983 was as a result of the July 1983 injury, that evidence was not presented to me at the hearing. The burden still rests with the claimant to show that he has done so by a preponderance of the evidence. Therefore, no award will be given regarding the July 14, 1983 injury, since claimant has already been paid for all that he is entitled to under the state of the record.

Certain medical expenses have been submitted. Those for treatment prior to August 1, 1983 will be ordered to be paid.

FINDINGS OF FACT

1. Claimant was employed by defendant on March 9, 1983.

2. Claimant hurt his back while working on March 9, 1983.

3. Claimant was disabled from acts of gainful employment from March 10, 1983 through July 10, 1983. This disability from acts of gainful employment was as a result of the March 9, 1983 injury at work.

4. The claimant temporarily aggravated a preexisting back condition as a result of the injury of March 9, 1983.

5. Claimant failed to prove by a preponderance of the evidence that the injury of March 9, 1983 caused permanent partial disability.

6. Claimant incurred medical expenses which were made necessary by the injury. Further, the expenses are fair and reasonable.

7. Claimant was employed by defendant on July 14, 1983.

8. Claimant hurt his back and neck while working on July 14, 1983, aggravating a preexisting condition.

9. Claimant was paid three days' compensation for the injury, having been off six days.

10. Claimant failed to prove that he was disabled from employment beyond this point or that he was permanently disabled thereby.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant was employed by J. I. Case on March 9, 1983.

3. Claimant sustained an injury arising out of and in the course of his employment with J. I. Case on March 9, 1983, said injury being an aggravation of a preexisting condition.

4. Defendants will be ordered to pay unto claimant seventeen and four-sevenths (17 4/7) weeks of temporary total disability compensation at the rate of three hundred eighteen and 35/100 dollars ($318.35) per week.

5. Defendants will be ordered to pay the following medical expenses:

Osteopathic Hospital	$1,727.10
Osteopathic Hospital	30.00
Osteopathic Hospital	2.10
Osteopathic Hospital	10.50
Radiology Assocs.	104.50
Dr. D'Angelo	200.00
Franciscan Hospital	380.00
Dr. Goettsch	76.00
Mercy Hospital	188.00
Dr. Johnson	662.00
Total	$3,380.20

6. Claimant was employed by defendant employer on July 14, 1983.

7. Claimant sustained an injury arising out of and in the course of his employment on July 14, 1983, said injury being an aggravation of a preexisting condition.

8. Claimant has been paid all compensation due him for the July 14, 1983 injury.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant seventeen and four-sevenths (17 4/7) weeks of temporary total disability compensation at the rate of three hundred eighteen and 35/100 dollars ($318.35) per week.

IT IS FURTHER ORDERED that defendant pay unto claimant the following medical expenses:

Osteopathic Hospital	$1,727.10
Osteopathic Hospital	30.00
Osteopathic Hospital	2.10
Osteopathic Hospital	10.50
Radiology Assocs.	104.50
Dr. D'Angelo	200.00
Franciscan Hospital	380.00

Dr. Goettsch	76.00
Mercy Hospital	188.00
Dr. Johnson	662.00
Total	$3,380.20

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from the date said payments became due.

Costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendant is to file a final report upon payment of this award.

Signed and filed this 6th day of September, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY O. WILLIAMS,

Claimant,

vs.

QUAKER OATS,

Employer,

and

IDEAL MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 682923

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED

JUL 12 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the Linn County Juvenile Court Facility in Cedar Rapids, Iowa on November 16, 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 October 2, 1981 along with a memorandum of agreement calling for the payment of $180.03 in weekly compensation. A final report was filed on September 2, 1983 revealing that claimant had been paid thirty-five weeks of healing period compensation and thirty-three weeks of permanent partial diability compensation based upon a fifteen percent loss to the left leg.

The record consists of the testimony of the claimant and Arlethia Williams; the depositions of the claimant, Warren Verdeck, M.D., Fred J. Pilcher, M.D.; claimant's exhibits 1, 2, 3, 5 and 6; defendants' exhibits A through I; answers to interrogatories 14 and 15; and all attachments to the interrogatories.

ISSUES

The issues for resolution are:

1) The nature and extent of injury;

2) The rate of compensation; and

3) Whether claimant is entitled to additional benefits pursuant to section 86.13, Code of Iowa.

STATEMENT OF THE EVIDENCE

Claimant, age 51, testified that she dropped out of school. She testified that she has lived in the Cedar Rapids area for thirty-four years. She has worked in the stockroom at the J.C. Penney store. Her primary employment, however, was as a domestic in hotels and private homes. She became employed by Quaker Oats in 1973. Her first employment was in the elevator department. This job involved sweeping and dumping rejected product. Claimant worked on trucks and measured grain. Her only injury during this time was an eye infection secondary to grain dust. Claimant then became employed in the package department. Claimant's duties included the dumping of bottle and inserts.

Claimant then became employed as a cereal inspector. Claimant inspected and weighed product. She also was required to sweep her work area. Claimant's job apparently is to inspect unpackaged breakfast cereal after it moves along a conveyor after it comes from an oven. Claimant was required to remove defective cereal bits from the product with a vacuum hose. the conveyor ran at the waist level and the job is done while sitting. However, the attendant duties often involved standing and movement. On August 28, 1981 claimant testified that the line was already down. Claimant started to walk to the water fountain, slipped and fell down. Claimant broke her left ankle. Claimant was taken to St. Luke's Methodist Hospital where she was admitted. There was minimal swelling and x-rays showed a comminuted lateral malleolus and posterior malleolus fracture. There was some posterior displacement of the fracture, of the fragments and ankle itself. Neurovascular status was normal. A closed reduction was occasioned and a long leg cast was applied. Claimant did complain of mild lumbosacral and midthoracic tenderness was recorded. The cast needed to be split longitudinally. Claimant's treating physician was Fred Pilcher, M.D., a Cedar Rapids orthopedist. Claimant was released from the hospital on September 3, 1981. Claimant continued to be treated by Dr. Pilcher. At one point a second cast was applied. Claimant was given physical therapy treatments. Claimant testified that things started to improve somewhat. On November 11, 1981 claimant was fitted with an ankle brace. Dr. Pilcher noted that claimant was responding slowly. As of December 18, 1981 claimant had not completely healed. Dr. Pilcher explained what the problem was:

> Yeah, the fracture was not the problem. We were dealing with -- the actual bones that were broken were not causing her problem. They were healed. The healed bone doesn't hurt. We were dealing with trauma to the ankle joint. Whether it be the part of the ankle the weight is borne on when you are standing, there was no fracture, it is called the talus bone, whether there is something inside the ankle that you can't see, there is soft tissue injury, to me all these things were apparently affecting her recovery. I couldn't blame it on the bone not healing, because it had healed and it had never changed position, so obviously something else had to be going on which wasn't healing.

Dr. Pilcher described claimant's recovery. A fair reading is that claimant's recovery was protracted and slow. Dr. Pilcher kept encouraging claimant to return to work and issued several limited return to work slips. Dr. Pilcher eventually gave claimant a permanent disability rating of ten percent of the left leg.

Claimant testified that Dr. Pilcher released her to return to work in September 1983 (full release) and that she had returned to the same job at about that time. Claimant testified that she had a lot of pain in her foot, especially after working eight hours. Claimant testified that she was sent to a doctor in Iowa City for a brace. She testified that she was able to finally return to work on April 21, 1983. Claimant was examined by Warren Verdeck, M.D., for the employer. He rated claimant's impairment as fifteen of the extremity. The examination occurred on July 21, 1983. On February 4, 1983 Dr. Pilcher had raised his rating to 26 percent of the leg. He explained the facts which led him to change the rating:

> Q. When was the next time you saw her?
>
> A. January 20th, 1983. When she came in in bad shape. She had, I believe it was a son or daughter, I don't recall, but she was as bad then as I had ever seen her. Quite upset. Her ankle was swollen, she had lost more motion, and I was so desperate that I thought I would obtain a short leg brace for her to see if we could completely unload that ankle, that is if it hurt for her to be on it, if we could distribute the weight over her entire leg or at least lower portion of her leg, then the pain would be not cured, but it would be lessened to the point where she would be up walking on it.
>
> Q. All right. did you reevaluate your disability rating at that time?
>
> A. I did, and I came out to -- I went through a different range of motion. She could hardly move her ankle at all that day. She lost inversion and eversion, the side turning, and I recalculated that and came out to twenty-three percent lower extremity,

adding three percent for persistent pain, making a total of twenty-six percent, which I don't often do that. In fact I don't know as I have ever done that.

Q. Evaluated a disability upward after a period of time?

A. Well, at least twice what I did.

The record reveals that claimant had chondromalacia and early degenerative arthritis as early as July 1982, but no causal relationship nor permanency was attached thereto.

The employers final report (Exhibit C) indicates that claimant was paid healing period from August 31, 1981 through May 2, 1982. Exhibit D indicates that claimant did not return to work until September 20, 1983. Claimant took some leave of absence time to fill in th void. The document indicates that claimant also lost a number of weeks in 1983. Further information received after the hearing indicates that claimant was paid compensation through September 1982. The record shows that supplemental benefits were paid through that date in an amount compatible with the payment of compensation.

APPLICABLE LAW

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

2. Section 85.26(2), Code of Iowa, provides that an award for payments may be reviewed within three years from the last payment of weekly benefits.

3. 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).

4. The claimant has the burden of proving by a preponderance of the evidence that the injury of Augut 28, 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).

5. Section 85.34(1), Code of Iowa, provides for a statutory 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 medicaly indicated that significant improvement from the injury is not anticipated or until the employee is medicaly capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever comes first.

6. In Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983) the court held that compensation for the claimant's scheduled leg injury was limited to the specific physical impairment and benefits were not to be measured by industrial disability factors such as loss of earning capacity.

7. 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 this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

ANALYSIS

Based on the principles enunciated, it is found that claimant has established her claim to permanent partial disability. Claimant is entitled to be compensated on the basis of a 26 percent loss to the leg. The rating given by Dr. Pilcher is given greater weight since he is the treating physician. This status, coupled with my personal observation of the claimant, indicates to me that claimant's impairment exceeds the fifteen percent given by Dr. Verdeck. Claimant, therefore, will be awarded an additional 24.2 weeks of permenant partial disability compensation. [57.2 weeks (26% of 220 weeks) less 33 weeks (15% of 220 weeks) already paid]. Claimant has not proven that her permanent disability extends beyond her leg.

Claimant has not proven that she is entitled to additional healing period compensation. There is insufficient evidence in this record for me to increase the healing period already paid. Likewise, the gross weekly wage as reflected in Exhibit H appears correct.

Although a case may be made to support an award for increased benefits pursuant to section 86.13, there was no unreasonableness in not paying 26% immediately. Two physicians gave ratings of ten and fifteen percent, and the first physician changed his rating to 26 percent. Nonpayment of an amount based on this last amount is not unreasonable.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on August 28, 1981.

2. Defendants filed a memorandum of agreement concerning an August 28, 1981 injury.

3. Claimant fell and broke her left ankle while working on August 28, 1981.

4. Claimant sustained permanent partial impairment to her left leg as a result of the fall while working on August 28, 1981.

5. Claimant's impairment as a result of the August 28, 1981 fall is confined to the left leg.

6. Claimant's permanent partial impairment to the left leg is twenty-six percent (26%).

7. Claimant has already been paid permanent partial disability compensation based upon a fifteen percent (15%) loss to the left leg.

8. Defendants' nonpayment of permanent disability based upon a twenty-six percent (26%) loss to the left leg was not unreasonable.

9. Claimant was paid healing period through September 1982.

10. Claimant's condition met the tests of section 85.34 in September 1982.

11. Defendants made certain collateral payments to supplement compensation paid by them.

12. Claimant incurred reasonable mileage expenses which should be paid.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant was employed by Quaker Oats on August 28, 1981.

3. Claimant sustained an injury arising out of and in the course of employment on August 28, 1981.

4. Claimant's medical expenses and healing period compensation have been paid.

5. Claimant should be paid an additional 24.2 weeks of permanent partial disability compensation at the rate of one hundred eighty and 03/100 dollars ($180.03) per week.

6. Claimant is not entitled to further compensation pursuant to section 86.13, Code of Iowa.

7. Defendants are to receive credit pursuant to section 85.38, Code of Iowa.

8. Claimant will be awarded twenty-eight and 73/100 dollars ($28.73) in transportation expenses.

ORDER

IT IS THEREFORE ORDERED that defendants pay additional permanent partial disability compensation for a period of twenty-four and two-tenths (24.2) weeks at the rate of one hundred eighty and 03/100 dollars ($180.03) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant twenty-eight and 73/100 dollars ($28.73) in transportation expenses.

Defendants are to receive credit for payments made pursuant to section 85.38, Code of Iowa.

Costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Interest is to accrue pursuant to section 85.30, Code of Iowa, from the date of this decision.

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

Signed and filed this 12th day of July, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN WOOLDRIDGE, Claimant, vs. MAY CONSTRUCTION, Employer, and UNITED FIRE AND CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 612542 A P P E A L D E C I S I O N FILED AUG 23 1984 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 27, 1984 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, to issue a final agency decision on appeal in this matter. Defendants appealed the decision on remand filed May 21, 1984.

The record on remand consists of defendants' exhibits 1 through 4, inclusive, and a transcript of the hearing.

ISSUE

The issue on appeal is whether or not defendants have shown good cause why the evidence they sought to present could not have been presented at the time of the original hearing and whether or not defendants have shown the unavailability of the witness Elizabeth Kotalik.

A review of the record discloses that the hearing deputy's analysis, findings of fact and conclusions of law are proper.

Wherefore, the decision on remand filed May 21, 1984 is hereby adopted as the final agency decision.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant was injured on July 18, 1979.

That a first report of injury was received August 16, 1979.

That a memorandum of agreement was received August 27, 1979.

That claimant's petition in review-reopening was filed January 21, 1982.

That a number of analyses of status/certificates of readiness for prehearing conference were sent to the parties.

That claimant's deposition was taken on June 24, 1982.

That claimant testified at the time of his deposition that he had back complaints and that he had lived with a woman.

That defendants certified on August 26, 1982 that their discovery was completed.

That defendants had seven months in which to conduct discovery.

That a notice of assignment for hearing was filed on December 6, 1982.

That the case was heard on January 21, 1983.

That Kotalik did not appear at the time of the original hearing.

That defendants did not take Kotalik's deposition prior to the hearing on January 21, 1983.

That no showing of Kotalik's unavailability has ever been made before the agency.

That an affidavit from the owner of an independent adjusting service was attached to defendants' brief on judicial review.

That a remand order was entered on February 4, 1984.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That defendants have failed to show good cause why the evidence they seek to present could not have been presented at the time of the orginal hearing.

That defendants have failed to show the unavailability of Kotalik in any proceedings before this agency.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay costs of the remand proceeding.

Signed and filed this 24th day of August, 1984.

Barry Moranville

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN WOOLDRIDGE, Claimant, vs. MAY CONSTRUCTION, Employer, and UNITED FIRE & CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 612542 D E C I S I O N O N R E M A N D FILED MAY 21 1984 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding on remand in the case of Marvin Wooldridge, claimant, against May Construction, employer, and United Fire & Casualty Company, insurance carrier, defendants. The remand hearing was held on May 9, 1984 at the office of the Iowa Industrial Commissioner.

A brief procedural history of this matter is helpful.

Claimant was injured on July 18, 1979. A first report of injury was received on August 18, 1979, and a memorandum of agreement was received August 27, 1979.

A petition for review-reopening was filed January 21, 1982.

Claimant's deposition was taken on June 24, 1982. At that time claimant's major complaint was a sharp back pain which went down into his legs. He reported a recent hospitalization for his back. He claimed the back pain had come on since he injured his knee. He said that he was not married, that he was living alone and that he no longer had anyone living at his house. He was questioned:

Q. You say you are living by yourself at the present time. When did the people you were--apparently were--I don't have her name in front of me. Apparently there was a lady, and she had a child,

that lived with you.

A. Yes, there was.

Q. When did she leave?

A. A couple of months ago. (Wooldridge dep., p. 22 ll. 6-13)

A series of analyses of status/certificates of readiness for prehearing conference relating to the progress of the case were sent out. On August 26, 1982 defendants indicated their discovery was complete. A notice of assignment for hearing was filed December 6, 1982.

The case was heard on January 21, 1983. Claimant testified at that time to having back problems stemming from reaching for a cup. He said that in 1981 his girlfriend and her son lived in his house.

On March 7, 1983 defendants filed an application to take immediate additional testimony which stated: "COMES NOW the attorneys for the Defendants, having this date been advised that Nancy Kotalik, who previously resided with the Claimant, Marvin Wooldridge, has information in regard to the onset of the Claimant's back condition, and we hereby request that the Deputy order that his deposition evidence be obtained forthwith and delivered to the Commission [sic] office." Claimant resisted.

This deputy commissioner filed a decision on April 4, 1983 in which she specifically denied additional evidence.

On April 22, 1983 defendants appealed to the commissioner and also asked to introduce additional evidence claiming that "evidence was discovered by the Defendant insurance company after March 1, 1983, wherein a witness by the name of Nancy Ann Elizabeth Kotalik supplied information in regard to the physical condition and work history of the claimant, which has a bearing on the issue of the causal connection of the back injury. Said evidence was not available or known by the Defendants prior to March 1, 1983...." Claimant resisted the allowance of additional evidence. On May 16, 1983 the industrial commissioner denied the request saying that "[n]o good cause is shown as to why the evidence now desired to be presented could not have been discovered prior to the original hearing."

Deputy Commissioner Barry Moranville filed an appeal decision on September 6, 1983. Judicial review was sought on September 9, 1983.

Attached to defendants' brief on judicial review was an affidavit from Milton Test, owner of an independent adjustment service, who had worked on the case and reviewed the telephone statement of Kotalik. He anticipated she would testify to information which "was not known to be available prior to March 1, 1983; and 2) would show that the claimant did considerable heavy lifting, hurt his back on several occasions, and didn't appear to have only knee problems...." Test also claimed to have developed another witness.

On February 8, 1984 District Court Judge Rodney Ryan entered an order remanding the case to the industrial commissioner who in turn remanded the case to the undersigned for further proceedings.

The remand order states in pertinent part:

> 4. That the issue of unavailability of said newly-discovered evidence was decided, as far as the file indicates, on conclusatory findings not supported by any specific evidence to support same; such as length of available time to conduct discovery, use of hearing to conduct discovery and no showing of unavailability; when in fact the only evidence in the file is the uncontested affidavit of the investigator that the new witness, who had a personal relationship with claimant, called him after the hearing with new facts bearing upon the claim made herein.
>
> 5. That an evidentiary hearing should be granted by the Industrial Commissioner for the sole purpose of determining what, if any, prior contacts had been made with this witness; what, if any, prior statements had been made by this witness; what may or may not have prompted the witness to withhold the alleged new information until after the hearing; and what may or may not have prompted the witness to come forward at the late date. Findings on these and all other material questions relating to the availability or unavailability of this new witness will lead to the decision thereon to allow or disallow the additional testimony sought to be adduced from the witness.

The record in the remand proceeding consists of the testimony of Carol Bowden; defendants' exhibit 1, the discovery deposition of claimant; defendants' exhibit 2, a tape recording marked 4370; defendants' exhibit 3, a tape recording marked 3573; defendants' exhibit 4, a transcript of the tapes made of the conversation with Nancy Ann Elizabeth Kotalik.

Defendants' exhibits 2, 3 and 4 were offered for the limited purpose of complying with Judge Ryan's order. Claimant objected on the grounds of hearsay and inability to cross-examine Kotalik. The objection made by claimant will be sustained; however, the undersigned has read the statement and finds virtually nothing therein which assists in determining matters set out by Judge Ryan. It would be possible, based on Kotalik's statement, to speculate as to Kotalik's motive in coming forth after the hearing.

The three conditions routinely necessary for testimony are that the witness be sworn, that the witness be in the presence of the trier of fact and that opportunity for cross-examination be given. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L Rev. 484 (1937) in Selected Writings of Evidence and Trial 756 (Fryer ed. 1957). Kotalik's statement is not sworn. This deputy industrial commissioner had no opportunity to observe Kotalik and assess her credibility. The major justification for not considering the evidence offered, however, is that claimant is denied the opportunity to cross-examine.

Carol Bowden, a claims supervisor for defendant insurer, testified to working on claimant's claim and to attending his discovery deposition. Prior to testifying at hearing she reviewed claimant's file. She recalled that she first had contact with Nancy Kotalik, the woman with whom claimant was living, on March 1, 1983 when Kotalik called the carrier's office and asked to speak with the person handling claimant's claim. Prior to that time the company had not been in contact with Kotalik and there was no statement from her on file. Bowden denied that the call from Kotalik was in any way solicited by the company. A recorded statement was made which later was transcribed, all in accordance with the established company procedure.

Bowden reported that Milton Test, owner of an independent insurance adjusting service who worked on claimant's file, swore an affidavit regarding Kotalik. To her knowledge, Test was not contacted by Kotalik.

Industrial Commissioner Rule 500-4.31 provides: "No evidence shall be taken after the hearing." It should be noted that this rule has changed since its interpretation in McSpadden v. Big Ben Coal Co., 288 N.W.2d 180 (Iowa 1980).

The order of remand suggests that findings should be made regarding the "length of available time to conduct discovery, use of hearing to conduct discovery and no showing of unavailability; when in fact the only evidence in the file is the uncontested affidavit of the investigator that the new witness, who had a personal relationship with claimant, called him after the hearing with new facts bearing upon the claim made herein."

Claimant was injured on July 18, 1979. Presumably, defendants conducted some investigation of his claim. More directly, defendants had from January 21, 1982, the date claimant's petition was filed, until August 26, 1982, the date on which they indicated discovery was completed, in which to do discovery. They were aware in June that claimant had been living with a woman. Defendants could have contemplated Kotalik's knowing something of claimant's condition and made contact with her at any time prior to the hearing or sought her testimony at the time of hearing.

The affidavit referred to in the remand order was not a part of any pleading before this agency. Neither this deputy nor the industrial commissioner had access to that affidavit. It was attached to defendants' brief on judicial review. Bowden, the claims supervisor, testified at the time of the remand hearing that Test had no contact with Kotalik. Apparently his affidavit was based on his review of the statement taken by Bowden rather than any personal discussion with Kotalik.

Defendants did not attempt to contact Kotalik prior to the original hearing in this case. They did not seek her out after hearing. She came to them. The undersigned is unable to examine other matters set out in the remand order as the witness was not present for hearing on remand. No explanation was offered as to why Kotalik did not appear.

Defendants did attempt to offer a tape recording from Kotalik and her recorded statement. As it was discussed above, those items cannot be considered.

Defendants have presented no good reason why testimony from Kotalik could not have been obtained prior to the original hearing or presented at the time of the original hearing. Temple v. Vermeer Manufacturing Co., 285 N.W.2d 157 (Iowa 1979). A hearing before a deputy commissioner is a hearing. It is not a discovery opportunity. It should be noted that in the course of the remand hearing defendants did request a continuance so that the deposition of Kotalik might be obtained. That request for continuance was denied. The remand order in this matter was entered on February 8, 1984. The remand hearing was held three months later. That time lapse was certainly sufficient for defendants to prepare their presentation. Defendants have failed to establish good cause for not presenting the evidence sought to be offered at the time of hearing.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant was injured on July 18, 1979.

That a first report of injury was received August 16, 1979.

That a memorandum of agreement was received August 27, 1979.

That claimant's petition in review-reopening was filed January 21, 1982.

That a number of analyses of status/certificates of readiness for prehearing conference were sent to the parties.

That claimant's deposition was taken on June 24, 1982.

That claimant testified at the time of his deposition that he had back complaints and that he had lived with a woman.

That defendants certified on August 26, 1982 that their discovery was completed.

That defendants had seven months in which to conduct discovery.

That a notice of assignment for hearing was filed on December 6, 1982.

That the case was heard on January 21, 1983.

That Kotalik did not appear at the time of the original hearing.

That defendants did not take Kotalik's deposition prior to the hearing on January 21, 1983.

That no showing of Kotalik's unavailability has ever been made before the agency.

That an affidavit from the owner of an independent adjusting service was attached to defendants' brief on judicial review.

That a remand order was entered on February 4, 1984.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That defendants have failed to show good cause why the evidence they seek to present could not have been presented at the time of the original hearing.

That defendants have failed to show the unavailability of Kotalik in any proceedings before this agency.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay costs of the remand proceeding.

Signed and filed this 4 day of May, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBRA ZIEGENHORN, Claimant,	:	File No. 721162
vs.	:	
GRAIN PROCESSING CORPORATION, Employer,	:	R E V I E W - R E O P E N I N G D E C I S I O N
and	:	
UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	:	F I L E D

INTRODUCTION

This is a proceeding in review-reopening brought by Debra Ziegenhorn, claimant, against Grain Processing Corporation, employer, and United States Fidelity and Guaranty Company, insurance carrier, defendants, to recover additonal benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of her employment on October 29, 1982. It came on for hearing on June 26, 1984 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 17, 1982. A final report received August 22, 1983 shows the payment of ten weeks of benefits.

At the time of hearing the parties stipulated to a rate in the event of an award of $255.98. Claimant's demand for additional healing period is from February 28, 1983 to April 24, 1983.

The record in this matter consists of the testimony of claimant and David Morrison; claimant's exhibit 1, the deposition of Thomas B. Summers, M.D.; claimant's exhibit 2, which was mismarked as defendants' exhibit 2, a letter and accompanying material from Ben F. Hanssen, D.C.; defendants' exhibit A, the deposition of William D. Reinwein, M.D.; joint exhibit C, which was labeled as defendants' exhibit C, a letter from Mark Odell, M.D., dated January 21, 1983; and joint exhibit D, which was marked defendants' exhibit D, a letter from Bruce L. Sprague, M. D., dated December 17, 1982.

ISSUES

The issues in this matter are whether or there is a causal relationship between claimant's injury and any disability she now may suffer and whether or not claimant is entitled to further healing period or to permanent partial disability benefits.

STATEMENT OF THE CASE

Thirty-three year old single claimant, who is a high school graduate and who spent a year in junior college learning secretarial skills, testified to work experiences as secretary, secretary-receptionist and secretary-bookkeeper. She commenced work for defendant employer in December of 1973.

She recalled two weeks' training in learning to work as a lab technician with duties of testing and analyzing materials going in and out of the company. Some of the work entails the use of machines. Some of it necessitates overhead lifting of light weights. At other times she must bend to look into a machine at about table height. The work is performed by standing and moving from counter to counter. Both days and shifts are rotated for an average forty hour week. In October of 1982 she was earning in excess of $11.50 per hour.

Claimant recalled the circumstances surrounding her injury on October 28, 1982 as follows: She was leaving work with a coemployee. She was carrying a purse. It had rained. She took a somewhat greater than normal step to cross a puddle. She had a cramp in her leg. She went down and twisted her ankle. As she fell, she grabbed a coemployee's arm. Her ankle was sore when she went to bed and sore when she got up the next day.

She did her regular work on Friday, Saturday and Sunday.

On Saturday she told a supervisor of her accident. On Monday she went to the safety department where she met with Doug Getty who made an appointment with Dr. Olson who x-rayed and examined her. Her ankle at that point was sore and swollen.. She was told to stay off of it. She worked by keeping her ankle elevated as she folded lab papers.

After a week to a week and a half she began having hip and leg pain. She asked Getty if she could see someone else. She then sought treatment from her own doctor who rewrapped the ankle and gave her medication for swelling.

She also got treatment from Dr. Hanssen, a chiropractor. She developed trouble standing up straight and was in a bent position. She saw Dr. Hanssen seven or eight times. The doctor called Getty who made an appointment with Dr. Sprague. She continued to be bent and to complain of her ankle, leg and hip.

She went back to Dr. Hanssen who sent her to her family doctor who sent her to Dr. Catalona. The workers' compensation adjuster called and she was sent to Dr. Reinwein instead. She first started missing work in mid-December.

Dr. Reinwein x-rayed and examined her and had a CT scan done. He then did surgery on her lower back. She was sent back to work on April 25, 1983 with the understanding she was to watch her lifting.

It was claimant's impression that workers' compensation was terminated because her back was not related to the ankle.

Claimant went back to the same job she had at the time of her injury. She has gotten pay raises since that time. She denied any physical problems with her job before October 28, 1982. She now experiences some soreness, but it has not kept her from working. She has ten years' seniority and plans to remain with defendant employer.

Claimant claimed that she is now limited in her personal life as she used to ride horses and work on the farm. Before her injury she fed and watered her horse in the morning and afternoon, cleaned the stall once a week and rode almost every day sometimes as long as an hour. She showed horses once or twice a month for four to five months in each year. She stated that her show riding and trail riding are both slow. She is no longer able to lift grain bags. She has someone else clean her horse's stall. She acknowledged riding four or five times since her injury including a trail ride in October of 1983. After riding she has soreness and stiffness but no pain down her leg. Her father carries big bales and feed. She has fed livestock as a favor to her father, but lifting buckets makes her back sore.

Claimant said her present complaints are of stiffness and pain in the lower part of her back. She notices pain on her sciatic nerve at a point in her menstrual cycle. She did not have sciatic pain before her injury.

Claimant said that her health prior to October 28, 1982 was good except for some problems with her lower back. She had no prior episodes of leg cramps. In 1972 she saw a chiropractor for a stiff neck with tingling in her fingers and toes. She was not sure how this incident occurred. In 1975 she was pushed into a stall by a horse and had a tightening in her neck. She was unsure if she missed work after this incident. In 1977 she was treated for her low back. In 1981 she fell from a horse. She had treatments to her neck and a leg. She was unsure if she missed work. Also in that year she fell on steps on ice and hit her whole back. She was off work and had treatment to her neck and lower back. She characterized her 1982 problems as different in that she had not had pain into her legs before, nor had she had difficulties straightening out.

In the winter of 1983-1984 she slipped on the ice and had soreness in her neck and some stiffness in her low back. She was treated for two months.

She uses a heating pad once or twice a month. She takes arthritis strength Bufferin for stiffness and soreness. She is able to bend to touch her toes. Twisting too far results in muscle pull. She asserted that she had more mobility prior to her injury.

David Morrison, a sixteen-year employee of defendant employer, who is supervisor in quality control with duties of gathering data and distributing work, testified to knowing claimant and to having her on his shift at times. She was under his supervision both before and after her surgery. As he recalled, she had no physical difficulties before October 28, 1982. He could see no adverse effects from the surgery and he found claimant as efficient as she had been before. He agreed that she is competent, dependable and truthful.

Morrison believed that of the 650 employees in the plant, twenty-two would be technicians. Of the estimated 500 persons covered by the collective bargaining agreement, about 400 would be machine operators or maintenance persons with various lifting and bending requirments, some of which could be demanding. He acknowledged that workers can move from job to job by bidding done on the basis of seniority. In September of 1982 lab technicians' salaries ranged from $9.80 1/2 to 11.25 1/2 per hour. The highest paid job covered by the contract was a technician in control stores who made $12.08 per hour. The witness was not familiar with the specifics of all positions in the plant.

He thought the company requires a physical.

Records from Ben F. Hanssen, D.C., show claimant was treated in early 1981 after she fell from a horse and injured her low back, neck and right arm. In November of the same year she fell down some steps and hurt the right side of her neck and back. In January of 1982 she had another fall. Claimant went to Dr. Hanssen on December 7, 1982. She complained of pain in her left ankle and leg and some low back pain. He treated her four times and referred her for medical treatment. His letter of January 26, 1983 notes: "Her previous history shows periodic chiropractic care with no major problems or disability."

Bruce L. Sprague, M.D., examined claimant on December 17, 1982 at which time she had full range of motion of the ankle, hind foot and mid-foot. There was no tenderness to palpation and no deformities. The doctor felt that claimant had a ligamentous injury which would gradually resolve. He encouraged her to use support stockings.

Mark Odell, M.D., family practitioner, reviewed his records and found no treatment for claimant for her low back until December 27, 1982. The doctor thought claimant might have a herniated disc and referred her to Dr. Catalona. Dr. Odell considered it possible claimant's back trouble was related to the fall in October, but he deferred to Dr. Reinwein for a more definitive statement.

William D. Reinwein, M.D., board certified orthopedic surgeon, examined claimant on January 5, 1983 and was told that she had sprained her ankle on November 28, 1982 and subsequently had sharp leg pain beginning in the middle of her back. She also spoke of pain in the left hip and leg with lifting and standing and stiffness in the muscles. Claimant told the doctor of being seen by several other physicians and having chiropractic treatment.

She had experienced flareups with back pain when she was horseback riding.

Documents filled out by claimant at the time of her first visit with Dr. Reinwein indicate the duration of complaints for which she saw him to be a little over two months. She wrote the first time she had severe backache was "just recently." She denied ever having a similar attack. She noted that her first pain in her hip and leg had come on two months before.

On examination, the doctor found limitation of motion, spasm and pain which he viewed as definite evidence of pressure on the nerve. A CT scan on January 7, 1983 showed a herniated disc at L5, S1. Claimant was admitted to the hospital for surgery on January 18, 1983. A laminectomy and discectomy at L5, S1 was performed the next day.

The history recorded by Dr. Reinwein at the time of claimant's hospitalization contains this statement:

> This patient is a 31 yr. old lab technician from Muscatine who has a long-standing complaint of low back disability radiating down to the left lower extremity. These symptoms have been aggravated on many occasions by horseback riding. The symptoms have been treated medically and by chiropractors and have been reluctant to conservative management."

Dr. Reinwein later noted: "There is no history of any disturbance in the gynecological history."

Claimant was released following surgery to return to work on April 18, 1983 with a thirty-five pound weight restriction. Based on the AMA Guides, claimant was given an impairment rating of five percent of the body as a whole. Later, the doctor gave a range of between five and ten percent based on the American Academy Guide of Orthopedic Surgeons with occasional leg pain bringing the rating to ten percent. Considered in the rating was claimant's excellent rehabilitation, excellent movement of the lumbar spine and her subjective and objective findings.

As to causation, the doctor testified:

> A. My opinion is that this patient sprained her ankle on November 28, 1982, that she was seen by Dr. Sprague who is quite a known man in Iowa City, and that she was examined and diagnosed with an ankle sprain; that she was seen here with a different set of symptoms involving pain in the leg and pain in the low back.
>
> ....
>
> Now, in summary, I would feel that I was receiving this patient in a remote time -- much later and I would think that at that time the symptoms that I have from her were certainly not the symptoms that Dr. Sprague listed in his report and his reason for treating this patient so I would say logically these set of symptoms were the ones that I was affronted with and I solved them medically.
>
> Now, how causally they could be connected as far as something that happened in the past I don't think is up to me because this has never been treated by myself as an accident. This has been treated by myself as a chronic illness with chronic symptoms with chronic disabilities with daily difficulties and has not in any way -- I have never attended this patient for any kind of an accident that she sustained. (Reinwein dep., p. 19 ll. 1-8, 25; p. 20 ll. 1-16)

Later he said:

> I can only speculate. I don't know these things. Nobody knows them. In other words, there is no way that it scientifically can be proven, but I will

answer that I am going to speculate on the basis of my own impression and my own experience in my lifetime, then I would say that what is the consensus by orthopedic surgeons is that these lesions produce when it occurs a breathtaking pain which is localized upon the lower lumbar spine, that this pain immobilizes the patient and leaves him exactly in the position in which he has to be now helped to move, that then it will be gradually relieved if he is placed on a hard object in a complete supine position for a longer period of time than two hours.

Now, this breathtaking pain which immobilizes a patient would be the most likely thing that would happen to a patient who ruptured a disc of the lower lumbar spine; however, since there are degrees of rupture, degrees of herniation as well as progression of herniation from a small one to a large one and they can occur, there are all kinds of variations here.

....

So this is all a matter really of speculation. I have no scientific proof that this patient could not have ruptured a disc by doing what she did. That is speculation based on my own -- what I see and what I hear. (Reinwein dep., p. 23 ll. 19-25; p. 24 ll. 1-16; p. 25 ll. 15-19)

Regarding the normal pattern for a herniated disc the doctor said:

As I stated, you would probably go from that acute stage into a subacute stage so if one person had a herniated disc and had immediate onset of pain, excruciating, breathtaking, immobilizing him, the acute stage would resolve itself into a subacute stage becoming a chronic daily fact of living.

If he goes for breakfast or whatever he is doing when he assumes weight bearing, the pain will recur and there will be some days bad and some days not as bad. That's a subacute stage and, of course, this is the first stage of the herniated disc that becomes so bad eventually there is no way the patient can escape the compression.

This patient, she came to me, I would classify her then as being in a subacute stage. In other words, in the stage that I am talking now with the pain off and on and there's no way that that pain is doing any better no matter who treats her and then she tries a chiropractor and she tries the M.D. and then she tries some other things and nothing helps and then she goes and the doctor tells her the way she explained it in her history there is something pressing on your nerve and you better see an orthopedic surgeon.

This is the subacute stage so this subacute stage would actually be the stage in which I met her because I have not treated her in the acute stages, you see.

Q. Did you determine from the history you obtained as to when, if ever, she had the acute stage?

A. Well, not really in the medical -- in my own experience the acute stage, this patient had related to the ankle and her foot and this is when she went to see not one, but two, three doctors and ended up in Iowa City and the conversation she had with Dr. Sprague was at the acute stage of the ankle and the foot and the advice of Dr. Sprague was the ankle and the foot ailment and this is what I don't have in my history is an acute stage, although as I told you, that an acute stage sometimes is just not there.

....

Now, this is what we are lacking in her case as far as if you want to be so really categorical about it, you don't really have that acute stage; but then as I stated, that does not really rule out the possibility because this is what I am talking about my own experience, my own speculation. They don't have the acute stage.

First of all, a lot of patients are not good historians and I would say the majority of them unfortunately are not good historians which already proves that he is not quite describing what happened to him two weeks ago so this is where we might not in a case like this really be so categorical.

But in my experience, the acute stage is not really there. I saw her in the subacute stage. (Reinwein dep., p. 31 ll. 21-25; p. 32 ll. 1-25; p. 33 ll. 1-13, ll. 18-25; p. 34 ll. 1-7)

Then he was asked:

Q. Could the incident she described of the spraining of her ankle and the twisting of her body as she noted it in her notes to you and the onset of symptoms some seven days later including not only the immediate ankle pain, but beginning of the leg pain and hip pain, could that be such an incident that may not have caused it, but have aggravated the incident that brought about the disc?

A. Yes, it could. (Reinwein dep., p. 34 ll. 19-25; p. 35 ll. 1-2)

He continued:

In other words, you really don't know the torque that can occur in that particular hundredth of a second upon the L-5, S-1 and you can be very surprised that that torque would be a lot more than you realize and I think this is a fact.

This can be aggravated. If there was a hernia there, it could be aggravated by that kind of a spill, by that type of accident. It most likely would be an extremely unusual thing that this really could cause something that we scientifically know that takes 1,500 pounds to move appreciably one vetebra [sic] from the other so you can see it on the x-ray. That's how many pounds you would need on a cadaver to move that.

How a person could cross a puddle and have that happen to her is pretty much beyond belief. The aggravation of a disc that is weak there could have been occurring. (Reinwein dep., p. 35 ll. 22-25; p. 36 ll. 1-14)

Thomas B. Summers, M.D., board certified neurologist, examained claimant on March 13, 1984 and took a history of claimant's fall on October 28, 1982 which was essentially that to which she testified at the time of hearing. On examination, claimant's right leg measured 33 centimeters while the left measured 32. Straight leg raising was positive at 70° on the right and 45° on the left. Claimant had good range of motion in her back. Sensory findings were normal. The left ankle jerk was somewhat diminished. Regarding his findings, the doctor noted some atrophy in the leg and some irritation of the nerve in the lower spine.

In addition to the material he obtained from his own examination, Dr. Summers had letters from Drs. Sprague, Hanssen, Reinwein and Odell.

Dr. Summers expressed his opinion on causation as follows:

It was my feeling that as a result of the accidental fall on October 28, 1982, Ms. Ziegenhorn had subsequently developed a herniated intervertebral disk. That is a ruptured disk in her lower spine. That had caused her to have back pain and lower extremity pain and all of the symptoms which ultimately led up to her surgical treatment. (Summers dep., p. 13 ll. 9-16)

He said that the delay between the injury and back problem was "not uncommon." He thought that earlier injuries "play very little" in claimant's present problem as they were minor and mild, did respond to chiropractic treatment, and did not necessitate hospitalization or intensive treatment. Neither did he find it uncommon for someone to work for a month and a half to two months post-injury.

The neurologist rated claimant's impairment at fifteen percent observing that claimant's ability to stoop, bend and lift will be hampered or restricted as a consequence of the impairment. The doctor felt claimant should avoid stooping, bending and lifting in excess of fifteen to twenty pounds.

The witness said he would be more concerned about a fall or being thrown from a horse than with actual horseback riding.

APPLICABLE LAW AND ANALYSIS

The major question in this case is whether claimant's stepping over a puddle on October 28, 1982 ultimately resulted in surgery to her back and a resultant disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 28, 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).

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).

Claimant had back trouble and sought chiropractic treatment from time to time before October 28, 1982. She observed, however, that her prior back complaints had not included pain radiating into her leg or an inability to straighten.

No records were offered from Dr. Olson who was the first physician claimant saw. Dr. Hanssen's records make no reference to radiating leg pain prior to October 28, 1982. When he saw claimant on December 7, 1982, she was complaining of left leg and low back pain. He interpreted her previous history as being one with "no major problems or disability." Records from claimant's family practitioner showed no treatment for her low back.

Dr. Sprague, whose specialty is the hand and upper extremity, saw claimant and issued a report which evidences examination of her ankle only.

Dr. Summers, who had the benefit of information from Drs. Sprague, Hanssen, Reinwein and Odell as well as his own examination, clearly makes a causal connection between the fall on October 28, 1982 and claimant's surgical treatment. Dr. Summers' evaluation of claimant's earlier injuries is convincing because he points out they did respond to treatment and did not necessitate either hospitalization or extensive care.

On first reading it seems Dr. Reinwein's testimony negates a causal relationship. Even if that were true, there is some substantial difficulty with the history on which the doctor based his opinion.

Dr. Reinwein assumed a history of a long standing complaint of low back disability radiating to the left lower extremity. That history is not supported by the other medical records presented nor by claimant's testimony. The doctor also said in his deposition that claimant had low back pain with her menstrual periods, but his hospital addendum included this statement: "There is no history of any disturbance in the gynecological history." Later it seems that he learned of the menstrual problem in October 1983. Claimant's testimony was that menstrual problems developed post-surgery. He also appears not to have considered the twisting which claimant said occurred when she sprained her ankle. He acknowledged that he did not have information about the extent of claimant's symptoms following horseback riding.

Dr. Reinwein was reluctant to consider his treatment of claimant as treatment for an accident. Seemingly, he considered himself to be treating claimant for chronic illness. Even the information provided to him by claimant herself does not support a chronic condition. He described what typically would happen in the case of a ruptured disc, but he vacillated in his testimony and acknowledged potential variations in the common pattern in that claimant might not have had an acute stage. He also agreed to the possibility of aggravation.

Based on the analysis of the medical evidence set out herein and on the record viewed as a whole, claimant has carried her burden of establishing a causal relationship between her fall on October 28, 1982, her subsequent back complaints, surgery and her present disability. Greater weight is being given to the opinion of Dr. Summers who had the most information regarding claimant's whole condition.

Claimant asks for healing period from February 18, 1983 to April 25, 1983 and that time will be awarded.

The remaining issue is claimant's entitlement to permanent partial disability.

As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 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 a younger worker with a good education. She has an established history as a worker whom at least one of her supervisors finds to be dependable and efficient. She has ten years' seniority in her present job. That position appears to be ideal for someone with a back condition. She does have a weight limitation and Dr. Summers suggested avoiding stooping, bending and lifting. None of these restrictions would seriously interfere with claimant's performance of her current job. She does not appear to have a reduction in actual earnings. She seems well motivated to continue working.

Balanced against all of these positive factors is the reality that claimant has had back surgery--an invasive procedure. She has made a good recovery although she continues to have some pain and stiffness from time to time. Claimant's functional impairment is in the five to fifteen percent range.

Based on the Iowa case law, the analysis included in this portion of the decision and the findings of fact set out below, claimant is determined to have a permanent partial industrial disability of twelve percent.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-three (33) years of age.

That claimant is a high school graduate who has spent a year in junior college learning secretarial skills.

That claimant has work experience as a secretary, secretary-receptionist, and secretary-bookkeeper.

That claimant's work experience for defendant employer which exceeds ten years has been as a lab technician.

That claimant's work involves lifting of light weights, standing and bending.

That claimant twisted her ankle in her employer's parking lot on October 28, 1982.

That claimant developed hip and leg pain.

That claimant got chiropractic treatment.

That claimant missed no work until December.

That on January 19, 1983 claimant had a discectomy at L5-S1 for an extruded disc.

That claimant returned to work on April 25, 1983.

That claimant is doing the same work she did prior to her injury.

That claimant has received raises.

That claimant's supervisor has noted no decrease in her efficiency.

That claimant has some stiffness and pain in her lower back.

That claimant's nonwork activities with her horse and on the farm have decreased.

That claimant had injuries to her back prior to October 28, 1982.

That injuries to claimant's back prior to October 28, 1982 had not resulted in pain into her legs or an inability to straighten.

That claimant's functional impairment is in the five to fifteen percent (5-15%) range.

That claimant should avoid stooping, bending and lifting in excess of fifteen to thirty-five (15-35) pounds.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence that her injury of October 28, 1982 is a cause of the disability on which she now bases her claim.

That claimant has shown entitlement to additional healing period from February 18, 1983 to April 25, 1983.

That claimant has proved a permanent partial disability of twelve percent (12%).

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant healing period benefits from February 18, 1983 to April 25, 1983 at a rate of two hundred fifty-five dollars and 98/100 dollars ($255.98).

That defendants pay unto claimant permanent partial disability benefits for sixty (60) weeks commencing on April 25, 1983 at a rate of two hundred fifty-five And 98/100 dollars ($255.98).

That defendants pay the following medical expenses:

Anesthesiology	$255.00
Dr. Reinwein	332.00

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 6 day of July, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

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Industrial Commissioner

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY L. ANDERSON,

Claimant,

vs.

COMMUNICATION SERVICES, INC.,

Employer,

and

WESTERN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 724421

A P P E A L

D E C I S I O N

FILED

NOV 2 1984

IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed September 17, 1984 the undersigned deputy industrial commissioner has been appointed under the provisions of Iowa Code section 86.3 to issue the final agency decision in this matter.

Claimant appeals from a decision filed July 26, 1984 which awarded him temporary total disability and medical expenses.

The record on appeal consists of the transcript of tne hearing; claimant's exhibits 1 and 2 and defendants' exhibits A through D. All evidence was considered in reaching this final agency decision which will be the same as that reached by the hearing deputy.

ISSUE

The issue on appeal as stated by claimant is as follows: "Is there a causal connection existing between the injury in Storm Lake, Iowa on June 29, 1982 and any permanent disability he now suffers?"

STATEMENT OF THE CASE

Twenty-five year old divorced claimant, a high school dropout who obtained his GED in the spring of 1984, testified to initial work experience as a delivery person and as a city employee laying concrete and running heavy equipment. He began work for defendant employer in December of 1979 as a builder of microwave tower systems.

Claimant indicated that he had a car accident in 1975 which resulted in a fractured vertebra. He was placed in a body cast. He denied back problems after the cast was removed. Claimant also denied missing work or having back trouble while working for defendant employer other than a pulled muscle which he said did not keep him from working. He had chiropractic treatments from Dr. Sprague for two weeks prior to his June incident. At that time he felt no problems which prevented his working.

Defendant employer is located in Sioux City. The road foreman would talk to Jerry O'Connor from the road site where the workers were working to learn what they were to do.

Claimant recalled the circumstances of his injury as follows: It was his first day back at work after being off for two and a half weeks. He was sent to Storm Lake by Jerry O'Connor. Larry Keating was with him. They were to assemble tower sections. He was "standing kitty-corner to the back of the truck trying to balance some steel that was hung up on the ground." The truck was a flatbed with an A-frame. Keating was running the winch truck. When the steel got hung up, he yelled to Keating to stop raising it, but Keating did not hear. The steel popped loose and struck his mid section. His body snapped backward. His feet hung toward the ground. His lower back was on the bed of the truck. He lost his breath. He rolled to the ground. He had severe pain in his lower back and stomach. After a half hour he was able to continue with an hour's work. He had "really bad, horrible" back pains unlike those he had felt before. He and Keating drove to Sioux City. He stayed at home for about two hours and then went to the hospital.

He was admitted to the hospital where he was treated by Dr. Wolpert for stomach pain and by Dr. Paulsrud for lower back pain. He was released from the hospital, but then he went back in. Claimant said that he continued to have severe lower back pain and to complain of a nerve in his leg. He eventually told Jerry O'Connor he was going to another doctor. He saw Dr. Dougherty on August 31, 1982. He was released to return to work on September 7, 1982.

Claimant reported that he went back to work, but he was still being treated by Dr. Dougherty who gave him a back brace, suggested light work and told him not to lift. According to claimant, O'Connor was told of the restrictions but he did not provide light duty and claimant did his regular job.

Claimant worked until November 23 and treated with Dr. Dougherty. He said O'Connor was aware he was seeing the doctor and did not tell him not to do so. He stated that during this time he had trouble carrying steel and lifting tower legs. He remembered the events in November thusly: He was doing ground work. His back locked. He had shooting pain down his leg. His back "just totally went out." He was unable to get to his feet. He went to Dr. Dougherty who performed surgery.

A second surgery was done in June of 1983.

Claimant returned to the hospital on December 8, 1983 after experiencing a pop in his back when he got out of bed to go to the bathroom. He did not think that he had been drunk the night before and he denied having an accident. Claimant testified that he told the doctor the muscle spasms he was experiencing at that time stemmed from his injury at Storm Lake.

Claimant indicated that Dr. Dougherty has not released him to return to work. He believed his condition to be ten percent better. He did not feel he could go back to the work he had been doing. He complained of pain in his lower back and right leg which keeps him from lifting or from sitting or standing for a long period. He uses traction four hours each day.

Claimant said both that he was off work and that he missed no work from June 11, 1982 to June 28, 1982 because he was seeing Dr. Sprague for his back as he felt he had pulled a muscle doing some work with a comealong. He initially experienced back pain in April or May. His pain was in the same area as that he injured. Claimant did not remember doing anything other than some fishing during the time he was treated. He saw Dr. Sprague who released him. He did not contemplate seeing the doctor thereafter. Claimant denied hurting his back in Texarkana when he fell from a barstool. He said rather that it was his hand that had been hurt. He also denied complaining to his coworkers of his back off and on during the preceding three or four years.

On September 1, 1982 claimant had another car accident which did not result in any medical treatment, but which wrecked his car.

Claimant stated that he had not attempted to find work since January 1, 1984 because the doctor has not released him. Neither has he talked to O'Connor about light work.

Claimant agreed that when he discussed going to see Dr. Dougherty with O'Connor he did not mention a workers' compensation claim. He denied that his main complaints when he talked to O'Connor were of his stomach. Claimant indicated that he was given permission by O'Connor to see Dr. Dougherty.

Claimant was unaware of Dr. Paulsrud's reporting he was able to perform orthopedic tests normally without pain. Claimant did know Dr. Paulsrud could find nothing objective. Claimant said he did not report to Dr. Dougherty a two year history of back pain; but he did tell the doctor he had been seeing a chiropractor in June and that he had been released by Drs. Paulsrud, Wolpert and Sprague.

Claimant reported that he is planning to take the A.C.T. tests with the hope of training as a surgical technician or for some field that would not involve much lifting.

On rebuttal claimant testified that when he got a letter from the insurance carrier he called Beverly Kapsch and she told him that she would look into the situation. He claimed he told her at that time that O'Connor knew he was changing doctors and that he was dissatisfied with Dr. Paulsrud.

Beverly Kapsch, insurance clerk for the insurance company who handled claimant's file, testified to paying medical expenses to Drs. Ashmore, Wolpert and Paulsrud and nine weeks of temporary total benefits terminating on September 1 when claimant was released by Dr. Paulsrud. Later she received a bill from Dr. Dougherty. She attempted to get a report from the doctor. When none was forthcoming, she denied payment.

Kapsch indicated she was never contacted by claimant regarding changing physicians. Neither was she aware of claimant's contacting her insured and expressing dissatisfaction. She had no information that claimant intended to change physicians. The witness replied "no" when she was asked if she tried to contact either claimant or her insured after receiving the bill from Dr. Dougherty. Kapsch denied being called by claimant about the letter she sent or having any other communication with him regarding the letter. Neither had claimant conveyed dissatisfaction with Dr. Paulsrud.

David G. Paulsrud, M.D., board certified orthopedic surgeon, first saw claimant on July 20, 1982 at which time he complained of being squeezed between a vehicle and a structure about three weeks before. Claimant told of being seen by Drs. Wolpert and Ashmore. He complained of low back and mid back pain worsened by sitting. He occasionally had radiation to the right thigh. Claimant reported having a prior fracture to the thoracic area of his back six years before in an auto accident and having occasional back pain since then.

On examination claimant had tenderness at the top of the lumbar spine at about the mid portion of the back with tightness producing increased lumbar lordosis. X-rays were reviewed which the doctor believed showed a healed compression fracture of the thoracic spine.

Claimant on a visit the following day was found to have anterior abdominal pain with tenderness in the left upper abdomen.

Dr. Paulsrud concluded claimant had a soft tissue back injury. Claimant did not return for a scheduled follow-up visit one month later, but he was seen in the outpatient department on August 27.

At that time he complained of low back pain and spasms. There was satisfactory motion in the spine with no spasm in the muscles. Straight leg raising and claimant's neurologicals were within normal limits. X-rays were unchanged. Claimant was told he could return to work as long as he did not do heavy (over twenty-five or thirty pounds) or repetitive lifting. The doctor then testified that claimant was returned to work in the first part of September and later that his temporary total disability lasted until September 1. He did not know if claimant had gone back to his job.

Compression of the sixth thoracic vertebrae was attributed to the 1975 car accident. The witness did not expect permanency attributable to claimant's most recent injury. Dr. Paulsrud said claimant was partially impaired during the period in which he saw him and partially impaired for a time thereafter with injuries such as his taking from eight to twelve weeks to heal.

John J. Dougherty, M.D., board certified orthopedic surgeon, first saw claimant on May 1, 1975 for injuries from an automobile accident. Claimant had wedging at D6 at that time, a mild compression fracture and an S-shaped scoliosis.

Claimant was next seen on August 31, 1982 at which time he complained of low back and right upper leg pain which felt like a pulling in his low back. Claimant reported a popping in his back with bending which had been present for two months. Claimant told of occasional pain into the scapula and into the posterior thigh on the right. He gave a history of trouble for two years and of hurting his back two months before when he was pinned between a truck and steel. He told of being off work for two months the preceding April when he could hardly bend. He underwent chiropractic treatment.

On examination claimant was bothered by the jolt test. Squatting troubled his back. Claimant was tender in the lower lumbar spine to the right of midline at L5, S1. Percussion gave claimant discomfort but no significant muscle spasm. Dr. Dougherty suspected either a fracture of L5 or spina bifida occulta. No definite determination of fracture was ever made. Claimant's scoliosis was thought to be probably developmental. Claimant was placed on exercise and told to try to go back to work and to return if he had problems.

Claimant returned on November 4, 1982 and said that he had been doing some work. He had pain in his low back with coughing and sneezing. He had aching in his leg and thigh. He was bothered by sitting. He was given a back support.

Claimant was back on November 24, 1982 saying that his condition was worse and that he could hardly stand working. Claimant held his back stiffly and there was question that his right Achilles reflex was diminished.

Claimant was hospitalized on November 29, 1982, placed in traction and given physiotherapy. A myelogram was done on December 2, 1982 which showed tenuation of the nerve root at L5, S1. There was also posterior narrowing at L5, S1. Claimant's condition was found compatible with a herniated disc. Surgery was carried out the following day with a hemilaminectomy at L5 and a posterior lateral fusion from L5 to S1.

Claimant was dismissed from the hospital on December 17, 1982 with a back brace and instructed not to lift, bend or drive a car. Claimant was continued in his brace on his one month follow-up.

Claimant was seen in March. He was tender over the midline and at his donor site. His right Achilles was still decreased. Straight leg raising troubled him.

Claimant was back on April 28, 1983 and told of pain from his leg up into his back and stomach. On forward bending his back was tight. Straight leg raising was restricted bilaterally. X-rays showed the fusion looking solid. Claimant was started on exercises and told to wean himself from the brace.

Claimant was next examined on May 19, 1983 at which time he walked with a hyperextended back. Bending gave him discomfort. He was tender over his right ilium. Straight leg raising had improved. Claimant's back muscles were tight.

Claimant had an electromyography on June 2, 1983 which was consistent with an S1 and S2 radiculopathy on the right. The electromyography was followed by another myelogram which seemed to reveal a problem at L4-5. A CT scan was compatible with a disc at L4-5.

An epidural flood was tried.

Claimant had another surgery on June 20, 1983 involving a hemilaminectomy at L4-5. Claimant was placed in a brace.

Claimant remained stiff on July 21, 1983 and it was decided he should soak in the tub before bed. On his next visit, claimant was moving better and he was advised to start weaning himself from the brace. By September 12, 1983 claimant was able to walk and squat without too much difficulty. He had some cramping in both his right and his left legs. Straight leg raising on the left was tight. Claimant was instructed to jog and to exercise more. The next month claimant had muscle tightness on the right. He did not reverse his curve well. Claimant told the doctor that he was helping his father around the house. Claimant was told to exercise. By year's end claimant was complaining of pain and of difficulty doing exercises. He was troubled both by standing and sitting and by a pinching in the low back. There was tightness in the back which the doctor did not think was true muscle spasm. The doctor considered fibrosis in the paraspinous muscles. X-rays showed some overriding of the facets. Claimant asked about going to Iowa City for an evaluation and Dr. Dougherty agreed to cooperate in obtaining an appointment. Claimant was told to continue using his back support and doing his exercises.

Claimant was admitted to the hospital on December 8, 1983 with complaints of back and leg pain particularly on the right. Claimant was placed on bedrest and put into traction. A Minnesota Multiphasic Personality Inventory was done which revealed elevation of the hypochondriasis, depression and hysterical scales. A myelogram showed the nerve root at L4-5 to be well filled. Repeat electromyography indicated no further deterioration in claimant's condition. There was some denervation activity consistent with a partial S1, S2 radiculopathy. Claimant was dismissed on December 18, 1983 to use home traction, his back support, medication and a TENS.

When claimant was seen on January 4, 1984 the TENS did not seem to be helping him. Later in the month claimant's back remained tight. Claimant was tender in the posterior thigh. Claimant's facet joints were injected with local anesthetic and some cortisone. Claimant's medication was changed.

At the time of his first deposition on February 1, 1984, Dr. Dougherty said he would not be adverse to claimant's doing something light which would not entail heavy lifting or a lot of bending or significant carrying and allowed claimant to change position. At the time of his second deposition, the doctor said claimant could do lighter work, but not carrying steel and climbing. Ultimately the doctor said that claimant has not been released for return to work.

Dr. Dougherty was asked about claimant's preexisting problems:

> Q. All right. Your third page of that report of '83 -- '82 you state, I don't know the connection between the fact that he has had problems apparently for two years and then he gets crushed. What's your thinking making that statement?
>
> . . . .
>
> A. I don't know the connection between the fact that he had problems apparently for two years and then gets crushed. Well, apparently he's had trouble before. Okay. Now he gets crushed, and he's got more trouble. Okay. I mean how much of the trouble that I was seeing him for was a result of the crush, and how much was a result of problems he had before?
>
> Q. You never made a determination as far as how much of this was caused by this June injury of '82 and how much had preceded that injury?
>
> . . . .
>
> A. I don't know. I don't know. I mean, that's -- I guess that's -- I guess that's the statement there -- is how do you tell?
>
> . . . .
>
> A. And apparently the one one -- well, at least the only one I know is he saw Dr. Sprague when he came back from Texas. I'm not sure -- and I must -- I suppose I didn't ask him this specifically -- I'm not sure if he -- if he had really been going to any doctors. And I don't know if he had one specific incident before. All I know is that his back had been bothering him for a while and apparently it started giving him more trouble when he was in Texas in April. (Dougherty dep., April 4, 1984 p. 13 ll. 4-8, 13-22 and 25, p. 14 ll. 1-2 and 4-12)

Dr. Dougherty at one point made a causal connection between claimant's incident in June of 1982 and the treatment he had ordered. He testified:

> Q. Would that physical trauma likely be the cause of a disk problem in the lower back?
>
> A. I think it could be. Because I don't think we really know what causes disks.
>
> Q. It is true that disk herniations generally occur from improper bending or lifting, don't they?
>
> A. The only thing I can say is you don't have a disk herniation until you have a tear in the annulus -- the annulus being the tough fibrous tissue that surrounds the disk nucleus pulposus and keeps it in place. Now, you got to have a tear -- you got to have a rent -- which is the same as a

tear -- in this to allow this herniated -- nucleus pulposus to extrude or come out. Now, how you get that, I don't know. And I don't think anybody knows. Whether this is congenital weakness, how do you know? Whether it's a one incident affair, whether it's an ongoing thing that has -- due to heavy lifting or whatever -- has slowly caused this tear, I don't know. And I don't think anybody knows.

Q. But the tear of the annulus can occur by simple external trauma in your view?

A. I would say that -- Well, in order to try to -- to, say, analyze the mechanism of injury, I would wonder if -- you know, where -- you know, blunt trauma from side to side or front to back -- you know, if it caused him an acute flexion or acute twisting or something, I think that is a possibility. I don't -- I don't know if -- if -- I guess -- I guess I don't know how it happens. And I don't know anybody that knows how it happens.

Q. Okay. Is it fair to say, though, that a disk is not likely to herniate simply from an external blow to the spinal area?

A. I think that it's a possibility. I suppose if -- if at the time -- you know, if at the time you would get an acute flexion or extension -- probably flexion maybe -- injury where all the force is dissipated at one level.

Q. So some bodily response to a blow could cause the annulus to rupture?

A. You got tough questions. And I don't think there's an answer to these questions. In other words -- in other words, I don't think -- to my knowledge -- that anybody can tell you exactly what mechanism of injury causes this. And is it one incident, or is it a combination of -- repeated trauma, I don't know. I think that people who get backaches can have -- can have -- and I've always been going to tear these articles out -- but you can read articles by well-thought of supposedly authorities on the subject --

Q. Uh-huh.

A. -- and they tell you that many times -- There are many causes of backache, and I don't think that you can say. Now, I feel that at times some of these guys are probably getting problems -- the pain in their back may be associated with a tear in the annulus. They don't have any symptoms of a herniated disk. They just got pain in their back. But that may be the first insult. Now, the next insult comes along and you may get a little bit more of a tear. If you haven't insulted it in the interval, maybe you heal that. If you've healed it though, I think it's a weak area. Maybe another insult comes along and you get a little bit more of a tear. (Dougherty dep., April 4, 1984, pp. 42-44, ll. 6-25, 1-25 and 1-17)

he physician was unable to say what the origin was of the arrowing at L5 and S1. Later he was asked: "Q. And you've lready stated that you felt that the incident in Storm Lake ontributed to it? A. I think it could have, yes." (Dougherty ep., April 4, 1984, p. 58 ll. 12-14)

Dr. Dougherty expressed the opinion that "anyone that has ad surgery probably should be limited somewhat." He explained:

> So I guess I feel that even though he did well and even though someone gets a solid fusion, then -- then I always suggest that they just always think about their back and not go whole hog. That doesn't mean to say that they need to have their -- be restricted particularly, but I think it means that they shouldn't be out lifting weights and lifting as much as they can. Now, it may not hurt them. But I think that some people's backs bascially may not be as good as somebody else's; and so, why ask for trouble. And if you do a fusion at one level, then, of course, it transmits more motion and more stress on the next level up, which didn't have as much as stress before. (Dougherty dep., April 4, 1984, pp. 21-22 ll. 19-25 and 1-6)

s an impairment from claimant surgeries, the doctor assessed ifteen percent and then twenty percent more.

APPLICABLE LAW AND ANALYSIS

The hearing deputy in this matter found an injury arising ut of and in the course of claimant's employment which caused a aterial aggravation of claimant's preexisting condition and hich resulted in temporary total disability only. Claimant hallenges the deputy's failure to conclude that he has permanent isability as a result of injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 29, 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).

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.

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, 252 Iowa 613, 620, 106 N.W.2d 59.

Claimant had a compression fracture of his sixth thoracic vertebra in a car accident in 1975. From June 11, 1982 to June 28, 1982 claimant underwent chiropractic treatments for his back. It was on his first day back at work that the injury claimed herein occurred.

Dr. Paulsrud first treated claimant nearly a month after the accident. He diagnosed a resolving low back strain which he did not think would result in permanency. Claimant told of pain which occasionally radiated to the right thigh. Claimant's tenderness at the time of his examination was at the top of the lumbar spine. When claimant was examined in late August, his examination and neurological were within normal limits.

Dr. Dougherty first saw claimant two months after his injury at which time he complained of his low back and right leg. When Dr. Dougherty was deposed by claimant he said claimant's pain had been troubling him for two months. When he was deposed by defendants, he agreed that his report said that claimant had been bothered by pain for two years. The orthopedist was unsure of the etiology of claimant's pain. He noted that claimant has a congenital scoliosis and spina bifida occulta. The doctor knew of claimant's automobile accident and additionally learned that claimant had difficulty in Texas in April which rendered him unable to bend over. Claimant's examination was essentially unremarkable and he was placed on exercises. Later a back brace was prescribed.

Claimant testified to a second work incident in November. It was after that time that he returned to Dr. Dougherty and was hospitalized. A hemilaminectomy at L5, S1 and a posterior lateral fusion from L5 to S1 was done. Later a hemilaminectomy with removal of a herniated disc was performed at L4-5.

When claimant took Dr. Dougherty's deposition, he asked: "And the last, do you have an opinion, based upon reasonable medical certainty, as to the cause of his problems which he is having which you've told us about?" He responded: "Well, it appears to be that the incident of somewhere around June of '82 when apparently he got pinned between some steel and a truck." When he was deposed by defendants he was asked: "Would that physical trauma [the incident of June 20, 1982] likely be the cause of a disc problem in the lower back?" He said: "I think it could be. Because I don't think we really know what causes discs." He concluded:

> The only thing I can say is you don't have a disk herniation until you have a tear in the annulus -- the annulus being the tough fibrous tissue that surrounds the disk nucleus pulposus and keeps it in place. Now, you got to have a tear -- you got to have a rent -- which is the same as a tear -- in this to allow this herniated -- nucleus puplposus to extrude or come out. Now, how you get that, I don't know. And I don't think anybody knows. Whether this is congenital weakness, how do you know? Whether it's a one incident affair, whether it's an ongoing thing that has -- due to heavy lifting or whatever -- has slowly caused this tear, I don't know. And I don't think anybody knows. (Dougherty dep., p. 42 ll. 12-24)

He said it would be possible for a herniation to occur with an external blow and he thought it would be more probable with flexion if the force was dissipated at one level.

There is some evidence in this record to support claimant's claim. As claimant points out, his burden is a preponderance and while absolute certainty is not necessary, a probability is required. Claimant also suggests that the probability can be inferred by combining the expert testimony of possibility with nonexpert testimony the condition did not exist before the occurrence of the situation alleged to be the cause. Although that proposition of law is correct, the evidence in this matter is that claimant did have back problems and congenital conditions

before the June 29, 1982 incident; and, in fact, he had been treated for back trouble immediately prior to his accident.

The record viewed as a whole will not support a finding of a causal relationship between the injury of June 29, 1982 and any disability claimant now suffers. Claimant had a preexisting scoliosis and spina bifida occulta. Claimant reported to Dr. Paulsrud occasional backaches since his accident in 1975. As the hearing deputy noted, claimant attempted to minimize his back problems in the spring of 1982, but at the same time told the doctor he could scarcely bend. When claimant was seen by Dr. Paulsrud, tenderness was found at the top of the lumbar spine. Claimant's subsequent surgery was in the lower spine. Both Drs. Paulsrud and Dougherty thought claimant able to perform work in early September. Claimant did, in fact, continue to work to the end of November. Claimant's evidence on causation does not rise above a possibility and does not show the incident of June 29, 1982 to have been a substantial factor in bringing about the herniated disc which led to claimant's surgery.

Claimant seeks a liberal construction of the workers' compensation law. It is important to recognize that it is the law and not the facts which is entitled to the liberal construction.

The hearing deputy's award of medical benefits under Iowa Code section 85.27 also will be affirmed. Claimant testified that he told his employer he was going to Dr. Dougherty and that testimony stands unrebutted. The hearing deputy allowed payment of the doctor's charge of $253.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-five years of age.

That claimant has a GED.

That claimant had work experience as a delivery person and a city employee prior to beginning work for defendant employer in 1979.

That claimant had a car accident in 1975.

That claimant has a congenital scoliosis and a spina bifida occulta.

That claimant was treated for his back from June 11, 1982 to June 28, 1982.

That on June 29, 1982 claimant was injured when he was struck in the mid section and had his body snapped back.

That the injury of June 29, 1982 involved claimant's abdomen and low back.

That the injury of June 29, 1982 materially aggravated claimant's previous back condition.

That the aggravation was temporary in nature.

That claimant was hospitalized following the incident and treated for stomach and low back pain.

That claimant was released to return to work on September 7, 1982.

That claimant did his regular job when he returned to work.

That claimant continued to work until November 23, 1982 at which time he had an episode in which his back tightened.

That claimant had a hemilaminectomy at L5-S1 and a posterior lateral fusion from L5 to S1.

That claimant had a second back surgery at L4-5.

That claimant continues to be treated by Dr. Dougherty and to use traction.

That claimant complains of pain in his lower back and right leg.

That claimant is unable to lift or to stand or to sit for long periods.

That claimant was notified by mail on November 18, 1982 that his treatment by Dr. Dougherty would no longer be authorized.

That claimant's rate of compensation is $125.74.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has proved by a preponderance of the evidence that he received an injury arising out of and in the course of his employment on June 29, 1982.

That claimant has proved by a preponderance of the evidence entitlement to temporary total disability from June 29, 1982 to September 7, 1982.

That claimant has failed to prove by a preponderance of the evidence a causal relationship between his injury of June 29, 1982 and any permanent partial disability he now may suffer.

That claimant's treatment in August of 1982 by Dr. Dougherty was authorized by his employer.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant weekly benefits at the rate of one hundred twenty-five and 74/100 dollars ($125.74) from June 29, 1982 to September 7, 1982.

That defendants be given credit for one thousand two hundred fifty-four and 60/100 dollars ($1,254.60) previously paid.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay charges of Dr. Dougherty totalling two hundred fifty-three dollars ($253).

That defendants pay costs of this action.

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

Signed and filed this 20 day of November, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PETER W. ARP,	:	
Claimant,	:	File No. 671795
vs.	:	
DEPARTMENT OF TRANSPORTATION,	:	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
STATE OF IOWA,	:	FILED
Insurance Carrier, Defendants.	:	OCT 15 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the Bicentennial Building in Davenport, Iowa, on December 22, 1983. The case was considered fully submitted at that time.

A review of the commissioner's file revealed that an employers first report of injury was filed on June 8, 1981. A memorandum of agreement calling for the payment of $185.95 in weekly compensation was filed on June 11, 1981. The record consists of the testimony of the claimant, Curtis Buck and Elna Arp; claimant's exhibits 1 through 8; and defendants' exhibits A, B and C.

ISSUE

The sole issue for resolution in this matter is the nature and extent of permanent partial disability.

STATEMENT OF THE EVIDENCE

Claimant, presently age 62, is married and dropped out of school in the ninth grade. He was a hired man on the farm until 1946 and farmed for himself between the years 1946 and 1961. In 1961 he started working for the state of Iowa as a truck driver for the department of transportation. He also was involved in a number of activities on and off the truck and divided his time between working by himself or with others as part of a crew.

Claimant testified that on May 27, 1981 he was shoveling the and off a bridge on Brady Street in Davenport, Iowa. Claimant as carrying a shovel to the end of the bridge and while walking as struck from the rear by a motorcycle. Claimant stated that he impact caused him to land on his shoulder and neck. Claimant as taken to the hospital where he was treated by Arthur M. Abramsohn, .O., his family physician. Claimant's main complaints were elated to a subcapital fracture of the right femoral. Dr. Abramsohn eferred claimant to Richard T. Beaty, D.O., an orthopedic urgeon who performed surgery on May 27, 1981 for an austinmoore rosthesis. Dr. Beaty reported that claimant did well post-peratively. Dr. Abramsohn was also treating claimant and noted nat claimant was having chronic bursitis of the right shoulder, rachial neuritis of the right arm and a gastric ulcer which he nought was stress-related. Claimant treated with Dr. Beaty for time, but his primary treating physician remained to be Dr. oramsohn. Claimant complained of some hip and back pain at the ime of hearing.

Claimant was released to return to work on November 1, 1981 nd did so but testified that his condition has become steadily orse. Claimant testified that when he puts in eight hours' ork he is "bushed."

In March 1983 claimant was seen by Steven R. Jarrett, M.D., Rock Island, Illinois. Examination by Dr. Jarrett revealed antalgic gait. Claimant had a healed surgical scar near the ight posterior and hip region. He had a fascial defect with enderness over the region of the fascial defect to palpation. e had no tenderness to palpation throughout the cervical spine lumbar spine. He had some mild discomfort and tightness of he upper trapezeii. He lacked five degrees of lateral rotation ilaterally, a finding which Dr. Jarrett thought was not signigicant n the 59 year old male. His lumbar spine was able to be orward flexed to 70° with excellent rounding; however, claimant acked a final 20° of flexion because of hip pain and not ecause of any intrinsic low back abnormality. He had full xtension and lateral flexion of the lumbar spine. Dr. Jarrett ote that claimant had a 24 percent impairment of the right ower extremity, which would translate into a ten percent whole an impairment. Dr. Jarrett felt that the problems regarding laimant's back, neck and shoulder are essentially those of iscomfort and not of weakness or reduced range. Therefore, he as unable to give an adequate rating to those areas.

In May 1983 defendants caused claimant to be evaluated at he Medical Occupation Evaluation Center, which is affiliated ith Mercy Hospital Medical Center, in Des Moines. The examination ook three days and the report of the examination was admitted s exhibit 7. An orthopedic surgeon, Bernard Hillyer, M.D., ndicated that claimant should consider a total hip replacement. . Hillyer thought that a total hip replacement would benefit laimant at that point in time. He felt that claimant had a 40 ercent impairment of the lower extremity. Range of motion ccounted for 19 percent impairment of the right lower extremity. Cybex test revealed a 24.23 percent impairment. A psychological valuation indicated that claimant had no psychological variables f significance in the causation or the exacerbation of the hysiological symptoms. The psychologist, Todd F. Hines, Ph.D, hought that claimant exhibited attitudinal factors which ometimes contributed to the experience of chronic pain. He hought that there was no evidence of significant anxiety or epression and that no psychological disorder was in evidence. he social workers' report was indicative of a well-balanced ersonality and a positive outlook on claimant's behalf. owever, it was felt that the stress which claimant was having ontributed to his ulcer, inability to sleep and increased moking. A vocational report that was included in the evaluation ndicates that claimant had been employed by the department of ransportation for a significant period of time, and it was ecommended that claimant continue with this employment. It was elt that claimant reached a state of maximum recuperation at he time of the evaluation. A later letter from Dr. Hillyer ndicated that a total hip replacement would decrease claimant's ain and increase his range of motion because it would give osthetic replacement for both the acetabular component and the emoral head. He felt that with the acetabular component and he femoral component in place, it would be easier for the laimant to bend over, straighten up and stand on his feet. his, in turn, would help decrease his pain.

Claimant testified that he was unwilling to undergo the rgery that was suggested because no guarantees were offered. laimant testified that he now has to sit on a heating pad in old weather because the metal device becomes cold. He cannot ear heavy shoes. Claimant testified that since he returned to rk he has been on pain pills. Some of this medication has en prescribed and some has not. Claimant testified that he s had ulcer problems since the injury and that he had not had cer problems before the injury.

On cross-examination, claimant readily admitted that the ployer has been cooperative in giving him work. He is still rking eight hours a day except for time off which he takes for eatment on Friday. He occasionally helps fill potholes at rk. He testified that he can drive for a half hour period. testified that he can get in and out of the cab of his truck d that he is able to walk. Claimant testified that if he were e person in charge of hiring at DOT, he would not hire a rson with his qualifications since he is not doing his job to s own satisfaction. Claimant testified that he doesn't want rgery unless it is absolutely necessary and he would at the esent time live with pain rather than have the surgery.

Claimant testified that he had some preexisting problems. These problems consisted of four hernias and some shoulder problem in 1976. Claimant stated that he had had some problem with his stomach attributable with nerves as a result of being main supervisor. Claimant readily admitted that he had planned to retire at age 65.

Claimant's wife, Elna, testified that claimant had more serious difficulties following the injury. She stated that claimant has shoulder problems and that he does not paint the ceiling or hoe the garden because of these problems.

Charles Buck, DOT area supervisor, indicated that claimant is an asphalt inspector and that claimant has never made any complaints to him regarding the job demands since the injury. The witness testified the claimant had been performing basically the same before as after the injury. Documentary evidence was introduced by way of testimony and the personnel records, indicating that claimant may have taken more sick leave prior to the injury in question.

Dr. Abramsohn testified by way of deposition in this case. He testified that he had treated claimant for many years prior to the injury in question. He testified that claimant suffered from stomach pains and ulcer caused by the injury in that claimant was unable to function in his job as well as before the injury. He stated that the reason for the gastric ulcer was stress. He quoted Dr. Beaty's opinion in that claimant should be rated at a ten percent permanent partial disability to the right hip only. The witness thought that claimant was more severely disabled than he would show by his actions. The witness stated that if a person were favoring a leg he would necessarily affect his lumbosacral area because of the disturbance to function in this area itself. He testified that claimant had a 50 percent loss of function due to the injury.

G. Brian Paprocki, is a vocational consultant in Rock Island, Illinois. He interviewed claimant in February and July 1983 and his report was admitted into evidence as exhibit 8. He noted that claimant's job history consisted of only two types of work--farming and department of transportation. Mr. Paprocki noted that claimant's current position did not provide any transferrable skills to alternative employment because the work was limited primarily to physical labor. It was noted that claimant did have some supervisory experience in the past and that he could on the face of matters perform these skills. However, the practical ability of claimant to do these tasks appears somewhat questionable in that claimant had stress problems when he was performing at that work. Claimant told Mr. Paprocki that his principal problem was the constant pain in the right hip and low back which appeared to be exacerbated by physical activity. Mr. Paprocki noted that the state had cooperated in allowing claimant to maintain his former level of employment and pay. He described this as quite admirable and out of the ordinary for most employers. He thought that claimant's physical activities, age and physical problems would preclude serious consideration for the numerous employment opportunities. He thought that claimant was 100 percent unemployable.

APPLICABLE LAW

1. Sections 85.3, 85.20 and 86.17 confer jurisdiction on 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 May 27, 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).

4. 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."

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, 257 (1963).

ANALYSIS

Based on the foregoing principles, it is found that claimant established his claim to permanent partial disability compensation.

Claimant's injury has been shown to be permanent. Claimant is in his sixties. He has been involved in manual labor all his life. The injury which caused the hip bone prosthesis to be installed caused permanent partial disability to the body as a whole. The effects of the injury extend beyond the leg and into the body as a whole. Claimant has had some increased medical problems which seemingly are increased by the injury. Claimant's ulcer problems are related to the injury in that the stress increased. However, the claimant's gastrointestinal problems affect claimant's industrial disability very little, if at all.

Claimant's previous jobs have been all physical in nature. Because of this, a severe trauma to the hip has a devastating effect on a person who is qualified for the rigors of manual labor only. Claimant has been fortunate in having an employer who hired him back at the same wage. Even though the employer might be bound by work rules common to the public sector, the effect is the same--an employer who hires back injured workers is not to be penalized for doing so for whatever reason. Even though claimant has returned to work, he has physical problems.

Claimant quit school in ninth grade. Considering the element of industrial disability, it is found that claimant's permanent partial disability for industrial purposes is 25 percent of the body as a whole.

FINDINGS OF FACT

1. Claimant was employed by the state of Iowa as a maintenance worker for the department of transportation on May 27, 1981.

2. Claimant was struck by a motorcycle while working on May 27, 1981.

3. Defendants filed a memorandum of agreement concerning a May 27, 1981 injury.

4. Claimant sustained permanent partial disability to the body as a whole as a result of the May 27, 1981 injury.

5. Claimant sustained a 25 percent permanent partial disability to the body as a whole as a result of the May 27, 1981 injury.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by defendant employer on May 27, 1981.

3. Claimant sustained an injury arising out of and in the course of his employment on May 27, 1981.

4. Defendants will be ordered to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability compensation at the rage of one hundred eighty-five and 95/100 dollars ($185.95) per week.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability compensation at the rate of one hundred eighty-five and 95/100 dollars ($185.95) per week.

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from the date of this decision.

Costs of this proceeding are taxed to defendants pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 15th day of October, 1984

Joseph M. Bauer
JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD BAILEY,	:	
Claimant,	:	File Nos. 719109
vs.	:	
NORTH AMERICAN VAN LINES, INC.,	:	ARBITRATION
Employer,	:	DECISION
and	:	FILED
LIBERTY MUTUAL INSURANCE COMPANY,	:	DEC 17 1984
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Donald Bailey, against North American Van Lines, Inc., employer, and Liberty Mutual Insurance Company, insurance carrier, for benefits as a result of injuries on April 7, 1981 and January 22, 1982. On July 21, 1983 this case was heard by the undersigned and was considered fully submitted upon completion of the hearing.

The record consists of the testimony of claimant and Richard Helstrom; claimant's exhibits 1 through 10; and defendants' exhibits A and B.

ISSUES

The issues presented by the parties at the time of the prehearing and the hearing are whether there is jurisdiction under section 85.71 of The Code and whether an employer-employee relationship exists.

FACTS PRESENTED

Claimant testified that he has lived in Alburnett, Iowa for seven years and in April of 1980 entered into a relationship with defendant of contract trucking where he would furnish the truck to pull defendant's trailer and defendant would dispatch.

Claimant testified that defendant would call him at his home and dispatch him somewhere to pick up a trailer. Claimant would drive his truck from his home and would sometimes pick up loads or deliver them in the state of Iowa. Claimant stated he receives his commission statements at his home as well as all other correspondence from defendant. Claimant indicated that defendant directed him to different parts of the country and would pay him according to the shortest route. Claimant revealed that defendant did not tell him how to get there.

On cross-examination, claimant stated that he went to Indiana to execute the contract he has with defendant. Claimant revealed that he could go any route he desired and could choose when to deliver the goods as long as he met the delivery date. Claimant disclosed that he hired someone to drive with him and that the other driver was his employee. Claimant knew he was to furnish the tractor, maintain it and the other equipment, hire other help and pay the operating costs. Claimant indicated that he repaired his truck or paid to have it repaired and bought all required safety equipment. Claimant bought his fuel, oil, tires, base plates and permits. Claimant disclosed that he determined how long he would drive and when he would drive.

Richard Helstrom testified he is a vice president with defendant and is also an attorney. Mr. Helstrom stated that defendant has no offices in Iowa, but has what he called agencies within Iowa which have contracted with defendant to lease vehicles, solicit business and provide for storage. Mr. Helstrom disclosed that they do not pay social security or withholding on claimant.

On cross-examination, Mr. Helstrom stated that defendant requires claimant to get workers' compensation insurance.

APPLICABLE LAW

Section 85.71 states:

> If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this chapter, provided that at the time of such injury:
>
> 1. His employment is principally localized in this state, that is, his employer has a place of business in this or some other state and he regularly

works in this state, or if he is domiciled in this state, or

2. He is working under a contract of hire made in this state in employment not principally localized in any state, or

3. He is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to his employer, or

4. He is working under a contract of hire made in this state for employment outside the United States.

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment, section 85.3(1).

Iowa Code section 85.61 defines the terms "worker" or "employee" as a person who has entered into the employment or works under contract of service, express or implied, or apprentice ship, for an employer.

Claimant has the burden of showing an employer-employee relationship. However, once a claimant has established a prima facie case the defendant then has the burden of going forward with the evidence and overcoming or rebutting the case made by claimant. The defendant must establish an affirmative defense, such as independent contractor, by a preponderance of evidence Nelson v. Cities Service Oil Co., 295 Iowa 1209, 146 N.W.2d 261 (1967). Should it be found that claimant has made a prima facie showing that he is an employee it will be incumbent upon the defendant to establish by a preponderance of evidence that claimant is an independent contractor.

The Iowa Supreme Court has recognized five factors in determining whether or not an employer-employee relationship exists. (1) The right of selection or to employ at will. (2) Responsibility for the payment of wages by the employer. (3) The right to discharge or terminate the relationship. (4) The right to control the work. (5) Is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed. The court has also looked to the intentions of the parties, but this criteria is viewed only in conjunction with the above criteria and serves as an aiding rather than a determinative element. Id.

The following are the recognized tests for an independent contractor: (1) The existence of a contract for the performance by a person of a certain kind of work at a fixed price; (2) The independent nature of the person's business or of the person's distinct calling; (3) The person's employment of assistants with the right to supervise their activities; (4) The person's obligation to furnish necessary tools, supplies and materials; (5) The person's right to control the progress of the work, except as to the final results; (6) The time for which a person is employed (7) The method of payment, whether by time or by job, and (8) Whether the work is part of the regular business of the employer. Id.

ANALYSIS

Claimant has met his burden in proving that the state of Iowa has jurisdiction to determine whether or not he is entitled to benefits. The only paragraph of 85.71 that could apply to claimant is paragraph number one. Claimant indicated that he resides in this state and regularly works in this state for defendant.

The greater weight of evidence indicates that claimant is not defendant's employee, but an independent contractor. The defendant and claimant have a very specific contract that clearly indicates the parties' intentions of making claimant an independent contractor. Such a contract is not controlling, but is one factor which may be looked at in determining whether or not an independent contractor situation exists. As indicated by claimant, he furnishes the tractor and safety equipment that is required. Claimant gets paid by the mile (the shortest distance), but is responsible for operating expenses as well as deciding which route he wishes to take. Claimant disclosed that he could choose when to deliver just as long as the shipment was received by the delivery date. Claimant also disclosed that he could hire other people to help him, but such expense was his. These factors clearly indicate that claimant is, in fact, an independent contractor.

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. The contract entered into by claimant and defendant was executed in the state of Indiana.

FINDING 2. Claimant is domiciled in the state of Iowa.

FINDING 3. Claimant regularly works for defendant driving in the state of Iowa.

FINDING 4. Claimant receives his instructions and other business mail at his residence here in Iowa.

CONCLUSION A. The state of Iowa has jurisdiction to determine if defendant is liable for workers' compensation benefits.

FINDING 5. Claimant gets paid by the shortest mileage from one point to another.

FINDING 6. Claimant furnishes the tractor he drives and his safety equipment.

FINDING 7. Claimant is responsible for the maintenance of his tractor and operating expenses.

FINDING 8. Claimant decides when he is going to drive and his route.

FINDING 9. Claimant can hire assistants, but is responsible for their expenses.

FINDING 10. The contract claimant entered into states claimant is an independent contractor.

FINDING 11. Claimant is an independent contractor.

CONCLUSION B. The greater weight of evidence indicates that claimant is an independent contractor and not defendant's employee.

THEREFORE, IT IS ORDERED that claimant is to take nothing as a result of this action.

Costs of this action are taxed to claimant.

Signed and filed this 17th day of December, 1984.

David E. Linquist

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONNA J. BAKER, Claimant, vs. IOWA DEPARTMENT OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 676618 R E V I E W - R E O P E N I N G D E C I S I O N

FILED
DEC 12 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening filed by Donna J. Baker, claimant, against the Iowa Department of Transportation, employer, and the State of Iowa, insurance carrier, for benefits as the result of an alleged injury on July 1, 1981. The matter was heard before the undersigned on September 12, 1984. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant; and joint exhibits A through M.

ISSUES

At the time of the hearing the parties stipulated that the claimant's rate of compensation in the event of an award is $138.68; that the claimant did receive an injury on July 1, 1981; that the claimant returned to work following the injury on July 20, 1981 and then was off work again from July 28, 1981 to August 12, 1981. The parties further stipulated that all healing period benefits have been paid and, thus, the issues to be resolved at this hearing are whether or not there is a causal relationship between the injury and the disability upon which this claim is based and the extent, if any, of permanent partial disability to which the claimant is entitled.

EVIDENCE PRESENTED

Claimant, age 38, testified that she has been married for 16

years. She had three children as a result of this marriage, all of whom are minors. She advised that her husband is unemployed due to a disability resulting from polio at a young age. She said that he was last gainfully employed in 1982.

Claimant testified that she is a graduate of high school. She also said that she obtained a license in cosmetology in 1974. Claimant stated that she has never practiced cosmetology and did not believe at this time that she could due to the nature and extent of her injuries.

Claimant testified that she received an injury on July 1, 1981 when she was working as a toll taker at a bridge crossing the Mississippi River in Clinton, Iowa. She received an injury when an intoxicated driver struck the toll booth in which she was housed. She said she was taken to the hospital by coemployees where she was examined and released. She said that she was suffering at that time from a severe headache and soreness over her entire body. She was off work for some time and then returned for approximately two weeks, but continued to suffer problems. She was again off work until August 12, 1981. Although she continued to suffer pain, she worked in the toll booth until December 1982 when the state of Iowa decided to no longer collect toll across the bridge and she was, therefore, laid off.

Claimant testified that prior to the injury of July 1, 1981, she did not have any problems with her cervical area or pain in her shoulders. She stated that she has had continuous pain since the date of the injury and presently needs help getting dressed and has several physical restrictions imposed upon her. She said she continues to take medication to help control pain in her neck and shoulder. She advised that the amount or degree of pain is relative to the level of activities which she performs during the course of the day. Claimant said she continues to require physical therapy on occasion to help relieve cervical and shoulder pain.

Claimant testified that she has in the past been employed in a furniture factory where she sewed cushions; she has been a waitress and a farm worker. She stated that she does not believe she could perform any of those activities at the present time. She stated she has sought employment but has been unable to find any. She indicated that she would like to become employed and that if she had a job offered she would attempt to do it and work around her limitations.

Claimant's deposition was submitted into the record as defendants' exhibit H. In that deposition claimant goes into greater detail concerning the circumstances of her injury and the complications which resulted therefrom. Claimant was quite candid in explaining the types of problems which she suffers as a result of her injury. Claimant described her pain as intermittent and said that some times she was better than at other times. She indicated that she suffers most when she uses her left arm for repeated motion or lifting objects. She outlined a number of activities that she could do prior to the injury which she can no longer do. Claimant also explained that she continues to do a number of activities even though they cause her pain simply because she refuses to succumb to the pain. In addition, claimant explained in considerable detail her efforts to find employment. Claimant has been to numerous locations seeking employment and indicated that she would attempt any job which was offered to her. She believed that she would be able to work even with the pain since she was able to do so with the defendant after her injury.

Pamela Hirshberg testified by way of deposition which was submitted as joint exhibit I. Ms. Hirshberg testified that she is employed by the International Rehabilitation Associates as a vocational rehabilitation counselor. She outlined her education and work experience and indicated that she is a certified rehabilitation counselor. Ms. Hirshberg testified that she took a history of the claimant which included her educational background, prior work experience, vocational interests and medical limitations. Ms. Hirshberg stated that she utilized this information through a computer system to arrive at the types of jobs for which claimant would be presently suitable. Deposition exhibit 3 attached to the deposition contains a summary of the information obtained by Ms. Hirshberg and the conclusions she reached as a result. There is an extensive list of potential employers included in the exhibit. It was Ms. Hirshberg's opinion that claimant would be able to perform the various jobs listed on the exhibit.

Also included in the deposition was the attached exhibit C which contains a statement of activity limitations imposed upon the claimant by her physician. According to that document, claimant, in the course of an eight hour work day, would be able to stand or walk from zero to two hours at a time for a total of two to four hours during the course of the day. She would likewise be able to sit in one position zero to two hours for a total of two to four hours during the day. A lifting limit of ten pounds was established. It is indicated that the claimant should not become involved in repeated grasping with her hands, no pushing or pulling and no fine manipulation. There was no restriction on claimant's ability to operate foot controls in a repetitive manner. The form states that claimant was limited to occasional bending, kneeling, climbing and squatting. There was an environmental restriction which indicated that claimant should not be exposed to cold or damp weather. The doctor indicated that claimant would never be relieved of the restrictions imposed.

Ms. Hirshberg stated that she interviewed the claimant initially for about an hour and a half and also discussed with her the results of her study. Ms. Hirshberg indicated that she believed claimant had an excellent desire to return to work and was impressed by her motivation and desire to do so.

Exhibit F is a letter dated May 21, 1984 to claimant's attorney from Eugene E. Herzberger, M.D. In that letter Dr. Herzberger reports that he examined the claimant in May of 1984 and confirmed the presence of disc degeneration at L4-5 and C5-6 and C6-7. He indicated that these changes were not present on x-rays taken immediately after the injury and thus concluded that the cause of the disc degeneration was the accident. He indicated that the disc degeneration created a disability of approximately 15 percent of the body as a whole. Exhibit G is a letter from Dale H. Weber, M.D., which indicates that he prescribed a TENS unit for claimant because of the pain involved as a result of the disc degeneration in the cervical spine. In a letter dated April 5, 1984 to claimant's counsel from John M. O'Shea, M.D., Dr. O'Shea stated that claimant's main complaint had been pain following the use of her arms for any lengthy period of time. He stated that it would be difficult to arrive at a quantitative degree of impairment because the injury involves pain with use and after use of her arms. He did indicate, however, that any employment which would involve significant use of the upper extremities would be out of the question for claimant.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 1, 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. Musselman v. Central Telephone Co., 261 Iowa 352, (1967).

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 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).

ANALYSIS

Claimant has prevailed on the question of causation. As defendant points out in its brief, the primary issue in this case is the extent of disability. Defendants contend that the disability does not exceed the functional impairment of 15 percent of the body as a whole. Claimant argues the injury has "a very marked effect on her ability to earn an income," but candidly concedes that she is employable. Claimant was, in fact, candid throughout these proceedings about the effect of the injury on her activities.

Claimant's motivation and desire to return to the work force even with her limitations is impressive. The record demonstrates that she sincerely desires to work and can do so if employed in a position which can accommodate her special needs. Claimant is apparently intelligent and has shown success in vocational training. Her age would not appear to adversely affect her employability and was considered to be an advantage by the vocational expert.

Claimant did not suffer pain in her neck, shoulders and arms prior to her injury. Since the injury she has been bothered constantly to some degree, dependent upon the extent of the day's activities. Claimant was a long time recovering from her injuries, notwithstanding her relatively short time off work. She has been restricted in many of her daily activities.

The doctors have established several restrictions on claimant including a ten pound weight restriction. She is unable to work where she would be required to raise her arms above her shoulders. Jobs requiring repetitive motion of the arms would also be illadvised. Fortunately, claimant does have prior work experience which gives her transferrable skills to other lines of work. Claimant was laid off her job with defendant for economic reasons, not because of her injury. There are a number of positions claimant could fill today if jobs were available. The vocational expert set forth a large list of possible employers.

This is a difficult case to assess. On one hand, claimant is well motivated, intelligent, experienced in a number of areas and capable of performing a variety of jobs. On the other hand, she has a persistent physical condition, easily aggravated, has diligently searched for but been unable to find employment and is restricted in her physical activities. Her injury clearly affects her ability to earn income in the future. On the facts of this case, claimant has proven an industrial disability of 35 percent.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On July 1, 1981 claimant received an injury while at work.

2. As a result of the injury, claimant suffered cervical disc protrusions and developed arthritis in the cervical spine.

3. As a result of the injury, claimant has moderate permanent physical restrictions such as the amount of weight she can lift and number of times she can bend during the course of a day.

4. Claimant was off work from July 1, 1981 to July 20, 1981 and from July 28, 1981 to August 12, 1981 for healing period.

5. Claimant has been paid all healing period benefits due her.

6. Claimant is intelligent and well motivated to return to work.

7. Claimant was laid off by defendant in December 1982 for economic reasons.

8. Claimant has a high school education and is a licensed cosmotologist.

9. Claimant has a number of transferrable job skills.

10. Claimant continues to suffer pain in her arms, neck and shoulders following certain kinds of activities.

11. Claimant is honest and candid about the nature and extent of her disability.

12. Claimant intends to return to work as soon as she can find employment which will accommodate her physical restrictions.

13. Claimant has made a sincere and diligent effort to find employment.

14. Claimant's rate of compensation is $138.68.

15. Claimant has paid medical expenses of $314.53.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that there is a causal relationship between her work injury and the disability upon which this claim is based.

Claimant has proven by a preponderance of the evidence that she presently suffers an industrial disability of thirty-five (35) percent of the body as a whole.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred seventy-five (175) weeks of compensation at the rate of one hundred thirty-eight and 68/100 dollars ($138.68) per week commencing August 12, 1981. All accrued payments shall be made in a lump sum. Interest shall accrue from December 9, 1983.

IT IS FURTHER ORDERED that defendants pay unto claimant three hundred fourteen and 53/100 dollars ($314.53) as reimbursement for medical expenses.

Costs of this action are taxed to the defendants.

Defendants shall file a final report within thirty (30) days following payment of this award.

Signed and filed this 12th day of December, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEVIN J. BASALA,	:	
Claimant,	:	File No. 700777
vs.	:	
RESEARCH COTTRELL, 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
NATIONAL UNION FIRE INSURANCE CO.,	:	FILED
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the Bicentennial Building for Scott County, in Davenport, Iowa, on December 22, 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 April 28, 1982. A memorandum of agreement calling for the payment of $351.06 in weekly compensation was filed on May 3, 1982. In addition to the healing period which has been paid to date, a permanent partial disability to the extent of nine percent of the body as a whole has been paid by the defendants.

The record consists of the testimony of the claimant; claimant's exhibit 1; and defendants' exhibits A, B and C.

ISSUES

The issues for determination are:

1) Whether there is a causal connection between the injury and the disability; and

2) Whether claimant is entitled to compensation for permanent partial disability;

STATEMENT OF THE EVIDENCE

Claimant, age 24, is married and has no children. He testified that he has lived in Illinois all his life. He worked three years as an apprentice ironworker and became a journeyman in 1981. He testified that his jobs as an ironworker are obtained through the union hall method of selection. Claimant testified as to the work which is done by an ironworker, including putting reinforcing rods in concrete construction and moving machinery. Claimant also stated that some high climbing is done by ironworkers and that the highest altitude he has reached is 1400 feet installing a radio tower. He testified that the tools required by an ironworker weigh from sixty to seventy-five pounds, and are carried on a belt. He stated that he ordinarily had to lift up to 185 pounds with other employees. He considered himself and all ironworkers in excellent physical condition and testified that he had no prior physical problems.

Claimant testified that on April 5, 1982 he fell over a plank on the upper floor of the building, falling backward onto a beam. He stated that he had immediate pain in his lower back with numbness down his legs following the fall. He has been treated by Raymond W. Dasso, M.D., and Robert J. Chesser, M.D., and has had no surgery performed upon him. Claimant testified that he last saw Dr. Dasso and Dr. Chesser eleven months prior to the hearing. At the time of the hearing, claimant complained that he had the same type pains as when he was working. He was unemployed at the time of the hearing. He complained that the lower right side of his back hurt. He indicated that his back did not hurt as much when he was not working. He testified that he takes conservative self-administered treatments of baths and rest. He was taken off temporary total disability on September 24, 1982, but had not been advised by any doctor that he could return to work. He testified that he returned to work on his own the last part of October 1982 because he needed the money. He had a job repairing bridge girders and continued to work up through Christmas of 1982. He went back to work for one week in April 1983 doing work involving the installation of a prefabricated metal building. He did some heavy lifting.

He testified that in June of 1983 he worked one day in a similar activity. In October or November of 1983, claimant worked for four weeks setting concrete for a bank and was involved in no climbing. He had not worked between November 1983 and the date of the hearing (December 1983).

He testified that in addition to the medical doctors noted above, he has seen Dr. Gerleman, a chiropractor, who is also his father-in-law.

Claimant testified he hurt his back changing a tire and felt pain in his low back and right leg at that time. This activity had nothing to do with work. Claimant indicated that he was presently on unemployment compensation and since the injury had not had an opportunity to either climb high or carry a full belt. He said that he has done very little bending or kneeling and at work has done no bending or kneeling on bridge decking. He stated that he did not think he could handle eight hours of work.

Evidence was produced concerning some old football injuries, but these were to the knee rather than to the back.

On cross-examination, claimant testified that he received his first treatment from his father-in-law in May of 1982. Claimant testified that he refused a myelogram by Dr. Dasso. Claimant testified that he calls the union hall for work two or three times a week and has never refused a job through the union hall. He stated that his weight limitations are self-imposed. He testified on cross-examination that Dr. Chesser told him he could return to work as of October 8, 1982. Claimant testified that he has quit all recreational weight lifting activities. He testified that when he has been working, he has not missed any part of a working day and has worked overtime. He indicated that psychological tests have been taken since the injury indicating that he had no significant reactive psychological problems. He stated that his pain is relieved when he takes a hot bath and prescribed drugs.

He stated on redirect examination that he didn't play softball anymore and stated that he had periodically lifted weights and that he is not confident at present in lifting weights. He does not run or jog. He stated that before the injury he was an excellent swimmer and that he has not done that well since he has pain in his back. He stated that he wakes up two or three times in the night as a result of pain. Claimant indicated that he quit the Y since the injury and he has also discontinued his running and jogging.

The medical records indicate in this case that claimant had knee injuries which were incurred while engaging in sports activities in high school. There is nothing in the records to indicate that any of his knee injuries are work related. Claimant had surgery on his knees in 1974 and 1975.

After his injury claimant was seen by Raymond W. Dasso, M.D., who indicated that claimant may have had a protruding intervertebral disc. X-rays were taken on May 4, 1982 wherein it is indicated that claimant had chronic L5 radiculopathy due to a protruding disc. A CT scan of the lumbar spine was negative. When physiotherapy and other methods of treatment were proving unsuccessful, claimant was sent to Robert J. Chesser, M.D., a physiatrist, who evaluated the claimant and indicated that he could find nothing specific to indicate radiculopathy or neurologic involvement. Treatment by both physicians continued and in September of 1982 Dr. Chesser indicated that claimant had been doing well and had anticipated that claimant would return to work shortly. He indicated that claimant had reinjured his lower back in September 1982 while changing a tire on his wife's car. Some psychological problems were suspected, but testing revealed claimant was normal in this regard.

On September 24, 1982 claimant was rated at nine percent of the body as a whole. In November 1982 Dr. Dasso indicated claimant had fifteen to twenty percent disability. Dr. Dasso was reluctant to give this rating inasmuch as a myelogram had not been performed. In December 1982 Dr. Dasso indicated that claimant had a fifteen to twenty percent disability.

Dr. Chesser testified by way of deposition in this case and his testimony in this regard is enlightening:

> Q. Let me stop you there if I might. Is what you are indicating that based upon your findings and the physical examination on September 24, 1982, there was disclosed some restriction of motion?
>
> A. Correct.
>
> Q. And based upon that primary factor you felt that as of that exam, that date he had a nine percent permanent impairment of the whole man?
>
> A. Correct.
>
> Q. You go on in your report to make mention of a 15 percent figure which you say with the extent of his symptoms and the way he presents today 15 would be more realistic considering his limitation. "However, I do not feel that this is a true representation since the patient had been doing well and just recently reinjured himself." What do you mean by that part of that sentence that I have just read?
>
> A. Part of his presentation that day, I think, was acute flareup, and did not represent really a chronic long-term disability. You know, you have the changing of the tire aggravated his back symptoms and he was having some acute pain which he did not experience prior to changing that tire. I guess it's my attempt to try to sort through what would be acute symptoms or acute findings versus what I felt to be more chronic findings. There was no way that I could do that on that day.

Dr. Chesser went on to indicate that claimant had a nine percent permanent partial impairment.

Dr. Chesser indicated the factors included in his determination of impairment.

> Q. What I guess what's unclear to me, Doctor, is what the -- if the injury is a strain, soft tissue injury, what is the opinion of permanency based upon? What physiologically has occurred to make that a permanent condition as opposed to one which with proper physical conditioning and exercises, weights, and the like perhaps for a period longer than the month of August and couple of weeks in September that your efforts entailed?
>
> A. No. I guess based on organic or objective data as far as like x-rays, bone scans, KT scans, EMG, there would be nothing that I could see that would indicate permanent deficit. My opinion as to the permanency was based on his unchanging symptoms after giving him a trial with physical therapy. Again it's relying on his subjective response that he is continuing to have pain and then looking at the amount of limitations that he has when I examine him before he reports that pain. That is what I based my opinion of permanency on, but there is no -- I could not document the specific bone abnormality or specific nerve damage to account for that in terms of unchanging symtoms.

APPLICABLE LAW

1. Sections 85.3, 85.20 and 86.17 confer jurisdiction on 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 April 5, 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). Lindanl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (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(1) code of Iowa provides for the payment

of healing period compensation.

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, 257 (1963).

ANALYSIS

Based on the foregoing principles, it is found that claimant sustained his burden of proof that he sustained industrial disability to the body as a whole as a result of the injury of April 5, 1982. Claimant is a young man, having been an ironworker for all of his working life. He has no prior medical problems to speak of, save some athletic knee injuries. He has a high paying, hourly job and has worked for the little time which was made available to him since the injury. One suspects that the absence from work was generated by economic conditions rather than the injury (claimant's position) or lack of motivation (employer's position). Based on the principles enunciated, it is clear that claimant's permanent partial disability is fifteen percent of the body as a whole. Claimant's youth forecasts a difficult life if heavy work is pursued, particularly lifting.

As regards healing period, it is found that claimant should be compensated an additional period of healing period compensation. This period (September 24, 1982 through October 8, 1982, or 2 1/7 weeks) represents payment through the first time that claimant was able to return to work.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on April 5, 1982.

2. Claimant hurt his back when he fell onto an "I" beam at work.

3. Defendants filed a memorandum of agreement concerning an April 5, 1982 injury.

4. Claimant sustained permanent partial disability to the extent of fifteen percent (15%) of the body as a whole as a result of the injury of April 5, 1982.

5. Claimant's condition reached significant stabilization on October 8, 1982 whereby he was able to return to work.

CONCLUSIONS OF LAW

1. This agency has jurisdication of the parties and the subject matter.

2. Claimant was employed by the employer on April 5, 1982.

3. Claimant sustained an injury arising out of and in the course of his employment on April 5, 1982.

4. Defendants will be ordered to pay unto claimant an additional two and one-seventh (2 1/7) weeks of healing period compensation at the rate of three hundred fifty-one and 06/100 dollars ($351.06) per week.

5. Defendants will be ordered to pay unto claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of three hundred fifty-one and 06/100 dollars ($351.06). Defendants will receive credit for amounts previously paid.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant an additional two and one-seventh (2 1/7) weeks of healing period compensation at the rate of three hundred fifty-one and 06/100 dollars ($351.06) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of three hundred fifty-one and 06/100 dollars ($351.06) per week. Defendants will receive credit for permanent partial disability compensation already paid.

Costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Interest is to accrue in this award from the date of this decision pursuant to section 85.30, Code of Iowa.

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

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID P. BITTERMAN,	:	
Claimant,	:	File No. 715114
vs.	:	A R B I T R A T I O N
ALUMINUM COMPANY OF AMERICA,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED

INTRODUCTION

This matter came on for hearing at the Bicentennial Building in Davenport, Iowa, on December 22, 1983 at which time the matter was considered fully submitted.

A review of the commissioner's file reveals that an employers first report of injury was filed on November 12, 1982. No payment of compensation was made.

The record consists of the testimony of claimant and Larry Delf; the deposition of John Sinning, Jr., M.D.; claimant's exhibits A through E; and defendant's exhibit 1 through 13.

ISSUES

The issues for resolution in this case are:

1) Whether claimant's action is barred by the statute of limitations;

2) Whether claimant sustained an injury arising out of and in the course of his employment;

3) Whether there is a causal connection between the injury and the disabilty; and

4 The nature and extent of disability.

Because the answer to the first issue is resolved against claimant, the other issues will only be dealt with in a cursory fashion.

STATEMENT OF THE EVIDENCE

Claimant testified that he had been employed by Alcoa for seven years. In March of 1979 he testified that he had an injury at the plant. He was operating a pneumatic saw and stepped back and hurt his ankle. Claimant testified that he went to the medical department where he was eventaully treated by E. M. Stimac, M.D. Claimant indicated that he did not miss work at that time but did lose time in 1980. Records of the Alcoa medical department indicate that claimant was treated extensively in April 1979 for ankle problems. Claimant was given light duty after seeing a physician on March 31, 1979. Claimant's treatments continued through April 1979 and the records indicate that on April 13, 1979 claimant's outer malleous was quite swollen, painful and tender. Claimant was seen by Dr. Stimac, and orthopedic consultation was ordered. Claimant was seen by John E. Sinning, Jr., M.D., an orthopedic surgeon, who placed claimant in an ankle brace. The records indicate that a stress x-ray was taken and that surgery might be necessary at that time. Claimant continued treatment through the summer of 1979 and the records indicate that he was on light duty. Claimant continued to have pain through about Labor Day 1979, as indicated by the Alcoa plant records.

On September 22, 1980 claimant indicated that he had a reinjury of his left ankle. This injury was incurred while playing a father-son baseball game. Claimant had a cast on his left foot and was under the care of Dr. Sinning thereafter. Claimant indicated that he lost 43 days of work in 1981 and was off a total of 182 days in 1980 and 1982.

The parties stipulated that the claimant missed a total of 225 days because of his ankle problems. It is also noted that claimant had received sickness and accident insurance benefits for this period.

Claimant fell on the ice in January 1982. He had a long history of his ankle giving way and surgery was performed in February 1982. The surgery performed was a construction of the lateral ligaments of the left ankle. Dr. Sinning described the surgery:

> Surgery was performed at Mercy Hospital on February 24, 1982. The surgery performed was a reconstruction of the lateral ligaments of the left ankle.
>
> Now, in this surgery the piece of bone, which has been referred to in the records as an ossicle, at the tip of the lateral malleolus I found to be attached to one of the important ligaments of the ankle, the ligament between the fibula and the talus. The ossicle of bone had come from the lateral malleolus, and by reattaching that bone to its original state on the lateral malleolus, that

brought the ligament back into function so that it would prevent the instability of the ankle. The instability of the ankle means that the foot would twist inward with a momentary dislocation occurring in the ankle joint because of the lack of this ligament.

Dr. Sinning's testimony with regard to the time restraints in this case is brought forth below:

Q. Doctor, is it fair, then, to say, based upon your experience in this case, that the nature and seriousness of this injury was not determined -- the injury of March 31st, 1979 -- the seriousness and the nature of it was not determined until January of 1981?

MR. KAMP: I'm going to object.

Not determined by whom?

MR. LIEBBE: By either Mr. Bitterman or Dr. Sinning.

MR. KAMP: I don't -- I object to that, because I don't think that Dr. Sinning can testify as to what Mr. Bitterman knew or should have known. He can testify as to his own knowledge.

BY MR. LIEBBE:

Q. You can answer the question as to what you knew, and then you can -- whether or not Mr. Bitterman made any references.

A. Well, I became aware in February '82 of the significance of the original injury as it had created a rotational instability.

Dr. Sinning assigned a permanent partial impairment of twelve percent of the left foot, or ten percent of the left leg. Dr. Sinning testified in his deposition as to the complexity of the case:

Okay. Mr. Bitterman's problem is a fascinating medical puzzle in which I presumed that the bit of bone we've been talking about was of no importance until the time of his surgery. And it was -- at the time of his surgery when I found that that bit of bone connected to the ligament that controlled his ankle, then I realized that the instability that we had been testing him for was the wrong kind of test; that he had, in fact, not a tilt instability, but a rotational instability; that restoring that bone with its attached ligament corrected the rotational instability of his ankle.

It was at that point that I recognized the significance of his previous three years of giving way of the ankle, which I had not recognized before that. It's based on my finding at surgery, and based on Mr. Bitterman's statement that his 1979 injury was his first ankle injury, that I put those things together to say it's because of the finding at surgery and it's because of he finding of -- or it's because of the fact of the 1979 injury that it then fits together. And I recognized that what I thought was giving way of an undiagnoseable cause then became something that I can identify.

On cross-examination, claimant indicated that since his injury in March 1979 he has had constant problems with his ankle. From the date of injury through the end of August 1979 claimant had been in the medical department of defendant employer on at least fourteen different occasions. Claimant testified that he told the plant nurse of the possibility of surgery on April 19, 1979 and told the plant nurse that the matter may have been caused by stress exercise. Claimant testified that from March 1979 through August 1979 he was expressing concern in regard to his ankle giving out. Claimant testified that he severely limited his activity in the summer of 1979 because of his ankle problems. Claimant stated that in 1980 he had lack of control of his ankle and that he gradually increased his activities. Claimant testified that Dr. Sinning was advised from the date of the injury as to a number of innocuous falls.

Larry Delf is the workers' compensation administrator for Alcoa. He testified as to claimant's medical records and was responsible for the foundation which allowed their admission into evidence. He also testified as to the various procedures at defendant employer's whereby the status of absent employees is determined.

APPLICABLE LAW

1. Sections 85.3, 85.20 and 85.71, Code of Iowa, confer jurisdiction on this agency in workers' compensation cases.

2. Section 85.26(2), Code of Iowa, provides:

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. Once an award for payments or agreement for settlement as provided by section 86.13 for benefits under the workers' compensation or occupational disease law law or the Iowa occupational hearing loss Act [chapter 85B] has been made where the amount has not been commuted, the commissioner may at any time upon proper application make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section 85.27.

3. The case of Orr v. Lewis Central School District, 298 N.W.2d 256 (1980) held that the statutory period of limitation under 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.

ANALYSIS

Based on the foregoing principles, it is found that claimant has failed to prove that he filed his original notice and petition within two years of the date of the discovery of the compensable nature of the condition. The record indicates that the original notice and petition was filed on October 15, 1982, about three and one-half years after the occurrence of injury.

Despite Dr. Sinning's seeming confusion regarding the nature of this injury, the record is clear that claimant had ankle difficulty immediately following this injury and that these symptoms continued to bother claimant for a sustained period of time, as evidenced by his continued pursuit of medical attention. This is not the case where a latent condition is discovered sometime after injury. My impression of the claimant is that he is an intelligent man and that he is thoroughly capable of understanding the nature of the condition which he had and he did have knowledge of this information shortly after its occurrence in 1979. For this reason, the relief sought by claimant must be denied.

FINDINGS OF FACT

1. Claimant was employed by Alcoa on or about March 31, 1979.

2. Claimant injured his left ankle at work on March 31, 1979.

3. Claimant sought medical treatment for his ankle injury in March 1979 and continued to seek medical treatment for an injury to his left ankle through August 1979.

4. Claimant injured his ankle while playing softball in 1980.

5. Claimant had surgery on his ankle in 1982.

6. Claimant alleges that the surgery was related to the injury in question.

7. Claimant had knowledge that he had a severe ankle injury in April 1979.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties in the subject matter.

2. Claimant's action was filed more than two years from the date of which claimant had the knowledge of the seriousness of his injury.

3. Claimant's action is barred by the statutory period of limitation.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

Costs of this proceeding are taxed against defendant pursuant to Industrial Commissioner rule 500-4.33.

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

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROMAYNE BLACKLEY,	:	
Claimant,	:	File No. 675739
vs.	:	
FARMLAND FOODS, INC.,	:	R E V I E W -
and	:	R E O P E N I N G
AETNA LIFE & CASUALTY COMPANY,	:	D E C I S I O N
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Romayne Blackley, against his employer, Farmland Foods, Inc., and its insurance carrier, Aetna Life & Casualty Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury sustained on July 17, 1981.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Fort Dodge, Iowa, on June 13, 1984. The record was considered fully submitted on that date.

A review of the industrial commissioner's file reveals a first report of injury was filed on July 22, 1981 and a memorandum of agreement on October 20, 1981.

The record in this case consists of the testimony of claimant; of claimant's exhibits 1 through 12; and of defendants' exhibits A through E.

ISSUES

The issues for resolution are:

1) Whether there is a causal connection between claimant's injury and his current disability;

2) Whether claimant is entitled to benefits and the nature and extent of any such entitlement; and

3) Whether certain medical costs are causally related to claimant's injury and thereby compensable.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's rate of compensation is $192.06; that he was off work from July 18, 1981 to January 4, 1982 as a result of his first injury and from December 27, 1982 to August 17, 1983 as a result of his second injury; that medical costs were fair and reasonable; that the commencement date for permanent partial disability for the first injury is January 4, 1982; and that the conversion date from healing period to permanent partial disability for the second injury was August 17, 1983. The parties also stipulated that paragraphs 1, 5, 6, 7, 8, 9 and 15 of claimant's petition and paragraph 3 of his first amendment and page 2 of his second amendment to petition are admitted.

Claimant, Romayne Blackley, testified in his own behalf. Claimant is a 49 years old gentleman who is married and has three children--one of whom is still attending college. Claimant stated he has been employed by Farmland since October 1972. Claimant reported that his initial injury occurred July 17, 1981 while working on maintenance at Farmland. Claimant was on a ladder removing duct work from a wall. The duct work fell and knocked claimant ten to twelve feet to the floor. Claimant broke his hip and was off work under the care of Josef R. Martin, M.D., from the injury date to January 1982. Claimant states he later broke his leg at home. He described this incident thusly: It was icy. Claimant had just descended his front steps. His left foot was on ice and his right on grass. Claimant's left foot "went out from under" him and "the left leg just shattered." Claimant stated the ground was level. He expressed his belief that this incident occurred because his leg has remained unstable from his initial injury.

Claimant stated that his left leg stiffens up and falls asleep. He reported he has no real feeling in the leg and can't tell for a second when his foot hits the floor. He claimed to have no control over his leg and, thus, is thrown off balance by it.

Claimant also reported that he experiences low back pain from stooping at work. He reported he had not had such pain before his initial injury. He relayed his understanding that Dr. Martin believes that his limp from his hip injury creates postural back pain. Defendants' objection to claimant's testimony regarding calcium deficiency is sustained.

Claimant identified a medical bill in the amount of $52.00 as related to an office call and x-rays occurring two weeks prior to hearing. He stated that these were related to treatment of his leg injury.

On cross-examination, claimant reported he was using handrails when his second injury occurred. He described that injury as a "slipped and sat" injury and reported his sidewalk was level with the ground. No one witnessed claimant's second injury. Claimant would not state unequivocally that his left leg had less than full sensation at the time of the second injury, but he relayed that the leg was always numb and, therefore, one became less aware of the lack of sensation.

Claimant reported his understanding that he has greater difficulty with his leg now than before his second injury since his leg brace restricts ankle movement and creates muscle pain. He agreed that his hip stiffness, "toe drop," numbness, and coldness in his extremities approximates that prior to his second injury. Claimant understands that his ankle will strengthen in time and that his second injury is limited to his lower left leg.

Claimant agreed that he is performing the same job now for Farmland as he did when deposed. He has since received a 28 cent per hour union negotiated pay raise. He reported that he works as many hours as the company allows. Currently, this is approximately a 37 hour week, though claimant reported he has worked 45 to 46 hour weeks. Claimant relayed that Drs. Martin and Garcia were his treating physicians and Dr. Jensen, his examining physician.

On redirect examination, claimant stated he first experienced numbness in his leg while walking in the hospital following his initial hip injury.

Defendants' objections to claimant's exhibits 1 through 3 are overruled; those to 4, 5 and 6 sustained; those to 7, 8, 11 and 12 overruled.

Claimant's exhibit 1 is a statement of the Carroll Medical Center of March 14, 1984. Claimant's exhibit 2 is a statement of the center of June 16, 1983. Claimant's exhibit 3 is a statement of Orthopedic Shoe Service, Inc., in the amount of $74.00, a statement of Missouri Valley Orthotic & Prosthetic Center for a leg brace and accessories in the amount of $244.00, and a receipt of the prosthetic center to claimant in the amount of $200.00. Claimant's exhibit 7 is a December 21, 1982 letter report of Werner P. Jensen, M.D. The doctor opined claimant had an eleven percent body as a whole impairment on the basis of the left femur now being in a position of slight internal rotation with altered functional consistent with claimant's complaints, some altered residual of peroneal nerve injury, displaced lesser trochanter, and lack of feeling of security in the left lower extremity. Claimant's exhibit 8 is an August 2, 1983 letter report of Dr. Jensen. The letter records the following opinion:

> I would expect bony union to occur in the tibia. He will probably want the internal fixation removed.
>
> Estimate of permanent impairment of the body as a whole as the result of the fractured hip and fractured leg on the left side, would be 15 percent. He still has weakness of the dorsiflexion of the left large toe and restricted motion of the left four small toes and altered sensation of the left foot as the result of the injury to the peroneal nerve part of the sciatic nerve when he fractured his left hip.
>
> The fracture of left leg is probably related to the fracture of the left hip.

Claimant's exhibit 9 is claimant's deposition of July 26, 1983. Claimant gave a work history of farm and home construction in which he painted and carpentered. Claimant later spent three years in the marine corps as a tank driver. Claimant then worked on the railroad, as a plumbing and furnace installer, and as a grain elevator maintenance worker. He remained in the latter employment for fifteen years and left as elevator foreman. Claimant has taken courses in welding and electrical wiring.

Claimant stated he is limited to fifty pounds of lifting and has to "get off" his leg a couple times during the day other than his twelve minute work break. Claimant stated coworkers had allowed him to sit down when he needed to because of his hip problem. Claimant opined spooning hams, the work he performed following his hip injury, would be appropriate work on his return following recovery from his leg injury. Claimant stated he had tried to insulate under his house in the fall of 1982.

Claimant's exhibit 10 is the March 23, 1984 deposition of claimant. Claimant explained he has been "folding plastic" since his work return following his leg injury. Claimant must stand while performing this job. Claimant stated coworkers allow him to take breaks as needed and his job permits him to move about as needed to keep limber. He stated his need to take daily breaks. Claimant admitted he has missed no work time since his work return as a result of his injury. Claimant explained that due to his injury-related change in job assignments his pay decreased 15 cents per hour on his work return following his hip injury. Claimant stated his health insurance has paid a portion of his medical costs.

Claimant's exhibit 11 is the August 8, 1983 deposition of Werner Jensen, M.D. Dr. Jensen is an orthopedic surgeon. The doctor examined claimant on two separate occasions, December 20,

1982 and August 1, 1983. The doctor reported that he had assigned claimant an eleven percent permanent impairment to the body as a whole as a result of his hip injury. On cross-examinatio the doctor stated this would equal approximately a 22 percent impairment of the left lower extremity. He then opined that claimant's combined impairment as a result of both his fractured hip and fractured leg would be fifteen percent of the body as a whole. He expressed his belief that claimant's leg fracture was related to his hip fracture. The doctor explained that claimant's original hip injury damaged the perineal portion of the sciatic nerve producing permanent residual weakness of the left foot. The doctor stated claimant has loss of dorsiflexion of his toes, weakness of extensor movement of the big toe, and restricted motion of the little toes of the left foot as a result of this damage. The doctor further opined:

> He cannot walk normally because he can't pull that foot up like the other side when he walks, and he doesn't have the function of pulling the toes up on that side; so he has impairment in the foot due to the perineal nerve injury which occurred at the time he broke his hip.

On cross-examination, the doctor agreed that claimant had not given a specific history indicating that he had been having problems with mobility or control of his left leg or odd sensations with his left foot immediately preceding his December 27, 1982 fall.

Claimant's exhibit 12 is the March 23, 1984 deposition of Clifford E. Smith. Mr. Smith is employed by Iowa State University in its industrial engineering department and as a faculty associate with its industrial relations center. Mr. Smith was personnel director at Iowa State from December 1972 to September 1975 and in that capacity was primarily responsible for the university's implementation of the Regent's merit system. Mr. Smit stated he presently also serves the university as an arbitrator in labor/management disputes and as an expert witness in workers' compensation disputes as to placement and industrial disability. Mr. Smith stated he has made workers' evaluations in more than 35 compensation cases. Mr. Smith opined that claimant would have a 30 to 50 percent chance of finding employment similar to the work he had done prior to his injury and 40 to 70 percent chance of finding employment involving less physical effort.

On cross-examination, Mr. Smith admitted he has no special training in evaluation of employability and the factors of industrial disability. He stated he had not considered vocational testing or training which would increase claimant's possibilities of working in a wider area of interests than those for which his current work history qualifies him, but elaborated by explaining that his evaluation was based on judgments prospective employers were likely to make concerning claimant as a function of claimant' physical limitations and past employment experience.

Deposition 1 is a report of Mr. Smith's evaluation of claimant.

Defendants' exhibit A is claimant's employment file including his attendance records for 1981-1984. Defendants' exhibit B is job descriptions for spoon luncheon meat and turn hams. Defendants' exhibit C is certain medical records relative to claimant. Medical records of claimant's July 17, 1981 St. Anthony Regional Hospital admission note a diagnosis of "comminuted fracture, intertrochanteric, left femur." A January 10, 1983 medical record of D. M. Garcia, M.d., diagnoses claimant's December 27, 1982 injury as a "[c]omminuted fracture of the tibia, left juncture of the middle and lower thirds."

An April 13, 1983 letter report of Dominador M. Garcia, M.D., states claimant is still in the process of recovering from his leg fracture, but that the doctor does not anticipate any significant additional partial disability as a result of that injury. A November 10, 1982 letter report of Josef R. Martin, M.D., states claimant has a twenty percent permanent partial disability of the lower extremity which is an eight percent impairment of the body as a whole. A medical report of Dr. Martin of July 23, 1982 summarizes claimant's condition thusly:

> This 47 year old male sustained a severe injury of the left hip which healed quite nicely. However, at this time he still has some disability which consists of a slight foot drop with numbness and weakness of the left foot. He walks with a short leg limp and has curvature of the spine....

Defendants' exhibit D is a copy of a page from the "Attorneys' Dictionary of Medicine Word finder" containing a discussion of the trochanter. Defendants' exhibit E is an anatomy chart of the bones of the leg.

Briefs submitted by both parties were considered in the disposition of this case.

APPLICABLE LAW AND ANALYSIS

Our first issue for resolution is whetner a causal relationship exists between claimant's injuries and his current disability.

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

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 substaintial factor in bringing about the result. It only needs to be a cause; it need not be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

The claimant has met his burden of showing a causal relationship between his current disability and the fracture of his left femur in July 1981. There is little dispute that claimant continues to have discomfort and difficulties in movement as a result of such injury. The medical histories of both Drs. Jensen and Martin speak of foot drop, numbness, and weakness of claimant's left foot as a result of such injury. Claimant, at hearing, recited that he continues to have such difficulties even though he had become accustomed to them to the point where he is less conscious of them than he formerly was.

Our key concern, therefore, is whether claimant's leg fracture of December 27, 1982 is causally related to his earlier hip fracture. Claimant testified that this injury occurred when he "slipped and sat" on level ground after descending his home steps on an icy day. Defendants countered that claimant's second injury resulted from the icy conditions and is not related to the claimant's problems from his earlier injury. Certainly icy conditions are hazardous to all individuals regardless of their physical condition. However, the evidence demonstrates that claimant, because of his femur injury and its residue, was far more likely than most persons to have difficulty walking and maintaining balance under such circumstances. Claimant testified he could not always feel his foot for a second after it touched the ground; he has toe drop and limps. Dr. Jensen testified that claimant's femur injury damaged the perineal nerve making claimant unable to pull his leg up normally. The doctor opined that because claimant's femur injury created this condition, that injury probably contributed to claimant's December leg fracture. Thus, the femur injury was a substantial contributing factor in claimant's later leg fracture and claimant has established the requisite causal relationship between his first injury and his second injury.

Claimant's benefit entitlement must now be decided.

The right of a worker to receive compensation for injuries sustained which arise 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).

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles a claimant to industrial disability. 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).

Our initial concern is whether claimant has a body as a whole or a scheduled member disability as a result of his July 17, 1981 injury. That injury was diagnosed as a comminuted fracture, intertrochanteric, left femur. At hearing, it was apparent claimant walks with a slight limp. He testified he has some low back pain as a result of this gait change following the injury. No other evidence of after-effects of the injury to the femur was presented. Dr. Jensen opined claimant has an eleven percent body as a whole permanent partial impairment; he stated this would equal about 22 percent of the left lower extremity. As a result of such injury Dr. Martin opines claimant has a 20 percent permanent partial impairment of the left lower extremity or an eight percent body as a whole impairment as a result of such. Section 85.34(o) provides that permanent partial disability compensation shall be paid as follows:

> The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred twenty weeks.

Claimant's injury of July 17, 1981 was to his left femur, a part of the leg between the hip joint and the knee joint. Claimant's testimony of low back pain as a result of his gait change is insufficient alone to establish that claimant's scheduled member disability extends to the body as a whole. Therefore, claimant's benefit entitlement for his first injury must be decided under section 85.34(o). While Dr. Jensen is an orthopedic surgeon with considerble expertise, he was claimant's examining physician only. Dr. Martin treated claimant for his femur injury until his retirement and apparently continues to oversee claimant's treatment by Dr. Garcia. Therefore, Dr. Martin's rating is accepted. Claimant is awarded a 20 percent

disability of the left lower extremity for which 44 weeks of benefits shall be paid.

It is noted that had claimant's disability been found to be to the body as a whole, claimant has shown little reduction of earning capacity. He testified that his earnings were reduced by 15 cents per hour as a result of an assignment change related to his work restrictions. His actual wage has increased by 28 cents per hour since his work return, however. Claimant's employer has retained him and the employer apparently acquiesces in accommodations claimant's coemployees make for him on account of his disability. Claimant admitted he has had no work absences related to his disability and that he can perform his assigned tasks adequately. Claimant's actual reduction of earning capacity is significantly less than might have resulted from his injury.

We next must discuss whether claimant is entitled to permanent partial disability benefits as a result of his second injury. Dr. Jensen opined that such injury increased claimant's body as a whole permanent partial impairment to 15 percent. Thus, four percent of the body as a whole impairment assigned is attributed to the second injury. Dr. Garcia did not believe the second injury would result in any permanent impairment. That injury was diagnosed as a comminuted fracture of the tibia, left juncture of the middle and lower third, and is clearly a scheduled member injury. Under Dr. Jensen's early reasoning, the assignment would result in an eight percent permanent partial impairment of the left lower extremity. It is difficult to discern how the doctor concluded claimant has any additional permanent impairment as a result of the second injury, however. The doctor did allude to the possibility that claimant could develop arthritis as a result of that injury. Claimant, on the other hand, testified that his disabling symptoms approximate those following his initial injury. Claimant has returned to substantially the same work position and testified he is able to perform it. Claimant presently does not demonstrate any disablement as a result of the second injury. Thus, Dr. Garcia's assessment is accepted and permanent partial disability is not attributed to claimant's second injury. Claimant is entitled to healing period benefits from his injury date to August 17, 1983 as a result of that injury, however. Claimant apparently has received appropriate healing period benefits arising from his first injury.

Claimant's medical costs in evidence relate to his second injury. That injury has been found to be compensable. Claimant, therefore, is entitled to payment of such costs under section 85.27.

FINDINGS OF FACT:

WHEREFORE, IT IS FOUND:

Claimant suffered a communted fracture, intertrochanteric, left femur in the course of his employment on July 17, 1981.

Claimant damaged his perineal nerve as a result of this fracture.

Claimant's nerve damage has left claimant with numbness in his left lower extremity, "toe drop," and weakness in elevating his foot while walking.

Claimant fractured his left tibia when he "slipped and sat" on his sidewalk and lawn after descending the stairs of his home on December 27, 1982.

Conditions were very icy.

Claimant had greater difficulty maintaining his balance than would an individual without perineal nerve damage.

Claimant's December 27, 1982 fracture is causally related to his July 17, 1981 femur injury.

Claimant has no after-effects of his femur injury which extend to the body as a whole.

Claimant's femur injury resulted in a permanent partial impairment of twenty percent (20%) of his left lower extremity.

Claimant has returned to work with his employer and is fulfilling the same functions as those fulfilled on his work return after his femur injury.

Claimant's current symptoms are similar to those experienced following his femur injury and have not increased because of his second injury.

Claimant has no permanent partial impairment as a result of his second injury.

Claimant's healing period following his second injury extends from Decemer 27, 1982 to August 17, 1983.

Claimant's medical expenses in evidence were causally related to his second injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his injury of July 17, 1981 is causally related to the disability on which he now bases his claim.

Claimant has established that the injury of July 17, 1981 was the proximate cause of his injury of December 27, 1982.

Claimant is entitled to healing period benefits as a result of the December 27, 1982 injury from the injury to August 17, 1983.

Claimant is entitled to permanent partial disability resulting from his July 17, 1981 injury of twenty percent (20%) of the left lower extremity.

Claimant is entitled to payment of medical expenses related to his December 27, 1982 injury as set forth below.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for forty-four (44) weeks at the rate of one hundred ninety-two and 06/100 dollars ($192.06) with those payments to commence January 4, 1982.

Defendants pay claimant healing period benefits for his December 27, 1982 injury from his injury date to August 17, 1983.

Defendants pay accrued amounts in a lump sum.

Defendants pay claimant the following medical costs:

Carroll Medical Center	$1,599.00
Orthopedic Shoe Service, Inc.	79.00
Orthotic & Prosthetic Center	244.00

Defendants pay interest pursuant to Iowa Code section 85.30.

Defendants pay costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Defendants file a final report when this award is paid.

Signed and filed this 23rd day of October, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY LOU BOOTH,

Claimant,

vs.

LEAR SIEGLER, INC./NOBLE DIVISION,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

FILED

OCT 31 1984

IOWA INDUSTRIAL COMMISSIONER

File No. 656820

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed September 17, 1984 the undersigned deputy industrial commissioner has been appointed under the provisions of Iowa Code section 86.3 to issue the final agency decision in this matter.

Claimant appeals from a decision which denied her additional benefits relating to an injury of February 9, 1980.

The record on appeal consists of the transcript of the hearing and claimant's exhibit 1. All evidence was considered in reaching this final agency decision.

ISSUES ON APPEAL

The issues as stated by claimant are: "I. Whether the Deputy erred in failing to find the industrial accident of February 9, 1980, caused Claimant's neck and head pain, memory loss and seizures. II. Whether the Deputy erred in failing to find Claimant disabled to any extent due to her scalp numbness."

STATEMENT OF THE CASE

Thirty year old married claimant, mother of three children and a high school graduate, worked at a fast food restaurant and some other jobs prior to commencing work for defendant employer in 1975 in light assembly. She soon moved to medium assembly and then to drill operator, a position in which she also ran a lathe.

Claimant recalled the circumstances surrounding her injury: She was running a lathe. She was using a file to shave the end of a part which was in the operating lathe. She was pulled into the machine by her left side. She was freed. She had injuries around her neck, loss of the hair on the back of her head and a fractured wrist.

She was rushed to the hospital where she saw Dr. Considine.

She returned with what she thought was a cut in salary, although she was not sure, to medium assembly where she had difficulty using an air gun and wrench because of her fractured wrist. She was embarrassed by her hair. She had a loss of sensation in the top of her head, and her neck was stiff and sore. She continued to work until the plant shut down with the exception of some time for maternity leave, and she has not worked since that time.

During the time she worked, she received medical care from Drs. Isgreen, Blume and Christensen. Claimant reported that about a year to a year and a half prior to hearing, she began to have seizures. She said that she saw Dr. Isgreen both before and after seizures started. Dr. Kitchell was seen afterwards. She initially saw Dr. Miller who placed her on Dilantin. In addition to the onset of seizures, she experienced numbness in the top of her head, stiffness in her neck, bad headaches and loss of memory. Claimant denied any accidents since that in February 1980.

Claimant claimed that she has tried to find work at various places.

Daniel Booth, claimant's spouse, testified to pulling her from the machine. He recalled that on a return to work claimant complained of her wrist and her neck. Booth stated that claimant's first seizure occurred while she was in bed and after she had fallen asleep. When she had a second seizure, they went to the doctor.

Dale L. Christensen, M.D., board certified family practitioner, saw claimant on March 3, 1980 at which time she gave a history of her accident and complained of "numbness in her scalp, over the top of her head and into her forehead." Later she had residual cervical spasms, headache and neck pain. The doctor treated her until January 16, 1981 at which time she was dismissed as improved although she continued to have numbness and tingling in her scalp and an occasional tight feeling in her neck. In a letter dated January 21, 1981 Dr. Christensen anticipated no permanent disability "as far as her ability to work is concerned." He did think, however, that she would have residual permanent numbness of her scalp.

Horst G. Blume, M.D., saw claimant on May 6, 1980 and she gave a history of her accident which included a fractured rib on the left side. Claimant complained of tingling in the top of her head, headaches, aching in the left wrist and lower back pain. Local tenderness was present at the vertex of the head on either side and in the midline. There was hypalgesia in the distal distribution of the greater occipital nerve bilaterally. Claimant had scar tissue on the left upper arm, in the armpit and over the neck. Dorsal flexion of the left wrist caused pain at the dorsal aspect of the wrist and ulnar abduction caused pain at the ulnar wrist joint.

Dr. Blume diagnosed a post traumatic occipital and cervical myalgia and a post traumatic sprain of the capsules and ligaments of the wrist joint. Claimant was given a local anesthetic for her scalp.

William P. Isgreen, M.D., board certified psychiatrist and neurologist, saw claimant on referral from Dr. Considine on July 14, 1981 six weeks after the birth of her second child. She claimed headaches and nausea with photophobia. She had tightness in the neck which varied with activity. She noticed frequent crying spells and an inability to remember. She also reported feeling lightheaded and weak.

Dr. Isgreen thought claimant was suffering from postpartum depression, but he believed it was worthwhile to do psychometrics, a Minnesota Multiphasic Personality Inventory, an electroencephalo gram and a CT scan.

Claimant was hospitalized on July 21, 1981 and seen in consultation by David G. Paulsrud, M.D., orthopedic surgeon, who found a moderate amount of cervical lordosis, thoracic kyphosis, rather severe lumbar lordosis, poor abdominal muscle tone and atrophy of the trapezius with drooping of the shoulders. Dr. Paulsrud attributed claimant's low back pain, neck pain and occipital headaches to posture and prescribed exercises.

An electroencephalogram was interpreted as minimally abnormal with mild disorganization and sharp activity in the left temporal derivatives. A CT scan was normal.

Claimant was released with a diagnosis of neck and arm pain secondary to posture and perhaps previous trauma and postpartum depression.

Dr. Isgreen next saw claimant on September 10, 1981 at which time she continued to have photophobia and to experience hypalgesi of the head.

Claimant returned on April 26, 1983 at which time she told of two sleep activated seizures which began in the previous fall. Dr. Isgreen doubted a relationship between the seizures and claimant's 1980 accident, but he noted "there is no way to prove it one way or the other."

A letter dated June 20, 1983 clarifies the doctor's position:

> There really is absoultely no way way of knowing whether this is post-traumatic in nature. Usually for one to see "post-traumatic seizures", one likes a history of rather severe head injury. Simply being confused and shakey without loss of consciousness I am not sure is enough. There is no way absolutely to aver that, but I tend really given the description of the incident to doubt that it has anything to do with her current probem [sic] with seizures.

Michael J. Kitchell, M.D., neurologist, saw claimant with complaints of seizures, memory loss, neckaches, headaches and dizziness which she dated to any injury on February 9, 1980. Loss of memory she traced to the birth of her second child. She reported two seizures which led to her being placed on Dilantin. She told of seizures in a paternal grandmother. An electroencephalogram was performed and declared within normal limits. Dr. Kitchell's opinion is summarized as follows:

> I cannot attribute Mary Lou's memory disturbance or her seizure disorder to any injury that she has described on February 9, 1980. Without a definite loss of consciousness, it would be virtually impossible for the injury to have caused any brain injury that would later show up as memory loss or seizures. I believe that there must have been some other event, possibly in 1981, which gave her her memory disturbance, and this certainly could be associated with her seizure disorder. I do not have any indication at the present time, however, as to what might have been the cause of her chief complaints. I certainly would expect that some of her more nonspecific complaints of neckaches and headaches, which she complained of following her injury, were as a result of that injury on February 9, 1980.

APPLICABLE LAW AND ANALYSIS

The first issued raised by claimant on appeal is "[w]hether the Deputy erred in failing to find the industrial accident of February 9, 1980, caused Claimant's neck and head pain, memory loss and seizures."

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 9, 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).

Preponderance of the evidence means the greater weight of evidence, the evidence of superior influence or efficacy. Bauer v. Reavell, 219 Iowa 1212, 260 N.W.2d 39 (1935). A decision to award compensation may not be predicated upon conjecture, speculation or mere surmise. Burt, 247 Iowa 691, 73 N.W.2d 732. Expert testimony stating that a present condition might be causally connected to the claimant's injury arising out of and in the course of employment, in addition to non-expert testimony tending to show causation, may be sufficient to sustain an award but does not compel an award. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). 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).

Claimant's three conditions -- neck and head pain, memory loss and seizures -- will be discussed individually.

At the time of her accident claimant had injuries around her neck and hair loss. When claimant was seen by Dr. Christensen on March 3, 1980, she complained of numbness in her scalp. She was treated by Dr. Christensen for head and neck pain and residual cervical spasm until January 16, 1981. Claimant also complained of headaches when she was seen by Dr. Blume on May 6, 1980 at which time he diagnosed post traumatic occipital and cervical myalgia. Claimant was seen on referral by Dr. Isgreen in July of 1981. Claimant complained of headaches accompanied by nausea and photophobia. Tightness in the neck varied with activity. Dr. Isgreen's examination revealed normal range of motion in the head and neck. Dr. Isgreen attributed claimant's neck pain to her previous trauma. However, Dr. Isgreen, a psychiatrist and neurologist, had claimant seen in consultation by Dr. Paulsrud, an orthopedic surgeon. Dr. Paulsrud took a history of increasingly severe back and neck pain after the birth of claimant's child and her return to work. Claimant's complaints were attributed to her posture and deconditioning. More specifically, her neck problem was assigned to atrophy of the trapezius. When claimant was seen by Dr. Kitchell in 1983 she told him of neckaches and headaches. He found no tender spots in the scalp. Her neck was supple without cervical muscle

>asms; however, Dr. Kitchell related claimant's nonspecific omplaints of neckaches and headaches to the February 9, 1980 njury.

The proposed decision found claimant's neck, low back and ead pain attributable to postural difficulties. In making that inding, the hearing deputy relied on a report of Dr. Paulsrud which she gave greater weight because it "was a part of an verall workup...; it...occurred later in time...[and] more ccurately reflect[ed] claimant's current condition." Additionally he noted that Dr. Kitchell was a neurologist while Dr. Paulsrud s an orthopedic surgeon. Claimant points out that there is not vidence of claimant's experiencing neck and headache pain prior o her injury, that claimant had pain from right after the ccident up to the present time and that Dr. Paulsrud indicated nly "most" of the pain resulted from postural defects. Claimant lso cites the deputy's ignoring circumstantial evidence and estimony intimating the industrial incident triggered a latent roblem.

Dr. Paulsrud's examination was later in time, but it was not he most recent and would not be necessarily more reflective of laimant's condition than Dr. Kitchell's examination in 1983 as he hearing deputy concluded. Claimant was treated in 1980 for ead and neck pain. She continues to complain of stiffness in er neck and of headaches. Drs. Blume and Kitchell relate laimant's complaints to her injury of February 9, 1980. Dr. aulsrud is an orthopedic surgeon who saw claimant on a one time asis. The undersigned does not believe that the opinion of Dr. aulsrud under the circumstances is entitled to any greater eight and finds the record viewed as a whole supports a finding hat claimant does have rather nonspecific complaints of her ead and neck related to the injury of February 9, 1980.

However, there is no medical evidence that either the head r neck pain results in any industrial disability. Although Dr. itchell relates claimant's pain to her injury, he recorded no hysical findings supportive of an impairment. Pain not sub- tantiated by clinical findings is not a substitute for impairment. aller v. Chamberlain Mfg., II Iowa Industrial Commissioner eport 419, 425 (1981). Claimant's difficulties on her return o work were with her wrist. She apparently worked with little oss of time with the exception of her maternity leave until the lant closed. Claimant has failed to establish by a preponderance f the evidence any disability related to her head and neck pain.

The next condition to be considered is claimant's memory oss. Claimant argues that she related her memory loss to neck nd headache pain. She first reported an inability to remember hings to Dr. Isgreen in July of 1981. Dr. Isgreen found laimant's problem to be postpartum depression. When claimant as seen by Dr. Kitchell in 1983, she indicated that her memory ad improved, but still had gaps. The doctor was unable to ttribute claimant's memory disturbance to her accident.

As the case law cited above indicates, matters of causal onnection are primarily within the domain of expert testimony. he expert testimony regarding claimant's memory loss is nonsup- ortive of a finding that the memory loss is causally related to er injury of February 9, 1980.

The final condition to be evaluated is claimant's seizures. hen claimant was hospitalized by Dr. Isgreen on July 21, 1981, er electroencephalogram showed "mild disorganization and even harp activity in the left temporal derivatives that is accented ith hyperventilation." Claimant told Dr. Isgreen in April of 983 that she had two sleep activated seizures in the fall of 982. Dr. Isgreen doubted claimant's accident of February 9, 980 had anything to do with her seizure problem. He looked articularly to the fact that claimant had no loss of conscious- ess at the time of her initial injury. Dr. Kitchell made a imilar reference to the facts that there was not a loss of onsciousness. Neither neurologist who has seen claimant elates her seizures to the accident on February 9, 1980. Dr. sgreen's testimony is somewhat equivocal, but Dr. Kitchell's is ot. Claimant has a family history of seizures. Her seizures id not begin until the late summer or fall of 1982. The earing deputy in failing to find a causal connection seemingly hought the seizures came on eighteen months after the claimant's ccident. In reality the seizures were even more remote beginning t least twenty-nine months post injury. The medical evidence nd the record again are insufficient to allow claimant to reponderate on the question of whether or not her seizures are ausally related to her injury of February 9, 1980.

The second issue as stated by claimant is "[w]hether the eputy erred in failing to find Claimant disabled to any extent ue to her scalp numbness." The hearing deputy found a causal elationship between claimant's work and her scalp numbness. he did not find any industrial disability as a result of the umbness.

Dr. Considine wrote that claimant had complete recovery xcept for numbness in her scalp which was not bothering her in ebruary of 1981. Dr. Christensen aoout the same time wrote hat claimant might have residual permanent numbness. Dr. Blume oted claimant's wearing of a helmet caused irritation of her calp. Dr. Isgreen made no notations of numbness. Dr. Kitchell hose examination was most recent wrote: "The numbness and ingling in her scalp, as well as her hair, did return back to ormal." Claimant's own testimony at hearing regarding numbness as that her head gets numb on top at times "and then other imes it's all right." Claimant's testimony coupled with the edical evidence is sufficient to causally relate the scalp numbness to claimant's injury. Dr. Kitchell concluded, based on his one-time examination, that the numbness has left, but claimant's testimony as to the transient nature of the complaint suggests that the numbness may not have been present at the time of his examination. It is found that claimant has some scalp numbness as a result of her February 9, 1980 injury.

Dr. Christensen did not anticipate numbness resulting in any inability in claimant to work. The evidence does not establish any reduction in earning capacity assignable to this occasional numbness. Reference is made to claimant's ability to work postinjury which was discussed above.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty years of age.

That claimant is a high school graduate.

That claimant began work for defendant employer in 1975.

That claimant's work for defendant employer included light and medium assembly and drill and lathe operation.

That on February 9, 1980 while working on her employer's premises claimant was pulled into a machine.

That claimant's accident resulted in injuries around her neck, loss of hair and a fractured wrist.

That claimant did not lose consciousness.

That shortly after her injury claimant had numbness in her scalp over the top of her head and into her forehead.

That claimant later had neck and head pain.

That in mid-1981 claimant developed memory loss.

That claimant gave birth to a second child in June of 1981.

That claimant had some abnormalities in her electroencephalogram in July of 1981.

That when claimant returned to work she had difficulty using some tools attributable to her wrist and she was embarrassed by the loss of her hair.

That after her return to work claimant worked with the exception of time off for maternity leave until the plant shut down.

That claimant has given birth to another child since the plant closed.

That claimant currently complains of numbness on the top of her head, neck stiffness and headaches.

That claimant has head and neck pain as a residual of her February 9, 1980 injury.

That claimant has numbness in her scalp as a result of her February 9, 1980 injury.

That claimant's neck and head pain result in no permanent disability.

That claimant's areas of numbness in her scalp result in no permanent disability.

That claimant's loss of memory is not causally related to her injury of February 9, 1980.

That claimant's seizures are not causally related to her injury of February 9, 1980.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence any disability which is causally related to her injury of February 9, 1980.

That claimant has failed to show entitlement to additional benefits for permanent partial disability.

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 31 day of October, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JANICE M. BREKKE,	:	
Claimant,	:	
vs.	:	File No. 681931
KIOWA CORPORATION,	:	D E C I S I O N
Employer,	:	O N
and	:	A T T O R N E Y
INSURANCE COMPANY OF NORTH AMERICA,	:	F E E S
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding brought by Janice M. Brekke to fix the fees to be allowed to Curtis A. Ward for his services in the arbitration proceeding which preceded filing of her petition to have the fee dispute resolved. The file in this proceeding reflects that a compromise special case settlement was approved February 14, 1984 which authorized a compromise settlement upon payment of the sum of $22,500.00. The file reflects that claimant signed the application for settlement on February 8, 1984 and the receipt and satisfaction and dismissal on February 15, 1984.

This matter came on for hearing on October 5, 1984 with both parties appearing pro se. The defendant did not provide a certified shorthand reporter as had been ordered on October 1, 1984 but the parties stipulated that this proceeding be heard without the making of a record as shown by the stipulation excuted by them and made a part of the file in this proceeding. The case was fully submitted on conclusion of the hearing.

The record in this proceeding consists of the testimonies of Janice M. Brekke, Robert E. Brekke and Curtis A. Ward. Claimant's exhibits 1, 2 and 3; and defendant's exhibits A and B were received into evidence.

ISSUE

The only issue presented by the parties at the time of hearing is a determination of the fee to be allowed to claimant's attorney, Curtis A. Ward.

REVIEW OF THE EVIDENCE

Claimant testified that Ward had been her attorney for approximately five years and that he had represented her in a juvenile court proceeding involving her son and in a simple misdemeanor proceeding. She stated that in neither instance had a written fee agreement been utilized. Claimant also related that she had previously filed a lawsuit, using the services of a different attorney, concerning the well on real estate which she and her husband had purchased.

Claimant testified that she had not previously discussed her workers' compensation case with any other attorney and that the fees contained in the written fee agreement, which is part of claimant's exhibit 2, were set by Ward and were not the product of negotiation. She stated that she realized that at the time she entered into the agreement she could see other counsel but that she chose not to do so. She stated that her understanding of the fee arrangement was that Ward would receive fees equal to 25 percent of the recovery if the matter did not go to court. She stated that in discussing the proceeding with him, before any action was taken, that he told her that she did not have to accept what this agency allowed and that it could go into the district court. She stated that it was her understanding that the fees would be one-third of the recovery if the case proceeded into the court. Claimant testified that she presently feels that 25 percent of the recovery would be reasonable and that she felt that such was what her attorney was going to receive and what she actually owed to him. She stated that at the time of entering into the fee agreement the range of fees commonly charged by attorneys for similar services was not discussed.

Claimant related that Ward had directed her to a physician in Waterloo, Iowa who performed surgery upon her without improving her condition. She stated that INA Insurance Company sent her to Albert L. Clemens, M.D., who recommended thoracic outlet surgery but that no one would authorize that surgery to be performed. She related being seen by David H. Stubbs, M.D., which resulted in a medical report which contained a history which was inaccurate.

Claimant testified that she signed the compromise special case settlement agreement because Ward had told her that she did not have a chance if the matter went to hearing. She stated that the actual amount of his fee was not discussed until the settlement had been approved and the check for the settlement received by him. She stated that the fee dispute arose at that time and that she initially refused to sign the check. She stated that Ward was a better arguer than herself and that she finally signed the check at a time which she estimated to be a couple of weeks after the time she received it.

Claimant testified that subsequent to making the settlement she returned to Dr. Clemens to investigate having the recommended surgery but that he continued to say that it was work related and that her group insurance would not pay for the surgery. She related that she then went to Walter J. Riley, M.D., who performed the thoracic outlet surgery on March 12, 1984. She related that she returned to work in May 1984 without restrictions. Claimant introduced exhibit 3 in which Dr. Riley expressed the opinion that her condition was related to her work.

On cross-examination claimant stated that she met with Ward on February 15 and that they discussed the actual dollar amounts each would receive. She stated that she was upset and did not want to proceed with the settlement and left his office. She stated that the check she received from Ward was dated February 27, 1984 as shown in claimant's exhibit 1.

Robert E. Brekke testified to explain the source of the error in Dr. Stubb's medical report. He stated that he felt Ward had seemed to promise more than he could deliver but could give no specific incident which supported his opinion.

Curtis A. Ward testified that claimant first came to see him regarding her workers' compensation case in the late winter or early spring of 1982. He related that she was also having other employment problems at that time which consisted of an attempt by the employer to terminate her employment before she could complete 10 years of service and become fully vested in the pension plan. He related that part of her problem was that her family physician was also the company doctor and that he had been treating her with pain killers and sending her back to work without addressing the cause for claimant's problems. He stated that claimant had received an offer of settlement from INA Insurance Company which he believed to be in the range of approximately $2,000.

Ward testified that in connection with signing the written fee agreement the percentages were discussed and that he explained the procedure which follows a workers' compensation case, including the appeal process.

Ward testified that he shared claimant's dissatisfaction with the physician in Waterloo.

Ward stated that claimant had attempted to settle the case herself but had not been able to obtain a result which she found to be satisfactory. He stated that it appeared certain to him after his initial meetings with claimant that it was highly likely that filing a proceeding would be necessary. He stated that the medical evidence was weak and conflicting which resulted in a substantial question concerning whether or not her condition was work related.

Ward testified that from the proceeds of settlement he had received $6,275.74. He related that claimant had received advance fees while the case was proceeding and that a reimbursement to the private disability insurance company in the amount of $338 was paid from his share of the recovery. Exhibit B shows that he has received fees of $609.50 on May 6, 1983, $195.00 on June 22, 1983 and $6,275.74 on February 27, 1984. It shows him receiving costs of $81.76 on February 27, 1984.

Ward testified that he is a 1975 law school graduate. He stated that he has always practiced in Marshalltown, Iowa and that he has a general practice in which workers' compensation is one of five or six areas which are the major portion of his practice. He related that he has taken five workers' compensation cases to hearing. He stated that he has no personal reputation as a workers' compensation attorney but that his law firm does have a favorable reputation for handling workers' compensation cases.

Ward testified that in his opinion, common fees for handling workers' compensation cases run in the range of 25 percent to 33 1/3 percent of the gross recovery with the lower fees being charged by attorneys who have an affiliation with labor unions or other employee groups which send clients to them.

Ward stated that he kept no record of the time he devoted to this case. He stated that he felt the case was difficult and that it involved a novel medical problem. He stated that at the time of settlement the case was ready for trial and that he was ready to try it. He stated that he felt that there was a risk that no recovery would be received if the matter went to trial.

Defendant's exhibit A is a copy of the letter which Ward sent to claimant following their meeting of February 16, 1984. Defendant's exhibit B is a copy of Ward's office records showing the costs advanced, fees received and the association with claimant's case.

APPLICABLE LAW AND ANALYSIS

Section 86.39 of the Code of Iowa makes all fees for services rendered in a workers' compensation proceeding subject to the approval of this agency.

The factors to be considered in arriving at a reasonable fee are the following: (1) The terms of any fee agreement; (2) the time and effort reasonably involved in handling the case; (3) the novelty and difficulty of the questions involved in the case

nd the skill required to properly perform; (4) the reputation, bility, status and expertise of the attorney; (5) the likelihood hat acceptance of employment will preclude the attorney from ther employment due to conflicts of interest, unfavorable ublicity or antagonism with other clients or other attorneys; 6) the fee customarily charged in the locality for similar ervices; (7) the amount involved in the controversy, the impact f the result upon the client and the result actually obtained; 8) time limitations, whether imposed by the client or other ircumstances; (9) the nature and length of professional relationhip between the attorney and client. Kirkpatrick v. Patterson, 72 N.W.2d 259, 261 (Iowa 1969). Disciplinary Rule 2-106(B) owa Code of Professional Responsibility for Lawyers.

The written fee agreement which exists in this case is an fficial Bar Association form. It provides for payment of xpenses by the client in paragraph 2. In paragraph 3.2 it tates:

> In the event of recovery, Client shall pay Attorney the following fee based on the amount of the recovery remaining after payment of all expenses: a fee equal to 25% of the recovery if settled without filing suit; a fee equal to 33 1/3% of the recovery after suit is filed and before notice of appeal to any appellate court, a fee equal to 33 1/3% of the recovery after notice of appeal; and a fee equal to 33 1/3% of the recovery if retried.

It is apparent that the form used was designed to apply to a roceeding in the district court, rather than a proceeding efore this agency. The written agreement does not clearly tate the point at which the fee shifts from 25 percent of the ecovery to 33 1/3 percent of the recovery. The use of the term suit" could as easily be construed to refer to the petition iled for judicial review in the district court as to the Form 00 filed with this agency. There appears to be no reason to oubt the credibility of Ward or claimant. The complexities of he legal system are often not well understood by lay persons nd it is found and concluded that claimant understood the fee rrangement to be that Ward would receive 25 percent of the ecovery up to the point that the case went into the district ourt and that Ward understood the agreement to be that he would e entitled to 33 1/3 percent of the recovery upon filing a roceeding with this agency. Additionally, claimant testified hat she had no knowledge of the fees normally charged by ttorneys for handling cases of this type and Ward testified hat he did not inform her of the range of fees commonly charged y attorneys in similar cases. It would appear that claimant elied upon Ward to charge a fair fee as the terms of the ritten agreement were not a product of negotiation. Under hose circumstances the weight given to the terms of a written ee agreement is not particularly great. When combined with the mbiguity of the agreement in this case, it is found and conluded that the written fee agreement is of minimal weight.

No records of the amount of time which Ward devoted to the andling of this case are available. The contents of the agency ile and the description of claimant's medical care which was escribed at hearing and the dates of entries showing telephone alls and photocopies as contained in defendant's exhibit B show hat a significant amount of time was devoted to the handling of his case.

The case involved conflicting medical evidence and treatment r evaluation by a number of physicians. There was a difficult uestion concerning whether or not the condition was work elated and whether claimant would be able to prove such at earing through use of the available medical evidence. While he evidence introduced at hearing indicates that claimant did ave thoracic outlet syndrom which Drs. Riley and Clemens felt as work related, the defendant employer and insurance carrier id not present the conflicting evidence which was present at he time the arbitration proceeding was settled. It is clear hat the case certainly involved a difficult question upon the ssue of whether a causal connection existed between claimant's mployment and the medical condition from which she suffered.

It is generally assumed that an attorney with a high level f expertise or with a reputation for proficiency in a particular rea of law can perform the work in a minimum of time and/or btain a more favorable result for the client than some other ompetent attorney of lesser repute or expertise. There is no howing that Ward should be awarded a higher fee based upon his tatus, reputation or experience.

There is no showing that Ward's handling of this case was in ny way prejudicial to the remainder of his law practice.

The fee customarily charged for similar services was fixed y Ward in his testimony at 25 percent to 33 1/3 percent of the ecovery. Such is adopted by the undersigned as correct.

This case was settled for $22,500. This would indicate that he amount in controversy, and its impact upon the client was oderate, the same being neither extremely large nor trivial. he result actually obtained cannot be evaluated in the sense of peculating as to what the result would have been if the case ad been taken to trial. One primary reason for this is the act that the employer's side of the case has not been presented. he results which can be clearly demonstrated are, however, that laimant had initially received an offer of settlement in the ange of $2,000 to $4,000 and that counsel negotiated a settlement n the amount of $22,500. This was certainly a very substantial increase and would indicate a favorable result. It is understood that claimant was dissatisfied with the ultimate result. She apparently feels that she was coerced into entering into the settlement. She did, nevertheless, agree to accept a special case compromise settlement in return for the sum of $22,500. It is a decision she made and with which she must live regardless of the outcome of this fee proceeding. It should be noted that any hearing or trial involves considerable uncertainty and risk. It should also be noted that if claimant had undergone the thoracic outlet surgery before hearing, established a causal connection with her employment and then had her disability evaluated, it is quite possible that her recovery would not have been substantially different from that which she received under the settlement.

There is no indication that any particular time limitations, other than ordinary statutory limitations, were involved with this case.

The previous dealings between claimant and Ward were not such as to have any effect on the fee to be charged in this proceeding.

A reasonable fee must bear some relationship to the amount of time devoted to the case which, in turn, bears a relationship to the point at which it is resolved. In this case the matter was settled prior to hearing. Even though counsel had performed a great deal of the preparation necessary for hearing, he was not required to expend the time, effort and uncertainty which necessarily follows from taking a case to hearing. He did not have to prosecute or defend a series of appeals. The point at which the case would be resolved could not have been known at the time the attorney-client relationship was established. The amount of work related to the handling of this case and the economic value of the case are not disproportionate with each other and the fee which counsel should receive should be neither higher nor lower as a result of those factors.

It is interesting to note that the form of the contingent fee agreement provides for entry of different percentages at different stages of the proceedings. Such is a reasonable approach in a contingent fee case. While the amount of work which a case will involve cannot generally be accurately predicted at the time the case is commenced, it can reasonably be anticipated that the further the case proceeds through the legal process the greater is the amount of work which it will require.

The written fee agreement in this case will not be followed due to its vagueness and due to the apparent variance between what claimant and counsel believed that it stated. This is not a case where claimant knowingly agreed to pay 33 1/3 percent of the recovery and has now changed her mind.

When all the applicable factors are considered, it is found and concluded that a reasonable fee for counsel in this proceeding is an amount equal to 25 percent of the gross recovery. This computes to $5,625.

Counsel is also entitled to recover the expenses he advanced. Reference to defendant's exhibit B shows these to total $130.67. This figure includes the $25 entry of June 1, 1983 which is entered in the record as having been disbursed from trust funds even though there is no indication that any trust funds were ever received. The dispute with claimant's private disability insurance carrier was settled for approximately 10 percent of what its claim would have been, if valid. Such is an expense which should be charged to claimant and not to counsel. Counsel's total entitlement of fees and expenses is $5,755.67.

It is noted that the fee of $7,492.50 in exhibit 2 is 33 1/3 percent of the gross recovery, computed defore deducting expenses, rather than after deducting expenses as provided by the written fee agreement.

Counsel's records, exhibit 13, shows receipt of fees of $7,080.24 and costs of $81.76 for a total of $7,162.00. The payment of $338.00 to The Standard of America Life Insurance Company is not shown.

What counsel actually did was take one third of the gross recovery as fees, $7,500.00, pay to claimant the balance of $15,002.00 plus the $804.50 which she had advanced and pay all expenses and the subrogation claim from the $7,500.00.

This left him with net fees and expenses of $7,162.00. Claimant is entitled to be reimbursed for this difference between $7,162.00 and $5,755.67, which computes to $1,406.33.

FINDINGS OF FACT

1. In April, 1982 claimant employed Curtis A. Ward to represent her in a workers' compensation proceeding against KIOWA Corporation and INA Insurance Company.

2. In April, 1982 claimant and Curtis A. Ward entered into a written attorney fee contract.

3. Claimant and Curtis A. Ward had not reached a mutual understanding regarding the point in time at which the attorney's fee would change from 25 percent of the net recovery to 33 1/3 percent of the net recovery.

4. Claimant, at the time of entering into the fee agreement, had no independent knowledge or information of the fees normally and customarily charged by attorneys performing similar services

and Ward did not advise her of such.

5. The percentages contained in the contingent fee agreement were not a product of negotiation.

6. The case was settled prior to hearing by special case compromise settlement which was approved on February 14, 1984.

7. At the time claimant agreed to accept the special case settlement, she was not aware that Ward was intending to charge one-third of the net recovery as his fee and she believed that his fee would be one-fourth of the net recovery.

8. At the time Ward received the settlement check and explained the proposed distribution to claimant, she objected to his fee being computed at the rate of one-third of the recovery and indicated to him that she felt that their agreement was that his fee should be one-fourth of the net recovery.

9. Ward made a concession in the amount of $338 plus expenses advanced in an attempt to appease claimant's apparent dissatisfaction.

10. Claimant's case involved difficult questions concerning a diagnosis of the source of her problem and also of whether or not the problem was work related.

11. Of the other pertinent factors, there are none present which would indicate that the fee in this proceeding should be higher than that customarily charged for similar services.

12. There is nothing in the record to indicate that counsel did not obtain a favorable result or that the fee should be less than the fee customarily charged in the locality for similar services.

13. Counsel advanced expenses of $130.67.

14. Claimant advanced fees of $804.50.

15. In settling with claimant, counsel paid to her two-thirds of the gross recovery and reimbursed the fees she had advanced for a total of $15,804.50.

16. In settling with claimant, counsel retained one-third of the gross recovery from which he settled a subrogation claim for $338.00 and retained net fees and expenses of $7,162.00.

CONCLUSIONS OF LAW

A written fee agreement is entitled to little weight where its terms are unclear and a meeting of the minds of the parties did not actually occur at the time of its making.

A reasonable fee for counsel in this proceeding is an amount equal to 25 percent of the gross recovery which computes to $5,625.00 plus reimbursement of costs advanced in the total amount of $130.67 with a resulting total of $5,755.67.

ORDER

IT IS THEREFORE ORDERED that fees and expenses for Curtis A. Ward for representation of the claimant in the proceeding against KIOWA Corporation, employer, and INA Insurance Company are hereby authorized in the total amount of five thousand seven hundred fifty-five and 67/100 dollars ($5,755.67).

IT IS FURTHER ORDERED that where counsel has received the total of seven thousand one hundred sixty-two dollars ($7,162) he shall refund to claimant the sum of one thousand four hundred six and 33/100 dollars ($1,406.33).

Signed and filed this 11th day of December, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN CAHALAN,

Claimant,

vs.

OSCAR MAYER,

Employer,
Self-Insured,
Defendant.

FILE NO. 682417

- REVIEW -

REOPENING

DECISION

FILED

OCT 8 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by John Cahalan, claimant, against Oscar Mayer & Co., self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on February 20, 1981. It came on for hearing on July 10, 1984 at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted at that time.

A prior decision in this matter awarded weekly compensation benefits for the period from February 2, 1981 through March 30, 1981.

At the time of hearing the parties stipulated that claimant's gross weekly earnings were $399.00.

The record in this matter consists of the record of the prior hearing on July 29, 1982; testimony by claimant, James Van Hyfte and Vernon Keller; claimant's exhibit 7, a letter from Richard T. Beaty, D.O., dated December 9, 1983; claimant's exhibit 8, a memo from Job Service of Iowa dated December 28, 1983; claimant's exhibit 9, a grievance dated February 9, 1983; claimant's exhibit 10, an agreement between Oscar Mayer and the United Food and Commerial Workers' International Union; claimant's exhibit 11, page 9 of a prior decision in claimant's case; exhibit C, a video tape; exhibit D, a listing of jobs; and exhibit E, a listing of jobs. The parties submitted briefs.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's occupational disease and any disability he now suffers; whether or not claimant is entitled to permanent partial disability; and what the proper rate should be in the event of an award.

STATEMENT OF THE CASE

The record from the prior hearing has been reviewed, but it is not detailed herein.

Forty-nine year old right-handed married claimant, testified to 28 years experience in boning on the cut floor. He recalled that he attempted to move to the pre-rigor department in June of 1981 but was unable to effectuate a bump. He sought pre-rigor because there were more jobs available in that department. Due to medical limitations he was given a department 71 job or light duty status and was sent to plastics. He was not able to go from plastics to pre-rigor.

Claimant professed to not knowing why he had been unable to get into pre-rigor because he felt that persons with less seniority than he were working in the department.

Claimant reported that his current restrictions which are a continuation of those imposed by Dr. Beaty and J. H. Sunderbruch, M.D., and include no lifting over 20 pounds, no progressive movement and no raising of the hands above shoulder level. It is claimant's feeling that those restrictions limit his work opportunities because there are many jobs that entail progressive movement.

Claimant described the work he has done since the last hearing as follows: He worked four weeks on the two inch Warwick line where two inch sausages or hot dogs are placed 12 to a package at a rate of 45 packages per minute. The bad links are removed and replaced. The job is run for a time each fall and then eliminated. He left his duty when the repetitive movement bothered his shoulder and also because the job ran out.

He was assigned for three to four weeks to filling large orders. He selected boxes from those piled on pallets. Some of the boxes weighed in excess of his weight limitation. He also piled boxes above shoulder height.

He lost a one week job in plastic when a more senior person returned from vacation. Plastic sheets were counted and then packed into boxes. There was a deep bubble job done standing which claimant said he could not do. A shallow job sitting he thought he could do. Repetitive motion of the glue line rendered him unable to do that work. He denied that the job could be done left handed.

A very brief couple of days were spent on the weiner tunnel where a box is positioned; dividers are inserted; weiners are

cked; and the box is sealed and returned to the line. Two ousand five hundred movements are done each hour. The repetitive vement troubled him.

Claimant felt he could have done the plastic job. His last ll day of work was in the week ending February 4, 1983. He s not worked since that time. He said that he has been to employment, to job service and to see a job consultant. He aimed to be troubled by both his age and by his inability to e his right hand. He has been unable to find work at the lary level he commanded with defendant employer. He claimed at he has tried to file applications, but that he did not member where and that he has none on file at present.

Claimant asserted that the more lifting or repetitive motion at he does the more he is troubled by his shoulder.

Claimant testified that he does not know what his job status . He continues to complain that he was not given a list of ailable jobs when his department closed in June of 1981. He els that lists of jobs he has seen since that time do not mport with section 123 of the labor management agreement in at there is inadequate information on which to make a selection. re specifically he believed that jobs should be listed by tle. He filed a grievance relating to this complaint with the mpany which was denied.

Claimant acknowledged that in addition to the four jobs he ied, he has been taken to some areas of the plant by Vernon ller. Claimant appears to have found that this tour was acceptable because the foremen who were present were unsure of b availability.

Claimant indicated a knowledge of negotiations on his benalf get him some rights in slice pack. Under the agreement aimant was to get half of his seniority. When he went to the partment with a letter to be signed by the foreman, he was ld that he would not be able to handle any job in the department. aimant stated that he drew sick pay from January to June or ly of 1982. Thereafter he got unemployment benefits until vember of 1983. Claimant was not aware that the company had lked to Dr. Beaty about his jobs. He denied that he had been anted an additional lump sum since the prior hearing. He pressed the opinion that there are jobs in the plant that he uld do if he could get to them.

Claimant agreed that he has learned to use his left hand for re things. He steers his mower which has an electric starter th his left hand. He fishes for catfish without casting. He nted for squirrels and deer only.

Claimant denied that he has been offered any job based on is seniority which he was able to handle, but he said he was ble to do the job in section 71 status.

James Van Hyfte, engineering supervisor since 1972, testified to familiarity with various job requirements and to familiarity ith jobs to which claimant testified. He supervised the making a video tape to portray the work claimant has tried to erform.

The video tape showed: The order filler in the shipping epartment takes an order and stacks the pallet with boxes to ill that order. Boxes are picked up one to four at a time. here is reaching above shoulder height and lifting of a maximum 50 to 70 pounds. Approximately three pallet orders are ompleted in each hour. Pallets are stacked to a height of 77 nches or to a weight of 2,200 pounds.

The plastic job is one that can be done right or left anded, standing or sitting. The weight lifted is about five ounds.

On weiner line packaging, 36 are done per hour if the line s running at full speed. Boxes filled weigh either 12 or 24 ounds and they are slid as opposed to lifted.

The Warwick loader job is a one person job. Claimant had nother person on the job with him because he was in training.

The witness testified that more than half the jobs in the lant require repetitive motion.

Vernon Keller, plant safety and security manager for 14 ears, said that he has been the company person dealing with laimant since the last hearing. He reported that claimant was vacation replacement in a section 71 job doing bubble stacking n plastics. It was his recollection that claimant was told on he fourth day he would be layed off. The next day claimant had sore shoulder and claimed the job was too much for him.

As claimant was in section 71 status something has to occur o get him out. He was not better. The union agreed a job hould be found for him and the union, with management and the octor, removed claimant from section 71 status. Claimant then ook a vacation from September 27, 1982 to November 5, 1982.

When claimant returned from vacation it had been predetermined hat he was to do a job in department 146. The Warwick loader ob was the easiest and claimant was placed in that position. he of the objectives of this move was to find claimant a home epartment from which he could operate. The union agreed that f claimant worked for 20 days he could take half of his seniority. laimant decided not to avail himself of that option.

It was hoped that claimant would be able to do the non-line job in the shipping department because if he had stayed to get seniority he could have obtained a riding job. He had trouble with the work which he was unable to do rapidly enough and he was disqualified by his supervisor. As there was some overhead work, the union agreed to call claimant's disqualification a medical one.

The witness took claimant to three departments to view open jobs. Claimant did the packaging job for two days and then was unable to continue. At that point the company had exhausted possibilities. Again an agreement was achieved with the union to place claimant on sick leave. Twenty-three weeks were paid followed by unemployment from July 1, 1982 to December 31, 1983.

Keller claimed that the company has nothing to offer claimant at this time as it is bound by the contract. Placement is based upon both plant and union seniority. He pointed out that claimant's self-imposed restrictions are different from those placed by the doctors. Keller understood the doctor imposed limitations to be no repetitive heavy lifting, no lifting in excess of 25 pounds and no lifting above shoulder height. Keller was not cognizant of a bar on repetitive motion.

The witness did not know if claimant had been given a list of jobs available as of June 5, 1981.

Claimant is particularly concerned with section 123G of the agreement between defendant and the United Food and Commercial Workers' International Union which provides:

> At the time of layoff, all open jobs and any jobs made available by this Section will be combined into a list from which employees in the order of plant seniority will be allowed to select a job. The jobs of junior employees will be made available, if necessary, in accordance with the following:
> G. An employee who has been placed in a job of his choice must be able to perform the job or learn the job within a reasonable length of time. If he is unable to satisfactory perform the job within a reasonable length of time he shall be laid off and shall no longer be eligible for placement in that job.

On February 9, 1983 claimant filed a grievance relating to that section. He felt that the company only gave him a choice of shift, department and classification. Management denied the grievance by saying that claimant "had the same information available to other employees at the time of selection."

A memo from Job Service of Iowa verifies claimant's active registration since August 28, 1983.

A letter from Richard T. Beaty, D.O., dated December 9, 1983 reports the doctor's discussing with claimant his impairment rating which was based "primarily upon pain" with repetitive motion or heavy lifting. Claimant complained of a worsening of his pain. The surgeon proposed either Cortisone injections or surgery. Claimant was reluctant to choose surgery because, as he told the doctor, "he has discussed this with Oscar Mayer but they are unwilling to accept him as being disabled if the surgery does not work." Dr. Beaty suggested referral to Dr. Sprague for evaluation and a second opinion.

APPLICABLE LAW AND ANALYSIS

This is a review-reopening proceeding. 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."

A prior arbitration hearing was held in this matter on July 29, 1982. That hearing resulted in an appeal of the proposed decision. In an appeal decision filed July 29, 1983 the proposed decision which had determined that claimant had an occupational disease caused by the rapid and repetitive motion in his job as a ham boner, that claimant was entitled to weekly benefits from February 20, 1981 through March 30, 1981 and that claimant had failed to establish disablement was affirmed. In the appeal decision the commissioner made the following 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 [sic] department on May 14, 1981.

11. Claimant lacked sufficient seniority to effectuate a bump into pre-rigger [sic].

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 [sic] packing industry due to his occupational disease.

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, 291 N.W.2d 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 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 clariication 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 pronouncemnt 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 reveiw 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 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).

Claimant's situation is somewhat different from that in the review-reopenings cited above in that this is an occupational disease case and claimant must establish disablement. Iowa Code sections 85A.4 and 85A.5 provide:

> 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.
>
> 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 has not shown an inability to perform his work. He himself testified that there were jobs within the plant he could do if he could get to those jobs. Defendant's exhibit D lists 54 jobs which do not require either heavy lifting or repetitive use of the right arm. However, claimant's unrebutted testimony is that he has been unable to find other employment at an equal wage. A letter from Job Service of Iowa states that claimant has been actively registered since August 28, 1983. Claimant did not have applications on file at the time of hearing.

It is necessary to examine claimant's condition when the decision was made in the prior proceeding and his condition at present to see if there has been a change required by the law.

On comparision, claimant is older now, but that aging is to be anticipated. His education remains unchanged. His work experience has been varied a bit by the work he attempted to do after the hearing. Claimant's permanent restrictions from Dr. Beaty at the time of the prior hearing seemingly are unchanged.

Claimant offered little in the way of medical evidence in his most recent hearing presenting only a letter from Dr. Beaty who apparently had discussed surgery with claimant whose position on having an operation is unchanged from the prior hearing. Dr. Beaty did not change his disability rating of five percent. Claimant's range of motion seemingly remains normal.

Claimant's seeking other suitable employment at an equal wage changes his situation and thereby allows him to establish both the change of condition required in a review-reopening proceeding and disablement as required by the Iowa Occupational Disease Law.

As claimant has shown disablement, his industrial disability must be evaluated. The Iowa Supreme Court in McSpadden, 288 N.W.2d 181, 190 concluded that the criteria used to evaluate industrial disability under chapter 85 could be applied to occupational disease matters.

The industrial commission has discussed the factors in industrial disability on many occasions as follows:

> 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 was forty-six when he began to have shoulder problems. He is now nearly fifty. He is a high school graduate.

Claimant's relevant work experience has been confined to defendant. Since the development of his occupational disease, he has been unable to work steadily for defendant. Intially there was difficulty for claimant in finding a position because his department closed and because of a labor management agreement. The undersigned urged the parties at the time of the last hearing to work together to resolve the problem. She is pleased with the manner in which union and management cooperated to find work for claimant. She finds less pleasure in claimant's response to those attempts. Admittedly some of the work offered was unsuitable to claimant; however, she is not impressed with claimant's cooperation. Unfortunately, claimant continues to dwell on the circumstances surrounding the closing of his department. At the time of his first hearing, claimant expressed his preference for working for defendant. Vestiges of that preference remain. Claimant has collected unemployment benefits and sick leave payments which in all likelihood have reduced his interest in looking for work.

Claimant carries a weight limitation of no lifting of over 25 pounds over shoulder level and a restriction on repetitive motion. Claimant has been off work for a considerable period. He needs to get back into the routine of work. The motivational factors discussed above lower the probability of rehabilitation for claimant.

Claimant's long period off work has not been helpful to his physical condition. Claimant's complaints are of his right shoulder. His right hand is his dominant hand although he did acknowledge increased ability to use his left. Claimant had a prior dislocation to his right shoulder. Dr. Beaty concluded at the time of his deposition taken in the prior proceeding that claimant had an impingement syndrome, supraspinatus syndrome or tendonitis of the rotator cuff. Claimant had a full range of motion which was documented by cybex. Dr. Beaty gave a functional rating based on pain of five percent. Dr. Beaty's most recent report finds claimant "relatively asymptomatic" with light activity.

Based on the Iowa case law, the discussion set out above and the findings of fact set out below and giving particular emphasis to claimant's inertia in light of repeated attempts to help him, it is determined that claimant is entitled to permanent partial industrial disability of eight percent.

At the time of hearing there was question as to an issue of rate. The rehearing decision filed on December 8, 1982 awarded compensation based on a gross weekly wage of $399. The rate was not at issue on appeal and the commissioner's decision also made an award on the same basis. That same determination for rate will be used in this case.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-nine years of age.

That claimant is a high school graduate.

That claimant is right-handed.

That claimant has long experience in boning.

That claimant was unable to work in pre-rigor, the department he chose when his own department was shut down.

That claimant is limited to 25 pounds of lifting over shoulder level and restricted from repetitive motion.

That since the prior hearing in this matter claimant has worked on the Warwick line, in filling large order, in plastics and on the weiner tunnel.

That claimant last worked in the week ending February 4, 1983.

That claimant has been to Job Services and to a job consultant.

That claimant has failed to find work at an equal wage in other suitable employment.

That claimant has drawn sick pay and unemployment benefits.

That claimant had a prior dislocation of his right shoulder.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established disablement pursuant to the Iowa Occupational Disease Law.

That claimant has established entitlement to permanent partial industrial disability of eight (8) percent.

That claimant is entitled to compensation based on a gross weekly wage of three hundred ninety-nine dollars ($399).

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant forty (40) weeks of permanent partial disability at a rate to be agreed upon by the parties based on a gross weekly wage of three hundred ninety-nine dollars ($399).

That defendant pay the amount of this award in a lump sum.

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

That defendant file an activity report in ninety (90) days.

Signed and filed this 8 day of October, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FLOYD CARD, JR.,	:	
Claimant,	:	File No. 691781
vs.	:	A R B I T R A T I O N
H & W MOTOR EXPRESS COMPANY,	:	D E C
Employer, Self-Insured, Defendant.	:	

FILED
OCT 31 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Floyd Card, Jr., claimant, against H & W Motor Express Company, a self-insured employer, defendant, to recover benefits for an alleged injury of January 15, 1982. It came on for hearing on February 21, 1984 at the Black Hawk County Courthouse in Waterloo, Iowa. It was considered fully submitted with the receipt of record from the Department of Public Instruction on February 27, 1984.

The industrial commissioner's file contains a first report of injury received January 19, 1982. A form 2A shows the payment of twenty-nine weeks and three days of healing period benefits.

At the time of hearing defendant admitted an injury arising out of and in the course of claimant's employment on January 15, 1982.

The record in this matter consists of the testimony of claimant, Eugene Kreger, Cletus J. Hammer, Steven Cecil Miller, Alma Frances Card, Roger David Kittle and Marian Jacobs; defendant's request for admissions 1 through 4; defendant's interrogatories 2, 4, 5, 6, 7, 8 and 9; exhibits 6, 7, 8, 9 and 10 accompanying the Crouse deposition; claimant's exhibit 24, a letter from James E. Crouse, M.D., dated April 13, 1982; claimant's exhibit 25, letters from Dr. Crouse; claimant's exhibit 31, a letter from Dr. Crouse dated February 4, 1982; claimant's exhibit 32, a letter from Dr. Crouse dated April 13, 1982; claimant's exhibit 33, a letter from Dr. Crouse dated October 11, 1982; claimant's exhibit 34, a letter from Dr. Crouse dated October 21, 1982; claimant's exhibit 35, a letter from Andrew C. Smith, M.D., dated October 23, 1982; claimant's exhibit 36, a letter from Dr. Crouse dated February 25, 1983; claimant's exhibit 37, notes from an examination by David C. Naden, M.D., dated August 9, 1982; claimant's exhibit 38, a letter from Dr. Crouse dated September 15, 1983; claimant's exhibit 39, a bill from St. Francis Hospital; claimant's exhibit 40, a bill from The Prescription Shop; claimant's exhibit 41, the deposition of Paul L. Meyeraan; claimant's exhibit 42, a bill from Orthopaedic Specialists; claimant's exhibit 43, a bill from Union Prescription Center; claimant's exhibit 44, portions of the Kittle deposition sought to be admitted as admissions; claimant's exhibit 45, the deposition of Roger David Kittle; claimant's exhibit 46, the deposition of Dr. Crouse; claimant's exhibit 47, the rehabilitation file; claimant's exhibit 48, a letter from claimant's counsel; defendant's exhibit A, notes referring to claimant's treatment for right inguinal hernia; defendant's exhibit B, a series of notes from Drs. Crouse and Walker; defendant's exhibit C, a letter from John R. Walker, dated July 12, 1979; defendant's exhibit D, a letter from Dr. Walker dated December 28, 1979; defendant's exhibit E, a letter from Dr. Crouse dated March 31, 1980; defendant's exhibit F, a letter from Dr. Crouse dated May 27, 1980; defendant's exhibit G, a letter from Dr. Crouse dated August 27, 1980; defendant's exhibit H, a letter from Dr. Crouse dated December 29, 1980; defendant's exhibit I, a letter from Dr. Crouse dated February 6, 1981; defendant's exhibit J, a letter from Dr. Crouse dated February 18, 1981; defendant's exhibit K, a letter from Dr. Crouse dated March 5, 1981; defendant's exhibit L, a letter from Dr. Crouse dated March 5, 1981; defendant's exhibit M, a letter from Dr. Crouse dated May 15, 1981; defendant's exhibit N, a letter from Dr. Crouse dated November 20, 1981; defendant's exhibit O, a letter from Dr. Crouse dated February 4, 1982; defendant's exhibit P, a letter from Dr. Crouse dated February 15, 1982; defendant's exhibit Q, a letter from Dr. Crouse dated February 25, 1983; defendant's exhibit R, a letter from Arnold Delbridge, M.D., dated February 27, 1980; defendant's exhibit S, a letter from Dr. Delbridge dated April 29, 1980; defendant's exhibit T, a letter from Dr. Delbridge dated February 13, 1981; defendant's exhibit U, a letter from Dr. Delbridge dated March 11, 1981; defendant's exhibit V, a letter from Dr. Delbridge dated March 9, 1982; defendant's exhibit W, a letter from Dr. Delbridge dated April 2, 1982; defendant's exhibit X, a letter from Dr. Crouse dated Februry 4, 1982; defendant's exhibit Y, a letter from Dr. Crouse dated April 13, 1982; defendant's exhibit Z, a letter from Jan Fowler dated June 30, 1982; defendant's exhibit AA, a letter from Dr. Crouse dated October 11, 1982; defendant's exhibit BB, notes from Dr. Naden dated August 9, 1982; defendant's exhibit CC, a letter from Dr. Crouse dated October 21, 1982; defendant's exhibit DD, a letter from Dr. Crouse dated February 25, 1983; defendant's exhibit EE, a letter from Dr. Smith dated October 23, 1982; defendant's exhibit FF; records of claimant's hospitalization of December 22, 1979; defendant's exhibit GG, hospital records relating to claimant's carpal tunnel release; defendant's exhibit HH, records from hospitalization of June 15, 1981; defendant's exhibit II, records from claimant's hernia repair; defendant's exhibit JJ, hospital records from claimant's 1982 back surgery; defendant's exhibit KK, the deposition of claimant; defendant's exhibit LL, the deposition of Roger W. Kittle; defendant's exhibit MM, curriculum vitae of Marion Jacobs; defendant's exhibit NN, a disability report by Jacobs; defendant's exhibit OO, information regarding the GATB test; and answers to interrogatories except answer 16.

Defendant's objections to exhibits 6, 31, 33, 34, 36, and 38 are overruled. See Iowa Rule of Evidence 803(4). Defendant's objection to exhibit 43 also is overruled based on claimant's testimony. Defendant's objection to exhibit 40 is overruled. Defendant's objections to exhibits 10, 39 and 47 were considered in weighing the evidence. Claimant's objection to a portion of exhibit 46 is overruled as are claimant's objections to defendant's exhibits B through W, Z, FF through II and KK.

ISSUES

The sole issue in this matter is claimant's entitlement to permanent partial disability.

STATEMENT OF THE FACTS

Claimant's testimony was offered both live at the hearing and through his deposition.

Fifty-eight year old right-handed married claimant, father of seven children, who has a ninth grade education, was employed by defendant employer for thirty-one years in January of 1982. Prior to commencing work for defendant employer he served in the marines as a medical corpsman. His job experience includes that on the assembly line for a manufacturer and that of a beef loader on a loading dock. He began truck driving in 1950.

He recalled that he broke a foot while he was working for the meat packer, that he had teeth knocked out in 1957, that he stumbled over an abutment and ruined cartilage in his right knee in 1961 which resulted in surgery and occasional subsequent trouble, that he hurt his lower back going down steps in April of 1970 and had a fusion, that he sprained his back in 1973 and was hospitalized for traction and that he tore his biceps in 1974 and had surgery.

Claimant said that following his 1970 injury he was able to return to work and to do his tasks as a truck driver which might include lifting five to one hundred pounds. After 1973 he was again able to resume his full duties. He regained use of his arm about six months post-surgery after his 1974 incident.

On March 1, 1979 claimant felt a snap in his right arm as he

nd another employee were attempting to dump some castings out f a barrel weighing between 400 and 500 pounds. He had numbness n his hand. He had surgery. He was released to go back to his uties as a dock foreman in June. He noted that he was sometimes othered by lifting and by tingling in the fingers.

On December 13, 1979 claimant was helping another employee ove a pallet. The other worker became faint. Claimant tried o maintain the pallet and had a snap in his shoulder on the ight side. Surgery was performed. Claimant resumed work in eptember of 1980 as a full-time driver. However, his shoulder ched and after a short period he called the doctor as he was aving trouble with shifting gears, picking up freight and nloading. He had cortisone injections and physical therapy. e was off work and had carpal tunnel surgery on the right on arch 10, 1981.

Claimant was given a full work release for June 1981; owever, he was soon off for seven weeks with hernia surgery. e returned to work in August. At that time he was feeling etter than he had in September of 1980. He again got help with eavy unloading. He also was troubled by a lot of shifting.

In January of 1982 he switched to a city driver because he hought working on the dock would be easier and help with ifting readily available. In actuality he got less driving, ut not less lifting. He was asked:

> Q. January the 14th, 1982. As things stood with you on that date, did you know of any reason why you could not have continued in your job with H & W as a city driver?
>
> A. Not really. I was doing what I could, suffering with this arm. You bet. I'd have stayed just as long as I could.
>
> Q. You were able to tolerate those activities?
>
> A. Well, I was, but it gave me a lot of trouble.
>
> Q. But you maintained a full-time work schedule, correct?
>
> A. Yes, sir.
>
> Q. You hadn't seen the doctor for at least a month?
>
> A. Three weeks; about three weeks, yes. (Card dep., p. 38 ll. 10-25)

Later he was questioned:

> Q. Now, back at that time, January the 14th again before your fall the next day, did you have any plans in mind about how long you would work for H & W?
>
> A. Well, I might have said, like Roger said, that I was going to retire when I was 57, but a lot of drivers down there -- and then Roger would kid me and he would say, "You'll be here until 65," which probabl, I would have been. If my health would have stayed up and I had no other injuries, no doubt I would have.
>
> Q. So you might have had some plans for retiring before this fall of January the 15th?
>
> A. No, I didn't have no -- I mean I might have said it but I didn't have no plans until after I hurt my arm, you bet. (Card dep., p. 39 ll. 15-25; p. 40 ll. 1-5)

He was positive he had not talked about retiring four years before.

On January 15, 1982 he fell from the top of a tractor and struck his back from his buttocks to his head. Traction, therapy and pain pills were tried and then surgery on February 1, 1982.

After surgery he used a corset, but then started taking it off to increase his activities. He became sore. He particularly recalled feeling something in his lower back as he was trying to fish. In the remainder of 1982 he could not bend over and had difficulty walking more than a certain amount. He had therapy and took muscle relaxants.

Claimant testified that his arm stayed pretty much the same after his fall as before, but he said, "now I cannot do anything with my back, no really I haven't tried the arm where it is really going to tear me up like it has."

According to claimant, Dr. Crouse has provided him with a release for no stooping, bending or lifting, but not with a full release although he had asked for one. He thought he might be able to do the driving of a city driver, but he did not think he could handle heavy freight. He said:

> The shifting and the driving is what would be bothering my arm, and the lifting, I mean, my back -- it ain't going to do it, neither is that right arm. But what I can do with my left arm I'll do it if there is any way possible. (Card dep., p. 47 ll. 8-12)

Claimant stated that his neck started hurting after surgery in February of 1982.

Claimant asserted that he would have worked indefinitely if "my shoulder held up" and that he would have continued to work had it not been for his shoulder. It was after one of his shoulder injuries that he began to think of retiring and after so many shoulder troubles that he decided to do so.

Claimant's retirement pension provides him with $625 monthly. He indicated that because of union regulations he could not try to work at any trucking firm or he could lose his pension.

Claimant testified that prior to January 15, 1982 he had no problems with walking, sitting, standing or sleeping. Claimant estimated he can now sit an hour, walk two or three blocks, stand ten to fifteen minutes and lift ten to fifteen pounds. At the time of his deposition claimant was taking only over-the-counter pain relievers and an occasional pill from his spouse.

When claimant last saw Dr. Crouse in April, he was sent for tnerapy to the area between his shoulders and to his neck. His visit to the doctor was prompted by lower back pain on both sides as well as pain down the left leg. Three medications were prescribed.

Claimant denied any snowmobiling since 1977 or 1978 and motorcycling in the past year. Claimant also denied doing any work at his cabin in the country other than pulling a few weeds in the garden. He said that his shoulder hindered his enjoyment of the cabin from December 1979 to January 1982.

Claimant acknowledged taking two twelve hour trips to Arkansas in a van with a bed. He drove for a brief time on one of the trips.

Claimant evidenced an interest in gunsmithing and a willingness to be trained to work in his own business with guns. Claimant thought he could answer the phone and drive perhaps an hour or two.

Claimant said that he was too miserable to contact vocational rehabilitation before June 24, 1983. He agreed that he had been instructed to go by his attorney. He said that he had visited the office three times and made other contacts by phone. He also saw Marion Jacobs who sent him to eight or ten places. She assisted him with making up a resume.

Claimant reported that his only cashier's experience came from taking money on the road or on the dock. He used a little adding machine as a dock foreman. He has had no bartending or security guard experience and he doubted his capacity to stand or to walk. He did not feel he could work an eight hour day.

Claimant acknowledged that he and his spouse have cared for over 130 foster children over the last fifteen to seventeen years. An allotment of a certain sum of money is made for each child. According to claimant a physical must be taken periodically to qualify as a foster parent.

Alma Frances Card, claimant's spouse, testified that claimant was off work with a low back problem for three months in 1970 and was able to return to work without problems. After his 1973 slip in front of the barbershop he had no trouble after a month and made no back complaints until January 15, 1982.

She included in his activities before December of 1979, riding motorcycles, snowmobiling, bowling, trap shooting, mowing, working in the yard, painting, and carpentry. He did all these with no physical problems. Neither was he bothered by walking, sitting, standing, lifting, or sleeping.

In December 1979 and January 1982 he had difficulty with his arm which he favored. He quit doing things he had done before. He did a little fishing, dishes and minor things. He was not troubled by sitting, walking, standing or sleeping.

The witness remembered that after surgery claimant did not move well. He wore his back support. She helped him with dressing. She did not feel claimant improved in 1983.

Card reported that since January 15, 1982 claimant hurts all the time and complains every day. He does not lift anything, even his grandchildren. He walks two or three blocks. He cannot stand and he does not bend.

She saw him try to run the rototiller--a five minute attempt. A similar situation occurred with a chain saw. He raked for ten minutes before his back hurt and he had to quit.

On a normal day it will take him an hour or two just to get started. He spends his days drinking coffee and visiting children and friends. One day a week they go to the cabin.

It was Card's opinion that claimant planned to work until he was seventy.

Cletus J. Hemmer, a lounge and bar operator from Raymond, Iowa, who appeared pursuant to a subpoena, testified to having known claimant for fifteen years and to having performed various activities with him. He recalled claimant's injury to his shoulder in 1979 and to his back in 1982 and said that until

1979 claimant engaged in hunting, fishing and mushrooming without physical problems.

From June of 1979 to January of 1982 he saw claimant once or twice a week and observed that claimant had trouble doing what he did before. After January 15, 1982 he found that claimant could hardly do anything including finishing a whole game of cards. Claimant went with him on two 638 mile trips to Arkansas with claimant either sitting in a chair or lying in a bed. Every 175 miles a stop was made to allow claimant to get out.

Hemmer, who claimed to have hired five or six bartenders in the course of running his business, said he would not hire claimant. He listed the bartender's duties as filling coolers, operating the cash register, cooking and serving customers. He stated that all his employees were at least high school graduates. His cash register is of the computer type.

Steven Cecil Miller, who appeared under subpoena, who had known claimant for twenty years and who had land adjoining claimant's cabin property, said that until December of 1979 he saw claimant about once a week and observed claimant fishing, cleaning up brush, working around the cabin, trap shooting, snowmobiling and riding motorcycles. He did not notice claimant's having physical problems nor did he hear claimant complain.

From December of 1979 to January 1982 he saw claimant every couple of weeks and saw that he had trouble with his arm. He did not think claimant had difficulties sitting, standing or walking. Since January of 1982 he has found claimant unable to do extensive walking or to stay in one place for too long a time. He said that claimant is no longer physically active. He complains of back pain.

Paul L. Meyeraan, a thirty year employee and current employee of defendant employer, testified to having made the north peddle run to deliver preloaded freight to towns to the north. The driver does the unloading during an eight to fifteen hour day. As a city driver, trailers are unloaded and trucks are loaded. Local deliveries are made. The witness said the city driver does less driving, but that lifting is pretty much equal during an eight to ten hour day.

The dock foreman has responsibility for setting things up in the morning, loading out and directing personnel. He estimated the weight lifted at 5 to 250 or 300 pounds with lift trucks and two-wheelers available as well as other workers to assist with lifting.

The witness knew that before December 13, 1979 claimant was a foreman as he was his dock foreman at that time. He said that claimant was a good foreman and he was not aware of any complaints about claimant's work. Neither did he recollect claimant's complaining about his shoulder or his refusing to do work.

Meyaraan thought that in the time from September 15, 1980 to October 6, '980 claimant was unable to handle his job. He stated that claimant told him that he hurt, but he went ahead and tried to do the work. Meyaraan agreed that there would have been times when either he or claimant could have been gone from the terminal. He also found it difficult to remember. Prior to his fall in January claimant was doing the duties he was assigned without assistance.

The witness did not remember claimant's speaking of retirement or of the two of them discussing it.

Forty-eight year old Roger David Kittle, terminal manager for defendant employer since September 1978, described the company as a common carrier in general, intrastate and interstate freight on a less-than-truckload basis and the Waterloo terminal as one in which freight is broken up, picked up or delivered. At the time of his deposition there were thirty-four employees in Waterloo including an assistant manager, three dock foremen, a part-time biller, clerk, a full-time and a part-time salesperson and twenty-seven drivers.

He listed duties of a dock foreman as organizing and starting crews, sorting bills into sequence, giving freight to customers who come to the dock, collecting money, handling phone calls, setting up city runs, making sure of loading, actually loading and occasionally delivering.

All drivers are maintained on the same seniority list, but they are separated into road drivers and city drivers.

The witness recalled that from September 1978 until March of 1979 claimant was a dock foreman working from 2:00 a.m. until 10:30 with lifting responsibilities ranging from five to one hundred five pounds. Equipment such as two-wheelers, forklifts, bars and rollers were used to assist with lifting. Claimant was observed by Kittle on a daily basis. He noted claimant had no difficulty with his work and he recalled no complaints of claimant's right shoulder or back.

He remembered claimant's injury on March 1, 1979 thusly: He called claimant and told him to send two drivers and a tractor and trailer to salvage freight from an accident. Claimant came himself and was verbally reprimanded for doing that. He then told claimant not to try to lift a drum of castings, but claimant attempted the lift and injured himself. Claimant told him that he would wait to see what the night brought before seeing a doctor. Later he learned claimant was having surgery.

Claimant returned to full-time work as a dock foreman. Kittle said that until December 13, 1979 claimant was able to do his regular activities without problems or complaints of either his right shoulder or low back. On December 1, 1979 claimant was told that he would no longer be the dock foreman and he was allowed to bid to any job he chose as senior man.

He first became aware of claimant's injury on December 13, 1979 when he got a call from another driver to tell him claimant had gone to the hospital. Later claimant called to say he had injured his shoulder.

Claimant returned to work on September 15, 1980 to the north peddle run. As the north peddle run driver, claimant would leave the terminal with his preloaded freight between eight 8:00 and 9:00 a.m., deliver goods and after eight plus hours return to Waterloo. He was expected to unload.

After claimant had come back to work, the witness did not see him lift. He did not hear complaints of the right shoulder.

Claimant took vacation beginning about October 12, 1980. Kittle got a call from the insurance adjustor telling him claimant was going to the doctor for his arm.

On June 1, 1981 claimant returned as the north peddle run driver. On June 15 he had a call from claimant telling him of his injury in the groin area which eventually was diagnosed as a hernia. Claimant returned to work on August 10, 1981 on the north peddle run. Kittle said from that time until January 1, 1982 he did not see claimant doing physical work. Neither did he hear claimant complain.

On January 1, 1982 claimant exercised a bid to a city driver's job--work involving less driving, but the same amount of lifting or possibly more. After the job change, Kittle observed claimant unloading and lifting some freight. Other drivers lifted and operated the same equipment. Other workers and equipment were available on the dock to assist with the lifting. Claimant made no shoulder complaints. The witness was aware of claimant's falling eight to nine feet from the top step of the truck and landing on his spine or tailbone. After this incident claimant sometimes complained of his low back.

Claimant was not allowed to return to work without a full unrestricted release. The release was necessary because of company policy and union rules. Under the contract claimant could have worked to age 70. He took retirement at age 57. Kittle recalled claimant had been saying for years that he would retire at age 57. More specifically, he thought they had discussed retirement at the end of 1978 or the beginning of 1979. He was conscious of this because of provision for a birthday holiday.

The witness did not remember claimant's expressing a desire to go to the city run because of his shoulder.

Kittle reported that the rate clerk for the company is a paralyzed person who is in charge of determining tariffs and classifying and assessing charges. This job allows for movement at will. The dispatcher has the same option. He correlates his work without the dock foreman to see that freight gets where it is to go. He said that he had discussed the dispatcher position, a lower paying job, with claimant.

It was the opinion of the witness that a union foreman needs the capacity to stand, sit, bend, drive trucks and to lift up to 100 pounds.

Fifty-six year old Eugene Claire Kreger, who appeared pursuant to a subpoena and who has a masters degree in guidance and counseling, testified to testing and personnel experience in the marine corp following which he worked in vocational counseling. Beginning in 1964 he was employed by the state department of vocational rehabilitation as a counselor. Since 1966 he has been supervisor for the Waterloo area.

The witness explained that in order for his agency to work with persons there must be a disabling condition which presents a handicap to employment. There must also be a reasonable expectation of benefit from rehabilitation. In addition to the information gained from clients in interviews which include such things as social and work history, the agency employs a medical consultant to assist in evaluating the physical disability and medical information. Medical documentation, psychological reports and aptitude tests are gathered. The attitude of the client is assessed and residuals which the client has that can be utilized also are considered in terms of transferrable skills which a person has from prior employment which could be used in a new occupation. Ultimately, an individualized program is attained and intermediate and long-term goals are set.

One test utilized is the General Aptitude Test Battery which has been used since 1947. The final two tests in this battery are used to evaluate finger dexterity and manual dexterity; i.e., agility and not strength.

Kreger testified to familiarity with job requirements applied by various area employers. He listed the following: Over-the-road truck dirver--attendance at Hawkeye Tech and some experience; local trucking--chauffer's license, ability to load and unload and knowledge of the territory; cashier jobs--probably knowledge of computers or at least dexterity and aptitude for computer training; security guard--experience as a police

ficer or a high school education and certification through a elve week course in Des Moines and the ability to run 300 feet le carrying a specified weight; bartender--pleasing personality, llity to meet the public, capacity to stand on the feet and od finger and manual dexterity; dispatcher or telephone swerer--ability to sit, possible physical capacity for being on the docks and moving around, potential ability to operate computer.

Claimant initially was seen at the agency by a counselor ned John Champ who has subsequnetly suffered from high blood essure. Claimant was referred by his attorney and he was seen July 18, 1983. On February 10, 1984 Champ wrote:

> Counselor makes note of the fact that there has been limited contact with this individual due to the fact that referral to RESB was by his lawyer, Mr. Greg Racette, solely for the purpose of obtaining information and assistance in this client in court suit. Client says court case is forthcoming and pending and are not really interested in any type of vocational discussion but more in what can be done for them in the way of obtaining financial relief from the court against the insurance carrier.

Kreger was of the opinion that based on the medical infortion available to him claimant could work neither as a truck ver nor as a dock foreman as he would be unable to load and unload trucks. He thought that claimant's transferrable lls would be an ability to do telephone work and to write ngs down such as a desk clerk at a hotel, but a clerk might re other duties than just checking in and out. He said that lephone sales work which allowed claimant to get up and to re about might be possible physically but he questioned imant's ability as a salesperson. He seemed to feel that a strictly answering the phone would not give claimant enough rement. He said claimant's age would be against him in ding employment as a houseparent. He did not think claimant ld get an interview as a security guard because he would need tification from the twelve week course in Des Moines. Some s also require a written examination. He decided employment a bartender would mean claimant would have to be on his feet too long a time. He noted that hand to eye coordination and ger dexterity and personality are important in bartending k. He conceded that claimant might serve beer in a working ss bar where there would be few mixed drinks.

Overall, the witness found claimant restricted to sedentary k. He did not see rehabilitation as feasible unless claimant s being trained for home-bound employment. He felt that imant did not have the ability to learn computers and that s lack of ability would be an embarrassment to him. He also ed claimant's finger dexterity as a deterent to being able to input.

In preparation for his testimony, the witness had contacted Services and four area employers. He reported large numbers applicants for all jobs.

Regarding their discussion of claimant's avocations and tivities, he said that he and claimant had considered claimant's rating a bait house. He understood claimant to be quite active.

Kreger did not believe obtaining a GED would increase imant's employability.

Marian S. Jacobs, a vocational consultant with a master's gree in counseling and personnel services, was retained by the surance carrier to see claimant. Prior to seeing him she viewed medical records and noted claimant's back injury and gery of 1970, the shoulder injuries in 1979 and surgeries in 79 and 1980, the carpal tunnel release in 1981 and the back jury and surgery in 1982. She also read the depositions taken this matter.

She recorded claimant's age and his work experience. She terviewed him with his spouse present on December 13, 1983. imant told her he was retired with pension benefits of $625 month. He estimated he could walk two or three blocks ten fifteen minutes at a time, sit for an hour, stand ten to fteen minutes, lift slightly more than ten pounds and drive fty to sixty miles. Bending and lifting cause him pain. He id that he is unable to apply pressure with his right arm at oulder height or above. He told her that his disabilities are affected by weather and temperature changes. In expressing r opinion she relied on what claimant told her regarding his pabilities.

Claimant reported being to the state vocational rehabilitation ency on two occasions and expressed an interest in returning work if a job within his physical limitations were available.

Jacobs interviewed Kittle and visited claimant's job site to serve the facility and to discuss in detail claimant's work. cobs also made contact with other area agencies and employers.

Among those inquiries she found a two hour a day job with a rvice station which involved picking up money, counting it and king it to the bank; a city parking lot security guard who ed a TV monitor and summoned others to handle problems which ise; a security guard; a micrographics job which allowed for ange of position and did not require great finger dexterity; a shier's opening with the state university; a bartender cashier position with a restaurant; a dispatcher for a cab company; and an answerer for an answering service. A care facility was interested in talking with claimant about being a houseparent.

Jacobs learned that claimant's income was too high to allow him to qualify for help from a senior citizens group which aids those fifty-five and over in finding work. She learned of a new business coming to the area which would give preference to those persons eligible for targeted job tax credit; i.e., the employer is given a tax credit equal to fifty percent of the first $6,000 in wages paid to an eligible employee in the first year of employment.

As factors in claimant's favor were his steady employment record and his established dependability and reliability. Jacobs recognized claimant's knowledge of the local area and his ability to keep accurate records, utilize adding machines, make change and organize work. She learned from Kittle that claimant was a good worker. She was aware of his inability to return there because of his lack of a work release. She did not believe claimant could do the work he had been doing for defendant employer. She did not think claimant's ninth grade education would be a handicap to him in the job she found, but she said that claimant's lack of education would be a hindrance in the overall competitive job market.

Jacobs determined claimant's preinjury wages to be $13.21 per hour. She anticipated he could earn a minimum of $3,484 a year in a part-time minimum wage job and a maximum of approximately $13,333 or $6.41 per hour.

As part of her evaluation Jacobs had claimant undergo the GATB test which he took on January 20, 1984. Test results were interpreted as showing claimant might encounter some difficulty in a two year educational program. He was not recommended for constant work with his hands.

Claimant was hospitalized in October of 1970 after an April fall at work which resulted in pain in his right leg and back. A disc was xcised at L4 on the right and a fusion using a prop H bone graft was done. Claimant's impairment was rated at sixteen percent of the body as a whole.

Medical records show claimant was hospitalized in March of 1979 with a rupture of the long head of the biceps in the right arm. A surgical repair was done and the tendon was sutured to the coracoid process. When claimant was seen on May 18, 1979 he complained of numbness of the two ulnar fingers. He was released to return to work on June 4, 1979 and given an impairment rating of twelve percent of the right upper extremity.

Jim Eldon Crouse, M.D., board certified orthopedic surgeon who had reviewed Dr. Walker's surgery for purposes of his deposition, saw claimant on December 13, 1979 in the emergency room. He took a history of a sudden onset of pain in the right shoulder and arm. Claimant had a prior surgery for a ruptured biceps tendon. He had swelling in the arm and bunching of the biceps muscle. Claimant was placed in a sling. It was Dr. Crouse's opinion that the accident on December 13, 1979 was a second injury to claimant's right shoulder area and that the incident was a predisposing factor to his carpal tunnel syndrome.

On January 2, 1980 Dr. Crouse explored the biceps tendon which was stretched but intact. Adhesions had developed. Surgery was done to release the adhesions and claimant was discharged with a sling.

By mid-February claimant was having severe pain with any activity. Cortisone and anesthetic were injected. Darvocet N-100 and Motrin was prescribed. Later in the month he had discomfort in both shoulders and in his neck as well. He was given a soft collar, his medication was changed and therapy was started for the neck. Dr. Crouse said that claimant's neck complaints were probably not connected with the December injury.

On May 14, 1980 another surgery was done based on a diagnosis of biceps tendon rupture with a chronic biceps tendon rupture with a chronic bicepital tendonitis of the right shoulder. The surgery found the biceps tendon attached to an area of pectoralis muscle. It was freed and inserted in a groove in the upper arm area of the humeral head anterior to the bicipital groove. The tendon was sutured to the groove. Claimant was discharged from the hospital with a splint and sling. Dr. Crouse agreed that the surgery resulted in an alteration of shoulder function.

Post surgery claimant developed some numbness in the thumb. Nerve conduction studies were done which showed slowing which was found to be consistent with swelling around the shoulder. When claimant was seen on September 8, 1980 he had a burning sensation if he rubbed the front of his shoulder and he had numbness in the tips of his thumb and index finger. He was given a release to return to work on September 15, 1980 with the idea that he should try working and see what he could do and how he would get along.

Claimant returned on October 6, 1980. He was having severe pain over the anterior humeral area of the right shoulder. He was on vacation from work. He was treated with a pain medication, a muscle relaxant and an anti-inflammatory. This treatment was followed by injections. At the end of November a TENS was ordered for use in the shoulder area. Claimant was kept off work and was to avoid any activity which would stress his shoulder.

In a letter dated February 6, 1981 Dr. Crouse rated claimant's disability at 40 percent of the right upper extremity or 24 percent of the whole person. A letter dated February 18, 1981 states: "At this point I believe Mr. Card's shoulder problem is going to be a permanent condition which will restrict him from returning to heavy work and therefore keep him from going back to his previous job. I do not believe there is any further therapy or surgery that will resolve the problem." A subsequent letter says: "I do not believe that he is going to be able to get back to his previous job and a rehabilitation program to train him for a sedentary type job I believe would be helpful in this 55 year old man." On March 5, 1981 the doctor gave a functional impairment rating to the shoulder of ten percent.

Nerve conduction studies were repeated in early 1981. Testing was positive for carpal tunnel syndrome. A carpal tunnel release was done on March 10, 1981. Dr. Crouse allowed that swelling in the upper extremity could be a precipitating cause of carpal tunnel syndrome. Claimant's wrist was splinted. He was released for return to work on May 4, 1981 but he was unable to go back as he developed tenderness around the scar in his hand. He was given ultrasound treatments. Later, because of sensitivity around the incision, that area was injected.

Claimant was released for work on June 1, 1981 to carry on activities as he could tolerate them, but he was restricted from heavy work with the right arm and hand.

On November 20, 1981 Dr. Crouse again rated claimant's shoulder impairment at 40 percent to the upper extremity or 24 percent of the body. He deducted the 12 percent previously given by Dr. Walker and attained 17 percent of the whole person. He discussed the basis for his determination.

> The determination of disability basically is a determination of how much impairment Mr. Card has in terms of what a normal man his age would be expected to do. He had scarring around the shoulder, he had had three previous surgeries, he had had the two previous injuries, he no doubt had some irritation of the nerves and was getting some injury to the nerve endings causing persistent pain.
>
> He had some limitation of motion, and most particularly he had quite a severe limitation in lifting because of weakness and marked tenderness whenever he tried to use the shoulder. In my estimation, this accounted for a 40 percent impairment of the upper extremity. (Crouse dep., p. 49 ll. 17-25; p. 50 ll. 1-5)

A letter dated November 20, 1981 contains this statement: "His shoulder, with rest, improved, so that finally on September 15, 1980 he was given a release to return to work. He was quite anxious to get to work to complete the short time necessary so that he would be able to retire with a full pension...."

On December 22, 1981 claimant was seen with severe right shoulder pain over the proximal humerus and the humeral head. X-rays showed bony hypertrophy over the area where the tendon had been injected. Dr. Crouse did not consider that claimant had a new injury.

As work claimant would either be unable to do or have difficulty in doing, the doctor listed repetitive work with the shoulder, turning a stiff steering wheel or loading or unloading cargo weighing more than a few pounds. Sedentary work was proposed.

Arnold E. Delbridge, M.D., saw claimant on January 27, 1980 and suggested claimant needed additional time for healing and therapy to begin soon. Dr. Delbridge saw claimant again on April 29, 1980 and thought that a reexploration of claimant's shoulder should be tried.

Dr. Delbridge next saw claimant on February 2, 1981 and agreed that claimant should have a carpal tunnel release. He pointed out that the carpal tunnel syndrome could be related to having his extremities immobilized.

Dr. Delbridge performed a disability evaluation on claimant on March 9, 1982. At that time claimant's pain in his proximal humeral area was quite severe. There was weakness in his grip strength on the right. A thirty percent impairment of the upper extremity was assigned. Dr. Delbridge converted that to eighteen percent of the whole person.

Claimant was seen by Dr. Crouse on January 15, 1982 for back and left leg pain which claimant said came on when he slipped and fell on his back. Claimant had previous disc surgery at L4 and a prop H fusion. X-rays showed mild hypertrophic changes in the back and slight narrowing of the fourth disc space. The doctor's diagnosis was acute back strain with left radicular pain superimposed on the disc fusion. Bedrest, medication and therapy were prescribed.

A CT scan was done which showed the canal at the L4 interspace was stenotic. Narrowing was from a combination of bone, bulging disc and ligamentous hypertrophy. There was irregular density posterior to the lumbosacral interspace.

Surgery was performed on February 1, 1982 consisting of a hemilaminectomy at L3, 4 and 5 on the left, foraminotomy at L4-5 on the left with a partial pediculectomy at L4 and an excision of L4.

When claimant was discharged from the hospital he was warned about heavy lifting and repetitive bending and stooping. He was advised to increase his activities and take frequent rests. At the time of his discharge his leg and buttocks pain was completely relieved.

When claimant was seen on March 19, 1982 his back and leg were doing well, but he had right shoulder pain. In May he had some muscle twitching in his back and discomfort in his neck.

Claimant's neck was evaluated when he was seen on June 1, 1982. X-rays showed spondylosis with radicular pain into the arm.

On July 1, 1982 claimant told the doctor of back discomfort which came on when he attempted to rototill his garden. The doctor noted that claimant would need to be on restricted activities indefinitely due to the back, shoulder and neck.

David C. Naden, M.D., saw claimant on August 9, 1982 to evaluate his back. He took a history of a prior fusion and of recent surgery. On examination heel walking was found to be eighty to ninety percent of normal. Claimant lacked six or eight inches of being able to touch the floor. Lateral bending and rotation was compromised. Hyperextension was almost nil. Sitting straight leg raising was negative bilaterally. His right ankle jerk was a trace. The left was absent. Muscle testing showed no localizing weakness. X-rays revealed a deficit in the laminae at L5 and a partial defect at L4 on the left. The spinous process of L4 was either very close to or touching L5. Disc spaces were "fairly well maintained" except for some narrowing at L5, S1. A fifteen percent rating was given.

Claimant was seen by Dr. Walker on August 13, 1982 at which time he gave a history of twisting his back in his boat. X-rays showed osteoarthritis and spondylosis. Dr. Walker believed claimant had a sacroiliac sprain on the left and prescribed medication. Claimant's condition at this time was viewed as an aggravation of his previous problem.

Claimant was given a slip to return to light work on October 11, 1982 with no heavy lifting and no repetitive bending or stooping.

Andrew C. Smith, M.D., in a letter dated October 23, 1982 wrote that he did not think claimant's pain in his left foot was related to his diabetic problem as his blood sugar was 160 and such a problem would involve both feet instead of just one.

Claimant was given pain medication in November and again in February.

Claimant was seen on April 7, 1983 at which time he told of increasing discomfort in the neck, upper back and lower back to the left of the midline. He was started on therapy and medication. Medication was for the neck and low back.

Dr. Crouse gave claimant a rating of 18 percent on this basis:

> At this time he has a laminectomy not only on the right side but also on the left side. He had a decompression essentially from L3 through L5. He has a persistent discomfort, certainly some increased instability with laminectomy bilaterally, and with the bilateral laminectomies with the resultant scarring which is present after all, any kind of surgery, the back pain and the leg pain, I believe that this would certainly warrant an 18 percent impairment to the increase. (Crouse dep., p. 78 ll. 5-14)

He stated that claimant will be restricted from prolonged standing, heavy lifting and from repetitive bending, stooping and lifting. He did not expect claimant to be able to do long driving and loading and unloading. He believed claimant's low back problem would restrict him to sedentary work which allowed him to move about and to rest occasionally.

Dr. Crouse thought claimant reached maximum medical improvement from his injury of January 15, 1982 on June 18, 1982.

The doctor felt claimant might be a candidate for a pain clinic at a future time. He did not relate claimant's neck complaints to his January 15, 1982 accident.

Deponent expressed the opinion that the combination of claimant's back and shoulder problems disabled him from full-time employment. Dr. Crouse acknowledged that discs can deteriorate with age whether or not surgery is performed, but he was unwilling to say that because a disc has been removed a person would be more likely to have further herniation at that spot. The doctor said that after he got through the bone graft there was no evidence of scarring or other residual of the previous surgery. He attributed the bony hypertrophy to "spondylosis or what you would see with routine ageing." The disc seen at L4 was bulging and had not actually herniated.

Dr. Crouse indicated he would not be surprised if claimant had difficulty driving a car, van or truck; but he said claimant could try to see what he could do. He thought claimant could

ork in a situation where he could control his work time, anding and sitting.

Dr. Crouse agreed that claimant's strain with the rototiller nd in the boat caused a setback in the time he was able to eturn to light work. The incidents, however, caused no damage o his underlying bony or muscular ligamentous structures. The octor was unable to say whether the twisting in the boat caused ew nerve injury which resulted in claimant's foot being numb.

The doctor agreed that after claimant's back injury the ajority of his complaints related to his low back.

K. Caldwell, M.D., saw claimant on December 5, 1983 for RESB nd recorded diagnoses of right biceps tendon rupture, spinal tenosis at L4 and low back strain.

APPLICABLE LAW AND ANALYSIS

The sole issue in this matter is claimant's entitlement to ermanent partial disability. As claimant has an impairment to he body as a whole, an industrial disability has been sustained. ndustrial disability was defined in Diederich v. Tri-City Railway o., 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 apacity and not a mere 'functional disability' to be computed n the terms of percentages of the total physical and mental bility 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.

ee Birmingham v. Firestone Tire & Rubber Company, II Iowa ndustrial Commissioner Report 39 (1981); Enstrom v. Iowa ublic Services Company, II Iowa Industrial Commissioner Report 42 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial ommissioner Report 430 (1981).

Claimant is an older worker with a limited education. His ork has been confined to the trucking industry where he has abored as a driver and as a dock foreman. When he functioned s a dock foreman, he was a working foreman. All his work in rucking involved heavy lifting. His work as an out-of-town driver could take as long as 15 hours each day. Claimant's work has provided him with experience in telephoning, in writing things down, in keeping accurate records, in knowing the local area, in utilizing an adding machine, in making change and in organizing his work. Claimant has been a good worker with established dependability and reliability.

A full and unrestricted work release is required by company policy and union rules to allow claimant to return to work for defendant. Workers are permitted to work to age 70. When claimant was unable to get an unrestricted release, he retired with a pension of $625 monthly. Claimant was somewhat equivocal about his intent to retire before January of 1982. Ultimately he admitted he might have said he would retire at 57 and that "he didn't have no plans until [he] hurt [his] arm, you bet." Claimant's spouse testified that claimant planned to work until age 70. Kittle claimed that claimant had been saying for years that he would retire at age 57 and that the two of them had discussed claimant's retirement at the end of 1978 or beginning of 1979. In a letter dated November 21, 1981 Dr. Crouse wrote: "he [claimant] was quite anxious to get to work to complete the short time necessary so that he would be able to retire with a full pension...."

Claimant's pension benefits coupled with workers' compensation benefits lower his incentive to seek work. Claimant's age and educational background make looking for a job a discouraging prospect. Claimant's disinterest in finding a position is evidenced in the records of the Department of Rehabilitation:

> Counselor makes note of the fact that there has been limited contact with this individual due to the fact that referral to RESB was by his lawyer, Mr. Gregory Racette, solely for the purpose of obtaining information and assistance in this client in court suit. Client says court case is forthcoming and pending and are not really interested in any type of vocational discussion but more in what can be done for them in the way of obtaining financial relief from the court against the insurance carrier.

Two vocational experts testified. Jacobs found a number of positions she thought would be within claimant's capacity. Kreger disagreed that claimant was capable of handling some positions found by Jacobs. Assuming claimant was able to obtain work, his maximum hourly earnings would be about half his earnings at the time of his injury.

The job market in the Waterloo area continues to be depressed with, as Kreger pointed out, many, many applicants for each position. The industrial commissioner has said:

> If one has a serious disability, their [sic] earning capacity is much lower in relation to the work force as a whole. If one has a poor education, their [sic] 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 downturn has 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, 435 (Appeal Decision 1981) (Dist. Ct. Aff'd, S. Ct. Appeal Dismissed).

Claimant has an extensive medical history. After an April fall claimant was hospitalized in October of 1970 for an excision of a disc at L4 on the right and a fusion using a prop H bone graft. After this surgery he was given an impairment rating of 16 percent of the body as a whole.

Claimant ruptured the biceps in his right arm in March of 1979. In the repair procedure the tendon was sutured to the coracoid process. Claimant was given an impairment rating of 12 percent of the right upper extremity. In January of 1980 surgery was done to release adhesions which had developed. An additional operation was performed in May of 1980. Dr. Crouse who performed the latter two surgeries was of the opinion in early 1981 that claimant's shoulder condition restricted him from heavy work with his right arm and hand and he did not think claimant would be able to go back to his previous work. Dr. Crouse anticipated claimant would have difficulty doing repetitive work, turning a stiff steering wheel or loading or unloading cargo. He proposed training for a sedentary job. When claimant was released to return to work on June 1, 1981, he was to avoid heavy work with his right arm and hand. All this was prior to the injury for which claimant now makes claim.

Claimant was treated in January of 1982 for back and left leg pain which was diagnosed as an acute strain. After claimant had back surgery in February of 1982, Dr. Crouse restricted him from prolonged standing, heavy lifting and repetitive bending, stooping and lifting. Claimant was found capable of sedentary work which allowed him to move about and to rest.

Claimant described his own capabilities as being able to sit an hour, walk two or three blocks, stand 10 to 15 minutes and lift 10 to 15 pounds. Testimony from claimant's spouse and friends indicates a reduction in claimant's activities.

Claimant has two impairment ratings relating to his back--a 15 percent rating from Dr. Naden and an 18 percent rating from Dr. Crouse.

Dr. Crouse finds the combination of claimant's back and shoulder problems disabling. Claimant's own testimony was that after his March 1979 injury he was bothered by lifting and by tingling in his fingers. Claimant acknowledged that he had trouble after his return to work following his December 1979 injury with such things as shifting gears, picking up freight and unloadi g. Claimant indicated that when he returned to work following hernia surgery he got help with unloading and was troubled by shifting. Claimant said that as of January 14, 1982 he was suffering with his arm. When he was questioned about his ability to work as a city driver, he said it was both his arm and back that prevented his working. However, he denied trouble with walking, sitting, standing or sleeping before January 15, 1982.

The most difficult aspect of assessing claimant's industrial disability is that this proceeding is to determine claimant's entitlement to benefits resulting from his injury of January 15, 1982. See Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1961).

Clearly claimant had some disability related to his shoulder injury and that disability existed to prior to any that was incurred through the January 15, 1982 fall. However, based on the Iowa case law, the analysis included in this portion of the decision and the findings of fact set out below, claimant is determined to have a permanent partial industrial disability related to his fall of January 15, 1982 of 40 percent.

Some medical expenses were offered at the time of hearing. A charge from The Prescription Shop was okayed by Kittle. Claimant's testimony was that charges from Union Prescription Center were for muscle relaxants and pain pills for his back. Dr. Crouse testified that charges in exhibit 10 were related to claimant's back. The expenses listed in exhibit 42 were specifically designated as low back care. Charges by St. Francis Hospital are not substantiated in the record.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is 58 years of age.

That claimant is right handed.

That claimant has a ninth grade education.

That claimant has worked in trucking since 1950.

That claimant's work in trucking required heavy lifting.

That claimant's work has provided him with some transferrable skills.

That on January 15, 1982 claimant fell from the top of a truck and hit his back.

That on February 1, 1982 claimant had a hemilaminectomy at L3, 4 and 5 on the left, foraminotomy at L4-5 on the left with a partial pediculectomy at L4 and excision of L4.

That in October of 1970 claimant underwent a disc excision at L4 with a prop H bone graft.

That after the October 1970 surgery claimant had a 16 percent impairment of the body as a whole.

That claimant had injury to his right arm on March 1, 1979 and had surgical repair.

That claimant had an additional exploration of his biceps in January of 1980 and a subsequent surgical procedure in May of 1980.

That claimant has disability relating to his shoulder.

That when claimant tried to return to work after treatment for his shoulder problems he had trouble shifting gears, picking up freight and unloading.

That claimant had carpal tunnel surgery in March of 1981 that kept him of work until June.

That claimant had hernia surgery in 1981.

That claimant has increased impairment to his body as a whole as a result of his January 15, 1982 fall.

That claimant is restricted by his back injury from prolonged standing and from repetitive bending, stooping and lifting.

That claimant's back and right arm limit his heavy lifting, his ability to drive long distances and his loading and unloading.

That claimant needs work which is primarily sedentary in nature and which would allow him to move about.

That claimant has retired and receives a pension of $625 per month.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence entitlement to permanent partial industrial disability of forty (40) percent.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay permanent partial disability benefits for two hundred (200) weeks at a rate of two hundred ninety-two and 58/100 dollars ($292.58) with payments to commence on August 10, 1982.

That defendant be given credit for amounts previously paid.

That defendant pay the following expenses:

Prescription Shop	$ 6.16
James E. Crouse, M.D.	2,401.00
Union Prescription Center	96.23

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

That defendant file activity reports as requested by this agency.

Signed and filed this 3 day of October, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD DEAN CARLSON,

Claimant,

vs.

CENTRAL IOWA POWER COOP,

Employer,

and

FEDERATED RURAL ELECTRIC INSURANCE CORPORATION,

Insurance Carrier,
Defendants.

File No. 625809

A P P E A L

D E C I S I O N

FILED

DEC 12 1984

IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed October 5, 1984 the undersigned deputy industrial commissioner has been appointed under the provisions of Iowa Code section 86.3 to issue the final agency decision in this matter.

Claimant has appealed and defendants have cross-appealed from a decision filed April 17, 1984 in which claimant was denied benefits.

The record on appeal consists of a transcript of the hearing; claimant's exhibits 1 and 2; defendants' exhibits A through G; and the depositions of Melvin Bert, Max Johnson, Dan Reed and two depositions of Thomas B. Summers, M.D. All evidence was considered in reaching the final agency decision.

The result on appeal will be the same as that in the proposed decision. The ground for reaching the decision is different.

ISSUES ON APPEAL

The matters referred to on appeal as stated by the claimant are as follows:

I. The claimant could recover for the neurological disturbance causing the giddiness, lightheadedness, headaches and nausea, should they be a disability.

II. Causation for occupational disease is different

than that of an ordinary occupational injury.

III. The claimant is disabled as a result of the neurological disorder which is a disease of the basil [sic] ganglia.

IV. The defendants failed to prove that claimant's condition arose from other causes.

V. Loss of a portion may be extended to the body as a whole.

VI. The evidence was more than adequate to support a ruling for the claimant.

The issue raised by defendants are:

I. Is claimant's cause of action barred by the statute of limitations contained in 85.26?

II. Did the Deputy correctly determine that the claimant failed to prove that his Parkinson's Disease is causally related to his employment. [sic]

STATEMENT OF THE CASE

The parties in this matter entered into two stipulations. They are as follows:

First Stipulation:

1. Richard Dean Carlson was born on March 16, 1936.

2. Richard Dean Carlson was raised on a farm and to his knowledge his parents did not use any chemicals in the farming operation.

3. Richard Dean Carlson served in the United States Army from 1945 to 1947 and was honorably discharged. He worked as a clerk in Korea and in the United States. To his knowledge, he was not exposed to any chemicals. Upon discharge from the Army Mr. Carlson worked for Hocke Construction Company in Des Moines constructing new power lines.

4. Richard Dean Carlson began working for Central Iowa Power Cooperative or its predecessor Southwest Federated Power Cooperative, on April 21, 1958 and worked until August 21, 1975. He worked the entire time as a lineman initially working up to being a working foreman of linemen. He performed inspections and general maintenance of power lines and was also in charge of clearing right-of-ways [sic]. He also worked on transformers, regulators and performed other duties.

5. In 1968 Richard Dean Carlson's left thumb began to tremble. He was treated by Dr. Dallas York in Creston, Iowa. Dr. York then referred Mr. Carlson to Dr. Harold A. Ladwig, a neurosurgeon in Omaha, Nebraska. On May 25, 1972, Dr. Ladwig diagnosed Mr. Carlson as suffering from Parkinson's Syndrome.

6. Richard Dean Carlson applied chemical herbicides to trees and bushes in the utility right-of-way from 1958 until April 5, 1972 which is the last day that he was exposed to any chemicals while in the employment of Central Iowa Power Cooperative.

7. From May of 1972 until August 21, 1975 Mr. Carlson performed duties other than those of a lineman. After leaving his employment on August 21, 1975 because of a physical inability to continue working, Mr. Carlson continued to be paid until January 15, 1976 due to accumulated sick-leave time.

8. If Richard Dean Carlson is entitled to worker's [sic] compensation benefits, the rate, pursuant to the tables in effect for the period July 1, 1971 through June 30, 1972 provide a rate of $64 per week for healing period and $59 per week for permanent partial or permanent total disability.

SECOND STIPULATION:

1. A sample of transformer oil secured by the claimant from one transformer of the defendant after October of 1978 and tested by Woodson-Tenent Laboratories on 11/5/79 shows a concentration of PCB of 37.8 PPM.

2. A sample of herbicide obtained by the claimant from the defendant's employer after October of 1973 and tested by Spectronics, Inc. before 1/12/81 showed a 2,4,5-T formuation [sic] containing 108 ppb TCDD level.

3. A blood sample of the claimant taken between 1/12/81 and 2/18/81 and analyzed by Spectronics, Inc. on 8/11/81 showed a concentration of TCDD in the blood of 5 ppt.

4. An August, 1982 fat analysis of Spectronics, Inc. shows that no CCD, CDF or PCB were detected in the claimant.

Forty-eight year old married claimant, testified to being born and raised on a farm, serving in the armed forces and then going to work for a construction company. He denied any exposure to chemicals during this period.

On April 21, 1958 claimant commenced employment with defendant employer. He claimed that he was in good health at the time with no diseases or physical problems. He started as an apprentice lineman and in six years became line foreman. In addition to climbing poles to work on power lines, he sprayed and cut trees in the right-of-way over a 450 mile stretch covering fourteen counties. He thought that the spraying was commenced shortly after he began working there in 1958. He last sprayed in the first part of April of 1972. He was diagnosed as having Parkinson's in May.

Claimant reported that his thumb had troubled him since 1968. Prior to that date he had black spots in front of his eyes. After the trembling in the thumb began, claimant next had trouble walking. He had the feeling that his left leg was shorter and it was difficult to control. He had nausea and vomiting. Claimant acknowledged two falls -- once while cutting brush and a second when coal cars were being unloaded.

Claimant indicated that the chemical 2,4,5-T came in fifty-five gallon drums. It was mixed with oil in a 1-25 ratio and then applied to the trees. The oil was either transformer oil, diesel fuel or number two fuel oil. Claimant estimated that two or three times more diesel fuel was used than transformer oil. Time for spraying included time to mix and to travel to the area where the spraying was to be done. Sometimes trees and bushes actually were cut down. Initially application was done with three gallon hand sprayers. The mist from the sprayers would get on exposed body parts and clothing. Beginning in approximately 1969 the workers were furnished with old rubber rain suits. The spray continued to get on the workers' faces and hands.

On May 25, 1972 claimant was diagnosed as having Parkinson's. He was transferred to the engineering department where he continued to work until 1975. He was given sick pay to January 15, 1976 and then was terminated. Beginning in 1977 claimant had convulsions which troubled him about once a week until 1980. Claimant has gone through a series of hospitalizations which ended in 1981. He said that since that time he has got progressively worse.

Claimant denied ever overdosing himself on his medication.

Claimant recalled that he first concluded there might be something wrong with him related to chemicals when he read a magazine article in October of 1979 and to his employment in January of 1980.

Claimant agreed that no physician has told him that his Parkinson's syndrome is work-related.

Claimant denied knowing in the period from 1958 through 1972 that PCB's were contained in the transformer oil or that the level of PCB's was the same in all transformers. He agreed that he did not know if the TCDD level in the 2,4,5-T formulation of the sample he took was the same as that he sprayed.

Claimant admitted his father had been hospitalized for a psychiatric condition.

Joy Carlson, claimant's spouse, testified to being aware when claimant did spraying because of the odor on his clothing which she said she might wash as many as two or three times. The witness who was pregnant at times during the washing process observed health problems in two children born of these pregnancies.

Carlson recalled her spouse's being hospitalized, having pneumonia and undergoing mood changes. The latter symptom occurred a year to a year and a half before claimant's diagnosis. She described a gradual tightening of claimant's muscles which pulled him back causing him to arch his upper body and draw his leg up. On at least one occasion, this occurred after he took his Sinemet and Dalmane. It was her recollection that convulsions started when claimant was at Mayo and that none had happened since that time. Claimant had been allowed before the convulsions commenced to adjust his Sinemet. Carlson listed claimant's current medications as Mellaril, Elavil and Sinemet.

An exhibit was offered showing portions of days spent spraying. The average was sixty-three hours per year for the twelve year period from 1961 to 1973.

Max Johnson, who has been employed by defendant employer in excess of thirty-three years, testified to having worked with claimant. He had not seen claimant spray nor had he done spraying himself. After being foreman of a substation, he became transmission superintendent in 1969. He had responsibilities for ordering brush control chemicals. Johnson denied having heard any comments regarding the dangers of 2,4,5-T or of talking to any salespersons about the chemical. He had not seen labels from the chemicals. He thought General Electric might have supplied oil with their transformers.

The witness recalled that sometime between 1969 and 1971 claimant requested to be transferred from foreman back to journeyman lineman. Eventually claimant was removed from

climbing and later from driving. The witness described claimant's handwriting as unstable, but he did not think claimant incapacitated from doing his job.

As to claimant's physical condition, Johnson had observed claimant having good days and bad days during which his head would wobble and his hands would tremble.

Melvin Bert, who has worked for defendant employer more than twenty-one years and who is a substation electrician foreman, testified to beginning work in 1961 as an apprentice lineman. After about six months he went to the substation, but he still occasionally helped the linemen. Work within the substation consisted of maintaining meters, regulators and transformers.

Bert explained that to clean the oil in the transformers, it would be taken out, put in barrels, filtered and then returned to the transformer. During the cleaning process oil might come in contact with the worker's body. He estimated that the oil from transformers was used for maybe two years or possibly more in the spraying operation. Thereafter, diesel fuel was utilized.

The witness did not recall any safety devices being furnished for the spraying operation. Testing for PCB's according to Bert has been done for several years. He reported that PCB's have ranged from zero to 173 parts per million with the worst level at the time his deposition was taken occurring in General Electric transformers. He said that oil with less than fifty parts per million is not contaminated while over 500 parts is contaminated. In between fifty and 500 is also considered contaminated, but it does not necessitate safeguards in the event of a spill.

Bert recalled claimant's developing a slight shaking movement, difficulty talking and some weakness.

Dan Reed, who has been employed by defendant employer in excess of thirty years, testified that of the 500 miles of lines only eighty to one hundred miles would have been brush. He estimated that the number of days spent spraying each year would vary from ten to thirty depending on the year. He said that the spray was mixed in fifty-five gallon barrels. Oil was put in and then the proper amount of spray was added. A one to thirty proportion would be used. Most or about ninety percent of the time diesel fuel was used. Transformer oil was used in the earlier years. The mixture was stirred with a stick. Initially spraying was done by hand applying the chemical at the base of the plant. The spray might get on the worker. At some point gloves were worn, not to protect from the spray, but rather to keep the hands clean.

The witness denied being told that 2,4,5-T might be harmful to his health; however, he said that when claimant first was sick it was mentioned. He believed that mention might have been made about the time Agent Orange came under discussion.

Reed thought that beginning in 1968 claimant's hands shook, his voice quavered and he was less coordindated. He did not believe claimant was having trouble with his work at the time he was let go, but he said that at the last it seemed as if claimant might not be thinking correctly.

The witness had sprayed brush with claimant and he said the spray would get on the clothing and hands and sometimes on the face. He supposed that if claimant sprayed from 1969 to 1971 it would have been a small amount.

Reed indicated that a tank type sprayer later was obtained which had a sealed lid and a motor.

The witness did not recall seeing any labeling on the 2,4,5-T to indicate it was dangerous to health.

Offered in evidence was a magazine article regarding Dioxin and Agent Orange.

Jerrad J. Hertzler, M.D., saw claimant on May 25, 1972 at which time he gave a history of twitching of the left thumb beginning the year before with the gradual development of clumsiness and stiffness in the left arm and leg. Claimant described a general slow down, difficulty in speaking and a loss of facial expression. He complained of occasional generalized headaches centering in the back of the head and neck which were severe in nature.

On examination claimant was found to have prominent facial masking; low volume, rapid speech; rigidity in the extremities and a tremor in the left hand. Claimant had a tendency to drag his left leg. There was congenital rigidity of the neck and left upper extremity. An electroencephalogram was interpreted as normal.

Claimant was diagnosed as having Parkinson's disease. Claimant was hospitalized and treatment with L'Dopa was commenced. He also was given Valium and Ser-Ap-Es for his hypertension. Claimant had physical therapy and was instructed in an exercise program.

On June 26, 1972 Dr. Hertzler's partner, Dr. Ladwig, wrote that claimant should have lighter duty with no climbing. About six months later claimant was found capable of resuming all his duties as a lineman.

Claimant was examined by Dr. Hertzler on January 24, 1974 at which time he gave a history of an auto accident in which he struck his left shoulder and the left side of his head. He continued to have pain in his shoulder and the tremor in his left extremity became more pronounced. Claimant had generalized headaches. Claimant's medications included L'Dopa, Symmetrel, Valium, Ser-Ap-Es and Dalmane.

Claimant was kept off work because of increased discomfort. In a letter dated July 26, 1974, Dr. Hertzler suggested claimant's condition was temporarily aggravated by the accident which did not cause a permanent change in his underlying disease. The doctor anticipated that claimant would have a slow worsening of his condition regardless of medication.

Claimant returned on September 19, 1974 at which time he had a mild tremor in his left upper extremity and irregular jerking movements of his head and four extremities. Claimant was felt to be having side effects in response to his medication.

In November, in answer to a letter from claimant's employer, Dr. Ladwig wrote that claimant could drive, but should not climb. It was expected that claimant would improve when his medications were adjusted.

Dr. Ladwig saw claimant about a year later. At that time claimant had been unable to work from August 2, 1975 because of severe fatigue following any physical activity. Claimant's tremor had increased. Claimant was found to have progressed to the second stage of the disease.

On a form dated January 7, 1976 Dr. Ladwig pronounced claimant totally disabled from August 21, 1975.

In July of 1976 claimant was hospitalized for adjustment of his medication and for psychological testing. Psychological evaluation showed evidence of a neurotic person with marked anxiety, tension, depression and anger. After stabilization of his medication, claimant had only mild symptoms of his disease.

Claimant was reevaluated by Dr. Hertzler in August of 1977 at which time claimant reported a fall which resulted in pain in his left shoulder and low back. Claimant's medication was again adjusted due to athetoid movements.

In a letter dated March 13, 1980 Dr. Ladwig reported having learned of claimant's using trichlorophenoxyacetic acid from April of 1958 until 1975 and using oil containing thirty-seven point eight parts per million of polychlorinated biphenyl. The doctor indicated medical literature was being reviewed to determine whether or not claimant's exposure to chemicals had produced involvement of the central nervous system.

Later in the year claimant again was hospitalized in an attempt to regulate his medication. He was told that he had Schamberg's disease. During this hospitalization claimant became confused, depressed, paranoid and hallucinated. Claimant was diagnosed as having an acute psychiatric reaction for which he underwent psychiatric care.

Dr. D. J. Goldberg reached this diagnostic impression:

> The picture he presents is a mixture of a thought process disorder with a state of semiconfusion. The first consideration would be for a toxic-type of psychotic reaction, but nevertheless, he could be assistant [sic] to the first symptoms of an acute psychotic reaction of schizophrenic characteristics with some depression and paranoia.

On January 4, 1981 Dr. Ladwig wrote:

> The patient does have Parkinson's Disease. He has been exposed to several toxins. A detailed study of each toxin is currently being established. Several reports from the laboratory identifying the substances indicate that the central nervous system can be damaged with continued exposure to the toxin.

Thomas B. Summers, M.D., board certified neurologist who had not personally examined claimant nor had he treated patients for exposure to chemicals involved in this case, described parkinsonism as follows:

> Parkinsonism belongs in that group or category of disorders known as movement disorders and for the reason that most of the people who have Parkinsonism will at some time or another have involuntary movement or tremor but not necessarily so.
>
> Most individuals afflicted with the disorder indicate that they slow down, and in the layman's opinion, the slowing down has reference largely to his motor movements or his physical movements; however, some indicate that even their mental processes slow down.
>
> They become aware of stiffness or loss of flexibility and not uncommonly involuntary movement in the form of tremor or shaking. Usually it starts out either in a hand or in a foot, and as time progresses the movement may spread to involve all of the limbs. The movement or tremor may affect the face and the lips, in fact, the whole body.

Many individuals complain of drooling of saliva and particularly at night. That is due to the fact that they lose the reflex ability to swallow their saliva. Their voice may lose its volume.

On examination, many of the individuals are observed to have a blank-like face. That's referred to as the mask face. There are many, many features. Primarily the cardinal features are those of tremor or involuntary movement, the stiffness or rigidity and so on. (Summers' dep., November 30, 1983, pp. 4-5 ll. 4-25 and 1-9)

As causes of the syndrome he listed encephalitis, cerebral arteriosclerosis, carbon dioxide and manganese poisoning and some drugs. However, he said that the most common type is idiopathic for which no cause is known. It was the doctor's opinion that there is no relationship between Parkinson's disease and peripheral neuropathy. Dr. Summers stated that extrapyramidal syndrome is a synonym for parkinsonism.

Dr. Summers did not think that a drug inhibiting the enzyme that metabolizes cholinesterase or acetylcholine would cause parkinsonism, but it could cause a neuritis or affect the peripheral nerves. Neither was the doctor cognizant of parkinsonism being associated with the inhalation of carbon tetrachloride. Dr. Summers indicated that Thorazine can present a picture which mimics parkinsonism. He explained the theory of parkinsonism caused by encephalitis as being that encephalitis increased the attrition of nerve cells with symptoms developing as many as ten or fifteen years later.

Dr. Summers estimated that drugs work fairly well for treatment of Parkinson disease in fifty percent of cases for a few months. As drugs that might be used, he listed Sinemet, Inderal, Symmetrel, Cogentin, Artane and Parsidol. Some of these drugs have produced toxic psychosis in some persons.

Regarding Sinemet poisoning, the doctor said that symptoms of parkinsonism can become much worse and induce abnormal movements, psychosis, nausea and vomiting, changes in blood pressure, disturbance in the cardiac mechanism, diarrhea, ataxia and gait disturbances. The expert believed that the opisthotonus or rearing back of the body was part of the toxicity of Sinemet or Levodopa.

Dr. Summers testified to familiarity with 2,4,5-T. He said that agent orange consists of a 50/50 mixture of 2,4-D and 2,4,5-T and that he understood 2,4,5-T or trichlorophenoxyl acetic acid to be more toxic than 2,4-D. PCB is polychlorinated biphenyl; TCDD is dioxin or 2,3,7,8 tetrachlorodibenzoparadioxin, a by-product in the manufacturing of 2,4,5-T. The expert did not know if mixing TCDD and PCB would encourage a tendency to potentiate each other. The doctor reported studying various medical literature on the substances including information from the Veterans' Administration.

Asked to assume that dioxin was present in the spray used by claimant at the rate of 106 to 109 parts per billion, the doctor did not know what effect would be had on the immune system. He was aware of dioxin producing such symptoms as numbness, weakness in the arms and legs, hyporeflexia, ataxia and loss of coordination.

Regarding parkinsonism related to 2,4,5-T spillage, Dr. Summers said:

I have talked to knowledgeable people who have had great experience, and I have been informed that there have been no cases of parkinsonism recognized or attributed to exposure to 2,4,5-T or to dioxin.

. . . .

We are aware of neuritis occurring, in other words, an involvement of the peripheral nerve system as a result of toxic exposure to dioxin or 2,4,5-T and the contaminant dioxin, but other neurologic symptoms such as parkinsonism and that have not been recognized. (Summers' dep., June 26, 1983, p. 44 ll. 24-25, p. 45 ll. 1-3 and 12-17)

As to whether or not the symptoms evidenced by claimant were related to spraying 2,4,5-T and dioxin, the physician said:

Well, it is my opinion that in the first place, the person exposed to this chemical substance, 2,4,5-T and dioxin, if he or she has not had any evidence of chloracne, this skin condition, then there has been no serious exposure to the toxic substance. In other words, this is the first prerequisite, that first of all, there must be the presence of chloracne to indicate toxic exposure of significant degree.

Secondly, my colleagues tell me that to their knowledge, there have been no reported cases of parkinsonism in individuals exposed to 2,4,5-T or dioxin or both. Now, we are aware of the fact that peripheral nerve involvement can and does take place. It's transitory. It is self-limiting. The symptoms do improve or subside with removal from the toxic substance and so on.

There are other symptoms that vaguely involve the central nervous system such as headache and nausea and giddiness or light-headedness or dizziness and so on, but in the patients that I have examined, I have not encountered anyone with parkinsonism. (Summers' dep., June 26, 1983, p. 59 ll. 9-25, p. 60 ll. 1-6).

Later he was asked:

Q. Why would these other symptoms which were 2,4,5-T symptoms and dioxin symptoms and the PCB symptoms be occurring at the same time of his original parkinsonian symptoms?

A. Why would they?

Q. Yes.

A. I think it could be coincidental.

Q. It couldn't be a causal connection?

A. Not necessarily.

Q. Could be?

A. It could be. (Summers' dep., June 26, 1983, p. 61 ll. 12-22)

Still later he said:

Again, the knowledge that I have gained from reviewing certain articles and literature has indicated that these substances may affect the nervous system, usually the peripheral nervous system, the peripheral nerves, and the individual will present with symptoms of a neuritis. This may be referred to as a polyneuritis or a polyneuropathy, but I have not found any evidence in the literature of other syndromes. There are some references to encephalopathy, but I don't know -- one of the articles didn't go much beyond that, so I really don't know what they have reference to in that discussion. (Summers' dep., June 26, 1983, p. 67 ll. 17-25, p. 68 ll. 1-4)

Finally, he said:

Q. At one point during the direct examination by Mr. Davidson, he asked you or mentioned a whole list of symptoms that his client supposedly suffered before he went to Doctor Ladwig's office in Omaha for treatment. Included in those were nausea, spots in front of the eyes. Do you recall that specific question?

A. Yes, sir.

Q. I believe the question listed that and asked if they could possibly be caused by PCB or dioxin, and you answered that they could be.

A. Yes, sir.

Q. Could other illnesses have caused those types of symptoms also?

A. It is possible.

Q. Do you have any direct information as to specifically what caused those symptoms that the claimant was experiencing at that time?

A. I don't have any clear-cut indication as to the cause. (Summers' dep., June 26, 1983, p. 72 ll. 12-25, p. 73 ll. 1-6)

Dr. Summers said that giddiness, lightheadedness, headaches, nausea and spots before the eyes would be akin to 2,4,5-T or dioxin poisoning or PCB or as a result of Sinemet or levodopa toxicity. The doctor saw chloracne as the common denominator among the symptoms evidenced by people exposed to a spill of agent orange. He supported his opinion with this quotation:

-- these gentlemen state, 'If there is no history of chloracne, then the likelihood of a significant exposure to or adverse health effects from TCDD is remote. Hence, chloracne is the clinical marker of TCDD exposure. In other words, witnout the chloracne, the likelihood of serious effects, whether it be involvement of the peripheral nervous system or the liver or what have you, is unlikely.' (Summers' dep., June 26, 1983, p. 64 ll. 1-9)

The doctor did not think a spasm in which claimant bent completely backwards with his hand touching is foot would be typical of parkinsonism.

In discussing whether the drugs used to treat Parkinson syndrome could cause changes in the porphyrin metabolism the physician said it was possible.

In reviewing claimant's test results he did not find a pattern of immuno-supression; but he thought it possible claimant's

drugs could effect his immuno-supression systems. Dr. Summers found no reference in the medical records to claimant's having ataxia.

Dr. Summers thought that particularly dioxin could cause a peripheral neuropathy or neuritis which in turn could cause a twitching of the muscles, but he differentiated that movement from what would be seen in parkinsonism and he noted that while at one time electromyography showed a mild carpal tunnel syndrome, a later study was normal. The usual symptoms of peripheral neuropathy would be a numbness or loss of feeling and later a weakness with potential for paralysis. He thought the symptoms could be transient.

Dr. Summers pointed to a discrepancy between the history recorded by Dr. Benjamin of spasms of the thumb in 1968 and that taken by Dr. Hertzler of spasm developing in 1971.

Dr. Summers admitted he had not known of claimant's early gastrointestinal problems, pneumonia, ulcers or sinusitis.

The expert had not encountered neurological difficulties in subsequent generations, but he said there are teratogenic and mutagenic defects caused by TCDD.

The doctor did not discern findings in the psychologist's report which would conflict with a diagnosis of parkinsonism.

Note was made that at the time of the original diagnosis of Parkinson's, claimant was not taking any drugs for the treatment of the disorder. At that time he was taking only Ser-Ap-Es for his high blood pressure.

The physician explained dopamine is contained within the nerve cell and is probably one of the amino acid building blocks. He knew of no test to determine whether or not dopamine is being secreted in the proper amount.

Bertram Warren Carnow, M.D., whose specialties include occupational and environmental medicine, toxicology, epidemiology, internal medicine and cardiopulmonary diseases, who is board certified in occupational and preventive medicine and who is certified by the American College of Toxicology and by the American College of Chest Physicians, testified to seeing claimant in 1982 and to looking for disease that might be related to 2,4,5-T, TCDD (Dioxin) and polychlorinated biphenyl (PCB).

The doctor explained generally that TCDD and PCB can enter the body through the skin, the mouth and through inhalation; that the chemicals move to the fat, liver, brain, pancreas, adrenals and other glands and cause the production of extra-ordinary quantities of enzymes; that the overproduction of enzymes causes a disturbance in the body's metabolism; that the chemicals effect the endoplasmic reticulum; that they destroy mitochondria which provide energy to the body; and eventually there is muscle dysfunction, cerebral dysfunction and dysfunction of multiple organ systems.

The expert indicated that he has been involved in more than 350 cases of persons with systemic damage from dioxin with close to 200 of those people having central nervous system damage and at least a half dozen manifesting a Parkinson type syndrome.

Dr. Carnow reported and interpreted claimant's history as follows: He had headaches, joint pain, nausea and vomiting which began soon after they started spraying. In 1963 there was an interstitial pneumonia. An ulcer came on in 1966 which was not confirmed by upper GI series. This was thought to be a severe gastritis although ulcers were possible. Porphyria, a very rare genetic disease was characterized as unique to Dioxin and PCB. Acute porphyria can cause abdominal pain, nausea, vomiting and personality changes. Claimant told of hemorrhoids which were not active at the time of this examination. In 1968 spasm of the thumbs developed. He also spoke of opisthotonus. Electromyography in February of 1981 was suggestive of median nerve disorder in both upper extremities. Weight loss was attributed to interference with protein metabolism. A report records a history of claimant's spraying three months out of the year for two to three weeks at a time for the whole day.

Physical examination showed decreased reflexes, ataxia and the findings characteristic of parkinsonism.

Dr. Carnow said that claimant has parkinsonism, but that in his case an attempt was being made to differentiate between idiopathic parkinsonism and severe chronic systemic chemical poisoning. As reasons for finding the latter, the expert pointed to extensive immuno-suppression which would not be found in idiopathic parkinsonism. Porphyria, abnormalities suggesting toxic damage to the cerebral hemispheres and a depressed sperm count were likewise atypical. The expert acknowledged that immuno-suppression can result from the use of medication. He did not think that to be true in claimant's case, but he had not reviewed all his medications.

Dr. Carnow was of the opinion that claimant has advanced chronic systemic chemical poisoning from dioxin, 2,4,5-T and PCB's with parkinsonism as one of the manifestations which had rendered claimant totally disabled. He stated that had claimant not been exposed to the herbicide spray and to PCB's there would be no Parkinson's syndrome.

The physician agreed that Parkinson's disease can occur before the sixth decade. He said that the disease can be treated by supressing acetylcholimine cholisepnis or increasing Dopamine transmission, but what generally would be done would be to use Dopamine adders. He acknowledged that drugs used to treat the disease can cause severe adverse reactions and that conceivably the medication claimant was taking could contribute to the psychotic episode.

Dr. Carnow was not certain when ataxia had begun, but he thought that it was about 1968. He said that ataxia may start and stop. He was aware that the doctors in Omaha specifically noted that claimant did not have ataxia when they first examined him. Regarding weight loss, the doctor believed claimant lost forty pounds from 1970 to 1974 and he did not know if a side effect of any of claimant's medications would be weight loss. He stated that weight loss is not usually created by Parkinson syndrome and the parkinsonism patients tend to be overweight.

In terms of the exposure claimant had, consideration was given to the sixty-three hours of spraying, claimant's sticking his hand in transformer fluid, his rewearing his clothes and his riding in his car. The doctor said that a PCB concentration of thirty-seven point eight parts per million is a high concentration. He likewise thought a concentration of 108 parts per billion of TCDD contained in the 2,4,5-T formulation to be a very high level. He admitted there is no way to know how much TCDD was in the 2,4,5-T formulation to which claimant was exposed.

The doctor agreed that Sinemet toxicity could be one cause of a grossly abnormal neuro-psychological examination. Ultimately he said that "the neuropsychological examination unequivocally indicates severe brain malfunction attributable to organic insult." Finally, the doctor admitted that some of claimant's complaints could be related to the medication he is taking. He stated that Sinemet might have caused some of claimant's symptoms, but was not a cause of his disease.

Dr. Carnow admitted that there is nothing in the medical literature which links 2,4,5-T; TCDD or PCB with Parkinsonism. In a 1976 article the expert listed as effects of PCB's chloracne, pigmentation of the skin and nails, distinctive hair follicles, excessive eye discharge, swelling in the eyelids, nausea, lassitude, anorexia, digestive distrubances, impotence and hematuria.

Dr. Carnow found claimant to have a hyporeflexia which was suggestive of a peripheral neuropathy, but electromyography was normal.

The doctor did not agree that neurological damage due to Dioxin would be in the peripheral neurological system. He felt that chloracne is only one manifestation.

Eric C. Comstock, M.D., board certified medical toxicologist, examined defendants' exhibit A, the report from Dr. Carnow, claimant's interrogatories, the discovery deposition of Dr. Summers and documents from defendant employer prior to his testimony. He also was present for testimony during the hearing.

Dr. Comstock described Parkinson's syndrome as the body's reflection of changes taking place in the basal nuclei of the brain which are manifested by ataxia, changes in expression, tremors and later changes in the cortical functions. The syndrome is treated with drugs to correct a biochemical defect in the metabolism of the nuclei and the brain stem. Treatment is symptomatic rather than curative. It was the doctor's opinion "that in reasonable medical probability there is no relationship" between claimant's exposure to 2,4,5-T, PCB or TCDD. It was further his opinion that "there is practically no level of those materials that could precipitate this disease;" and that therefore claimant's level of exposure would make a difference only within very broad limits. He testified that a concentration of TCDD within the 2,4,5-T formulation of a 100 parts per billion was not sufficient to cause health defects.

The toxicologist described 2,4,5-T as a chlorinated herbicide with a low mammalian toxicity. He had examined ten to fifteen persons exposed to 2,4,5-T.

Dr. Comstock said that the neurological symptoms found in persons exposed to dioxin were peripheral neuropathy which persists for a time and then improves. Testing for peripheral neuropathy can be on the basis of physical examination or through electromyograpy or nerve conduction or biopsy. He claimed that the peripheral nervous system is not the one involved in Parkinson's syndrome. He found no peripheral nervous system damage recorded in claimant's history. The doctor did not view the TCDD concentration of five parts per trillion found in claimant's blood to be significant.

Dr. Comstock reported that chloracne is an earlier manifestation of the body's reaction to Dioxin and that while he could not say it has to be present, most persons would have it with sufficient exposure.

The expert indicated that he has examined perhaps ten persons exposed to PCB's. He did not feel that claimant's exposure to PCB was sufficient to cause neurological effects.

In regard to Dr. Carnow's testing, Dr. Comstock observed that tests relating to porphyria were outside of acceptable normal limits, but they were not such as to be consistent with any significant clinical process. He noted that a number of drugs interfere with porphyrin metabolism. Dr. Comstock found claimant's testing consistent with depression in the immune

system, but he did not find anything in claimant's record to indicate claimant had an immune deficiency problem. He thought it improbable that claimant's exposure to chemicals caused his pneumonia in 1963. He also proposed that drugs used in the treatment of Parkinson's syndrome have potential for causing a psychotic reaction. He thought one sperm count insufficient for relevance.

The toxicologist agreed that there can be central nervous system damage from exposure to PCB or Dioxin and that there could be central nervous system damage without chloracne; but it would be unusual.

Dr. Comstock said that taking Sinemet, Thorazine or Mellaril would cause an extrapyramidal syndrome reaction. He thought the opisthotonus was the result of a drug reaction to tranquilizers, antianxiety or antipsychotic drugs and atypical of Parkinson's itself.

APPLICABLE LAW AND ANALYSIS

The issue raised by defendants' cross-appeal will be addressed first. That issue is whether or not claimant's cause of action is barred by Iowa Code section 85.26. Regarding this issue, the hearing deputy wrote:

> Claimant saw the article in October 1979 and filed his action November 26, 1980. [sic] It seems entirely reasonable that he would not suspect his parkinsonism might have resulted from exposure to the chemicals until it was suggested to him by the article in Life magazine. It therefore appears that the discovery rule may be applied in claimant's favor here and the statute of limitations would not begin to run until October 1979. It is clear that claimant filed his action within about 13 months [sic] after that time, thus placing him within the statutory limit of two years under §86.26, The Code.

Relevant dates in this matter are these:

1968 claimant's left thumb began to tremble.

April 1972 claimant last did spraying with chemicals.

May 25, 1972 claimant was diagnosed as having Parkinson's Disease.

1972 claimant transferred to the engineering department.

1975 claimant's last work was performed for defendant employer.

October 1979 claimant concluded there might be a relation between his symptoms and chemicals.

January 1980 claimant first considered that his Parkinson's disease might be related to his employment.

June 4, 1981 claimant filed his petition for workers' compensation benefits.

In Orr v. Lewis Central School District, 298 N.W.2d 256, 261 (Iowa 1980) the supreme court adopted the discovery rule as it applies to the statute of limitations in workers' compensation matters and held: "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.'"

Defendants' brief provides a good analysis of the Orr case as applied to the matter sub judice. It points out that as of May 25, 1972 claimant knew the nature and seriousness of his disease and that the question is whether or not he knew of its probable compensability. It was not until January of 1980 that claimant first considered that the disease might be related to his employment. He filed his petition well within two years of that time.

This matter has been treated as an occupational disease under chapter 85A of the Code. Although the undersigned finds no bar on claimant's right to bring this action by the statute of limitations found in section 85.26, claimant's remedy is foreclosed by other limitations in chapter 85A.

In Secrest v. Galloway Co., 239 Iowa 168, 30 N.W.2d 793 (1948) the Iowa Supreme Court observed that "a statute of limitations affects the remedy, not the right." Factually, the claimant in Secrest sustained compensable injuries in 1941 and a memorandum of agreement was entered into later in 1941, when full and final payment was made. In 1945, claimant applied for a review under Iowa Code section 1457 (1939), which provided that within five years from the date of the last payment of compensation, the commissioner, on application of either party, might review the award. Iowa Code section 1457 (1939), was changed in 1945 (chapter 77, §6, Acts of the Fifty-first General Assembly) to provide for review within three years from the date of the last payment of compensation. Ruling on the question of whether or not the amendment of 1945 reducing the time from five to three years applies to injuries that had taken place and an award made prior to such amendment, the court was unable to find any distinction between the enactment of section 1386 (currently section 85.26) and the amendment to section 1457 (1939). The court specifically found at pages 173-174:

> In each case there is authority given the commissioner to hear and determine the questions involved. In each case the legislature saw fit to require claimant, in section 1386, and the employer or employee in section 1457, to act within the prescribed time or lose the benefits granted under these sections. It is not a limitation upon the jurisdiction of the commissioner but is rather upon the right of interested parties to receive the benefits of the sections.

To make any recovery in this matter, claimant must establish disablement which is defined in Iowa Code section 85A.4 as follows:

> 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 designated and defined in this chapter in the last occupation in which such employee is injuriously exposed to the hazards of such disease.

Also relevant are 85A.12 and 85A.10. Section 85A.12 provides:

> An employer shall not be liable for any compensation for an occupational disease unless such disease shall be due to the nature of an employment in which the hazards of such disease actually exist, and which hazards are characteristic thereof and peculiar to the trade, occupation, process, or employment, and such disease actually arises out of the employment, and unless disablement or death results within three years in case of silicosis, or within one year in case of any other occupational disease, after the last injurious exposure to such disease in such employment....

Section 85A.10 states:

> Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, shall be liable therefor.

Claimant's difficulty, obviously, is that he did not suffer disablement within a year after his last injurious exposure to the chemicals in spraying in April of 1972. Claimant was transferred to the engineering department after he was found to have Parkinson's Disease. That transfer did not result in his being "actually incapacitated from performing his work." "Work" as used in section 85A.4 has been viewed in a generic sense. For example, a boner in a meat packing operation who is no longer able to do boning but who can do packaging has no disablement because the employee is still performing his work within the meat packing industry. Cahalan v. Oscar Mayer, (Appeal Decision filed July 29, 1983). Claimant transferred after the discovery of his parkinsonism, but he continued to work for defendant employer in a slightly different capacity. Claimant's last injurious exposure was in April of 1972. Claimant did not achieve disablement until 1975, well beyond the limitation in Iowa Code section 85A.12.

That recovery under the statute may be unduly restrictive is not within the jurisdiction of this tribunal to remedy. This would be exclusively within the authority of the general assembly.

In light of the resolution of this first issue it is unnecessary to address any other issues presented herein.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-eight years of age.

That claimant had no exposure to chemicals growing up on his family's farm or during his military service.

That claimant's work experience from 1958 until 1975 was as a lineman and line foreman.

That claimant's job entailed the usual duties of the line worker and, for an average of sixty-three hours per year, tasks surrounding the spraying of trees and brush.

That claimant also worked on transformers and regulators.

That included in the sixty-three hours of spraying was driving and mixing time.

That spraying was done without protective devices until 1969 at which time rubber rain suits were worn.

That claimant last did spraying in April of 1972.

That 2,4,5-T was used for spraying and was mixed with oil.

That claimant's earliest symptom was twitching of his thumb in 1968.

That in May of 1972 claimant was diagnosed as having Parkinson's disease.

That claimant was transferred to the engineering department in 1972.

That claimant worked for defendant employer until 1975.

That claimant was paid sick pay until January 15, 1976 at which time he was terminated.

That claimant first concluded there might be something wrong with him which related to chemicals in October of 1979.

That claimant first considered his Parkinson's disease might be related to his employment in January of 1980.

That claimant's petition for workers' compensation benefits was filed on June 4, 1981.

That claimant did not achieve disablement within one year of his last injurious exposure.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant filed his action within the time frame set out in Iowa Code section 85.26.

That claimant is barred from any recovery by provisions in Iowa Code section 85A.12.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That claimant pay costs of this matter on appeal.

Signed and filed this 12 day of December, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VICTOR CEDILLO,

Claimant,

vs.

R-H SILK SCREEN PRINTING CO.,

Employer,

and

OHIO CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 703154

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED

NOV 1984

IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Victor Cedillo, claimant, against R-H Silk Screen Printing Co., employer, and Ohio Casualty 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 May 18, 1982. It was submitted on a stipulated record filed October 22, 1984.

The industrial commissioner's file shows a first report of injury filed May 21, 1982. A memorandum of agreement was received on May 27, 1982. A final report shows the payment of twenty-four weeks and three days of healing period benefits and of eighteen percent of the right hand for thirty-four and two-tenths weeks of permanent partial disability.

The stipulated record consists of exhibit 1, notes from the hand therapist dated October 18, 1982; exhibit 2, a letter from James W. Turner, M.D., dated December 6, 1982; exhibit 3, notes from William W. Eversmann, Jr., M.D., dated July 5, 1983; exhibit 4, a letter from Dr. Eversmann dated July 25, 1983; exhibit 5, a letter from Dr. Turner dated March 16, 1984; exhibit 6, a letter from John R. Walker, M.D., dated June 27, 1984; and exhibit 7, a letter from Dr. Eversmann dated August 30, 1984.

ISSUE

The sole issue in this matter as stipulated by the parties is "whether claimant is entitled to additional benefits for permanent partial disability (scheduled injury)."

STATEMENT OF THE CASE

Earliest medical evidence, a note dated October 18, 1982, indicates claimant was involved in a work hardening program of three to three and a half hour sessions three times each week. Claimant was found to be wearing a glove and a wrist support on an intermittent basis. Range of motion in the right hand was as follows:

	M.P.	D.I.P.	D.I.P
Index	0-90°	0-90°	0-65°
Middle	0-90°	0-75°	0-35°
Ring	0-90°	0-80°	0-45°
Little	0-90°	0-90°	0-45°

Claimant had sensory abnormality over the middle and ring fingers in the form of hypersensitivity in the fingertips to pressure and vibratory stimulation.

As a result of this examination, claimant was thought to have a bony blockage at the proximal interphalangeal joints in the middle and ring fingers which limited flexion of those joints. Claimant was released for limited work.

On December 6, 1982 James W. Turner, M.D., assigned an impairment rating of eighteen percent of the hand.

Claimant was seen by William W. Eversmann, Jr., M.D., on July 5, 1983 and found to have adhesions of the extensor mechanism and the flexor digitorium profundus of the middle finger and a profundus tendon adhesion in the ring finger. Claimant was experiencing some dysesthesia. Two point discrimination showed reduction in the middle and ring fingers to the range of six to seven mm. Range of motion in the middle finger was zero to seventy-five degrees in the proximal interphalangeal and zero to thirty-five degrees on the distal interphalangeal. The ring finger range was zero to eighty in the proximal interphalangeal and zero to forty-five in the distal interphalangeal.

In a letter dated July 25, 1983 Dr. Eversmann agreed with Dr. Turner's rating of eighteen percent.

On March 16, 1984 Dr. Turner explained his rating of eighteen percent which he obtained by converting finger to hand impairment using the manual for orthopedic surgeons with values of three percent for the index finger, ten percent for the middle finger, two percent for the long finger, and one percent for the little finger and pointed out that Dr. Eversmann who specializes in hand surgery agreed with his figures.

John R. Walker, M.D., orthopedist, saw claimant and took a history of claimant's being caught by his hand and fingers in a machine. He understood that claimant had therapy and returned to full-time work. Claimant's complaints to Dr. Walker were of sensitivity in the ring and middle fingers with constant itching, an inability to grasp objects because he cannot make a full fist, slow healing in the ring and middle fingers and loss of sensation in the tips of his fingers.

Range of motion in the index finger was ninety degrees flexion in the proximal interphalangeal joint and forty-five degrees in the distal interphalangeal joint. The middle finger had seventy-five degrees and three degrees respectively; the ring finger, sixty-seven degrees and thirty degrees and the small finger, ninety degrees and three degrees. Dr. Walker noted atrophy of the interossei and lumbricales and increased painful sensation to the distal and dorsal portions of finger-nails of the middle and ring fingers. There was fifty percent loss of pinch and pinch strength between the thumb and index finger. Claimant's ability to make a fist was described as poor. His grip on the right was twenty as compared to eighty on the left. X-rays showed bone atrophy and narrowing of the articulations of the distal interphalangeal joints in the middle and ring fingers and in the index finger as well.

Dr. Walker assessed claimant's impairment at thirty-five percent with twenty-six percent based on loss of motion alone and the additional percentage attributable to loss of grip, scarring, pain, paresthesias, loss of muscle volume and loss of pinch.

Dr. Eversmann reexamined claimant and directed further testing of him by his hand therapist. A ten degree loss of range of motion was found in the proximal interphalangeal joints of the index, ring and little fingers. A twenty-five degree loss was seen in the proximal interphalangeal joint of the middle finger. At the distal interphalangeal joint there was fifteen degrees loss of motion in the index and little fingers, a forty degree loss in the middle finger and a thirty degree loss in the ring finger. Maximum grip strength was found in the third position seemingly because of a lack of distal interphalangeal flexion. Pinch was normal for lateral pinch but was reduced for three point pinch because of the sensory loss over the distal phalanx of the middle finger. Total grasp was reduced with patterned decreased use of the central fingers. In the Jebsen-Taylor testing claimant again developed compensatory motions.

Dr. Eversmann concluded claimant's test results were consistent and that his physical impairment had increased since the evaluation in July of 1983 because of losses of motion in the index and ring fingers. Claimant's impairment was raised to twenty percent. A decrease in dysesthesia was found. In making his assessment, the doctor had referred to AMA Guides.

APPLICABLE LAW AND ANALYSIS

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).

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).

The sole issue in this matter is claimant's entitlement to any additional permanent partial disability. The classic conflict as presented herein is a fairly high rating by claimant's evaluating doctor and lower ratings by defendants' physicians. The undersigned is faced with assessing the weight to be given to the opinions of the various medical experts. She concludes that there is no reason to discount any of the ratings as each has merit in its own right.

Dr. Turner, orthopedist who seemingly supervised claimant's initial treatment and who would be considered the treating physician, gave claimant an eighteen percent rating. Treating physician's ratings have been afforded special consideration because of the doctor's greater familiarity with the case. Dr. Turner used the manual for orthopedic surgeons to achieve his assessment.

Dr. Eversmann, an orthopedist who specializes in treatment of the hands and who is a part of Dr. Turner's group, saw claimant and initially concurred with Dr. Turner's impairment rating. Later he reevaluated claimant through extensive testing and discovered an increase in claimant's loss of motion, but some decrease in dysesthesia. His rating for which he referred to the AMA Guide was changed to twenty percent. Dr. Eversmann has a subspeciality in treating hands and performed a thorough and extensive evaluation.

Dr. Walker, the third orthopedist to see claimant, conducted an equally complete and comprehensive examination. His rating was thirty-five percent with consideration given to factors in addition to strictly loss of motion. Dr. Walker obviously spent a good amount of time evaluating claimant and eliciting all of his complaints.

The ratings of all three doctors were used in concluding that claimant has a permanent partial disability of the right hand of twenty-five percent which entitles him to additional workers' compensation benefits.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant had an injury to his fingers and hand as he worked at his job on May 18, 1982.

That claimant has lost motion in portions of all his fingers on his right hand.

That claimant has sensory changes in his fingers on his right hand.

That claimant has decreased grip strength in his right hand.

That claimant has atrophy and narrowing of the articulations of the distal interphalangeal joint in the middle and ring fingers and in the index finger as well.

That claimant has objective findings which support impairment.

That claimant has developed compensatory movements in his right hand.

That claimant has lost the ability to make a fist.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant is entitled to additional permanent partial disability benefits for an injury to his right hand.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant permanent partial disability benefits at a rate of one hundred seventy and 89/100 dollars ($170.89) for forty-seven and one-half (47 1/2) weeks.

That defendants be given credit for amounts previously paid.

That defendants pay amounts due and owing in a lump sum.

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 8 day of November, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL COLLINS,	:	
Claimant,	:	File No. 758406
vs.	:	A R B I T R A T I O N
JOHN DEERE DAVENPORT WORKS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	F I L E D

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IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration filed by Daniel Collins, claimant, against John Deere Davenport Works, a self-insured employer, for the recovery of benefits as a result of an alleged injury on January 12, 1984. This matter was heard before the undersigned on September 14, 1984 at the Bicentennial Building, Davenport, Scott County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Hester Hursh, M.D., and Patrick J. Crippes; claimant's exibits 1 through 4 and defendant's exhibits A, B and C.

ISSUES

The issues presented by the parties at the time of pre-hearing and hearing on this matter are whether the claimant received an injury arising out of and in the course of his employment; whether there is a causal relationship between the alleged injury and the disability upon which this claim is based and whether the claimant is entitled to temporary total disability benefits or healing period and permanent partial disability benefits. In addition, the pre-hearing order indicates that there is an issue as to whether defendant should be entitled to credit for benefits paid under a group plan pursuant to §85.38(2), Code of Iowa. The parties stipulated that claimant's rate of compensation for injuries occurring on January 12, 1984 is $380.42.

EVIDENCE PRESENTED

Claimant testified that he is 40 years old. He said he is a graduate of high school and has one year of seminary training.

He is married and has four children living at home and under age 18. Claimant advised that he was wounded in the right shoulder at age 16 by a shotgun blast. A few of the pellets remain embedded in his shoulder.

Claimant stated that he began working for the defendant on July 8, 1974. He remains employed by the defendant. Claimant testified that in July 1980 he began to operate a metal shearing machine. Claimant advised that this was an incentive job and that he was earning an average of $15 to $16 per hour. His base pay was $11.33 per hour.

Claimant described his job as follows: He would use a hand magnet to grab sheets of metal weighing 50 to 1200 pounds or more and put them on steel rollers going into a shearing machine. The metal sheets would go into the machine and a metal blade would come down and cut the sheet to the desired length. During this process claimant would hold the metal sheets down with the palms of his hands. He was also required to do a considerable amount of twisting, turning and bending to operate the machine. Claimant's hands would vibrate constantly when he had them on the metal sheet.

Claimant advised that on July 13 or 14, 1983 he was awakened during the night because of pain radiating up from his hands to his arms, shoulder and neck. Following this incident claimant reported to the company first aid station and was then sent to see the company physician. Claimant said supervision of his treatment was conducted by Hester Hursh, M.D., from the fall of 1983 through the spring of 1984. He said he sought a second medical opinion after Dr. Hursh indicated she thought claimant's condition was improving. Claimant advised that Dr. Hursh recommended a hand specialist, whom claimant consulted. He indicated he was again unsatisfied, so he consulted a physician of his own choice, John T. Johnson, D.O.

Claimant testified that his condition between July 1983 and January 12, 1984 continued to grow worse. He stated that because of this the defendant reassigned him to a nonincentive job doing paint "touch-up" jobs. He advised that not only did he lose potential incentive pay but that his pay scale was reduced by two grades.

On cross-examination, claimant stated that his left hand was worse than his right. He advised that he was seen and examined by Richard Ripperger, M.D., on March 29, 1984. He said that Dr. Ripperger discussed with him methods of treatment including conservative treatment modes and carpal tunnel release surgery. Claimant advised he was to return to Dr. Ripperger to let him know what treatment method he favored, but did not do so. Claimant, instead went to Dr. Johnson.

Claimant testified that he first saw Dr. Johnson in February 1984 complaining of a stiff neck. He chose Dr. Johnson on recommendation of the plant union representative. He said that Dr. Johnson had x-rays taken of him and prescribed some kind of vitamin. Claimant advised that he did not take to Dr. Johnson any background material from Drs. Hursh or Ripperger. He stated that he has seen Dr. Johnson three or four times, the last visit was in April 1984. Claimant conceded that Dr. Johnson was not a specialist, but contended he would be reluctant to have surgery on the wrist unless recommended by him.

Hester Hursh, M.D., testified that she is a physician employed by the defendant. She advised that she specializes in hand surgery. She received her medical training at the University of Illinois, interned at Cook County Hospital and in Paris, France. She stated that she is licensed to practice medicine, has hospital privileges at Illini Hospital and is a member of the American Medical Association and the American Occupational Medication Association.

Dr. Hursh testified that she first saw claimant on July 20, 1983. She revealed that he was complaining of his hands falling to sleep, more on the left than on the right. He indicated that this condition was growing worse and was aggravated by the pushing he was doing with his hands at work. Dr. Hursh stated that at that time claimant had already attempted to pad his hands with gloves. In addition to that treatment, Dr. Hursh prescribed vitamin therapy and recommended he avoid tight gripping and pushing with his hands for a period of about two weeks. She advised that she has seen claimant frequently since her initial contact.

Dr. Hursh testified that she diagnosed claimant as having a mild compression of his median nerves (carpal tunnel), more on the left than on the right. The doctor said that conservative treatment was instituted, but failed to resolve all of his problems. Dr. Hursh then referred claimant to Robert Chesser, M.D., for electrical studies which confirmed the diagnosis of carpal tunnel syndrome. Claimant was examined by Dr. Chesser in November 1983. She stated that following this examination, and due to the failure of conservative treatment to resolve the problem, she felt it was appropriate to consider surgical release of the median nerve.

Dr. Hursh stated that she talked with claimant about the possibility of conducting further tests or consulting another doctor for a second opinion. She said it was decided that claimant would get a second opinion, so in March 1984 he was sent to Dr. Ripperger. She stated that a report was received from Dr. Ripperger who suggested two alternative methods of treatment; conservative and surgery. She advised that Dr. Ripperger suggested further methods of conservative treatment which included continued anti-inflammatory medication, Cortisone injection, nighttime splinting and light duty. Dr. Hursh stated that she met with the claimant after she received the report from Dr. Ripperger. According to Dr. Hursh, claimant elected to follow the conservative method of treatment, but to her knowledge he followed through with only the light duty recommendation. Dr. Hursh stated that at the time of hearing claimant was neither following the recommendations for conservative or surgical treatment.

Dr. Hursh revealed that claimant did not complain of any neck pain or problems during the time she was treating him. She stated that she had last examined claimant on August 17, 1984. At that time she found claimant's carpal tunnel syndrome on the right had resolved itself. She recommended that claimant have surgery on the left to decompress the median nerves. It was Dr. Hursh's opinion that if claimant had surgery on the left hand to decompress the median nerve that he would not have any impairment to his left hand.

Dr. Hursh went on to testify that in her opinion claimant's present neck complaints are not connected to the carpal tunnel syndrome. She based this opinion on the results of the nerve conduction velocity tests which were normal in both upper extremities.. Dr. Hursh said that if claimant's problems were related to a pinched nerve in the neck the tests would have been abnormal.

Dr. Hursh stated that she knew Dr. John Johnson, who specializes in family practice. She advised that Dr. Johnson has in the past called and consulted her about his patients who had hand and carpal tunnel syndrome symptomatology.

On cross-examination, Dr. Hursh conceded that claimant had on two occasions complained of shoulder pain; on November 17, 1983 and February 8, 1984. She opined that his complaints could be compatible with carpal tunnel syndrome, but did not believe claimant's symptoms were consistent with C4, 5 radiculopathy. Dr. Hursh said she had not seen the x-rays of claimant's cervical spine taken by Dr. Johnson, but based on his report believed the disc at C4, 5 was a little worn. She stated that in the absence of positive neurological findings the x-rays would not reveal nerve impingement.

Dr. Hursh further testified on cross-examination that claimant's reliance on the opinion of a family doctor rather than a specialist was not reasonable. Dr. Hursh agreed that claimant's hand problems were probably related to his work. She believed that if claimant was not satisfied with her opinion or the opinions of the specialists he has seen he should consult yet another specialist rather than relying on a family practitioner. She indicated that defendant would be willing to send claimant to yet another specialist whom he did trust.

Dr. Hursh stated that she believed claimant had an 80 to 90 percent chance of a successful resolution of his carpal tunnel syndrome if surgery were performed. She believed that chances for successful treatment would diminish over time, particularly in light of the fact that claimant is presently taking no treatment at all.

Patrick J. Crippes testified that he is the safety director at John Deere. He stated that claimant had made no complaints about a neck injury to the defendant until he filed an amendment to his petition in this action on August 27, 1983. He said claimant did complain of a stiff neck on August 8, 1983, which was attributed to an off-the-job injury.

Claimant's exhibit 1 is a copy of claimant's records from the John Deere medical department covering a period from December 3, 1976 through May 18, 1984; an x-ray report from Robert Chesser, M.D., dated December 27, 1983; a letter dated November 11, 1983 from Dr. Chesser to Dr. Hursh; lab reports from Franciscan Hospital Rehabilitation Center dated November 10, 1983; a letter from Dr. Hursh to Dr. Chesser dated October 31, 1983; a letter from Steven R. Jarrett, M.D., to Rollin M. Perkins, M.D., dated August 8, 1977 with an accompanying attending physician's report; a letter from Dr. Perkins to Dr. Jarrett dated July 14, 1977; an x-ray report dated June 23, 1977 from LD.A Losasso, M.D., and a report signed by claimant on June 18, 1976. A review of the documents show that claimant first complained of neck pain in May 1977. The initial diagnosis of the problem was early cervical strain because of abnormal use. Continued problems with his neck led to an x-ray examination which was read as normal. Claimant continued to have problems so he was referred to Steven R. Jarrett, M.D., who diagnosed "tension myalgia affecting the cervical spine." It was recommended that claimant see a psychologist for relaxation technique training. Although there was initial psychological testing of the claimant, a psychiatric progress note dated August 24, 1977 indicates claimant began to feel better so he rejected counseling. The records show no complaint of a neck problem after August 1977.

A review of the documents contained in claimant's exhibit 1 also disclose that claimant first complained to the John Deere medical department about his hands on July 14, 1983. These records confirm the testimony of both claimant and Dr. Hursh as to the diagnosis and treatment of the problem. The records show that claimant complained of intermittent pain in his left shoulder on November 17, 1983 and February 8, 1984. The x-ray report on claimant's hands dated December 27, 1983 (from x-rays taken July 20, 1983) indicate that the radiologist read the x-rays as normal. Dr. Chesser's letter of November 11, 1983 diagnoses claimant's condition as carpal tunnel entrapment on

the left; however, Dr. Chesser felt some of the symptoms were rheumatological in nature. Dr. Chesser made the following report of the nerve velocity conduction tests he administered:

> NCV: In the left upper extremity, the distal median sensory latency was prolonged at 4.2 milliseconds with 3.7 being the upper limit of normal. The ulnar sensory latencies were normal at 3.2 milliseconds. The distal median motor latency was prolonged at 4.6 milliseconds with 4.3 being the upper limit of normal. Conduction velocity was normal at 59 meters per second. The distal ulnar motor latency was normal at 2.5 milliseconds with a normal conduction velocity of 65 meters per second in the forearm and normal across the elbow at 72 meters per second. In the right upper extremity, the distal median and ulnar sensory latencies were both normal at 3.5 and 3.2 milliseconds respectively. The distal median motor latency was normal at 3.5 milliseconds with a normal conduction velocity of 60 meters per second. The distal ulnar motor latency was normal at 2.8 milliseconds. Conduction velocity was normal in the forarm [sic] at 57 meters per second and normal across the elbow at 75 meters per second.

Claimant's exhibit 2 is a report dated March 29, 1984 from Dr. Ripperger. After reviewing claimant's symptoms, treatment and job description, he stated:

> On examination he has a full range of motion of the neck, there is no forearm or arm muscle atrophy, strength is normal, there is some very mild left thenar atrophy and weakness. Two point discrimination is unreliable, Phalen's test and Tinel's test are positive, Allen's test is negative.
>
> IMPRESSION: Left carpal tunnel syndrome.
>
> Conservative measures in the form of continued anti-inflammatories, Cortisone injection and night time [sic] cock up splint along with light duty for a time vs carpal tunnel release were discussed. He just cannot make up his mind today and he is going to get back in touch with me.

Claimant's exhibit 3 is a letter dated May 14, 1984 from John T. Johnson, D.O., to claimant's attorney. Dr. Johnson stated in part:

> With respect to Daniel Collins, I can state the following: The patient related that while on the job at Deere and Company, he did repetitious acts of twisting, lifting, and especially pushing and using vibratory machines, when pain developed in both arms.
>
> My examination revealed that he has symptomatic carpal tunnel syndrome bilaterally, and a narrowing of the C-4, C-5 interspace was noted on x-rays. I believe that this man has disc disease, causing pain to radiate into both arms, with carpal tunnel syndrome bilaterally superimposed. I believe that all the symptoms are caused by the work, as described above, that the patient does at Deere and Company. I do not believe that the cervical disc problem is severe enought yet to warrant surgical intervention, and a carpal tunnel release operation will probably not yield a beneficial result at this time. This patient has restriction of motion in the neck, decreased sensation in the arms, and decreased ability to grasp properly. Continued working around vibrating machinery, continued pushing of heavy objects, or repetitious acts of lifting and twisting will aggravate the condition.
>
> I believe that with the period of time already elapsed without significant relief, a state of chronicity has been reached, and his conditions of carpal tunnel syndrome and cervical disc disease are probably permanent.

An x-ray report from x-rays ordered by Dr. Johnson were admitted as claimant's exhibit 4. According to that report, claimant appeared to have a slightly narrowed disc space in the cervical spine between C4 and C5. There were no other abnormalities noted.

Employer's exhibit A is a letter dated August 30, 1984 from G. K. Dice, M.D., to Pat Crippes and a letter dated September 4, 1984 to Thomas N. Kamp from Dr. Hursh. The letter of Dr. Dice reveals the results of an examination of claimant conducted by him on July 14, 1984. According to that report, claimant first began to notice a problem with his hands in July 1982. On the basis of this examination, Dr. Dice opined that claimant had a two percent impairment of the right upper extremity and one percent of the left upper extremity. In the letter from Dr. Hursh, it is indicated that claimant was having difficulty with his hands for about one year prior to her first examination of him on August 23, 1983. Dr. Hursh briefly outlines the course of treatment undertakened for claimant's condition and states that conservative treatment had not been successful. She indicated her concurrence with Dr. Ripperger's opinion that surgery was appropriate for claimant and that the greater the delay the more likely he would suffer permanent impairment. She believed claimant would have no permanent impairment if the hand surgeon's recommendations were followed.

Defendant's exhibit B is a copy of a page from the records of the medical department at John Deere which was included in claimant's exhibit 1 and previously discussed herein. Defendant's exhibit C is also a medical record from the John Deere medical department which contains the notes of claimant's visits to that department after April 6, 1984. These reveal that he was seen on May 14, 1984 and July 6, 1984. On May 14, 1984 claimant reported that he was not on medication and was having no problems with his hands while doing the touch up painting job. The note dated July 6, 1984 reveals that claimant was continuing to do well in his new position.

APPLICABLE LAW

Proceeding under the workers' compensation law should be simple and informal so long as the employer is confronted with sufficient information about the basic material facts upon which the employee relies to enable him to prepare and defend the claim. Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188 (Iowa 1968).

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 12, 1984 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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 12, 1984 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.

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).

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 ultimate objective of the workers' compensation law is

to return the injured employee to work. The accomplishment of this goal requires the cooperation of all parties and an employer should not be penalized for an employee's unreasonable refusal to accept medical treatment. Johnson v. Tri-City Fabricating & Welding Company, 33rd Biennial Report, 179 (1977).

ANALYSIS

Claimant clearly alleges the wrong injury date in his petition, apparently because of his counsel's reliance upon Illinois rather than Iowa law. Claimant's injury date is July 1983, not January 1984. Because of the foregoing principle of law however, and in spite of claimant's failure to amend even when the problem was pointed out to him, this matter will be considered as though the correct injury date had been pled. The employer in this case had control of claimant's medical records and was aware that claimant's problems with his hands began to appear in July 1983. The employer would suffer little prejudice and the claimant would suffer great prejudice if this decision were based upon a relatively technical error. This should not, however, be considered an unsubstantial matter and claimant's counsel would be well advised in the future to rely upon the law of this state and not that of foreign jurisdictions.

Claimant alleges two injuries; bilateral carpal tunnel syndrome and disc space narrowing at C4, C5. The carpal tunnel syndrome began to evidence itself in July 1983. The only mention of the disc space narrowing is contained in the report of Dr. Johnson. Dr. Johnson attributes the disc space narrowing to disc disease, but nevertheless causally relates it to his employment. How his employment would cause disc disease is not explained. It is fairly clear from Dr. Hursh's testimony that the carpal tunnel syndrome is related to claimant's employment. She rejected Dr. Johnson's conclusion that any of claimant's problems were related to this disc space narrowing.

It can not be found on this record that claimant has suffered an injury of his cervical area. Other than a slight narrowing at C4, C5 as read by Dr. Johnson, there is no evidence of nerve impingement. Claimant apparently informed no one except Dr. Johnson that his neck was bothering him except in August 1983 when he complained of a stiff neck from a nonwork injury. In addition, the record discloses prior complaints of neck pain by claimant which was attributed to muscle tension. Dr. Hursh attributed claimant's complaints of shoulder pain to the carpal tunnel syndrome, not to any cervical injury. Dr. Hursh's opinion, as a specialist, is entitled to greater credence than Dr. Johnson's, who is a family practitioner. In addition, Dr. Hursh had treated claimant for a longer period of time, had first hand knowledge of claimant's employment duties and had seen him on many more occasions. Claimant testified he had seen Dr. Johnson four times at best.

Claimant has established that the bilateral carpal tunnel syndrome was probably the result of his employment activities. There is virtually no disagreement among the experts as to the causal relationship. Accordingly, claimant has established that he received an injury arising out of and in the course of his employment.

It is clear that claimant's disability, if any, as a result of the injury is confined to the right and left upper extremities. He has not shown an injury to the body as a whole. Claimant has not missed a single day of work as a result of his injury, thus any compensation to which he is entitled is in the form of permanent partial disability. There is no healing period or temporary total disability. Only Dr. Dice assigns any functional impairment to the extremities. He opined that claimant had a two percent impairment of the right upper extremity and one percent of the left upper extremity. Dr. Hursh indicated that claimant's right carpal tunnel syndrome had resolved with conservative treatment. Surgery has been recommended for the left, but not for the right.

Dr. Dice's impairment ratings are confusing for a couple of reasons. First, claimant and all medical evidence shows claimant's condition was worse on the left than on the right. Yet, Dr. Dice found claimant's impairment on the right twice that of the left. Second, Dr. Dice gives no indication of what guidelines were followed in arriving at his impairment rating. The record does not disclose Dr. Dice's qualifications. Considering the record as a whole and particularly Dr. Hursh's superior qualifications and experience with the claimant, it must be concluded that the greater weight of evidence is that claimant has no permanent impairment of the right upper extremity.

Claimant continues to have problems with his left hand. Surgery has been recommended by two specialists, but claimant rejects the idea of surgery and chooses to rely upon the non-specialist opinion of Dr. Johnson. It is difficult to understand claimant's reliance upon a family practitioner he has seen three or four times, but rejects the opinions of qualified specialists. Nevertheless, claimant should not be compelled to have surgery if he does not desire it. At the same time, however, defendant should not be held responsible for a disability which could be easily resolved. Even if surgery is against claimant's personal conviction, his refusal to follow the conservative measures outlined by Dr. Ripperger is wholly and totally without reason. Dr. Hursh stated that claimant's continued refusal to accept treatment will reduce chances of successful resolution in the future. The employer has indicated that if claimant is not satisfied with the opinions of the experts he has seen they would send him to others, including Iowa City. Claimant continues, however, to rely upon the opinion of Dr. Johnson and has not accepted the offer for second or third opinions of specialists. This is admirable on the part of the defendant and unreasonable on the part of claimant. The defendant's repeated efforts to provide treatment to claimant have been repeatedly rejected by claimant. Certainly claimant is suffering from an impairment to the left upper extremity. The only opinion of the degree of impairment is one percent. Dr. Hursh said he would have no impairment if he would follow competent medical advice. Thus, although claimant has a one percent impairment of the left upper extremity, the cause of that impairment is not the injury, but claimant's unreasonable refusal to accept treatment. Under the facts of this case, claimant is not entitled to compensation for the one percent impairment.

There was no evidence submitted concerning credit for payment under a group plan so that issue is not discussed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On July 14, 1983 claimant developed bilateral carpal tunnel syndrome.

2. The cause of claimant's bilateral carpal tunnel syndrome was his employment activities.

3. Claimant has missed no time from work as a result of his injury.

4. With conservative treatment, claimant's carpal tunnel syndrome on the right has resolved and claimant suffers no impairment of the right upper extremity.

5. Claimant continues to suffer from carpal tunnel syndrome on the left.

6. Claimant's left carpal tunnel syndrome presently causes a one percent impairment to the left upper extremity.

7. Claimant has unreasonably refused competent medical treatment, both conservative and surgical, of the left carpal tunnel syndrome.

8. If claimant would follow competent medical advice, he would suffer no impairment to the left upper extremity.

9. Claimant has received no injury to his neck while in the employ of defendant.

10. The longer claimant refuses medical treatment for the left carpal tunnel syndrome the greater the likelihood he will suffer permanent impairment.

11. Defendant has offered to provide claimant with medical treatment from specialists other than those he has seen, including Iowa City if he so desires.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that on or about July 14, 1983 he received an injury arising out of and in the course of his employment.

Claimant has failed to prove by a preponderance of the evidence that he suffers a disability as a result of his injury.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

The costs of this action are taxed to defendant.

Signed and filed this 14th day of December, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RALPH CONYERS,	:	
Claimant,	:	
vs.	:	File No. 527404
	:	A P P E A L
LING-CASLER JOINT VENTURE,	:	
Employer,	:	D E C I S I O N
and	:	FILED
	:	
MARYLAND CASUALTY COMPANY,	:	NOV 21 1984
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed November 21, 1984 the undersigned deputy industrial commissioner has been appointed under the provisions of Iowa Code section 86.3 to issue the final agency decision in this matter. Defendants appeal from a decision filed August 27, 1984 in which claimant was awarded additional healing period benefits and 150 weeks of permanent partial disability.

The record on appeal consists of the transcript of the hearing; claimant's exhibits A through E; defendants' exhibits 1 through 4 and commissioner's exhibit 1. All evidence was considered in reaching this final agency decision which will modify that reached by the hearing deputy.

ISSUES

The issues on appeal as stated by defendants are as follows:

I. Deputy Industrial Commissioner erred in concluding that the claimant is entitled to permanent partial disability for the reason that there is insufficient evidence to support said conclusion.

II. The Deputy Industrial Commissioner erred by admitting and basing his decision on evidence pertaining to industrial disability factors which, in this instance, are irrelevant.

III. The Deputy Industrial Commissioner erred in extending the healing period benefits from February 25, 1982, through December 10, 1982, for the reason that there is no evidence to support said extension.

STATEMENT OF THE CASE

Thirty-one year old left-handed married claimant, father of three children, testified to being a union electrician who received a journeyman's license in 1978.

Claimant described his injury on December 21, 1978 as follows: The workers were running conduit. He had to ground the conduit. There was an electrical flash and fire came from the bottom of the electrical panel on which he was working. He smelled burned skin and hair. He went to the hospital where his hands and face were treated.

Claimant asserted that prior to his injury he was working forty hours a week doing such things as installing wire and pulling conduit without difficulty or limitation.

When claimant returned to work on March 11 or 12, he described his ability as "[v]ery limited." He worked part-time at first because his hands ached. After about three weeks he began working full-time. He found his ability to pull wire and work in termination reduced by half. Although he is able to install conduit, he claimed that twisting to tigthen connectors, couplings or straps is a problem. He also claimed reduction in his ability to dig electrical wires into the ground. He asserted difficulty using such hand tools as screwdrivers, adjustable jaw pliers, wire strippers, mikes and side cutters because of trouble with gripping and twisting with motion producing pain in the back of the hand. In addition to these difficulties, claimant asserted an inability of his hands to stand winter cold and a tendency in his hands to chap, crack and bleed. Gloves are of some aid.

Claimant testified that he had trouble with the jobs he got after his injury in that his hands bothered him. Claimant indicated that he has been unable to take some jobs which require working outside in the cold.

Claimant has noted no improvement in the condition of his hands since his initial return to work.

Regarding his examination by Dr. Dougherty, claimant said that it lasted about five minutes and he denied telling the doctor that problems of which he complained had been present for a mere six months. Claimant pointed out that his initial grip strength is good and that gripping over a sustained period is what bothers him. Dr. Foster did a fifteen minute examination to check his hands.

Claimant acknowledged that he saw no doctors from April of 1979 until November 3, 1981. Claimant was not laid off of any job because of his hands. He quit working when the jobs ended.

Beverly Conyers, claimant's spouse of fourteen years, testified that before his burns claimant was able to do everything without limitation. She said that claimant's activities around the house have decreased. She noted that claimant is at times unable to grip the steering wheel to drive home from work. Although he does not complain, she observed him rubbing his hands and he will tell her they hurt if she asks. She also has seen claimant's hands crack and bleed. She evaluated the condition of his hands at the time of hearing as the same as when he returned to work in March of 1979.

Hospital records show claimant was admitted on December 2, 1978 with a flash burn. Nearly all of the back of the right hand and half of the back of the left hand was burned with third degree burns in some areas. Claimant was treated by A. H. Kelly, M.D. R. B. Bedell, M.D., saw claimant in consultation to evaluate any damage to his eyes. The doctor observed some skin peeling from the lids and residual inflammation. The lid function was excellent; the lenses were clear and the retina was normal.

L. D. Foster, M.D., in a report dated February 13, 1979 diagnosed first degree burns to claimant's face and second and third degree burns to the dorsum of the hands and wrists. He declared that claimant was incapable of doing the work he had done before the injury and he doubted that claimant would have permanent disability. On March 15, 1979 Dr. Foster wrote that claimant could return to indoor work as of March 6, 1979.

On March 10, 1979 Dr. Kelly noted that claimant should have no permanent disability other than slight susceptibility to cold.

Dr. Foster saw claimant on November 3, 1981 and recorded claimant's having "what sounds like perfectly typical arthritic pain primarily over the dorsum of his hands at the metacarpal phalangeal joints." Claimant told the doctor of dull, continuous aches in the hand and of cold sensitivity. The doctor believed that after the hands were warmed up, claimant had normal strength, normal range of motion and good grip. Claimant's burns were well healed with no permanent scarring. Dr. Foster wrote: "By later in the day, the hands are well warmed up, and he has normal strength, normal range of motion and good grip."

John J. Dougherty, M.D., saw and examined claimant on December 28, 1981 and took a history of stiffness beginning approximately six months before. A constant dull pain then developed. Claimant told of sensitivity to cold. Dr. Dougherty, too, wrote: "Once he gets going, he seems okay." On examination the orthopedist found full flexion and extension and pronation and supination. Claimant was able to abduct and adduct the fingers. His grip was good. He apposed the thumb to the little finger. Sensation was intact. There was no swelling or tenderness in the joints. There was some residual scarring on the dorsum of the hands around the metacarpophalangeal joints of the long and ring fingers. X-rays were not remarkable.

Dr. Dougherty's diagnosis was "previous flash burns to the hands, with residual stiffness, etiology (?), possible mild periarticular fibrosis." He was unable to verify claimant's subjective complaints with objective findings. He did not think claimant evidenced arthritic changes. The doctor noted: "Whether this is connected to his orginal injury, I am not sure. However, it certainly seems a little bit peculiar that this happened in December of '78 and it only began to bother him about six months ago. Therefore I would really question if this is really related to the initial injury or whether it is related possibly to more at what he is doing at the present time."

Richard P. Murphy, M.D., hand surgeon, evaluated claimant on February 24, 1982 at which time he complained of constant aching pain and stiffness aggravated by use of the hand. Motion, sensation, circulation and motor strength were intact. Increased sclerosis was seen in the lunate bones of both carpal areas. Electromyography and nerve conduction were recommended as well as a bone scan to look for vascularity changes secondary to electrical injuries.

That testing was done on March 31, 1982. The bone scan showed several areas of increased uptake which were "not necessarily related to the electrical injury." When claimant continued to complain, the tests were repeated in July. X-rays also were done which showed no evidence of acute or chronic boney injuries. Dr. Murphy's impression was "status post operative hand injury, 'burns' with no objective evidence of permanent disability." The doctor suggested claimant continue to work as he could tolerate it without restriction.

G. R. Carlton, M.D., examined claimant on October 7, 1982 and a second time on December 10, 1982. Claimant complained of continuing hand pain particularly with cold weather. He also told of cracking and morning stiffness. Dr. Carlton suggested cocoa butter or Nivea cream to keep claimant's hands soft. The physician ascribed the etiology of claimant's aching to microscopic scarring in the skin which causes the nerve endings to become painful. Dr. Carlton knew of no treatment to improve claimant's condition, but he thought it might improve with time.

APPLICABLE LAW AND ANALYSIS

The second issue raised on appeal will be addressed first. The undersigned must agree that there is some language in the

hearing deputy's decision that suggests consideration of industrial disability. However, he cites Iowa Code section 85.34(2)(s) and Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983). Those citations are the appropriate ones for this matter.

Iowa Code section 85.34(2)(s) provides:

> Compensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1 of this section. The compensation shall be in addition to the benefits provided by sections 85.27 and 85.28.
>
> . . . .
>
> 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.

This case presents the situation referred to in Iowa Code section 85.34(2)(s) in that claimant had injury to both hands 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 his body as a whole.

The Iowa Supreme Court in Simbro, 332 N.W.2d 886 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 determining 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.

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).

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 claim there is insufficient evidence in the record to support claimant's entitlement to permanent partial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 21, 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).

Two things are clear herein. Claimant had serious burns to his hands. Claimant has not been given a functional impairment rating by any practitioner. The absence of a functional impairment rating does not preclude an award. The Iowa Administrative Procedure Act, 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 complains of difficulty with gripping and twisting, inability to withstand cold and chapping, cracking and bleeding of his hands. Claimant's testimony was that his initial grip strength is good and that it is gripping over a sustained period which gives him trouble. The hearing deputy observed claimant's inability to sustain a twisting motion. That assertion and the deputy's observation were inconsistent with some evidence which will be set out below. There is no evidence that claimant had any impairment in either of his hands prior to receiving these burns.

Dr. Foster, who was involved with claimant's initial treatment, doubted that claimant would have a permanent impairment. He last saw claimant on November 3, 1981 at which time he thought claimant was having "perfectly typical arthritic pain" and that claimant's symptoms decreased as his hands warmed up. Dr. Kelly, another practitioner who was involved with claimant's initial treatment, felt that he would have no permanent disability other than slight susceptibility to cold. Dr. Dougherty, too, thought claimant was all right "[o]nce he gets going." He found some residual scarring. Dr. Murphy, a hand surgeon, observed some areas of increased uptake which he did not clearly relate to claimant's injury and he said the findings were "not necessarily related." Dr. Carlton, whose letterhead indicates his group works with burn cases, proposed that claimant's aching was due to microscopic scarring in the skin which caused nerve endings to become painful.

Contrary to claimant's assertions and the hearing deputy's comments in his decision, claimant's condition has not worsened. He testified:

> Q. The function of your hands as you've described them to the judge, are they approximately the same now as they were when you were released from the hospital and first went back to work?
>
> A. Yes.
>
> Q. Has there been any progression one way or the other as far as you know?
>
> A. No. (Tr., p. 38 ll. 3-10)

As defendants point out, a substantial period of time passed before claimant sought additional medical care. On the other hand, his complaints of cold sensitivity have persisted. He has some minimal scarring. Dr. Carlson presents a plausible explanation for claimant's symptomatology. Dr. Murphy's report suggests vascularity changes shown on bone scan related to electrical injury. Based on the record viewed as a whole and considering both the lay and expert medical evidence, it is found that claimant has permanent impairment. Claimant's burns were more extensive to his right hand; and were that his dominant hand, he might have been found to have a greater impairment on that side. As the left hand is dominant, equal impairment will be assessed. That impairment is found to be five percent of each hand which converts to five percent of the upper extremity which converts to three percent of the whole person. Three percent combined with three percent is six percent. Six percent of 500 weeks equals thirty weeks. Thirty weeks of benefits will be granted.

It is noted that the deputy awarded benefits at a weekly rate of $265. The maximum rate for permanent partial disability on the date of claimant's injury was $244.

The remaining issue is whether or not the hearing deputy erred in awarding healing period benefits from February 25, 1982 through December 10, 1982.

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

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROGER CRANE,	:	
Claimant,	:	File No. 720669
vs.	:	REVIEW -
TAMA PACK,	:	REOPENING
Employer,	:	DECISION
and	:	FILED
RANGER INSURANCE COMPANY,	:	DEC 20 1984
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Roger Crane, claimant, against Tama Pack, his employer and Ranger Insurance Company, insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on November 9, 1982 for which claimant was paid one point five seven one weeks at the agreed weekly rate of $150.35.

This matter was heard in Des Moines, Iowa, on March 16, 1984 and considered as fully submitted at the conclusion of the hearing.

Based upon the undersigned notes of these proceedings, the record in this matter consists of the oral testimony of the claimant, Cecilia Blaskovich, Roger Bristol, Steven Tosuska and John Tomcheck; claimant's exhibits 1 through 3 and defendants' exhibit 1 consisting of 338 pages.

In this decision we shall concern ourselves with the nature and extent of claimant's disability, if any, and in particular whether or not claimant's current condition was a preexisting abnormality.

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

Claimant, age 26, single and a member of the Iowa National Guard since 1976, began his employment for the defendant employer in November of 1981 primarily assigned to work in the casing department. Claimant's work history is typical of a young farm boy in that claimant has worked as a farmhand, short order cook, laborer on a bridge construction crew, a spot welder and service station attendant prior to his current employment with defendant employer.

In December of 1981, claimant underwent bilateral carpal tunnel releases. Claimant was a beef lugger at that time. There seemed to be no disagreement on causal connection between claimant's employment and the injury. V. T. Wilson, M.D., reported on January 8, 1982 as follows:

> The patient has had excellent relief of symptoms from bilateral carpal tunnel syndrome. He has minimal tenderness. He is anxious to return to work and is released to return to work on 1/11/82 at Tama Meat Pack and is given a note that so states. However, this is quite early for convalescence from bilateral carpal tunnel syndrome, and he is told that if he can't handle the work due to localized pain, etc. he should come back and he might need a couple more weeks of disability. (Defendants' exhibit 1, p. 29)

This response does not appear to be one normally made by a person lacking motivation. To the contrary, such conduct does imply a strong work ethic.

On November 9, 1982 while working as a beef pusher, claimant sustained a low back strain. Defendant employer sent claimant to Dennis I. Mallory, D.O., who diagnosed claimant's condition as a lumbar strain. (Defendants' exhibit 1, p. 223) John W. Hughes, M.D., an orthopedic surgeon on March 16, 1982 reported upon referral in part as follows:

> General: Patient presents a moderately obese, tall white male. On exam of the back there is subjective complaint of tenderness about the right paraverteoral lumbar area. There is pain with lateral bending, particularly to the right side. There is moderate discomfort with extension, with flexion patient is able to bend forward to within about one foot of the floor with the knees extended, he reports pain in the above mentioned area with this activity. He is able to walk on his heels and on his toes, deep tendon reflexes are brisk and equal throughout, extensor strength of the toes is judged to be normal. straight-leg raising causes mild back pain on both sides, there is no specific leg pain.
>
> X-rays: A-P & lateral views of the lumbar spine reveal no specific bony abnormalities.

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.

Claimant's contention that a basis for terminating healing period is when a doctor says no further treatment can be given is incorrect. Healing period does not continue just because treatment is being rendered if that treatment is of a maintenance nature. Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112 (Appeal Decision 1982). Defendants properly point out that claimant was released to return to indoor work as of March 6, 1979. Claimant was, in fact, working during a portion of the time awarded by the hearing deputy. Claimant agreed that he never was laid off of any job because of his hands. Defendants paid healing period through March 16, 1979. Claimant's healing period was ended appropriately with his return to work.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-one years of age.

That claimant is left handed.

That claimant is a journeyman electrician.

That on December 21, 1978 claimant suffered burns to his hands and face as he was grounding conduit at his job site.

That as a result of his injury on December 21, 1978 claimant was hospitalized and received medical treatment.

That claimant was paid weekly benefits through March 16, 1979.

That claimant now experiences some difficulty with using hand tools.

That claimant's hands are cold sensitive and have a tendency to chap, crack and bleed.

That claimant's condition has remained unchanged since his return to work in 1979.

That claimant saw no doctors from April 1979 until November 3, 1981.

That claimant has no permanent impairment to his face area as a result of his injury.

That claimant has functional impairment to each hand of five percent.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence entitlement to permanent partial disability due to impairment to his hands caused by his injury of December 21, 1978.

That claimant has not established by a preponderance of the evidence entitlement to any additional healing period benefits.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant thirty (30) weeks of permanent partial disability benefits at a rate of two hundred forty-four dollars ($244) per week.

That defendants pay the amount of this award in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.3(

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

Signed and filed this 12 day of December, 1984.

Judith Ann Higgs

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

Diagnosis: Lumbar strain. (Defendants' exhibit 1)

Disposition: I advised the patient I could see nothing wrong with his skeleton, nor did he have any finding suggestive of nerve root irritation in his back. I suggested to him to continue with the pain medicine which he had at home, which apparently is Thlenol #3, I also gave him a prescription for an anti-inflammatory, i.e., Clinoril to take. I told him to discontinue the muscle relaxants, he was told to continue to rest his back and assume the most comfortable position he could find and to give it some more time. He is obviously improved from what he was, I see no reason to think that he will not continue to improve and hopefully be able to resume work activities in the near future. He is to check back with me the first of next week, hopefully we can consider getting him back to work at that time. (Defendants' exhibit 1, p. 9)

Claimant returned to his duties November 23, 1982, assuming to his duties in the meat cooler which required him to push carcass beef halves down an over head rail.

Claimant testified that after a month or so he felt another "pull in my back" and that on March 28, 1983 was made to get up from his bed, made to kneel as he rolled out of bed and needed help to walk being unable to do so unassisted. Claimant became a patient of D. L. Ferguson, M.D., who reported in part as follows:

FINDINGS: Patient was admitted to the hospital for physical therapy, bedrest after he did not improve at home. He injured his back approximately a year ago at work, works in a beef packing plant moving carcasses. He no longer carries the carcasses as he did once. He is concerned that he may have to change his work because of the aggravation of the back pain. More recently the back became increasingly painful, he was started on physical therapy at home and continued for about four days. The pain became so severe that I have to hospitalize him.

PROGRESS WITH ANY COMPLICATIONS: The patient was started on intensive physical therapy, bedrest. Since the patient has the appearance of being depressed, he was put on full doses of Amitriptyline, however this failed to improve. His condition and his blood pressure ranged upward to as nigh as 170-120 at times so this was DC'd. It had not seemed to help anyway. After two weeks the patient had made no improvement and the decision was made to transfer to consultants care.

DISPOSITION: Transfer to consultant with back x-rays, discharge summary and transfer note. (Defendants' exhibit 1, p. 6)

Claimant was sent to E. A. Dykstra, M.D., who reported on May 3, 1983 as follows:

PRESENT ILLNESS: The patient is a 25 year old, white male with approximately a one year history of back pain. He initially injured his back while lugging beef at a packing plant. He has had multiple chiropractic procedures since that time, initially with some improvement. However, over the last approximately 1-1½ months has had persistent pain in his back and occasionally down into legs, right side worse than left. He was treated with hospitalization in Grinnell for approximately ten days with bedrest and traction with a little improvement. He had had episodes of crying and difficulty sleeping, and other symptoms consistent with depression. Was treated with a short course of Amitriptyline by Dr. Ferguson prior to transfer her [sic]. The patient was transferred. On physical exam here showed an alert, somewhat anxious, white male. Neck supple. Chest clear. Heart regular rhythm without murmurs or gallops. Extremities showed the straight leg raising negative bilaterally, although somewhat limited secondary to back spasm. Reflexes were intact and good ankle extensors. Had no sensory deficit. Had some flank tenderness on the left side and some diffuse tenderness in the lumbar spine. The patient was treated at bedrest with additional traction, underwent a computerized CAT scan which showed no definite herniation. There was a bony abnormality described in the sacrum of questionable density. For this reason, a bone scan was performed which was of normal density with no evidence of metastatic disease. Disc showed slight bulging annulus at both L4-5 and L5-S1, but symmetrically with no definite disc herniation. It was felt that this more consistent with degenerative disc disease than herniation. The patient was treated by Dr. Peter Anderson on 4/19/83 with an epidural steroid injection and some improvement in his symptoms there. He was also evaluated by Dr. Varner and was placed on much higher doses of Amitriptyline than he had been on prior to this with marked improvement in his sleeping. From the standpoint of eating and moving was doing considerably better. Was discharged by Dr. Durkee on 4/21/83 to return to the office in approximately 4 weeks, to see Dr. Varner in two weeks. Dosage of Amitriptyline at the time of discharge was 100 mg., h.s. and 50 mg. in the a.m. He was also placed on 1 mg. Xanax on a q.i.d. basis. (Defendants' exhibit 1, p. 15)

Claimant was seen by James L. Bleesman, M.D., at Mercy Hospital who reported in part on May 18, 1983 as follows:

In summary, I do feel that Roger's back injury was real. It has been somewhat difficult to evaluate because of his seemingly borderline intelligence. I do not think that he is malingering. I feel that he needs to continue with psychotherapy. I would expect that the need for psychotherapy would be somewhat prolonged. I would recommend a very directive father-like approach to this gentleman psychologically. We have recommended that he continue with a very active exercise program at home through a local YMCA or similar health facility. While he was a patient here he was started on appropriate reconditioning exercises of the muscles of his back and abdomen. Assuming that the Mental Health Association in Grinnell can motivate Roger to continue with his very active exercise program, there is at least a reasonable possibility that he may be able to return to his previous employment. I would recommend that he be re-evaluted as far as work prescription two months from the time of his discharge from the Pain Center. I would also recommend that he not be given any further narcotics or anti-anxiety drugs for his pain symptoms as these suppress the body's natural endorphins. In the future if he continues to complain of significant back pain and muscle spasms, I would recommend one additional trial of a Medrol dosepack. If at time his response is as dramatic as we saw here, further evaluation as to myositis or auto-immune disease should be carried out. At the time of his discharge he was given prescriptions for Elavil 150 mg. at h.s. #50 and Meclomen 100 mg. four times a day with meals, #100. (Claimant's exhibit 1)

John W. Hughes, M.D., expressed the opinion that claimant recovered from his back strain in a short time after the episode under review. (Defendants' exhibit 1, pp. 53-55)

Claimant has had a long history of prior back complaints beginning in 1978. The cutting issue is whether or not claimant's current abnormality is caused by the November 1982 incident or has his current condition stabilized and in the same condition as it was prior to the incident.

Claimant was last seen by Dr. Mallory, whose testimony is given the greater weight, on November 1, 1983. Dr. Mallory reported as follows: "Mr. Crane has very minor recurrent, sporadic episodes of lumbar strain which I believe to be non-incapacitating. Due to the nature of his personality his symptomatology becomes exaggerated. This malady could not be considered a permanent disability." (Defendants' exhibit 1, p. 284)

Other than claimant's direct testimony, this record contains little support for claimant's complaints of pain. The undersigned is particulary struck by claimant's testimony concerning a truck accident that occurred some 90 days prior to the hearing involving the claimant. The accident occurred December 20, 1983 and claimant did not seek medical attention for his low back until January 6, 1984. Such conduct in light of claimant's subjective complaints appears to the undersigned to diminish claimant's credibility as a witness.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 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).

In applying the foregoing legal principals to the case at hand, it is concluded that the claimant has failed in his burden of proof. Claimant has not produced competent medical evidence in support of his claim for permanent partial disability. Claimant's actions belie his testimony.

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. That this agency has jurisdiction of the persons and the subject matter.

2. That the claimant sustained an admitted industrial injury on November 9, 1982.

3. That the claimant received one point five seven one (1.571) weeks temporary total disability at the stipulated weekly rate of entitlement of one hundred fifty and 35/100 dollars ($150.35).

4. That the claimant has failed establishing his entitlement to any additional award.

THEREFORE, IT IS ORDERED that the claimant takes nothing further as a result of these proceedings.

Costs under Rule 500-4.33 are charged to the defendants.

Signed and filed this 20 day of December, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALBERT M. DANA,

Claimant,

vs.

SARGENT ELECTRIC COMPANY,

Employer,

and

HOME INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 688686

A P P E A L

D E C I S I O N

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IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed October 5, 1984 the undersigned deputy industrial commissioner has been appointed under the provisions of Iowa Code section 86.3 to issue the final agency decision in this matter.

Defendants appeal from an order by a deputy industrial commissioner approving examination pursuant to Iowa Code section 85.39 at the Medical Occupational Evaluation Center at Mercy Hospital.

The record on appeal consists of the application for examination with attachments; the defendants' resistance thereto; the offical agency filings and the pleadings. All evidence was considered in reaching this final agency decision.

The ruling in this matter will be different from that reached by the ruling deputy and his order will be vacated.

ISSUES ON APPEAL

The issues in this matter are whether or not Iowa Code section 85.39 contemplates payment for a "multi-disciplinary team evaluation" costing $3,500 and whether or not approving such an examination is "in violation of statutory and constitutional provisions, is ultra vires, unreasonable, arbitrary, capricious or an abuse of discretion, under the extant circumstances."

STATEMENT OF THE CASE

On November 28, 1983 claimant filed a petition asserting an injury on November 28, 1981 which resulted in a fractured right wrist, tibia and fibula as well as an injury to the right knee. The industrial commissioner's file contains a memorandum of agreement. No final report has been filed.

On August 24, 1984 claimant filed an application for examination under Iowa Code section 85.39 claiming injury primarily to his right leg, knee and wrist and seeking evaluation at the Medical Occupational Evaluation Center of Mercy Hospital. Attached to the application was a part of a report from John R. Walker, M.D., which assigned a permanent, partial impairment rating to the right wrist and to the right lower extremity and an office note from Dr. Fisher in which he expressed agreement with Dr. Walker's evaluation.

Defendants filed a resistance which states that "the Application for Section 85.39 benefits is improper under the circumstances and is redundant based upon the previous evaluations and care provided by Claimant's own physicians."

The evaluation was granted on September 10, 1984.

APPLICABLE LAW AND ANALYSIS

The issue in this case revolves around the agency's interpretation of Iowa Code section 85.39. More specifically the portion with which we are here concerned reads as follows:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evluation 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 the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Defendants argue that the medical evidence offered to the date of the ruling on the examination did not demonstrate a need for evaluation by other than a qualified orthopedist and point to the reasonable fee requirement of the statute.

Claimant argues that the medical evidence shows a need for a "more comprehensive evaluation" to include "the other factors of psychic and psychological injury and functional and occupational disability." Claimant also points out that "many employers send injured employees to the Medical Occupational Evaluation Center at Mercy Hospital in Des Moines right away so they can obtain such a thorough and complete evaluation in order that there be fewer delays and disputes about thorough evaluations."

Claimant's last assertion is correct. Sending injured employees to an evaluation center is a voluntary act on the part of the employer/insurance carrier in certain cases. The industrial commissioner has, in fact, ordered examination at facilities much as the one requested by claimant. See Gregory v. U. S. Homes, 33 Biennial Report of the Industrial Commissioner 100 (1977). The undersigned cannot agree with claimant's first assertion.

Initially it is noted that claimant meets the threshhold requirements for examination under Iowa Code section 85.39, which are that a memorandum of agreement has been filed and a rating of permanency has been assessed. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Coble v. Metro Media, Inc., 34 Biennial Report of the Industrial Commissioner 71 (1979).

Claimant's brief urges that his injury goes beyond the physical and additionally that because of vocational considerations a more comprehensive evaluation is needed. Claimant's petition alleges orthopedic injury to two members in a single accident. That petition also seeks vocational rehabilitation benefits pursuant to Iowa Code section 85.70. Claimant has not amended his petition to assert injuries other than those to the right upper and lower extremities. Contrary to claimant's assertions, the medical evidence contained in the file is not suggestive of a need for evaluation of other than those injured areas. The state of the record at the time of the ruling deputy's order suggests that claimant's injury falls within the the purview of Iowa Code section 85.34(2)(s). The Iowa Supreme Court in Simbro v. DeLong Sportswear, 332 N.W.2d 886 (Iowa 1983) made it clear that impairment in such cases must be computed as functional impairment rather than as industrial disability.

The undersigned finds no circumstances herein which would entitle claimant to anything other than an orthopedic examination unless that evaluation were consented to by defendants. The order entered by the ruling deputy is hereby vacated and claimant's current application for examination under Iowa Code section 85.39 is hereby denied.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant received a compensable injury on November 28, 1981.

That defendants have filed a memorandum of agreement.

That claimant's petition alleges injury to his right upper and lower extremities.

That claimant has impairment ratings to his right upper and lower extremities.

That claimant seeks examination at the Medical Occupational Evaluation Center of Mercy Hospital.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish entitlement to an examination at the Medical Occupational Evaluation Center of Mercy Hospital pursuant to Iowa Code section 85.39.

ORDER

THEREFORE, IT IS ORDERED:

That the deputy's ordered filed September 10, 1984 is hereby vacated.

That claimant's application for evaluation under Iowa Code section 85.39 is hereby denied.

Signed and filed this 20 day of November, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT DEAN DAVIDS,	:	File No. 458088
Claimant,	:	REVIEW-
vs.	:	REOPENING
E. I. DuPONT de NEMOURS, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	

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IOWA INDUSTRIAL COMMISSIO

INTRODUCTION

This is a proceeding in review-reopening brought by Robert Dean Davids, claimant against E. I. DuPont de Nemours, Inc., a self-insured employer, for the recovery of further benefits as the result of an injury on September 27, 1976. By pre-hearing order filed January 27, 1984 this is a bifurcated proceeding. The matter was heard before the undersigned on September 12, 1984. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant and Joyce Marie Davids; joint exhibits A and B; and defendant's exhibit 1.

ISSUES

The issues presented in this bifurcated proceeding are whether there is a causal relationship between the injury of September 27, 1976 and the disability upon which this claim is based and whether the claimant is entitled to receive medical benefits pursuant to §85.27, Code of Iowa. The latter issue involves whether or not there is a causal relationship between the claimant's stated need of medical treatment and the injury of September 27, 1976. Claimant's brief also alleges that there is an issue as to whether or not the claimant is entitled to an independent medical examination pursuant to the provisions of §85.39, The Code. However, the pre-hearing order filed January 27, 1984 does not state that §85.39, The Code, is an issue and it will not be discussed or addressed in this decision.

EVIDENCE PRESENTED

Claimant testified that he was born December 10, 1950, that he is a graduate of high school and had vocational training in truck driving and heavy equipment operation. He stated that he served in the United States Navy from July 1969 to December 1973. He advised that while he was in the Navy he took several physicals and received an honorable discharge with no service related disability.

Claimant testified that he became employed by defendant in April 1976. He stated that on September 27, 1976 he was working on a production job pushing a roll of cellophane weighing 400 to 600 pounds. As he was pushing the cellophane, he experienced a severe pain in his back and left leg which he immediately reported to the plant physician. He received Cortisone from the plant physician but continued to experience pain in his lower hip down his right leg and knee and to his ankle. Claimant went home, but later received a call from his supervisor requesting that he come to work. Claimant came to work and due to the fact that the plant physician was not in at the time, he was given permission to consult his own doctor. Claimant said he was experiencing constant pain and a pulling sensation in his legs. He saw his family physician who gave him a preliminary examination and scheduled an appointment for him to see an orthopedic specialist, R. Scott Cairns, M.D. Claimant said he went to see Dr. Cairns who conducted an examination and admitted him to Mercy Hospital. He remained in the hospital for 11 days. He revealed that the pain continued even while in the hospital but that it did become less sharp and aggravating. Claimant stated that he was able to return to work in December 1981. Claimant contended that prior to September 27, 1976 he had never experienced a disabling back condition. He did admit that he would on occasion have a backache but that these were minor in nature and never required him to be off work. Claimant said that upon his return to work he experienced similar symptoms and that his leg would occasionally fall asleep. The condition would worsen depending on how much time he had spent on his feet during the day. Claimant said he has continued to suffer pain in his back and leg since September 1976, though at times he would feel better than at other times. Claimant denied he received any significant injury since September 1976, though he did admit he would on occasion aggravate the condition. One such occasion was in January 1979 when he slipped and fell on some ice. He was able to catch himself but the slip and fall incident did aggravate his back condition.

Claimant testified that he has continued to treat with Dr. Cairns and Charlton H. Barnes, M.D., since the date of his injury. Claimant stated he has discussed with Dr. Barnes various methods to relieve his symptoms including surgery and chemonucleolysis. Nothing is being done pending a determination of the liability of the defendant.

Claimant stated that it was his opinion that his work record with defendant was quite good with the exception of some moodiness which he attributed to back pain.

Claimant testified that defendant is extremely safety conscious and that following his first injury he was encouraged to treat the matter as not work-related in order to preserve defendant's outstanding safety record. Claimant said he presently wears a back brace because of his pain. He stated that this is the only workers' compensation claim he has filed against the defendant.

On cross-examination, claimant stated that there were witnesses to his injury and that both of his treating physicians have indicated that the injury was work-related. Claimant said that he was able to return to work but that he did experience a great deal of pain while performing his job. He advised that he was laid off due to economic conditions in August 1981. He said he has attempted to follow the restrictions imposed by the doctors to the extent possible, though he admitted he has cut wood for home heating. He advised that if the cutting wood would start to bother his back that he would stop and wait for his back to feel better. Claimant admitted that he participated in a sports activity in August 1978 and helped win a tug of war. He said he only pulled 25 pounds during the tug of war. Claimant advised that because of his injury he no longer bowls because of fear that he will reinjure his back. He stated that he has been advised by his supervisor that if he was not able to perform his job then he would be fired.

Claimant admitted that from October 1977 to January 1979 he did not seek medical attention. He did return to the doctor in January 1979 following a slip on ice when he reinjured his back. He stated that the back condition grew worse over a two day period but that it eventually resolved itself to where he felt his condition was the same as before the slip and fall incident. Claimant contended that he has suffered back pain in various degrees since September 1976.

Joyce Marie Davids testified that she has been married to the claimant for eight years. She stated that they were married in May of 1976 and that she knew the claimant for some time prior to that time. She stated that prior to September 1976 she was unaware of any complaints of back pain which the claimant may have had. She said she recalled the date of injury of the claimant and stated that she has observed claimant to be in continuous back pain since that date.

R. Scott Cairns, M.D., testified by way of deposition given December 22, 1976 which was submitted into evidence as joint exhibit A. Dr. Cairns is an orthopedic surgeon and fellow of the American Academy of Orthopedic Surgeons. He stated that he first examined claimant on September 28, 1976 with complaints of pain in his low back. He explained the history that he obtained from the claimant and indicated that his diagnosis was a herniated nucleus pulposus at L5-S1 on the right. He said he admitted

claimant to Mercy Medical Center for treatment. Dr. Cairns was uncertain at that time as to whether or not claimant would suffer a permanent impairment as a result of the herniated disc. He emphatically stated that the cause of the herniated disc was the work injury of September 27, 1976. He indicated there may have been a questionable spondylolysis at L5-S1. He did not believe that if the spondylolysis in fact existed that either contributed to claimant's injury or to his complaints.

Charlton H. Barnes, M.D., testified that he is an orthopedic surgeon. Dr. Barnes testified that he first examined claimant on January 24, 1977. At that time his notes indicate that claimant was doing fairly well and was working at the time. Dr. Barnes examined claimant on December 8, 1983 and found that his condition was basically unchanged since he first saw him in 1977. Because the condition was unchanged, Dr. Barnes believed that claimant's condition as a result of the injury was of a permanent nature. He opined that the permanent impairment was approximately five percent of the body as a whole. Dr. Barnes indicated that the claimant should restrict his activities to a certain degree in order to avoid reaggravating his back condition. He indicated that heavy lifting or sports activities would be things which could aggravate the back condition. Dr. Barnes also felt the question of spondylolysis was equivocable in claimant's case. Dr. Barnes revealed that between October 12, 1977 and January 22, 1979 he did not treat claimant for his back condition. There were several records which were attached to and made a part of joint exhibit B including the progress notes from Bluff Medical Center. These progress notes reveal that claimant was seen by Dr. Barnes on January 24, 1977 at which time Dr. Barnes indicated that claimant was suffering from a small resolving disc rupture or protrusion at L5-S1 with a questionable spondylolysis at L5-S1. Dr. Barnes' notes of October 12, 1977 also indicates that claimant is suffering from disc protrusion. The next note appearing in the medical history is dated January 22, 1979. At that time claimant apparently returned stating that he had reinjured his back about two days prior, but that it was markedly improved. In his deposition Dr. Barnes stated that claimant's condition in January 1979 was the same as it was in October 1977.

In a letter dated March 23, 1982, John R. McKee, M.D., stated as follows:

> I would like to thank you for the referral of Robert Davids, whom I saw in the office 27 March 82 for low back pain. The patient worked at Dupont when he suffered an accident in 1976. I do not have the details of this accident but it was worked up initially but [sic] Dr. Cairns and later by your office. This included a normal myelogram in the past and numerous low back films as well as a CT scan of the lumbar spine. Evidently all have been normal though I do not have those records. At any rate, the patient has continued to have alternating left and right low back pain along with fragments of left and right sciatica. He will usually improve to a point and then slip on the ice and catch himself or have some other trivial trauma to the back, which will induced low back pain and sciatica again. In January he again slipped on the ice and at present he is having left sacroiliac joint and sciatic notch region pain as well as minor pain and numbness in the left lateral calf. He also has some trouble with bladder control in that he cannot hold his urine as well, though he has not actually had urinary incontinence.

Dr. McKee went on to state that he would suggest claimant continue on conservative treatment since that had been successful in the past.

Defendant's exhibit 1 is the Clinton Plant News dated August 31, 1978. On the sports page of the newspaper there is a picture of the claimant with the headline Tug-Of-War. According to the story line beneath the picture, claimant was one of a seven member team which won first place in the light weight division of the tug of war constant at the Sabula Island City Days. The newspaper also reflects the defendant's strong emphasis on safety. There is a lead story on the front page concerning safety and the fact that the defendant had operated for some 375 calendar days without a loss work day injury. There are safety reminders on each of the four pages of the paper.

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 September 27, 1976 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 27, 1976 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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.

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

ANALYSIS

For purposes of this decision it must be presumed that claimant suffers a disability in order to address the question of whether that disability is causally related to the injury of September 27, 1976. It must also be presumed that claimant requires medical attention. The record would indicate that both presumptions are supported by the evidence.

This is an unusual case because of the great length of time since the original injury. Almost eight years elapsed between the date of injury and the hearing upon which this decision is based. During the intervening years claimant returned to work, engaged in sports activities, performed strenuous household chores and on at least one occasion reinjured his back. These facts demand careful consideration of the causative factors of claimant's present disability.

Claimant's original injury was without question work-related. According to Dr. Cairns, claimant's original injury was a herniated disc of L5-S1 on the right. In October 1977 Dr. Barnes suggested either a herniated or bulging disc at the same location. It was not known at that time whether the condition was permanent. The question of permanency was dependent on how claimant functioned in the future.

According to claimant, he continued to suffer periodic pain following his injury. He found occasions when overexcertion would cause increased difficulty though he has continued to function fairly well. The most notable incident in the medical records is the slip and fall incident in January 1979. It does not appear that this incident was more than a mere temporary aggravation of the previous disc problem. Claimant began to improve within two days following the incident. Most importantly, however, Dr. Barnes found claimant's condition unchanged from October 1977. Clearly, the slip and fall incident did not contribute to claimant's disability except on a very temporary basis. None of the experts suggested that this incident was the cause of claimant's condition.

It should also be noted that claimant took a long time to recover from his original injury. He was hospitalized because of the injury and was off work more than two months. This indicates the severity of claimant's original injury.

Claimant has demonstrated that he is a well motivated individual. He returned to work and engaged in as many of his usual activities as he could notwithstanding his pain. It would be most unjust to hold claimant's motivation against him and find that because he did these things, the causative relationship between the injury and disability was broken. These facts go more to the question of extent of disability than to its cause.

The fact that claimant engaged in a tug of war in 1978 does not break the causative chain. Indeed, claimant's participation may not have been well advised, but there is nothing to suggest he suffered an injury because of his participation. The same thing holds true for his acitivities at home cutting wood. While these activities have the potential to aggravate his condition, it is clear they are not the cause. The cause is the herniated or protruding disc and the disc problem was caused by the work injury. In other words, the proximate cause of claimant's present disability is his injury of September 27, 1976.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On September 27, 1976 claimant received an injury arising out of and in the course of his employment.

2. Prior to his injury claimant suffered an occasional backache, but nothing that ever caused him to miss work.

3. Claimant's injury of September 27, 1976 caused a herniated or protruding disc at L5-S1.

4. Since his injury claimant has suffered temporary aggravation of his injury of September 27, 1976.

5. Claimant's present disability is the result of the herniated or protruding disc he received on September 27, 1976.

6. Claimant continues to require medical treatment for his injury of September 27, 1976.

7. Claimant is credible.

8. Claimant is well motivated.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that there is a causal relationship between his injury of September 27, 1976 and his present disability.

Claimant has proven by a preponderance of the evidence that there is a causal relationship between his injury and his need for medical treatment thereof.

ORDER

IT IS THEREFORE ORDERED that this matter be assigned for hearing of the remaining issues herein.

Costs are taxed to the defendant.

Signed and filed this 14th day of December, 1984.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MILTON DICKENSON,	:	
Claimant,	:	File No. 661038
vs.	:	A P P E A L
JOHN DEERE PRODUCT ENGINEERING,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from a proposed ruling in review-reopening wherein claimant was awarded permanent partial disability benefits based upon a finding of an industrial disability of 60 percent. The record on appeal consists of the transcript of the review-reopening proceeding; joint exhibits 1 through 11; the January 19, 1983 and August 24, 1983 depositions of Donald C. Zavala, M.D.; the deposition of Donald P. Schlueter, M.D.; the telephonic depositions of Mark D'Amico, Barbara Miller, and Donald P. Schlueter, M.D.; and the briefs and filings of the parties.

Defendant further appeals from a nunc pro tunc order of the deputy issued in response to applications for rehearing filed by both parties.

ISSUES

Defendant states the issues on appeal as:

1. Whether there is causal connection between claimant's impairment and exposure to ammonia.

2. Whether the claimant has sustained a 45 percent functional impairment of the body as a whole, and whether the claimant has sustained a 60 percent industrial disability.

3. Whether claimant is entitled to interest from July 10, 1981.

REVIEW OF THE EVIDENCE

Claimant was 30 years old at the time of the hearing. (Joint Exhibit 5) He is a high school graduate and is married with one child. (Transcript, pages 13-14) Claimant has taken business courses at a community college and has had three to four months of life underwriter's training. (Tr., pp. 14-15, 19) He has worked in general labor and engine assembly and also sold insurance for two years. Claimant has also sold cars at dealerships in Ohio and Iowa. (Tr., pp. 18-23) In October of 1978 claimant began working for defendant employer. He began as a machine operator and was transferred to work as a stationary test operator. His job was to record data on tractor engines for the Product Engineering Center, a research and development division of defendant employer. (Tr., pp. 24-29) Claimant testified his duties included spray painting parts, engine maintenance and driving a forklift truck. (Tr., pp. 29, 34-35) On January 20, 1981 claimant was in an engine monitoring room with other employees when an employee advised the group there was a leak in the corridor. (Tr., pp. 36-40) Claimant testified the cold room for testing engines was next to where he was working, and there was always an ammonia smell in the area. (Tr., p. 44) Claimant stated he opened a door to the corridor and was hit by fumes that burned his eyes and prevented breathing. (Tr., pp. 45-46) Claimant testified he and the other employees ran outside and then claimant returned to help "Dale," a maintenance man who worked in the cold room where the ammonia was pumped. (Tr., pp. 47, 48-51) Claimant stated that he and Dale went outside and then returned to the building. Claimant turned on fans and opened doors, then returned to the pump room with Dale to clean up the spill. (Tr., pp. 53-56) Claimant testified his eyes were teary and his skin burned. He tried to take "a lot of short breaths." (Tr., p. 56) Claimant testified he had been asked by Dale to help, and because he was familiar with the area, was asked to pull large fans out of the small "break" rooms and hook them up. (Tr., pp. 53-58) Claimant testified they were trying to keep the fumes away from the other wings of the building. (Tr., p. 58) Claimant stated he was then told by the captain of the fire brigade to go take a shower. (Tr., pp. 58-59) The shift supervisor's report indicates that the leak occurred at approximately 5:45 p.m. and at approximately 6:30 eight people, including claimant, took showers. At 7:30 ten people, including claimant, were examined in the medical department. Claimant and three other employees were sent to Schoitz Hospital for examination. Claimant and another employee were admitted for observation. (Joint Exhibit 11) Claimant was treated at the hospital by James Cafaro, M.D., who reported on January 20, 1981:

> This is a 28-year-old, Black male, involved in an industrial accident in which he was exposed to ammonia and gas fumes. He works in the engine inspection part of the John Deere Plant and apparently a pipe was being cleaned which carried ammonia gas as a refrigerant and began to leak and he went over to help the maintenance man who was trying to repair the leak. He was exposed to fumes for about 45 minutes. He had nasal and eye and throat irritation as well as some cough, chest tightness, some shortness of breath and some tingling in his legs. He is a nonsmoker for about 1½ years and before that smoked about ½ pack a day. He has no chronic lung problems and is in good health otherwise. His faimly history is negative.
>
> PAST HISTORY: Is negative for surgical or medical illnesses. He has no allergies and takes no medicines.
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> ....
>
> HEENT: There is conjunctivitis. Nasal mucoa is slightly red and posterior pharynx is erythematous, with no drainage. Tympanic membranes are normal.
>
> ....
>
> IMPRESSION: Chemical conjunctivitis, secondary to ammonia exposure. (Joint Ex. 5)

On January 24, 1981, Dr. Cafaro noted:

> Chest x-ray on the night of admission and the next morning were normal. Blood gases at the time of admission showed some mild hypoxemia with p02 of 65, pC02 39, pH 7.39.
>
> During his hospitalization this gradually improved and on disharge his p02 was 84. His UA, CBC and ammonia levels were all normal.
>
> HOSPITAL COURSE: He was given 2 gm of Solu-Medrol in the Emergency Room and Cortisporin Drops in his eyes. He was given supplemental oxygen. He improved fairly quickly, although on discharge he still complained of some mild shortness of breath, but his cough and upper airway irritation symptoms were gone. Spirometry was done and was normal. (Joint Ex. 5)

Claimant testified he was discharged from the hospital after three days and returned to his regular work duties some four days later. (Tr., pp. 64-65) He continued to work until April or May of 1982 when he was replaced by an employee with more seniority. (Tr., pp. 65-67) Claimant stated that during this period of work he had to avoid fumes and dust in the air and could no longer paint or stay around the engines when they were

running. He was able to continue recording information as his room was air conditioned. (Tr., pp. 66-67) During this time claimant stated he suffered from chest pains and shortness of breath. (Tr., p. 68) Claimant explained he had trouble breathing while driving the forklift on cold, windy days. Breathing was also more difficult on hot, humid days. (Tr., p. 70) In July of 1981, claimant was examined by Donald C. Zavala, M.D., director of Pulmonary Diagnostic Labs of the University of Iowa Hospitals and Clinics. (Joint Ex. 3) Dr. Zavala reported:

> IMPRESSION: Abnormal progressive exercise (cycle) test with a ventilatory response characteristic of significant restrictive lung disease! This diagnosis is further supported by the spirometric results and low lung volumes. The subject is at least 50% disabled. Unfortunately the disability is permanent. He is capable of walking only 2 miles per hour but possibly could do light work on an assembly line. He must scrupulously avoid smoke, fumes or contaminated air.
>
> Most likely Mr. Dickenson's lung disease is a direct result of exposure to ammonia fumes on January 21, 1981. A lung biopsy is not necessary to establish his diagnosis of pulmonary fibrosis secondary to chemical fumes. (Joint Ex. 4)

Dr. Zavala retested claimant the following month and commented:

> This patient has a normal cardiovascular response to exercise with normal pulse, BP and O_2/pulse values. He did have an abnormally high frequency of breathing with a low Vt/VO_2 relation. In addition, he had increased VO_2/power output and increased Ve/VO_2. These data are consistent with a mild restrictive process, but the changes in Vt and breathing frequency are subject to patient control. Also, these data do not suggest a significant functional impairment nor are they diagnostic of a significant restrictive defect. In addition, he has markedly improved since his previous test.
>
> FINAL IMPRESSION: Markedly improved response to exercise. This patient may now participate in normal activity. There are no job-related restrictions except for avoidance of contaminated air. (Joint Ex. 4)

On March 30, 1982 Dr. Zavala again evaluated claimant and reported an impairment of 50 percent. Dr. Zavala noted:

> The patient returned to the University of Iowa Hospitals today for follow-up spirometry, arterial blood gases and exercise physiology testing. He has an impairment of approximately 50% due to moderately severe pulmonary fibrosis. His condition is relatively stable. Please make an appointment for him to return to the Pulmonary Lab within the next few weeks for a repeat spirometry, arterial blood gases, diffusion capacity (DLco), lung volumes (body box) and maximum voluntary ventilation (MVV). As we discuss on the telephone, Mr. Dickenson presents a rather complicated problem where things need sorting out. (Joint Ex. 1)

After claimant was "bumped" from his engine testing job, he worked for a period on the assembly line but couldn't continue because of exposure to glue fumes. (Tr., pp. 71-72) Claimant stated the climbing and movement required by the work produced sweating and dizziness. (Tr., p. 73) He was taken off assembly and operated a fork truck. Claimant stated he had no problems except when he entered certain work areas where the environment affected his breathing. (Tr., p. 74) In September of 1982, due to lack of seniority, claimant was laid off in a general cutback and has not been recalled. (Tr., pp. 77, 90)

In September 1982 claimant consulted Jose C. Aguiar, M.D., an ear, nose, throat specialist, who noted claimant's "lung disability" and reported that nasal and chest congestion aggravated the breathing condition. (Joint Ex. 7) Also in September of 1982, claimant's condition was being followed by Richard V. Corton, M.D., defendant's plant physician, who reported on September 16, 1982:

> I gave him a prescription for Serax 15 mg (#50) no refill 1 qid, returned him to work and told him I wanted to see him in a week. I talked with his supervisor who indicated that Milton has been doing an excellent job, has an excellent attitude, has been doing trucking which he likes, because he enjoys having the air movement. The supervisor of Dept. 497 is aware that there are some pulmonary pollutants probably in the weld shop because one can see haze there, but Milton just apparently drives through that area. The supervisor was not aware that Milton was having any problems medically; that he had been on vacation last week and gone to Chicago and complained about the air pollution there, just as he had complained about the air pollution in Cleveland. (Joint Ex. 9)

In September of 1982 Dr. Corton indicated that there was good evidence that claimant had a permanent problem but recommended waiting for an evaluation as "some improvement can continue for as long as 2-3 years." (Joint Ex. 9) Dr. Corton notes that as of September 22, 1982 claimant was also seeing physicians at the Family Practice Center. (Joint Ex. 9)

In April and May of 1981 and November of 1982, claimant saw Michael L. Deters, M.D., an internist, who reported that claimant's breathing was incapacitated by exercise or activity. On January 19, 1983 Dr. Deters stated:

> It would appear that his history of problems is closely associated with his ammonia exposure and probably is secondary to this. The pulmonary function tests demonstrate typical restrictive lung disease and because there is nothing else in his history to explain this, despite his normal chest x-ray, it certainly would appear that the onset is related and probably the cause of his respiratory dysfunction is his exposure to the ammonia. (Joint Ex. 9)

Dr. Deters noted that claimant did not keep followup appointments, and the doctor could not estimate the effectiveness of treatment. (Joint Ex. 9)

In January of 1983 claimant underwent a fourth evaluation of his lung status at the University of Iowa Hospitals. A final diagnosis of moderately severe pulmonary fibrosis was established. Dr. Zavala recommended sedentary work and reported that claimant was not capable of performing sustained work above 3 to 3.5 METS. (Joint Ex. 2) Dr. Zavala testified by deposition that as claimant's lung disease progressed, his vital capacity scores, a measurement of restrictive lung disease, changed from 44 percent of normal in July 1981 to 67 percent in August of 1981, 46 to 56 percent in March of 1982 and 41 percent in January of 1983. (Zavala Deposition 1, pp. 19-21) Dr. Zavala indicated that such scores may vary between 5-10 percent depending on various factors including the cooperation of the patient, but that claimant's general trend was down from normal. (Zavala Dep. 1, pp. 20-21) Dr. Zavala stated that lung capacity scores indicated stabilization at 61 percent (Zavala Dep. 1, p. 22) In reporting diffusing capacity, the ability of oxygen to get to the blood, Dr. Zavala stated claimant's score was 75 percent of normal. Under exercise, claimant's frequency of breathing increased for a relatively small workload. (Zavala Dep. 1, pp. 24-26) Dr. Zavala explained that a METS measurement is the amount of oxygen the body consumes. At rest, the body consumes one MET. Walking three miles per hour is equal to 3 to 3.5 METS. Claimant is not capable of performing sustained work above 3 to 3.5 METS. Dr. Zavala testified that when claimant exercised at 4.2 METS of work, he exceeded his anaerobic threshold and had to be helped off the exercise bike. (Zavala Dep. 1, pp. 29-32) Dr. Zavala stated that claimant's lung disease was secondary to exposure to ammonia fumes. He estimated claimant's permanent disability to be 60 percent of the total body. (Zavala Dep. 1, p. 32) The doctor recommended restrictions against walking on level ground in excess of 3 m.p.h., mowing the lawn, working in the garden, and carrying significant weight. (Zavala Dep. 1, pp. 32-33) Dr. Zavala stated he did not know what claimant's work duties entailed. (Zavala Dep. 1, p. 46) Dr. Zavala stated his determination of 60 percent disability was a subjective estimate on his part and had to do with the claimant's disability in the industrial environment, as opposed to functional impairment. (Zavala Dep. 1, p. 48) Dr. Zavala stated that if an individual with claimant's physical condition had a job within his limitations and one he could do, his disability would be zero. (Zavala Dep. 1, p. 48) Dr. Zavala does not use the AMA Guidelines for physical impairment but referred to guidelines of the American Lung Association and the American Thoracic Society. (Zavala Dep. 1, pp. 48-50) He explained that on a pulmonary function ratings, an 80 percent of normal rating would fall within a range of normal. (Zavala Dep. 1, pp. 58-59)

Donald P. Schlueter, M.D., professor of medicine and chief of Medical Chest Service of Milwaukee County Medical Complex examined claimant on June 2, 1983. (Schlueter Dep. 1, pp. 3-7) Dr. Schlueter testified that chest x-rays of claimant on June 2, 1983 were normal. Spirometric measurements of total lung capacity and volume, tests of lung diffusing capacity, and exercise studies were also performed. (Schlueter Dep. 1, pp. 16-20) Dr. Schlueter reported the best result from claimant's spirometry indicated slight restrictive impairment. Claimant's flow-volume curve showed no evidence of small airways obstruction, and a methacholine test measuring bronchoconstriction response to the cholinergic was negative, indicating normal airway reactivity. (Schlueter Dep. 1, pp. 22-24) On treadmill exercise claimant was able to do 7.6 METS, which Dr. Schlueter explained was equivalent to walking 5 m.p.h. on level ground and lifting weights up to 20 pounds. Dr. Schlueter stated that claimant could not sustain a 7.6 METS level of activity for eight hours but could perform it for five minute periods. (Schlueter Dep. 1, pp. 29-33) Claimant would be able to do work in factory assembly, cleanup, truck driving and test equipment monitoring. (Schlueter Dep. 1, p. 31) Dr. Schlueter commented that inconsistencies in some testing results may have been due to less than maximum effort on the part of claimant. The doctor concluded from the tests that claimant had mild restrictive ventilatory impairment and decreased exercise tolerance following ammonia inhalation. (Schlueter Dep. 1, pp. 40-41) Dr. Schlueter found no evidence of obstructive disease. (Schlueter Dep. 1, p. 56) Dr. Schlueter stated that impairment ratings on pulmonary injuries offered by the AMA and the Canadian Medical Association were classified according to zero, minimal, slight, moderate and severe, and percentage had to be assigned from the physician's experience. Dr. Schlueter used guidelines of the AMA and the American

Thoracic Society in classifying claimant's impairment as mild. He determined an impairment of 25 percent. (Schlueter Dep. 1, pp. 57-58) Dr. Schlueter testified that it was an unusual response to ammonia exposure for a patient to get better and then get worse. (Schlueter Dep. 1, p. 111)

In a second deposition, Dr. Zavala testified that he had reviewed the testing results of Dr. Schlueter and believed Dr. Schlueter's method of evaluating blood gas would mask the disability and invalidate the results. Dr. Zavala stated he believed blood had not been drawn by Dr. Schlueter during the period of exercise. (Zavala Dep. 2, of August 24, 1983) Dr. Schlueter testified in a second deposition that his method in drawing blood samples during exercise was by means of a permanently fixed catheter and that samples were drawn during and after the exercise period. (Schlueter Dep. of October 14, 1983, pp. 15-16)

Barbara Miller, supervisor of the pulmonary physiology lab at Milwaukee County Medical Complex testified by telephone that she performed the tests on claimant during exercise and that blood was drawn during the exercise period by means of a catheter in the artery. (Miller Dep., pp. 4-8) Ms. Miller stated that claimant was further monitored during exercise by means of electrodes for an EKG, a blood pressure cuff, and a mouthpiece for breathing. Ms. Miller testified she remembered claimant's test because she had worked hard on the spirometry tests to get some duplication. She believed claimant was "goofing off." (Miller Dep., pp. 7-12) Ms. Miller stated that claimant was breathing at 64 respirations per minute during the last two minutes of the exercise test, which was extremely fast. At the end of the exercise he returned to resting level within two minutes. (Miller Dep., pp. 13-16)

Mark D'Amico, a respiratory therapist with Milwaukee County Medical Complex, testified by telephone that one of his duties is to maintain two reservoir breathing bags during exercise tests. (D'Amico Dep., pp. 3-5) Mr. D'Amico stated he remembered claimant and that blood was drawn during the course of the treadmill exercising. (D'Amico Dep., pp. 4-5)

Claimant testified that before the work injury he had no physical limitations. He followed a morning exercise program of exercise, weight lifting and running. (Tr., p. 36-37) He stated that he can no longer run and becomes short of breath and dizzy when he tries. Claimant testified he gets chest pains when he walks on level ground for one-half mile. He is able to go up two flights of steps to his apartment and must catch his breath before proceeding up the third flight. (Tr., pp. 77-79) He has problems playing with his daughter and begins gagging when he is around fumes of any kind. (Tr., p. 80) A psychological evaluation prepared by Melville Finkelstein, Ph.D., on March 24, 1982 indicates that claimant is concerned about the state of his health and is subject to depression. (Joint Ex. 8) Tax records indicate claimant earned $19,289.04 in 1980; $21,597.43 in 1981; and $18,122 in 1982 while employed by defendant. (Joint Ex. 10)

George A. Draine testified he was working at PEC on January 28, 1981 and was on his break time talking with claimant and others when the leak occurred. The witness stated the gas was noticed around 5:35 p.m. (Tr., pp. 147-149) Mr. Draine recounted rushing to the outside after the group was told of the ammonia leak. He recalled seeing claimant one-half hour later by the air tanks helping Mr. Wilson. Mr. Draine stated he left again because the ammonia smell was too bad to stay. (Tr., pp. 149-457)

Toni L. Dickenson, wife of claimant, testified that before the injury claimant had been athletic and had a morning routine of exercise. (Tr., pp. 160-162) She stated that she has never seen claimant smoke. (Tr., p. 162) Mrs. Dickenson testified that now claimant has to stop and rest when he vacuums the floors and washes his car. He also has trouble carrying his daughter and doesn't play with her as much. (Tr., pp. 166-168) Mrs. Dickenson stated that she had to keep the air conditioning going and that claimant had shortness of breath in warm, humid rooms. (Tr., pp. 166-170) She stated that claimant uses prescribed nasal sprays to help his breathing. (Tr., p. 171)

Dale Wilson testified he worked as a maintenance man in the cold room at the time of the ammonia leak. (Tr., p. 173) Mr. Wilson stated he was involved in shutting off the valve and in the cleanup of the ammonia at the site of the leak, but was not assisted by claimant. Mr. Wilson testified he dumped the ammonia outside with the help of another employee. Both men wore air packs while performing these duties. (Tr., pp. 179-189) Mr. Wilson did not recall seeing claimant in the area of the leak. (Tr., p. 191)

Al C. Shindelar, shift supervisor of the test plant, testified that he became aware of the leak around 5:45 p.m. (Tr., p. 215) He helped Dale Wilson get the air pack on to go to the leak site to shut off the valve, and then went for help. He did not see claimant in the area at that time. He did recall seeing claimant in the hall several minutes later, opening doors. Mr. Shindelar stated he did not put on breathing protection equipment. The high concentration of ammonia persisted for 10-15 minutes and then dissipated down the hall after the valve was shut off. (Tr., pp. 217-221) Mr. Shindelar testified he had asked claimant to turn on the overhead fans in the bay. (Tr., p. 235)

A memorandum of agreement filed on February 23, 1981 indicates claimant has been paid nine days of disability benefits based on gross weekly earnings of $437.00.

Claimant's petition for review-reopening was filed on August 19, 1982. Proof of service upon the defendant was filed on August 26, 1982.

APPLICABLE LAW

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

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).

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.

Interest from the date of maturity is added to weekly compensation payments. The date of maturity can not be determined until claimant applies for additional compensation payments or a determination is made thereof. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957).

ANALYSIS

Defendant's first issue on appeal questions whether a causal connection has been shown between claimant's industrial injury and his disability. Defendant argues that claimant was not exposed to ammonia long enough to have warranted his present impairment.

The record contains conflicting testimony as to the time the ammonia leak occurred and the subsequent actions of various employees as efforts were made to stop the leak and clear the air in the affected area. The testimony of Mr. Draine and Mr. Shindelar does place claimant in an area of ammonia concentration after other employees had left the building. The report of the shift supervisor establishes that of the ten workers exposed to fumes sufficient to require medical examination at the plant, only claimant and another employee were admitted to the hospital. At that time, the treating doctor noted that claimant had been exposed to ammonia fumes and had nasal and throat irritation, some cough and some shortness of breath. Claimant remained in the hospital for three days and after another four days, returned to his regular duties. In July 1981, claimant was evaluated by Dr. Zavala who reported findings of restrictive lung disease, moderate and stable, and throughout 1982 and 1983, claimant continued to consult various doctors for his pulmonary condition. Drs. Zavala, Deters and Schleuter have all reported claimant's lung complaints as being causally related to his inhalation of ammonia fumes.

Prior to the industrial injury claimant followed a daily program of exercise and running. There is no evidence that he suffered from pulmonary complaints or that his work activities were in any way restricted by breathing difficulties. Following the January 20, 1981 injury, claimant's personal activities were curtailed and, at work, he had to avoid air containing dust and fumes. When he was bumped from his data recording job, he was unable to perform the strenuous tasks of the assembly line and required a transfer to forklift operation. In contesting the causal relationship between injury and disability, defendant has neither argued other causal factors nor presented evidence which

suggests other producing causes. The record strongly supports a finding that the January 20, 1981 incident is causally related to claimant's disability.

Defendant's second issue on appeal disputes the degree of functional impairment and industrial disability found by the deputy. Dr. Zavala has reported claimant's disability as 60 percent of the total body and Dr. Schlueter determined an impairment of 25 percent. In reviewing the testimony of the doctors concerning their determinations, it is found that Dr. Zavala arrived at his rating by considering the disability within the industrial environment, as opposed to a determination of physical or functional impairment. Dr. Zavala indicated that by this method of determination, an individual with claimant's physical condition doing a job within his physical limitations would have a disability of zero. Dr. Zavala does not use the AMA guidelines for evaluating permanent impairment, and his yardstick for measurement appears to be highly subjective. His determination is problematical in two respects: it does not indicate a rating of functional or physical impairment, and it includes unspecified industrial considerations. As the AMA Guide to Evaluation of Impairment points out, it is important for the physician to distinguish between those recommendations and conclusions of a medical nature for which the physician is responsible, and those of a nonclinical nature which lead beyond the domain of medical expertise. The finding of functional impairment is within the realm of the physician; a finding of industrial disability, based on physical, social and economic factors, is reserved to this agency.

There has been much discussion by the parties of the possibility of error in the conclusions of Drs. Zavala and Schlueter. Without addressing these specific arguments, it is found that the conclusions of Dr. Schlueter appear to be based on valid testing procedures and his impairment rating of 25 percent will be used as the measure of functional impairment.

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 30 years old and a high school graduate. He has had special training in life underwriting and has taken business courses at a community college. His past work experience includes sales and machine testing. As a result of his inhalation of ammonia fumes, claimant has restricted pulmonary function and cannot sustain vigorous activity. He encounters breathing difficulties when exposed to dust, chemical fumes, and climate extremes. Following his industrial injury, claimant worked for a year and a half as a data recorder and forklift driver before being laid off, not as a consequence of his disability, but due to a general lay-off. He was able to perform sedentary tasks in an air conditioned environment and could tolerate minimal exposure to adverse conditions while driving the forklift. Dr. Zavala has reported that claimant is not capable of sustaining activity in excess of 3 to 3.5 METS, which is equivalent to walking at three miles an hour. Dr. Schlueter found that claimant could perform activity up to 7.6 METS for short periods of time, which is equivalent to walking five miles per hour, and reported that assembly work, cleanup and truck driving would be within claimant's physical capabilities.

Although claimant's work injury has produced limitations on his ability to engage in strenuous work activities, claimant's previous jobs have not generally involved vigorous physical labor, and he has a number of skills which may be applied to work situations, such as sales and driving, which are within his physical capabilities. The impact of claimant's impairment seems to strike hardest at claimant's personal fitness activities and at the setting in which he can seek employment. Clearly, he is precluded from outdoor work or indoor environments which expose him to air contaminants. The range of job opportunities for which he may hope to successfully compete has thus been narrowed, and his earning potential has been accordingly diminished. In view of the foregoing considerations, it is found that claimant has incurred an industrial disability of 40 percent.

Defendant's third issue on appeal concerns the date from which interest should be computed and was the subject of a nunc pro tunc order filed by the deputy on January 23, 1984. In his proposed decision, the deputy determined that payment of permanent partial disability benefits together with the statutory interest thereon, would commence on June 6, 1983, the date of Dr. Schlueter's report to defendant. Subsequent to the filing by both parties for reconsideration of the decision, the deputy amended the award to commence payment and interest on July 10, 1981, the date of first examination and report by Dr. Zavala. Defendant has appealed the January 23, 1984 order and, since it addresses the third issue raised on appeal, the order will be reviewed in conjunction with this decision.

Defendant argues that interest should be computed from the date of the review-reopening decision, December 19, 1983. Defendant points out that because claimant's entitlement to additional benefits was in dispute and since the extent of disability and payments due were unknown to defendant until the claim was adjudicated, interest should not commence until it was determined that claimant has sustained his burden of proving his claim.

There are two major Iowa cases dealing with interest: Bousfield, 249 Iowa 64, 86 N.W.2d 109, and Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (1979). In an arbitration proceeding, Farmers Elevator Co., Kingsley, applies; in review-reopening, as here, Bousfield is applicable . Bousfield stands for the proposition that interest should commence on that date when the injured worker applied for additional benefits or a determination was made thereof.

Claimant's entitlement to permanent partial disability benefits is based upon a finding of industrial disability. The deputy's amended award found that payments should commence on the date of Dr. Zavala's first report of permanent impairment. Had claimant's disability been such that a medical assignment of impairment could constitute the sole basis of the award, as with a scheduled member disability, determination of benefits due prior to adjudication might have been possible. But here, industrial consideration involved not only functional impairment but loss of employment opportunity as well. At the time of claimant's application for benefits in August 1982, he was still fully employed by defendant. Claimant was not laid off until September of 1982. Therefore, a thorough analysis of the industrial factors was not possible until all the evidence had been submitted. Permanent partial disability payments and the accompanying interest thereon will commence as of the date of the proposed decision, December 19, 1983

FINDINGS OF FACT

1. Claimant sustained a work injury by ammonia inhalation on January 20, 1981.

2. Claimant was admitted to the hospital for three days following the injury.

3. Claimant returned to his regular duties after seven days.

4. Claimant was paid nine days of disability compensation.

5. Claimant continued to experience breathing difficulties and consulted numerous doctors over the next two years.

6. Claimant had no previous history of pulmonary problems or work restrictions prior to the industrial injury.

7. Claimant's pulmonary impairment is causally related to the work injury of January 20, 1981.

8. Claimant has a functional impairment of 25 percent.

9. Claimant is married and has one child.

10. Claimant is 30 years old and has a high school education.

11. Claimant has had additional training in business and insurance sales.

12. Claimant's previous employment has included sales, test data recording, and forklift driving.

13. Claimant worked at his regular duties and as a forklift driver for one and a half years following his injury.

14. Claimant was laid off in a general plant cutback in September of 1982.

15. Claimant is able to perform work duties of 3 to 3.5 METS, equivalent to walking three miles an hour, with short periods of activity up to 7.6 METS.

16. Claimant must avoid extreme climate conditions and exposure to chemical fumes and dust.

17. Claimant is able to perform duties in driving, cleanup and equipment monitoring.

18. Claimant can not do work requiring strenuous labor.

19. Claimant's ability to compete for work and his earnings potential have been diminished as a result of his disability.

20. Claimant's gross weekly earnings were $437.00 with three exemptions.

21. Claimant's rate of compensation is $258.29 per week.

CONCLUSIONS OF LAW

WHEREFORE, it is found:

That claimant has sustained his burden of showing that his permanent partial disability is causally related to his work injury of January 20, 1981.

That as a result of claimant's industrial injury, he has an industrial disability of forty percent (40%).

That permanent partial disability payments and interest thereon will commence on December 19, 1983.

THEREFORE, the decision of the deputy is affirmed in part and modified in part. The nunc pro tunc order of January 23, 1984 is hereby vacated. The expert witness fee in the amount of three hundred dollars ($300) for two deposition of Donald Zavala, M.D., which was awarded in the proposed decision has not been contested on appeal. Said expert witness fee award is hereby incorporated into this decision.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant permanent partial disability benefits at the rate of two hundred fifty-eight and 29/100 dollars ($258.29) per week for an additional one hundred ninety-eight and five sevenths (198 5/7) weeks.

That defendant pay the accrued amount in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30 commencing on August 26, 1982.

That defendant pay costs pursuant to Industrial Commissioner Rule 500-4.33, including an expert witness fee in the amount of three hundred dollars ($300) for two depositions of Donald Zavala, M.D.

That defendant file a final report within ninety (90) days.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MILTON DICKENSON,	:	
	:	File No. 661038
Claimant,	:	
	:	N U N C
vs.	:	
	:	P R O
JOHN DEERE PRODUCT ENGINEERING,	:	T U N C
	:	
Employer,	:	O R D E R
Self-Insured,	:	
Defendant.	:	

FILED
NOV 21 1984
IOWA INDUSTRIAL COMMISSION

The appeal decision filed in this matter on November 15, 1984 contains an omission in the Findings of Fact and a scrivener's error in the first and third paragraphs of the order.

The Findings of Fact is hereby amended to include Finding No. 22, which states:

22. Permanent partial disability payments and the interest thereon will commence as of the date of the proposed decision in review-reopening.

The Order should state and is henceforth amended to read:

THEREFORE, it is ordered:

That defendant pay unto claimant permanent partial disability benefits at the rate of two hundred fifty-eight and 29/100 dollars ($258.29) per week for an additional two hundred (200) weeks.

That defendant pay the accrued amount in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30 commencing on December 19, 1983.

That defendant pay costs pursuant to Industrial Commissioner Rule 500-4.33, including an expert witness fee in the amount of three hundred dollars ($300) for two depositions of Donald Zavala, M.D.

That defendant file a final report within ninety (90) days.

Signed and filed this 21 day of November, 1984.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLIFFORD DODD,	:	
	:	
vs.	:	File No. 724378
	:	
OSCAR MAYER FOODS CORPORATION,	:	A R B I T R A T I O N
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This matter came on for hearing at the Scott County Courthouse in Davenport, Iowa, on December 23, 1983 at which time the case was fully submitted.

A review of the commissioner's file reveals an employers first report of injury was filed on March 14, 1983. The record consists of the testimony of the claimant; the depositions of John H. Sunderbruch, M.D., Barry L. Fischer, M.D., and Irwin T. Barnett, M.D.; claimant's exhibits 1 through 20; and defendant's exhibits A and B.

ISSUES

The issues for resolution are:

1. Whether claimant sustained an injury arising out of and in the course of his employment.

2. Whether there is a causal connection between the injury and the disability.

3. The nature and extent of disability.

4. The payment of certain medical expenses.

5. Whether claimant gave statutory notice pursuant to section 85.23, Code of Iowa.

6. Whether claimant's action is barred by the statute of limitations.

STATEMENT OF THE EVIDENCE

Claimant, age 46, testified that on January 1, 1982 he was married and was the father of two minor children. He had been employed by defendant since September 1959. He has an eighth grade education. Claimant testified that as a part of his employment at Oscar Mayer he was required to take a preemployment physical. Claimant testified that he was closer operator and that the movements required in performing this job required a lot of movement of his arms to the left. Claimant testified that there were a lot of flaws in the line and that he was required to perform the movements 1800 times a day. Claimant testified that when the line broke down he had to do a great deal of lifting.

Claimant testified that in July 1981 he had a great deal of difficulty with his right arm in that he could not lift it. He had to use his left arm to move his right arm.

Claimant saw John H. Sunderbruch, M.D., the company doctor who gave claimant an injection and sent claimant to Mercy Hospital. Claimant returned to work in November 1981 and was on light duty. He had had some physical therapy treatment at the hospital. Dr. Sunderbruch had submitted an illness and accident disability report dated October 12, 1981. Dr. Sunderbruch had referred claimant to Byron R. Rovine, M.D.

Dr. Rovine thought that claimant had a severe right subdeltoid bursitis with contiguous areas of muscle spasm.

Claimant's light duty job was confined to cleaning a large catwalk which had been covered with brine. Claimant would clean the catwalk by taking an emery cloth in order to clean the rails and posts. Claimant testified that he worked five hours a day at this endeavor and that a lot of shoulder and arm movement was required. Claimant was required to get a five gallon bucket and carry it up two flights of stairs in order to wipe cabinets. Claimant had to change the water in the bucket three times a day. Claimant testified that he had to dump boxes and lift about thirty pounds in this endeavor. Claimant testified he worked until January 8, 1982 and stopped because he was laid off. He was experiencing right shoulder pain. He called Dr. Sunderbruch and saw him on January 11, 1982 and was complaining of right shoulder pain.

Claimant made an appointment with C. R. Fesenmeyer, M.D. Dr. Fesenmeyer's examination showed that claimant was having discomfort with motion of the right shoulder, but that there was no evidence of atrophy or other deformity of the shoulder muscles. When Dr. Fesenmeyer saw claimant again on February 4, 1982 claimant was complaining of pain in the right hip and thigh. Claimant continued to treat with Dr. Fesenmeyer and Dr. Fesenmeyer referred claimant to the University of Iowa for consultation.

Claimant was seen at the university in April 1982 and the university recommended that claimant was scheduled for a discectomy at the L5-S1 level on the right. Claimant testified that the pain he was having was similar to the back problem he had in 1969 and 1970 when he was treated by Leo Miltner, M.D., an orthopedic surgeon. Claimant testified that he did not have the operation as recommended by the physicians at Iowa City since he was afraid he would never walk again.

On November 24, 1982 claimant saw P. J. Crowley, M.D., for the purposes of receiving an evaluation for disability benefits. Dr. Crowley diagnosed claimant's condition as a ruptured intervertebral disc of L3-L4 and probably C4 and C5. Dr. Crowley indicated that claimant had a lumbar spinal surgery and probably cervical spinal surgery and thought that claimant might not be able to tolerate manual labor again.

On January 26, 1983 claimant was examined by John E. Sinning, Jr., M.D., who testified that claimant had a shoulder problem which was manifested by some limited motion in his shoulder in splinting and protecting of that motion. There was an absent ankle jerk, but no significant sciatica or atrophy. Range of motion was fairly good. Low back impairment was rated at five to ten percent. He did not feel that claimant was totally disabled for purposes of the Oscar Mayer disability plan. Dr. Sinning noted that claimant had been in his office in June 1978 at which time he took part in a YMCA rehabilitation program. X-rays of the lumbar spine were normal. Disc heights were thought to be equal and at the end of his letter Dr. Sinning indicated that the herniated disc had resolved.

Claimant was seen by Barry Lake Fischer, M.D., on April 7, 1983. Dr. Fischer practices medicine in Chicago. Physical examination revealed decreased range of motion of the right arm at the shoulder. Measurements of the right upper arm and left upper arm are equal. Examination of the lower back revealed a right lumbosacral and paravetrebral tenderness and spasm to palpation and pressure. The spasm radiated to the right side down the posterior aspect of the right leg. There was right side sciatic radiation with spasm. Dr. Fischer indicated that the claimant has sustained a repetitive trauma to the right shoulder and lower back as a result of work. He also testified that claimant had residual myositis of the musculature of the right shoulder. Decreased range of motion at the right arm at the shoulder was also observed. He thought claimant had right lumbosacral disease and narrowing of the lumbosacral disc space. At that time Dr. Fischer estimated permanent partial disability at 25 percent of the right arm and 35 percent of the right leg.

Claimant was also examined by Irwin T. Barnett, M.D., on April 7, 1983. Dr. Barnett practices in Chicago. He indicated that claimant had a flattening of the parabolic curve in the lumbar spine region which is indicative of chronic low back disease. He thought claimant had residuals of a low back injury with bilateral sciatic root irritation secondary to a disc pathology. He also thought that claimant had narrowing of the fifth lumbar disc space and residuals of a soft tissue and ligamentous injury of the right shoulder. He thought claimant had a 65 percent loss of use of the right lower extremity, 35 percent loss of the left lower extremity and 15 percent loss of the right upper extremity "on an industrial basis."

Leo J. Miltner, M.D., examined claimant on May 5, 1983. He had examined and treated claimant in 1969. He wrote a detailed report (exhibit 15). He indicated that claimant had a 26 percent impairment of the body as a whole and that 16 percent of the disability would resolve since it was temporary and related to the shoulders. Therefore, he indicated that claimant's impairment was ten percent of the body as a whole. Dr. Miltner indicated that the claimant appeared to have "considerable emotional overlay." Dr. Miltner wrote that this was indicated by muscle tension in the shoulders and lower spine which relaxed considerably upon distraction.

Claimant indicated he is unable to hunt since he is unable to walk and bear weight in his right shoulder. He indicated that his wife assists him in putting on his shoes and socks and he cannot raise his arm over his shoulder at all. He stated that he is unable to drive very far and must stop to rest periodically.

On cross-examination, claimant indicated that his shoulder problem showed up in 1981, but that claimant noted that he had previous shoulder problems in 1980. These were treated by chiropractic treatments and manipulations. Claimant testified that in 1980 he missed time because of pain in his right shoulder. Claimant testified that in June and July 1981 he missed time for his sore back. Claimant indicated that he had back problems in 1969 and 1970 and that he sought chiropractic treatment in the early 1960's for back problems. He was also off in 1971, 1972, 1975, 1976 and 1978. The 1978 problem appears to be related to the neck and shoulder. Claimant testified that he experienced numbness in 1978 when he had a sensation much like heat on the outside of his right foot. He took treatments in 1978. Claimant testified that when he returned to work at the end of 1978 he was not pain-free and was able to do the job, however. In 1979 claimant hurt his back shoveling and also later in that year had right shoulder pain. Claimant placed particular emphasis on his pain which developed in October 1979. Claimant described himself as a person who did not like to give in to pain and tries to put up with it as long as possible. Claimant testified that the work of cleaning of the brine was in itself an aggravation of his condition.

Dr. Sunderbruch testified that claimant's problems were essentially caused by employment. Dr. Sunderbruch was actively involved in much of the treatment of this case and appeared to disagree with counsel with regard to certain matters associated to the substance of the medication given the claimant, and also objected strenuously to the form of the questions purported by counsel for the claimant.

Dr. Barnett, an orthopedic surgeon, examined claimant on April 7, 1983 and concluded that claimant had a 55 percent loss to the right leg, and 35 percent loss to the left leg, and a 15 percent loss of the right arm. He indicated that loss was as a result of the injury which occurred in July 1981 (deposition, p. 17) Dr. Barnett testified that x-rays indicated that claimant had a degenerative spondylolisthesis of the low back. he also observed a flattening of the lardosis of the lower spine.

Dr. Fischer testified that claimant's condition was causally related to the injury in question. He testified that claimant's upper arm and low back problems were caused by his employment and the permanent partial disability was 25 percent of the right arm and 35 percent of the right leg.

APPLICABLE LAW

1. Sections 85.3, 85.20 and 85.71, Code of Iowa, confer jurisdiction on this agency and workers' compensation cases.

2. Section 85.26(1) states:

> 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.

3. 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 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.

4. Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 8, 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).

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

6. 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.

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, 257 (1963).

8. Section 85.34(1), Code of Iowa, provides for the payment of statutory healing period in cases of permanent partial disability.

9. Section 85.27, Code of Iowa, provides for the payment of medical expenses to injured employees.

ANALYSIS

Based on the foregoing principles, it is found that claimant sustained an injury arising out of and in the course of his employment which culminated in his missing work in January 1982. Statutory notice was in the meaning of the Code and filing of the original notice and petition was had. Therefore, claimant has prevailed on the statute of limitations and notice issues.

Claimant has also sustained his burden of proof with regard to the issue of arising out of and in the course of his employment. It appears that all physicians indicate there was a direct causal connection between the employment and claimant's problems and this is adopted by me as part of this decision. The causal connection was made and claimant must therefore prevail.

The basic question to be resolved is the amount of permanent partial disability had by the claimant. The functional impairment is but a small matter to be considered in the determination of that industrial disability. The physicians testified to varying percentages of disability and themselves indicated that the percentages given might vary from day to day. This is perhaps but one reason that functional impairment is not the sole guide of the disability, but merely a factor to be included in the determination of industrial disability.

Claimant is 46 years old and has been employed by Oscar Mayer for the major portion of his adult working life. He has an eighth grade education and no apparent specialized training in any field other than manual labor. Considering the elements of industrial disability, therefore, it is found that claimant sustained a 35 percent disability to the body as a whole for industrial purposes as a result of his injury of January 8, 1982.

The matter of healing period must now be addressed. Although claimant prayed for healing period to conclude in November 1933, the record indicates that claimant's active treatment ended at an earlier time. The examinations by Drs. Barnett and Fischer were just that--examinations. A reading of the record indicates that the first firm evaluation of claimant's condition occurred on January 26, 1983. This examination was made by Dr. Sinning. The record reveals that claimant missed work from January 9, 1982 and reached maximum medical recuperation on January 26, 1983, a period of 54 5/7 weeks. Healing period will be awarded for that period of time.

FINDINGS OF FACT

1. Claimant was employed by Oscar Mayer in July 1981.

2. Claimant hurt his right shoulder while working in July 1981.

3. Thereafter, claimant started having low back problems in addition to the shoulder problems.

4. These back and shoulder problems resulted in claimant seeking medical attention and $24.40 is due St. Luke's and $58.00 due Mercy Hospital for services rendered. These charges are fair and reasonable.

5. Claimant sustained permanent partial disability to the body as a whole as a result of the July 1981 injury.

6. Claimant is disabled to the extent of thirty-five percent (35%) of the body as a whole because of the July 1981 injury.

7. Claimant was disabled from working because of the injury commencing January 9, 1982.

8. Claimant has not returned to work.

9. Claimant reached maximum medical recuperation on January 26, 1983.

10. The parties stipulated that the rate of compensation is two hundred forty-one and 15/100 dollars ($241.15).

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by defendant in July 1981.

3. Claimant sustained an injury arising out of and in the course of his employment in July 1981, which commenced in his missing time starting in January 1982.

4. Claimant will be awarded fifty-four and five-sevenths (54 5/7) weeks of healing period compensation at the age of two hundred forty-one and 15/100 dollars ($241.15) per week.

5. Defendant will be ordered to pay medical expenses totaling eighty-two and 40/100 dollars ($84.40) unto claimant.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant fifty-four and five-sevenths (54 5/7) weeks of healing period compensation at the rate of two hundred forty-one and 15/100 dollars ($241.15) per week.

IT IS FURTHER ORDERED that defendant pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of two hundred forty-one and 15/100 dollars ($241.15) per week.

IT IS FURTHER ORDERED that defendant reimburse claimant eighty-two and 40/100 dollars ($82.40) for medical expenses.

Costs of the proceeding are taxed against defendant pursuant to Industrial Commissioner Rule 500-4.33.

Interest will accrue on this award pursuant to section 85.30, Code of Iowa, from the date payments became due.

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

Signed and filed this 5th day of November, 1984.

Joseph M. Bauer
JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD DODSON, Claimant, vs. IOWA STATE PENITENTIARY, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 711201 REVIEW - REOPENING DECISION

FILED
OCT 12 1984
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Ronald Dodson, claimant, against Iowa State Penitentiary, employer, and the State of Iowa, 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 July 8, 1982. It came on for hearing on September 20, 1984 at the Henry County courthouse in Mount Pleasant, Iowa. It was considered fully submitted at that time.

The record in this matter consists of claimant's exhibit 1, a series of medical records; claimant's exhibit 2, a series of medical records; defendants' exhibit A, the deposition of Arnold H. Menezes, M.D.; defendants' exhibit B, a treatment refusal form dated July 11, 1982; defendants' exhibit C, a letter from Kevin R. Kopesky, M.D., and Carl J. Graf, M.D., dated September 1, 1982; and defendants' exhibit D, a series of notes and reports from the University of Iowa.

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 temporary total, healing period or permanent partial disability benefits.

STATEMENT OF THE CASE

Claimant was not present at the hearing. His attorney appeared for him.

Medical records show claimant was seen the emergency room on July 8, 1982 and was sent to Iowa City.

Arnold H. Menezes, M.D., associate professor of neurosurgery, reported claimant was admitted to the neurosurgery service on July 8, 1982 at which time he gave a history of a fall of 15 to 20 feet from a roof while he was painting and of landing on his back on a steel pipe. He claimed to have had immediate back pain and decreased sensation in his legs. Claimant gave a history of asthma and renal stones and of a previous hospitalization for paralysis in the lower extremities.

On examination there was a decrease in voluntary function and strength in the muscles of the hips, knees, ankles and feet. Claimant claimed decreased sensation to light touch and pin prick. X-rays showed no evidence of fractures or dislocations. There was some straightening of the lumbar spine.

Claimant was treated with medication and bedrest. He signed out of the hospital against medical advice on July 11, 1982. On that same date he refused admission to the ward at the penitentiary.

Claimant was seen again on July 12 complaining of continued low and mid back pain and hematuria. Impressions at that time were of a paraspinous soft tissue rupture/spasm and possible renal contusion. A urological consult failed to implicate renal causes for the low back pain as an excretory urogram was normal. Straight leg raising was positive on the right at 30 degrees. Claimant had paraspinal muscle spasm as well. Claimant's pain was determined to be musculoskeletal in origin.

On July 12, 1982 Drs. Kevin R. Kopesky, M.D., and Menezes wrote that claimant should return to the clinic on an as needed basis.

On July 30, 1982 claimant complained of a headache and of tingling in his right arm and leg. Claimant was unable to grasp with his right hand and he could not tell dull from sharp on the right side. He underwent some jerking of his body which appeared to the nurse to be deliberate.

In a letter dated September 1, 1982, Drs. Kopesky and Carl J. Graf, M.D., wrote that approximately three days after claimant's discharge he felt numbness in his right lower extremity to the ankle level and an inability to move his foot in any direction. Claimant denied significant pain in his back or changes in the left lower extremity. Examination produced no back pain to percussion. There was normal strength in the left lower extremity and normal strength and sensation throughout. Claimant's gait demonstrated an exaggerated flaccid foot gait with no use of his quadriceps to pull the foot up and place it down. Sensory examination was nonreproducable.

Claimant was thought to have a functional deficit rather than any sort of nerve impairment. Treatment was conservative and it was suggested claimant have electromyography of his right lower extremity. Note was made of the presence of an ankle jerk and that there was no atrophy of the quadriceps or soleus muscles.

On July 19, 1983 claimant was issued a cane for 90 days.

On October 3, 1983 claimant was seen with complaints of occasional blackouts, headaches and back pain. Claimant gave a history of hitting his head as well as his back in his fall in July of 1982. On examination there was a slight break away tendency in the right lower extremity. An electroencephalogram and a CT scan were both within normal limits. Electromyography and nerve conduction studies were normal. Claimant had lumbosacral tenderness and limited range of motion. Straight leg raising was positive at 75 degrees on the right and claimant was observed to walk in a stooped position. Sensation was normal..

Francis M. Walker, M.D., and Tony Kitslaar, M.D., gave impressions of chronic low back pain, mixed tension and vascular headaches and transient episodes of loss of consciousness of uncertain etiology. Medication, physical therapy and bedrest were prescribed. Claimant was seen in follow-up on November 22, 1983 at which time straight leg raising was positive at 40 degrees on the right. There were no sensory or motor deficits. Reflexes were symmetrical and plantar responses were flexor. Claimant was given low back exercises and medication. Continued conservative treatment was suggested.

APPLICABLE LAW AND ANALYSIS

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 he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

An 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, 251 Iowa 375, 101 N.W.2d 167. 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).

Iowa Code section 85.59 provides in pertinent part:

> For the purposes of this section, the term "inmate" includes a person confined in a reformatory, state penitentiary, release center, or other state penal or correctional institution while that person works in connection with the maintenance of the institution or in an industry maintained therein or while on detail to perform services on a public works project.
>
> If an inmate is permanently incapacitated by injury in the performance of his or her work in connection with the maintenance of the institution or in an industry maintained therein or while on detail to perform services on a public works project, the inmate shall be awarded only such benefits as are provided in section 85.27 and section 85.34, subsections 2 and 3. The weekly rate for such permanent disability shall be equal to sixty-six and two-thirds percent of the state average weekly wage paid employees as determined by the Iowa department of job service under the provisions of section 96.3 and in effect at the time of the injury.
>
> Weekly compensation benefits under this section may be determined prior to the inmate's release from the institution, but payment of benefits to an inmate shall commence as of the time of the inmate's release from the institution either upon parole or final discharge.

As claimant failed to appear there is no lay testimony in this matter. Neither is there medical evidence at this point to show claimant's entitlement to any benefits. At the time of his emergency admission, he reported striking his back only. He specifically denied striking any other part of his body. There is not sufficient evidence in the record to award either permanent partial or permanent total disability.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That on July 8, 1982 as claimant was painting a roof he fell landing on his back on a pipe.

That claimant complained of pain in his back and both legs.

That x-rays at the time of claimant's fall showed no evidence of fracture or dislocation in his back.

That claimant was treated with medication and bedrest.

That after his fall claimant made complaints of blackouts, headaches and back pain.

That in October of 1983 an electroencephalogram, CT scan, electromyography and nerve conduction studies were normal.

That at the time of claimant's last medical evaluation in November of 1983 continued conservative treatment was suggested.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to prove by a preponderance of the evidence that his injury of July 8, 1982 is a cause of any disability he now may suffer.

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 12 day of October, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ERNIE L. FOGLE,	:	
Claimant,	:	File No. 737632
vs.	:	
DIXON'S WHOLESALE MEATS, INC.,	:	ARBITRATION
Employer,	:	DECISION
and	:	
BITUMINOUS INSURANCE COMPANIES,	:	FILED
Insurance Carrier, Defendants.	:	DEC 31 1984
		IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Ernie L. Fogle against Dixon's Wholesale Meats and Bituminous Insurance Companies. Claimant alleges that he sustained an injury to his back on February 11, 1983 while lifting boxes of meat and seeks compensation for permanent partial disability.

The hearing commenced on November 14, 1984 at 9:00 a.m. in the Industrial Commissioner's Office in Des Moines, Iowa. The case was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of Ernie L. Fogle, Myrtle Fogle and Robert T. Carlson. The record also contains claimant's exhibits 1, 2 and 4 and defendants' exhibits 1, 2, 3, 5 and 6.

ISSUES

The issues presented by the parties at time of the hearing are whether claimant sustained an injury arising out of and in the course of his employment; whether there exists a causal connection between the alleged injury and any disability from which claimant may suffer; a determination of the nature and extent of any disability which claimant may have as a result of the alleged injury and a determination of his entitlement to benefits for permanent partial disability.

It was stipulated that, in the event of an award, claimant's rate of compensation would be $175.10 per week, that the date for converting compensation payments from healing period to permanent partial disability is July 1, 1983 in that any entitlement to healing period benefits arising prior to July 1, 1983 has been fully paid. It was also stipulated that defendants' have paid all of claimant's medical expenses and that no claim is made for further healing period benefits or medical expenses under section 85.27 of the code.

REVIEW OF EVIDENCE

Ernie L. Fogle testified that he is 62 years of age five feet five inches tall and 160 pounds in weight. Claimant stated that his wife is Mrytle Fogle and that his five children are out of his home.

Claimant testified that he was born and raised in Jefferson, Iowa where he went to school through the tenth grade but was forced to drop out in order to help support the family. He denied receiving any other formal training but did obtain a GED in about 1960.

Claimant testified that he was released from the Navy in 1945 after having served approximately three years. He then worked as a meat cutter in Panora, Iowa until 1965. He had operated his own shop in Panora from 1960 until 1965 at which time fire damage to the building in which he was located forced him to end the business. Claimant characterized his business as profitable and stated that his earnings from self employment were more than what he could have earned working as someone's employee. Claimant stated that he had worked for Dixon's approximately ten years and held no other employment during that time.

Claimant testified that Dixon's Wholesale Meats Inc. cuts and sells meat to restaurants and hospitals on a wholesale basis. He stated that his job duties included unloading beef from trucks which delivered it to the business premises as well as cutting, grinding and packaging meat. He stated that a normal work day began by obtaining an order and then obtaining meat from the cooler and cutting it up. He stated that during the early years of his employment beef came in "on the rail" in quarters which took about one and one half hours to unload. During recent times beef has come in cardboard boxes weighing approximately 50 to 60 pounds each. Claimant stated that the business included the handling of poultry and pork as well as beef. He stated that the number of employees ranged from as many as 15 to as few as eight or nine and that when he was employed in 1983 there were seven meat cutters who performed work similar to his. He stated that Dixon's had a seniority system and that he was second from the top of the seniority list.

Claimant stated that on February 11, 1983 he was lifting boxes of beef to fill an order and that when he turned, his back went out. He described the sensation as like an electric shock or knife and stated that pain went across his back and down his legs. He stated that he just stood there and held onto the cart which he was using and that in approximately five minutes the pain subsided somewhat. He stated that he was alone in the cooler at the time it happened but that a coemployee, Larry Yakel, came into the cooler shortly after it had happened and that claimant related the incident to him. Claimant stated that when the pain subsided he pushed the cart out to his meat block and that he proceeded to cut it. Claimant testified that the injury occurred at approximately 10:30 a.m. and that February 11, 1983 was a Friday. He stated that he continued to work until the end of the work day although he was experiencing difficulty in doing so. Claimant testified that he also reported the injury to Vic Leinen on the day that it happened and that Leinen was an appropriate person to receive such a report. He stated that Robert Carlson was out of town at the time the injury occurred.

Claimant testified he was not able to see his doctor, Lawrence Staples, M.D., until the following Monday, February 14. He stated that Dr. Staples examined him and sent him to have x-rays. Claimant stated that x-rays were taken on Tuesday the 15th, and that he again saw Dr. Staples on the 15th. Claimant stated that he was referred to W. C. Koenig, Jr., M.D., who placed him on a program of physical therapy which continued for approximately four months. Claimant stated that the physical therapy helped at times. Claimant stated that at the end of the therapy he again returned to Dr. Staples who in turn referred him to Ronald K. Bunten, M. D. Claimant stated that he was examined by Dr. Bunten on one occasion and then returned to Dr. Staples for the remainder of his treatment. Claimant stated that Dr. Staples had been his family doctor since 1969.

Claimant testified that his prior medical history was generally unremarkable except for an appendectomy in 1947, hernia surgery in 1963 or 1964 and high blood pressure which is currently controlled by medication. He stated that he had seen a chiropractor in approximately 1950 for problems which lasted approximately a week.

Claimant testified that when released by Dr. Koenig there had been little improvement and that he continued to experience pain and aggravation in his low back and hips. He stated that he has not improved subsequently. Claimant testified that prior to the injury he operated an antique repair shop in his garage. He stated that he bought, sold and repaired antiques. Part of the work was done for other individuals. He stated that he made no substantial income from the antique operation but that he had planned to expand it after retirement. He stated that his back now prevents him from doing the antique work.

Claimant testified that he owned three rental properties which he described as three bedroom single family dwellings. He stated that each had a value in the range of $55,000 to $60,000. Claimant stated that prior to the injury he performed all the maintenance on the properties himself but that the injury rendered him unable to do the bending, lifting and climbing necessary to properly maintain them. He stated that such has prompted him to sell the properties. He stated two have been sold but he is still renting the third and hires someone to perform the maintenance work. On cross-examination claimant stated that the first property was sold for $32,000 in February, 1983 before he ceased working. He stated that another was sold in April, 1984. He stated that both properties were sold on contract and that the monthly payments from the contracts are only slightly higher than what he had previously received as rent from the properties. Claimant testified that he used the down payment monies to pay off debts.

Claimant testified that he applied for social security when he reach age 62 and that he now receives retirement benefits of $478.00 per month.

Claimant testified that while working at Dixon's he was covered by a union contract. He stated that he typically worked 40 hours per week and earned $8.20 per hour. He stated that in 1981 he took a voluntary reduction in hours at his employer's request at a time when business was slow. He stated that in 1982 he had worked on nearly a full-time basis for the entire year. He stated defendants' exhibit 1 was entered into as a result of negotiations in order to accomplish the employer's request for reduced hours but allowed claimant to retain his job security. Claimant stated that he desired to work on his rental property and that the part-time agreement was also beneficial to him.

Claimant testified that he had not seriously discussed retiring with his employer or co-workers and stated that he may made casual comments regarding it.

Claimant testified that he had planned to take a two week vacation to visit his daughther in Norfolk, Virginia commencing immediately after Friday, February 11, 1983. He stated that the vacation was delayed as a result of the medical care he received and that he did not leave until the end of the first week. He stated that while on the trip his wife did most of the driving, that they stopped frequently and that he experienced a great deal of discomfort. He stated when they reached Chicago they nearly decided to return home.

Claimant testified that on his return from the vacation he

returned to work and met with Robert Carlson. He stated that thereafter he worked a day or two off and on and that he may have worked for a day or so in March. He stated that he would not dispute the days of work which were shown in his employer's records. Claimant stated that after the vacation the first day back to work was March 1 or 2 and that Robert Carlson was aware of his injury prior to that time. Claimant denied giving Carlson the document which was entered into evidence as defendants' exhibit 2.

Claimant testified that when he was released from medical care by Dr. Koenig he again discussed his employment situation with Carlson. He stated that Carlson told him that it would be necessary to hire two laborers to perform claimant's lifting if he were to put claimant back to work. Claimant stated that he did not tell Carlson that he would not be returning to work but he did agree that he told Carlson that he couldn't perform his usual work and that if he were to have been reemployed it would have been necessary to create a light job for him. Claimant testified that work at Dixon's involved standing or walking for the entire day except for breaks. He stated that he could not now perform his old job. Claimant testified that he applied for and received unemployment benefits.

Claimant testified that he has sought employment at every grocery store, tire shop and other places he thought he could find work. He filled out an application at a wall paper store but was not hired.

Claimant testified that restrictions on his activities have been imposed by Drs. Koenig and Bunten. He stated that he can lift as much as ten pounds but not over 20 pounds. He stated that he has tried to perform the activities that he formerly performed but that he cannot and that such causes pain. Claimant testified that he is no longer able to perform maintenance around the house or yard work as he formerly had done. He stated that he does vacuum and that he can do the dishes if he does not try to do them all at one time. He stated that he can drive approximately 25 miles but that he lets his wife do the extended driving.

Claimant testified that he can walk a mile but that after the first one quarter mile he experiences pain and that at the end of the mile he is in misery.

Claimant testified that he sleeps with a board under his mattress and with a pillow or blanket under his knees as such is the only way he can get comfortable. He stated that at night he gets up three or four times and turns frequently, all due to back discomfort. He stated that he must get up slowly from chairs and that he can only stand for approximately five minutes without moving around. Claimant testified that to bend over he has to squat and go down on one knee. He stated that he can reach out in front of himself but that he can not reach and lift. He stated that he cannot twist. He stated that his wife ties his shoes.

Claimant testified that he was the union steward at Dixon's. He stated that he had received no disciplinary action directed against him and that he had not received any complaints of his work performance. Claimant denied working strictly as a poultry cutter in the last two or three years that he worked at Dixon's but stated that he had cut poultry during a period of two or three years which ended approximately two years before his injury. He stated that he sometimes read the scale when beef quarters were received but denied that he had performed a lesser amount of the general unloading and lifting than any of the other employees. He stated that the days he was off work in January and February in 1983 were due to his part-time contract and that business was slow at that time.

Claimant denied making any back complaints to Dr. Staples prior to the time of the alleged injury. He stated that he did not know of any preexisting condition involving his back. He stated that he is not presently receiving physical therapy or under medical care for his back. He stated that the only prescription medicine he receives is that for his blood pressure problem.

Claimant denied having any memory of an incident of running across a street in December, 1983 while carrying a gas can. He stated that such an event was, possible, however.

Claimant testified that at the time he discussed returning to work with Carlson that he gave him the document which has been received into evidence as exhibit 5. When called on rebuttal claimant testified that he was released from medical care at the end of June, 1983 and that it was on or about July 3, 1983 when he discussed his return to work with Carlson.

Myrtle Fogle testified that she is claimant's wife. She stated that prior to the time of the alleged injury he was very active and not one to sit in the house and watch television. She stated that on occasion he played ball, tennis and went swimming. She stated that in maintaining the rental properties he performed interior and exterior painting, wallpapering and roofing. She stated that he had performed some carpentry work.

Mrs. Fogle related that they had acquired the properties for purposes of a retirement income and that they had made no plans for her or claimant to take an early retirement. She stated that the properties were sold because claimant was unable to care for them any longer and confirmed that the contract sale payments were little more than what had been formerly received from rent.

Mrs. Fogle confirmed that she now performs the yard work which claimant formerly had done. She stated that he does minor things in the house such as light dusting but that he can no longer carry clothes to the basement for laundry or move furniture. She confirmed his testimony concerning his sleeping arrangements and stated that he did not have those problems prior to the time of injury.

Mrs. Fogle testified that claimant has undergone a change in his attitude. She stated that he was formerly kind and spoke no sharp words towards her. She stated that he made no prior complaints of back problems and that his only prior physical complaints involved his high blood pressure. She stated that she attributes the change in his attitude to his back problem and stated that she feels that his pain affects his disposition. She related that she helped him put on his pants on the morning of the hearing.

Robert T. Carlson testified that he is the president of Dixon's Wholesale Meats Inc. He stated that claimant was one of seven or eight meat cutters normally employed by the company. He stated that all meat cutters work on beef but one person does mostly poultry work and that another does mostly pork chops. He stated that during the last four years of claimant's employment that claimant had worked primarily cutting poultry and dicing steaks. He stated that dicing steaks was the easiest job in the plant. He stated that claimant had been given the easier jobs due to his age. He stated that the truck drivers unload the boxed beef and that claimant has not unloaded beef carcasses for years.

Carlson testified that while the provisions of the part-time employment agreement were being negotiated claimant had made statements indicating that he intended to retire in the near future. He stated that claimant had indicated a desire to cut back the amount of his work hours and that the part-time agreement was reached as a result thereof. On cross-examination he agreed that the part-time agreement was also beneficial to the business. Carlson stated that he always got along well with claimant even though claimant was the union steward.

Carlson stated that exhibit 6 was a summary of the days when claimant had and had not worked during 1983. He stated that the days claimant did not work in January and February, 1983 were in compliance with the three day work schedule which had been followed as a result of the part-time employment agreement. He stated that claimant had worked part-time during much of the summer and fall of 1982 and that claimant had worked more in 1982 than in 1981 because claimant needed more money.

Carlson testified that the procedure for reporting injuries was to report them to the production manager, Bob Cook or to Randy Carlson, the witness' son in the front office. He stated that no written report of claimant's injury was made on February 11th. Carlson stated that the first knowledge he had of claimant's alleged injury came on March 2, 1983 when claimant reported it to him. He stated that claimant presented what has been marked as defendants' exhibit 2 and some bills and asked him to summit them to the workers' compensation insurance carrier. Carlson related that claimant said his back was bothering him but that it was not bad.

Carlson testified that he saw claimant in August, 1983 at which time claimant presented the letter from Dr. Koenig which is defendants' exhibit 5. He stated that claimant advised him that he would not be returning to work and that claimant did not ask to return to work. Carlson stated that the union contract would have required him to put claimant back to work on a part-time basis if claimant had requested it. Carlson did agree that the union contract implied that work which claimant was capable of performing had to be available if claimant were to be expected to work.

Carlson testified that on December 16, 1983 he was driving on Douglas Avenue near Merle Hay Road when he saw a person he believed to be claimant running across Douglas carrying a red five gallon gas can. He stated that when he approached closely he was able to recognize the person as claimant and that on driving farther down the street he saw claimant's car stopped on the parking with claimant's wife and another person in the vehicle but with no one in the driver's position.

Claimant's exhibit 1 is the deposition of Lawrence Staples, M.D., taken July 12, 1984. It includes deposition exhibits 1, 2 and 3. Dr. Staples stated that he had not treated claimant for a back problem until incident in question (Dp. 4). Dr. Staples performed a neurological test of claimant when he examined him on February 14, 1983 and found a positive patrick's test which indicates sciatic nerve inflammation. He also found discoloration of the skin on claimant's back which indicated excessive use of heat treatments. (Dp. 9)

Regarding the cause for claimant's complaints Dr. Staples stated:

> A. When he came in with this story, even without knowing that he had spondylolisthesis, I didn't know he'd had it. There was no reason for me to X ray his back. I felt that his story and the complaints were correlated, cause and effect.
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> Q. Now, do people have this abnormal condition

described as spondylolisthesis and not have any symptoms from that condition?

A. Absolutely. In fact, that's the rule; and then you do something and the spondylolisthesis becomes symptomatic.

Q. So the traumatic experience he described made it symptomatic at that point?

A. I'm of the opinion that's correct. (Dp. 10-11)

Dr. Staples confirmed claimant's testimony regarding treatment for high blood pressure.

In deposition exhibit 2 which is part of the Staples deposition an entry of December 12, 1974 makes reference to claimant's elbows and wrists aching on occasion and seeing Dr. Wirtz. An entry of December 17, 1979 appears to read "has a problem with his back-won't go away" the same is in Dr. Staples' hand writing and it cannot be certain if the foregoing intrepretation of that hand writing is correct. Dr. Staples was not questioned concerning that entry in his deposition.

Dr. Bunten examined claimant and found him to be afflicted with a spondylolisthesis. He opined that claimant had a 20 percent permanent partial disability of which he related 10 percent to the incident of February 11, 1983 and the remainder to the preexisting condition. (Dp. 9-11) He recommended that claimant restrict himself to sedentary activities such as work which allowed walking and moving about but which did not involve alot of stooping, bending, lifting or maximum effort type of activities. He recommended that claimant not work as a butcher and stated that his recommendations regarding claimant's activities were permanent. (Dp. 13) Dr. Bunten stated that claimant's spondylolisthesis could generally be expected to be accompanied by progressive degeneration and an increase in pain due only to the passage of time. (Dp. 18)

In exhibit 3 to the Staples deposition a general history-subseque visit statement dated March 16, 1981 indicates that claimant is in his third week of semi-retirement and that his wife will retire when she reaches the age of 58 years.

Claimant's exhibit 4 is a written statement of Larry Yakel which confirms claimant's testimony that Yakel came upon him immediately after the back injury occurred.

ANALYSIS AND APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on February 11, 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).

Claimant testified at hearing concerning the incident from which his symptoms arose. It was reported to a coemployee as confirmed by claimant's exhibit 4. It was reported to Dr. Staples shortly after it occurred. It is therefore found that claimant did in fact injure his back while lifting a box on February 1983. From the evidence he was at his employer's place of business, on the payroll, performing his employer's work. It is also concluded that the injury arose out of and in the course of his employment with Dixon's Wholesale Meats Inc.

The evidence from Dr. Staples and Dr. Bunten clearly establishes that claimant had a preexisting spondylolisthesis. From claimant's own testimony, the records of Dr. Staples and claimant's work record it is found that the condition was sufficiently asymptomatic to allow claimant to be regularly employed prior to February 11, 1983.

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.
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> ....
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> A personal injury, contemplated by the workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

While it is true claimant did pursue a life devoted to labor and hard work it is the incident of February 11, 1983 which caused his preexisting condition to become symptomatic. It was a traumatic occurrence and not the mere process of nature.

Dr. Bunten has rated claimant as having a 20 percent disability of the body as a whole based on the condition of his back. Of that 20 percent he, in his professional opinion and judgement, assigned one half of that total impairment to the incident of February 11, 1983. Even though Dr. Bunten characterized his apportionment of the disability as being "arbitrary," his testimony establishes that such is in fact his best professional judgement based upon his knowledge and experience. It is not unfounded speculation or conjecture. The ratings protessed by Dr. Bunten are therefore accepted as correct.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 11, 1983 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).

Both physicians, Dr. Staples and Bunten, relate claimant's present back complaints, at least in part, to the incident of February 11 1983.

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).

It is clear that claimant had a preexisting spondylolisthesis. It is likewise clear that the incident of February 11, 1983 aggravated that condition and caused it to become symptomatic. At page 18 of his deposition Dr. Bunten stated that it was possible that a person with spondylolisthesis could generally experience progressive degeneration and an increase in pain due only to the passage of time. It was his opinion, however, as related at pages 8 through 12 that the incident of February 11, 1983 made a permanent change in the condition of claimant's back. The injury cannot properly be characterized as a temporary aggravation of a preexisting condition.

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 pnysical 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).

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden v. Big Ben Coal Co., supra.

The undersigned observed all the witnesses as they appeared and testified at hearing. Upon observing claimant it was apparent that he exhibits a great deal of hostility toward his former employer. As trier of fact the undersigned has found claimant to be credible with regard to the incident of February 11, 1983. The undersigned does, however, have doubts concerning some of the other portions of claimant's testimony. Claimant had related that defendants' exhibit 5 was given to Carlson in July when claimant sought to return to work. Exhibit 5 is dated August 9, 1983 and would not have been available to give to Carlson in July. Claimant denied giving defendants' exhibit 2 to Carlson when they met on or about March 2, 1983. The exhibit is dated February 28, 1983, was addressed to Myrtle Fogle and was introduced by defendants. Even though the same is not particularly persuasive it is found by the undersigned that defendants' exhibit 2 was given to the employer by either claimant or his wife at some point in time. Based upon the testimony of Carlson that time is

found to have been March 2, 1983.

There was a great dispute between the parties as to whether claimant told Carlson that he could not return to work or as to whether Carlson told claimant there was no work available within the medical restrictions shown on defendants' exhibit 5. A great deal of claimant's hostility seems to have risen from that meeting which is found to have occurred in August, 1983. The fact of the matter is that claimant could have return to the work which he had been performing and remain in compliance with his medical restrictions. At hearing claimant acknowledged that such was in fact true and that he did not feel he could have performed the work. It is clear from the evidence that the employer could not have returned claimant to work, in compliance with his capabilities and medical restrictions, unless a new job were created for him.

Carlson testified of an incident in December, 1983 involving claimant's car and claimant running across Douglas Avenue carrying a red gasoline can. Claimant did not deny the incident. He said it was possible that such had occurred but that he had no memory of it. Running out of gas on Douglas Avenue in December is not the kind of event which the undersigned believes could be easily forgotten. It is not a common occurrence and claimant should know, beyond any doubt, whether or not it had happened.

In short, the undersigned is somewhat suspicious of claimant's testimony as it relates to the degree of claimant's continuing disability. Although claimant is not found to be fully credible in these matters his lack of credibility is found by the undersigned to be in the nature of exaggeration for the enhancement of his case and not a total fabrication.

Claimant is now 62 years of age. He was 61 at the time the injury occurred. His age is such that any attempt at substantial retraining is unwarranted. Claimant is within the range of ages at which workers in our society normally retire. It is found that claimant was in fact semi-retired prior to the time of injury as evidenced by his part-time work arrangement. It is also found that claimant had been considering the alternatives of full retirement at the time of the injury. The entry of March 16, 1981 in deposition exhibit 3 to claimant's exhibit 1 confirms that he and his wife were both considering retiring. Claimant's own testimony at hearing was to the effect that he had not planned to retire until reaching age 65. He also testified concerning plans for a part-time antique business to enhance his retirement income. He has retired earlier. He is receiving social security retirement benefits. His medical restrictions would seem to prohibit him from doing any substantial work in the antique business. The purpose of workers' compensation is to replace lost earnings. The fact that claimant was approaching his normal retirement age is certainly a factor to be considered in arriving at his industrial disability. It does not, however, absolve the defendants' from all responsibility for the injury. While claimant did begin to receive social security retirement benefits upon reaching age 62 he is receiving substantially less than what he would have received if he had waited until age 65 to commence receiving those benefits. The amount of retirment benefits which claimant receives are substantially less than what his earnings would have been if he were still working the customary three day per week part-time work schedule. It appears that claimant will not be able to supplement his income with a part-time antique business. The fact that claimant was semi-retired at the time of injury is adequately reflected by his rate of compensation. The status of semi-retirement could have continued on for a susbstantial time had the injury not occurred.

Claimant has a GED. He appears to be intelligent and well motivated. He in fact appears to have been a very industrious worker in view of the evidence of the rental properties which he has acquired. His present level of education does not, however, qualify him for any particular sedentary occupation which would be expected to provide earnings similar to those which he earned at Dixon's. As previously stated, substantial education which would qualify him to enter a new field is not warranted in view of his age.

It requires a substantial amount of specialized skill and knowledge to function as a meat cutter. Claimant quite obviously possesses that skill. He also appears to have a significant amount of knowledge and experience in performing minor household repairs. Unfortunately, his physical condition prohibits him from being gainfully employed working as a meat cutter, carpenter, carpet layer or any other occupation which would allow him to actually use those skills which he possesses. There are certainly positions where his knowledge could be utilized without actually requiring him to physically perform these skills which he possesses. He could perhaps work as a sales clerk at a hardware store. He could possibly find some line of work where his meat cutting knowledge could be applied. His physical condition is, however, a detriment to his employability as is his age and limited formal education.

Claimant testified that he has applied for a number of jobs but has not found any employment. In today's labor market it is probably unlikely that he could find any employment, other than perhaps a minimum wage type of job, even if he were in perfect health. It appears to the undersigned that claimant has in fact applied for a number of positions which he knows are beyond his own physical capabilities and the medical restrictions which have been imposed. It does not appear that he has applied for many of the types of employment which are within his physical capabilities. Even if he had done so, however, it is unlikely that he would have found employment and any employment which he may have found is unlikely to have been other than a minimum wage type of job. Claimant's employer did refuse to give him any work after the injury. It could not have done so and complied with the medical restrictions. Claimant has not found comparable work since the injury. Although there may be question concerning how diligently he has searched for suitable work, a different result would not necessarily be expected even if his attempts at finding other work could be charaterized as exemplarly.

Claimant's physical impairment is 20 percent of the body as a whole. He has a ten percent impairment as a result of the injury. A cause is proximate if it is a substantial factor in bringing about the result, it need not be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). Apportionment of disability between a preexisting condition and an injury is proper only when there was some ascertainable disability which existed independently before the injury occurred. Varied Enterprises Inc. v. Sumner 353 N.W.2d 407 (Iowa 1984). Dr. Bunten was of the opinion that claimant had a preexisting disability. Claimant's testimony that he had no back problems or pain prior to the incident of February 11, 1983 is not accepted. Even individuals with a relatively healthy back have occasional incidents of back pain and it cannot be found or concluded that he was totally asymptomatic prior to February 11, 1983. If his back had been examined prior to February 11, 1983 a spondylolisthesis would have been detected and medical recommendations would have been made for restrictions similar to those which are now in effect. Such did not occur, however. Claimant was significantly less symptomatic prior to the injury than he is now and any preexisting disability which he may have had from an industrial standpoint would have been relatively small. It is therefore, concluded that as a result of the injury of February 11, 1983 claimant has sustained an industrial disability which is 15 percent of total disability.

Claimant has been forced to curtail his rental property activities. The same have been sold on contract. The contract payments are only slightly more that what the rent had produced. As a contract seller, however, he is not responsible for repairs and maintenance. He is not required to provide insurance or pay real estate taxes on the properties. It cannot be found or concluded that the sale of the properties was detrimental to claimant.

FINDINGS OF FACT

1. On February 11, 1983 claimant was a resident of the state of Iowa employed at Dixon's Wholesale Meats Inc. as a meat cutter in Des Moines, Iowa.

2. Claimant injured his back on February 11, 1983 while lifting a box of meat at his employer's place of business.

3. At the time of injury claimant was working as a meat cutter and performing a task which was a part of his normal employment duties.

4. As established by stipulation of the parties claimant's healing period for the injury ended June 30, 1983.

5. Claimant had a preexisting undetected spondylolisthesis. That preexisting condition had given claimant a ten (10) percent permanent partial impairment of the body as a whole but the same was relatively asymptomatic prior to February 11, 1983.

6. The injury claimant sustained was an aggravation of that preexisting condition and caused an additional ten (10) percent permanent partial impairment of the body as a whole.

7. Claimant's medical expenses have been paid by the defendants and are not at issue.

8. Claimant is presently sixty-two (62) years of age, married and has no dependent children.

9. Claimant's rate of compensation is established by stipulation of the parties as one hundred seventy-five and 10/100 dollars ($175.10) per week.

10. At the time of injury claimant was working approximately three (3) days per week for which he was paid at the rate of eight and 20/100 dollars ($8.20) per hour.

11. At the time of injury claimant was semi-retired but had no plans to retire completely until age sixty-five (65).

12. Claimant had plans to supplement his retirement income with an antique business which he operated out of his home.

13. Claimant's medical restrictions resulting from the condition of his back prohibit him from working as a meat cutter, from performing the maintenance work necessary to maintain residential rental properties and from operating an antique business.

14. Claimant has a GED but no other formal education.

15. Claimant's work experience is as a meat cutter. He also has significant amount of experience in home maintenance and repairs.

16. Claimant appears to have no intellectual deficiencies

or emotional instability. Throughout his life he has been industrious and well motivated.

17. Claimant is found to be generally credible with regard to the incident from which his injury arose, his credibility is somewhat lacking, however, with regard to post injury incidents.

18. Claimant has not found other suitable work and it is unlikely that he will be able to do so.

19. Claimant has not returned to work with the employer since he last worked on March 25, 1983.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the subject matter of this proceeding and its parties.

2. The injury claimant sustained to his back on February 11, 1983 was in the nature of the aggravation of the preexisting condition and that arose out of and in the course of his employment with Dixon's Wholesale Meats Inc.

3. The personal injury which claimant sustained on February 11, 1983 was a proximate cause of the disability from which claimant now suffers.

4. The industrial disability resulting from the injury of February 11, 1983 is fifteen (15) percent of total disability.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant seventy-five (75) weeks of compensation for permanent partial disability at the rate of one hundred seventy-five and 10/100 dollars ($175.10) per week commencing July 1, 1983.

IT IS FURTHER ORDERED that defendants' pay all such weekly payments which are now due and owing in a lump sump together with interest pursuant to section 85.30 of the code from the date each of such payments came due.

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 31st day of December, 1984.

/s/ Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK H. FRAISE,	:	
Claimant,	:	File No. 636673
vs.	:	R E V I E W -
CLARENCE B. HOLTKAMP,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
GRINNELL MUTUAL REINSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	NOV 1 9 1984
		IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Mark Fraise, claimant, against Clarence Holtkamp, employer, and Grinnell Mutual Reinsurance 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 May 20, 1980. It came on for hearing on October 17, 1984 at the Iowa County Courthouse in Marengo, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury and a final report indicating payment of medical benefits, twenty-two weeks and five days of healing period benefits and permanent partial disability for twelve percent of the left lower extremity.

At the time of hearing the parties stipulated to a rate in the event of an award of $144.22 and to fairness of the medical expenses.

The record in this matter consists of the testimony of claimant and of Lorene Beth Fraise; joint exhibit 1, office notes and a letter from Martin P. Roach, M.D.; joint exhibit 2, the records from claimant's hospitalization of May 20, 1980; joint exhibit 3, a report from Steven R. Readinger, M.D.; joint exhibit 4, a form 2A; joint exhibit 5, a bill from Orthopedic Surgeons, P.C., dated February 3, 1983; joint exhibit 6, the deposition of Dr. Roach; joint exhibit 7, the deposition of James J. Puhl, M.D.; and defendants' exhibit 8, a letter from Marlys A. Youkin dated January 7, 1981. The parties submitted letter briefs.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury of May 20, 1980 and any disability he now may suffer; whether or not claimant is entitled to additional healing period benefits; whether or not claimant is entitled to additional permanent partial disability benefits; and whether or not claimant is entitled to benefits under either Iowa Code section 85.27 or 85.39.

STATEMENT OF THE CASE

Twenty-six year old married claimant, father of two children, testified to work for defendant employer as a farmhand caring for crops and assisting in a cattle feeding operation.

Claimant recalled the circumstances of his May 20, 1980 injury as follows: He was helping the veterinarian with vaccinating cattle. The cattle were penned. They were taken from the pens six or eight at a time and moved into a long alleyway with a head chute at the end. The vet was trying to get the cattle into the chute at one end of the alley. He was at the opposite end of the alley. The cattle came out of the alley on his end. He fell under the gate and landed on his back and head with his leg bent. There were cattle on the gate. He tried to push the gate which was lying at chest level off of himself. The vet moved the iron gate which was ten to twelve feet in length and which weighed between seventy-five and one hundred pounds. He was prone on the ground. His leg was numb. His main injury was to his left knee, but he also had soreness in his ankle and hip and the rest of his body because the animals had walked over him. His back "kind of hurt" right above his left hip. His right leg was bruised and a little stiff and sore.

Defendant employer's wife was called. He was driven to town in the pickup and his wife was notified. He saw Dr. Readinger whom he told that he had been knocked down by cattle, that his whole body hurt and that his leg hurt worst of all.

He was referred to Iowa City. At Iowa City he was seen by Dr. Puhl who asked how the injury happened and the position of his leg. He informed the doctor that he was stiff all over. His left leg was hurting and swelling. He was treated with pain shots and x-rayed. Surgery was carried out and he was hospitalized for eight days. He was placed in a cast which extended from his toes to his hip and his leg was suspended in the air. He had throbbing in his leg and his back was uncomfortable. Pillows were positioned behind his back.

When he was released from the hospital, he was on crutches. Use of the crutches bothered his back. His spouse bought a recliner in which he slept at night and which he used until the cast was removed.

Claimant denied both previous back problems and medical treatment to his back before the injury.

Claimant agreed that he was paid temporary total disability until October 26, 1980. He was unsure about the time frame relating to his return to work. He recalled that he had been instructed by Dr. Puhl to try working half days initially. He was discharged on December 1, 1980. He did not think he got back to full-time work until the spring when full-time work became available. During the winter he labored about thirty hours a week.

Claimant asserted that on his initial return he was unable to do what he had done before the injury. His leg would bother him with climbing. He was unable to run the combine for long periods. He was slow at his work and could not run after cattle. He looked for easy jobs like driving a truck or tractor. He wrapped his ankle and used a brace on his knee. He used a cane for a time. He claimed that his hip bothered him and that he had trouble sitting in the combine. He stated that he favored his leg by keeping it stiff and that he swung his body when he walked.

Claimant left work for defendant employer in October of 1982 and took to driving a truck. His current job at which he earns four dollars an hour for a guaranteed forty hour week varies with the seasons and entails duties similar to those he carried out for defendant employer. He estimated that he works ten hours fewer now than he worked before his injury.

Claimant was unable to recall if he had been referred to Dr. Roach by his attorney. He alleged that he went to Dr. Roach because his Cedar Rapids location was more convenient. Apparently his primary reason for seeing the doctor was to determine what is wrong with his ankle. He and the physician discussed ankle exercises which claimant believed would be beneficial to him.

As to his present complaints, claimant listed difficulty with his ankle, stiffness and popping in h s knee and low back and left hip pain particularly with spring calving. He continues to wrap his knee to work. He acknowledged that he "bunged up" his knee a couple of months ago.

Regarding what he had told various physicians, claimant said that he was not asked what happened to him when he was seen in the emergency room, that Dr. Puhl asked him what happened, and that he told Dr. Roach his complaints. He noted that Dr. Puhl

had assistants who carried out taks for him.

Lorene Beth Fraise, claimant's spouse, testified to driving him to Iowa City. As she recalled, claimant was placed in a temporary brace in Mount Pleasant. He was upset and complained of pain. More specifically he said his legs hurt and he was stiff all over. She said that both his-legs and back were checked. Pillows were placed behind his back. She claimed that claimant had been given three or four back rubs each day and that he complained of back pain from the first. She agreed that claimant was thoroughly examined by Dr. Puhl.

When claimant was brought home to recuperate, she took a leave of absence from work. She bought a recliner because claimant had trouble getting on the couch or in and out of chairs.

The witness estimated that it was May of 1981 before claimant was back to full-time work, but she did recollect his trying to work in October. She thought that in the following month he had worked ten to fifteen hours a week and had tried to get into shape gradually.

Fraise said that claimant weighed about 170 pounds at the time of his injury and now weighs 186 pounds.

Offered in evidence was a letter to claimant dated January 7, 1981 which tells him that his healing period benefits were terminated on October 27, 1980 and that he will be paid twenty-six and four-tenths weeks permanent partial disability benefits.

Steven M. Readinger, M.D., issued a report dated June 16, 1980 in which he records a history of a cow and gate falling on claimant's left leg bending his left knee back and laterally. A diagnosis of a probable torn medial collateral ligament of the left knee was made.

Claimant's chief complaint on admission to the hospital in Iowa City was of an injury to the left knee. The only abnormality noted in claimant's back and extremities was swelling and tenderness medially and inferiorally in the left knee.

James J. Puhl, M.D., board certified orthopedic surgeon, saw claimant on May 20, 1980 and took a history of an accident on the previous afternoon in which claimant was pinned against a side of a loading chute. The doctor examined claimant's left knee which was swollen and tender to palpation over the medial aspect. No complaints of any other areas of his body were made.

Further examination was conducted under anesthesia on May 21, 1980 at which time claimant was found to have torn his medial collateral ligament and his anterior cruciate ligament. The ligaments were reattached and repair to the left medial meniscus was carried out. Claimant was placed in a cast.

Dr. Puhl's office notes show claimant was changed to a long leg cast brace on June 18, 1980. Approximately a month later, the brace was removed and claimant was to begin using crutches. When claimant was seen in September, his quadriceps tone was described as terrible and that led the doctor to conclude that claimant had not been pursuing his activity. He was given a new brace and a return to work date two weeks later and instructed to use the brace at all times. Claimant was discharged from the doctor's care on December 1, 1980.

Dr. Puhl had not recorded any complaints to any part of claimant's body except his knee, and in a letter of August 11, 1982 he wrote: "I have nothing in my records indicating an ankle injury from the injury of May 20, 1980."

In a letter dated June 6, 1984 the doctor wrote: "I have no notes of primary injury to either the knee or the ankle, nor previous complaints at this time." A subsequent letter changes knee to back.

Claimant was seen for evaluation on April 16, 1984 at which time he told of pain in his knee after vigorous physical activity and of pain and stiffness in both his back and his left ankle. Range of motion was checked in the lumbar spine, knees, hips and ankles. On the basis of his examination, the doctor found no significant injury to claimant's back or ankle but rather "persistent instability of the knee consistent with a good surgical repair." Claimant was told to continue weight lifting exercises and to maintain his abdominal muscles in good shape "to control any potential back problem."

The doctor was unable to demonstrate any objective cause for the ankle complaints made by claimant. As to further treatment, he testified:

> Q. Do you think Mr. Fraise would benefit from further physical therapy at this time based on your examination of April of 1984?
>
> A. The more the man lifts weights to strengthen the muscles about his knee, be it in a formal physical therapy program or be it on his own at home, the better his knee will be.
>
> Q. Well, would you recommend a specific physical therapy program or program of treatment for Mr. Fraise to try and deal with these present complaints that he had when you examined him in April of 1984?
>
> A. I have had outlined to him all through the treatment program the need for extended rehabilitation of his knee, that is continuous weight lifting and certainly think that these recommendations of 1980 still hold true today. (Puhl dep., p. 17 ll. 9-24)

Dr. Puhl testified that with no record of injury to the back or ankle he could not see how claimant could have disability in either his back or ankle related to the May 20, 1980 injury. The orthopedist said that "[i]nstability of the knee usually does not lead to disability at the hip or ankle." He ultimately stated that claimant might have occasional stiffness in the ankle because of the immobilization; however, he found no objective cause for claimant's complaints. He believed claimant's impairment rating to be twelve percent.

Dr. Puhl specifically recalled examining claimant's back at the time of his injury.

Martin F. Roach, M.D., board certified orthopedic surgeon, saw claimant on two occasions -- the first being on April 20, 1982. Claimant gave a history on that visit of being trampled by some cows on May 20, 1980 and subsequently having knee surgery. The doctor understood that claimant was placed in a long leg cast and then a cast brace. Claimant told the doctor of intermittent knee pain, some ankle pain and a recent sprain of the left ankle.

On examination claimant had full range of motion in the left knee. Valgus stress testing showed the collateral ligament to be fairly taut. There was a slight anterior drawer sign; pivot shift was negative; and Lachman's was weakly positive. X-rays revealed some irregularity and early lipping of the margins of the femur and tibia with mild narrowing of the joint space on the anterioroposterior view.

Dr. Roach diagnosed "[r]esiduals of torn medial collateral and anterior cruciate ligament...with mild osteoarthritis." He assigned a ten percent permanent partial disability to the left knee.

Claimant was seen on July 14, 1982 with complaints of weakness in his ankle and intermittent pain in his left knee.

On examination the knee was unchanged. Claimant had full range of motion and good stability. There was some laxity in the peroneal muscles. Dr. Roach proposed use of the Cybex to test the knee and ankle and an exercise program using the Orthotron, and he anticipated that following such a program would strengthen claimant's knee and decrease his instability.

Dr. Roach related claimant's problems to his original accident. In his deposition he testified to a possibility that the knee instability he found in his exams could affect other parts of the body. Also in deposition testimony he denied any history from claimant of locking in the knee. The doctor was of the opinion that the condition of claimant's knee would put him at greater risk in jobs requiring him to be on a ladder, roofs or in other high spots and that claimant would need a brace for that type of work.

APPLICABLE LAW AND ANALYSIS

The first issue to be decided herein is one of causal connection. There is really no question but that claimant has permanent impairment of his left lower extremity which is causally related to his injury of May 10, 1980 and that he has in fact been paid twenty-six and four-tenths weeks of permanent partial disability benefits which equals twelve percent of the lower extremity. The real question is whether claimant has impairment beyond that scheduled member which is causally related to his injury and which would entitle him to additional permanent partial disability benefits. More specifically, claimant seeks to show that back and ankle complaints are the result of his injury.

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).

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 princip'e 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).

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

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, 251 Iowa 375, 101 N.W.2d 167. 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).

At the time of hearing claimant testified to falling on the ground with major injury to his left knee, but additional soreness in his ankle, hip and the rest of his body. Claimant claimed that his back troubled him while he was hospitalized in traction and later when he was using crutches. Claimant's complaints of backache were corroborated by his spouse.

Medical evidence is not supportive of a causal relationship between claimant's injury and his back and ankle complaints. Dr. Readinger's report which is fairly contemporaneous with claimant's accident gives a history of a cow and gate falling on claimant's left leg.

Dr. Puhl's history was of claimant's being pinned against a side of a loading chute. The only abnormality noted on examination was in claimant's left knee and no other complaints in any areas of the body were recorded. Dr. Puhl who specifically recalled examining claimant's back at the time of the injury performed an evaluation of claimant on April 16, 1984 and found no siginificant injury to either claimant's back or ankle. He was unable to attribute disability to claimant's back or ankle to the May 20, 1980 injury.

Dr. Roach thought claimant was trampled by cows. When he saw claimant in 1982, claimant told him of knee and ankle pain and of a recent ankle sprain. He did not make note of any back complaints. Dr. Roach testified to only a possibility of the instability in claimant's knee affecting other body parts.

Claimant fails to carry his burden of a preponderance. In not finding a causal connection between claimant's injury and any back or ankle complaints that have subsequently developed, the undersigned is giving greater weight to the evidence of Dr. Puhl in that he is the treating physician and the doctor who saw claimant both at the time of his accident and more recently than Dr. Roach.

In light of the conclusions reached on causal connection, no additional permanent partial disability can be awarded. That conclusion does not preclude claimant's receiving additional healing period benefits relating to his initial knee injury. Claimant, who was paid benefits through October 26, 1980, alleges entitlement to healing period from October 27, 1980 to December 1, 1980.

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 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.

Under the statute there are three points at which healing period can be ended -- on return to work, on reaching maximum medical recuperation or on being capable of returning to substantially similar employment. Healing period ceases at the first of the three events. Claimant's healing period was terminated on return to work. Claimant testified he did not go back to his regular full-time duties until the spring of 1981, but the record is clear that he was discharged from Dr. Puhl's care on December 1, 1980 (presumably the time of maximum medical recuperation) and his failure to undertake full-time duties was attributable to the availability of farm work rather than any incapacity on his part. Conceivably he was capable of resuming substantially similar employment sometime before the spring. However, termination of healing period occurs at the first of the three events set out in the statute. That event was return to work.

Neither claimant nor his spouse was sure of a precise date on which return to work occurred, but Lorene Praise did recall claimant's trying to work in October. Claimant's burden again is a preponderance of the evidence. The record is just not clear enough to award additional healing period. There is some evidence to suggest that claimant may have been entitled to temporary partial disability benefits for a portion of the time for which he seeks healing period, but again the record does not allow an award.

At the time of hearing claimant raised an Auxier issue based on the answer to interrogatory 12: "Upon advice of legal counsel, defendants state an Auxier notice was not required in that the claimant returned to work for the defendant-employer." The Iowa Supreme Court in Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (1978) stated at 142: "We hold, on the basis of fundamental fairness, due process demands that, prior to termination of workers' compensation benefits, except where claimant has demonstrated recovery by returning to work, he or she is entitled to a notice which, as a minimum, requires the following [emphasis added]" and went on to outline requirements which subsequently have been codified in Iowa Code section 86.13. Defendants' legal counsel was correct. Return to work eliminates the requirement of the Auxier notice. See Sparks v. Herberger Construction Co., filed October 21, 1983.

The remaining issue is claimant's entitlement to benefits under either Iowa Code section 85.27 or 85.39. Claimant asks two things -- that a bill of $190 from Dr. Roach be paid and that he be provided with physical rehabilitation. The latter request will be considered first.

When Dr. Roach saw claimant in 1982 after claimant had recently sprained his ankle, he proposed a formalized program of rehabilitation including use of the Cybex and the Orthotron. Dr. Puhl acknowledged the importance of a treatment program for extended rehabilitation of the knee. It is noted that claimant was not always diligent in his exercises post surgery and that he has let his weight rise from 170 pounds to 186 pounds. Defendants will be ordered to provide claimant with an evaluation by Dr. Puhl to determine what, if any, sort of rehabilitation program should be undertaken by claimant to increase the stability of his knee.

The remaining issue is the payment of Dr. Roach's bill. Claimant's brief argues that the treatment was emergency in nature. Iowa Code section 85.27 does allow an employee to select care in an emergency situation in which the employer or his agent cannot be reached. The record does not substantiate the existence of an emergency which led claimant to seek care from Dr. Roach. See Jeffrey v. Jack A. Schroeder, 32 Biennial Report of the Industrial Commissioner 121 (1974). Section 85.27 is clear regarding the procedure to be followed by an employee who is dissatisfied with the medical care offered by the employer.

Neither can Dr. Roach's bill be paid through Iowa Code section 85.39 which provides in pertinent part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the 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.

Defendants argue that they had no notice of the examination. The statute requires service of the request. There is no evidence that that procedure was followed and the payment of the charge will not be allowed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-six years of age.

That claimant worked for defendant employer as a farmhand who cared for crops and assisted in a cattle feeding operation.

That claimant was injured on May 20, 1980 as he was aiding

the veterinarian with vaccinating cattle.

That as a result of his accident claimant tore his medial collateral ligament and his anterior cruciate ligament and had a peripheral detachment of the left medial meniscus.

That claimant's sole complaint at the time of injury was of his left knee.

That claimant was paid healing period benefits through October 26, 1980.

That claimant was unable to work full days at the time he returned.

That claimant no longer works for defendant employer.

That claimant has done some truck driving since his injury.

That claimant presently works as a farmhand with a guaranteed forty hours a week at a rate of four dollars an hour.

That claimant's present complaints are of difficulty with his ankle, and popping in his knee, low back and left hip.

That claimant was discharged from Dr. Puhl's care on December 1, 1980.

That impairment resulting from claimant's accident of May 20, 1980 is confined to claimant's left knee.

That problems with claimant's left ankle and back are unrelated to his injury of May 20, 1980.

That under the circumstances here presented defendants were not required to provide an Auxier notice.

That claimant's treatment and evaluation by Dr. Roach was unauthorized and did not occur in an emergency situation.

That claimant made no request for an examination to be paid for by his employer.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence a causal relationship between any disability to his back or to his left ankle resulting from his injury of May 20, 1980.

That claimant has failed to establish entitlement to any further healing period or permanent partial disability benefits.

That claimant has failed to establish entitlement to benefits under Iowa Code 85.39.

That claimant has shown a need for additional evaluation and possible treatment of his left knee.

ORDER

THEREFORE, IT IS ORDERED:

That defendants provide to claimant an additional evaluation of his left knee and any further physical therapy suggested by Dr. Puhl.

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

Signed and filed this 19 day of November, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT P. FRYE, Claimant, vs. CAPITOL AUTO PARTS, Employer, and WESTERN CASUALTY AND SURETY COMPANY, Insurance Carrier, Defendants.	File No. 672728 A P P E A L D E C I S I O N

FILED
OCT 29 1984
IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed October 5, 1984 the undersigned deputy industrial commissioner has been appointed under the provisions of Iowa Code section 86.3 to issue the final agency decision in this matter.

Defendants appeal from a decision filed August 13, 1984 in which they were ordered to pay claimant fifteen weeks of permanent partial disability resulting from an injury arising out of and in the course of his employment on May 8, 1981 [sic].

The record on appeal consists of a transcript of the proceedings and exhibits 1 through 3, all of which were considered in reaching this final agency decision.

ISSUES

The issue on appeal as stated by defendants is that "[t]he claimant did not sustain a permanent disfurgement of the face or head which impairs his future usefulness and earnings in his occupation at the time of injury, and thus, is not entitled to compensation for permanent partial disability under section 85.34(2)(T) Code of Iowa."

STATEMENT OF THE CASE

Thirty year old claimant testified to an accident on May 7, 1981 at which time he was removing a rearend from a car which came down on him as he tried to take out a seat which had been crammed into the driveshaft.

Since his accident claimant has noted a "weird feeling" in his back when he attempts to pick things up, turns, works above his head or looks down. He is bothered by cold or rainy weather. He continues to see the doctor periodically.

In addition to his back complaints, claimant said that as a result of the accident his eyelid "droops" and "feels weird" and that his eye is "getting kind of sensitive to light and stuff like that." The drooping which he characterized as "slight" occurs three or four times a week or "maybe not that often." Claimant told of a habit of pushing up on his eye. Light sensitivity has gradually developed. Claimant testified he presently is working at remodeling houses. His work for defendant was described as a labor-type and handyman thing. He responded "no" to the question of whether his eye has affected his present employment. Claimant indicated that he missed no work because of his eye condition. He was asked: "Q. It is your testimony today that this eye condition in no way affects your present job and the job that you held at Capitol Auto Parts in the performance? A. No. I pretty well function like I should, I guess." (Tr., p. 16 ll. 17-22)

Leo J. Plummer, M.D., reported first seeing claimant in June of 1981 on referral from Dr. Boulden for Horner's syndrome in the right eye. The doctor said the condition is "an interference of the sympathetic nerve fibers that serve the right eye and surrounding tissues" with the effect of causing "a smaller pupil than in the other eye and...a very slight ptosis or sagging of the upper and lower lid."

Claimant was seen for follow-up on January 27, 1983. There was an insignificant refractive error with 20/20 visual acuity bilaterally. Dr. Plummer found claimant to have no functional impairment, although his condition is permanent. In a letter of April 11, 1983 the doctor assigned a percentage of disability from the cosmetic defect of five percent.

APPLICABLE LAW AND ANALYSIS

Defendants' contention on appeal is that "claimant did not sustain a permanent disfurgement of the face or head which impairs his future usefulness and earnings in his occupation at the time of injury, and thus, is not entitled to compensation for permanent partial disability under section 85.34(2)(t) Code f Iowa."

Iowa Code section 85.34(2)(t) provides:

For permanent disfigurement of the face or head which shall impair the future usefulness and earnings of the employee in his occupation at the time of receiving the injury, weekly compensation,

for such period as may be determined by the industrial commissioner according to the severity of the disfigurement, but not to exceed one hundred fifty weeks.

Dr. Plummer has assigned a five percent rating for a cosmetic defect. Assignment of that rating does not compel an award under section 85.34(2)(t) which requires, in addition to permanent disfigurement, impairment of future usefulness and earnings in the same occupation.

Claimant's work at the time of his injury was as a laborer and handyman in a junkyard. Claimant was able to return to his same job post-injury and made at least as much money as before, if not more. He missed no work because of his eye condition and he denied that it affected his ability to do his job in any way. Additionally, claimant testified that the drooping of his eyelid is slight and occurs only three or four times a week, if that often.

Claimant does not meet the requirements of section 85.34(2)(t). The occupation on which to focus, as claimant properly points out, is the one in which he was working at the time of injury. His disfigurement in no way impaired his usefulness in that occupation. Neither did it impair his earnings which remained the same or perhaps increased.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty years of age.

That claimant was injured on May 7, 1981 at his job.

That claimant complains of a droopiness and weird feeling in his eye as well as sensitivity to light.

That claimant's symptoms occur three to four times a week or less.

That claimant's work at the time of his injury was as a laborer and handyman.

That claimant has Horner's syndrome in the right eye.

That claimant has no functional impairment to his vision.

That claimant's disfigurement does not impair his usefulness as a laborer and handyman.

That claimant's disfigurement will not impair claimant's earnings as a laborer and handyman.

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence entitlement to benefits under either Iowa Code section 85.34(2)(p) or Iowa Code section 85.34(2)(t).

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 29 day of October, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAREL DUANE GEARY,
Claimant,
vs.
IOWA BEEF PROCESSORS, INC.,
Employer,
Self-Insured,
Defendant.

File No. 626439

A P P E A L

D E C I S I O N

FILED
DEC 31 1984
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from a decision wherein claimant was awarded benefits for permanent partial disability to the body as a whole as a result of an alleged injury of April 8, 1982. The decision of the deputy was a proposed review-reopening and arbitration decision covering claims contained in file numbers 626439, 729342 and 729343.

The original petition in the matter sub judice was filed August 9, 1982 for injury dates of February of 1980 and February of 1982 alleging a continuation of present condition from injury of February 1980 and a new injury in February 1982 and March 1982.

The original petition contained reference only to file number 626439. At pretrial the other file numbers were assigned to distinguish between the claims.

No benefits were awarded to the claim in file number 626439. No benefits were awarded to the claim in file number 729342. Benefits were awarded for the claim contained in file number 729343. Defendant chose to appeal from the decision contained in file number 626439 but contest the award of benefits connected with file 729343.

Defendant, in its brief, stated one of the issues on appeal to be whether or not claimant sustained injuries arising out of and in the course of his employment as alleged in his petitions in February 1980, February 1982 and March 1982. The February 1980 injury is the claim in file number 626439 for which an award was made in a prior proceeding. The February 1982 injury is the claim in file number 729342. The March 1982 injury is the claim in file number 729343. (This date was later changed to April 8, 1982 for reasons explained later.)

Although defendant has captioned its appeal to be from only file number 626439, the matters appealed from and evidence to be reviewed are contained in all three files. Therefore this matter is in reality and considered to be an appeal of the entire consolidated proceeding contained in file numbers 626439, 729342 and 729343.

The record on appeal consists of the transcript of the hearing; claimant's exhibits A through U excluding P; defendant's exhibits 1 through 6; and the briefs and arguments of the parties on appeal. Claimant appellee's brief on appeal was untimely, however, it was reviewed and taken into consideration in the resolution of this matter.

ISSUES

1. Whether claimant sustained injuries arising out of and in the course of employment by Iowa Beef Processors, Inc., as alleged in his petitions in February 1980, February 1982 and March 1982.

2. whether claimant is entitled to maintain an action and receive an award for an alleged injury on April 8, 1982 based upon the lack of facts and failure to file a petition for such injury.

3. Whether the alleged injury for which compensation was awarded, April 8, 1982 was barred by the statute of limitations.

4. The nature and extent of disability.

5. Set-off against any award for company financed benefits paid to the claimant.

6. whether the rehabilitation report was admissible into evidence.

7. Whether the deputy correctly ruled on objections.

8. whether claims in arbitration are barred by section 85.23, Code of Iowa.

REVIEW OF THE EVIDENCE

Claimant was 47 years old at the time of hearing. Claimant is married and has five children. Claimant is a high school graduate who worked on grain bins for Buena Vista County for three years before going to work for defendant employer. (Transcript, pages 15-16)

Claimant became employed by defendant employer in 1962. During the hearing claimant described the various jobs he has

performed over the years:

A. Over the years, I had--I laid hides. That's when I started down at the roundhouse. Then about a year and a half I went up and trimmed ears off the snout.

Q. The snout?

A. Yes it's on the hides. Then after that I was rim over brisket.

Q. Rim over briskets?

A. Rim over brisket, b-r-i-s-k-e-t.

Q. What is involved in rim over brisket?

A. You've got to take the hide away from the brisket.

Q. Where is the brisket on a cow?

A. Kind of like on the front. Right in the front.

Q. How do you take that hide off the cow?

A. With an air knife.

Q. Well, can you describe it a little more completely? You just take--

A. Well, you pull the hide back like that (indicating) and you come with your air knife down through it.

Q. What do you do then?

A. Take the hide away--

Q. Skin it off the animal?

A. Yes, from the carcass.

Q. And you skin it away from the carcass. What do you do when you skin the hide off the brisket?

A. Well, you come down the brisket, and you hold your hide in one hand and your air knife in one hand; you take the air knife and cut the hide away from the brisket. I got to go way back by the front shank.

Q. Then when you cut the hide off, does that go on to another--

A. Another person.

Q. And they pull the hide off; you cut it?

A. Yeah, after it goes around.

Q. Are these sides of beef hanging on a chain?

A. Yes.

Q. How many would run through there in an eight-hour shift?

A. Well, you average about 118--118 an hour.

Q. An hour?

A. Yeah.

Q. So that would be maybe nine hundred to a thousand an eight-hour shift; is that right?

A. Yeah.

Q. And then you would-- And they'd be going by you one after another?

A. Right.

Q. And are you standing on a platform or how?

A. Yes.

Q. How far off the ground is that platform?

A. It's probably about as high as this chair here.

Q. And these beef--sides of beef go by in front of you, right?

A. Yes.

Q. What would the average side of beef weigh?

A. Probably 20 pounds, if it's-- It depends on your beef.

Q. Now, you're talking about the hide, are you?

A. Yeah.

Q. I'm talking about the whole side.

A. Oh, the whole side would--the whole side of beef probably runs about two, two and a half a side.

Q. And you run about 119 an hour?

A. Uh-huh.

Q. How many years did you do rim over brisket?

A. About 15 years.

Q. Let's describe a little more better for us, if we can--the side of beef comes in front of you?

A. Right. Well, you got the whole beef; and when the beefs [sic] comes like this, just the whole beef coming through, then I got to take the air knife and get this side of the beef off, the skin off of the brisket.

Q. The hide?

A. Yeah. And then I got to pull at this side to get the other side off. I work two sides.
(Tr., pp. 17-19)

Claimant further testified that rim over brisket requires extensive twisting back and forth. Claimant estimated that he twisted left and right at least 240 times an hour. (Tr., p. 20)

In February of 1982, claimant testified that he twisted his back while performing rim over brisket. Claimant was in the hospital for a week following the incident. (Tr., pp. 22-23)

Claimant testified to a work-related incident on April 8, 1982. Claimant related:

Q. And what happened just prior to April 9th?

A. And then when I come back that time, I was-- then they give me-- Then they wasn't sharpening the air knife like they was. You get a dull air knife. Before we went, every time we take a break or go in, we'd leave our air knives so they would sharpen them. When I come back that other time, they was cutting down on sharpening your air knives. That's when you got--if you don't have a sharp air knife, you know how it is when you push. You got to push.

It's like pushing a dull knife. And then I come back, and the dogs were still missing every other one. So that's--

Q. How did your back-- Something happen to your back?

A. Yeah.

Q. What happened?

A. That's when my back just started hurting again, so I had to--

Q. Okay.

A. Felt like it was pinching me.
(Tr., pp. 24-25)

Claimant testified that he remained at home from April 9, 1982 through April 21, 1982. Claimant recalled that his treatment during this period was "hot packs and stuff on my back." (Tr., p. 26)

In claimant's deposition he related:

Q. Okay. Did you have any injuries in 1982, and that would have been last year?

A. No.

Q. You had no injuries at home?

A. No.

Q. No injuries at work that you can remember?

A. Huh-un.

Q. Huh-uh, I think by that you meant no?

A. No, yes.
(Defendant's Exhibit 1, p. 15, ll. 5-13)

Claimant's wife, in a deposition, testified:

Q. Now Dr. Hutchinson has down here on his part of this, quote: "Was getting out of bed and turned and heard something pop, 4-9-82," unquote. Who told him that, did you or your husband?

A. Well, we was both there. I mean, like I said,

it happened first back in 1979. But then also when he was -- different times when he has got out of bed, the same thing has happened again.

Q. On 4-9-82?

A. Yeah.

Q. And that was what led him to go in to see Dr. Hutchinson then?

A. Uh-huh, yeah. 'Cause he went to get up, you know, and I mean after he turned over and his back popped, he couldn't hardly walk.

Q. So the truth of the matter is that on 4-8 or 4-9 when he was in bed at home, he turned over, his back popped?

A. Uh-huh.

Q. And then the next day he went in to see Dr. Hutchinson; is that the truth?

A. Yeah. 'Cause it happened in the night so we had to wait until morning to go see him.
(Def. Ex. 2, p. 6, ll. 4-25)

Defendant's exhibit 5, dated April 16, 1982 is a disability claim form which recites in line 3 of the lower portion of the form: "I turned over in bed and something popped in my back and I couldn't hardly move - had to go to Dr. & get a muscle relaxer shot 4/12/82." Claimant's wife indicated she helped fill this report out and that it was the truth. (Def. Ex. 2, p. 7)

Claimant testified that he was admitted into a Fort Dodge Hospital by Roy M. Hutchinson, M.D., on April 21, 1982. Claimant remained there until April 28, 1982. Claimant recalled that Dr. Hutchinson referred claimant to Joe F. Fellows, M.D. (Tr., pp. 26-27)

By way of deposition, Dr. Fellows testified that he first saw claimant on May 9, 1980 following a work-related accident. He stated that he also saw claimant on June 1, 1982. Dr. Fellows testified that it was at this time that claimant revealed that he had twisted his back at work in February and April of 1982. Dr. Fellows testified that he took x-rays of claimant's back in both May of 1980 and June of 1982. In comparing those sets of x-rays, Dr. Fellows indicated that "there had been a little widening of the neural arch defect. In other words, the area where the bone was deficient had widened just a slight amount over that two-year period." (Claimant's Ex. T, pp. 6-9)

The testimony of Dr. Fellows contains the following exerpt:

Doctor, on August 10, 1982, did you receive any history at all that either the episode related to you in February or April of 1982 occurred at work?

A. Not that I have recorded, no.

MR. DAHL: All right.

A. You want me to go ahead and answer the --

MR. DAHL: We'll repeat our objection. Now you go ahead and answer, Doctor.

Q. Doctor, what I want to know is, did you have an opinion as to whether or not these two injuries aggravated the spondylolisthesis further?

A. I really can't say for sure. I think the only thing I can say is that there had been a change in the x-rays over a two-year period. Whether that was a gradual change or whether it was related to any injury I can't state for sure.

Dr. Fellows testified that he performed surgery on the claimant on September 8, 1982. The surgery performed was a lumbar fusion and a gill laminectomy where the loose segment of bone related to his condition of spondylolisthesis was removed. (Cl. Ex. T, p. 12)

Dr. Fellows testifed that he has been following claimant on a regular basis since the surgery. Dr. Fellows stated that claimant is wearing a lumbar support corset. Claimant is restricted from doing any heavy lifting or frequent bending or stooping. Dr. Fellows stated that in his opinion claimant was suffering from a 35 percent functional impairment of the low back. (Cl. Ex. T, pp. 12-14)

In a report dated June 1, 1982, Dr. Fellows noted:

Darel has finally managed to lose some weight. He weighs in the office today 191 pounds which is about a 20 pound weight loss from his last visit. However, he continues to experience back discomfort and pain radiating into both buttocks aggravated by any undue stress on the back as in prolonged standing, walking, bending, lifting, etc. He has occasional paresthesias in the lower extremities which he noted first in April when he twisted his back, but these seemed to have cleared. He was hospitalized on two different occasions in the last couple of months with recurrent back pain. He was treated primarily with physical therapy. This was at his home in Fort Dodge. He worked primarily as a hide cutter at the meat packing plant and had to do a fair amount of heavy lifting as well as upper arm motions which tended to aggravate his back pain. (Cl. Ex. K)

On August 10, 1982 Dr. Fellows wrote:

He indicated to me that he did injure the back twice prior to the June visit in 1982. I recorded the one in April at which time he twisted the back, but he also did it in February of 1982 when he twisted the back, and had increasing pain and discomfort, and was treated with hospitalization on that occasion plus again in April for approximately one week each time with increased lower back pain. (Cl. Ex. K)

A report was also admitted from John J. Dougherty, M.D., dated July 15, 1983 as defendant's exhibit J. That report states in part:

In attempting to draw a conclusion to this, it appears that this patient has had a spondylolisthesis, probably congenital and was probably destined to have trouble sooner or later especially in view of the fact that he is rather obese.

I think episodes such as working, turning in bed and doing other different things could flare it up and aggravate it. The patient certainly appears to be rather listless and moves kind of slowly, however, I would think that overall he really is not doing too badly and that maybe further investigation to possibly a more deep-seated problems may shed some additional light on the overall picture.

Dr. Dougherty indicated that due to claimant's spinal fusion he probably has a functional impairment in the neighborhood of 10 percent of the body as a whole.

Also admitted into evidence is claimant's exhibit Q, a report dated April 27, 1982 from Patsy Wright, M.D., C.R.C., of Professional Renabilitation Management, Inc. According to that report it is highly unlikely that claimant will ever be able to return to his former employment. In addition, claimant's vocational experience, current physical restrictions, and intellectual deficits limit future employment to simple, continuous and repeated operations of a very light nature. Ms. Wright anticipates that claimant will be employable only at jobs paying minimum wage and few, if any, fringe benefits.

It was also found by this report that claimant's academic and intellectual deficiencies preclude training. The Weschler Adult Intelligence Scale-Revised administered by Mr. Coffrey indicates claimant's full scale I.Q. at 80, which places him in the ninth percentile in the dull normal classification. The report suggested a proposed rehabilitation program for claimant.

APPLICABLE LAW

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

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 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.

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

The claimant has the burden of proving by a preponderance of the evidence that an injury related to the employment 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 v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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."

Iowa Rule of Civil Procedure 249 states:

> In deciding motions under R.C.P. 243 or 244, the court shall treat issues actually tried by express or implied consent of the parties but not embraced in the pleadings, as though they had been pleaded. Either party may then amend to conform his pleadings to such issues and the evidence upon them; but failure so to amend shall not affect the result of the trial.

Where parties proceed without objection to try an issue, even though not presented by the pleadings, it amounts to consent to try such issue and it is then rightfully in the case. Ashby v. School Township of Liberty, 250 Iowa 1201, 1206, 98 N.W.2d 848 (1949) other Iowa decisions to the effect that issue voluntaril tried, although not technically within the scope of the pleadings, are rightfully in the case include Thorson v. Board of Supervisors, 249 Iowa 1088, 1098-1099, 90 N.W.2d 730, 736 (1958) citations; Weidert v. Monahan Post Legionnaire Club, 243 Iowa 643, 648 (1952).

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.

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).

ANALYSIS

On appeal, defendant maintains that claimant has failed to establish that he sustained compensable injuries in February of 1980, February of 1982 and March of 1982. In a decision dated March 16, 1984, it was concluded that claimant sustained an injury arising out of and in the course of his employment on February 5, 1980, and awarded 15 percent permanent partial disability to the body as a whole. No appeal from this decision was taken and it will not be disturbed in this proceeding. Presumeably defendant contends no further disability is related to that injury or that the injury of February 5, 1980 was not the cause of or related to any subsequent injuries.

Resolution in the negative of the question regarding whether or not claimant has sustained his burden of proof that he received an injury arising out of and in the course of his employment other than that for which he has been compensated eliminates the necessity of consideration of the remaining issues.

While there is evidence that claimant may have sustained some incident in the employment, such evidence is in substantial conflict with other evidence given by essentially the same witnesses. Defendant's exhibit 4 is a disability claim form submitted for the February 1982 incident. Defendant's exhibit 5 is a disability claim form submitted for the April 1982 incident.

At the hearing claimant testified as to the February 1982 incident:

> Q. Well, the Exhibit 6, or one of these exhibits of the Iowa Beef, show you off work in February. What happened in February?
>
> A. February is when I had the--
>
> Q. 1982?
>
> A. Yeah.
>
> Q. Did anything happen at work?
>
> A. That's when I twisted my back.
>
> Q. What job?
>
> A. Rim over brisket.
>
> Q. What happened?
>
> A. I was pulling beef, or beef was coming across; and there must have been a dog up above.
>
> Q. what's a dog?
>
> A. A dog is a thing on the chain--it spreads the beef. And the rumper up above, he was rumping. when they come around the corner, he had to pull them. I just pulled a little--there was four of us there--and pulled it; and when I pulled it, it snapped, you know.
>
> Q. What snapped?
>
> A. My back.
> (Tr., p. 22, l. 13 - p. 23, l. 8)

and further:

> A. Yeah, that's when I slipped. I went-- I was coming out, and they--
> Q. Wait a minute, now. I'm talking about you went back to work, and you described this incident of twisting yourself on a rim over brisket?
>
> A. Yeah, when I come back. I come back. I was off, then I come back; and I was doing my job. And when I come back, I had--then I had to hang tags, and then I-- You had to reach way around then to get the tags from the beef to hang on the carcass.
>
> Q. And?
>
> A. Then when my back started bothering me, I went to come home. I come around the corner, and that's when I-- They was trimming fat off the beef right around the corner. And when I come around the corner, when I was going back this, you know--my back was bothering me. When I went back, then I pretty near went back down. Two guys helped me from falling to the ground, or to the floor.
>
> Q. How did your back feel at that time?
>
> A. Feel like I fell to the floor at that time.
>
> Q. And then you went-- What doctor did you go to? Dr. Hutchinson?
>
> A. Yes.
>
> Q. And he put you in the hospital?
>
> A. Yes.
>
> Q. And then you were in there from February 5 for a week?
>
> A. Yeah.
>
> Q. To February 10? When you got out of the hospital, you returned to work?
>
> A. Yeah, I returned.
> (Tr., p. 23, l. 14 - p. 24, l. 19)

In his deposition (taken nine months before the hearing) claimant stated regarding the February 1982 incident:

> Q. Okay. Did you have any injuries in 1982, and that would have been last year?
>
> A. No.

Q. You had no injuries at home?

A. No.

Q. No injuries at work that you can remember?

A. Huh-uh.

Q. Huh-uh, I think by that you meant no?

A. No, yes.
(Cl. Dep., p. 15, l. 5 - l. 13)

At the hearing claimant testified as to the April 1982 incident:

Q. And what happened just prior to April 9th?

A. And then when I come back that time, I was-- then they give me-- Then they wasn't sharpening the air knife like they was. You get a dull air knife. Before we went, every time we take a break or go in, we'd leave our air knives so they would sharpen them. When I come back that other time, they was cutting down on sharpening your air knives. That's when you got--if you don't have a sharp air knife, you know how it is when you push. You got to push. It's like pushing a dull knife. And then I come back, and the dogs were still missing every other one. So that's--

Q. How did your back-- Something happen to your back?

A. Yeah.

Q. What happened?

A. That's when my back just started hurting again, so I had to--

Q. Okay.

A. Felt like it was pinching me.
(Tr., p. 24, l. 23 - p. 25, l. 16)

and:

Q. Now, then, you did go into the hospital in April of 1982 here in Fort Dodge under Dr. Hutchinson, didn't you?

A. Yes.

Q. And was there any sort of accident or injury that caused you to go into the hospital then?

A. That was-- Yeah, that was my back.

Q. were you just getting stiff and having some trouble with your legs and stuff?

A. That's when I twisted my back. That was the--
(Tr., p. 34, l. 24 - p. 35, l. 7)

and further:

Q. And then the next time that you had trouble with your back was April 8 or 9, 1982; wasn't it?

A. Yes.

Q. And that was the time that you reported to the company that you were getting out of bed and turned and heard something pop--April 9, 1982--isn't that right?

A. Yes.

Q. You turned over in bed and something popped in your back?

A. Well, it was bothering me that night, and she called the doctor; and he said, "Wait until morning."

Q. It was that night?

A. Yeah. She called the doctor; and he said, "Come in in the morning."

Q. It was that night?

A. Yeah. She called the doctor; and he said, "Come in in the morning." And that morning, that's when I went in, because I was having trouble when I come home that night.

Q. And then you turned over in bed and something popped, and you couldn't hardly move, and you had to go to the doctor and get a muscle relaxer shot; didn't you?

A. I got a muscle relaxer shot, yes.
(Tr., p. 36, l. 20 - p. 37, l. 13)

In his deposition claimant stated, regarding the April 1982 incident:

Q. Do you remember being in the hospital in April of 1982 here in Fort Dodge under Dr. Hutchinson?

A. Yeah.

Q. Was there any sort of an accident or injury that caused you to go into the hospital then?

A. I was getting stiff then and some trouble with my legs and stuff.

Q. All right. Did you go back to work after you were in the hospital in April of 1982 under Dr. Hutchinson's care?

A. No, no.

Q. Okay. Now I'm going to show you a paper here and down at the bottom by -- oh, up about an inch, is that your signature?

A. Yeah, that's my signature.

Q. Is that a form that you made out to give to the company to get some benefits when you were either going into the hospital or had already been in the hospital?

A. I think this was when I was going in the hospital.

Q. Okay. Now you've read it; have you?

A. Well, as far as I can make out, yeah.

Q. Did you actually do the writing or did your wife?

A. I don't know. That don't look like her writing. Oh, yeah. Now I see, yeah. I did it.

Q. Is that your writing or hers?

A. This must be mine here, yeah.

Q. All right. Now you see down here there's a part that says to be completed by employee, and then there's a place that says describe fully the nature of your disability and the cause thereof.

And then somebody has printed some words in there. Do you know who printed those words?

A. Yeah. That's my wife's writing there.

Q. Did you tell her what to write?

A. Yes.

Q. Now--

A. Well, if that's on the back and stuff, I mean, that's what the doctor--

Q. Now it says here that -- the question is: "Describe fully the nature of your disability and the cause thereof."

And it says: "I turned over in bed and something popped in my back and couldn't hardly move." Did your wife write that down?

A. Well, that was -- that was the first time I went in then.

Q. Into the hospital?

A. Yeah. Or it was on that deal that-- That's the time I couldn't get up.

Q. Now you'd been in the hospital here before then-- Hadn't you? --that year of 1982?

A. Yeah.

Q. Okay. was that the truth, that in April of 1982 you turned over in bed and something popped in your back and you couldn't hardly move?

A. It pulled. I couldn't move my legs then. There that day I was stiff. And you know it's just like you work three days, you think it'll come out of it, you know. You just think it's like pushing -- pushing them beet around the thing.
(Def. Ex. 1, p. 16, l. 4 - p. 18, l. 12)

At the hearing claimant's wife testified regarding the February 1982 incident:

Q. Okay. Sharon, back to February, '82, do you recall calling in to Diane--

A. Yes.

Q. --about Darel? Will you tell us about that?

A. He come home that night from work, and his back was giving him a lot of trouble and very stiff. And when he went to bed that night he turned over a little later, and it popped in his back and he coulan't move. So I called the doctor in the middle of the night, and he said to keep him at home until morning and then bring him in. And then in the morning I called in to Iowa Beef and told them that he couldn't move or anything, so then he had an appointment with the doctor that morning.

Q. Did Darel tell you when he come home that night about what happened at work?

A. Yes.

....

Q. (By Mr. Ulstad) What did he tell you?

A. He said that when he come home he had twisted his back and that it was giving him a lot of trouble.
(Tr., p. 40, l. 5 - l. 20 and p. 41, l. 4 - l. 6)

Regarding the April 1982 incident, claimant's wife testified:

Q. (By Mr. Ulstad) Darel hasn't worked since April 9th, according to the work records of, I believe, Miss McIntyre, he's been off work since that date and since somebody called in. Was that you?

A. Yes.

Q. What did you tell her?

A. I told her he had twisted his back at work; and during the night it was still giving him a lot of trouble, and he turned over in bed and it popped and he could not get up the next morning to come to work.
(Tr., p. 42. l. 6 - l. 15)

In her deposition regarding both incidents in 1982 claimant's wife testified:

Q. Now I'm going to show you a form that we've talked about before. Mr. Geary has identified his signature on that and says that you as he recalls made out part of it?

A. Uh-huh.

Q. Do you remember making out the form?

A. Yes, I did, this bottom half, yeah.

Q. All right. And did you fill in the information from what he told you?

A. Yes.

Q. Is your husband a truthful man?

A. Yes, he is.

Q. Now some of it perhaps isn't as clear as it could be. Perhaps you could read where it says to describe fully the nature of your -- meaning his -- disability and the cause thereof? Go ahead, what does it say?
A. It says: "I turned over in bed and something popped in my back, and I couldn't hardly--"

Q. Move?

A. "--move," yeah.

Q. "Move, had to go to doctor--"

A. Yean.

Q. "--and get a--"

A. I can't even read that.

Q. Okay. Now we'll get the original so we can all see, but whatever that is, is that in your printing or your handwriting?

A. Yes, yes, it is.

Q. And you put down what your husband told you?

A. Yes.

Q. Did you believe him when he told you that?

A. I was there.

(Def. Ex. 2, p. 2, l. 13 - p. 3, l. 19)

and further:

A. In other words, I went back to where it says to describe you know the disability referring to this, I went back to the first time in August of '79 when--

Q. Way back?

A. Yeah.

Q. You're talking about 1979 and not in -- even though the form's in '82?

A. Yeah.

Q. Okay. And the '79 one really got nothing to do with the work injury; does it?

A. No.

....

Q. Now this says that his disability began on April 9, and was that right, that was the day--

A. That's the last--

Q. --he became disabled?

A. That's the last day he worked in '82.

Q. And it was the night before that he turned over in bed and his back popped; is that what you wrote down?

A. Well, I was referring back to when it first happened. I mean how it first happened in the very first place.

Q. 1979?

A. Well, that's the first time that it happened.

Q. Did you go with him when he talked to Dr. Hutchinson?

A. I have been with him every time he has went to the doctor. I take him ususally 'cause he -- it bothers him to drive.

Q. Now Dr. Hutchinson has down here on his part of this, quote: "Was getting out of bed and turned and heard something pop, 4-9-82," unquote. Who told him that, did you or your husband?

A. Well, we was both there. I mean, like I said, it happened first back in 1979. But then also when he was -- different times when he has got out of bed, the same thing has happened again.

Q. On 4-9-82?

A. Yeah.

Q. And that was what led him to go in to see Dr. Hutchinson then?

A. Uh-huh, yeah. 'Cause he went to get up, you know, and I mean after he turned over and his back popped, he couldn't hardly walk.

Q. So the truth of the matter is that on 4-8 or 4-9 when he was in bed at home, he turned over, his back popped?

A. Uh-huh.

Q. And then the next day he went in to see Dr. Hutchinson; is that the truth?

A. Yeah. 'Cause it happened in the night so we had to wait until morning to go see him.
(Def. Ex. 2, p. 4. l. 16 - p. 6, l. 25)

Dr. Fellows testified:

Doctor, on August 10, 1982, did you receive any history at all that either the episode related to you in February or April of 1982 occurred at work?

A. Not that I have recorded, no.

MR. DAHL: All right.

A. You want me to go ahead and answer the --

MR. DAHL: We'll repeat our objection. Now you go ahead and answer, Doctor.

Q. Doctor, what I want to know is, did you have an opinion as to whether or not these two injuries aggravated the spondylolisthesis further?

A. I really can't say for sure. I think the only thing I can say is that there had been a change in the x-rays over a two-year period. Whether that was a gradual change or whether it was related to any injury I can't state for sure.
(Cl. Ex. T, p. 11, l. 5-20)

In deposition exhibit 1 and claimant's exhibit U Dr. Fellows writes:

Mr. Gerry was first seen by myself on May 9, 1980. He stated to me that he had originally begun having backache and back pain on or about August 15, 1979. He woke up one morning with stiffness in his lower back, and this gradually increased with backache and back pain over the next several days. He then twisted his back at work, greatly aggravating the back discomfort. He was subsequently hospitalized in Port Dodge, and treated with conservative management. He was found to have a spondylolisthesis, Grade I, at the L5-S1 level.

The spondylolisthesis pre-existed the acute back strain or back injury and was a contributing factor to the development of the back problem. It is my impression that the back strain he sustained in August of 1979 did aggravate his pre-existing [sic] condition, that being the spondylolisthesis. As you may note, spondylolisthesis is a bony defect of the lower back in which the vertebrae has slipped forward a slight amount. This significantly weakens the support structures of this area.

The evidence in the record when viewed as a whole does not preponderate in favor of claimant that any employment related incident a material or significant cause of claimant's disability subsequent to the heretofor compensable event in February 1980.

The medical records characterize claimant's condition as a preexisting spondylolisthesis which was aggravated by an August 1979 back strain. The August 1979 back strain was not an injury arising out of and in the course of employment. Subsequent twistings aggravate the back discomfort. However, in both February and April 1982 claimant and his wife both testify to his back "popping" while he twisted in bed at home. In retrospect employment activities are alleged to have precipitated the at home events but the evidence is not convincing that any actual event occurred at work in either instance.

WHEREFORE the consolidate proceeding is affirmed in part and reversed in part.

FINDINGS OF FACT

1. Claimant began working for the defendant in 1962.

2. Claimant had a preexisting condition of spondylolisthesis.

3. Claimant aggravated the spondylolisthesis in August 1979.

4. Claimant received a compensable injury in February 1980.

5. Claimant aggravated his back condition in February 1982 when he twisted in bed at home.

6. Claimant aggravated his back condition in April 1982 when he twisted in bed at home.

7. Neither the February 1982 nor April 1982 incidents were caused by or related to the February 1980 injury.

CONCLUSIONS OF LAW

Claimant did not prove by a preponderance of the evidence that he is entitled to further disability related to his injury of February 1980.

Claimant did not prove by a preponderance of the evidence that he received an injury arising out of and in the course of his employment in February 1982.

Claimant did not prove by a preponderance of the evidence that he received an injury arising out of and in the course of his employment in March or April 1982.

ORDER

THEREFORE, claimant will take nothing from review-reopening proceeding 626439.

Claimant will take nothing from arbitration proceeding 729342.

Claimant will take nothing from arbitration proceeding 729343.

Costs of this action are assessed to defendants.

Signed and filed this 31 day of December, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RODNEY D. GERRIETTS,	:	
Claimant,	:	FILE NO. 457119
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
WESTERN ELECTRIC,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Rodney D. Gerrietts against Western Electric Company, a self-insured employer. Claimant seeks benefits in the form of compensation for permanent disability alleged to be the result of the injury which occurred on August 5, 1976. Claimant's rate of compensation is $131.36 per week as established by the memorandum of agreement on file and by stipulation of the parties at the time of hearing.

The hearing commenced June 12, 1984 at the industrial commissioner's office in Des Moines, Iowa. The case was considered fully submitted upon conclusion of the hearing. The record in this case consists of the testimonies of David B. McClain, D.O., Stephen Bennett, John P. Clark, D.O., Rodney D. Gerrietts, Jerry Ferris, Margaret Ann Gerrietts and Neil Stevens. Claimant's exhibits 1 through 20 and defendant's exhibits A through E were received into evidence.

ISSUES

The issues presented by the parties at the time of hearing are a determination of claimant's entitlement to benefits for permanent partial disability. The underlying issues are whether the injury is related to the complaints involving claimant's neck and cervical spine. An additional underlying issue is the effect of an incident which has been described as a "fall" which occurred near Christmas time during the winter of 1981-1982. Evidence was heard regarding a laceration of claimant's right index finger which occurred February 13, 1979. The result of the injury was addressed in defendant's brief but not by claimant in his brief. The result of that injury will also be considered in this decision. The parties stipulated that claimant had been paid benefits for all times during which he was off work as a result of the injuries and that the defendant has paid all of claimant's medical expenses incurred for treatment of the injuries. It was further stipulated that in the event of an award the appropriate conversion date concerning the injury to claimant's back is August 15, 1978. It was also stipulated that no benefits for permanent partial disability had been paid.

David B. McClain, D.O., testified that he performed a lumbar laminectomy on May 16, 1978 and provided followup care. He opined that a causal relationship existed between the injury of August, 1976 and the surgery which he performed upon claimant. (Transcript page 23) He also opined that claimant has a 15 percent disability rating as a result of the injury. (Tr., p. 24) He did not feel that any cervical or neck problems which claimant may have were related to the injury of 1976. (Tr., pp. 25 & 26) (Ex. A, pp. 21 & 22) Dr. McClain stated that he authorized claimant to return to work without restrictions on June 18, 1979 as shown in exhibit 11. (Tr., p. 22) (Ex. A, p. 19) He related that he had recommended that claimant obtain training to enter a different line of work. (Tr., p. 21) (Ex. A, p. 16 & 20) He stated that claimant has been left with a residual loss of the Achilles reflex, tenderness over the left sacroiliac region and slight restriction of motion. (Tr., p. 24) (Ex. A, p. 20).

Steven A. Bennett testified that he is presently a self-employed operator of an aircraft supply company. He formerly worked for Western Electric Company with claimant. He testified that prior to August, 1976 claimant did everything which everyone else at the warehouse did, including lifting weights of as much as 100 pounds. He related that since August, 1976 claimant had been assigned work which involved a lot of paper work until early 1981 when claimant was sent to work in the warehouse. He was not aware that the weight restriction which had been medically imposed had ever been removed. Bennett testified that the work which claimant performed following his surgery involved assigning him to existing positions without the creation of a new position. He stated that claimant generally did his job except that claimant required help lifting heavy items. Bennett related that some other workers at the warehouse felt that claimant was not doing his fair share but that he personally felt that claimant was performing adequately. Bennett agreed that he and claimant are friends and share an interest in aviation.

John P. Clark, D.O., testified that he has been claimant's family physician since June or July 1979. He related that over the years claimant's chief complaint has been low back discomfort which has progressed to his upper back. He also provided care for claimant's injured finger. Dr. Clark related that claimant had tightness in his neck as early as October 13, 1980. Dr. Clark opined that the problem claimant experiences in his neck is related to his lower back injury. (Tr., p. 68) (Ex. 18, p. 26) Dr. Clark opined that claimant has a disability of 30 percent relative to the condition of his back. (Tr., p. 77) (Ex. 18, p. 35)

He stated that eight percent was attributable to claimant's neck and the remaining 22 percent attributable to the low back. (Tr., p. 77) Dr. Clark stated that when he saw claimant on January 12, 1982 that claimant related an incident which he understood from claimant to have been in the nature of a fall from a ladder. (Tr., p. 79) (Ex. 18, p. 44) Dr. Clark stated that such an incident would be consistent with further injury to or aggravation of claimant's back. (Tr., p. 82) (Ex. 18, p. 44) Dr. Clark confirmed that claimant does not have scoliosis. (Tr., p. 84) He declined to state any opinion upon whether or not falling against a building could result in further injury. (Tr., pp. 87 & 88) Dr. Clark prescribed Percodan for claimant on January 12, 1982 and could not find a time when he had made a prior prescription for that particular drug. He stated that such was at or about the time of the incident involving the latter. (Tr., p. 81) (Ex. 18, p. 42) Dr. Clark testified that in 1979, 1980 and 1981 he saw claimant 14 or 15 times each year. He stated that in 1982 he saw claimant 49 times, in 1983 50 times and in 1984 15 times to the date of hearing.

Rodney D. Gerrietts testified that he is 39 years of age, married and has two minor children, the oldest of which is four years of age. He testified that he graduated from high school in 1963 in the lower ten percent of his class. Claimant related that while in high school he worked in a nursery where he repotted small plants and planted small trees. He then worked in a station as an attendant where he pumped gas, changed tires, oil and performed tune-ups. Claimant enlisted in the Marine Corps where he served four years. During the period of military service he took courses in electronics and field wire communications. He held two different positions where he was in charge of a wire section where he supervised other personnel.

Following his discharge from the service he was employed by Western Electric for approximately two years where he worked as an installer. He then worked as a field representative for Anker Data Systems which involved repair and service of cash register equipment. In 1970 he returned to Western Electric Company where he installed central office switching equipment, including toll terminal microwave. In late 1972 he returned to work for Anker Data Systems as a service manager where he was responsible for the installation, service and repair of company equipment. This involved supervision of as many as eight subordinates, training of dealer service personnel and problem resolution as well as actual work which he personnally performed on the equipment.

In 1974 claimant returned to employment with Western Electric Company at its Des Moines, Iowa warehouse.

Claimant testified that he was initially placed in the "plug in central stock" (PICS) department. He related that he stocked parts for three states and that the only significant weights he handled were when a number of items were placed in a large container. He was then moved into the warehouse where he stated that the weights of items ranged up to three hundred or four hundred pounds.

Claimant related that on August 5, 1976 while selecting equipment from its position on the shelf, he was picking up a fairly heavy box and in doing so hit the small of his back on a shelf. He stated that by the next day the pain had increased substantially and that Neil Stevens drove him to see Ralph R. Pray, M.D. He remained off work through November 7, 1976. He related three relapses, the third of which was followed by surgery. He stated that the third relapse which occurred in April, 1978, came about when he had been standing on a lower shelf in order to place a box on a higher shelf. He stated that as he stepped down he experienced pain in his back. He stated that he finished work on that day but sought medical attention the following day.

Claimant stated that when he returned to work the employer accommodated the medical restrictions. He stated that as time passed he felt himself growing stronger and that at the time his job ended he could handle up to 35 pounds without problem. He denied that Dr. McClain ever advised him that the weight restriction had been removed.

Claimant testified that following surgery he was not put back into the normal rotation for workers but was given lighter work in the PICS department.

Claimant identified exhibit 16 as a list of places where he has sought employment and stated that the list is incomplete. He said that he has not given up searching for work and has interviewed for another position with Western Electric but that he did not receive it. He related that he screened the jobs for which he applied according to the anticipated income, whether the job met his physical restrictions and whether he would want to work at that particular place. He stated that he has been applying for positions in field service or warehouse supervision. He stated that he has not worked since July 3, 1981 when the Western Electric Warehouse closed. He has been denied social security disability benefits.

Claimant testified that he is presently enrolled in a 10 week management course which is designed to improve his employ-ability and job hunting skills. He stated that since 1981 he has occupied himself by job hunting and watching his sons at home while his wife works at her employment. He estimated that child care expenses would be $80 or $85 per week if he were to find employment.

Claimant testified that he is right handed and that the injury to his right index finger causes a lot of problems. He stated that he has no sensation in the right side of the finger and little motion at the first joint. He underwent surgery on the finger in July, 1980 and stated that the only restrictions which had been medically imposed were to exercise caution with the finger and to protect it.

Claimant denied having any back problems prior to the 1976 injury. He stated that while in the service he handled reels of wire which weighed 40 or 50 pounds. While with Anker Data Systems he carried a tool kit which weighed approximately 60 pounds and moved cash registers which weighed as much as 185 pounds. He stated that prior to the 1976 injury he mowed the yard and helped in the house cleaning but that now his wife performs both of those activities. He stated that he does not pick up his children except when he is seated.

Claimant testified that the recent job application with Western Electric was handled by a representative named Judy Kilpatrick, the personnel director for the company in Omaha. He stated that she told him that he was not employed as a result of his weight restriction and a hearing loss. He stated that the hearing loss preceded his employment with Western Electric.

Claimant testified that his neck problems started developing in 1982 and that he did not have them at the time the warehouse ceased operation.

Claimant stated that in January of 1982 he was taking Christmas lights off the front of his house and that while stepping up on the ladder his left hip popped and that he fell to the left catching himself with his left shoulder on the side of his house. He stated that such caused a bruise on his shoulder but that it did not otherwise change the discomfort which he was experiencing in his neck or back.

Claimant testified that prior to the time of the initial injury he enjoyed hobbies including working on cars, woodworking, hunting, fishing, canoeing and aviation. He stated that he has cut back on hunting and canoeing. He related that his auto mechanics is limited to keeping his own vehicle running and that he has discontinued the other activities, all in response to the pain in his back.

Margaret Gerrietts testified that she and claimant were married in 1973. She stated that he had no back problems prior to the 1976 injury. She confirmed that prior to the injury he did yard work but stated that she did most of the house work. She confirmed the hobbies of which he testified and added remodeling their home as one of his activities. She stated that now she mows the lawn and that he does only what must be done and then he performs it in such a manner as to compensate for his problems. She stated that she was not aware of the ladder incident until this proceeding. She described claimant as very strong prior to the time of his injury.

Claimant's spouse stated that she assists in the job hunting which usually begins with the want ads in the Sunday newspaper. She stated that prior to the injury claimant was a good provider and always employed.

Upon the issue of relocating she stated that she is a teacher at the Polk County Juvenile Home. She stated that it would take a very good job to justify relocating.

Jerome Ferris testified that claimant worked under his direction both pre and post injury. He stated that claimant was in the warehouse in 1980 and that in that position claimant was required to lift. He felt that claimant could not perform the normal requirements of the job. He stated that of the five people on the crew claimant was the only one that had restrictions. He stated that he felt that claimant did try and that he was not goofing off or malingering. Ferris stated that when claimant returned following his surgery he was placed in a position where he had extensive control of the PBX station in which he performed satisfactorily. He stated, however, that when working as a selector that he required extensive assistance due to the weight limitations. Ferris was not aware that the limitations had ever been lifted.

Neil Stevens testified that he hired claimant in order to obtain claimant's knowledge of PICS equipment. He stated that at the time of injury he was claimant's supervisor. He stated that following the injury he directed claimant to follow the medical restrictions and get assistance when it was needed. He stated that exhibit 11 was probably brought to him by claimant and that it was timely when he received it. He stated that no restrictions were applicable when claimant was placed back to work in the warehouse in late 1980 and that claimant performed adequately in the warehouse until the facility closed. He evaluated claimant as being above average and that if the facility had not closed he knew of no reason why claimant would not have continued in employment there. He did not recall if the grade 4 directors were made aware of the fact that claimant's medical restrictions had been removed. He stated that he kept claimant in the PICS section after the restrictions had been removed in order to utilize his expertise. He agreed that such expertise was of little value outside the communication industry.

Stevens was not aware of the weight restrictions which had been imposed by Dr. Carlstrom as shown in exhibit 14 but stated that at the present facility where he is employed most of the production jobs in the shop area would fall within those re-

strictions, namely repairing telephone sets and doing repair work on circuit packs. He felt that those jobs would be in compliance with a restriction which included a prohibition against prolonged sitting or standing without allowing an opportunity to change positions.

Exhibit 7 is a billing statement from Dr. Clark which shows the frequency at which claimant received care. It reflects that claimant was seen November 17, December 1, December 8, December 17, December 22 and December 29, 1981 as well as January 5, 1982. The billing shows that claimant received osteopathic manipulative therapy on those occasions. Exhibit 19 shows that his complaints on those visits were related to his low back, hip and leg.

Exhibit 8 is a report from Dr. McClain dated August 12, 1981. It confirms his impairment rating of 15 percent as a result of the trauma and recommends job rehabilitation.

Exhibit 12 is a report from Thomas A. Carlstrom, M.D., dated September 8, 1981. In it he relates that he examined claimant on August 25, 1981 in which he states: "Rodney appears to have stable, chronic low back pain. I would expect that he will continue to have significant symptomatology, and we generally rate a 5-10% disability. He should rate no disability for the index finger injury." In exhibit 13 Dr. Carlstrom opines that the pain in claimant's neck is not related to his back condition and should not be considered to be work related. In exhibit 14, a report concerning an examination of May 22, 1984, he opines that claimant's impairment has elevated to approximately eight percent of the body as a whole. He recommends that future employment should be designed to exclude lifting, particularly repetitive lifting of more than approximately 20 or 25 pounds and an absolute lifting restriction of above 50 pounds.

APPLICABLE LAW AND ANALYSIS

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. It does not establish the nature or extent of disability. Freeman v. Lippes Transport Company, Inc., 227 N.W.2d 143 (Iowa 1975).

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 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).

Drs. McClain and Carlstrom did not find any relationship between the condition of claimant's neck and the injury. They are orthopedic specialists and their opinions will be given greater weight than the opinion of Dr. Clark who believes that a causal connection exists. It is therefore found and concluded that claimant has failed to establish that any causal connection exists between the injury of August 5, 1976 and the complaints which he experiences in his neck. Any impairment in claimant's neck or cervical spine will not be the responsibility of the defendant.

There is no evidence in the record of this case which relates the injury of claimant's index finger to the back injury. The only evidence in this case which purports to determine whether or not an impairment of claimant's index finger exists is exhibit 12 wherein Dr. Carlstrom found no disability in the finger. If an impairment existed it would be compensated as an injury to a scheduled member. There being no impairment, claimant is not entitled to any compensation for permanent disability relating to the finger injury and there is also no impairment in the finger which would have any bearing upon claimant's degree of industrial disability.

Dr. McClain clearly opined that a causal connection exists between the August, 1976 injury, the laminectomy which was performed in 1978 and its results. Dr. Clark agrees that a causal connection exists between the injury and claimant's continuing symptoms regarding his low back and hips. Dr. Carlstrom does not deny that such a connection exists. It is found that the injury of August 5, 1976 is a proximate cause of claimant's present disability. There is evidence, however, that claimant was involved in an incident shortly after Christmas of 1981 which has been described in exhibit 19 at an entry dated January 12, 1982 as "fell off laddr [sic]". Defendants would not, of course, be responsible for the results of any subsequent injury unless that subsequent injury was approximately caused by the first injury. DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777, 780 (Iowa 1971). There is no evidence in this case which would establish such a relationship between claimant's original injury and whatever happened in the ladder incident. Dr. Clark had no independent recollection of what claimant actually told him on January 12, 1982. He surmised that the note in his records indicated that he must have understood the occurrence to have been a fall from a ladder. Claimant related that he did not actually fall off a ladder but that he did fall to the side striking his shoulder on his house. Claimant's first prescription for Percodan was issued January 12, 1982. He had previous prescriptions, however, of other pain relief medications including Zomax on January 5, 1982, Empirin on October 2, 1981 and Parafon Forte on September 2, 1981. It appears that the administration of Percodan on January 12, 1982 was an alternative for the earlier prescribed Zomax which had upset claimant's stomach.

Dr. Clark is the only physician who is questioned concerning the effect of claimant's ladder incident. As shown at pages 87 through 88 he states that an incident of falling with the shoulder hitting a building may or may not cause any further disability. In 1982 and 1983 the frequency of claimant's visits with Dr. Clark had substantially increased. It appears, however, that the frequency has again decreased with only 15 visits as of June 12, 1982. From exhibit 19, however, it appears that the increased frequency of visits commenced November 17, 1981. Dr. Carlstrom found a slight increase in claimant's impairment between his examinations of August 25, 1981 and May 22, 1984 but he does not express any opinion for the cause of the change. It should be noted that the latter rating is within the range expressed in the 1981 rating.

The ladder incident probably did aggravate claimant's back. The evidence does not establish, however, that the incident caused any change in claimant's long term impairment or disability.

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, [illegible] (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.

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden v. Big Ben Coal Co., supra.

The impairment ratings given by the doctors in this case vary from five to ten percent and eight percent for Dr. Carlstrom, 15 percent for Dr. McClain and 22 percent for Dr. Clark. The AMA Guides assess a five percent impairment for removal of a disc and additional impairment based upon any loss of motion or nerve involvement. Claimant does exhibit some neural impairment as evidenced by his complaints of pain and the loss of his Achilles-tendon reflex. It would appear that claimant does have a permanent physical impairment in the range of 10 to 15 percent of the body as a whole relative to his lower back.

Claimant is a 39 year old high school graduate who has expertise which would be valuable in the communications industry. He also has experience in the fields of automechanics, plants and trees, cash registers and warehouse operations. He has exhibited the ability to supervise other employees and has managerial experience. His intelligence and ability is significantly above that which would be indicated by his high school graduation class ranking. The restrictions indicated by Dr. Carlstrom in exhibit 14 are not significantly different from those which had been imposed by Dr. McClain subsequent to claimant's surgery. Although Dr. McClain did remove those restrictions as shown in exhibit 11, he has consistently recommended that claimant seek job retraining. All of claimant's previous employments, including his employment with the Western Electric Company, has involved significant bending and lifting.

Claimant has not found other employment since the Western Electric warehouse closed. He has searched many places. It does not appear that he has been unduly selective. The mere number of inquiries he has made and the current self-improvement class in which he is enrolled show a reasonable level of motivation to find employment. It is certainly understandable that a great number of rejections would be discouraging. Even the defendant employer has refused to rehire claimant for a position for which he was apparently qualified. Unemployment is presently relatively high but claimant's limitations can reasonably be expected to have permanent detrimental effect on his ability to obtain long term employment which provides economic benefits similar to those of his employment with Western Electric. It is found and concluded when claimant's disability is measured in industrial terms the injury of August 5, 1976 resulted in 30 percent of total disability.

FINDINGS OF FACT

1. Claimant was a resident of the State of Iowa and was employed at the Western Electric Company Warehouse in Urbandale, Iowa when he injured his back on August 5, 1976.

2. As a result of the injury claimant underwent a laminectomy which was performed by David B. McClain, D.O., on May 16, 1978 in which he surgically removed a posterior lateral protusion of the nucleus pulposus which had encroached on the nerve root at the L5 disc space.

3. Claimant is 39 years of age, married and has two minor children, both born since the injury.

4. Claimant presently has a loss of the Achilles tendon reflex on the left and suffers discomfort in his left hip and lower back. It has been medically indicated that he restrict his bending and lifting and that he seek vocational rehabilitation.

5. The ladder incident which apparently occurred in early January, 1982 caused a temporary aggravation of claimant's condition but did not cause any permanent change or increase his disability.

6. All of the disability which presently exists in claimant's lower back is related to the injury of August 5, 1976.

7. Claimant has no impairment or disability in his neck or cervical spine which is related to the injury of August 5, 1976.

8. Claimant has no functional impairment in his right index finger which is a result of the injury of February 13, 1979.

9. Claimant has a permanent functional impairment in the area of his lower back which is in the range of 10 to 15 percent.

10. Claimant has limited experience in auto mechanics and in working with plants in a nursery. He has expertise in telephone communication equipment and cash registers. He has experience as a business manager and supervisor of other workers.

11. Claimant is a high school graduate whose only subsequent education has been in the military or in training provided by his employers. He is of at least average intelligence and has no medically diagnosed emotional disturbances. He is motivated to return to work.

12. Claimant has been unable to find other suitable work since his employer's facility closed, the major reason for his inability to find work is the prevailing high employment rates and his self-imposed requirement that any position he accept pay sufficient compensation to warrant the cost of child care expense for his children. However, claimant's physical impairment which has arisen from the injury is a detriment to his ability to find employment.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and its parties.

Claimant has no entitlement to benefits for permanent partial disability with regard to the injury to claimant's right index finger which occurred February 13, 1979.

Defendants shall have no responsibility to pay compensation for the condition which exists in claimant's neck and cervical spine.

Claimant has a 30 percent industrial disability as a result of the injury to his low back which occurred August 5, 1976.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred fifty (150) weeks of compensation for permanent partial disability at the rate of one hundred thirty-one and 36/100 dollars ($131.36) per week commencing August 15, 1978. The entire amount thereof is now due and owing and defendants shall pay the entire amount in a lump sum.

IT IS FURTHER ORDERED that defendants shall pay interest pursuant to section 85.30 of the Code of Iowa upon each weekly payment of permanent partial disability compensation from the date each weekly payment thereof came due until the same is fully paid.

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 final report within twenty (20) days from the date of this decision.

Signed and filed this 29th day of October, 1984.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ED GIEDRAITIS, Claimant, vs. ONE TRIP PLUMBING, Employer, and BITUMINOUS CASUALTY CO., Insurance Carrier, Defendants.	:	File No. 729310 A P P E A L D E C I S I O N

FILED
DEC 24 1984
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a proposed decision in review-reopening wherein claimant was awarded healing period benefits commencing on March 8, 1983 and running for the period until he has returned to work or it is medically indicated that significant improvement is not anticipated; or the claimant is medically capable of returning to substantially similar employment. Certain medical expenses were also awarded to claimant.

The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 22 through 37; defendants' exhibits A through D; the deposition of Stuart R. Winston, M.D.; the deposition of claimant; and the briefs and filings of the parties.

ISSUES

Defendants have not filed an appeal brief. The issues on appeal, therefore, will be those considered in the review-reopening proceeding.

1. The nature and extent of disability resulting from the claimant's injury on March 8, 1983, and;

2. Whether the bill of Dr. Winston and hospital and other services and supplies he prescribed for treatment of the injury on March 8, 1983 were authorized and allowable under section 85.27, Code of Iowa.

REVIEW OF THE EVIDENCE

The parties stipulate that the applicable rate of compensation is $355.10 per week. (Transcript, page 18) The parties further agree that June 23, 1983 is the date of the first payment of disability compensation to claimant. (Tr., p. 19) Claimant is 38 years old and was married and supporting two minor children at the time of the alleged injury. Claimant is a high school graduate who has served three years as a bosun's mate in the navy. His special training, other than on-the-job training was as an apprentice in the pipe fitting trade. He served in the apprentice program for five years and is now a journeyman plumber. (Griedraitis Deposition, pp. 44-48) Claimant's previous work experience has included general labor, and working in plumbing out of the union halls. Claimant has also worked as a welder and as a steam fitter. Claimant testified that his duties as a steam fitter, plumber and welder involved "a lot of lifting." Claimant testified that the weights he lifted varied from five pounds to 150 pounds. Claimant stated that the duties also involve reaching, bending and climbing. (Tr., pp. 26-32)

Claimant began working for defendant employer in March of 1983. (Tr., pp. 35-38) His duties involved hanging five to six inch pipe at the Veterans' Hospital in Des Moines. Claimant testified that he would raise the pipe from floor to ceiling then weld the pipes into place. On March 8, 1983 claimant testified he was pushing on a six inch pipe trying to put in a butterfly valve. Claimant stated:

> I pushed a little harder. When I let off the line it sprung back and my back bothered me. That happened about nine o'clock in the morning. It didn't hurt that bad, but the day went on and it kept getting worse and worse, so I left the job about one o'clock and went home. Then I think that evening I went to Methodist Hospital and had X rays. (Tr., p. 38)

Claimant testified that he called the employer the next day and told them he would not be in because of his back bothering him. Claimant did not remember if he went in that day or the next day to fill out an accident report. Claimant recalled that he had told Mike Murphy, his foreman, that he was going home from work because his back bothered him. (Tr., pp. 39-40) Claimant testified that he has not been employed since March 8, 1983. (Tr., p. 40)

Mercy Hospital Medical Center records indicate that claimant was seen on March 8, 1983 complaining of pain in the low back, stomach, and testicles. The record indicates that claimant reported he had hurt his back that morning pushing something at work. (Claimant's Exhibit 22)

Stuart R. Winston, M.D., testified by deposition that he saw claimant on March 14, 1983. (Winston Dep., p. 8) Claimant complained of right posterior thigh pain occasionally going below the knee. (Winston Dep., p. 9) Dr. Winston stated that he started claimant on a muscle relaxant and an anti-inflammatory for pain. He also started claimant on some outpatient physical therapy with heat, massage and ultrasound to the areas affected in the low back. Traction was added after claimant had been in therapy for about a week. At the original consultation, Dr. Winston testified he had advised claimant to remain off work. Claimant was seen again by Dr. Winston on March 28, 1983. Claimant was continuing to experience pain in the low back and right leg. Dr. Winston found that he had a positive straight leg raising on the right; that is, when claimant would straighten his leg out he would get sciatic radiation of pain down the leg. Claimant also complained of subjective numbness on the top of the foot and, Dr. Winston detected a mild weakness in the movement of the big toe up toward the knee. Dr. Winston recommended a computerized scan be done of the low back. The results of the scan indicated a bulging disc with questionable minimal herniation on the right side at L4-5 causing some narrowing of the intervertebral foramen at that level and extending slightly lateral. (Winston Dep. 9-11) Dr. Winston determined that claimant had a herniated lumbar disc at the L4-5 level on the right side. A myelogram was performed and results were compatible with a herniated disc at the L4-5 level. Claimant was initially treated with an enzyme injection. Dr. Winston testified that claimant at first seemed to show improvement and claimant was told to slowly increase his activities. Dr. Winston continued to see claimant in followup until May 26, 1983 when Dr. Winston noted claimant had a return of the straight leg raising abnormality The CT scan was repeated and the results indicated little change in claimant's condition. (Winston Dep., pp. 12-17)

Claimant was rehospitalized and a second myelography was performed. The myelography showed an abnormality of the nerve root on the right side and there was a question of some abnormality on the left side at the same level. On June 23, 1983 surgery was performed and the disc was removed. Claimant was seen approximately four weeks after surgery and was overall improved. Dr. Winston commented that claimant had some slight left leg pain but that he was better than before. Claimant was taking no medications. Dr. Winston testified that he told claimant to continue to take it easy and not to overdo it. Claimant was allowed to return to driving and to ride his bicycle to increase his leg strength. Claimant continued to be seen in followup by Dr. Winston. When he was seen on November 10, 1983 claimant's gait was normal but he still had some generalized back and leg pain down to the knee which seemed to be on both sides, one side one time and one side the next time. Dr. Winston testified that claimant expressed concern about returning to work to soon. Dr. Winston suggested claimant continue with the same regimen of exercise and advised claimant he would have to try to return to work or undergo some type of rehabilitation with respect to finding something else to do around the first of the year. (Winston Dep. pp. 16-19) Dr. Winston testified that he expected to see claimant for a followup examination in January of 1984, at which time he expected claimant to have reached maximum medical improvement. (Winston Dep., pp. 37-38, 40, 42-43) By agreement between the parties, Dr. Winston's report following that examination would be admitted into evidence. On February 9, 1984 Dr. Winston indicated that claimant's permanent partial impairment as a result of the March 1983 work injury was 15 percent. (Cl. Ex. 23) In this exhibit (which was a letter from claimant's attorney to Dr. Winston with four questions) Dr. Winston was asked if claimant had "recuperated to the maximum amount from this last injury and the surgery." No response to this question was indicated. This was subsequent to the followup examination in January 1984.

Dr. Winston testified that he had first treated claimant in June 1981 for a herniated lumbar disc. The disc lesion was located at L5-S1, left. Surgery was performed and in December of 1981 claimant was released to return to work. Dr. Winston testified that at that time, claimant had a permanent physical impairment of 15 percent. Dr. Winston again saw claimant in March of 1982. Claimant was experiencing back pain and some leg pain on the left side. The third time that Dr. Winston saw claimant was in March of 1983 following the work injury. (Winston Dep., pp. 5-8) Dr. Winston testified that he believed the March 1982 event represented an aggravation of the condition as it existed in December of 1981. However, the doctor believed that claimant's complaints in March of 1983 were the result of a new event rather than the results of his earlier surgery in 1981 or the episode in 1982. (Winston Dep., p. 40) On February 24, 1984 defendants submitted a Supplemental Medical Report in which Dr. Winston indicates that claimant's permanent physical disability as a result of the December 1981 surgery was seven percent. (This is a change from his earlier testimony) Dr. Winston indicated that the 15 percent permanent physical disability mentioned in his February 1984 report was due exclusively to the injury occurring since 1981. The doctor assigned the figure of 22 percent as claimant's total permanent physical disability as a result of both injuries.

Defendants' exhibit A contains a series of correspondence exchanged between claimant and defendants' counsel in April through August of 1983. In June of 1983, defendants indicated that they were authorizing only the myelogram and diagnostic tests which they wanted to have independently interpreted. On August 11, 1983 defendants notified claimant that the lumbar laminectomy had not been authorized, and that defendants would not be responsible for either Dr. Winston's bills after June 21 or the Mercy Hospital bill.

Defendants' supplemental claim activity report filed June 24, 1983 indicates claimant has received disability payments since March 8, 1983 at a weekly rate of $355.10.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 8, 1983 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).

Iowa Code 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 and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

Iowa Code 85.34 states in relevant part:

> 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 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 empoyee 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.

It is only at the point at which a disability can be determined that a disability award can be made. Until such time, healing period benefits are awarded the injured worker. Thomas v. William Knudson & Sons, Inc., 349 N.W.2d 124 (Iowa App. 1984)

ANALYSIS

The record supports a finding that claimant's disability is causally related to the March 8, 1983 work injury. There is no evidence that prior to March 8, 1983 claimant was restricted in his ability to perform his work tasks. Following the March 1983 injury, claimant underwent treatment for pain in the lumbar area which resulted in surgery for a herniated lumbar disc at the L4-5 level on the right side.

At the close of the hearing record, it had been determined by Dr. Winston that claimant had a disability of 22 percent, 15 percent of which was a result of the March 8, 1983 work injury. Although, Dr. Winston did not indicate in his brief notation of February 9, 1984 whether claimant had reached maximum medical recovery, the only inference to be drawn from the medical testimony is that the earlier anticipated date when claimant would reach maximum improvement had been met. Therefore, the deputy's determination of a running award of healing period benefits is inappropriate. Dr. Winston gave a disability rating to claimant after the examination of January 19, 1984 and the healing period will be deemed terminated as was anticipated at that time.

With regard to the issue of medical expenses, Dr. Winston, a board certified neurosurgeon, has testified that in his professional opinion surgery was indicated when the enzyme injection failed to achieve to relief for the pain and restricted movement claimant continued to experience.

While defendants have contended that no surgical treatment was authorized for claimant in June 1983, they have failed to show that alternative medical care was being offered during this period. Necessary medical care for an injured worker may not be expected to be held in abeyance while the employer and insurance carrier contemplate a course of action. Defendants are required to tender reasonable medical services under Iowa Code section 85.27 Included in any construction of reasonable is the aspect of timeliness. Dr. Winston treated claimant on a continuing basis following a March 1983 injury. By early May, defendants had received Dr. Winston's reports and had expressed the intention of arranging for treatment by an authorized physician. There is no indication that when surgery was performed by Dr. Winston on June 23 defendants had yet offered alternative treatment to claimant. The deputy was correct in finding the medical costs incurred in claimant's treatment chargeable to defendants.

FINDINGS OF FACT

WHEREFORE, it is found:

1. On March 8, 1983 claimant sustained a work-related injury to the lower back.

2. As a result of the industrial injury, claimant incurred related medical expenses.

3. Defendants did not offer prompt medical services for the treatment of claimant's injury.

4. The medical expenses claimant incurred are compensable.

5. Claimant has incurred a permanent impairment as a result of the work injury.

6. Claimant reached maximum medical recovery from the March 8, 1983 injury on January 19, 1984.

7. Claimant's rate of compensation is three hundred fifty-five and 10/100 dollars ($355.10) per week.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That claimant has sustained his burden of showing that he has incurred a permanent partial disability as a result of the March 8, 1983 industrial injury.

That the healing period related to the injury of March 8, 1983 terminated January 19, 1984.

That costs of medical services incurred by claimant in the treatment of the March 8, 1983 injury are chargeable to defendants.

The proposed decision of the deputy is modified and remanded.

ORDER

THEREFORE, it is ordered:

That commencing on March 8, 1983 the defendants pay the claimant weekly compensation at the rate of three hundred fifty-five and 10/100 dollars ($355.10) per week for a healing period from March 8, 1983 through January 19, 1984.

The defendants are also ordered to pay the following:

Mercy Hospital Medical Center	$ 174.95
Mercy Hospital Medical Center	851.99
Mercy Hospital Medical Center	3,315.17
Iowa Lutheran Hospital	192.00
Iowa Methodist Medical Center	136.30
Medical Center Anesthesiologists, P.D.	425.00
Neuro-Associates, P.C.	2,537.00
Urbandale Pharmacy	85.84
Uptown Pharmacy	20.20
Ina Helweg, Physical Therapist	680.00

Defendants are further ordered to pay claimant mileage for transportation costs incurred in treatment at the rate of twenty-four cents ($.24) per mile.

Past due benefits are payable in a lump sum together with statutory interest.

Costs are charged to the defendants and shall include the cost of a transcription of the medical evidentiary deposition of Dr. Stuart R. Winston, together with an expert witness fee of one hundred fifty and 00/100 dollars ($150.00) payable to him as contemplated by section 622.72, Code of Iowa, and the costs of two medical reports as contemplated by Rule 500-4.33.

The case is remanded for determination of the degree of industrial disability attributable to the injury of March 8, 1983.

Signed and filed this 24 day of December, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RALPH R. GILTMIER,	:	
Claimant,	:	File No. 681096
vs.	:	R E V I E W -
ALUMINUM COMPANY OF AMERICA,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
OCT 15 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the Bicentennial Building in Davenport, Iowa, on December 22, 1983 at which time the record was considered closed.

A review of the commissioner's file reveals that an employers first report of injury was filed on September 16, 1981. A memorandum of agreement calling for the payment of $272.50 in weekly compensation was filed on October 21, 1981. A final report was filed at the hearing indicating that claimant had been paid 39 3/7 weeks of weekly compensation. The record consists of the testimony of the claimant, Larry Delf and S. Louis Casta, M.D.; the deposition of Richard Ripperger, M.D.; and exhbits 1 through 22.

ISSUES

The issues for determination in this matter are:

1) Whether there is a causal connection between the injury and the disability; and

2) The nature and extent of any permanent partial disability.

STATEMENT OF THE EVIDENCE

Claimant was employed at Alcoa for about four years prior to his injury. Claimant testified that he started at Alcoa in February 1980. His duties were described as being a "helper." Claimant testified that the job involved quite a bit of lifting and quite commonly the claimant lifted weights from 75 to 100 pounds.

Prior to his employment by Alcoa, claimant was a delivery driver for Globe Machine for about six months. He was a loading dock worker, a delivery driver for Montgomery Ward, worked in a printing establishment and was employed by American Motors for the years 1974 and 1975. Claimant testified that he had both complaints relating to back pain with the previous employers. Prior to his employment with Alcoa, claimant testified that he had a very complete physical examination.

In May of 1981 claimant testified he was working the 3:00 p.m. to 11:00 p.m. shift as a shear helper in the foil mill. On May 21, 1981 claimant testified that he had about 200 pounds of metal drop into his arms. Claimant heard a pop in his back, but finished the day. On May 22, 1981 claimant testified that he was unable to get out of bed. He testified that he couldn't move and he called his employer's place of business and the plant physician, E. M. Stimac, M.D, wanted to check claimant's physical condition. The notes of Dr. Stimac indicate that claimant reported to Dr. Stimac that he was not doing anything unusual, did not fall or slip, did not strike anything and was doing his normal job when he hurt his back. No specific injury was noted. Claimant testified that he was told to see his plant physician, Paul H. Beckman, M.D. He saw claimant and reported that there was evidence of acute lumbosacral strain with no evidence of disc involvement. Dr. Beckman advised claimant to partake in bed rest, use heat and take muscle relaxants. Claimant continued to see Dr. Beckman through the month of June 1981. On June 29, 1981 claimant's symptoms were improved, but he did complain of hip pain. X-rays of the hip and pelvis were negative except for transitional lumbosacral body with partial sacralization of the transverse process of the left and moderate sclorosis. Claimant was to return to work at that time and testified that he continued to be on and off work during 1981. The record indicates that claimant was off from September 14, 1981 through October 6, 1981 and from November 9, 1981 through January 6, 1982.

On September 1, 1981 claimant was treated by Richard Ripperger, M.D., a Davenport orthopedist. Physical examination and x-rays revealed that the claimant had a mild restriction of forward flexion of the back, had tenderness over the lumbosacral region posteriorally and into the right hip region posteriorally. Claimant also had tenderness over the back of the greater trochantar near the hip. The x-rays showed four lumbar vertebrae with a sacralization of the fifth lumbar vertebra. Dr. Ripperger stated that this was a congenital problem. However, he thought that claimant was suffering from a chronic sprain of the ligaments about the lumbosacral joint and also some tendonitis of the piriformis tendon. Claimant, upon his return in early 1982, worked about half of 1982. He was off most of 1983.

Claimant was seen by Eugene Collins, M.D., in May 1982 (exhibit 8). Neurological examination revealed a loss of lumbar lordosis with a mild decreased range of motion of the back, especially in flexion. There was mild paravertebral muscle spasm. There was point tenderness over the right hip region. Straight leg raising was negative in both the sitting and lying position. There was no atrophy for fasciculation noted. Dr. Collins has stated that it was originally thought that the claimant's symptoms were most compatible with a chronic lumbosacral sprain. However, the claimant did have a decreased ankle jerk on the right side and pain down the right leg which Dr. Collins thought could represent an S-1 radiculopathy. Claimant was admitted to Mercy Hospital in Davenport where a lumbar myelogram was conducted on May 10, 1982. There was a sacralization of the fifth lumbar segment. There was an equivocal defect on the right side at the segment between the last lumbar segment and the first sacral segment (transitional segment). A CT scan of the lumbar spine was conducted on May 12, 1982 which was thought as being compatible with a herniated disc.

Claimant was seen by Steven R. Jarrett, M.D., a specialist in rehabilitation medicine, who commenced a program of therapy in the late summer of 1982. An examination on August 27, 1982 revealed that the claimant held himself very rigidly, but that he was able to flex forward fully. He complained of pain on palpation in the low back. He had good extension in lateral flexion. Neurologically, he had a more easily fatigable right ankle than left ankle jerk as previously reported. He complained on straight leg raising on the right at 75° and on the left at 80°. Dr. Jarrett suggested psychometric studies including and MMPI.

Claimant was referred to Robert W. Milas, M.D., a neurosurgeon. He was seen by him on September 24, 1982. Dr. Milas reviewed the myelogram and the CT scan and felt them to be relatively unremarkable. Claimant was found to have sacralization of the fifth lumbar vertebra. Dr. Milas noted that claimant has attempted to return to work, but that the discomfort increases and becomes disabling after he does return to work. Straight leg raising was limited to 80° bilaterally. The claimant demonstrated moderate limitation of lumbar motion in all segments and had no significant lumbar paravertebral muscle spasm or tenderness. Dr. Milas' impression at that time was that the claimant had lumbar pain of unknown etiology. At present, he could find no evidence of radiculopathy. He ordered electrodiagnostic studies. On October 14, 1982 Dr. Milas saw claimant again and a report made the following day indicates that the electrodiagnostic studies were normal. He did not feel that epidural steroid injections to be particularly beneficial to the claimant. Dr. Milas noted that the claimant was relatively asymptomatic, but extremely apprehensive of returning to work. Dr. Milas noted that claimant had sacralization of the lumbar vertebra in which the condition had shown some incidents of lumbar discomfort associated with manual labor in the literature. Dr. Milas does not feel there is any lasting disability.

At the request of the accident and sickness benefit carrier, claimant was seen by William D. Reinwein, M.D., a Moline orthopedic surgeon. Symptoms were described as continuous pain with frequent attacks of exacerbation with pain extending to the right leg associated with the feeling of numbness. There also was a limp which did not respond to treatment the claimant had received. Dr. Reinwein found the objective findings were characterized by paravertebral spasm, restriction of movement and extension and flexion of the pain, weakness in the muscles inervated by the fifth lumbar nerve root, and loss of the ankle reflex on the right side. He also found positive straight leg raising on the right as well as a positive Fabere test and Lasegue test. Further objective findings included a defect in the myelogram on the right side at the segment between the last lumbar and the first sacral vertebrae. The CT scan was compatible with a herniated disc at that level. Dr. Reinwein advised claimant of the surgical treatment involved at that level. Diagnosis was of a herniated disc at the L4, L5 on the right and Dr. Reinwein felt that this was consistent with the type of accident (work accident in May 1981) described by the claimant. Dr. Reinwein stated that this definitely was work related. Claimant worked part of January and part of February 1983 and had a TENS unit which was prescribed for him by Dr. Jarrett. Dr. Ripperger indicated that claimant had an eleven percent permanent partial impairment of the body as a whole and that the impairment was related to the injury of May 19, 1981 (deposition pp. 16-17). Dr. Ripperger also indicates that the claimant's preexisting condition was activated by the injury as described. The claimant testified that at the time of hearing he could only walk about half an hour. He could occasionally lift his grandson. He complained of pain down both legs.

He received his high school degree by GED and is forty years of age. He went to high school at a vocational school and specialized in printing. He testified that he has at all times been willing to take any work offered, but there has been none offered to him. Claimant did take the MMPI. His prior employment was outlined above, and he testified that he had done spot welding at American Motors. He testified that he had been on sickness and accident benefits at the rate of $247.00 per week for all time lost. Claimant testified that he talked to Dr. Casta, the plant physician, in March 1983 in order to find out what was wrong with his back.

On cross-examination, the claimant admitted that the weight restrictions which he was under were self-imposed. He testified as to the various times he has been off since the injury as has been documented above. Claimant testified that since February 1983 he has been doing some work around the house, cutting grass, working on his car or taking walks. He has not applied for other employment. He testified that he has been told he cannot do physical labor and he has not gone to any employment agency because he was awaiting to see what Alcoa could do. There was no prospect of additional training or schooling. Claimant testified that in the army he had an electronics training background and that training lasted sixteen weeks. Claimant also indicated he has seen a chiropractor. These reports were admitted into evidence. Claimant testified as regards to his employment which indicatd that the claimant had been a grounds keeper at a golf course, a laborer for various concerns, a shipping clerk and a plant manager for a magazine company, a warehouseman, an employee at American Motors, a warehousing job and a delivery driver.

Larry Delf, safety and health supervisor at Alcoa, testified that he makes the workers' compensation decisions at Alcoa. This witness testified that the claimant was placed on sickness and accident insurance and that the case was considered as noncompensable originally because there was no trauma involved. The claimant has low seniority and due to the plant and union rules he testified that claimant's prospects of placement were limited. The witness indicated that he played a part in claimant's job assignments on each of his seven return-to-work dates since the injury. It would appear that claimant's activities were limited to work in the foil mill. The witness testified that each time claimant had returned to work he could perform with increasing discomfort and then would start the same cycle over again. The witness testified that it was difficult to move claimant from one department to another because of contracted union matters. If claimant were removed out of the foil mill to get him in to the lightest work possible, claimant would have immediately been laid off because of the slowdown which affected the plant employment as a whole.

S. Louis Casta, M.D., is one of the plant physicians at Alcoa. He explained the various medical records which were received into evidence and the procedures which were present for the documentation of medical information.

APPLICABLE LAW

1. Sections 85.3, 85.20 and 86.17 confer jurisdiction on 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).

2. The claimant has the burden of proving by a preponderance of the evidence that the injury of May 21, 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).

3. 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).

4. 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).

5. Section 85.38, Code of Iowa, sets forth the method of crediting an employer for benefits paid pursuant to a nonoccupational plan in a workers' compensation case.

ANALYSIS

Based on the foregoing principles, it is found that claimant has established his claim by a preponderance of the evidence. By the filing of a memorandum of agreement, I must find that claimant was employed by Alcoa and that he sustained an injury arising out of and in the course of his employment. The evidence supports a finding that claimant aggravated a preexisting condition as was shown by the evidence given us by Dr. Ripperger. Further, the evidence given us by the other practitioners reveals that all agree as to the work-related nature of claimant's condition. A preemployment physical reveals the sacralization of the fifth lumbar segment. The history reveals no prior back problems. The evidence in this case indicates to me that claimant worked steadily before the injury and has not been awfully successful since. The medical evidence, coupled with the lay evidence, indicates to me that the injury is permanent.

Claimant was 40 years of age at time of hearing and held a position of a laborer for most of his working life. His education in army electronics was in the early 1960's, and one suspects that claimant's knowledge in this field has been eroded by memory and surpassed by technology. Although there was some evidence to indicate that claimant might not be well motivated, it would appear that claimant has made repeated efforts to return to work and has failed. At this point he shows a natural apprehension to continue a cycle that appears to have started. He was in obvious pain at the hearing. Rehabilitation would appear to be in order. Since a specific plan of rehabilitation has not been presented, a payment for rehabilitation will not be awarded. An order may be issued later regarding this.

Considering claimant's age, education, motivation and the severity of his injury, it is found that claimant is disabled to the extent of 50 percent of the body as a whole.

The parties stipulated that claimant's entitlement to healing period ended April 11, 1983, a date which coincides with Dr. Ripperger's examination when permanency was assigned. Defendants are to receive credit for amounts paid in sickness and accident benefits pursuant to section 85.38, Code of Iowa.

FINDINGS OF FACT

1. Claimant was employed by Alcoa on May 21, 1981.

2. Claimant hurt his back while working on May 21, 1981.

3. When claimant was hurt he aggravated a preexisting back condition.

4. Defendant filed a memorandum of agreement concerning a May 21, 1981 injury.

5. Claimant sustained permanent partial disability because of the injury to his back on May 21, 1981.

6. Claimant is permanently and partially disabled to the extent of fifty percent (50%) of the body as a whole because of the injury of May 21, 1981.

7. Claimant has been receiving benefits from a plan covering nonoccupational conditions.

8. Defendant contributed to this plan in whole or in part.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant was employed by defendant on May 21, 1981.

3. Claimant sustained an injury arising out of and in the course of employment on May 21, 1981.

4. Defendant will be ordered to pay unto claimant 250 weeks of permanent partial disability compensation at the rate of two hundred seventy-two and 30/100 dollars ($272.30) per week.

5. Defendants will receive credit for amounts paid pursuant to a sickness and accident plan to which it contributed.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant two hundred fifty (250) weeks of permanent partial disability compensation at the rate of two hundred seventy-two and 30/100 dollars ($272.30) per week.

Defendants will receive credit for amounts already paid pursuant to section 85.38, Code of Iowa.

Costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Interest will accrue on this award pusuant to section 85.30, Code of Iowa, from the date of this decision.

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

Signed and filed this 15th day of October, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLIFFORD H. GOODEN,	:	
	:	File No. 497561
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
CATERPILLAR TRACTOR COMPANY,	:	
	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED
NOV 30 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Cliffod Gooden, claimant, against Caterpillar Tractor Company, a self-insured employer, for the recovery of further benefits as the result of an injury on May 13, 1978. The case was heard before the undersigned on September 11, 1984 in Scott County at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant and Warren D. Snyder; claimant's exhibits 1, 2 and 3; and defendant's exhibits A through J.

Claimant's rate of compensation as indicated by the memorandum of agreement filed March 9, 1979 is $238.60.

ISSUES

The issues presented by the parties at the time of the pre-hearing and hearing in this matter are whether there is a causal relationship between the injury and the disability upon which the claim is based; whether the claimant is entitled to benefits for temporary total disability or healing period and permanent partial disability; and whether the claimant's action is barred by operation of §85.26(2), Code of Iowa.

EVIDENCE PRESENTED

Claimant, age 55, testified that he was last employed by the defendant on May 13, 1978. He stated that he has not worked since that time. Claimant attributed his inability to work to the injury of May 13, 1978.

Claimant stated that he received the injury of May 13, 1978 while he was working for the defendant as a machinist. He said it was about quitting time, around 11:30 p.m. He said he was putting away some tools when the lights were turned out. As he was walking quickly out of the work area, he struck his left knee against a motor. He said he went down to the floor in agonizing pain, but was able to get up and walk to the nurse's office. He stated that when he arrived at the nurse's office he had discovered that she had gone home, so he washed up and left. He advised that his knee was swelling considerably and he was in excruciating pain. After he returned home, he soaked his knee in epsom salt in an attempt to relieve the swelling and pain.

Claimant testified that on the following Monday his left knee and foot were swollen so he went to see the doctor. According to claimant the doctor placed him in the hospital for a period of one to two weeks. He was released from the hospital after the swelling had gone down. He contended that after the swelling went down he continued to suffer pain and had difficulty moving or bending his left knee.

Claimant stated that after about three weeks at home he was again placed in the hospital. This time he was admitted for one and a half to two weeks. He received shots and medication and again the swelling subsided. Claimant was diagnosed as having phlebitis in the lower left knee.

Claimant stated that in 1980 or 1981 he was operated on and the patella of the left knee was removed. He stated that he was last seen by the doctor in November of 1983 and was not at the time of the hearing receiving any type of medical treatment.

Claimant testified that since his injury he has been able to do a number of things when he feels well but that he has continuing problems with pain and swelling in the left knee. He stated he believed he could do some of the jobs at Caterpillar under appropriate restrictions. He stated that on occasion even sitting can cause him problems. Claimant said he has to climb stairs at home which causes him a lot of problems. He said he is presently looking for a one story home because of the difficulty in climbing the stairs.

On cross-examination, claimant disclosed that he received the original injury to his left knee in June 1971. He stated that a shelf swung down and struck his knee. He specifically denied that the injury occurred when he jumped off a platform and twisted his knee. He said that following this injury in 1971 he received an operation on his knee and that he experienced a considerable length of healing period following this injury. He stated that he was, in fact, off work for almost four years as a result of this injury. He explained the types of problems he had during this period of recovery.

Claimant denied that he received any treatment from Kenneth W. Blecher, M.D., on the following dates: May 18, 1978, June 9, 1978, June 18, 1978 and June 29, 1978. He stated that he did not know what he told Dr. Blecher about his injury. He specifically stated that he was not running at the time of his injury. He said he did not tell Dr. Blecher he was running, because it was not possible for him to run. Instead, claimant stated that he saw J. Govindaiah, M.D., immediately after the injury and was immediately placed in the hospital. He denied that there was any possibility that it was seven to eight months between the injury of May 13, 1978 and his first hospitalization. He stated that he was at a later time examined at the Mayo Clinic because he was having problems with his memory and shortness of breath. He said he was uncertain whether he was placed in the hospital again after his return from Mayo Clinic.

Claimant admitted that he had had some problem with his right knee but denied that he had ever received any treatment for the right knee. He advised that if he had ever received treatment or was examined because of his right knee that it was done so without his knowledge or consent. Claimant testified that he could not recall whether he returned to work in October 1978 and denied that he had received a release to return to work in October of 1978. He later recalled that he had in fact returned for five or six weeks.

Claimant testified that he is now receiving long term disability benefits from Caterpillar in the amount of $346 per month and receives social security disability benefits in the amount of $762 per month.

Warren D. Synder testified that he is employed at Caterpillar Tractor Company as an employee-benefits supervisor. He advised that the company's group insurance policy will not pay for a work-related injury. He said the defendant never pays group benefits and workers' compensation at the same time. He advised that the group insurance carrier had paid to the date of hearing a total of $30,871 to the claimant for long term disability benefits. He advised that claimant continues to receive long term disability benefits. He further stated that claimant's long term disability benefits will expire in 1989.

Claimant's exhibit 1 contains the medical records from Illina Hospital which concern the claimant. These records reflect that claimant was admitted on two occasions, the first being January 25, 1979. Claimant was admitted at that time with a diagnosis of (1) headache and dizziness of undetermined etiology, (2) arthritis of the left knee and (3) a possible pulmonary embolism and anxiety. The diagnosis of pulmonary embolism was discarded upon discharge. X-rays of the left knee showed some calcification in the soft tissue above the patella. The records of March 28, 1979 show that claimant was admitted for phlebitis of the left leg. A secondary diagnosis of patello-femoral arthritis of the left knee, obesity and a strong functional overlay was also made. Claimant's exhibit 3 is copies of progress notes from Drs. Jersild and Blecher. These documents were duplicated in defendant's exhibit B and will be discussed as part of defendant's exhibit B.

Defendant's exhibit A is a letter dated June 3, 1982 to Dr. J.C. Donahue from Patrick G. Campbell, M.D. Dr. Campbell saw the claimant for the purpose of conducting a psychiatric examination on May 18, 1982. He was first seen by the doctor on July 10, 1978 at which time the doctor concluded claimant was suffering from a conversion neurosis. According to Dr. Campbell the claimant improved and returned to work in July 1978. As a result of the May 18, 1982 examination, Dr. Campbell concluded that claimant was not suffering from a conversion disorder but rather that he was in obvious pursuit of material gain and avoidance of work.

Defendant's exhibit B contains a number of documents including a letter dated December 17, 1981 from Harold J. Jersild, M.D., to claimant's former attorney, John Stonebraker. In that letter Dr. Jersild states that it would be difficult to determine whether claimant's patellar problem was secondary to an injury. He indicates that it would be possible for the patellar problem to have been aggravated by an injury; however, he points out that claimant had a similar problem with his uninjured knee on the right. Defendant's exhibit B also contains the progress notes concerning claimant from the Moline Orthopedic Associates, Ltd. These notes cover a period from September 28, 1973 through December 3, 1981. The first progress note following the injury of May 13, 1978 is dated May 18, 1978 and signed by Dr. Blecher. Dr. Blecher indicated in this note that claimant bumped his knee about six days prior to the office visit. Dr. Blecher noted that x-rays of claimant's knee showed some minimal osteoarthritic changes with slight medial joint line narrowing and spurring of a mild nature. Dr. Blecher suspected that claimant had a flare-up of arthritis but doubted whether there was any bona fide injury. The next note from Dr. Blecher dated June 6, 1978 reveals that claimant returned with continued complaints of knee pain. At that time claimant had his knee wrapped in an ace bandage and would not let the doctor touch it because he claimed it was too sensitive. Claimant apparently complained that even his pants touching the knee caused pain, but the doctor could not understand how that could be true in light of the fact that the ace bandage was wrapped around it. Dr. Blecher again expressed doubt that claimant had received a bona fide injury and suggested that there was something else at work which was causing claimant's problems. In the progress note dated June 19, 1978 Dr. Blecher stated that he was unsure whether claimant was suffering from an emotional overlay or outright malingering. He again reiterated that he did not believe the problem was organic. In the progress note dated June 29, 1978 claimant explained to the doctor that he was actually running when he bumped his knee. Claimant was also complaining of emotional problems, sexual impotence and pain in the right knee. Dr. Blecher x-rayed claimant's right knee and found a little roughness over the surface of the patella but no other abnormalities. Dr. Blecher said he would allow the claimant to return to work whenever the claimant felt he could handle the job. Claimant saw Dr. Blecher again on August 29, 1978 complaining that his leg was swollen. Dr. Blecher's examination failed to reveal any significant swelling. Dr. Blecher was uncertain why claimant had come to see him.

The progress notes show that claimant was next seen by Dr. Blecher in April of 1979 following his admission to Illini Hospital for patellofemoral arthritis and phlebitis. Claimant had apparently been to Mayo Clinic where surgery was recommended to remove the patella on the left knee. Dr. Blecher referred claimant to Dr. Jersild because Blecher was unwilling to perform surgery on the claimant. Claimant was seen in May 1979 with swelling in the right knee. Treatment on the right knee continued through the month of May. The progress notes continue and reflect that claimant was seen periodically with continuing complaints of pain in his left knee. He was seen in November 1981 two weeks after a patellectomy and Trilot. At that time he had a hematoma in the knee which was aspirated by Dr. Jersild. Sutures were removed on November 10, 1981.

There are numerous letters from various doctors attached to the remainder of defendant's exhibit B. These outline claimant's condition and work restrictions. It should be noted that Dr. Blecher did not believe claimant was well motivated to return to work and that an individual with good determination to work could have performed the jobs which claimant said he could not do.

Finally, it should be noted that in the review-reopening decision filed July 30, 1974 which was admitted into evidence as defendant's exhibit E, deputy industrial commissioner Dennis L. Hanssen found that claimant's original injury of June 23, 1971 did not cause any permanent disability.

APPLICABLE LAW

Section 85.26(2), The Code, 1977, states:

> Any award for payments or agreement for settlement provided by section 86.13 for benefits under the workers' compensation or occupational disease law may, where the amount has not been commuted, be reviewed upon commencement of reopening proceedings by the employer or the employee within three years

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

Section 86.13, The Code, 1977, states in part:

> Any failure on the part of the employer or insurance carrier to file such memorandum of agreement with the industrial commissioner within thirty days after the payment of weekly compensation is begun shall stop the running of section 85.26 as of the date of the first such payment.

Section 85.33, The Code, 1977, 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.

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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 13, 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).

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.

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager, 253 Iowa 369, 112 N.W.2d 299; Ziegler 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. 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 sustained an injury arising out of and in the course of his employment on May 13, 1978. The injury was conclusively established by the filing of a memorandum of agreement on March 9, 1979. According to that memorandum, clamant was last paid compensation on October 6, 1978. If the employer had timely filed the memorandum, claimant's action would be barred by the statute of limitations in §85.26(2), The Code, 1977. The statute, however, was tolled until March 9, 1979 by operation of §86.13, The Code, 1977. Thus, the statute did not run until March 9, 1982. Claimant's petition which was filed December 10, 1981 was filed within the time limits thus established. Therefore, defendant's affirmative defense of the statute of limitations must fail.

Claimant was paid compensation benefits for fifteen weeks and four days following his injury. Benefits were terminated when claimant returned to work. Claimant contended at the hearing that he could not recall having returned to work, then conceded he may have worked two weeks. In several respects, in addition to this one, claimant was a very poor historian. According to claimant's petition, he was off work from May 13, 1978 to August 30, 1978 and from December 13, 1978 to the present. Dr. Campbell's note states claimant returned to work in July 1978. The memorandum of agreement list two periods of disability; one from May 17, 1978 to July 10, 1978 and another from August 2, 1978 to August 10, 1978. Claimant was apparently paid fifteen weeks and four days of compensation. The record most strongly supports the conclusion that claimant was off for the period of time set forth in the memorandum and then again in December.

According to the claimant, he was placed in the hosital immediately after the injury. That is just not so. The record shows claimant's first hospitalization was in January 1979; almost nine months after the injury. The January 1979 and March 1979 hospitalizations were primarily for phlebitis. There is not even a suggestion by any physician or expert that the phlebitis was related to the injury. In fact, Dr. Blecher who examined claimant's knee within days after the May 13, 1978 injury had doubts that claimant received any injury. Claimant was of no help in clarifying this because he denied having seen Blecher during this time. Claimant also denied having told Dr. Blecher that he injured his knee while running. Dr. Blecher was not able to observe any definite injury and believed claimant was probably having a flare-up of arthritis, if anything.

The only statement of causation found in the evidence submitted that suggests relationship between claimant's numerous problems and any injury is the letter of Dr. Jersild dated December 17, 1981. He states that it is possible that claimant's problem with the patella in the left knee could have been aggravated by an injury. He does not specify any particular injury. Dr. Jersild also points out that claimant has a similar problem with the patella on the right knee. The evidence does not support a finding of causal relationship between the bump on the knee on May 13, 1978 and subsequent patellectomy in 1981. The greater weight of evidence would suggest there is no relationship.

Even if we assume a relationship exists, there is not a single opinion which suggests the patellectomy increased claimant's impairment to the left leg. Nothing suggests the injury of May 13, 1978 caused any permanent impairment. Claimant, at most, received a temporary disability and he has been fully compensated. He should take nothing further from these proceedings.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On May 13, 1978 claimant received an injury arising out of and in the course of his employment.

2. Claimant's injury resulted in a temporary total disability from May 17, 1978 to July 10, 1978 and from August 2, 1978 to August 10, 1978.

3. Claimant's time off work commencing in December 1978 was not related to the injury.

4. Claimant was paid compensation for all work missed as a result of the injury.

5. Defendant filed a memorandum of agreement on March 9, 1979.

6. The injury of May 13, 1978 did not result in a permanent disability.

7. The patellectomy performed on claimant's left knee in 1981 was not caused by the injury of May 13, 1978.

8. Claimant filed his petition on December 10, 1981.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant's action is not barred by the statute of limitations.

Claimant has failed to prove by a preonderance of the evidence that there is a causal relationship between his injury of May 13, 1978 and the disability upon which this claim is based.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing further from these proceedings.

The costs of this action are taxed to the defendant.

Signed and filed this 30th day of November, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOIS GROTE,	:	
Claimant,	:	File No. 731990
vs.	:	REVIEW -
WALL LAKE LOCKER,	:	REOPENING
Employer,	:	DECISION
and	:	FILED
IMT INSURANCE COMPANY,	:	OCT 31 1984
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Lois Grote, against her employer, Wall Lake Locker, and its insurance carrier, IMT Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury sustained in March 1983.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Fort Dodge, Iowa, on June 14, 1984. The record was considered fully submitted on that date.

A review of the industrial commissioner's file reveals a first report of injury was filed May 2, 1983.

The record in this case consists of the testimony of claimant, of claimant's husband, Leo Grote, of Robert Tiefenthaler, of Phyllis Tiefenthaler; of claimant's exhibits 1, 2, 4, 5, 6 and 7; and of defendants' exhibits A through E.

ISSUES

The issues for resolution 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 any such entitlement;

3) Whether claimant is entitled to payment of certain medical expenses; and

4) Claimant's rate of weekly compensation.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's medical costs were fair and reasonable.

Claimant, Lois Grote, testified in her own behalf. Claimant is 39 years old, married, and has three children, ages 18, 17, and 11. Claimant has graduated from high school and gave a work history as a drugstore clerk, a Tupperware salesperson, an in-home babysitter, and a homemaker prior to beginning work with Wall Lake Locker in October 1982.

Claimant explained that the locker slaughters and butchers meat for its customers. Claimant initially "deboned" meat and later rendered lard and wrapped meat. She reported all work is performed while standing and without bending over.

Claimant stated she first experienced back pain while lifting twenty pound trays of hamburger up to the grinder. She relayed that this involved a twisting maneuver which produced pain and soreness in her lower back. Claimant explained that she did not see a doctor initially because she felt her pain would go away.

Claimant described lifting trays into the sharp freeze. Claimant characterized the trays lifted as being either 2 feet x 1.5 feet or 3 feet x 2 feet long. She stated that one had to slide the trays from the table and then lift them approximately three to four inches to place them in the sharp freeze. Claimant stated this entailed a twisting maneuver since claimant had to either twist to open the door or to pick up a tray from the table. Claimant stated the full trays weighed approximately 60 pounds. Claimant reported she did this work from December 1982 to April 1983. She claimed her back bothered her continually when lifting. She described her pain as a sharp pain in the low back with radiation of pain and numbness into the left leg.

Claimant represented that she saw W. J. Nichols, D.O., in January 1983, but continued working. Defendants' objections to the testimony is overruled. Claimant reported she hurt her back in March 1983. She asserted that she was carrying a pile of round steaks and a knife to the boning table. She slipped and caught herself on the boning table. Claimant stated her back was definitely worse following this incident. She related that she first noticed pain in her left leg following the incident.

Claimant saw Dr. Nichols on April 5, 1983. X-rays were taken. Claimant reported that the doctor advised her to rest in bed for two weeks, take Clinerol, and not return to her employment. He directed her to John Connolly, M.D., whom she saw on April 11, 1983. Claimant began prescribed physical therapy at Manning General Hospital in June 1983 and was still receiving such at time of hearing. She reported Dr. Nichols prescribed the therapy.

Claimant explained a work return of May 16, 1983 thusly: She stated that the insurer ordered her to return to work that day. She had previously notified her employer that she could not continue her regular duties. She reported she was not given light duty work, but performed her regular duties. She began to experience back pain after several hours. She then left work. Claimant volunteered she offered to do telephoning for her employer, but was told little such work was available.

Claimant reported she mentioned her back pain to three coemployees on different occasions. Claimant characterized her health as good prior to beginning work at the locker. She stated she had been jogging up to two miles at least three to five times per week when she began work. She reported Dr. Connolly has advised her against running with her current difficulties.

Claimant asserted she always did her own housework before beginning work at the locker. She described her home as a large three bedroom house. She stated that after March 1983 she had difficulty doing most housework and found vacuuming, laundry, washing windows, hanging drapes and any upward lifting "impossible." Claimant is taking a "slim trim" exercise class for her back.

Claimant stated she has applied for jobs as a teacher's aide and as a grocery delicatessen worker since her injury. Claimant expressed her belief that she could not work full-time as a delicatessen worker. She reported she is currently employed by the City of Wall Lake to clean and stock its community building. Claimant earns $3.45 per hour and works only after the building is used. She reported earning $45.00 in April and $35.00 in May 1984. Claimant reported she has no advanced training, but stated she would undergo such if necessary.

Claimant identified claimant's exhibit 1 as her wage records. She reported her hourly rate of pay as $3.75 and stated she was paid $138.32 for forty hours of work and four hours of overtime. She reported receiving a wage of $172.52 on January 10, 1983 and stated her checks during 1982 had approximately equalled that amount. Claimant reported that the restaurant bills of January 5, 1984 included in exhibit 2 cover meals eaten when she and her husband traveled to Omaha for examination by Dr. Connolly.

On cross-examination, claimant agreed she was not examined by Dr. Connolly on January 5, 1984, but rather was present for his deposition on that date. Claimant stated her husband was employed when she began work at the locker but subsequently was laid off until February or March 1983. She explained she had hoped to work only part time when employed, but that her hours varied from 44 to 22 hours per week.

Claimant reported that the work space at the locker was relatively small, but bigger than 11' x 22'. Claimant shared this work area with two to four coworkers. Claimant relayed that she did not tell Mr. Tiefenthaler or his wife about her back pain when she first noticed it. She explained that she "kept hoping it would go away and didn't think it would be a continuing problem." Claimant acknowledged that she told Mrs. Tiefenthaler she was going to the doctor on April 5, 1983 and stated she may have told her of her hysterectomy of February 1982. Claimant admitted she did not begin jogging until September 1982 as she was recuperating from her earlier surgery. She admitted reporting chest pains while jogging to Dr. Nichols in the fall of 1982. She stated the doctor referred her to a specialist for tests. Claimant continued to jog in the winter of 1982-83, however. Claimant reported she now walks two to three miles per day. On redirect examination, she explained that she is supposed to walk in order to keep her back limbered up.

Claimant stated she asked Dr. Nichols to prepare his letter of April 5, 1983 in order to explain to her boss why she would not be working. Claimant stated that in discussing her back problem with her boss, she asked him about workers' compensation. She reported he replied "as long as you got it here." She reported she then replied "you mean workers' compensation" and he stated "no, the injury here" to which she replied "I don't know." She then explained that in her final response, she was referring to workers' compensation insurance and not to her injury. Claimant acknowledged that on insurance forms of April 12, 1983 she checked "no" in response to a query as to whether her condition was employment-related.

Claimant confirmed that she did not call, cry out, or tell anyone about the March 1983 incident. She reported no one witnessed the incident. Claimant agreed that it is possible to slide the meat basket into the open sharp freeze door when there is room available to do so. She stated there would not be enough room if a second worker was in the area or if one were working with two meat baskets. She acknowledged that in sliding the baskets in only one end of the basket need be lifted. She disbelieved that full baskets weigh 40 to 45 pounds; she stated 50 pounds of hamburger would be placed in the large tray.

Claimant stated she never received the work evaluation, which is Connolly deposition exhibit 2, in her correspondence with her IMT claims adjuster. Claimant admitted she has not sought vocational rehabilitation.

On redirect examination, claimant stated she knows of no other available jobs but for those for which she has applied and acknowledged seeking help with her housework for six to eight weeks following her hysterectomy. She denied having problems with her housework after that time.

Leo Grote, claimant's husband of twenty years, testified in her behalf. He corroborated claimant's testimony as to her physical condition and abilities both before and after beginning work at the locker. He reported that by January 1983 his wife was "slowing down" and by March 1983 she could no longer turn around in bed. He testified that claimant told him she had slipped while carrying a meat tray in March 1983. On cross-examination, the witness stated that his wife reported the tray incident to him in late March or early April 1983. He recollected her telling him that "it hurt" and that the floor was all greasy.

Defendants called Robert Tiefenthaler, co-owner of the Wall Lake Locker, to testify in their behalf. The witness reported he works in the business and is in the locker most work days. He runs the band saw, bones, and waits on customers. He stated he usually has three or four employees who work in the same work room and converse in the course of their work. He stated that the wire meat baskets used in the business are 12 inches by 18 inches and 17.5 inches by 22.5 inches long. He opined that a full large basket weighs 65 pounds at most and weighs 50 to 55 pounds on the average. He stated the ledge into the sharp freeze is two inches tall. He reported that he instructs employees to slide the basket across the table; lift one side up; and slide the basket into the sharp freeze. He testified he tells employees to "holler" if they need help and that someone is always available to help. He relayed that claimant never asked to be assigned to a job requiring less standing and lifting.

The witness stated he learned claimant was going to see a doctor April 4, 1983. He reported that on April 5, 1983, claimant came to the locker and handed him a letter that was "something to the effect of exhibit 5." Claimant then said she needed time off. He testified claimant asked him "what do you think about workers' compensation" and he asked her if she was injured at the locker. He reported claimant said "I don't know." The witness stated he agreed to provide claimant with light duty work as requested by his insurer. He reported that work involving less than twenty pounds of lifting was available and that generally less than ten pounds need be lifted. He acknowledged that meat cutting requires standing and that little seated work is available in a locker. He reported claimant returned to work and was paid for the two hours of work she stated she had worked before leaving. The witness identified exhibit 5 as a free hand drawing of the locker work room and described the room as a 11 feet by 22 feet space.

On cross-examination, the witness agreed that at deposition he had said the large trays were 23 inches long but opined that the standard tray was 25.5 inches long. He characterized claimant as a good worker who, to his knowledge, had not had physical problems when she began work.

Phyllis Tiefenthaler, who owns the locker with her husband, Robert, next testified for defendants. The witness stated she worked with claimant at the locker, but that claimant did not tell her she had back pain. The witness reported she was present during claimant's conversation with Mr. Tiefenthaler on April 5, 1983. She reiterated her husband's account of that conversation, but reported claimant stating "I can't honestly say where I got hurt." The witness reported that locker employees have fifteen minute breaks at 10:00 a.m. and 3:30 p.m. She stated she was aware of the light duty restrictions on claimant and reported she and her husband had intended to provide claimant work within the restrictions.

Claimant was called as a rebuttal witness. Claimant reported she spoke with the Tiefenthalers at noon on April 5. She stated she was referring to whether her injury was covered by workers' compensation when she said "I don't know." She reported that she did not know when she was injured but did know that her injury occurred at the locker.

Claimant represented that the light duty restrictions were never discussed with her. She reported that the insurer's adjuster simply told her she had to return to work. Claimant stated she returned and tried to "bone out" a hamburger cow. She reported that the Tiefenthalers were not in the locker but that their son who was present told her to do what she could and to leave if she could not continue to work. Claimant reported she left but telephoned the following day to ask for telephone work. Defendants' objection to this testimony is overruled pursuant to section 17A.14 and the evidence is admitted for whatever probative value it may have. On cross-examination, claimant stated she first saw the work restriction sheet at August 1983 deposition.

Claimant's exhibit 1 is claimant's 1982 W-2 wage and tax statement which reports gross earnings from the locker of $1,300.18 and wage statements from January 10, 1983 through April 4, 1983 which report the following earnings:

	Regular Work		Overtime Work		Gross Wage
1-10-83	40 hrs at	$150.00	4 hrs at	$22.52	$172.52
1-17-83	40 hrs at	150.00	5 hrs at	28.15	178.15
1-25-83	38.5 hrs at	148.13			148.13
1-31-83	36.25 hrs at	135.94			135.94
2-07-83	33.5 hrs at	125.62			125.62
2-15-83	34.5 hrs at	124.38			129.38
2-21-83	30 hrs at	112.50			112.50
2-28-83	26 hrs at	97.50			97.50
3-08-83	22 hrs at	82.50			82.50
3-14-83	30 hrs at	112.50			112.50
3-21-83	22 hrs at	82.50			82.50
3-29-83	22.5 hrs at	84.38			84.38
4-04-83	20.5 hrs at	76.88			76.88

Claimant's exhibit 2 is certain receipts and medical cost statements. Defendants' objections to the Happy Chef restaurant receipts dated January 5, 1984 are sustained. Defendants' objections to the statements of Manning General Hospital for physical therapy are overruled. Claimant's exhibit 4 is a copy of claimant's and her husband's 1982 federal income tax return reporting claimant's income as $1,300 from wages, salaries and other employee compensation.

Claimant's exhibit 5 is an April 22, 1983 report of W. J. Nichols, D.O., which states:

> The patient was first seen by me for a low back complaint on April 5, 1983, in the outpatient department of the Manning General Hospital. An x-ray done at that time has a copy of the report enclosed. The patient stated that the condition had gradually come on during the past six months, it had become more severe in the past two weeks. The patient stated that the pain was related to her work at a meat packing plant which required a lot of lifting and standing her feet on concrete. The patient stated that occasionally the pain did radiate into her left buttock and down her left thigh. She had never been treated at my office previously for a low back problem, and having known her for some time, the patient is a non-complainer and a good worker....The patient is now on Clinoril 200mgs in the hopes that this may help the difficulty. The future treatment of the patient would include rest from any type of work at this time, as well as the above mentioned medication. In the future if the patient does not improve, then surgery may be contemplated.

Claimant's exhibit 6 is a letter of Dr. Nichols of April 5, 1983 to Mr. Tiefenthaler which states claimant is suffering from intervertebral disc disease. Claimant's exhibit 7 is an April

22, 1983 letter of Dr. Nichols to Mr. Tiefenthaler recommending that claimant cease all physical work at that time.

Defendants' exhibit A is the deposition of John Connolly, M.D., an orthopedic surgeon. He reported that on initial examination of April 11, 1983 claimant complained of pain in the low back of six months duration which had gotten worse over the few weeks immediately previous to examination. Claimant related that her pain was related to her work and apparently reported she had to stand on concrete and lift meat trays weighing up to 80 pounds. The doctor reported that claimant did not describe any specific injury at work. The doctor reviewed x-rays taken by Dr. Nichols and reported these indicated claimant had some narrowing of the L5 lumbosacral disc space and some irregularity in the left sacroiliac region. The doctor stated that following his initial examination of claimant he felt she had evidence of disc disease with possibly some arthropathy or psoriasis that had been exacerbated by her recent activity. The doctor opined that the changes evidenced in claimant's x-rays "were consistent with more long-standing changes rather than acute injury." (p. 9 ll. 7-8) He later opined that claimant's spinal changes predated October 1982. The doctor opined that on May 5, 1983 claimant could return to work that was within the restrictions outlined in deposition exhibit 2.

The doctor opined that lifting 80 pounds on a frequent basis over many years could exacerbate symptoms from previous conditions and that such would most likely result from reinjury or damage to the joints of the spine and the ligaments and muscles. He expressed his belief that one should recover from such soft tissue damage within a matter of weeks. The doctor noted that jogging has been implicated as a cause of backache, but that he could not implicate claimant's hysterectomy as a likely cause of backache. Claimant's objection to this testimony is overruled. The doctor opined that mental stress may magnify back pain. It was noted that claimant's father had been ill in the fall and winter of 1982-83 and her husband was laid off during such time.

The doctor opined that claimant has a five percent body as a whole functional impairment because of her back difficulties. The doctor opined that as of the deposition date, January 5, 1984, claimant could perform the work described in deposition exhibit 2, the "return to work evaluation."

On cross-examination, the doctor agreed that in deposition exhibit 2, the higher figure represented the maximum number of hours claimant should engage in an activity and that claimant should stop an activity when she begins to experience pain and discomfort. The doctor also agreed that from the history claimant gave him, his impression was that claimant's problems resulted from an aggravation of a preexisting condition by her work. The doctor characterized claimant's problem as an exacerbation of the spine itself rather than as soft tissue damage. The doctor states as regards claimant's work restrictions:

> I probably said that she should avoid working at the type of job she had been describing and try lighter work. I didn't tell her she shouldn't work, I just said that type of work she was describing was going to give her problems.

Deposition exhibit 1 is an April 11, 1983 report of Dr. Connolly to Dr. Nichols. The report notes that x-rays show some changes in the left sacroiliac region along with narrowing of the L-5, S-1 disc space. The doctor opines "that the L-5-S-1 disc space changes are old and the symptoms may actually be of a psoratic arthopathy of the left sacroiliac joint."

Deposition exhibit 2 is a return-to-work evaluation for claimant dated May 5, 1983. The evaluation states that in an eight hour work day claimant can stand or walk 1-4 hours; can sit 1-3 hours; can lift 10-20 pounds frequently; can use hands for repetitive simple grasping, pushing and pulling, and fine manipulation; can use her feet for repetitive movement; and can bend or climb occasionally, but should not squat. Deposition exhibit 3 is a July 27, 1983 report of Dr. Connolly. Deposition exhibit 4 is a December 29, 1983 letter report of Connolly which states in part:

> When I examined her, she was walking rather stiffly and had limited forward flexion in the lumbosacral spine of 40° and limited lateral bending of 20°. She had no neurologic symptoms or signs of nerve root irritation. There is no sensory or motor deficit in her legs and straight leg raising was normal. X-rays do show the narrowing of the L-5/S-1 disc space with some sclerosis of the sacro-iliac joint.
>
> In reply to your specific inquires, I would think that this disc space narrowing might well explain her episodes of back pain and pain radiating occasionally down the left leg. Back pain is quite often associated with degenerative disc disease but not necessarily or inevitably so.
>
> From the history of the problem, Mrs. Grote felt the major symptoms came on in October, 1982, but the x-ray changes in the L-5/S-1 space seem to have predated that particular onset.
>
> The running or jogging activities are likely to aggravate back problems and in general should be avoided with disc disease.
>
> The restrictions I placed on her work activity were the result of the aggravation of her preexisting condition as a result of the work she was doing. At the present time she is unable to return to heavy work and I think she would be well advised to not plan on any kind of heavy lifting or laborious kinds of demands on her back in the future.

Defendants' exhibit B is the deposition of claimant. Claimant stated that in January or February she told Craig, a coworker, that her back was bothering her; that she told Shari, a second coworker, that her back was bothering her shortly after beginning work at the locker; and that she told Paul Jensen, a third coworker, that her back was bothering her. Claimant related that she told Dr. Nichols that she felt the lifting and standing at the locker were the source of her back problems. She admitted that she told neither Dr. Nichols nor Dr. Connolly's historian of a specific work incident. Claimant agreed that she did not tell her employer or her coworkers of the March 1983 incident, but believed she had mentioned it to Shari, who was no longer working at the locker. Claimant stated she had only seen the "work sheet" of Dr. Connolly indicating her work restrictions once. Claimant admitted she had checked "no" in response to a query as to the work relatedness of her condition on an April 12, 1983 health insurance form. She stated her answer to a similar question on an April 5, 1983 health insurance form was "blurry."

Deposition exhibit 1 is a copy of a handwritten statement of claimant of April 29, 1983. The statement does not describe a specific work incident. Deposition exhibit 2 is a Time Insurance Company claim form of April 5, 1983 for claimant. The form has the "yes" box totally blocked in and a possible pencil mark in the "no" box in response to the query "was condition related to employment? [sic]" Deposition exhibit 3 is a Time Insurance Company claim form of April 12, 1983 for claimant. The form has "no" checked in response to the query "was condition related to employment [sic]".

Defendants' exhibit C is a May 13, 1983 letter of K. D. Eilers of IMT Insurance Company to claimant with the return-to-work evaluation attached. The letter advises claimant that her employer will provide light duty work within the work evaluation guidelines and directs claimant to report to work as usual on Monday, May 16, 1983. The letter further advises claimant that Dr. Connolly is her treating physician and that as of May 13, 1983 charges by other physicians are not authorized. Defendant's exhibit D is a May 19, 1983 letter of Eilers to claimant advising claimant as follows:

> We have been advised, that our insured, Wall Lake Locker, has provided you with light duty work in accordance with the specifications set out by the authorized physician Dr. John Connolley [sic]. It is further our understanding that you have refused to return to this available work. Therefore, under the workers [sic] compensation law of Iowa, no additional benefits are due.

Cleamant's hearsay objections to exhbiits C and D are overruled pursuant to section 17A.14.

Defendants' exhibit E is a hand drawn diagram of the locker work room.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether a causal relationship exists between claimant's work injury and her current disability.

An award of benefits cannot stand on a showing of a mere possibility of causal connection between the injury and claimant's employment. An award can be sustained if the causal connection is not only possible, but fairly probable. Nellis v. Qualy, 237 Iowa 507, 21 N.W.2d 584 (1946).

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 1983 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).

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.

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 not established a causal relationship between her work at the locker and her current back problems. Claimant's testimony as to a specific work incident of March 1983 is not supported by the record as a whole. Claimant's husband does corroborate claimant's recital of such an event. Additional objective evidence substantiating its accuracy is lacking, however. Claimant told neither Dr. Nichols nor Dr. Connolly of a specific work incident. She did not report the incident to her employer or tell coemployees of such. This is particularly troubling since claimant testified that she told three coemployees of her back difficulties on separate occasions. It is not improbable then that she would also have discussed a specific work incident with them. Claimant did testify that she told another former employee of the incident, but that individual did not appear to substantiate claimant's recital. Claimant also did not mention the March 1983 incident in her statement of April 29, 1983.

Claimant's failure to tell her doctors of the incident is especially troubling. Claimant saw Dr. Nichols and Dr. Connolly following the alleged incident. In speaking to her doctors, claimant attributed her back problems to her work. She apparently described the work duties she performed and the physical demands made upon her. Indeed, claimant appears to have been a better than average medical historian. It is disconcerning that she told neither doctor of the alleged incident especially in light of the fact that she states she told her husband of such. One believes that when an intelligent, well spoken individual judges a work incident significant enough to discuss with their spouse or a friend, they will also judge such significant enough to discuss with their doctor, especially when describing back pain which they ascribe to their work. For like reasons, claimant's failure to describe the incident in her statement is troubling. She wrote the statement within a month of the supposed incident. The incident should have remained in claimant's recollection. Claimant knew the statement affected her right to compensation for her injury and that its accuracy was of utmost importance. Thus, her failure to mention a specific work incident in the statement also seriously undermines claimant's assertion that a specific incident occurred.

Since claimant has not established a specific work incident to which any current disability may be tied, we must discern whether claimant's ongoing duties at the locker created her current disability. The record belies such. Dr. Connolly, after reviewing claimant's x-rays, noted that they evidenced a disc disease more consistent with long standing changes rather than with any acute injury. He added that claimant's spinal changes--a narrowing of the L5-S1 disc spaces--predated October 1982, the time when claimant began work for the locker. The doctor opined that disc narrowing may result in back pain and radiating leg pain. The doctor later opined as well that claimant's symptoms may actually reveal a psoratic arthropathy of the left sacroiliac joint. Thus, claimant's condition existed prior to her work for the locker and claimant can only recover if she can establish that work aggravated her preexisting condition.

Whether claimant has a work aggravation is far from clear. The doctor agreed that jogging and stress could produce back pain. Claimant continued to jog while working at the locker. Her family's economic situation was unsettled for most of that time. Each of these could have contributed to claimant's back pain while working. On the other hand, Dr. Connolly opined that claimant had aggravated her preexisting condition in her work. He stated that claimant had told him she lifted 80 pounds on a frequent basis in her work. He explained that lifting that weight over a number of years could exacerbate symptoms from a previous condition such as claimant's. Unfortunately, as the doctor's explanation reveals, the record does not support the history on which the doctor based his opinion. The record indicates that claimant lifted 65 pounds at most. Claimant worked for the locker only six months. Claimant reported she had symptoms from the time she began work at the locker. Thus, it appears claimant's symptoms related to her prior disc disease and not to aggravation of that disease in the course of her work.

Likewise, claimant's current problems cannot be attributed to a disability resulting from aggravation of her preexisting condition by her work but must be attributed to her preexisting disc disease itself. It does appear that at one point, claimant's work increased the severity of her pain to the extent that she had to remain off work from April 5, 1983 to May 16, 1983 when she was to return to work under her doctor's restrictions. Claimant is entitled to temporary total disability for the time within this period when she could not work. (Claimant presented evidence suggesting her employer did not make a good faith effort to return her to work on that date. It is difficult to assess the credibility of this evidence since it lacks corroboration. Claimant's failure to establish the described, specific work incident, her history of lifting weight far in excess of that actually lifted, her inability to state whether she had checked a "yes" or "no" box on an insurance claim form, and discrepancies in her testimony at hearing and at deposition as to when and how often she had viewed Connolly deposition exhibit 2 all test the reliability of claimant's singular testimony.)

Claimant seeks payment of certain medical expenses. Section 85.27 requires the employer to furnish reasonable care and to allow reasonable transportation expenses for injuries compensable under this Act. Therefore, claimant is entitled to treatment of the temporary aggravation of her back condition, but not to payment of expenses related to treatment of the condition itself. Claimant's period of temporary aggravation ended May 16, 1983 when Dr. Connolly authorized her work return. Medical charges incurred beyond that date, therefore, are disallowed. Claimant is entitled to payment of a fee of $51.00 incurred at Manning General Hospital on April 5, 1983.

Claimant's rate of weekly compensation remains in dispute. The evidence establishes that claimant was paid by the hour. Section 85.36 controls computation of claimant's rate. Claimant's total earnings excluding premium or overtime pay in the thirteen consecutive weeks immediately preceding her injury were $1,516.58. When that same is divided by 13, claimant's average weekly earnings were $116.66. Claimant was married and apparently entitled to five exemptions under the Internal Revenue Code in March 1983. Claimant's rate, therefore, is $86.47.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant has degenerative disc disease with evidence of spinal changes at the L5-S1 disc space which predate October 1982.

Claimant's disc disease is more consistent with longstanding changes rather than with acute injury.

Claimant's symptoms are consistent with those of psoratic arthropathy of the left sacroiliac joint.

Claimant began work for the employer in October 1982 and continued working until April 5, 1983.

Claimant jogged throughout the winter 1982-1983.

Claimant was under stress due to family illness and financial problems throughout the winter 1982-1983.

Stess and jogging may result in back pain in susceptible individuals.

Claimant's duties at the locker involved lifting and standing but not to the degree claimant described to Dr. Connolly.

Dr. Connolly opined lifting 80 pounds over a number of years could aggravate a preexisting disc disease.

Claimant did not lift 80 pounds over a period of years in the course of her employment.

Claimant gave an inaccurate medical history to Dr. Connolly.

Claimant did not describe a specific work incident to her doctors, her employers, her coworkers, or on her statement of April 29, 1983.

Claimant had no specific work incident.

Claimant left work at the locker on April 5, 1983 as advised by her physician.

Dr. Connolly released claimant to return to work within restrictions on May 16, 1983.

Claimant suffered a temporary aggravation of her preexisting disc disease within the course of her employment from April 5, 1983 through May 15, 1983.

Claimant's current problems result from her preexisting disc disease itself and not from the temporary aggravation in the course of her employment.

Claimant's medical expense of fifty-one dollars ($51.00) at Manning General Hospital of April 5, 1983 is compensable.

Claimant's total earnings excluding premium or overtime pay in the thirteen (13) consecutive weeks immediately preceding her injury were one thousand five hundred sixteen and 58/100 dollars ($1,516.58).

Claimant was entitled to five (5) exemptions and was married. when she experienced her temporary aggravation.

Claimant's rate of weekly compensation is eighty-six and 47/100 dollars ($86.47).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to temporary total disability benefits from April 5, 1983 through May 15, 1983.

Claimant's rate of weekly compensation is eighty-six and 47/100 dollars ($86.47).

Claimant is entitled to payment of a medical charge of Manning General Hospital of April 5, 1983 in the amount of fifty-one dollars ($51.00).

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant temporary total disability benefits at the rate of eighty-six and 47/100 dollars ($86.47) from April 5, 1983 through May 15, 1983 with credit to defendants for any benefits previously paid.

Defendants pay claimant the medical expenses of Manning General Hospital of April 5, 1983 in the amount of fifty-one dollars ($51.00).

Defendants pay any accrued amounts in a lump sum.

Interest is to accrue in this award pursuant to Iowa Code section 85.30.

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

Defendants are to file a final report when this award is paid.

Signed and filed this 31th day of October, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RAYMOND L. HEMM,	:	
Claimant,	:	
vs.	:	File No. 636036
VAN BUREN COMMUNITY SCHOOL DISTRICT,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	FILED
EMPLOYERS MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Raymond L. Hemm, claimant, against Van Buren Community School District, employer, and Employers Mutual Casualty Company, insurance carrier, for benefits as a result of an injury on November 20, 1979. On June 22, 1983 this case was heard by the undersigned.

The record consists of the testimony of claimant, Jack Sapp, Hale Conlee, James T. Worrell, M.D., Gerald Bennett, Ed Looney, Richard Johnson and Edith Hemm; claimant's exhibits 1 through 9; and defendants' exhibits A through F.

ISSUES

The issues presented by the parties at the time of the prehearing 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 claimant's 85.27 benefits.

FACTS PRESENTED

Claimant testified that he started working for defendant employer as a custodian on August 1, 1971 and took over the position of head custodian on July 1, 1974. Claimant stated:

Q. In your job as head custodian, what responsibilities did you have during the 1977-1978 school year besides the other school centers? Besides Keosauqua was concerned?

A. To see that the custodians at the other centers was getting their--keeping their buildings in shape and to suggest things that needed to be done, as to any repair work that hadn't been taken care of that I thought should be taken care of.

Q. Did you do the district maintenance prior to July of 1978?

A. Yes.

Q. What kind of things would that involve?

A. Anything from putting a jade trap under a sink to repairing a stool or putting in steam pipes or electrical-carpenter work, whatever.

Q. Did you deliver the supplies to the other centers prior to July of 1978 also?

A. Yes.

Q. How often would you do that?

A. Once a week.

Claimant testified that in July of 1980 his health was excellent.

Claimant revealed that he also worked on the side driving school buses and mowing lawns and cemeteries. Claimant indicated that in July of 1978 his job responsibilities changed. Claimant stated:

Q. How did this new arrangement change what you did at the school?

A. Made my work load a lot heavier.

Q. How so?

A. This had been a 40 hour job. And I had been putting in approximately from 64 to 68 hours on an average. And it was just cut down to one man. Let's say 108 in a 40-hour week.

Q. In return, weren't you relieved of the district maintenance responsibilities?

A. Yes.

Q. How many hours had you been spending on that?

A. Well, on a yearly basis, like I say, eight to 12 hours a week average. Sometimes--it only happened two or three times a school year that I was gone for more than two days.

Claimant testified that after July of 1978 he no longer delivered supplies once a week but delivered them once a month with the use of a school bus. Claimant indicated this did not give him adequate time to check on the work of the other janitors. Claimant also complained because another janitor left the system and he was not replaced leaving claimant with more work to do. Claimant alluded to the fact that in January of 1979 another employee received a raise but he did not. Claimant said he got behind in his work because of the extra load but was constantly being told what he was doing wrong by Mr. Johnson. Claimant also stated:

Q. Did Mr. Johnson get mad at you at work?

A. No, not that I ever knew of.

Q. Did he complain about the job that you did or just the order that you did it in?

A. I didn't really realize that he was dissatisfied with my work on the whole of whatever I did except that one time or two times that he wasn't happy that I didn't drop that. Other times I thought I was satisfying Mr. Johnson okay.

Q. Did Mr. Johnson make you nervous?

A. The pressure did. Mr. Johnson did just constantly call for more than I could handle and he said it should be done on time. It did get to my nerves,

yes.

Q. Did you have deadlines on your job?

A. Yes.

Q. What kind of deadlines would you have on your job?

A. Getting the football field ready, track field ready in the spring. Getting the basketball court and gym all ready.

Q. Is this the kind of pressure you are telling me about that was bothering you?

A. No. We always had this same thing. Only had two men. And we'd equal it out between the two of us. One would want to work in the football field and the other fellow in the building doing his job. And sometimes I would go out and work a half-a-day in the football field and then he would.

Q. Were you working as hard as you can work?

A. Yes, we were.

Claimant said he was unable to keep up with the work but didn't tell anyone he needed any help. Claimant revealed that he asked that his wages not be raised but that he be relieved of some responsibility. Claimant indicated that the first written job evaluation he received was in May of 1979. Claimant revealed that he did not fill out time studies because he didn't have enough time to fill them out.

Claimant testified that one day he finished driving an activity school bus at 9:00 in the evening. The following morning he drove a substitute bus route. Claimant stated:

Q. After you got back from your substitute route the next morning, did you fill out the time sheet?

A. No.

Q. What did you do?

A. I don't remember for sure anymore, but I knew Mr. Johnson was going to be jumping on me because I hadn't filled it out. And my nerves was completely on edge. And I just remember walking in. And I think I got the mail and walked in, laid the keys on the desk. I think it was Ilene's desk. And Carol was standing there. It was the school board secretary. I said to Carol, "I'm sick. I am going home. I am going to go to the doctor. Here is these keys. Take care of them."

I thought at the time I would be gone a week or so because my nerves was completely gone. I thought I should leave before I hurt somebody because I felt it went that far. I was getting out of control.

A. Who did you think you were going to hurt?

Q. Anyone that would have confronted me with anything at that time.

Q. Did you think Mr. Johnson was going to confront you?

A. Yes.

Q. Were you afraid of hurting him?

A. Yes.

Q. Is that one of the reasons that you left?

A. Yes.

Q. What did you do after you left?

A. Went home, went to bed. I should have went to the doctor that day. I slept the rest of the day completely. And the next day I went to the doctor. He give me nerve medicine. Didn't seem to help a whole lot.

Q. Okay. Have you worked since that day when you quit at the school--left the school?

A. Not as an employee. I've done a little bit of work around the house, mowed a little. That's about the size of it.

Claimant revealed that the day he left the school his daughter who also worked for defendant employer as a night janitor received a termination notice.

Claimant testified that since November of 1979 he has problems with wearing out, fatigue, chest pains and lack of memory. Claimant opined that because of his lack of memory he would be unable to follow instructions.

Claimant testified that in March of 1979 he was involved in a motor vehicle accident while going to pick up the mail and as a result was hospitalized for ten days. Claimant stated that his doctor after releasing him from the hospital instructed him to take two weeks of work off but he returned to work.

Claimant disclosed that since November of 1979 he has not tried to work at any forty hour week jobs but has mowed lawns. Claimant stated he would like to be able to work.

On cross-examination, claimant stated he couldn't remember what doctors he has seen or what he talked about. Claimant also disclosed that after July of 1978 he had no responsibilities for supervising the other janitors, but that the principals became responsible for their supervisors.

In his deposition claimant disclosed that in 1979 when he was made head custodian he was driving a school bus full-time and did so until 1977 when he took activity routes. Claimant stated:

Q. What were your duties during the school year 1978-1979?

A. Well, it was to sweep the halls twice a day, keep lunch, the lunch hour duty so if someone spilled anything to mop it up, and clean all the restrooms at least once a day. Mow five acres of grass outside. Take care of the football field in football season. Take care of the baseball field in baseball season, and take care of the track area during track time. Wintertime it was keep all the parking lots clean from snow and the sidewalk clean.

Q. Was there anyone working with you during that school year '78 and '79?

A. No, not in the daytime. I had two janitors on the night.

Q. Were you head custodian during that particular school year?

A. Yes.

Q. What were your duties in--beginning in 1979, in the fall of 1979, what were your duties then?

A. Same as they have been all over the years. It was just, oh, administration I'd been there from '71 to '78, I was just to--I run the custodian department completely, and they run the principal's office and the superintendent's office. I hadn't been used to somebody being on my back continuously every day, tell me I had to get done, I had to get that done in a certain length of time; or before if I had something to get done, everything would get done. The grass was always kept mowed, the walk was always clean, parking lots was kept clean. I run--I run a custodial job, the other fellows run theirs. But the new administration started '78, they never got off my back so I couldn't take no more of it, drove me up the wall.

Q. When did that start?

A. Mid July of '78.

Claimant testified that Mr. Johnson was on him every day from 1978 until the day he left when he "could not take anymore." Claimant said he didn't quit but just went home because he was sick. Claimant stated that the only reason he brought this lawsuit was to get paid 75 to 100 days of sick leave which he felt he had coming to him. Claimant stated:

Q. Would it be correct that the duties that you were performing in 1979, during the fall of 1979 were the same as the duties that you were performing during 1978 as janitor?

A. Absolutely, yes, sir.

Q. None of the duties changed at that time, Mr. Hemm, until you left there---

A. Only just the constant pressure on my back when they changed administration.

Claimant disclosed that in January of 1981 he started receiving social security payments. Claimant opined he could not return to work because within 15-20 minutes he would be tired and would have to rest an hour or two. Claimant testified

that his nerves started getting to him in late 1978 or early 1979 and he also began having chest pain at that time. Claimant disclosed that in September 1979 he was injured while moving a heavy safe at the schoolhouse. Claimant stated that both his hip and shoulder were affected.

Claimant testified that after he quit school he had problems going out without getting lost.

Richard Johnson testified he is a high school principal for defendant employer and found claimant a hard worker and one who tried to do a good job. Mr. Johnson stated:

> Q. Okay. If Raymond tells me that you supervised him very closely during the 1979 school year and he used the term, "I guess you were on his back day in and day out," why would he tell me that if that is not the case?
>
> A. I have no explanation for that.
>
> Q. You are telling me that that didn't happen?
>
> A. Yes. I'm telling you that that did not happen.

Mr. Johnson indicated that in the 1978-1979 school year the responsibility for custodians shifted to the principal of the building. Mr. Johnson disclosed that he drew up claimant's job description. Mr. Johnson gave claimant a written job evaluation in 1979 which included some areas that needed improvement. Mr. Johnson testified that he also initiated a time study of claimant's job because he thought claimant was having problems organizing his duties.

Mr. Johnson disclosed that he was satisfied with claimant's effort, but not always satisfied with how clean the building was left. Mr. Johnson disclosed that claimant was pretty easy going except when talking about some of the problems his one son was experiencing.

Ed Looney testified he has been superintendent of schools for defendant employer for five years. Mr. Looney disclosed that when he started David King was the district maintenance supervisor. Mr. King reported directly to Mr. Looney and the board of education. Mr. Looney stated that claimant reported to the building principal, the district maintenance supervisor and himself. Mr. Looney disclosed that job descriptions were written up. Mr. Looney stated:

> Q. What was your understanding of Mr. Hemm's responsibilities during the '78-'79 school year? What was his job to be?
>
> A. The job would be the daytime custodian in the Keosauqua Center and which would, in effect, give him the responsibilities for custodial duties during the day. And many of those duties were outlined, I think, in a job description written probably either by Mr. Johnson or certainly with his knowledge. Ray would also be assigned some supervisor--not supervisor--but coordinating responsibilities with the people who worked at night in that building. Also, during that first year, there was an attempt to coordinate and phase out some of the things that--of the responsbilities [sic] that Ray had had so that they might be assumed by Mr. King.

Mr. Looney revealed that claimant asked the board of education for a reduction of duties at the same salary rather than a raise for the 1979-80 school year. Mr. Looney indicated he thought other janitorial personnel received raises, but claimant did not because of his request.

Mr. Looney testified that claimant delivered commodities to the various schools in an old bus. Mr. Looney stated that the year started with claimant doing plumbing and electrial work at the various locations, but that changed as the year progressed. Mr. Looney stated that he could not remember claimant relating any problems getting along with other personnel. Mr. Looney disclosed that personnel needed prior approval before working overtime. Mr. Looney indicated claimant would get his work done and was the only day janitor. Mr. Looney revealed that since November of 1979 they have continued to have only one janitor at the Keosaqua center. Mr. Looney realized that claimant was also working as an activity bus driver and a substitute bus driver. Mr. Looney testified that claimant had a daughter who also worked for the school system. Mr. Looney did not remember if he fired claimant's daughter or exactly when she was terminated. Mr. Looney didn't remember claimant being irritable or uneasy. Mr. Looney testified that if there was an opening and claimant was capable of performing his work he would rehire claimant.

Jack Sapp testified he is the superintendent of schools for Hedrick, but was employed by defendant employer as superintendent from 1971-1978. Mr. Sapp stated that claimant was lead custodian of the defendant employer at that time. Mr. Sapp indicated that there was one other custodian during the day which worked with claimant, some part-time help in the afternoon and one evening janitor. Mr. Sapp stated:

> Q. What responsibilities did Mr. Hemm have as far as being head custodian? Was there anything other than the Keosauqua Center that you recall?
>
> A. Yes. If we had any electrical or plumbing difficulties at the other center, Raymond was called upon to do what he could. And if it required a professional person, why, then we hired a professional person. Many, many jobs that Raymond would do were of a finer nature.
>
> Q. Did he have anything to do with delivering supplies to the other centers while you were there?
>
> A. Generally about every Monday, I believe it was. Raymond would deliver commodities. And at that time he did visit with the other custodian and they talked over mutual problems, whatever problems might be at the local centers.
>
> Q. Was there some reason that he would be delivering these commodities? Why was that done?
>
> A. I guess he was--he was the only person available to do that.

Mr. Sapp disclosed that prior to his leaving, defendants had decided to hire a head custodian over the entire district. Defendants wanted someone more qualified so outside people would not have to be called in to do plumbing or electrical work.

Mr. Sapp testified that employees were required to have prior permission from him to put in overtime. Mr. Sapp stated that each spring claimant, the other janitor, would help him with ordering the inventory. Mr. Sapp revealed that he had no problems with claimant organizing his work day and he was able to do the work given him. Mr. Sapp stated that he was claimant's supervisor and not the principal.

On cross-examination, Mr. Sapp indicated that claimant received extra income by driving a school bus. Mr. Sapp revealed that claimant had no supervisory responsibilities over the other janitors. Mr. Sapp disclosed that claimant received some criticism for the speed of his work and his thoroughness and cleanliness of the building.

Mr. Sapp testified that once every month defendants would use the bus to pick up food supplies, custodian supplies and paper supplies.

Hale Conlee testified he worked for defendant employer for four years but left them in 1978. Mr. Conlee stated he was the second day man and that claimant was head custodian. Mr. Conlee indicated that the two of them had all the work they could handle. Mr. Conlee testified that claimant was a good worker, a good man and did not complain. Mr. Conlee stated:

> Q. Were you aware of some changes that were going to be made in the way the maintenance was done at the school before you left?
>
> A. I didn't--I knew when they cut or closed the elementary school and I didn't have a job no more, I knew--I didn't know what their plans was. I knew one man couldn't take care of it.
>
> ....
>
> Q. You are familiar with the responsibilities of Raymond Hemm as far as district maintenance supervisor; is that correct?
>
> A. Right.
>
> Q. And you were familiar with his responsibilities?
>
> A. Right.
>
> Q. And you were aware that your responsibilities might be lessened because the elementary building was going to be closed? And the mobile units were going to be removed?
>
> A. Right.
>
> Q. Let me ask you this question, Mr. Conlee: If Raymond Hemm no longer had to do his district maintenance responsibilities, do you have an opinion as to whether or not that would be a fair exchange for picking up the responsibilities that would have been left to be done by yourself with the deletion of these other buildings?
>
> A. Well, there--oh, I don't know. The school is old. And it was--there was just more than one man

could handle with the mowing and everything, and getting the football fields ready. Even though the elementary was closed and he didn't have to go to the other centers.

Q. Still wasn't a fair trade, in your opinion?

A. Not to my knowledge, no.

Q. Did you make that conclusion here today in court or did you make that at some earlier time or when did you arrive at that conclusion?

A. When I left in '78 I had to work until the middle of June because I had two weeks vacation coming. We are redoing some floors down by the janitor's room. And I told Raymond when I left, I said, "Raymond, one man cannot handle this."

Q. Did Raymond respond?

A. He just kind of shook his head.

Mr. Conlee stated that some jobs required two men and he always helped claimant load the commodities.

Edith Hemm testified that she has been married to claimant for 28 years and has had no outside employment since her marriage. Mrs. Hemm indicated that in 1979 they mowed two cemeteries. Mrs. Hemm stated:

Q. (By Mr. Watkins) When did you first notice a change in your husband's ability to work? Do you recall?

A. I think in September he seemed--after that accident at the school when he was unloading the file cabinets, from then he--he just kept getting tireder and tireder.

Q. What year was that?

A. 1979.

Q. Did you see a doctor for the file cabinet injury that you are talking about?

A. Yes. He went to an osteopath or a chiropractor.

Q. Had he had any problems with his physical or mental health prior to September of 1979 that you are aware of?

Mrs. Hemm disclosed that claimant appeared exhausted and had trouble staying awake. Mrs. Hemm indicated this problem with exhaustion had continued.

Mrs. Hemm testified that the day claimant left the school he came home indicating he was sick and went to bed. Mrs. Hemm stated that since the incident in November of 1979 claimant's memory became worse and was unable to remember telephone numbers or addresses which he had previously had an ability to remember. Mrs. Hemm indicated that claimant has been violent a couple of times since his injury. Mrs. Hemm revealed that claimant has not been able to work because of his chest pains and exhaustion. Mrs. Hemm testified that claimant's chest pains began in June of 1980 and later indicated that claimant had chest complaints in 1973 and 1977. Mrs. Hemm disclosed that claimant has used a rotor tiller since leaving the school.

Gerald Bennett testified he works for the vocational rehabilitation agency for the state of Iowa and worked with claimant when he was enrolled at the center from January 10, 1983 to January 28, 1983 for a vocational evaluation. Mr. Bennett recommended claimant be involved in a homebound training program through Camp Sunnyside. Mr. Bennett could not recommend competitive employment because of claimant's anguish and need for medication.

James T. Worrell, M.D., testified live and by way of deposition. Dr. Worrell revealed that he is a general practitioner and has been claimant's family physician for over twenty years. Dr. Worrell indicated that claimant's health changed after being hit by a car in March of 1979. Dr. Worrell stated:

Q. Did you see him sometime around November of '79 then?

A. Oh, yes, sure.

Q. What was the purpose of that visit?

A. Well, he felt great anxiety and he was--he complained that he was--his nerves were getting to him and so on. He also said that when he talked about turning the keys in that, oh, that he had it. I asked him about why he did it and he evidently, he and the principal had a little something going on, and that day the principal wanted him to make out a time schedule as to how much time he was spending with each job and write it all down for the day. And this he considered an insult and too much. So he said rather than--he felt that he was going to do physical harm to the principal, or somebody in that area was going to be attacked, so better than that he turned his keys in.

Q. What complaints was he telling you when he came to see you other than the anxiety that you mentioned?

A. Well, he was having chest pains and some--and he was--he also had some stomach pains.

Dr. Worrell testified that he saw claimant once a month since November 19, 1981. Dr. Worrell disclosed that claimant and his family mow grass and also do yard work for him. Dr. Worrell stated that he has seen claimant stop the riding mower and take nitroglycerin for chest pain. Dr. Worrell stated:

Q. (By Mr. Watkins) After reviewing the medical evidence that has been obtained since we last talked with you and based upon your further evaluations of Mr. Hemm, have you come to any medical conclusions about what is wrong with Mr. Hemm at this point in time? Has it changed since your last statement to us?

A. No, not much change.

Q. All right. What is your opinion as far as Mr. Hemm's medical problems at this time?

A. Well, he has angina pectoris, I think.

Q. Has he got any other mental or physical problems that you are aware?

A. Well, his memory has been impaired, but improving.

Q. All right. Anything else?

A. He continues to take his heart medicine. And he continues to use the nitroglycerin. His mood swings are less radical and his general mental attitude has improved.

Q. All right. Based on your evaluations and the reports of the other doctors, and based on what you just told me, Mr. Hemm is not degenerating in any way? Getting worse?

MR. HANSSEN: I would object to that question. I'm not sure what reports that Dr. Worrell is relying upon. I believe there is a conflict in the evidence whether there is a deterioration or not. Without foundation as to what reports he is relying upon, I don't believe that the respone can have any substantive value. And it would be speculative. And it doesn't provide an opportunity for the Defendants to object to what he is relying upon in expressing such an opinion.

THE DEPUTY COMMISSIONER: Will be taken subject to the objection. You may answer.

MR. WATKINS: You may answer.

THE WITNESS: Well, I would base my opinion on observation of the patient rather than too much on reports. The reports as far as I know are not in agreement. I feel as far as I am personally concerned from my observation of Mr. Hemm that he is improving mentally as far as memory is concerned. And as far as mood is concerned. His heart is--the amount of medicine he is taking and the number of attacks that he has had has not changed a great deal.

Q. You have been his family physician for some time; is that correct?

A. Yes.

Q. All right. When did the symptoms we are talking about, the problems we are talking about, first show up?

A. The mental type of--

Q. That problem and the heart problem that you spoke about?

A. Well, I think that this all developed after he left the school position.

Q. Well, did these mental problems or the nervousness

associated with the mental problem come on after he left the job, on or before he left the job?

A. He was injured before he left the job. And at that time he was talking about that it was a--that it was a stressful kind of situation for him. And that was sometime before he resigned.

Q. Has Mr. Hemm's condition improved to the extent that he is able to go to work today?

A. I don't think he is employable.

Q. Do you foresee in the future that he would be employable?

A. No, not in the immediate future, if ever.

....

Q. (By Mr. Watkins) Dr. Worrell, did you take a history from Raymond Hemm as far as the incidents we are talking about here today?

A. Yes.

Q. Okay. Did Mr. Hemm relate to you any incidents that gave you a basis to form an opinion as far as causation?

A. Well, as I recall, his statements were--might be summarized--that he reached a point where the anxieties and the pressures of the job were too great. And that he couldn't handle all of the pressures and all of the anxieties because they seemed to be mounting and getting greater all of the time.

Q. Did those pressures and anxieties that he related to you, in fact, cause the problems that he has experienced?

A. I think so.

Dr. Worrell did not agree with the psychiatrists which diagnosed claimant's problem as organic brain syndrome, but felt the stress from his job got to him. Dr. Worrell opined that claimant's angina is related to stress as well as his impaired memory. Dr. Worrell indicated he knew claimant was having family problems around this time, but opined that claimant's work was a contributing factor. Dr. Worrell didn't have an opinion of whether claimant's work was still causing his symptoms.

On cross-examination, Dr. Worrell revealed he had no clinical note or record that indicated claimant had stress at work at the time he was hit by the car, but remembered talking about it when claimant was in the hospital. Dr. Worrell stated he was aware that claimant's son had quit school and that this caused claimant acute anxiety for which he was given medication. Claimant was referred to Iowa City for angina in June of 1980, but had been complaining of angina for a couple of months. Dr. Worrell revealed that claimant's angina complaints started after March of 1980. Dr. Worrell stated:

Q. Has Mr. Hemm given you a history as to what brings on his angina complaints?

A. Well, as I say, he works--he does some work on the lawn for us and somedays he can work hard all day and maybe take only one nitroglycerin. But the next day he may not be able to get out of bed to come back to work and may have to wait a day or so.

Q. And you attribute these complaints as being precipitated by stress?

A. Well,....I think it's connected also to physical exertion.

Dr. Worrell revealed that another son of claimant's was having problems for which he was seeing a psychiatrist. One of claimant's sons was assaulted. Dr. Worrell stated:

Q. Don't you think that the stress as a result of the child who is seeing the psychiatrist and was placed at Mt. Pleasant for a period of time is different than the stresses that Mr. Hemm previously had with his children?

A. Well, this is kind of a difficult thing to say, yeah or ney, too as far as I am concerned.

Q. Well, it wasn't very difficult for----

A. It's a stressful affair.

Q. Well, it wasn't very difficult for you to relate it to the stresses at school?

A. Well, there was certainly a cause and effect. We have a man who is functioning normal and all of a sudden, abnormal.

Q. And you don't think these family stresses contributed----

A. Certainly they contribute. How much they contribute, I can't tell you. I don't know.

A. [sic] Well, isn't it also true that you don't know how much the stresses at school contributed either?

Q. [sic] Other than he was functioning normally up to the time he walked out of the school and from there on, it has been a chaotic thing ever since.

Q. Isn't it possible that the stresses from the family was the straw that broke the camel's back?

A. Certainly, but it's a sum total.

Q. Wasn't he functioning all right before that time?

A. Yes.

Q. Until these family stresses came about?

A. He had family stresses before that time.

Q. Those family stresses were different than the ones that he was experiencing about that time or after that time; aren't they?

A. Well, they were different types.

Q. What stresses did he have before 1978 from his family as far as involvement with the police or school administration officials?

A. I don't know. I only know of the medical problems which he had numbers of.

Dr. Worrell indicated that it was determind that claimant had an acute duodenal ulcer. Dr. Worrell revealed that claimant was given tranquilizers, but nothing was given to claimant for a heart condition because claimant had a normal electrocardiogram.

Dr. Worrell stated:

Q. (BY MR. WATKINS) Do you have an opinion as to the cause of the condition Mr. Hemm--the physical condition and mental condition Mr. Hemm was in in November of '73 based on a reasonable degree of medical certainty; what was the cause?

A. Well, his anxiety is due entirely to the stress of the employment.

Q. Were there other stresses that you were aware of during this time that Mr. Hemm was under other than job stresses?

A. Well, his family, of course, was giving some difficulties at various times. The boys give him a lot of worry. He always--after he got this tranquilizer I first thought this was maybe the result of tranquilizers, but he had an unusually good memory, but he could remember anything--well, for instance. he told me that in the area in which we was born that he knew all the roads. He got over there and got lost. I thought, well, this is just from the tranquilizer. But we did try it without and it didn't make any difference. It was not due to the tranquilizers. He also could remember phone numbers very well, and he couldn't remember any phone numbers. For awhile he was really lost and confused.

Dr. Worrell disclosed that claimant has been experiencing angina pectoris and opined that stress, mental stress, anger, physical activity caused claimant's angina. In his deposition Worrell opined that claimant's condition has been getting worse, but also indicated claimant made no complaint of chest pain prior to November of 1979.

Dr. Worrell causally connects claimant's chest pain with the stress at school, but stated:

A. Well, the only conclusion, of course, is that he never had it before, and immediately, quickly after all this thing occurred, he began having it. Now, whether that is the exact cause of it would be--you can't say that. He never--he never had an angio before this.

Q. Do you have an opinion based on your medical

background as to what the cause is then?

A. All I can say is that this aggravated it. The cause is obscure on most angios.

Dr. Worrell opined that claimant is totally disabled.

On cross-examination, Dr. Worrell revealed that the records brought with him did not include any clinical records and that he would not be able to tell when he last saw claimant prior to November of 1979.

Dr. Worrell stated:

Q. Even though you say there is no way of finding a definite cause for Mr. Hemm's angina as you just told Mr. Hanssen, do you have an opinion as to what the cause of that angina is or at least sort of that cause?

A. You can't say yes and no about that. It's kind of a thing which occurs and is related to stress. It's also related to physical activity. It's related to restricted coronary arteries. So that it's--it's not a yes and no kind of term.

In his report of May 22, 1980, Dr. Worrell stated:

I'm writing in response to your letters of February 15, and March 28, 1980, requesting a medical report covering the injuries Raymond Hemm received while an employee of the Van Buren Community School System.

I have been Mr. Hemm's physician for many years. Prior to 1979 he had not been the subject of any medical problems out of the ordinary.

In march [sic] of 1979, I saw Mr. Hemm for the treatment of injuries he received when he was run over by a car. The accident occured [sic] while Mr. Hemm was returning from the post office with the mail for the school as he normally did each day. Mr. Hemm was pushing a mail cart when he was struck by the car. As a result of this accident Mr. Hemm was hospitalized for several days. I have enclosed copies of the discharge summary that cover this accident.

It was while Mr. Hemm was hospitalized for the March injury that he first mentioned that he was feeling pressure from his job responsibilities. As you can see there is no notation of any nervous disorder on the report I filled out at that time. However, I do remember Raymond first complaining about it then. The patient related to me that he had requested less job responsibility but that he could handle the load that had been given to him and this was what was getting to him.

I did not see Mr. Hemm again until November of 1979. Mr. Hemm came in soon after he resigned his job at the school. He was very upset and complained that his nerves had gotten the best of him. The patient told me that he had to get out of the school before he did some physical damage to his superiors. The main person Raymond felt responsible for his stress was the principal of the school.

I have been treating Mr. Hemm for his nervous disorder since November of 1979. Mr. Hemm is not progressing as well as I expected he would in the beginning. The patient has developed an acute duodenal ulcer that is probably the result of the stress he suffered on the job, and the stress he has suffered since losing the job. This ulcer has slowed the patient's recuperation. I have done x-rays of the stomach and confirmed this ulcer. The latest x-ray was taken on March 31, 1980. I have attached a copy of this x-ray report.

The patient has also complained of chest pains. This started in the latter part of March 1980. In April an ekg was administered and the results were normal. These pains may be related to the stress Raymond is undergoing, regardless of the negative test results.

As I stated above I have known Raymond for many years, and I have never before seen him exhibit a belligerent type of attitude that he has toward this incident.

The patient has recently been complaining of memory loss. This could be a side affect of the drug he is taking to treat his nervous disorder. He is presently on Tranzine 7.5 mg.

In addition to treating the nervous disorder, I am treating the ulcer with diet and medication. The medication for the ulcer is Tagamith.

Mr. Hemm has been severely disabled both functionally and industrially since the time of the accident. In my opinion Mr. Hemm was not capable of doing anything during the first two months following the November incident. Since that time, he has been able to do some work. In fact, he does do some work around the house, but at most can work a half a day, and then gets so shook up that it is impossible for him to continue. In addition to the nervous disorder delaying Mr. Hemm's return to work he's probably unemployable due to the ulcer I am now treating. All these elements have combined to make it impossible for Mr. Hemm to stay with a job for any length of time.

It is my opinion that Mr. Hemm is still in the healing state. Although he is progressing, it would be impossible for me to state if and when he will return to normal at this time. Mr. Hemm has always been a hard worker since I have known him and I believe he would return to work if he was capable. At this time he is just not able.

Dr. Worrell stated the following in his report of February 18, 1983:

Raymond Hemm has been in Des Moines at the State Rehabilitation Center where they determined that about all that Raymond is capable of doing is a homebound workshop making small objects out of wood. While he was there, on January 21 he had severe angina which incapacitated him for two days which was relieved by bed rest and Nitroglycerin.

I saw him on February 17. He had been incapacitated for four days with severe chest pain, and again taking Nitroglycerin at frequent intervals. This man has very severe angina which limits his activities. He will start working on this home bound [sic] workshop in hopes he can be partially able to support his family. Raymond's heart condition is getting worse.

Donald D. Brown, M.D., who testified by way of deposition, indicated that he is a cardiologist on the staff at the University of Iowa Hospitals and first saw claimant on June 26, 1980. Dr. Brown stated:

Q. What was that history?

A. In brief -- and I would like to quote from my own record -- "A difficult historian. Two discomforts: Number one, a sternal coming on with working too hard, five to fifteen minutes in duration, apparently relieved by rest, and duplicated on a recent treadmill test. Number two, discomfort coming on while driving with his arms lifted, in which case he develops a 'surging, throbbing ice pick discomfort' in about the same areas as the first pain, radiating to the right neck and superimposed on top of a constant pain described as pain number one. In addition, he has noted headaches, blurred vision and diffuse numbness and tingling." That was the story I obtained from him.

Dr. Brown testified that catherterization showed 30 percent narrowings. Dr. Brown stated:

Q. What was that diagnosis?

A. Very vague. We discharged him with the diagnosis of atypical chest pain, leaving open the question whether or not any of the discomfort that he might have had might be related to these narrowings seen in that single artery.

Dr. Brown next saw claimant on January 4, 1982 and stated:

Q. What was the history that you received at that time from Mr. Hemm?

A. He again described two types of chest discomfort, and I would like to read exactly what I obtained from the history at that time. "The first type he describes as a corset or cinch like squeezing 'like a tight belt' wrapping around him from his Axilla to the center of the chest. He describes the squeezing sensation as lasting from two to five minutes, occasionally up to eight to ten minutes. He states it's no more likely to occur with activity than it is at any other time. He describes a second type of discomfort. This he describes as a 'discomfort beginning in the sternum and radiating to the right side of the neck and occasionally down

the right arm. It also radiates to the right side of the head, and the left side of the head is where the discomfort is described as headache'. He describes his headaches as always being present with this discomfort, being bi-temporal and pounding in character associated with pressure behind the eyeball. He describes the sharp 'discomfort in the sternum and right side of the neck' as a 'stabbing or knife like' sensation, recurrent, and each sharp thrust lasting a second or so. There is some increased sharpness with deep breaths. The headache and the sharp pain are sometimes associated with blurred vision but not with flashing scotoma, s-c-o-t-o-m-a. He states that this sharp pain is his most common type of discomfort and is the one that is most frequent and is the one he considers disabling. The sharp discomfort is not distinctly related to activity. It is usually about thirty minutes in duration, but in August of 1980, it lasted almost constantly 24 hours a day for four days. It was because of this discomfort that he was begun back on Inderal. There was no squeezing discomfort associated with this at that time. He feels that these discomforts have been better since he started on the Inderal. He also mentions that if he takes Nitroglycerin, he notes some relief after seven to eight minutes, and then he feels that this sharp discomfort is gone after the second Nitroglycerin.

Dr. Brown gave claimant a physical examination and noted no significant findings related to his chest pain. Dr. Brown revealed that claimant never told him he related the chest pain to times when he was emotionally upset. Dr. Brown stated:

> Q. Do you have an opinion, within a reasonable degree of medical certainty, whether the event in November of 1979 is causally connected in any way to the chest complaints made by Mr. Hemm when you examined him in June of 1980 and January of 1982?
>
> A. From the cardiovascular standpoint and a cardiologist's point of view, I cannot see how that one particular incident has any relationship to his modest and most equivocal--equivocally significant coronary disease, nor to the chest complaints that he currently told me about in '82 or described to me in 1980.
>
> Q. What is the basis for you expressing that opinion?
>
> A. Well, it's taken in two parts. Number one, that if you wanted to say that the narrowings that he has in his heart are related to that one single moment of stress, that there would be almost no scientific basis for such a feeling. The coronary lesions, which are very modest to begin with and it's very hard to believe have much to do with anything, do not -- did not develop there just overnight and certainly not from stress that developed on one day or one occasion, six months prior to the finding of these lesions. Number two, the current discomforts that he is having, whatever they may be due to, even if I would concede, which I cannot prove and don't frankly think is true, were related to his heart, don't correlate with anything that I can scientifically feel would be myocardial ischemia or cardiac pain. In other words, as pointed out, this man can do a treadmill test and it takes -- if he gets any of the discomforts, it takes an incredible effort, if you look at his treadmill, in order to bring anything out. You have to really stress his heart to bring out anything. He doesn't tend to get any sort of chest discomfort that's related consistently either to activity or to times of emotional stress, which would produce the same amount of heart rate, blood pressure changes or coronary vascular changes, so I find it very hard to, number one, relate his chest discomfort to a cardiac cause in the first place. I think that's very equivocal. Number two, even if they were, I cannot see how they would be possibly related physiologically to that event in, I believe, November of '79.

Dr. Brown revealed that he could not agree with Dr. Worrell in that all he could find was atypical chest pain which he could not conclude was agina. Dr. Brown stated he wasn't sure what was causing claimant's chest pain, but also under questioning from claimant's attorney revealed that claimant's symptoms were not typical of the symptoms that someone with a cardiac problem would complain of. Dr. Brown stated:

> Q. The other diagnosis in your January 14, 1982 letter to Dr. Worrell of mild organic brain syndrome with isolated explosive disorder, major depressive disorder by history, and is consistent with acute rheumatic fever in childhood with no definite evidence of residual -- those are not your diagnoses?
>
> A. That was a diagnosis based on other assessments made by people in the Department of Psychiatry and Behavior.

Dr. Brown opined that claimant has no disability from a cardiovascular standpoint. Dr. Brown revealed that he had claimant seen by neurology for what Dr. Brown thought were migraine attacks, which later confirmed his impression that he had vascular headaches. Dr. Brown disclosed that claimant was started on the drugs Inderal and Ergomar for those headaches, not because of any cardiac problem.

In a report dated July 2, 1980, Dr. Brown opined that claimant's chest pain was not of cardiac origin.

Conrad Swartz, M.D., who testified by way of deposition, stated he specilizes in psychiatry and first saw claimant on November 10, 1980 and supervised claimant's inpatient care at the University of Iowa Hospitals. Dr. Swartz stated:

> Q. Well, do you think Mr. Hemm actually had a memory loss, actually was nervous and actually had the other symptoms he was complaining of?
>
> A. Mr. Hemm was very upset about his environment, having lost his job. His concentration was impaired. In an ordinary sense, person to person, there was no memory problem that we could see, even person to physician. To an ordinary exam by a psychiatrist, he seemed to be in full command of his mental faculties.
>
> ....
>
> Q. What was the treatment that you administred when you saw Mr. Hemm in November, 1980?
>
> A. We put him on a weight reduction diet because he was overweight and this would make things easier for his heart. We gave him some supportive psychotherapy. We determined to continue particular medications that he was taking, which were Inderal and Valium and Nitroglycerin. We sent the patient up to have an electroencephalogram and the neuropsychological testing that we mentioned in connection with that hospitalization, which was actually done at the end of December, and the spinal tap which he had in January. There was no specific drug that was appropriate to his mental problem.
>
> ....
>
> Q. Was Raymond Hemm disabled when you were seeing him in November of '80?
>
> A. From a psychiatric perspective, we felt that he was not disabled in terms of there was no presence of psychosis or neurosis or disabling organic brain syndrome. We felt that he was very upset, but that if his emotional maladjustment could be resolved, he would be able to return to work and we encouraged him to be active.

Dr. Swartz indicated that claimant's anger aggravated his brain problem to a point that he had impaired concentration and that claimant was not in any mood to work. Dr. Swartz testified that claimant has had organic brain syndrome for a long time.

Dr. Swartz opined that claimant was not as able to cope with new circumstances as people without organic brain syndrome. Dr. Swartz disclosed that claimant's complaint of memory loss was not entirely consistent with what they observed. Dr. Swartz disclosed that testing done in September of 1981 indicated that claimant's condition had not had any further deterioration. Dr. Swartz's diagnosis remained organic brain syndrome. Dr. Swartz stated:

> Q. In your opinion, is Mr. Hemm psychologically able to go back to work today?
>
> A. I haven't seen him today.
>
> Q. As of the last time you saw him?
>
> A. As of the last time I saw him, I believe that he's not ready to go back to work and not able to go back to work.
>
> Q. Do you have any idea how long this condition will remain such that he would not be able to go back to work?
>
> A. From a mental standpoint, I believe that he is not able to go back to work until he no longer feels offended, until he is no longer so angry.

Q. Well, because of Mr. Hemm's organic brain syndrome, was he subject to being overstressed in the past?

A. Theoretically, he was more sensitive than most other people to stresses that put important -- that require important mental attention. Apparently he had not encountered enough of these stresses to run into problems until the months prior to his quitting the job.

On cross-examination, Dr. Swartz revealed that a person's memory is not in the part of the brain affected by claimant's organic brain syndrome. Dr. Swartz stated:

Q. I think you've indicated that when he was discharged in November of 1980 you did not consider him to be psychiatrically disabled?

A. Not psychiatrically disabled. That is to say, he did not have a psychosis or a neurosis or an organic brain syndrome that is disabling. Psychologically there is another perspective on the matter, as I see it.

Q. And at the time you saw him in November of 1980, that anger had been precipitated by the conflict between the principal and the son concerning the use of some cigarettes? Was that --

A. That's right. Of course, that anger was far out of proportion to what actually took place and it was, in essence, an opportunity for Mr. Hemm's more deep-seated anger to break out.

The clinical notes of November 1980 prepared by Dr. Swartz state:

This 52 year old white male was referred by Dr. Worrall [sic] from Keosaugua to our outpatient clinic who referred the patient for admission.

This admission was precipitated by an explosive reaction which this patient had to apparent discrimination by his son's school principal against his son. Reportedly the patient's son had been smoking an unknown cigarrete [sic] off the school grounds with half a dozen of his school mates. He was reportedly observed doing this by the principal and then suspended from school for 11 weeks while the other boys had been suspended for 2 weeks. The patient became very angry and he took a baseball bat and rode off to find the principal; meanwhile apparently the patient's wife called the sheriff who intercepted the patient before any battery was done.

This is one of a number of emotional upsets associated with relationship between this patient and that principal who had once been his job supervisor. It was because of interactions with this principal that Mr. Hemm lost his job. Following losing his job he became nervous, tremulous, apathetic, had suicidal thoughts, was lethargic, motor retarded, confused, and insomniac. He gained 30 lbs. and had a loss of libido. This lasted for about 6 months and it was about that time when it was ending that he was admitted here. At the time he was admitted here there was no definitive psychiatric diagnosis made apparently. He also was evaluated in cardiology for troublesome angina and episodes of ventricular tachycardia. He underwent a cardiac catheterization which disclosed a 30 to 50% lesion of one coronary artery. The CT scan showed prominent ventricles. Cardiology chose to continue Inderal which had been started by the patient's family doctor at a dose of 10 mg q.i.d.

The patient describes that actually the chest pain is a major difficulty in his life and that the Inderal relieves it substantially but not totally.

The patient describes that he has always been the sort of person that helps out other people and that he has never lost his temper at any other person but this principal.

Diagnoses:

Isolated explosive disorder
Major depressive disorder by history
Angina pectoris of unknown etiology, presumably spasmotic in origin although this has not been documented and there have been normal EKGs while the patient has experienced chest pain.
Headaches in remission with Inderal.

Plan and Recommendations:

The patient also complained of memory problems which we did not observe but we will do memory testing, we will consider increasing the Inderal, relaxation therapy. Pulmonary function testing will be necessary before increasing the Inderal.

In his report of December 24, 1980 Dr. Swartz stated:

In response to your letter of December 12 and your letter of December 19 I am writing regarding Mr. Raymond L. Hemm.

We understand that Mr. Hemm became explosively angry at a school principal regarding aledged [sic] maltreatment of Mr. Hemm's son. We understand that this is one of a number of emotional upsets generated by that principal in his relationships with Mr. Hemm. Mr. Hemm reported that this principal had lead to the loss of Mr. Hemm's job and that following this job he became nervous, tremulous, apathetic, had suicidal thoughts, was lethargic, motor retarded, confused and insomniac. He claimed that he had gained 30 pounds and had a loss of libido which lasted for about 6 months. He also complained of memory problems.

Psychological testing revealed exceptionally poor scores on the Porteus Maze test which indicated likely organic brain damage in the frontal lobes. A word recognition test also indicated only minimal reading skills. There was no deterioration in cognitive tests since previous testing 5 months before.

A spinal tap was attempted but was not successful because of Mr. Hemm's large girth. In the Electro-encephalogram that was scheduled I note that a computed Tomogram of the head in June of 1980 showed mild prominence of the ventricular system but nothing else. A neurology consultation has been scheduled for December 30, 1980.

Our diagnoses are 1) isolated explosive disorder, 2) organic brain syndrome with frontal lobe malfunctioning probable. This is consistent with development of the explosive episode. 3) Major depressive disorder by history, currently there is no depression. 4) History of angina pectoris and obesity.

We recommended that the patient go on a weight reducing diet. He was discharged on inderal (for his heart) valium, 5 mg/day and nitroglycerin as needed. I note that discharge was performed because of the patient's insistence that he must leave. It was our medical advice that the patient remain here for his EEG and neurology consultation and for the proper completion of a spinal tap, but he insisted on leaving anyway.

At this time, the cause for his frontal lobe syndrome is unknown and undetermined. The EEG and spinal tap are necessary, and neurology may feel that additional tests are called for. I cannot estimate a prognosis at this time because of the lack of a definitive diagnosis regarding this organic condition.

I can assure you, however, that Mr. Hemm is suffering from an illness. Hopefully, after December 30, 1980 and the EEG we will have additional information regarding his prognosis.

Dr. Swartz, on July 9, 1981, in response to a letter written by claimant's attorney stated something was organically wrong with claimant's brain. Dr. Swartz went on to say:

My medical perspective on this case at this time is that Mr. Hemm occasionally has some mild difficulties in memory and understanding. These lead him to feel anxious and sometimes to behave in an agitated manner. It is possible that he can no longer cope as calmly as he used to because of an organic brain problem.

In retrospect it seems must [sic] appropriate to say that Mr. Hemm was not normally capable of adjustment to potentially tense situations of change, as with the change in the school administration a couple of years ago. Mr. Hemm is at least subjectively aware of his difficulties and intellectual limitations, and he feels a certain tendency towards being intimidated if not threatened by others. In other words Mr. Hemm appears to have some difficulty formulating a reasonable course of action under stressful circumstances.

My diagnostic impressions at this point are: 1) Isolated Explosive Disorder, secondary to organic

brain syndrome, 2) Organic brain syndrome, either a stable lesion or a degenerative illness.

It is also my impression that Mr. Hemm is handicapped. It seems that he should be employable in jobs where intellectual stresses are minimal.

Among the stresses in Mr. Hemm's life is the continuing problem of litigation and compensation and I have no doubt that it is causing Mr. Hemm substantial strain. In sum, I am saying that Mr. Hemm does not have just compensation neurosis but that the evidence is that he has some organic brain disease which limits his ability to cope, and which I expect will continue even after the litigation and compensation questions are concluded. I do not know if Mr. Hemm's current levels of abilities will deteriorate but this also is a possibility.

In his letter to claimant's attorney dated September 24, 1981, Dr. Swartz stated:

In sum, we appear to have a patient who has a stable brain condition that he is likely to have had for many years. With this stable condition, he had been getting along quite adequately in his job until the nature of his job and the administration of it changed. Under this new environment and new circumstances, Mr. Hemm apparently did not do so well, I understand. It is my professional judgment that he did not do so well as formerly, not because of himself, but because of additional stresses and demands which had been placed on him that he had not had formerly.

In retrospect, Mr. Hemm has always been somewhat handicapped. He was able to do his job in a satisfactory manner, however, until he was asked to do what he was unable to do. This left him frustrated and demoralized.

It still seems that Mr. Hemm has the potentiality of being employable in jobs where intellectual stresses are minimal. The stress on Mr. Hemm's life from the continuing problems of litigation and compensation are, no doubt, causing him substantial strain and it is, indeed, possible that he will not be able to cope well in a new job environment until these problems are resolved.

In a progress note on October 14, 1981, Dr. Swartz stated:

I understand that with the particular circumstances that have occurred concerning his leaving the job that he had had, he felt that he was being taken advantage of and that he was owed a certain amount of sick leave and other considerations. As I noted previously, Mr. Hemm appears to have an organic brain condition which affects his ability to adapt to changes and to manage abstract ideas. This organic condition might also predispose him to be more emotional than most people when he is frustrated.

In his perception of having been taken advantage of, Mr. Hemm is extremely upset. As Mr. Hemm feels it, this situation has some similarities to rape and Mr. Hemm is unlikely, in my opinion, to adjust to the situation and be employable again unless and until he feels that he has no longer been taken advantage of.

As I see it, Mr. Hemm would be much more likely to work again if he were given some financial compensation for his trouble and an apology from the people who misunderstood him.

Michael J. Taylor, M.D., who testified by way of deposition, indicated he specializes in psychiatry and evaluated claimant on June 11, 1981. Dr. Taylor revealed that he had claimant seen by Edmund E. Nadolny, Ph.D., who administered claimant a battery of testing and concluded that claimant had organic brain syndrome rather than depression. Dr. Taylor again interviewed claimant on January 13, 1983 and came up with the diagnosis of chronic organic brain syndrome. Dr. Taylor stated:

Q. Could you describe for me and define for me an organic brain syndrome as defined in the nature of it?

A. An organic brain syndrome is a mental disorder which is caused by a change in the actual structure of the central nervous system, either an abnormality in the way the cells function or physical damage to a portion of the brain. It means that there is evidence of physical damage to the central nervous system.

Dr. Taylor disclosed that the testing, abnormal CT scans and history indicated organic brain syndrome. Dr. Taylor testified that it was inconceivable claimant's organic brain syndrome could be caused by the environmental factors surrounding his employment. Dr. Taylor stated that head trauma or toxins could cause organic brain syndrome. Dr. Taylor stated:

Q. Initially, when he was evaluated at the University of Iowa Hospitals, there was a diagnosis of Compensation Neurosis. I believe the records at the University of Iowa Hospitals indicate that the last time that he was seen there that that diagnosis was no longer the primary diagnosis. Is there an explanation for that?

A. Yes, I think so. Dr. Schwartz who is no longer with the University, originally made the diagnosis of Compensation Neurosis. There was also a question at one point that Mr. Hemm might be suffering from a major depression. At that point and time the abnormalities and psychological testing were not as pronounced as became the case later. I think what has occurred is that we have had an opportunity to gather more information. His condition has further deteriorated so that the findings are more obvious. The CAT scan is more abnormal whereas earlier it was not. His functioning on psychological testing has deteriorated. It's sort of like a person who presents himself with a cough and we do a chest X-ray. It may be at the time the first X-ray is taken that a lung cancer would be too small to show up. Then a year later or six months later the tumor has grown big enough that it's now obvious on the X-ray. The doctors can look back and say, "Now, we can understand why this man is coughing and has lost weight." Whereas there was no way to detect it earlier.

Q. The irritation and frustration that is noted in the records, is that a symptom of an organic brain problem?

A. Yes.

Q. What about the explosiveness that is also noted in the record?

A. That is also a typical symptom of organic brain syndrome. Those symptoms can occur in other psychiatric illnesses. We have to put the whole clinical picture together. There is nothing inconsistent with the fact that he is irritable, has a low frustration tolerance and sometimes has temper outbursts. That is very consistent with the diagnosis.

Dr. Taylor opined that claimant's brain syndrome developed four or five years ago and has gradually progressed since that time. Dr. Taylor opined that claimant's condition will get worse without any stimuli. Dr. Taylor indicated that job stress would have no effect on his symptoms. Dr. Taylor stated that the cause of claimant's organic brain syndrome is unknown. Dr. Taylor opined that claimant is not capable of working. Dr. Taylor stated:

Q. In your report to me dated August 25, 1981, you did discuss the possibility of a period of depression of being related to job stress. You also discussed the possibility of this period of depression being related to the organic brain syndrome. Do you have an opinion at this time as to whether that period of depression is related to the job stresses or is related to the organic brain syndrome?

A. I think we have much clearer evidence now of the organic brain syndrome. I would say if there were a period of depression, that it would be primarily related to the organic brain syndrome, again, acknowledging that it is possible that the job stresses could have increased his level of discomfort.

Q. If the job stresses did increase his level of discomfort, do the records support the termination of that discomfort in June of 1980?

A. Yes.

Q. That is the end of the depression that they found, is that correct?

A. Yes. That is the end of what they and I happened to think was a depression. Early in the course of the illness in organic brain syndrome, it is not unusual to see this type of diagnosis only to clarify at a later point and time the more clear cut symptoms of the organic brain syndrome.

In a report dated January 13, 1983, Dr. Taylor stated:

Based on all the information currently available to me, it appears that there has been no essential change in Mr. Hemm's condition. It continues to be my opinion that Mr. Hemm is suffering from an Organic Brain Syndrome and that the etiology of this is unclear. It continues to be my opinion that there is absolutely no causal relationship between Mr. Hemm's current psychiatric difficulties and any job stresses that he may have, in the past, experienced.

In their report of June 17, 1983, Dr. Stephen C. Olson, M.D., and John Claney, M.D., stated:

> Your patient, Raymond Hemm, was evaluated in the Outpatient Psychiatry Clinic and in the Dept. of Behavioral Neurology at the request of Mr. Ron Watkins. We were asked to see Mr. Hemm to objectively evaluate possibility that he has suffered continued deterioration in his cognitive capacity since our last evaluation. Mr. Hemm was examined by Dr. Paul Eslinger of the Dept. of Behavioral Neurology and I quote from his report;
>
> "After comprehensive reexamination of Mr. Hemm (who is well known to us in five preview evaluations), we find no neuropsychological evidence of deterioration in his cognitive memory, perceptual and linguistic capabilities. In fact, the minor deficiencies noted on our previous exam of February 10, 1982 are almost all corrected. The only questionable finding today is mildly abnormal visual perceptive discrimination of unfamiliar faces, but this performance has remained unchanged over the past three years. On interview with the patient and his wife, neither described deterioration in his social, personal, or cognitive capabilities. They do note, however, his unreliable recall and his easy frustration and anxiety of tasks he cannot immediately resolve.
>
> Impression: No evidence of deterioration in mental capacities. In fact, improvement is evident in several tests."
>
> Although several evaluations here and elsewhere have failed to clearly define the nature of Mr. Hemm's condition, we can state with assurance that he is not currently suffering from a progressive deteriorating condition such as Alzheimer's disease.

In a report to claimant's attorney dated September 25, 1980, Rafig Waziri, M.D., stated:

> Your client, Raymond Hemm, was admitted to our ward for evaluation of his mental condition after a referral from the Outpatient Department by Dr. Remi Cadoret. Mr. Hemm gave a history of problems dating two years prior to admission, with difficulties relative to his memory. About a year and a half prior to admission, he began to have difficulties at his job, when he felt too many responsibilities were being piled on him without adequate compensation. He experienced nervousness, irritability, insomnia, weakness, shakiness, and despondency. These complaints were apparently exacerbated by an incident in which a car hit him while he was pushing the mail cart for the school where he had worked for many years. This episode which occurred in March 1979 led to his hospitalization under the care of Dr. Worrell of Keosauqua. His problems with nervousness and depression continued and in November 1979 he quit his job summarily without prior notice or resignation and while hw [sic] as [sic] quite angry at the school administration for making too many demands on him.
>
> In our hospital we observed Mr. Hemm and found him to be nervous and somewhat depressed. Since he exhibited a mask-like facies, we explored the possibility of a Parkinsonian illness. Also, he had complaints of occasional chest pain and shortness of breath. We carried out psychological testing which revealed an individual under stress, with no definite signs of organic brain syndrome. His EEG and CAT scan were normal. During his hospitalization in our ward, significant improvement in his mood and attitudes were noted. This improvement occurred without the use of psychoactive drugs. Since he had some signs of cardiac insufficiency, he was transferred to the Cardiology Ward for further evaluation and catheterization.
>
> As far as your specific questions in respect to the job related disabilities that Mr. Hemm may have suffered, let me make a general statement. In psychiatric practice we occasionally see patients with a genuine psychiatric problem variously described as compensation neurosis, accident-related neurosis, sick claimant, etc. The main features of this illness are the psychiatric and/or medical decompensation which occurs in individuals with very good prior work record and generally stable personalities. Their illness is triggered by physical or psychic injuries that they accidently suffer, for which they feel they are not adequately compensated or symphathized [sic] with, such events lead to anger, despair, a feeling of being victimized, which causes more problems at work and at home, leading to more anger, nervousness and finally signs and symptoms of depression, following which the individual no longer can work adequately. Their memory, energy, initiative, and interest generally decline. These indivudals can end up as invalids with their anger and search for legal revenge. In looking over the history of Mr. Hemm's developing problems, it is my considered opinion that he has suffered from compensation neurosis. The best treatment for such a condition is an adequate and speedy settlement of legal problems before the condition becomes chronic and the patient develops further disabilities. It is to the advantage of both sides in the dispute to settle quickly and "cut their losses". [sic]
>
> Since it is almost three months ago that I saw Mr. Hemm, I cannot say what, if any, disabilities he has at present. At the time of discharge from our ward, his psychiatric condition had improved significantly. All I can say at this point is that, on the basis of the history we obtained and the comments of Dr. Worrel, he had suffered injury (physical and mental) that led to his psychiatric problems and his inability to do his work.
>
> I regret that I cannot be very specific in answering your questions but neither psychiatry nor medicine are such exact sciences that would permit exact affixations of numbers on Mr. Hemm's disabilities.

In his psychological evaluation of claimant dated December 1981, Allen Silberman, Ed.D, licensed psychologist, stated:

> Mr. Raymond Hemm is a 54 year old male who was psychologically evaluated at the request of his attorney, Mr. Ronald K. Watkins. There is a history of emotional disorder that resulted in three separate mental health hospitalizations. Each admission was for anxiety and depression. Onset of the disorder was traced to November, 1979, when he became explosive and irrational at work. There have since been at least three occassions [sic] where he either became explosive toward or threatening to another person. This individual's history revealed no previous treatment for emotional disorder. There is also no history of alcohol or drug abuse. Mr. Hemm further denied the existence of an extended family history of emotional illness.
>
> Mr. Hemm was born in the same county where he presently resides (Van Buren County). Throughout his life he has lived in four different houses. He attended school through the 7th grade. Apparently he left school because his father saw little value in formal education and felt that Raymond should remain at home and work on the family farm. He worked on the farm until age 27, at which time he married and because of economic necessity, started work at a local factory. The steadiness of his employment can be seen through the fact that he remained at the same job for 15 years. At age 41, he left the factory job because of the hazards of the environment (smoke within the plant) and also the presentation of an opportunity to be the custodian of the Van Buren Community High School. Three years later, he became head custodian. His duties included responsibility for acquisition of janitorial supplies, maintenance, and cleanliness of all of the schools in the district. There was no reported history of work reprimands or any other suggestion of employer dissatisfaction. He would always go to work on time, he would always accept responsibility for tasks assigned to him and would complete all tasks in a timely manner. According to him, in July, 1978, major changes took place when there was a change of school superintendents. The new superintendant, [sic] according to Mr. Hemm, imposed a considerable amount of pressure upon him. As the pressures built, Mr. Hemm complained that he was having difficulty handling all of the stresses associated with being head custodian. By November of 1979, this patient's defense mechanisms and coping strategies withered to the point of being ineffective. He thus became anxiety ridden and depressed. Symptoms that surfaced at that time included: Shakiness, jitteriness, trembling,

somatic symptoms which included: sweating, heart pounding, clammy hands, dry mouth, dizziness, and numerous symptoms of cardiac disorder. He is ruminative, has difficulty with attention and concentration and global memory functioning. Although depressed, his primary difficulty seems to be that of anxiety. There were no indications of hallucinations, delusions, or perceptual distortion associated with a schizophrenic disorder. Affect was essentially flat, speech was clear, pressured, and reflective of a proneness toward rumination. Ego functioning seemed impaired. Although desirous of seeing himself as a capable self-maintaining adult, he truly sees himself as incapable of handling even the most minor of stresses associated with functioning in a competitive work environment. Insight was adequate, but limited. Orientation to time, place and person was appropriate. There were no indications of a thought disorder.

Impressions: In light of the overall history, presenting symptoms, and observations during the interview, it is felt that this individual has a rather severe and chronic anxiety neurosis. It seems highly unlikely to me that his symptoms would spontaneously move into remission. Exacerbation of his illness appears to be the result of the incident that had occurred at the local school. The overall prognosis for symptom removal to the point of being able to return to full-time employment, seems poor. It is felt that this individual is in need of long term psychotherapy, possibly supported by pharmacological intervention. Because of his apparent difficulties with learning, verbal tests were not administered to Mr. Hemm. An intellectual screening test based upon visual perceptual problem solving abilities was administered. The results of the Raven Progressive Matrices Test revealed an IQ (based upon the Wechsler Adult Intelligence Scale norms) of 87. This is in the dull normal classication range. This range encompasses IQ scores of 80 through 89. It is felt that his intellectual limitations, in conjunction with his severe anxiety neurosis, serve as significant handicaps to the maintenance of full-time employment.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 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 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.

"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.2 298 (Iowa 1979), McClure, 188 N.W.2d 283, Musselman, 261 Iowa 352, 154 N.W.2d 128.

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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 20, 1979 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.

ANALYSIS

The greater weight of evidence discloses that claimant has chronic organic brain syndrome. In his deposition, Dr. Taylor clearly describes the nature of such a problem as a "mental disorder which is caused by a change in the actual structure of the central nervous system, either an abnormality in the cells function or physical damage to a portion of the brain." This diagnosis of organic brain syndrome was made by both Dr. Taylor and Dr. Swartz. In this regard, the opinion of claimant's family physician, Dr. Worrell, has less weight in that he is not a specialist in the area of psychiatry.

The greater weight of evidence indicates that claimant's organic brain syndrome was not caused by claimant's work. Dr. Taylor states flatly that stress of work would not cause such a problem. The testimony of Dr. Swartz does not actually contradict Dr. Taylor. In looking at causes of organic brain syndrome, Dr. Swartz did not state job stress caused claimant's condition.

Where the disagreement really appears between the parties and experts is whether the job stress aggravated claimant's prior condition, thereby, resulting in increased impairment of some form. The undersigned notes that there is a lack of written reports that state claimant was having problems with memory, chest pain, anger, or suicidal thoughts, prior to claimant quitting his job. On the other hand, several of the reports disclose that these problems developed after claimant's employment with defendant employer had terminated.

Claimant contends that the change in his job responsibilities and the administration increased the stressfulness of his employment. Although there is evidence that claimant had some additional responsibilities, the greater weight of evidence also reveals that some responsibilities were lessened.

Dr. Swartz reflects on claimant's anger and opines that claimant's disability will remain until claimant feels he is adequately compensated. The undersigned finds no authority to hold that "anger" by itself is a compensable injury under chapter 85 of the Code. Also of importance is claimant's own statement regarding his anger:

> I went along, of course, expecting I'd get my--some sick leave. Well, a month went by, no check. So I went past Christmas, still heard nothing. So I called over, come over to the welfare office, asked for some help and I got some help. And so I went then and saw Mr. Looney. Well, he said, "I had the understanding that you quit." I said, "No, Ed, I didn't quit." I said, "I told Carol I was sick. I was going home to the doctor. I am under doctor's care." So well, he said, "Then we'll set up a meeting with the school board and see what we can get done there." So they set up their meeting. I wasn't able to go to the meeting because Mr. Worrell and Mr. Story both went over and talked with Ed and Ed said, "Be no problem whatsoever." He said, "Raymond will get his sick leave." A few days later I got some notice that they voted seven to zero against me having any sick leave. So I thought, well, okay. If they want to keep it, fine, didn't do anything about it at all. Went ahead with getting help over at the welfare office. But along the early part of February, why, I happened in Stockport and I had picked up some

plaster for my cousin that worked the hours--the semi driver hours, you work--he couldn't get to the lumberyard, of course, I've knowed Fred for I expect 25 or 30 years. We are good friends. We still have--I hold nothing against Fred. I hold nothing against the rest of the fellows. But Fred said, "How are you making out, Raymond?" "Oh," I said, "fair, but you guys gave me kind of a shady deal on my sick leave." He kind of grinned, he said, "Well, yeah, Raymond, I know we did," but he said, "we had to." He said, "if we give you your sick leave," he said, "this school would have too damned many lawsuits on our hands on people that we beat out of their sick leave. Their wages would have broke the District." I said, "Fred, is that actually the truth?" He said, "Sure." I said, "By God, you got a lawsuit on your hands right now. Soon as I get to Keosauqua and get me an attorney I'm filing a suit." That's what this all started about. If they had paid 75, 100 days sick leave I had coming, that would be the whole problem because there wouldn't be no lawsuit. We wouldn't be sitting here talking today."

None of the histories given by the doctors refer to this revelation of claimant's. Obviously, everything that claimant has done or has stated since this encounter may have only been done or stated for personal gain and as a vendetta against defendants.

The greater weight of evidence indicates claimant's anger did not exist until after cliamant's employment was in fact terminated and he had the above conversation.

The undersigned finds that claimant's psychological problems were not aggravated by claimant's work. Any aggravation that did occur was after he left defendant employer's employment. The greater weight of evidence indicates that the lack of a job caused claimant a great deal of stress as well as other situations within his family which were occurring at this particular time.

Claimant also contends that he has a heart condition which is caused by an aggravation by his employment. Again, claimant's contention is supported by claimant's family physician. Dr. Brown, who specializes in cardiology, could find no significant findings related to claimant's chest pain. Dr. Brown also indicated that claimant never opined that his chest pain was related to emotional stress. Dr. Brown opined that claimant's alleged chest pain was not related to myocardial ischemia or cardiac pain and revealed that the tests would indicate that claimant's chest discomfort was not related consistently either to activity or emotional stress. Dr. Brown was unable to testify to a causal connection and under questioning by claimant's attorney revealed that claimant's symptoms were not typical of the symptoms of a person with a cardiac problem. This becomes more significant when claimant's statements about his anger at defendants and his reason for filing this lawsuit are considered. The undersigned finds the testimony of Dr. Brown to have the greatest weight regarding claimant's alleged heart pain.

The evidence fails to reveal that any of claimant's other complaints are related to his employment.

Based on the evidence presented, claimant has failed to prove he had an injury arising out of and in the course of his employment on or near November 20, 1979.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

FINDING 1. Claimant has worked for defendants as a custodian since August 1, 1974.

FINDING 2. Claimant also worked for defendants driving a bus.

FINDING 3. Claimant also worked mowing lawns and cemeteries.

FINDING 4. In November of 1979 claimant's employment with defendants was terminated.

FINDING 5. Prior to his termination claimant had a change in job responsibilities. Some of claimant's responsibilities had been taken away from him and some other responsibilites were given to him.

FINDING 6. Claimant has organic brain syndrome.

FINDING 7. Claimant complains of chest pains.

FINDING 8. Claimant's organic brain syndrome was not caused by claimant's work.

FINDING 9. Claimant's chest pain was not caused by his work.

FINDING 10. After his termination and talking to Fred, claimant became very angry at defendants and filed this lawsuit to teach defendants a lesson.

FINDING 11. Claimant had a great deal of family problems near the time of his termination from defendants' employment.

FINDING 12. Claimant's mental and physical problems were not aggravated by his employment.

CONCLUSION A. Claimant has failed to prove he had an injury arising out of and the course of his employment.

ORDER

THEREFORE, IT IS ORDERED

That claimant take nothing as a result of this action.

Each party is to pay their own costs including the costs of any deposition taken on their behalf. Defendants will pay the costs of the trial transcript as well as the cost for the court reporter at the time of hearing.

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

David E. Linquist

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLENE M. HENDERSON, Claimant, vs. LEROY SCHOON, d/b/a SCHOON CONSTRUCTION, INC., Employer, and IOWA NATIONAL MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 475752 D E C I S I O N O N A T T O R N E Y FILED OCT 10 1984 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

On October 14, 1983 claimant filed a petition seeking to have this agency determine and establish the amount of attorney fees to be paid to her counsel in the original arbitration proceeding, John D. Loughlin. John D. Loughlin has filed a motion for summary judgement seeking approval of the written contingent fee agreement which provided for attorney fees equal to 35 percent of the gross recovery. Claimant has resisted the motion for summary judgement. In her resistance, however, she agrees that the matter be submitted upon the record as it now stands and requests that summary judgement be entered in her favor. Upon review of the file, the motion and resistance, it is clear that no material factual dispute exists and that the matter is appropriate for determination by summary judgement. Neither party requested oral hearing and the matter will therefore be determined upon the record as it stands without oral hearing. Claimant has not filed any opposing affidavits and the evidentiary facts which are propounded in the affidavit which is part of the motion stand largely uncontradicted. It should be noted that this finding does not extend to any conclusions regarding the reasonableness of the fees which were charged for the services rendered.

ANALYSIS

Section 86.39 of the Code of Iowa makes the fees which a claimant must pay subject to the approval of this agency. The

factors to be considered are the following:

1. The terms of any fee agreement.

2. The time and effort reasonably involved in handling the case.

3. The novelty and difficulty of the questions involved in the case and the skill required to properly perform.

4. The reputation, ability, status and expertise of the attorney.

5. The likelihood that acceptance of employment will preclude the attorney from other employment due to conflicts of interest, unfavorable publicity or antagonism with other clients or other attorneys.

6. The fee customarily charged in the locality for similar services.

7. The amount involved in the controversy, the impact of the result upon the client and the result actually obtained.

8. Time limitations, whether imposed by the client or other circumstances.

9. The nature and length of the professional relationship between the attorney and the client.

Disciplinary Rule 2-106(B) Iowa Code of Professional Responsibility for Lawyers.

The written fee agreement was entered into on September 30, 1977. It provided for a 35 percent contingency fee and made no reference to costs.

This proceeding involves only the fees for the workers' compensation case. Accordingly, the time spent by the attorney on other matters will not be considered, even though the source of funds for payment of those services may have been the recovery in this case.

The attorney's time records are part of the record in this proceeding. The services properly related to the handling of the compensation case are contained in the first 10 pages of the time records. These total 118.83 hours. The entries of September 12, 13, 23 and 30, 1977 contain charges which relate to a probate proceeding. On the tenth page begins a series of charges of one-quarter hour each which appear to be for receiving claimant's compensation check, deducting the contingency fee and mailing the balance to claimant. While the entries of September 20 and 29 and October 2 and 4, 1978 are a reasonable amount of time to set up a stable system of payment, the attorney will not be authorized to charge claimant a fee for the function of receiving his fee and the accompanying bookkeeping functions of his office. The record also reflects expenses for long distance telephone calls, travel and advancement of costs and fees in the total amount of $514.75 which is all the expenses listed except the charge of $23.25 on September 30, 1977 for publication fees relating to the probate proceeding.

This case is one, the complexity of which could easily be understated in view of the fact that it was settled by the filing of a memorandum of agreement prior to any adjudication. It did involve substantial issues of law and fact which required competent handling. While it may not have been a "landmark case" it was certainly a case of greater than average complexity.

The record gives little indication of Loughlin's experience, reputation or status. He does not frequently appear before this agency. His time records indicate a degree of unfamilarity with this agency and its procedures. He did, however, have a sufficient degree of expertise in this field of law to recognize the fact that a claim existed and to competently pursue that claim.

There is nothing to indicate that acceptance of employment in this case was in any way adverse to the attorney's continuing practice of law.

No evidence of customary fees in the Cherokee, Iowa area was introduced except the attorney's statement that the fee was reasonable. Contingency fees for workers' compensation cases in the State of Iowa are usually in the range of 20 percent to 33 1/3 percent with 25 percent being a very common fee. Generally, the fees with a greater percentage appear in cases of lesser total economic value or where the attorney has a reputation for substantial expertise in workers' compensation. Normal hourly rates vary greatly with most falling in the range of $50 per hour to $100 per hour and fees in the range of $60 to $75 per hour being most common. It is generally assumed that an attorney with a high level of expertise can perform the work in a minimum of time and is thereby warranted charging a higher hourly rate.

This case involved a very substantial amount. The result of the case could not have been more critical to claimant and the results obtained could have not been more favorable to claimant.

There were no time limits imposed by the claimant in this case. The normal limitations of statute did apply but counsel was not in a position which required immediate action in order to avoid problems with them.

There is no indication that the duration of the attorney-client relationship should have any effect upon the fee to be charged in this case.

Of the total time spent in handling the case 16.08 hours were related to the partial computation. The balance of 102.75 hours is attributable to establishing claimant's entitlement and the normal administration which accompanies any case.

The written contingent fee agreement will not be upheld. It was entered into at a time of stress for claimant. Any contract, to be fair and reasonable must be the result of the parties having equal bargaining power. There is no showing that claimant had any knowledge of common or prevailing legal fees. There is no evidence in this case that claimant did anything other than accept the charge which counsel, whom she presumably trusted and relied upon, quoted to her. This is a case which holds the potential for total payments in excess of $200,000.00 if claimant should choose to not remarry and not seek a further commutation. The strengths and weaknesses of the case could not have been known at the time the fee agreement was entered into. Although it was known that the defendants had denied liability, it is also clear that they had not gained the amount of information which was necessary in order to properly evaluate the case. When the matter proceeded to litigation defendants' counsel, an attorney with a great deal of expertise in this field, apparently found claimant's case to be quite strong since the matter did not go to hearing and was concluded by a memorandum of agreement being filed without any apparent concession being made by claimant. While the record is silent, it is assumed that such filing was a result of successful negotiation handled by claimant's counsel.

This case was one which, absent a special case settlement, would have provided claimant either with a lifetime of benefits or nothing at all. As previously stated, the results counsel obtained could not have been more advantageous to claimant.

An attorney's time is the only commodity which he can market. The cost of maintaining a law office is substantial and continues regardless of whether fees are earned or received. Where contingency fees are used, it necessarily follows that the attorney will be underpaid for his time in some cases and overpaid in others if the compensation is measured in relation to the amount of time devoted to the case. Any contingency fee case which results in lifetime benefits usually results in a fee which is greatly disproportionate to what the fee would be if it were determined by the number of hours worked and the attorney's normal hourly rate. This case is no exception. It is the amount by which the fee will exceed what the fee would have been if computed at counsel's normal hourly rate that is the crux of this proceeding.

A reasonable fee must bear some relationship to the amount of time devoted to the case and the point at which it is resolved. In this case the matter was settled prior to hearing. Even though counsel had performed a great deal of the preparation necessary for hearing, he was not required to expend the time, effort and uncertainity which necessarily follows from taking a case to hearing. He did not have to prosecute or defend a progression of appeals. The point at which the case would be resolved could not have been known at the time the contingency fee agreement was signed. While this case required a substantial amount of preparation, the economic value is similarly substantial.

The written fee agreement did not make any distinction with regard to the fee based upon the stage of the proceedings at which recovery was obtained. General public policy does not favor contingency fees. They are allowed only because they make legal services available to persons who would otherwise be unable to obtain representation. It is a certainity, however, at the commencement of any case, that the amount of work which the case requires will be dependent, to some extent, upon the stage of the proceedings when the final result is determined. The contingency fee of 35 percent could very well have been appropriate if the matter had gone through trial or into the appeal process. It will not be upheld, however, where the case was settled without trial. Under these circumstances a contingency fee of 30 percent of the gross recovery will be allowed. Counsel will also be awarded $514.75 for reimbursement of the costs he advanced in handling the case.

IT IS THEREFORE FOUND AND CONCLUDED that a reasonable fee for counsel in this proceeding is an amount equal to thirty percent (30%) of the gross recovery and reimbursement of his expenses in the amount of five hundred fourteen and 75/100 dollars $(514.75).

IT IS FURTHER ORDERED that a contingency fee of thirty percent (30%) of claimant's recovery will be allowed and an attorney's lien of thirty percent (30%) of claimant's recovery plus five hundred fourteen and 75/100 dollars ($514.75) for reimbursement of costs advanced is approved in favor of John D. Loughlin.

IT IS FURTHER ORDERED that counsel may retain the amount which he has already received but that he shall refrain from taking further fees until such time as that amount is five hundred fourteen and 75/100 dollars ($514.75) greater than thirty percent (30%) of the gross compensation benefits which have been paid, including the amount received in the partial commutation. Once that point has been reached, counsel may resume deducting his fee from the compensation checks but the same shall be at the rate of thirty percent (30%) counsel may not charge an additional fee for negotiating claimant's compensation

checks and distributing the proceeds.

IT IS FURTHER ORDERED that claimant pay the costs of this proceeding.

Signed and filed this 10th day of October, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOIS J. HERRING,	:	
Claimant,	:	File No. 733671
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.	:	FILED

OCT 10 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration and for medical benefits brought by claimant, Lois J. Herring, against her self-insured employer, Armour-Dial Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained on April 28, 1983.

The matter came on for hearing before the undersigned deputy industrial commissioner at the office of the Iowa Industrial Commissioner in Des Moines, Iowa, on August 27, 1984. The record was considered fully submitted on that date.

A review of the industrial commissioner's file reveals that a first report of injury was filed on May 23, 1983.

The record in this case consists of the testimony of claimant, of Geraldine F. Conrad, and of Martin Lyle Graber; of claimant's exhibts 1 through 8; and of defendant's exhibits A through C.

ISSUES

The issues for resolution are:

1. Whether claimant received an injury which arose out of and in the course of her employment;

2. Whether claimant's current disability is causally connected to her alleged injury;

3. Whether claimant is entitled to benefits and the nature and extent of any current benefits entitlement; and

4. Whether claimant is entitled to payment of certain medical expenses.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's applicable weekly rate is $268.08; that claimant was off work on May 13, 1983 and then from May 19, 1983 through the time of hearing; that claimant's medical expenses are fair and reasonable and, but for exhibits 5 and 6, have been paid by her accident and health insurance carrier. Pursuant to defendant's counsel's request, claimant's remaining witness was excluded from the room during claimant's testimony.

Claimant, Lois Jane Herring, testified in her own behalf. Claimant is 41 years old, married, and has one dependent child, age nine. Claimant has graduated from high school but has received no other formal training. She recited a work history as a homemaker and factory worker before beginning work for defendant in December 1972. Claimant initially worked as a sausage packer on the sausage line. In March 1973 she began work in the "overhead" department as an inspector of finished products. This entailed inspecting and culling damaged finished products. Claimant stated substantial lifting and hauling of products was involved. Claimant was performing this job on her injury date. She explained that she was doing damage, that is, taking dented cans from their cartons and replacing them. Claimant disclosed that she was bent over pulling apart two cases of hot beef that were glued together. She recited she felt a shooting, burning pain through the top of her left wrist into her elbow, shoulder and the top of her neck. She reported she told Geri and Jim, two coworkers, about the incident and then told her foreman, Bill Kennel. Claimant testified the incident occurred between 9:00 and 10:00 a.m. Her work hours are from 7:00 a.m. to 3:18 p.m. Claimant related that she saw the company nurse who told her she had likely suffered a sprain and that they should wait to see how it would resolve itself. Claimant reported she continued to have tremendous pain through the weekend and again saw the nurse on Monday. The nurse referred her to James Kannenburg, M.D., whom claimant saw on May 3, 1983. The doctor apparently examined claimant, took x-rays and splinted her hand and wrist. Claimant reported she returned to work with a light duty restriction and did what she could using only her right arm.

On May 9, 1983 claimant apparently was reexamined by Dr. Kannenburg who then referred her to to D. MacKenzie, M.D. Claimant claimed MacKenzie advised a second surgery on her hand and thumb. She reported that Mr. Martin Graber cancelled her appointments with Drs. Kennenburg and MacKenzie. Claimant stated that on May 12, 1983 she saw Duane Nelson, M.D., who told her not to report for work the following day. Claimant stated she reported this to Mr. Graber and was told he had spoken with the doctor and the doctor had released claimant for work. Claimant disclosed she returned to work on Monday and glued labels. Claimant testified she saw Dr. Nelson on May 19, 1983 and he told her he had never released her for work. Claimant reported she has not worked since that date. She characterized Dr. Nelson as her treating physician, but stated she has not seen him since May 1984. Claimant reported Dr. Nelson performed a carpal tunnel release in June 1983 and a series of ganglion blocks in February 1984.

Claimant's detailed medical mileage expenses in addition to those listed on claimant's exhibit 7 are as follows:

May 3, 1983	22	round trip miles
May 9, 1983	22	" " "
May 10, 1983	22	" " "
May 12, 1983	62	" " "
May 18, 1983	62	" " "
February 21, 1984	140	" " "
February 22, 1984	140	" " "
February 23, 1984	140	" " "
March 1984	140	" " "
May 1984	140	" " "

Claimant recited that repetitive raising of her left arm remains a problem. Claimant reported that she had injured a tendon in her upper left arm at work in 1979 and that she had missed "quite a bit" of work when hospitalized for stomach problems prior to the April 28, 1983 incident.

On cross examination, claimant elaborated concerning her 1979 injury. She stated she ruptured a tendon while lifting cases of chili from a pallet. She testified that the muscle in her upper left arm "caved in." Claimant was off work because of this injury from January 10, 1979 through April 1, 1980. She reported a Dr. Browning treating her condition and performed surgery about 1.5 inches above her wrist on her forearm. She stated the doctor described such as "clearing out a tunnel" but "didn't call it a carpal tunnel." Claimant stated returning to her regular job following her injury was "quite an adjustment." She reported that she experienced a dull ache in her wrist following this injury. Claimant disclosed that she was hospitalized in 1982 for severe headaches. She recited that tests at that time revealed a pinched nerve. Claimant admitted she had experienced pain at the base of her skull before 1983 and that such radiated into both shoulders. Claimant relayed that in May 1983 she displaced a rib while loading meat into her home freezer.

Claimant identified the table pictured on defendant's exhibit A as the type of work station she used on her injury date, but stated the materials on the table differed. Claimant recited that on the injury date she was working on the right

side of the table and Geri was working on the left. Claimant stated she reported her injury to her foreman within one-half hour of its occurrence. Claimant explained at times pulling cartons apart required greater than ordinary force since the glue was thicker or different. Claimant stated on her injury date she was pulling apart cartons for Geri as well as for herself since Geri's arm was in a sling. Claimant agreed that line 6 in the initial accident report states there were no witnesses to the April 28, 1983 work incident.

Geraldine T. Conrad appeared in claimant's behalf. Ms. Conrad stated that she was working with claimant on claimant's injury date. She characterized claimant as fair and honest. She testified that claimant was taking cases from the pallet, putting them on the table, and prying double-glued cases apart. She represented that claimant bent over, grabbed her wrist and elbow, and said it felt like something had snapped and that she had pain in her wrist. She stated claimant initially did not wish to report her injury because she had had difficulties with her employer following her 1979 injury. The witness stated she advised claimant to report her injury.

On cross-examination, the witness stated claimant was standing diagonally relative to the witness when the witness viewed the incident and did not have her back fully toward the witness. The witness could not recall an interview with Martin Graber concerning the incident and denied agreeing that such interview could be taped. The witness did not dispute the accuracy of her time card for April 28, 1983 which is defendant's exhibit C. The witness is president of the Armour-Dial employee union.

Martin Lyle Graber testified for defendant. Mr. Graber is employee relations manager at the company. As such, he oversees labor, safety and security at the plant. He related he had been claimant's foreman in the sterilization assurance department from July 1979 to May 1981. The witness explained that finished product cases are wrapped around the product and two cases are glued or "piggybacked" together. One or two glue spots are placed in the center of each carton to glue them together. The witness demonstrated two methods for separating cartons. Cartons may be separated with a utility paddle approximately 6" x 9" in diameter or they may be separated by hand. In hand separation, the worker either wedges the fingers of both hands between the cartons or the worker holds the cartons firm near his or her body while wedging the carton apart with one hand only. Separation does not require great physical force.

The witness disclosed that he had interviewed Ms. Conrad concerning claimant's work incident and that she had agreed that the interview could be taped. Claimant's counsel objected to further testimony concerning the interview and tape on the grounds that defendant had not produced such in response to claimant's request to produce. A review of the file reveals that claimant sought only written and recorded statements of claimant in its request. Defendant, thus, was not required to produce Ms. Conrad's statement and claimant's objection is overruled. Mr. Graber testified that in the recorded statement, Ms. Conrad reported that claimant's back was to her at the time of claimant's work incident. The witness identified defendant's exhibit C as Ms. Conrad's time cards for April 28, 1983. He recited that Ms. Conrad worked 1.9 union hours that day and that she was away from her work station doing union business from 8:53 a.m. to 10:16 a.m. and from 12:44 p.m. to 1:23 p.m.

On cross-examination, claimant's counsel asked the witness whether he knew of anyone who said the work incident did not happen. Defendant's objection to this testimony is sustained. Claimant's motion to amend his petition to conform to proof by alleging a section 86.13 issue regarding unlawful withholding of benefits is denied. The witness stated that claimant did her assigned work and was truthful insofar as she perceived the truth. He recalled that claimant had missed work because of illness on many occasions. The witness testified that an individual going on break would not punch out on the time clock.

Claimant's exhibit 1 is certain medical records relative to claimant. Medical notes of Dr. Nelson from May 12 through May 25, 1983 record an impression of preexisting left upper extremity carpal tunnel syndrome or cervical radiculopathy with a secondary reflex sympathetic dystrophy. A note of June 1, 1983 states EMG's show no evidence of a cervical problem and, therefore, the unchanged diagnosis is of a shoulder-hand syndrome following a minor injury with probable underlying mild carpal tunnel syndrome. A carpal tunnel release was performed June 3, 1983. A note of June 10, 1983 recites claimant's symptoms have not changed in the week following such. A note of June 17, 1983 recites that claimant is extremely tender to palpation over the coracoid process of the left scapula and very tender along the course of the coracobrachialis and short head of the biceps muscle. The impression states: "The symptoms are now becoming more localized and I believe she may have suffered a tear of the coracobrachialis or short head of the biceps at the coracoid process." An impression note of July 6, 1983 states: "Remains the same, that of a tear of the coracobrachialis or short head of the biceps with irritation of the proximal portions of the nerves in the medial aspect of the arm." An impression note of August 8, 1983 states: "[S]he is improving. She has a chronic benign pain syndrome. Secondary to soft tissue injury of the upper extremity, and is status post reflex sympathetic dystrophy."

Claimant's exhibit 2 contains further notes of Dr. Nelson. A note of January 30, 1984 states an impression of "reflex sympathetic dystrophy, left upper limb, resolving." A February 10, 1984 letter report of Dr. Nelson to claimant's counsel states:

> I first saw Mrs. Herring on May 12, 1983. The history as related to me at that time, was that she was well up until 2 weeks prior to that time, when she experienced a snapping sensation in her left wrist with shooting pain up into her forearm when she was pulling two cases apart, which had been glued together.
>
> Over the rest of the day, she developed pain up into her arm, shoulder and scapular area, and also a numbness in her ring finger and thumb of her left hand. When I saw her on May 12th, she was in a significant amount of distress from pain throughout the left upper extremity. Her hand was stiff and markedly swollen. The skin was dry, the skin of the left hand was markedly pale, as compared to the opposite hand. She held the upper extremity in a protected position. She had extreme tenderness with any palpation throughout the left upper limb and I was unable to find any specific abnormality, except that she had all the physical findings of a reflex sympathetic dystrophy. This is an exaggerated physiologic response to pain, which leads to constriction of the blood vessels and lack of nutrition to the soft tissues, because of poor blood supply.
>
> Based upon that history, there is no question in my mind that there is a causal relationship between her injury on April 28, 1983 and her problems that began at that time and have persisted up through the present.
>
> Mrs. Herring has not reached maximal recuperation from this injury. Tentatively, she is awaiting a series of stellate ganglion blocks for treatment of persistent symptoms of a reflex sympathetic dystrophy. All in all, I feel that she is doing much better than she was several months ago, but that she still is unable to do any labor which involves use of the left upper limb. She also continues to be bothered, especially by cold intolerance.
>
> ....
>
> ...Maximum recuperation period should entail another 3-6 months.

Claimant's exhibit 3 contains a note of Dr. Nelson of March 23, 1984. The note reports that claimant has made an excellent response to the series of ganglion blocks administered, thereby confirming the diagnosis of a reflex sympathetic dystrophy and opines another series probably will be necessary and perhaps two or three more series of blocks may be necessary for claimant to receive permanent relief from her condition.

Claimant's exhibit 4 contains a note of Dr. Nelson of May 24, 1984 in which the doctor states that claimant continues to feel relatively well although she still has left shoulder pain and some cold intolerance and that another series of ganglion blocks is in order.

Claimant's Exhibit 5 is a statement of Anesthesia, Incorporated-P.C in the amount of $294.40. Claimant's exhibit 6 is a statement of Burlington Medical Center in the amount of $66.78. Claimant's exhibit 7 records medical travel expenses including seven trips in 1983 of 140 miles each, one trip in 1983 of 100 miles, and two trips in 1984 of 140 miles each. Claimant's exhibit 8 is a supervisor's incident investigation for claimant's incident completed April 28, 1983 by Bill Kennel. The report recites the time of day was 10:00 a.m., that "[e]mployee states she strained her left arm and wrist when she pulled two chopped beef cases apart," that there were no witnesses to the incident, and that a contributing factor to the incident was "[e]xtra amount of glue between the cases made them hard to pull apart."

Defendant's exhibit A is a picture of a department work station. Defendant's exhibit B is the transcript of Ms. Conrad's statement to Mr. Graber. Claimant's objections to same are overruled for the reasons stated in regard to claimant's objections to Mr. Graber's testimony concerning same. Claimant's objections to the copy of Ms. Conrad's time card of April 28, 1983, defendant's exhibit C, are overruled for like reasons.

The transcript contains the following discourse:

> M.B. So that, on the morning that Lois had her injury what do you remember or would you state for the record in your own words what you remember happening that day.
>
> G.C. The only thing I can remember is that Lois had turned around to get some more boxes to put more boxes up on the table and she had her back to me and all at once she dropped the boxes and she just held her arm and she just kind of made a face and really you know like she had a terrible pain all at once and I asked her what was the matter and she said she didn't know she thought she did something but she didn't know what it was and it was,

it just hurt her really bad I can still see her·she just went --- you know.

M.G. You would say she grabbed a hold of her self [sic] being her arm.

G.C. Her shoulder, arm, I don't know just where.

M.G. But tucked it into her body.

G.C. Yes, she just sort of tears came to her eyes, you know had like instant paid [sic].

M.G. So from what you observed, her back was towards you.

G.C. Then she turned around towards me.

M.G. That is when you noticed that her arms were like folded across her chest and she seemed to be grimacing in pain.

G.C. Yes she was.

M.G. What did she say then, to the best of your memory?

G.C. I don't know the exact words any more because that has been quite awhile ago, the only thing I can remember her saying something like I must of torn something or pulled something out of place or she said something is wrong it was just like a bullet like an instant thing that happened, she just got, her face got really white and you could tell she was having a lot of pain I told her to go ahead and report it to Bill you know she should go tell her supervisor about it.

The transcript later contains the following discourse:

M.G. Do you remember what time this happened?

G.C. I would say it was in the morning.

M.G. The Early [sic] part of the morning or the late part of the morning.

G.C. I would say pretty early in the morning.

And the following:

M.G. You were there and witnessed the incident would there have been anyone else there to wittnes [sic] it.

G.C. I don't believe there was. We were facing each other but I just remember her turning around taking those boxes and when she turned back to put them on the table why she, it was really something.

As well as the following:

M.G. Are there any other statements, comments, you would like to add for the record.

G.C. Like what?

M.G. Anything that relates to this incident that you think might be important as far as your statement.

G.C. Well I know if you are working on Potted Meat a lot that is hard to pull apart, because that glue is really stuck with, the glue really sticks the Potted Meat together and then the boxes are wrap [sic] around cases and they are really glued tight and you really have to hammer them out with your opener to get the flaps open.

Defendant's exhibit C is the time card of Geraldine Conrad for the week ending May 1, 1983. The card records that on Thursday, April 28, 1983, Ms. Conrad used 5.9 hours for the company and 1.9 hours for the union. The reverse of the card notes that on that date Ms. Conrad cnecked out at 8:53 and returned at 10:16 and again checked out at 12:44 and returned at 13:23.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether claimant received an injury which arose out of and in the course of her employment.

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on April 28, 1983 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).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

"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.

There are discrepancies in the evidence concerning the time of claimant's incident and concerning whether Ms. Conrad witnessed the incident as well as the degree of strength required to open the cartons. Defendant suggests these demonstrate a work incident did not occur. The greater weight of the evidence supports the occurrence of an incident, however. Claimant testified her incident occurred between 10:00 and 10:15 a.m. Claimant's work day began at 7:00 a.m. Claimant testified she reported the incident to her foreman within one-half hour of its occurrence. Both she and Ms. Conrad indicated that claimant was reluctant to do so. An accident report was filled out that notes the time of occurrence as 10:00 a.m. and states there were no witnesses to the incident. Ms. Conrad, in her recorded statement, reported the incident occurred "pretty early in the morning." Ms. Conrad's time card reflects that she was away from her work station from 8:53 to 10:16 on the injury date. Ms. Conrad's recorded statement, like her testimony, was detailed, credible, and consistent with the testimony of claimant, however. A disagreement does exist between her testimony at hearing and her recorded statement as to whether claimant's back was to the witness at the time of injury. On the statement, Ms. Conrad stated claimant's back was to her. At hearing, she stated claimant was diagonal to her. The description of a diagonal position is compatible with the maneuver of turning partly aside from a work station to pick up a carton, open it and return to the work station. Thus, the description at hearing appears to be a more complete description of the position of claimant rather than one inconsistent with the earlier statement. When all of the above is considered, it appears that a work incident did occur in the early morning of April 28, 1983, that Ms. Conrad was working with claimant at such time, and that there was some delay in reporting the incident, such that the supervisor who filled out the accident report recorded the time of occurrence as 10:00 a.m. rather than earlier. Indeed, Ms. Conrad's characterization of the occurrence time as "pretty early" suggests an early morning rather than a mid morning occurrence time. It is also noted that the accident report form recites there were no witnesses to the incident. Yet, defendant sought out Ms. Conrad for her statement concerning the work incident. This suggests defendant had some knowledge that Ms. Conrad was a probable source of information concerning the incident. That fact and the earlier characterization of claimant's position at the work station relative to Ms. Conrad makes the notation of no witnesses on the accident report form compatible with Ms. Conrad's initial awareness of claimant's incident.

Defendant's witness demonstrated various methods for separating cartons at trial. These would suggest that separating cartons is a simple maneuver requiring little physical exertion. Contraindicative of this, however, is the accident report form which lists excessive glue between cartons as a hazard contributing to claimant's injury. Ms. Conrad, in her written statement, and claimant, in her testimony, also allude to excessive glue as a problem. All such is credible evidence supporting claimant's account of the work incident. Significant also are the facts that claimant reported the work incident to the company nurse and that her doctors recorded the incident substantially as claimant relayed it at hearing. Each suggests a truthful account of the April 28, 1983 work incident. Thus, the greater weight of evidence establishes claimant sustained an injury arising out of and in the course of her employment on April 28, 1983 and claimant has carried her burden.

Our second concern is whether claimant's current disability is causally related to her injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 28, 1983 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.

Dr. Nelson has diagnosed claimant's problem as reflex sympathetic dystrophy and has opined that a causal relationship exists between claimant's April 28, 1983 injury and her continuing problems. It is noted that claimant had an underlying carpal tunnel syndrome which apparently was resolved following a release on June 3, 1983. Such did not resolve claimant's symptoms, however. There also was some evidence that claimant suffered a tear of the coracobrachialis at the coracoid process from her injury. However, the primary diagnosis is of the reflex sympathetic dystrophy and Dr. Nelson clearly relates this to the April 28 incident. Thus, claimant has established the requisite causal relationship between the work incident and her continuing problems.

We next must decide the nature and extent of claimant's benefits entitlement and her medical benefits entitlement, if any. The evidence demonstrates that claimant has not returned to work and is not yet medically capable of returning to employment substantially similar to that she engaged in when injured. Thus, claimant is entitled to temporary total disability benefits under section 85.33(1).

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.

Because claimant has not yet reached her maximum medical recovery, evidence relating to permanent partial impairment was not available. Should such impairment result, the issue of permanent partial disability remains for resolution. Should permanent partial disability benefits be appropriate, claimant's temporary total disability benefits may be converted to healing period benefits.

Claimant is entitled to payment of her medical expenses including her medical mileage expenses under section 85.27. Those expenses include the cost of claimant's first series of stellate ganglion blocks prescribed to treat her reflex dystrophy. Dr. Nelson has opined that claimant will require at least a second and possibly further series of ganglion blocks in order to recover to her status preinjury. Claimant has not specifically requested that payment of such be ordered. However, Dr. Nelson opines the second series is required and certainly such constitutes reasonable care under section 85.27. Therefore, payment for the projected second series by defendant is appropriate.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained an injury arising out of and in the course of her employment when she strained herself while separating two cartons of canned meat which were glued together.

Claimant's injury resulted in a reflex sympathetic dystrophy with an underlying carpal tunnel syndrome.

Claimant had a carpal tunnel release performed June 3, 1983. The release did not relieve claimant's symptoms.

Claimant had a series of ganglion blocks in February 1984. These resulted in some improvement in her symptoms.

Claimant will require at least a second series of ganglion blocks to return to her preinjury status.

Claimant has not recovered to the extent that she can return to work substantially similar to that in which she was engaged when injured.

Claimant has not yet returned to work for defendant.

Claimant has incurred medical expenses related to her April 28, 1983 injury. These include medical mileage of 1270 miles in 1983 and of 840 miles in 1984, and costs for a series of ganglion

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury of April 28, 1983 arising out of and in the course of her employment.

Claimant has established that her injury is the cause of the disability on which she now bases her claim.

Claimant is entitled to temporary total disability benefits until such time as she has returned to her employment with defendant or is capable of returning to employment substantially similar to that in which she was engaged when injured or she has reached her maximum medical improvement.

Claimant is entitled to payment of her medical expenses as evidenced in claimant's exhibits 5 and 6 and to payment of her medical mileage expenses totaling 1270 miles in 1983 and 840 miles in 1984.

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay unto claimant temporary total disability benefits at a rate of two hundred sixty-eight and 08/100 dollars ($268.08) from her injury date until she has returned to work, or is capable of returning to employment substantially similar to her employment when injured, or has reached maximum medical recovery, whichever is first to occur.

Defendant pay any accrued amounts in a lump sum.

Defendant pay claimant mileage expenses of one thousand two hundred seventy (1270) miles incurred in 1983 at the rate of twenty-four cents ($.24) per mile and mileage expenses of eight hundred forty (840) miles incurred in 1984 at the rate of twenty-four cents ($.24) per mile.

Defendant pay claimant the following medical expenses:

Anesthesia, Incorporated-P.C.	$294.40
Burlington Medical Center	66.78

Interest shall accrue pursuant to section 85.30, The Code.

Costs of this proceeding are taxed against defendants pursuant to Industrial Commission Rule 500-4.33.

Defendant is to file a final report when this award is paid.

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

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MAXINE W. HINGST, Claimant, vs. IOWA STATE PENITENTIARY, Employer, and STATE OF IOWA, Insurance Carrier, Insurance Carrier,	File No. 714202 A R B I T R A T I O N D E C I S I O N

FILED
OCT 31 1984
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in arbitration brought Maxine W. Hingst, claimant, against Iowa State Penitentiary, employer, and the State of Iowa, defendants, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury arising out of and in the course of her employment in June of 1981. This matter came on for hearing on September 18, 1984 at the Henry County courthouse in Mount Pleasant, Iowa. It was considered fully submitted with the filing of the statement of gross weekly wages on October 10, 1984.

The industrial commissioner's file contains no filings.

The record in this matter consists of the testimony of claimant; claimant's exhibit 2, a series of medical reports; defendants' exhibit A, the deposition of claimant; defendants' exhibit B, various forms from Blue Cross and Blue Shield of Iowa and defendants' exhibit C, a letter from Bill D. Tipsword dated March 15, 1982.

On May 21, 1984 defendants filed an application for protective order. Among the allegations in that application are the following: That Dr. Catalona refused to give an opinion on causal connection in January of 1983; that Deputy Linquist ordered all discovery be completed by March 3, 1984; that the parties agreed discovery would be completed by March 3, 1984; that claimant gave notice of Dr. Catalona's deposition on May 15, 1984; and that claimant has made no allegations to justify violation of Deputy Linquist's order.

Claimant resisted on July 4, 1984 asserting that the case

was not at that time scheduled for hearing (it was in fact set for July 9); that the interest of justice required permitting the deposition; and that there was a difficulty with scheduling time through the doctor's office. On the same date the resistance was filed, a motion for continuance was made alleging claimant's counsel needed to be in the supreme court.

As defendants assert, the final discovery deadline in this matter was March 3, 1984 by order of Deputy Linquist filed October 6, 1983. On April 13, 1984 the commissioner himself entered an order which includes this statement:

> THIS ASSIGNMENT ASSUMES THAT ALL MEDICAL REPORTS HAVE BEEN RECEIVED AND EXCHANGED AND THAT ALL EXAMINATIONS AND DEPOSITIONS HAVE BEEN COMPLETED. 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 June 14, 1984.

Final discovery deadlines are set for a reason. There must be a cutoff date on the gathering of evidence. If there is not, parties attempt to schedule their depositions to be the last in the case. Much of claimant's resistance to the application for protective order relates to a claim for liver damage. Dr. Catalona did not treat her for that condition. Claimant's petition was filed nearly two years ago. The discovery period extended about eighteen months from that time and should have been ample for taking Dr. Catalona's deposition particularly in the light of his refusal to make a causal connection in early 1983. The deposition offered at hearing as claimant's exhibit 1 and objected to by defendants will be excluded.

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 any disability she has suffered; and whether or not claimant is entitled to temporary total, healing period or permanent partial disability benefits. The defendants have raised the affirmative defense of notice.

STATEMENT OF THE CASE

Single claimant who is a high school graduate with some college work testified at the hearing and by way of deposition. She gave a work history of being a waitress and bartender for all of her life. Immediately prior to commencing work for defendant employer in November of 1977 she had been off work for two years living with and helping to care for her mother. Before that time she had been employed for five years as a bartender working five nights and one day a week.

Claimant stated that her work for defendant employer as a food service coordinator in charge of the dining room and caring for the diet line required her to stand or to walk for almost all of her work shift on a concrete surface. Because the food service routinely was short of help, she sometimes did not get breaks in the eight hour shift. Due to her mother's illness and the need for money from late 1979 until late 1980 she worked as much overtime as she could. Her overtime work also necessitated standing on concrete surfaces.

After the death of her mother in February of 1980, she spent time sitting or in bed except for the period required for her to care for her small apartment. Claimant recalled that she quit working overtime in later 1980 as her feet were bad. She, during that period, would drive home from work, have a bath, lie down and elevate her feet.

Claimant, who denied any foot trouble before she started working on hard surfaces, alleged that she first had trouble with her feet in late 1979. They worsened on a daily basis until 1981 at which time she saw Dr. Catalona for the bunions, hammer toe and burning sensation she experienced.

Claimant said that she told Ruby Winston, the chief food stewardess of her foot complaints in the latter part of 1980. In June of 1981 she went to the personnel office with a note from Dr. Catalona saying she needed surgery. She spoke with the personnel manager. She testified that she did not know enough to ask if she could draw workers' compensation.

Claimant reported that she last worked on June 24 or 25 of 1981. She had been keeping in touch with personnel on a monthly basis or every six weeks. She stated that she was shocked to get a letter on December 18, 1981 from the state telling her that she had been terminated. She has not been supplied with a release to return to work.

Claimant described surgery to her right foot which included straightening of a hammer toe, insertion of a plastic joint and removal of a bunion. Later another toe was done and the bone in a toe was relocated. Since those procedures, claimant has had trouble getting around in that the joint in her toe does not bend well. The bunion has returned. The speed of her walking is decreased. She at times uses a cane. She has had assistance with housework at her house and with her care from a local woman.

She recently was referred by Dr. Ridgely to a Dr. Durkee in Iowa City. She said that she is to have further surgery on her right foot before the end of September.

Only two toes are involved on her left side and the surgery there has decreased her pain.

Claimant in an application dated June 22, 1981 applied for group disability payments. That form contains the question: "Did disability result from employment?" The response is "No." Claimant did not know if she contributed to the cost of the disability benefits. She agreed that she had marked the box saying her foot trouble was not work-related, but she was unable to say why she had not said it was work-related. More specifically she told of a burning sensation in early 1979. She had no bunions or hammer toes at that time. In the early 1980's she became sure her trouble was related to being on concrete floors.

In addition to her foot surgeries claimant had surgery by Dr. Smith to her knee. She gave a history of a fall on the ice at work after she delivered a meal to a cell house. She saw a doctor in Fort Madison, but she continued to work. When she saw Dr. Catalona for her feet, he suggested the knee should be watched. She understood that a cyst had formed which interfered with a nerve. She had surgery but her knee remained uncomfortable.

Claimant acknowledged being hospitalized for pneumonia and having liver problems discovered. Claimant remembered she began to feel tired in the latter part of 1979 or 1980. She thought she might have told Mrs. Winston of a possible liver problem, but she agreed that the problem was not found until 1982. Claimant recalled that there was spraying of insecticide in the kitchen area and she claimed that she vomited after the spraying was done. Claimant said that she has taken shots for allergies in the past. Claimant claimed that she continues to have pain from the liver trouble and has not been released to return to work.

Claimant denied being told by Dr. Catalona that her surgery was elective and to the contrary she felt that it was important that surgery be done immediately which was why the surgery was arranged so quickly. She observed that Dr. Catalona gave his deposition using only a few sheets of paper.

Claimant said that she had someone contact Senator Percy's office for her when she was denied social security and was not given a reason for the denial. She did not know where information had been obtained regarding her having foot problems for years.

Correspondence from the department of health and human services shows claimant was denied benefits on the basis that her disabling condition (surgery on the right foot) did not last a year.

Claimant was unsure whether or not she had ever asked for a leave of absence without pay.

Claimant's gross weekly wage was calculated to be $163.02.

William Catalona, M.D., saw claimant on June 22, 1981 and observed a severe hallux valgus and hammer toe deformity of the second toes of both feet. Claimant was presented with options as to her treatment and chose surgery. Surgery was scheduled for the right foot. X-rays of the knee were negative and the cause of claimant's knee pain remained undetermined.

On June 30, 1981 a modified Keller and proximal phalanx osteotomy of the right great toe and hemiphalangectomy of the second toe were carried out. Claimant was discharged on July 3, 1981. On July 7, 1981 Dr. Catalona estimated the term of claimant's disability as about a year.

In a report to social security disability determination claimant was certified as disabled.

On March 1, 1982 claimant had a McBride procedure and hemiphalangectomy on the left.

On May 17, 1982 claimant complained of pain in the posterior and anterior tibial tendon.

When claimant was seen on July 8, 1982, she complained of pain in the plantar aspect of the second metacarpophalangeal joint with local callous formation and prominence of the metatarsal head. The third toe had a hammer toe deformity with a callous on the dorsum of the proximal interphalangeal joint. She also spoke of left knee pain.

On July 13, 1982 an excision of a lateral sesamoid was done on the great toe with an oblique osteotomy of the second metatarsal and a transfer of the flexor tendon to correct a hammer toe deformity.

In a letter dated January 13, 1983 Dr. Catalona wrote:

> Bunions and hammer toes are not commonly related to injuries, however, Mrs. Hingst contends that the deformity of her feet were [sic] related to the long standing and walking which was required of her at her job. Since I have treated Mrs. Hingst for her condition, I would prefer not to judge whether or not her foot problems were work-related. I would suggest that you have an independent examiner evaluate Mrs. Hingst and determine whether or not her foot problems were work-related.

APPLICABLE LAW AND ANALYSIS

The first issue to be determined is whether or not claimant's

when it is within a period of employment at a place where the employee may be performing duties and while she 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). It must be established that a causal connection is not only possible, but fairly probable. Nellis v. Quealy, 237 Iowa 507, 21 N.W.2d 584 (1946).

Claimant testified to noting tiredness in 1979 or 1980. She last worked for defendant employer in 1981. She was hospitalized with pneumonia in September of 1982. Testing at that time suggested significant liver disease and a liver biopsy showed a focal necrosis of unknown etiology. The physician performing the biopsy proposed consideration should be given to exogenous toxins. Dr. Ridgley, who was claimant's treating physician, reviewed the medical literature and concluded that most insecticides such as the one to which claimant alleged exposure would not cause liver impairment, but he also learned that claimant had been exposed to halogenated anesthetics. It was to those anesthetics that Dr. Ridgley attributed claimant's hepatitis in a report in July of 1983.

Claimant has not sustained her burden of establishing by a preponderance of the evidence that her liver problems arose out of and in the course of her employment.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is single.

That claimant claims only one exemption.

That claimant had a gross weekly wage of $163.02.

That claimant is a high school graduate with some college work.

That claimant's life's work has been as a waitress and bartender.

That claimant commenced work for defendant employer in November of 1977.

That claimant developed nausea following the spraying of insecticides.

That claimant last worked for defendant employer in June of 1981.

That claimant was hospitalized with pneumonia in September of 1982.

That a liver biopsy in 1982 showed a focal necrosis of unknown etiology.

That claimant's hepatitis was secondary to halogenated anesthetics.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to prove by a preponderance of the evidence an injury arising out of and in the course of her employment.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

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

Signed and filed this 31 day of October, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BETTY HOLBROOK,	:	
Claimant,	:	File No. 706067
vs.	:	
ALLIED CHEMICAL CORP., (Prestolite Battery Division),	:	R E V I E W - R E O P E N I N G
and	:	D E C I S I O N
TRAVELERS INSURANCE CO.,	:	FILED
Insurance Carrier, Defendants.	:	NOV 1 1984

INTRODUCTION

This is a proceeding styled in review-reopening and for medical benefits brought by the claimant, Betty Holbrook, against her employer, Allied Chemical Corp., Prestolite Battery Division, and its insurance carrier, Travelers Insurance Co., to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury sustained June 11, 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Iowa County Courthouse, Marengo, Iowa. The record was considered fully submitted on that date.

A review of the industrial commissioner's file reveals a first report of injury was filed June 25, 1982.

The record in this case consists of the testimony of claimant, of Mary Kay Kellogg; of claimant's exhibits 1 through 19; and defendants' exhibits A, B and C.

ISSUES

The issues for resolution are:

1. Whether claimant received an injury arising out of and in the course of her employment.

2. Whether a causal relationship exists between claimant's injury and her disability.

3. Whether claimant is entitled to benefits and the nature and extent of any such benefit entitlement.

Claimant moved to amend their petition July 11, 1984 seeking relief under the occupational disease act. At hearing, she moved to amend to conform to proof on the same grounds.

On July 23, 1984, defendants moved to amend their answer to assert the affirmative defense of the statute of limitations if claimant's injury predates June 11, 1982.

At hearing, defendant moved to amend to conform to proof on the same grounds. Evidence regarding each matter was presented without objection at hearing.

Iowa Rule of Civil Procedure 80 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 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.

Iowa Rule of Civil Procedure 106 provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Claimant's amendment regarding the claimed occupational disease is denied. Defendants' amendment regarding the statute of limitations affirmative defense is permitted.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant was off work from June 15, 1982 to November 23, 1982; that claimant's weekly rate is $153.34; that claimant's medical bills are fair and reasonable but for her chiropractic charges; and that claimant's conversion date for permanent partial disbility is November 23, 1982.

Claimant, Betty Lee Holbrook, testified in her own behalf. Claimant has been married and has two children ages 19 and 22. Claimant left high school after the 11th grade and achieved a GED in 1976. She testified she expected to graduate from the Hamilton Business College in September 1984. She is taking courses in administrative accounting and microcomputers. She stated she decided to enroll in the college since she can no longer do factory work.

Claimant began work with Prestolite in March 1979. Claimant initially worked as a post burner. She stated a post burner used a torch to burn lead around the inside of a mold for a battery, then filled the mold with lead and capped it. The post burner was also required to reach under the line and pick up the lead sticks and put them in the worker's bin. Claimant stated she lifted 100 or more lead sticks per day and that each stick weighed approximately one pound each. After working a year and a half as a post burner, claimant developed tendonitis in her right arm. Claimant received workers' compensation benefits as a result of this injury and later returned to light duty work at the factory. In the fall of 1980 she applied for and received the inspector's job which she held in June 1982. The inspector examined batteries for rejects and removed the rejected batteries from the line. Claimant recited that batteries weighed between 7 to 100 pounds and had to be lifted over a barrier 12 to 18 inches high in order to be removed from the line.

Claimant was hospitalized June 15, 1982 at the direction of her chiropractor. While hospitalized, she was treated by John A. Weibel, D.O. Claimant recited that prior to her hospitalization, she worked Friday, June 11. By evening she had such pain she couldn't get up from her chair when resting at home. She explained that she rested throughout the weekend hoping her pain would subside. She reported needing help getting out of bed Monday, but worked anyway. She stated she had to be lifted out of bed Tuesday morning and once up could not walk at all. She called and reported she could not work. She then saw Garry M. Dunn, D.C., who advised her to enter the hospital. Claimant stated that when released from the hospital on June 20, she still had so much pain she couldn't walk nor stand to have the doctor palpate her back. She reported her legs and hips hurt. Following that discharge, claimant could not return to work and was again hospitalized. Paul A. Searles, D.O., referred her to Gerald L. Meester, M.D., an orthopedic surgeon, in July 1982. Claimant subsequently has seen James Weinstein, M.D., and Martin F. Roach, M.D.

Claimant reported she was terminated by Prestolite on December 15, 1982 when the company represented it had no work she could perform within her restrictions. Claimant stated she sought other work through Job Service of Iowa, but found none. She reports she worked two or three weeks doing phone surveys for Kelley Services. She reported she left because the position required her to sit constantly and that caused her pain in her low back. Claimant earned $4.00 per hour at this job. Claimant also interviewed for a position as an insurance clerk. She was told she did not have enough experience to do this. Claimant recited she had no outstanding job offers at hearing time. She explained that her only training has been as a waitress and bartender and that she believes she is unable to do these jobs now.

Claimant recited she had visited Dr. Dunn for minor pain several months before beginning work with Prestolite. She stated her problems increased the longer she worked at Prestolite and, therefore, she made regular visits to Dr. Dunn. Claimant explained she had had no traumatic injury prior to the June 1982 incident. She reported that the number of rejected batteries had increased greatly in the last two months before her initial hospitalization. She attributed this to the fact that a new post burner had been hired and had not been properly trained. Consequently, almost all of his batteries had to be removed from the line. She reported she carried the batteries with her whole body and had to carry each ten to fifteen feet.

Claimant described her present problems. She stated she has pain in her hips and low back and that sitting and riding in cars is painful. She reported she had difficulty sleeping. She expressed her desire for a job where she could get up and move about and opined that she can't be on her feet long enough to do either factory work or waitressing.

Claimant identified exhibits 15, 16, 3 and 5 as certain charges of medical expenses related to her back condition. She stated it is 100 miles round trip from her home to Dubuque; 140 miles round trip from her home to Iowa City; and four or five miles round trip from her home to Dr. Weibel's office.

On cross-examination, claimant admitted her grade point average at the business college is 4.0. She stated she intends to become an accountant and that her ultimate goal is to become a CPA. She agreed that graduates of the college have an 80 percent placement rate. She relayed that she does "book work" for the gentleman with whom she resides. In return, he forgives loans to her. Claimant explained she had seen Dr. Dunn on three occasions before beginning work at Prestolite. She recited that at that time her major complaints were of low back pain, but that she also has pain in her hips and in her shoulder blades. She agreed she had fractured her tailbone while roller skating in early 1982. Dr. Searles treated her for this condition. She recited that she continues to have pain all of the time, but that it is not as severe as when she worked at Prestolite since she is "not lifting those batteries all of the time." Claimant agreed she talked to Mary Fleming about her pain on June 14, 1982 and added the company had known about her pain from the time she worked as a post burner. She agreed she did not give written notice that her back condition was work related until June 11, 1982.

Claimant agreed Dr. Dunn had told her she should change jobs in 1980. She asserted she did change jobs then in that she became an inspector. She expressed her belief that the doctor had not meant she stop working at Prestolite when he told her to change jobs.

On redirect, it was established that claimant saw Dr. Weinstein on four or five occasions; that x-rays taken cost $36.00 and that the charge for each visit was $20.00; and that she did not miss work because of her fractured tailbone. Defendants' answers to interrogatories 14, 15, 16 and 19 were received into the record as admissions against interest.

Mary Kay Kellogg was called as a witness for defendants. Ms. Kellogg is currently human resources manager at Prestolite. On June 11, 1982 she was the personnel clerk for the company. She testified that as such she was involved in the personnel, insurance, and miscellaneous functions of the department; processed insurance claims; and provided support to the nurse and the personnel manager. The witness testified she has, maintains and controls the personnel records of the company. Claimant's objections as to the witness' competence to testify regarding the contents of claimant's personnel file is overruled. The witness testified that a review of claimant's file did not disclose claimant had made any written notice to Prestolite that work had caused her back pain prior to June 14, 1982. She disclosed that the documents in claimant's file indicate claimant first gave the company notice her work was creating back problems after June 11, 1982.

The witness testified claimant was paid 22 weeks of employer-funded disability at $127.20 per week and that these would not have been paid had workers' compensation also been paid claimant for her problem. She testified that the employer-funded program also paid claimant's Delaware Memorial County Hospital bill in full as well as her Finley Hospital bill. She stated the company did not authorize claimant's visit with Dr. Meester, but that claimant's estimation of her out-of-pocket costs for his services was likely correct given the fact that claimant would be required to pay 20 percent of her costs plus her $100 deductible under her major medical policy.

The witness then testified as to the number of batteries rejected in the year preceding June 11, 1982. Claimant's objection to this testimony is overruled. She stated one to two percent of batteries produced were rejected. She stated that under this scenario a maximum of twenty batteries per day would have been rejected.

On cross-examination, it was disclosed that the witness did not have with her the written study of the rejects during that year.

The witness identified claimant's exhibit 21 as a reimbursement agreement between claimant and the Aetna Life Insurance Company.

Claimant's exhibit 1 is a report of Garry M. Dunn, D.C., of March 2, 1984 which states:

> For the years 1978 and 1979 Mrs. Holbrook's major complaint was low back pain, which I diagnosed as Posterior, inferior and internal displacement of the right ilium. All neurological examinations were negative, motion was near normal. I saw her as she had problems and she felt good until she started heavy lifting for prolonged periods at work. Chiropractic adjustments maintained her back very well at this time.
>
> In 1980 her back was severely irritated by work and I advised her to change jobs. Heavy lifting was causing deterioration of her vertebra. Patient was receiving care from a medical doctor and taking muscle relaxers and pain killers with very little result. Regular chiropractic adjustments maintained her condition.
>
> By 1981 deterioration and discopathy of the lumbar region was causing pain down her left leg. There seemed to be sciatic involvment [sic]. X-rays show scoliosis is being irritated by lifting of heavy batteries at work, and I once again advised her to find a different job. Her back is too weak for the continous [sic] lifting. Patient got temporary relief from chiropractic adjustments but her work

caused the symptoms to return quickly. Her major complaint was pain in low back and down her left leg.

By 1982 Mrs. Holbrooks' [sic] condition had deteriated [sic] to such a point that I was no longer able to help her. She was admitted to the hospital during that time and the medical doctors that took care of her at that time will be able to verify this.

Claimant's exhibit 2 is the July 19, 1984 deposition of Dr. Dunn. All objections in the deposition are overruled. Dr. Dunn explained that x-rays taken on April 3, 1981 revealed that claimant has a minor curve in her low back. He stated the condition causes her back to curve to the left and causes stress to her back with heavy lifting accompanied by turning. The end result is ligamentous damage which decreases the back's strength and creates pain during her work. The doctor elaborated on the significance of these findings as follows:

A. Well, the curvature causes the back to be weaker just because it's out of alignment. This is something that might have happened when she was a kid. It's an old problem that once you start doing more and work with it, it becomes more apparent. It shows up as a problem.

Q. Would a person with a curvature that you have described have any difficulty in lifting objects?

A. Yes. Because the back is weaker in that area. So they don't have near the structural strength.

Q. Would a person with a curvature that you've described -- and specifically Betty Holbrook -- have any difficulty in bending motions?

A. It affects the lower lumbar region. And bending comes from that area so it will have an affect [sic] on it.

The doctor stated that x-ray examination on June 15, 1982 did not reveal a structural reason for claimant's pain and, therefore, it was assumed that her problem was musculature. The doctor noted that claimant's problems "progressed extremely" from when she first received treatment, that she presented with no injuries other than her work, and that "with her work her back seemed to get weaker and weaker, and she seemed to have more and more problems, a more numerous level."

The doctor indicated he last examined claimant July 10, 1984. X-rays were taken. He stated these revealed claimant's lumbar curvature is less and she has no arthritis or bone deterioration. He explained that claimant had positive Deerfield and Knackle's tests but negative Goldwaite and Brazard's tests. He indicated that claimant's chief complaint at that time was of stiffness in the low back and attributed this to irritation of the sacroiliac joint and musculature in the lower lumbar region as a result of post injury. The doctor opined claimant's employment at Prestolite "is the reason" for her current back problems which he described as back pain, back muscle spasms and sciatica. The doctor concluded as follows regarding employment factors which would cause claimant's condition:

Mostly types of work that would irritate the back which would involve a lot of bending, a lot of lifting, turning while lifting is kind of the worst one because you put such a strain into the back, lower back especially.

The doctor opined claimant has a ten to fifteen percent permanent partial impairment to the body as a whole as a function of her limited motion.

On cross-examination, the doctor opined that claimant would have some future pain regardless of whether she avoids heavy lifting. He stated he was uncertain what creates this pain but that he considered it part of this curvature in her spine. The doctor reiterated that the curvature causes claimant's back to become weaker and is a substantial factor in claimant's pain. He further stated muscle and ligamentous damage is causing most of her pain, however. He stated that the damage will improve with time but never completely dissipate "because once you do any damage to a ligament, it never heals properly, so it's weaker always." The doctor then disclosed claimant has a wedging or narrowing of the disc between the fourth and fifth lumbar resulting from her curvature and causing pain with stress from standing, lifting, or sitting. The doctor later stated the wedging produced pressure on claimant's nerves which caused her pain. The doctor admitted he first advised claimant her work was creating problems for her back in 1981 and that she complaind of no specific work injury on examination on June 14, 1982. He stated claimant's impairment might improve with time depending on the treatment she receives and the activities in which she engages. However, he further stated:

Well, based upon your experience, Doctor, and your ability to treat this kind of a condition, do you think it's a good possibility that it will improve?

A. No. Just by going over her past history, she's just staying about the same or worsening. She's been off work here for quite some time. After talking to her, she's still having the same problems. After reading the medical records by the other specialists, orthopedic people, they have no real positive action about her getting a lot better.

The doctor admitted he had not known of claimant's 1982 fracture of her coccyx or sacrum until he reviewed her medical records prior to the deposition. He opined that a fracture of the sacrum or coccyx would cause pain on sitting.

Claimant's exhibit 3 is a statement of John A. Weibel, D.O., in the amount of $25. Defendants' objections to the exhibit are overruled. Claimant's exhibit 4 is statements of Dubuque Orthopaedic Surgeons, P.C., showing charges incurred from July 9, 1982 to November 24, 1982 in the amount of $235 with payments of $190 and an outstanding balance of $45. Claimant's exhibit 5, 6 and 7 are statements of Paul A. Searles, D.O., of June 15, 1982 through June 20, 1982, June 23, 1982 and July 7, 1982 recording total charges of $108, $12 and $21 respectively. Defendants' objection to exhibit 5 is overruled. Claimant's exhibit 8 is a statement of Lynn D. Kramer, M.D., of October 25 and October 27 recording total charges of $231. Claimant's exhibit 9 is a July 27, 1984 medical report of Martin F. Roach, M.D., with an attached statement in the amount of $150. The report states claimant has no scoliosis or truncal list, notes an impression of lumbosacral pain syndrome probably related to overuse at work; and opines that a permanent partial disability is not anticipated and that claimant's fractured coccyx is unrelated to her current symptoms.

Claimant's exhibit 10 is a letter report of Gerald L. Meester, M.D., to Rehabilitation Education and Services Branch. The letter states claimant's diagnosis as low back pain and that she was released for work November 23, 1982 with no lifting over 10-15 pounds. Claimant's exhibit 11 is medical notes of Dr. Meester relative to claimant from July 9, 1982 to October 18, 1982. The notes state the following history:

This is a 36 year old white female with pain in the low back and right leg and she is here to see us because she can't get into the Clinic [sic] in Cedar Rapids or to Iowa City for 4 months. The patient said she has never had any back pain, except for minor aches and pains until she started working at Pretolite [sic] Battery Company in Manchester. She has worked there for 3 years. She had been on her present job for 18 months and since that time she has had numerous severe back aches after work. She does a lot of bending over at work with batteries. On the particular time in question she was doing her regular job, went home, had a lot of stiffness that night, had severe pain, wound up being hospitalized after being unable to get around with the pain and she was in the hospital for 5-6 days, on medication and P.T. She has really progressed very little, has not been on bedrest at all. She has pain in the right buttock and hip area with occasional radiation to the right leg. There is no pain in the left leg at all. She has very little if anything in the way of back pain at this point.

The October 18, 1982 entry states claimant is never going to be well enough to return to heavy lifting such as she was performing at Prestolite.

Claimant's exhibit 12 is medical statements of Dr. Dunn. Defendants' objection to such are overruled. Claimant's exhibit 13 and 14 are Prestolite Battery physician referral reports for claimant. Claimant's exhibit 15 is a summary of medical costs prepared by claimant. The summary notes six trips to Dubuque to see Dr. Meester and one trip for hospital admission. Defendants' objection to the exhibit are overruled. Claimant's exhibit 16 is a statement of Finley Hospital in the amount of $927.25. Claimant's exhibit 17 is a statement of Delaware County Memorial Hospital in the amount of $971.40. Claimant's exhibit 18 is a December 15, 1982 letter to claimant from Tony Gotto, personnel manager of Prestolite. The letter states:

Dr. Tyrrell has completed your physical examination and concurs with the necessity for and the duration of the medical restrictions Dr. Meester established to govern your return to work.

After conducting a complete assessment of position availability, it has been determined that the Company is not able to provide employment that meets the restrictions and their duration of your medical release. Consequently, we regret to advise you that your employment has been terminated effective December 15, 1982.

If and when you can submit satisfactory medical certification which allows for proper placement, the Company will consider your application for re-employment.

Claimant's exhibit 19 is various medical records relative to claimant. A note of the Manchester Family Health Clinic of April 24, 1981 records: "Back discomfort. On and off, usually after work, in fact, much related to work on the line at Prestolite." Claimant's exhibit 20 is medical notes of James Weinstein, M.D., relative to claimant from July 27, 1983 to November 23, 1983. The notes state that claimant's symptoms may be related to the type of work that she was doing. Claimant's exhibit 21 is a

reimbursement agreement of July 26, 1982 between claimant and Prestolite Battery Division.

Defendants' exhibit A is medical notes of Drs. Weibel and Searles relative to claimant and dated from June 15 to June 28, 1982. Defendants' exhibit B is a medical note of Dr. Meester of October 29, 1982 stating the etiology of claimant's back pain remains undetermined. Defendants' exhibit C is Delaware County Memorial Hospital notes relative to claimant. Defendants' exhibit D is temporary disability income statements for claimant from Eltra Corporation and Aetna Life & Casualty from June 22, 1982 through November 22, 1982.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether the statute of limitations bars claimant's action. Section 85.26 provides in relevant part:

> 1. No original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless such proceeding 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.
>
> 2. 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. Once an award for payment or agreement for settlement as provided by section 86.13 for benefits under the workers' compensation or occupational disease law or the Iowa occupational hearing loss Act [chapter 85B] has been made where the amount has not been commuted, the commissioner may at any time upon proper application make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section 85.27.
>
> 3. Notwithstanding the terms of chapter 17A, the filing with the industrial commissioner of the original notice or petition for an original proceeding or an original notice or petition to reopen an award or agreement of settlement provided by section 86.13, for benefits under the workers' compensation or occupational disease law or the Iowa occupational hearing loss Act [chapter 85B] shall be the only Act constituting "commencement" for purposes of this statutory section.

The statute of limitations is an affirmative defense which defendants must prove by a preponderance of the evidence. Baines v. Blenderman 223 N.W.2d 199, 203, (Iowa 1974).

The discovery rule delays the accrual of the cause of action until the injured person has in fact discovered his injury or by exercise of reasonable diligence should have discovered it. Chrischilles v. Griswold, 260 Iowa 453, 463, 150 N.W.2d 94, 100 (1964).

The limitation period under section 85.26 begins to run when the employee discovers or in the exercise of reasonable diligence should have discovered the nature, seriousness and probable compensable character of the injury for which benefits are claimed. Orr v. Lewis Central School District, 298 N.W.2d 256, In the context of the notice statute, section 85.23, the Iowa Supreme Court has explained its similar rule thusly:

> 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. Robinson v. Department of Transportation, 296 N.W.2d 809, 812 (Iowa 1980).

Both standards are apparently derived from the following statement of the discovery rule in workers' compensation cases: "The time period for notice or claim does not begin to run until the claimant, as a reliable man, should recognize the nature, seriousness and probable compensable character of his injury or disease. 3A [sic] Larson, Workmen's Compensation 78.41 at 15-65 (1976)" as cited in Robinson at 812.

Claimant's petition was filed December 22, 1982 and is styled in review-reopening. However, a review of the file and the evidence presented at hearing establish that neither an agreement for settlement nor an award for payments has been made in this case. Therefore, the matter is properly styled as an arbitration proceeding wherein the two year statute of limitations is applicable. Dr. Dunn, both in his report of March 2, 1984 and in his deposition of July 19, 1984, indicates he advised claimant in 1980 that her back was irritated by her work and she should change jobs. In neither case does he specify a date certain in 1980 by which he advised claimant of the foregoing. Claimant states her understanding of the doctor's advice was that she should change the physical requirements of her work and not necessarily her employer. She asserts she changed those physical requirements when she transfered from the position of post burner to that of line supervisor. In any event, claimant's condition became so debilitating that she entered the hospital June 15, 1982. She subsequently filed her petition December 22, 1982.

As noted above, defendants must prove the limitations defense by a preponderance of the evidence. In this case, such requires that they establish claimant's injury occurred prior to December 22, 1980. This, they have not done. Apparently, defendants argue claimant's injury occurred on or before Dr. Dunn advised her to change jobs. The evidence is inconclusive as to this; claimant continued to be able to fulfill her work duties until June 11, 1982. Furthermore, defendants have not established Dr. Dunn advised claimant to change jobs before December 22, 1980. Thus, even if defendants had preponderated on the time of occurrence of claimant's injury, they have not established that claimant did not file her petition within the applicable two year limitation period. For this reason the limitations defense fails.

Our next concern is whether claimant received an injury which arose out of and in the course of her employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on June 11, 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).

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.

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.

"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 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.

Claimant has established an injury arising out of and in the course of her employment. Claimant cannot recite a specific work incident which created the problems which resulted in her June 1982 hospitalization and her subsequent prolonged recovery period. Nevertheless, claimant has established that her back problems, even if related to an underlying scoliosis, were substantially aggravated by her job duties. Claimant was required to lift batteries weighing from seven to ninety pounds in the course of her work as an inspector. Removing the batteries from the line involved a lifting and turning maneuver. Claimant's

chiropractor, Dr. Dunn, opined that this maneuver would be most harmful for a person with spinal curvature such as claimant's and contributed significantly to the muscular and ligamentous damage which claimant sustained. Thus, the cause or source of claimant's injury lies in her work duties at Prestolite. The work duties themselves go to the time, place, and circumstances of claimant's injury and are sufficient to demonstrate an injury in the course of claimant's employment. It is noted that the evidence establishes that claimant fractured her sacrum or coccyx in early 1982 while roller skating for recreation. The evidence does not establish that that insult to claimant's body was in any way related to the lower back, hip, and leg pain which culminated in her June 1982 hospitalization.

We next must consider whether a causal connection exists between claimant's injury and her claimed current disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 11, 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, 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'- 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.

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 b a personal injury. Ziegler, 252 Iowa 613, 620, 106 N.W.2d 591, and cases cited.

Claimant has established that a causal relationship exists between her current disability and her work injury. The medical evidence does establish that claimant had a preexisting scoliosis or spinal curvature as well as a wedging at the 4th and 5th lumbar interspace which predisposes her to problems with lifting, bending, or turning maneuvers such as she performed in the course of her work. Claimant's condition has improved since she left the company. Dr. Dunn testified the curvature in her back is less than when she was working. Had she improved significantly following her work release, only a temporary aggravation of her symptomatology would have resulted from the work injury and her continuing problems would more properly relate only to her preexisting conditon. However, Dr. Dunn testified that claimant's work activities resulted in nonreversible ligament damage which with her preexisting problems will likely create problems regardless of the types of activities she performs. This fact demonstrates a disability directly related to claimant's work injury for which claimant is entitled to benefits. The nature and extent of this entitlement must now be decided.

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 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.

The industrial commissioner has said on many occasions:

> A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.
>
> Factors considered in determining industrial disability include the employee's medical condition prior to the injury, after the injury, and present condition; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; and age, education, motivation, and functional impairment as a result of the injury and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.
>
> There are no weighting guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

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. Roach opined that claimant was not likely to have a permanent partial impairment as a result of her work injury. Dr. Dunn opined that she has a ten to fifteen percent permanent partial impairment as a function of her continuing pain and her limited motion. He then recited no objective range of motion studies had been made. This fact undermines the validity of the doctor's opinion. It is apparent claimant has a permanent partial impairment, however. For this reason, the lower figure is considered a more accurate reflection of claimant's body as a whole impairment. Additionally, Dr. Dunn did not consider claimant's preexisting conditon in assigning her impairment rating. The evidence suggests claimant would have had difficulties because of her earlier condition even had she not engaged in the

ork activities she performed. Thus, her impairment rating must e discounted for this reason as well.

Claimant's preexisting problems also are significant in onsidering her work release from Prestolite. While an employer's efusal to give any sort of work to a claimant after she suffers er affliction may justify an award of industrial disability, it ppears claimant's work release goes to her underlying problems nd not to her work injury as such. Considered in this light, laimant's work release, while relevant evidence of her con- inuing unsuitability for employment such as that in which she ngaged at Prestolite, is not entitled to the same weight as it ight otherwise be under Blacksmith and McSpadden rationale.

Other factors also enter into the assessment of claimant's industrial disability. Claimant is 38 years old. She is enrolled in a business college accounting and microcomputer program. She reports she has a 4.0 grade point average, a fact which demonstrates she has high abilities in her chosen course of study. Her enrollment and her academic achievement also speak to her high motivation. Claimant indicated graduates of the business college have an 80 percent placement rate. Thus, it appears claimant will be able to engage in gainful employment for the balance of her work years. When all of these facts are considered, it is determined that claimant has an industrial disability of 8.5 percent. The evidence establishes that defendants have paid claimant 27 weeks of disability benefits to which she would not have been entitled were her injury found compensable under the Workers' Compensation Act. Defendants are entitled to a credit for such benefits under section 85.38(2).

Claimant's petition is styled in section 85.27 medical benefits. This issue was not addressed in the prehearing order filed August 8, 1983 in this case. Neither did the parties raise it at hearing. However, substantial evidence on the matter was presented by both parties. Therefore, the matter will be addressed. Section 85.27 provides claimant with compensation for medical costs related to a compensable condition. The employer has a right to choose the care where the employer has accepted liability for claimant's injury. Defendants denied liability in this matter. Therefore, no authorization question exists. Defendants established claimant's Manchester County Memorial Hospital and her Finley Hospital costs were paid by defendants. Claimant is not entitled to compensation for these costs. Likewise, claimant's unsubstantiated oral testimony as to costs of treatment by Dr. Weinstein and her unsubstantiated drug costs of $5.83 on exhibit 15 are insufficient to warrant payment of such costs. Claimant is entitled to payment of the balance of the medical costs which she has actually paid including costs incurred with Dr. Dunn after June 11, 1982 and mileage costs incurred in seeking medical treatment.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant received an injury arising out of and in the course of her employment when she aggravated her preexisting scoliosis while removing rejected batteries from the production line.

The work activities produced muscular and ligamentous damage in addition to claimant's preexisting scoliosis and 4th and 5th lumbar interspace wedging. Claimant's ligament damage has produced a permanent change in her condition and an impairment not attributable to her preexisting condition.

Dr. Dunn did not make objective range of motion studies before assigning claimant an impairment rating of ten to fifteen percent (10-15%) of the body as a whole. Dr. Dunn did not consider claimant's preexisting problems in the assigned impairment rating. Claimant's permanent partial functional impairment as a result of her work injury is less than ten percent (10%) of the body as a whole.

Claimant was released from employment following her work injury. Claimant's work release relates to her continuing unsuitability as a result of her preexisting condition for work such as she engaged in for her employer and did not result from her work injury as such.

Claimant is thirty-eight (38) years old and well motivated. Claimant has a GED and is completing a business collge course in accounting and microcomputers. She has maintained a grade point average of 4.0. Graduates of claimant's college have an eighty percent (80%) job placement rate.

Claimant has sustained an industrial disability of eight point five percent (8.5%).

Claimant has received twenty-two (22) weeks of disability benefits at a rate of one hundred twenty-seven and 20/100 dollars ($127.20) under an employer funded program. Claimant would not have been entitled to such benefits had her condition been found to be work related.

Defendants have paid claimant the costs of her Finley Hospital and Delaware County Memorial Hospital hospitalizations.

Claimant incurred costs for treatment of her work injury with Drs. Dunn, Weibel, Searles, Kramer and Meester.

Claimant also incurred medical travel expenses in seeking medical treatment.

Dr. Dunn first advised claimant that her condition was work related sometime in 1980.

Claimant filed her petition December 22, 1982.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Defendants have not established that section 85.26 bars claimant's cause of action.

Claimant has established an injury of June 11, 1982 which arose out of and in the course of her employment.

Claimant has established that her current disability is causally related to her work injury.

Claimant is entitled to healing period benefits from her injury date until November 23, 1982.

Claimant is entitled to permanent partial disability resulting from her injury of June 11, 1982 of eight point five percent (8.5%).

Claimant is entitled to payment of certain medical expenses as enumerated in the order below.

Defendants are entitled to a credit under section 85.38(2) for disability benefits paid claimant during her healing period.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant forty-two point five (42.5) weeks of permanent partial disability benefits at the rate of one hundred fifty-three and 34/100 dollars ($153.34) per week.

Defendants pay claimant healing period benefits from her injury date to November 23, 1982 at a rate of one hundred fifty-three and 34/100 dollars ($153.34) per week with credit for those benefits paid claimant under the employer contributed plan.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

Defendants pay claimant mileage expenses totaling seven hundred (700) miles at the rate of twenty-four cents ($.24) per mile.

Defendants pay claimant the following medical expenses:

John A. Weibel, D.O.	$ 7.40
Paul Searles, D.O.	16.20
Gerald Meester, M.D.	37.00
Lynn Kramer, M.D.	23.00
Garry Dunn, D.C.	8.00

Defendants pay costs of this action.

Defendants file a final report when this award is paid.

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

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JEFFREY HOLTZMAN,

Claimant,

vs.

BLACK ANGUS RESTAURANT,

Employer,
Defendant.

File No. 746495

A R B I T R A T I O N

D E C I S I O N

FILED
NOV 2 - 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Jeffrey Holtzman, against his employer, Black Angus Restaurant, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained October 14, 1983. This matter came on for hearing before the undersigned deputy industrial commissioner at the office of the industrial commissioner in Des Moines, Iowa, on May 8, 1984. The record was considered fully submitted on that date.

A review of the industrial commissioner's file reveals that no filings have been made.

The record in this case consists of the testimony of claimant, of claimant's mother, Judy Holtzman, and of Paul H. Woods; of claimant's exhibits 1, 2 and 3; and of defendant's exhibits B, C and D.

ISSUES

Under the prehearing order, the issues for resolution are: Whether a causal relationship exists between claimant's injury and any disability; whether claimant is entitled to benefits; and the nature and extent of any such entitlement. Claimant's rate of weekly compensation also remains unresolved.

At hearing, claimant's counsel sought to include the issue of sanctions under 86.13. The amendment is denied. Claimant, of course, is free to bring a separate action for such benefits.

PRELIMINARY MATTER

The claimant, through his attorney, filed a petition with the industrial commissioner on November 30, 1983. He sent a copy to the employer by certified mail, return receipt requested, as required by law and the return receipt shows that Paul Woods on behalf of Black Angus received a copy of the petition on November 30, 1983.

On December 27, 1983 the claimant filed a motion for default and request for hearing with the commissioner.

The motion for default was sustained on January 11, 1984 and the case was ordered placed back into the assignment for prehearing. No penalty was assessed for default in the January 11, 1984 order.

On May 3, 1983 the employer, through Paul Woods, filed a witness list with this agency. A copy of the list apparently was mailed to claimant's counsel.

On May 8, 1984 a hearing was held to determine what benefits to which claimant was entitled. The order of default established liability. Paul Woods, having been sent notice, presented himself as agent for the employer at the hearing with counsel, whom stated he was counsel for the defendant. It was established that the employer's insurance coverage for the injury had been disputed until May 7, 1984 when the carrier agreed to provide counsel for this matter.

Defendant was allowed to participate in the hearing by cross-examining claimant's witnesses and offering proof mitigating damages. Claimant objected on the grounds of the entered default. The industrial commissioner has stated the following regarding default in a workers' compensation case:

> The whole matter of the default is, however, for the most part an exercise in futility and an unnecessary delay in arriving at the ultimate issue. As noted by the deputy the default has little effect upon the defendants.
>
> "Where a defaulting defendant appears prior to trial of the question of damages, he has a right to be heard and participate therein." Williamson v. Casey, 220 N.W.2d 638, 740 (Iowa 1974). "He (defendant) may cross-examine witnesses and may offer proof in mitigation of damages. Defendant may in effect even defeat the action by showing that no damages were caused to plaintiff (claimant) by the matters alleged.' Hallett Construction Co. v. Iowa State Highway Com'n., 154 N.W.2d 71, 74 (Iowa 1967).
>
> The damages in this workers' compensation case would appear to be the amount of weekly compensation and medical benefits related to claimant's injury. Defendant may thus "be heard and participate", "cross-examine witnesses", "offer proof in mitigation of damages" and show that "no damages were caused to claimant by the instant injury." Breitbach v. Bertch Cabinet, I Iowa Industrial Commissioner Report 30, 32 (Appeal Dec. 1981).

Thus, the fighting issue here is whether defendant appeared prior to trial of the question of damages. The employer filed its witness list May 3, 1984. On the morning of May 8, 1984 the employer's agent presented himself to the hearing deputy prior to the onset of the hearing. He was accompanied by counsel who represented he was counsel for defendant.

Black's Law Dictionary, revised 4th edition, 1968, defines "appearance" as a coming into court as a party to a suit, whether as plaintiff or defendant. It further states that the term anciently meant an actual coming into court either in person or by attorney and that an appearance may be made by a party in person or by his agent. The Iowa Supreme Court has held that where a party appears in person or by his attorney, he submits himself to the jurisdiction of the court. See Lonning v. Lonning, 199 N.W.2d 60, 62 (Iowa 1972), and that jurisdiction may rest on a voluntary appearance. See Beh v. City of West Des Moines, 131 N.W.2d 488, (Iowa 1964). Cert. denied 85 S. CT. 1766, 381 U.S. 935, 14 L.Ed 2nd 699. Under the above recited legal principles, defendant's filed witness list and his agent's personal appearance at hearing were each sufficient to submit defendant to the jurisdiction of this agency. Each gave claimant notice, prior to hearing, that defendant intended to participate in and defend this action. Defendant having appeared prior to hearing, claimant's objections to its participation in the hearing in order to cross-examine witnesses and offer proof in mitigation of damages is ill founded and is overruled.

REVIEW OF THE EVIDENCE

Claimant, Jeffrey Holtzman, testified in his own behalf. Claimant stated he is nineteen years old and has completed tenth grade. Claimant described his injury as chemical burns to the toes of both feet. Claimant stated that on his October 1983 injury date his supervisor, Paul Woods, directed him to scrub the restaurant kitchen floor. Claimant stated he asked Mr. Woods if an item was the floor cleaner and Woods told him the item was the cleaner. Claimant attempted to scrub with the product. It soaked through his tennis shoes and claimant felt a burning sensation on his toes. Claimant examined his toes after leaving work. He reported he found burn marks. Claimant returned home. He recalled that his parents called the hospital and were directed to wipe his foot down with warm water through the night. Claimant stated he visited the hospital the following morning.

Claimant relayed that his feet looked as if they had holes in them that morning. He represented that his doctor described the burns as chemical burns and advised him not to return to work that day. Claimant conveyed that his doctor stated he was not to work or be exposed to irritant. Claimant stated his feet initially improved but then became infected. Claimant reported he was released to return to work on a trial basis. He explained he tried to work for four hours but was unable to continue working because of his injury. Claimant reported he told Mr. Woods this and then left. Claimant recalled that Mr. Woods later called him and asked him if he could return to work. Claimant advised that Mr. Woods fired him when claimant told Woods he could not return to work. Claimant recited that he obtained other employment with a Holiday Inn on January 7, 1984. Claimant reported he earned $3.35 per hour at the Inn but worked less hours Than at the restaurant. Claimant earned $3.35 per hour there.

Claimant described four of his left toes as very badly scarred and stated his left and right foot are scarred as well. He advised that his toes hurt "real bad" on wet or damp days. Claimant stated a determination of permanent partial disability has not been made. Claimant identified exhibit 3 as a statement of antibiotics prescribed for his injury and exhibit 1 as his statement for treatment at Mercy Hospital. He acknowledged that his father's insurance paid a portion of the Mercy expense. Claimant reported that he had to travel 6.9 miles one way for his medical treatment at Mercy. He stated the statements and reports in evidence accurately reflect the number of visits made. Claimant stated he worked six days per week at the restaurant and generally worked over eight hours per day.

Claimant objected to any cross-examination by defendant. For the reasons outlined in the preliminary matter, the objection is overruled.

On cross-examination, claimant stated his hours varied each week and that he sometimes worked more than forty hours per week; other times not as much. Claimant recited that he had worked two weeks for the restaurant before his injury and worked one day after his injury. Claimant admitted his 1983 W-2 statement for the restaurant records earnings of $199.83. Claimant's objection to this testimony is overruled. Claimant testified he sought other employment earlier than January 1984, but "after his toes had completely healed." On redirect examination, claimant expressed his belief that the W-2 statement was incorrect. He explained that he had received two full and one partial check from the restaurant. Claimant indicated his doctor had advised that he not get his feet wet and that his current position as a dishwasher is within that restriction.

On recross-examination, claimant stated he wears leather

shoes at the Holiday Inn and these are not susceptible to moisture. Claimant agreed he could wear a protective shoe cover to keep his feet dry. He volunteered that "now [his] foot can get as wet as they like" for, other than pain on wet days, claimant is "fine." Claimant agreed he had a medical release to return to work November 12, 1983 and that he had not asked his employer to alter his W-2 statement in order to report greater income to the IRS.

On further redirect examination, claimant stated he worked two weeks for the restaurant and that he worked six days each week, eight hours each day. On further cross-examination, claimant stated he could not have worked at the restaurant with protective gear.

Judy Holtzman, claimant's mother, testified in his behalf. She testified claimant was living with her when injured. She disclosed that claimant's toes already had holes burned in them when he returned from work. She represented that claimant had worked at the restaurant six days per week and in excess of forty hours per week for two weeks prior to his injury. The witness stated claimant left for work at 3:00 or 3:30 p.m. and returned home at about 2:30 a.m. She opined that claimant had accurately described the condition of his toes and relayed that claimant had never complained about his feet before his injury.

On cross-examination, the witness recalled that claimant had worked a split shift with final clock-out times ranging from 10:30 p.m. to 2:05 a.m.

Paul Harvey Woods, owner of the Black Angus, was called by defendant. For reasons outlined above, claimant's objections to his testimony are overruled. Mr. Woods testified that claimant's W-2 statements record the total wages paid claimant in 1983. He stated claimant's hours varied and that claimant clocked himself in and out each work day.

On cross-examination, the witness could not specify the work to which the time sheet in exhibit C related. He recited $181.74 would represent a gross weekly wage while claimant's check would reflect his net pay. The witness did not agree that the wage reflected in exhibit C was typical of that for work similar to that claimant performed. The witness volunteered that he had called claimant and asked him to return to work after claimant's termination. The witness stated he had not been aware that the insurer was not paying claimant's medical costs when claimant asked him to pay these.

On redirect examination, the witness identified two checks, one for $181.84 and the other for $17.49. He explained these reflect the amount recorded on the W-2 forms. He stated the check for $181.84 might well be atypical with less hours worked other weeks.

Claimant was called on rebuttal. He stated his checks were issued weekly and each was for one week's employment. He reported that he had completed the time sheet which is exhibit C and that it reflects one week's work. He identified exhibit D, a check for $17.59, as a "net check without withholding for his work following his injury." He characterized the check for $181.84 reflected in exhibit C as his gross wage in the "big week" immediately preceding his injury. Claimant expressed his belief that one week of wages is not recorded in his W-2 statement. Claimant indicated he would now demand a modified W-2 statement.

Claimant's exhibit 1 is a statement of Mercy Hospital in the amount of $162.76. Claimant's exhibit 2 is medical notes relative to claimant. A report of October 10, 1983 notes acute burns of the left foot, dorsal aspect, secondary to acid containing chemicals. An October 16, 1983 report notes one percent body burns of both feet and reports discussing the need to keep the injured areas clean with the patient and his mother. An October 19, 1983 report notes that the right foot has almost cleared up and that the left foot looks clean and dry. The impression is of no evidence of infection and satisfactory healing. An October 24, 1983 report notes crusted lesions across the toes and dorsal aspect of the left foot but states there is no evidence of infection. An October 27, 1983 report states claimant is showing evidence of infection of a second degree burn in left foot. A November 2, 1983 report repeats this impresion. A November 8, 1983 report notes the wounds are healing well and claimant has no sign of infection at this time. A November 12, 1983 report states the patient may return to work. A radiology report of November 9, 1983 states that the left foot shows no evidence of fracture, dislocation or other bone pathology. Claimant's exhibit 3 is prescriptions for claimant of October 15, 1983 for Dolobid, Silvadene and EES in the amounts of $8.30, $5.75 and $7.05 respectively.

Claimant's objections to defendant's exhibits B, C and D are overruled. Defendant's exhibit B is claimant's W-2 wage and tax statement for 1983 showing wages, tips and other compensation of $199.33. Defendant's exhibit C is a copy of a check of the employer with claimant as payee in the amount of $142.61. The check slip is dated "10-10"; lists 54 1/4 hours worked and a rate of $3.35 per hour for total earnings of $181.74. An accompanying time slip also records 54.25 hours worked and demonstrates claimant worked a five day week. Defendant's exhibit D is a copy of a check drawn by the employer with claimant as payee in the amount of $17.59. The check slip and the accompanying time slip list 5 1/4 hours worked and total wages of $17.59. The check is dated October 29.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether a causal relationship exists between claimant's injury and his disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 14, 1983 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) 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.

There is little doubt that claimant's injury resulted in disabling burns to his toes. Serious doubts remain as to whether claimant has a continuing disability though. (It is noted that claimant pled a total disability in his petition. Under Iowa Rules of Civil procedure, Rule 102, allegations of value or amount of damage even when pled are not deemed admitted. The extent of disability in a workers' compensation case is directly related to damages. Therefore, despite the default entered against defendant, this issue as well as that of the nature and extent of claimant's disability must be decided.) Claimant was released to return to work November 12, 1983. He, himself, admits that out for some pain on damp days he is "fine" and now has no problem with his toes even if he gets them wet. Furthermore, no physician has attributed any permanent impairment to claimant as a result of his injury. Claimant in his brief argues that fact evidences claimant is still in his healing period. The fact that claimant's physicians have released him to work and the medical records in evidence belie that assertion, however. The evidence presented establishes that claimant's injury resulted in temporarily disabling burns to his feet from which he had adequately recovered by November 11, 1983. Claimant is entitled to temporary total disability benefits under section 85.33 from his injury date of October 14, 1983 to such date. It is noted that in a different case a permanent partial disability award might have been appropriate.

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).

The evidence establishes that after claimant's injury he attempted to return to work, felt he was unable to, and after telling his employer's agent, left. The employer's agent then contacted claimant and asked him to return to work. Claimant advised he could not work. He then was terminated. The employer's agent apparently later asked claimant to return to work which

claimant did not do. It is unclear whether claimant's refusal of the employer's offer of work occurred before or after claimant's November 12, 1983 work release. It is clear that claimant exercised some choice in his decision not to continue his service with the employer. Thus, while neither claimant nor his employer's agent can properly be characterized as exercising sterling maturity and good judgment, the record does not establish that the employer refused to give claimant work of any kind following his injury. Claimant, hence, does not qualify for permanent partial disability benefits under the rule of Blacksmith.

Claimant's rate of compensation remains in dispute. The facts relative to this issue were hotly disputed. The undisputed facts are that claimant worked at least 54.25 hours before his injury; that claimant was paid an hourly wage of $3.35; that claimant worked a split shift each day; and that claimant's W-2 statement reflects that claimant earned $199.33 in 1983, $17.59 of which reflect post injury earnings leaving preinjury earnings of $181.74. The parties dispute whether claimant worked one or two weeks prior to his injury. Claimant's time card demonstrates one five-day week of work before his injury. Such is consistent with claimant's W-2 statement which, in the absence of substantial evidence contradicting such, is accepted as accurately reflecting claimant's earnings with the employer in 1983. Claimant worked a split shift and it is not at all improbable that he would typically have worked 54.25 hours per week under that arrangement. Nor is it improbable that that arrangement and that number of hours per week is similar to the work conditions of other employees in similar occupations. Section 85.36(7) governs claimant's rate computation. The section and relevant subsection provide:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings mean 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 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.

Claimant's weekly earnings then are $181.74, or when rounded to the nearest dollar $182.00. Claimant is single and entitled to one exemption. Claimant's rate of weekly compensation is $117.37.

Claimant seeks payment of certain medical expenses including medical travel expenses and prescriptions. All are causally related to claimant's injury and, therefore, are compensable. Exhibit 2 indicates claimant traveled to Mercy for medical treatment on ten occasions. He is entitled to compensation for such.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant received an injury arising out of and in the course of his employment October 14, 1983 when he suffered chemical burns to his feet while scrubbing the kitchen floor in his employer's restaurant.

Claimant sought medical treatment at Mercy Hospital on ten different occasions.

Claimant traveled 11.8 round trip miles on each occasion. Claimant's burns healed and he was released to return to work November 12, 1983.

Prior to November 12, 1983 claimant attempted to return to work and was unable to do so. Claimant was subsequently terminated.

Claimant's employer's agent asked claimant to return to work. Claimant refused.

Claimant was temporarily totally disabled from his injury date to November 12, 1983.

Claimant worked one split shift week of 54.25 hours at a rate of 3.35 per hour for the employer prior to his injury date. Such was typical of work hours and earnings of other employees in similar occupations.

Claimant incurred compensable medical expenses as a result of his injury.

CONCLUSIONS OF LAW

Claimant has established a causal relationship between his temporary total disability and his October 14, 1983 work injury.

Claimant's rate of weekly compensation is one hundred seventeen and 37/100 dollars ($117.37).

Claimant is entitled to temporary total disability benefits from his injury date until November 12, 1983.

Claimant is entitled to payment of medical costs and medical mileage expenses as delineated in the order below.

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant temporary total disability benefits at the rate of one hundred seventeen and 37/100 dollars ($117.37) from his injury date to November 12, 1983.

Defendant pay accrued amounts in a lump sum.

Defendant pay claimant mileage expenses totaling one hundred eighteen (118) miles at the rate of twenty-four cents ($.24) per mile.

Defendants pay claimant the following medical costs:

Mercy Hospital	$162.76
Dahl's Prescriptions	21.10

Defendant pay interest pursuant to section 85.30, The Code.

Defendant pay costs of this action.

Defendant file a final report when this award is paid.

Signed and filed this 29th day of November, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RODNEY L. HOUSEHOLDER, Claimant, vs. CITY OF CENTERVILLE, Employer, and THE HARTFORD INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 716573 A P P E A L D E C I S I O N

FILED
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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision wherein claimant was denied workers' compensation benefits as a result of an injury he received on or about May 14, 1982.

The record on appeal consists of the transcript of the aribtration hearing which contains the testimony of claimant, claimant's wife, Susan Mae Householder, Van Lee Hern, Clint Swan, Fred Clayton, and Jerry Baker; claimant's exhibits 1 through 4 and A; defendants' exhibits 1 through 8; and the briefs and filings of all parties on appeal.

ISSUE

Whether claimant provided defendants with a timely notice of injury pursuant to Iowa Code section 85.23?

REVIEW OF THE EVIDENCE

Claimant was twenty-nine years old at the time of hearing. He is married and has a daughter. Claimant received a GED from high school and has taken a few college courses. Prior to working for defendant employer, claimant testified that he worked as a farm laborer, feed store clerk, fertilizer plant laborer, photographer, correctional officer, police patrolman, and grain bin builder. Claimant also testified that he served in armed services where after three years, he received an honorable discharge. (Transcript, pages 14-26)

Claimant testified that prior to working for defendant employer he had never been hospitalized for work-related injuries. However, claimant testified that while in the service, he fractured his wrist, and "[t]hey thought I had hepatitis, but it went from intestinal cancer to hepatitis and ulcers, and I don't think they really knew what I had." (Tr., pp. 26-27)

Claimant testified that he was hired by defendant employer on December 1, 1980 as a "manager slash custodian." Claimant stated that the position involved the bookkeeping of airport records, maintenance of the buildings and the airport snow removal, mowing, and all around general custodial work. Further, claimant testified that his job included manual labor such as pushing and pulling airplanes, maintenance on the lights, and supplying oil for the airport. (Tr., pp. 15-16)

Claimant recalled that in the middle of May 1982 he was digging up a water line that had frozen and broke over the winter. He testified "I was bent over the hole baling water out. And by the time I got done, I couldn't straighten up." (Tr., p. 28) Claimant stated that "it was like a kink in my lower back. I couldn't straighten up. I couldn't bend over to pick anything up. I couldn't stand up to sneeze or cough, I had to either squat or grab something or sit down or lay down." (Tr., p. 29)

Claimant testified that Fred Clayton, a member of the airport commission, was present at the time of injury. Claimant recalled that he disclosed to Clayton that his back was hurting. Claimant testified that after the incident took place, he and Clayton walked back together to claimant's house. (Tr., pp. 29-31) Claimant did not seek medical attention at this time.

Claimant testified that in mid-June of 1982, he was replacing some airport hangar doors which had come off its hinges. He had gotten one of them hung and left the other one for later. A couple of weeks later he went back and attempted to finish the job. Claimant stated that he experienced great difficulty in hanging the doors because the pain in his back had spread to his leg. (Tr., pp. 32-34)

Fred Clayton testified to both incidents at hearing. In regards to the injury which occurred in mid-May, Clayton stated he did recall claimant digging at the water line but did not remember claimant telling him he hurt his back nor the two of them walking back to claimant's home. (Tr., pp. 131-134)

Claimant did recall, however, the second event which occurred in June or July of 1982. He testified:

> Q. Now, have you also heard Mr. Householder testify that at a later time, perhaps in June or July of '82, he told you that he'd hurt his back while working on a hangar door?
>
> A. Why, yes.
>
> Q. You heard that testimony?
>
> A. I heard that.
>
> Q. Do you remember him telling you that he had hurt his back while hanging a door?
>
> A. I don't know whether he told me or not, but he did mention it. He mentioned he had injured his back. I don't really know whether he told it to me as a matter of form or whether he just -- just made a remark that he had, but one or the other.
>
> Q. Now, in this remark that he made to you, did he tell you he had hurt his back?
>
> A. Yeah, he injured his back.
>
> Q. Did he tell you how he had hurt his back?
>
> A. No. Indicated he'd been lifting on a door.
>
> Q. Did he tell you what kind of a door?
>
> A. Well, no, but I know what kind they are. I've lifted them myself.
>
> Q. So when he said door, you automatically knew what kind of door?
>
> A. I knew what door it was, yes. Not the exact door, but what kind.
>
> Q. Did he tell you for what reason he was lifting on the door?
>
> A. No, he didn't.
>
> Q. Do you happen to recall approximately when it was that he mentioned to you these facts?
>
> A. This was after the episodes of the digging out of the pipe. Shortly after that.
>
> Q. Can you give us an approximate month?
>
> A. Let's just say a month, as close as I could get to it. I know it's not accurate, but as close as I could get to it.
>
> Q. So that would put it in June of 1982?
>
> A. I would say, yeah.
> (Tr., pp. 134-136)

Claimant testified that he first sought medical attention during the second week of July 1982. He saw William A. Heffron, a chiropractor. Claimant testified that Dr. Heffron performed chiropractic manipulation and prescribed muscle relaxers and pain killer. (Tr., p. 36)

On July 26, 1982 claimant visited Charles Poncy, D.O. He disclosed to Dr. Poncy that he had hurt his back digging up the water line.

Claimant testified he also told Dr. Poncy that two days prior to visiting the doctor, he aggravated his back picking up a dog. (Tr., pp. 38-39) Dr. Poncy had him hospitalized on that day. (Tr., p. 40)

Claimant recalled that during his hospitalization he called Jerry Baker, the airport commissioner and asked him to get some help at the airport while he was in the hospital. (Tr., p. 41) Claimant testified that Baker was aware he hurt his back on the job. (Tr., p. 44) His stay in the hospital lasted four or five days. (Tr., p. 40)

Claimant testified that he was rehospitalized the following week. Claimant stated that he told Baker again that he would need help at the airport because his back was hurt. (Tr., p. 44)

Jerry Baker testified to these conversations as follows:

> Q. Jerry, there's been testimony from Mr. Householder that while he was hospitalized the first occasion at St. Joseph's, that would have been in late July, 1982 and early August, 1982; that he telephoned you and advised you that he had hurt his back on the job. Now, first, do you recall him telephoning you from the hospital and talking to you?
>
> A. I remember him telephoning me and telling me he needed help because he was going to be put in the hospital, yes.
>
> Q. Okay. Was it just one occasion or two occasions?
>
> A. I don't remember. The first time it was for a couple days. We wasn't really that concerned about it. I believe the second time was a week. And at that time I sent my son out to work and help Rod, or actually help Susie, because Susie was there part of the time. I guess you just had the baby. And my son was there most of the time by himself.
>
> Q. Did you go to see him personally at the hospital on either of those occasions?
>
> A. No.
>
> Q. During at least the one phone conversation -- maybe there were two, did Mr. Householder advise you what his medical problem was?
>
> A. I knew that he was, what I call down in the back. I don't know what the correct terminology is. I knew that he was down in the back.
>
> Q. Did he during those phone conversations tell you what had happened to cause him being down in the back?
>
> A. No.
>
> Q. How did you have knowledge that he was experiencing a back ailment?
>
> A. I had seen him and talked to him, that he was -- In fact, I made a trip to the airport one time when he was laying on the floor. And, you know, I said, if you got hurt, I've got to file reports, and he said no. He didn't want to file reports, so we did not make out a report.
>
> Q. By report, you mean a first report of injury for workers' compensation?
>
> A. Yes, sir.
>
> Q. Well, when you were out at the airport did you have discussions about how his back ailment had occurred?
>
> A. No. No. I just thought he was down in the back. I didn't even know he was actually hurt. I didn't know it was an injury. I just thought he was down in the back.
>
> Q. So you didn't know or Mr. Householder didn't tell you he had hurt his back on the job?
>
> A. No. The first knowledge that I knew that he

was actually claiming disability, hurt on the job, was when the mayor called me to the City hall on the 29th of September when he got served the noticed [sic] and asked me about it. (Tr., pp. 145-147)

After being discharged from the hospital the second time, claimant was referred by Dr. Poncy to Jack W. Brindley, M.D. Dr. Brindley prescribed a back brace and medication to claimant. Claimant testified that Dr. Brindley advised claimant that his condition would not improve without surgery. (Tr., pp. 45-46) Dr. Poncy then referred claimant to Stuart R. Winston, M.D., in the fall of 1982. Claimant testified that Dr. Winston scheduled a myelogram and then performed surgery. Claimant testified that after the surgery he felt a great deal better but "it took three or four months for all the pain to pretty much leave my leg." (Tr., pp. 48-49)

Claimant testified that he attended the meetings of the airport commission. Claimant stated that the commission members included: Claimant, Jerry Baker, Van Lee Hern, Fred Clayton, Gordon Cooper, and Clint Swan. Claimant testified that the commission met once a month. Claimant recalled that he only missed one meeting from mid-May to the end of September of 1982. (Tr., pp. 34-35)

Claimant testified that the commission became aware of his impending surgery about the first of October of 1982. (Tr., pp. 49-50) However, claimant testified that the commission knew of his back problems during the summer months of 1982. He stated that the commission knew of his injury because he told Fred Clayton and Jerry Baker about the injury. (Tr., pp. 35-36)

Van Lee Hern testified that he became a member of the commission in the fall of 1982 and he first became aware of claimant's back ailment in September or October of 1982. Hern recalled claimant was lying on the floor during a commission meeting and appeared to be in pain. (Tr., pp. 109-111)

Clint Swan testified that he had been on the airport commission since May of 1982. Swan recalled that he attended most meetings from mid-May through September. He stated that he made the following observations about claimant:

> Q. Did you observe Mr. Householder during the summer of 1982 after you came on the board at the meetings?
>
> A. Yes, sir.
>
> Q. Okay. Was he sitting in a chair or was he laying down on his back, various times you saw him at the meetings?
>
> A. ISU -- Iowa Southern Utilities has a hangar out at this airport, and I'd be out there helping work on their planes, and various times he'd be over around different places on the premises.
>
> Q. Okay. But the airport meetings that met on this Thursday, it's my understanding that you were present at those meetings after you came on the board, prior to September there were meetings?
>
> A. Uh-huh.
>
> Q. Okay. And you were present at those meetings?
>
> A. I would about have to have been because I don't think I've only missed one since I've been on the board.
>
> Q. Was Mr. Householder present at those meetings?
>
> A. I think he was present on every one of them.
>
> Q. Okay. And would he be laying on the floor during those meetings?
>
> A. I only recall one time that he was laying on the floor.
>
> Q. Would that have been prior to September?
>
> A. Sir, I can't -- I don't know anything to to [sic] match the dates to because at the time I had no idea that we'd been sitting here now. All I can say is we all seen it the same night so I'd suppose you'd have to go on the assumption of what four agree on. (Tr., pp. 126-127)

Claimant testified that he first became aware of the existence of workers' compensation benefits in September of 1982. (Tr., pp. 51-52) Defendant employer claims that it was notified of claimant's work-related injury on September 29, 1982. (Defendants' Exhibit 7)

APPLICABLE LAW

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.

The statutory period of notice commences to run only after: (1) the employee has knowledge or reasonable grounds for knowledge of this disability; and (2) the employee has discovered or by reasonable diligence could discover that his disability may be work related. Robinson v. Department of Transportation, 296 N.W.2d 809, 812 (Iowa 1980); Lewis v. Chrysler Corporation, 230 N.W.2d 538, 543 (Mich 1975).

Section 85.23 does not expressly require any information in addition to knowledge of the injury to satisfy the actual knowledge prong of the statute. Furthermore, we cannot defeat the beneficient purpose of the workers' compensation statute by reading something into it which is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298, 299 (Iowa 1979). In seeking the meaning of the statute, however, we must consider its entirety rather than only one portion and must give it a construction which does not make any part superfluous. Iowa Department of Transportation v. Nebraska-Iowa Supply Co., 272 N.W.2d 6, 11 (Iowa 1978).

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. Knipe v. Skelgas, 279 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 related. Robinson, 296 N.W.2d 809, 811.

The principle is stated in 3A 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.

This principle has been held to apply to the actual knowledge provision of section 85.23. Robinson, 296 N.W.2d 809, 811.

ANALYSIS

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. 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 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.

Defendant concedes that the notice period should not begin to run prior to the time the claimant knows of his disability and its alleged connection to his employment. However, defendant argues that the plaintiff was in possession of all operative facts on May 14, 1982 when he sustained the back injury digging up a water line. Defendant overlooks one very basic point: it is one thing to be in possession of all the facts and quite another to comprehend the complex interrelation of those facts.

While it is true that claimant's education includes a GED and a series of college courses, the record indicates that the claimant's condition was the kind of injury of which the seriousness was not immediately known.

Further, evidence discloses that more than one incident could have resulted in an injury which would have placed claimant within the statutory notice period. The record clearly shows that not only was claimant involved in an incident on May 14, 1982, but there is sufficient corroboration by Fred Clayton to establish that in July 1982, claimant was involved in a work-related incident lifting a hangar door.

Finally, there is evidence in the record which points out that claimant didn't recognize the probable compensable character of his injury at those times. Until the fall of 1982, he allegedly didn't even know what workers' compensation benefits were.

Therefore, pursuant to section 85.23, it is concluded that the claimant did not recognize the nature, seriousness, and probable compensable character of his injury on May 14, 1982.

In determining when the defendant employer received actual knowledge of claimant's injury, the deputy accurately stated the test to be whether a reasonably conscientious employer had grounds to suspect the possiblity of a potential compensation claim.

In the present case, several facts are present:

(1) The airport commission knew that claimant's job required a great deal of manual labor;

(2) Fred Clayton, a member of the airport commission, knew of at least one occasion when claimant hurt his back;

(3) Claimant telephoned Jerry Baker, the airport commissioner, from the hospital on two occasions disclosing his back pain.

(4) During various airport commission meetings from mid-May through September, claimant would lay on the floor in pain.

Because reasonable persons could reach different conclusions from the evidence, it does not follow that the defendant employer could not make the "intellectual leap" from the fact that claimant was having back difficulties to the injury being work related. Defendants have not established by a preponderance of the evidence that claimant did not provide timely notice of the injury pursuant to section 85.23.

FINDINGS OF FACT

1. Claimant began working for defendant employer on December 1, 1980.

2. Claimant injured his back while performing manual labor for defendant employer on May 14, 1982.

3. Claimant reinjured his back and discovered pain in his leg while performing manual labor for defendant employer in July of 1982.

4. Claimant sought medical treatment for his discomfort in July 1982.

5. Claimant was hospitalized twice during the summer of 1982.

6. During both hospitalizations, claimant telephoned defendant employer disclosing the injury to his back and leg.

7. Claimant attended airport commission meetings from mid-May through September 1982 and was noticeably in pain.

8. Claimant was again hospitalized in October 1982 and surgery to his back was performed on October 21, 1982.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant did not have knowledge as to the compensability of his injury on May 14, 1982.

3. Defendants have not shown they were void of timely notice or knowledge of claimant's injury pursuant to section 85.23.

ORDER

THEREFORE IT IS ORDERED:

That the deputy commissioner's decision be reversed and remanded for hearing.

That defendants pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 16 day of November, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLIFFORD A. KETCH, Claimant, vs. SWIFT INDEPENDENT PACKING CO., Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 747912 A P P E A L D E C I S I O N FILED OCT 19 1984 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner dated September 17, 1984 the undersigned deputy industrial commissioner has been appointed under the provisions of Iowa Code §86.3 to issue the final agency decision in this matter.

Defendants appeal from a decision filed July 26, 1984 which ordered them to provide further evaluation and treatment by Dr. Bakody.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 and 2; and defendants' exhibits A through G. All evidence was considered in reaching this final agency decision.

The decision will be slightly different from that reached by the hearing deputy.

ISSUE ON APPEAL

The issue as stated by defendants is: "Whether claimant is entitled to further treatment with Dr. Bakody under section 85.27, Code of Iowa."

STATEMENT OF THE CASE

Right-handed twenty-nine year old claimant began his employment with defendant employer on September 23, 1981. His work was to take quarter rib sections and divide them into commercial cuts. He testified that in October of 1982 his fingers began to swell as he labored at a job holding a meat hook in his left hand while cutting with his right. He reported his problem to his foreman, to the nurse and to Robert W. Hoffmann, M.D., the company physician.

Dr. Hoffmann did surgery on claimant's finger, removed a growth and returned claimant to light duty. He was placed on his regular job. Claimant claimed he had trouble pulling the cuts of meat apart. He also was bothered by the cold, which he said could get to freezing, in that his hands would go limp and he would be unable to use a knife. In early 1983 he had trouble in his forearms and wrists and he dropped his equipment. By the fall of 1983 his difficulty was with pain and numbness in his forearms and shoulders. He saw Dr. Hoffmann who prescribed medication which made him sick. A brace prescribed by the doctor prevented his using a knife and he was moved to a well saw the use of which he asserted resulted in an inability to move his left arm.

After receiving two write ups for poor work performance, claimant was taken off work for electromyography. When the results of that testing were received, Dr. Hoffmann wanted to do surgery on claimant's wrists the next day. Claimant declined to have the operation because of the results from his first surgery, because he had no one to watch his child and because he wished to have his wrists done one at a time.

Claimant was adamant in his assertion that he was willing at all times to undergo surgery so long as it could be done a wrist at a time.

In October claimant on his own initiative and at his own expense went to Dr. Bakody whom he told of pain in his arms and of an inability to hold his equipment. He was then sent by the company for additional electromyography and x-rays and to see Dr. Socarras whom he told of an inability to use his arms.

He returned to Dr. Hoffmann who performed a left carpal tunnel on February 3, 1984 and a right carpal tunnel on February 17, 1984.

Claimant declared that post surgery he has been unable to use his hands well, that his first three fingers and thumb on both hands are numb and that his left arm falls asleep.

Claimant recalled returning to work four weeks post surgery and being placed on the fat line where he was to pull meat from fat scraps. He was suspended and then returned to the 50-50 line where again he was pulling fat off meat. After being suspended from that job, he eventually got back to the same job he was doing when he was hired.

Claimant's present complaints are of extreme pain in his right hand which goes to sleep and renders him unable to hold his knife. His left arm also goes to sleep. He claimed numbness in both hands and in the fingers on both sides. He has difficulty picking up and holding on to things. Exposure to cold results in his hands and arms going to sleep.

Claimant stated that he has been trying through his foreman and the plant nurse to get an appointment with Dr. Hoffmann.

R. W. Hoffmann, M.D., board certified surgeon, first saw claimant on October 19, 1982 and took a history of claimant's developing pain in both hands in October of 1981. Claimant had a mass over the proximal phalanx of the left index finger from using a hook in his left hand. Based on his observations and what he was told by the claimant the doctor diagnosed a tenosynovitis of the flexor tendon of both hands at the wrist and possibly an early carpal tunnel syndrome. Claimant was given medication.

Claimant returned on December 20, 1982 with sore wrists particularly on the left. His condition was diagnosed as chronic tenosynovitis of the left hand and forearm. A wrist splint was applied.

Dr. Hoffmann then commenced seeing claimant at least once a month and at times twice. The mass on the left hand, a myxoid neurofibroma, was removed about April 29, 1983. Electromyography was done on October 12, 1983 which revealed bilateral carpal tunnel syndrome. Nerve conduction studies were repeated on November 16, 1983 and again were interpreted as showing bilateral carpal tunnel syndrome with distal conduction of the median nerve unchanged as compared to the previous study. A cervical spine series done November 28, 1983 was normal.

After what the doctor characterized as false starts, a carpal tunnel release was done on the left on February 3, 1984 and on the right on February 17, 1984. Claimant's recovery was described as "real nice" with a return of strength and feeling. Dr. Hoffmann said it was at claimant's request that he was returned to his original job. After three or four days claimant reported being unable to do the work because he did not have the strength and because he dropped his knife.

The surgeon reported no evidence of thoracic outlet syndrome either on electromyography or in cervical spine films. Claimant was referred to Dr. Socarras, a neurologist, who found no radiculitis or clinical evidence of thoracic outlet syndrome. Neither was a diagnosis of Raynaud's disease verified. The latter entity was characterized as a disease of the end arteries manifested by whiteness in the hands when they become cold, pain in the tips of the fingers and atrophy of the skin and subcutaneous tissue.

Dr. Hoffmann admitted the possibility that claimant might have both carpal tunnel and thoracic outlet syndrome at the same time. He explained that carpal tunnel involves only the wrists while thoracic outlet syndrome is present in the whole arm, that carpal tunnel will nine times out of ten involve the median nerve although the radial and ulnar nerves may also be involved, and that thoracic outlet syndrome involves the radial, median and ulnar nerve roots.

John T. Bakody, M.D., board certified neurosurgeon, saw claimant on October 21, 1983 at which time claimant complained of painful numbness from his elbows into both hands and the fingers which had been present for over a year. Claimant reported having been seen by Dr. Hoffmann and advised to have surgery. Claimant told of difficulty with fine sensation and of color changes in his hands with cold.

On examination claimant's grip did not register on the right and was 60 on the left. The Tinel sign was positive over the ulnar nerve bilaterally. The Roos test and the costoclavicular test were positive on the left which was thought to be consistent with a diagnosis of thoracic outlet syndrome. Dr. Bakody described all tests, the Phelan's, Tinel's and a blood pressure assessment, for carpal tunnel as negative. Based on his testing, Dr. Bakody diagnosed thoracic outlet syndrome on the left and found symptoms suggestive of Raynaud's phenomenon.

In discussing thoracic outlet syndrome, Dr. Bakody said the symptoms would be pain, numbness and weakness in the use of the extremity which usually are worsened by overhead work. The syndrome would most commonly affect the ulnar nerve. Carpal tunnel would involve the median nerve with symptoms occurring in the first three digits although there might be referred pain problems. Dr. Bakody related claimant's symptoms to his work.

Dr. Bakody did not distinguish between Raynaud's phenomenon and Raynaud's disease. He said that occasionally Raynaud's disease or phenomenon will be seen in conjunction with thoracic outlet syndrome.

The doctor suggested having claimant seen by a surgeon to see if the diagnoses would be confirmed and to do surgical treatment.

Dr. Bakody acknowledged that he had seen claimant only on one occasion and had not seen him since the carpal tunnel release.

Alfredo D. Socarras, M.D., neurologist, examined claimant on January 6, 1984 at which time claimant complained of starvation, nervousness, pain and stiffness in his neck, pain in the left forearm, lack of function in his knuckle where surgery had been performed and numbness in his left arm.

On examination the Tinel sign was positive over the right median nerve. After reviewing the electromyograms of October 2, 1983 and November 16, 1983, the cervical x-rays and the reports of Drs. Bakody and Hoffmann, Dr. Socarras concluded that claimant had work-related carpal tunnel syndrome. He believed claimant's main problem was emotional and he was unable to find signs of cervical radiculitis or clinical evidence of thoracic outlet syndrome.

APPLICABLE LAW AND ANALYSIS

The issue herein is whether claimant is entitled to further treatment under Iowa Code section 85.27 which provides in pertinent part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artifical 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.

Both parties cite Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1966) for the proposition that a claimant "must prove by a preponderance of the evidence that the alternative care is necessary." The undersigned does not believe that proposition to be correct. Initially it must be noted that Nelson cited by the parties does speak of a preponderance of the evidence, but that is to establish an employer-employee relationship and has nothing to do with Iowa Code section 85.27.

Claimant does need to show by a preponderance of the evidence that the treatment he seeks is causally related to his injury of October 15, 1982. He does not have a similar burden regarding alternative care. To obtain different care he need only substantiate the reasonableness and necessity for a change of care. See Kimrey v. Swift Independent Packing Co., Appeal Decision filed December 30, 1983.

Claimant's first complaints were in 1982 and were of his fingers. Claimant had surgery to remove a growth on his finger and then to both his wrists. Claimant now complains of pain in his right hand and numbness in his hands, fingers and his left arm. Numbness is exacerbated by cold.

Defendants sent claimant to Dr. Hoffmann who performed claimant's first surgery. Dr. Hoffmann diagnosed carpal tunnel syndrome. Before carpal tunnel surgery was done, claimant on his own went to Dr. Bakody. Also prior to surgery, claimant was sent to Dr. Socarras presumably for a second opinion.

Dr. Hoffmann said that in an investigation of whether or not claimant had thoracic outlet syndrome, he had ordered cervical spine x-rays and some of the tests suggested by Dr. Hurd. Testing also was done for Raynaud's disease. Dr. Hoffmann himself did not receive the information regarding that testing; however, he had Dr. Socarras do some tests which he said were for the purpose of determining whether or not claimant had thoracic outlet syndrome. Dr. Hoffmann, who seemingly ruled out both thoracic outlet syndrome and Raynaud's disease agreed that diagnosis of neurological problems is beyond his expertise.

Dr. Bakody, board certified neurosurgeon, saw claimant on one occasion and prior to his carpal tunnel surgery. Claimant told him his symptomatology was aggravated by driving and working with his arms overhead. Claimant does neither driving nor working overhead in his work for defendant employer. Dr. Bakody's testing was negative for carpal tunnel. It must be noted that at the time of Dr. Hoffmann's surgery on the left he found "[t]he median nerve...markedly compressed by a very thick and fibrous carpal tunnel. The nerve itself was firmly bound with inflammation." On the right Dr. Hoffmann found "[t]he nerve was markedly flattened and there was a rather thick carpal tunnel overlying this median nerve. The adjacent tendon sheaths were also markedly swollen."

On the other hand, Dr. Bakody's testing for thoracic outlet syndrome showed a postive Roos and costoclavicular. The doctor concluded claimant has thoracic outlet syndrome and some symptoms indicative of Raynaud's phenomenon. Dr. Bakody pointed out that person may have more than one condition at a time and he maintained that based on what he had seen claimant has thoracic outlet syndrome. He suggested evaluation of the vascular component of claimant's condition. Dr. Bakody ultimately concluded that symptoms claimant had at the time of his evaluation were work-related.

Dr. Socarras reviewed electromyography, x-rays and reports of Drs. Bakody and Hoffmann. He found no signs of cervical radiculitis or clinical evidence of thoracic outlet syndrome.

The hearing deputy ordered that "[d]efendants shall pay claimant for further evaluation of his work-related injury under the direction of Dr. Bakody, including treatment if deemed necessary." The order in this decision will be slightly different.

Claimant, post surgery, has continuing complaints. Dr. Bakody has suggested a vascular evaluation. Dr. Hoffmann points out that thoracic outlet syndrome is outside his area of expertise. Dr. Bakody made a diagnosis of thoracic outlet syndrome, but he sought a vascular surgeon to confirm his diagnosis. Claimant seeks further evaluation and treatment by Dr. Bakody. Dr. Bakody seemingly has done what he can do this point. The undersigned believes that on this record a vascular evaluation is reasonable and necessary.

Defendants have the right under Iowa Code section 85.27 to control medical care. Claimant has evidenced dissatisfaction with his medical care to this point. He has followed the prescribed procedure under the law to make his dissatisfaction known. In a spirit of compromise, the undersigned will order defendants to provide claimant with a list of three authorized physicians, including at least one vascular or thoracic surgeon, to provide claimant with a vascular evaluation and further treatment should that treatment be found necessary and related to his injury of October 15, 1982.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-nine years of age.

That claimant is right-handed.

That claimant began work for defendant employer on September 23, 1981.

That claimant developed swelling in his fingers and a growth on one finger.

That claimant had surgery by Dr. Hoffmann to remove a myxoid neurofibroma.

That claimant's hand went limp in cold and he was unable to hold a knife.

That claimant's complaints moved into his wrists, forearm and shoulder.

That Dr. Hoffmann performed a carpal tunnal release on the left on February 3, 1984 and on the right on February 17, 1984.

That at the time of surgery on the left Dr. Hoffmann found marked compression of the median nerve by a thick and fibrous carpal tunnel.

That at the time of surgery on the right Dr. Hoffmann found the nerve markedly flattened with a thick carpal tunnel overlying the median nerve.

That claimant presently complains of an inability to use a knife in his right hand due to numbness and pain, numbness in his hands and fingers and difficulty picking up and holding on to things.

That claimant's symptoms are exacerbated by cold.

That Dr. Bakody saw claimant one time nearly a year ago and prior to his carpal tunnel releases.

That a vascular evaluation is appropriate medical care.

That claimant has followed the procedure in Iowa Code section 85.27 applicable when an employer and employee cannot agree on medical care.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has shown the necessity for further evaluation under Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That within twenty (20) days from the signing and filing of this order defendants provide to claimant a list of three (3) physicians including at least one (1) vascular or thoracic surgeon authorized to evaluate his condition.

That defendants provide additional care to claimant for any condition which is causally related to his injury of October 15, 1982.

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

That this matter be returned to the docket for issuance of further analyses of status certificates of readiness so that the other issues in this case may be resolved.

Signed and filed this 19 day of October, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEROY W. KEYES,	
Claimant,	FILE NO. 542036
vs.	
B. L. ANDERSON, 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
UNITED STATES FIDELITY & CASUALTY COMPANY,	FILED
Insurance Carrier, Defendants.	

This is a proceeding in review-reopening brought by LeRoy W. Keyes, the claimant, against B. L. Anderson, Inc., his employer, and United States Fidelity & Casualty Company, the insurance carrier to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on May 4, 1979. The claimant received healing period benefits for a period of four weeks, six days at the stipulated weekly rate of entitlement of $159.00 per week. Claimant also received a 50 week period of permanent partial disability or 10 percent functional impairment of the body as a whole.

This matter was heard in Cedar Rapids, Iowa on January 10, 1984 and in accordance with an order of January 5, 1984 signed by Deputy David Lindquist, the record in this matter was left open until the filing of the evidentiary deposition of John S. Koch, M.D., which was taken January 17, 1984.

We shall concern ourselves with the nature and extent of claimant's disability, if any.

The record in this matter, based upon the undersigned's notes, consists of the oral live testimony of the claimant, Fred Netser, Randall Forsyth, Carroll Walter and Dennis Goettel; claimant's exhibits 1 through 7; defendants' exhibits A through F, together with the evidentiary deposition of John S. Koch, M.D.

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

Claimant, age 42, now residing in Rice Lake, Wisconsin, began his employment activities for the defendant employer May 20, 1964 (Defendants' exhibit F). The employer is in the crushed rock and asphalt business and the claimant's duties were that of a Terrex end loader driver at the quarry. Claimant was also required to tend a rock crusher and free the conveyor belts should such maintenance be required. This work was to be done with a pointed shovel and required the excess rock to be pushed or shoveled from the belts. On May 4, 1979 claimant injured his low back while pushing up the "A frame" tongue of a rock crusher preparatory to having it moved by a bull dozer. Claimant's foreman, Carroll Walters, was operating the dozer and testified that the hook-up procedure wherein the tongue was to be attached to the dozer was normally considered a two man job. Claimant and his foreman testified that the claimant was alone in lifting this heavy tongue. Claimant experienced immediate sharp pain and was taken to the outpatient department at the Vinton Hospital arriving there at 9:00 a.m. (Claimant's exhibit 1, page 3). G. A. Fry, M.D., found acute low back spasm on the right from D8 to L2. Claimant returned to work May 8, 1979 (Def. ex. E, p. 1) but began to lose time from his employment on May 22, 1979 returning on June 24, 1979. Claimant became a patient of W. J. Robb, M.D., who reported his findings on May 29, 1979, in part, as follows:

> On examination he stands with a slight curve of the lumbar spine favoring the right leg. The straight leg raising is positive at 60° on the right and 70° on the left for pain in the right hip. Bending to the right increases the pain while bending to the left relieves the pain. Flexion 30° and then pain in the right buttock. Naffziger's test negative. Cevical flexion negative. Heel and toe gait well performed. Reflexes intact. There might be a little diminished ankle jerk on the right. Sensation diminished over the lateral calf and foot of the right leg.
>
> X-ray examination reveals a normal lumbosacral spine.
>
> Diagnosis: HERNIATION, FIFTH LUMBAR DISC, RIGHT, WITH NERVE ROOT COMPRESSION, MILD NEUROLOGICAL DEFICIT
>
> Treatment: The patient has been advised he should be on relative bed rest for a period of at least five to ten days and not applying any stress to his back. I advised him that his recovery might be rather slow and at all costs avoid any stress to the back.
>
> I cannot estimate when he can return to work but would plan to check him in about two weeks and depending on his improvement make some estimate as to when he might return.

Claimant continued his employment duties for the balance of the year with increasing pain and problems.

Claimant began to experience problems with alcohol abuse. Claimant testified to a 6 week "dry out" period and finally was discharged by his employer for excessive absenteeism (Def. ex. F) on November 17, 1980.

Claimant next sought medical attention from W. J. Robb, M.D., on August 11, 1981 due to intermittent back and leg pain. Dr. Robb reported on August 13, 1981, in part, as follows: (Cl. ex. 2)

> This patient has not worked since November, however, not due to his back but because he is not employed on the heavy equipment job where he operated a heavy equipment apparatus for B. L. Anderson.
>
> This patient has not had increase in the symptoms as described nor has he been on any medications.
>
> On examination he stands straight without any list to either side. He bends through a normal range of motion without any list to either side or evident muscle spasm. His leg tests are essentially normal. On palpation and percussion there is minor soreness over the low back. No referred or radicular pain produced. Neurological examination of reflexes, sensation, and motor control all appear within normal limits. His knee jerks are hyperactive.
>
> The patient has not been really active or carrying out any exercise program or keeping himself physically fit since he has discontinued working. He is largely sitting and sedentary.
>
> Recommendations: This patient is really out of condition. He needs to start a program of exercises to strengthen the low back and for the soreness that occurs intermittently, a trial of Naprosyn for a month or so might be beneficial. This program was outlined for him and the exercises and he should report back in about six weeks at which time we will give him some additional exercises to carry out.

On January 18, 1982 and March 4, 1982 Dr. Robb again reported as follows: (Cl. ex. 2)

> The symptoms of which Mr. LeRoy Keyes complains of at this time are in my opinion related to the disc injury which is documented in a report of May 29, 1979, a copy of which is enclosed.
>
> This patient improved on conservative management in 1979, had intermittent symptoms in the low back during 1980 and then in 1981 developed increased symptoms which are documented in a report of August 13, 1981.
>
> This patient was admitted to Mercy Hospital on October 6, 1981, and a myelogram was performed on October 7 which did not reveal any gross abnormality of the spinal column or neurological structures.
>
> He has been placed on conservative management.
>
> LeRoy William Keyes was examined by me on the 11th of August of 1981 in regard to a possible disc syndrome producing pain in his low back, left hip and leg for which he was subsequently admitted to Mercy Hospital on the 6th of October for treatment and further evaluation. A lumbar myelogram performed at that time did not show evidence of a herniated disc so he was released from the hospital on conservative management. He was placed on a program of exercises.
>
> Subsequent examinations have indicated that though improving moderately he still has a considerable amount of low back pain and he may have a mild disc syndrome which cannot be demonstrated in the myelogram but at least sufficient in degree to cause him incapacity and the inability to perform gainful employment or job at this time.
>
> This patient I feel is disabled insofar as performing average or heavy physical work. Such activities as he could do job-wise would be largely sedentary.

Following an examination of March 25, 1982, Dr. Robb found a 10 percent permanent partial disability of the body as a whole based upon a minimal L5 disc herniation, left. (Cl. ex. 2) This impairment has been paid by the defendants.

During the summer of 1981, claimant was a patient at the state institution located in Independence, Iowa for alcohol drug abuse treatment. In December of 1982 claimant was being treated at a mental health institute following an attempted suicide. Claimant had climbed the water tower in Vinton, Iowa and upon climbing down, he jumped from the pump house roof to the ground. Claimant also testified that he painted an entire house in Vinton, Iowa, but that such activity took him 90 days. Claimant further testified that he assisted in some concrete form work but that he did all the easy work in connection with such assignment.

Claimant was seen by John R. Walker, M.D., June 16, 1982. The doctor's history appears to be in concert with the testimony provided at the hearing. The doctor reported, in part, as follows: (Cl. ex. 3)

> OPINION: This man appears to have a sciatica on the basis of a space occupying lesion. I believe that it is undoubtedly a herniated 4th lumbar disc involving the 5th lumbar nerve, on the left side. This picture may be slightly clouded by this patient's alcoholism and it is possible that he has a little polyneuritis or neuritic change due to alcoholic ingestion but I think that his main problem is from the injury.
>
> As far as the neck is concerned, he has a spondylosis of the 6th cervical disc, which of course is giving him some radicular pain. I cannot relate this directly to his injury.
>
> I believe that Dr. Robb has handled this case very nice up to this point and would agree probably almost in fact throughout his whole handling and his reticence to do surgery on this man. To begin with, apparently the EMG's and the myelographic studies are not pathological, however, we should remember that 30% of the myelograms give a false/negative. We should also remember that an EMG in itself is not totally reliable but I cannot give you the figures on what percentage of disc problems it misses, however, I can say with my experience where the EMG has been negative I have gone ahead and operated either in the cervical or dorsal region and have definitely found pathology, cured the pathology and in spite of the negative myelgoram [sic] and EMG's have gotten the patients well.
>
> At this point I would state that this man is certainly partially disabled particularly from the low back lesion. I do not know how to figure in the neck lesion at this point. He tells me that he is dry now and is not taking alcohol and I don't know how reliable this is. Certainly today he seems to be in good shape. I believe that Dr. Robb would be perfectly justified in doing an exploratory operation and laminectomy on the left side in

trying to relieve this man of his left sided radicular pain. Perhaps a repeat myelogram and CAT Scan combination should be done at this point. In Waterloo what we are doing is using Metrizimide dye and doing the myelogram in the morning for the lumbar region only and then in the afternoon the CAT Scan which in itself potentiates the findings in the CAT Scan. It does appear that in spite of all this man's drinking problems that he does deserve a shot at getting well surgically. I have asked him whether or not he would consider surgery and he feels that he would be more than willing to go through this if he thought it could help him.

Dr. Walker also reported, in part, on April 27, 1983 as follows: (Cl. ex. 3)

All-in-all it would be my opinion that based on his x-rays, his history to me and my examination, that this man has suffered a permanent, partial impairment of 19% of the body as a whole. 1% of this would be based upon his neck problem and 18% of this is based on his low back and leg problem. If this evaluation is not satisfactory and you wish me to see him again and go over the whole situation and examine him and check him again I would be glad to. I believe, however, that I would probably come up with a very similar evaluation if I did the repeat.

Claimant was seen by John S. Koch, M.D., on February 27, 1983 at the request of the defendants. Dr. Koch testified during his evidentiary deposition as follows: (Deposition p. 31, line 24 through p. 33, l. 15)

Q. Then he didn't present any indication of a disability which would support 19 percent permanent partial disability of the back, isn't that true?

A. I did not find impairment or disability that I would relate to an injury that would produce 19 percent disability of the back. His complaints or difficulties relative to the back or the use of the back might be described as being impairing of this man at 19 percent in the carrying on of activities. Someone might ascribe that impairment.

He does have some impairment. He does complain relative to the back. But I do not think it's of a very significant level, and 19 percent in this situation would imply that he's able to do four out of five things without any difficulty or one out of five things that he cannot do. I think it's perhaps maybe nine out of ten, but I would relate his impairment to wear and tear changes rather than to injury.

Q. And would that also be true as well concerning a 10 percent permanent partial disability of the back?

A. Those remarks would apply to a similar statement. Depending on the examiner he might say 19 percent, another examiner might say 10 percent, but I don't relate any of the impairments and difficulties, and I think it's an honest difference of opinion as to this man's capability possibly at the time of their examination that allowed a difference of 9 percent, but I do not relate this to injury, I relate it to wear and tear process.

Q. In relation to your conclusion that it was a wear and tear process, you indicated in the report that you felt Mr. Keyes was subject to chronic postural back ache leading to myofascial tightness, and is that the terminology used for a wear and tear development condition?

A. No. It would be used in conjunction possibly with a wear and tear condition of the back. I had identified some wear and tear changes of the small joints of the back. I identified tightness of the muscles related to the back. These are coexistent.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 4, 1979 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

In applying the foregoing legal principles to the case at hand, it appears that the claimant has sustained his burden of proof in establishing that his current lumbar abnormality is causally connected to the industrial injury under review.

The medical opinion of Dr. Robb as the claimant's treating physician is given the greater weight in this decision.

In examining the facts in this matter, we are faced with a credibility issue concerning the claimant's testimony. The hard facts are that following this episode, claimant has lost his position of employment with this employer after 10 years of seniority. Claimant proposed that his current alcohol abuse is due to his attempt to reduce the pain and discomfort he experiences following physical effort. Based upon the opinions of Dr. Robb and Dr. Walker when taken together with the enormous change in claimant's life, claimant's testimony as to the existence of pain is given the greater weight.

It is concluded that the claimant has a 15 percent functional impairment of the body as a whole.

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."

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. * * * *

In applying the foregoing legal principles to the matter under review, it is apparent that this claimant has suffered a wage loss that will be present in the future. Taking into account the opinion of G. Brian Paprocki, M.S., V.E., as contained in claimant's exhibit 4 and the apparent motivational difficulty of the claimant (Cl. ex. 6), it is concluded that the claimant's industrial disability is 20 percent of the body as a whole.

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

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

2. That on May 4, 1979 claimant sustained an admitted industrial injury.

3. That claimant's healing period benefits have been paid at the stipulated weekly rate of $159.00.

4. That the claimant has been paid a 50 week period of permanent partial disability beginning on March 29, 1982 as provided in section 85.34(2)(u), Code of Iowa.

5. That this claimant is 42 years of age and has earned a G.E.D. certificate.

6. That the claimant has a history of alcohol abuse and that such abuse is due to claimant's attempt to reduce the pain.

7. That such pain is causally related to the industrial injury under review.

8. That the claimant remained unemployed at the time of the hearing.

9. That claimant's future employment opportunities appear dim.

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

THEREFORE, IT IS ORDERED that beginning on March 15, 1983 defendants pay the claimant an additional 50 week period of permanent partial disability at the rate of one hundred fifty-nine and no/100 dollars ($159.00). Accrued benefits are payable in a lump sum together with interest from the date due.

Costs are charged to the defendants in accordance with Iowa 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 29 day of October, 1984.

HELENE MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL LaDOUX,	:	
Claimant,	:	File No. 699340
vs.	:	A R B I T R A T I O N
MID-IOWA CONSTRUCTION CO.,	:	D E C I S I O N
Employer, Defendant.	:	FILED

NOV 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Michael LaDoux, against his alleged employer, Mid-Iowa Construction to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained October 12, 1981. This matter came on for hearing before the undersigned deputy industrial commissioner at the office of the industrial commissioner in Des Moines, Iowa, on October 29, 1984. The record was considered fully submitted on that date.

A review of the industrial commissioner's file reveals that no filings have been made in this matter. The record in this case consists of the testimony of claimant, of Dean Freizen and of claimant's exhibits 1 and 2.

ISSUES

1) Whether claimant received an injury arising out of and in the course of his employment;

2) Whether claimant's alleged injury is causally related to his disability;

3) Whether claimant is entitled to benefits and the nature and extent of any such entitlement;

4) whether an employer-employee relationship exists between claimant and defendant;

5) Whether claimant is entitled to payment of certain medical expenses under section 85.27; and

6) Claimant's rate of weekly compensation in event of an award.

REVIEW OF THE EVIDENCE

Claimant, Michael Dean LaDoux, testified in his own behalf. Claimant is 30 years old, married, and has two children. Claimant testified he has been employed by defendants, Mid-Iowa Construction. He stated that he started work for the company in the spring of 1981, was laid off throughout the summer, and had begun work again in the fall. Claimant characterized Mid-Iowa as a partnership between Jerry Thomas, Sr., and Dean Freizen. Claimant testified that he installed wood and chain link fences, was paid $5.00 per hour, and worked a 40-50 hour week. Claimant stated he had started back to work two or three weeks before his injury.

He indicated he injured his left hand while working on a fencing project at Farmers Services. Claimant stated that both Mr. Freizen and Mr. Thomas, as well as several coworkers, were present at the time of his injury. Claimant reported that, when injured, he was trying to level a post and had his hand on the post to steady it. He stated that Jim, a coworker, was swinging an axe handle and that the axe handle flew from Jim's hand and hit claimant on the knuckle of claimant's left hand. Claimant indicated that the axe handle "smashed" his left hand against the post. Claimant stated that this injury occurred around 3:00 or 4:00 p.m.; that he told coworkers about the injury; and that he went home and soaked his hand. Claimant reiterated that Mr. Freizen was aware of his injury.

Claimant stated that he went to Broadlawns Medical Center the following day. He reported that personnel there told him to go home, soak his hand, and return if its condition did not improve. Claimant reported that the swelling in his hand did not subside and that he "ended up going to Mercy."

Claimant reported that Marshall Flapan, M.D., treated his hand at Mercy. He reported that Dr. Flapan and other Mercy personnel indicated he had a severed tendon and a bone fracture at the knuckle. Claimant stated that outpatient surgery was performed at Lutheran Hospital. Claimant indicated that a cast and splint with pin were applied to the fractured finger. He stated that Dr. Flapan told him he could not return to work until released. Claimant received a work release on January 5, 1982. Claimant advised that he currently has no strength in his finger and "can't grip nothing." Claimant indicated that no records from Dr. Flapan are in evidence. He stated the doctor has refused to cooperate because he has not yet received payment for surgery. Claimant indicated that neither he nor Mid-Iowa has paid the doctor's bill.

Claimant asserted that after visiting Broadlawns, he called Mid-Iowa's office and spoke with Mr. Thomas' wife. Claimant characterized Mrs. Thomas as someone who did the running around for the company and answered the phone in the business.

On cross-examination, claimant agreed that under the agreement between himself and Mid-Iowa Construction, he was "supposed to be a subcontractor" and "was supposed to put in his own gas and fuel." Claimant apparently was working with Jerry Thomas, Jr., putting in the posts. Claimant did not recall any agreement that he and Mr. Thomas, Jr., would receive a fixed amount for setting in the fence posts. He reiterated that they would be paid a flat rate of $5.00 per hour. Claimant stated that at the time of the injury, Jim was standing on a road about ten feet from him batting around rocks. Claimant agreed that he had been on break with Jim and they had both been "messing around." Claimant stated that he had gone back to work and Jim kept "messing around." Claimant agreed that when he first began work with Mid-Iowa, he was to be responsible for his own insurance as well. He stated, however, that time cards were submitted to Mid-Iowa.

On redirect examination, claimant stated that he had never received a written bid for a job with Mid-Iowa Construction. He reported that Mr. Freizen and Mr. Thomas told him when to begin and to finish work. He reported that at the time of the injury Mr. Freizen had directed him and Jim to return to work. Claimant stated that he was one of four or five persons doing fence assembly for Mid-Iowa Construction.

Dean Darrell Freizen appeared in behalf of defendant. Mr. Freizen testified that, with his partner, Jerry Thomas, Sr., he operates Mid-Iowa Construction and Fencing. He reported that in the spring of 1981, Jerry Thomas, Jr., and claimant approached Mr. Thomas, Sr., and himself and asked if they could work as subcontractors. He stated that claimant and Mr. Thomas, Jr., worked as subcontractors for the company when work was available and that agreements as to pay were "mostly oral." Mr. Freizen indicated that the company had subcontracted with two other individuals that work season. He stated that he was present when claimant was injured and reported that both claimant and Jim were batting rocks around when claimant was injured.

On cross-examination, Mr. Freizen indicated that claimant was about four or five feet away from Jim when the injury occurred. Mr. Freizen indicated that claimant threw a rock and Jim tried to hit it with the axe handle. He stated that Jim missed the rock but hit claimant's finger. He agreed with claimant's counsel that claimant was within reach of the axe handle when the injury occurred. The witness stated that before the injury he had directed Jim to return to work and roll out fence wire. The witness indicated that the fence posts being set were purchased by Mid-Iowa Construction and that the witness dug the holes for the posts. He explained that he was digging the holes because a much larger auger was required. The witness stated that claimant and Jerry Thomas, Jr., decided their own work hours. He explained that "it was up to them to complete their contract and get paid." He indicated that a Mr. Rick Wyer and Mr. Jim Thomas were subcontracted to string out wire. The witness explained that the gentlemen worked as subcontractors because the company did not have enough work to hire them as employees. He stated the company did not want to pay workers' compensation if it had no work for its employees. The witness agreed that no other bids were taken for the jobs on which claimant worked. The witness indicated that he determined the amount claimant would be paid for each job. He indicated that Mid-Iowa supplied all materials used by claimant and Mr. Thomas, Jr., and that claimant and Mr. Thomas, Jr., were told the location of a job site and the date on which to start a job.

Claimant's exhibit 1 is certain medical statements for treatment of claimant. It includes a Mercy Hospital Medical Center statement in the amount of $67.50; an Iowa Lutheran Hospital statement in the amount of $688.12; a statement of Des Moines Anesthesiologists in the amount of $176; and a statement of Orthopedic Associates in the amount of $861.50. At hearing, claimant indicated that Des Moines Anesthesiologists administered the anesthesia for his outpatient surgery. Dr. Flapan is associated with Orthopedic Associates.

Claimant's exhibit 2 is certain medical reports relative to claimant. A Lutheran Hospital note apparently of November 11, 1981 indicates that claimant received outpatient surgery for repair of a boutonniere deformity of his left ring finger. An Iowa Lutheran Hospital history and physical of the same date signed by Marshall Flapan, M.D., indicates that the diagnosis was of a boutonniere deformity of the left ring finger secondary to rupture of the central slit and extensor mechanism. The report gives the following history of present illness.

> HISTORY OF PRESENT ILLNESS: 27-year-old Caucasian male who works at Mid-Iowa Construction as a fencer, sustained an injury to his left ring finger on or about the 25th of October, 1981, when, while driving a fence post, it was struck with the ax handle overlying the PIP joint. He initially was seen at Broadlawns after he was unable to extend his digit, but he was discharged there without treatment. He was seen again on the 31st of October in the Mercy emergency room where x-rays were said to have been negative. Because of continuing discomfort and inability to extend the digit, he was seen. He had a small abrasion over the dorsum of the PIP joint. He was unable to actively extend the PIP joint and he had a tendency towards a boutonniere deformity of the ring finger.

A report of Stephan M. Cooper, M.D., of November 2, 1981 states that as regards claimant's left finger, "There is a chip fracture arising from the dorsal aspect of the proximal portion of the middle phalanx of the 4th finger. Soft tissue swelling about the tracture site is demonstrated. The remaining visualized structures are intact."

APPLICABLE LAW AND ANALYSIS

Our first concern is whether an employer-employee relationship existed between claimant and defendant Mid-Iowa Construction.

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of employment. Iowa Code section 85.61(2) and section 85.61(3)(b) states:

> 2. "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for any employer, every executive officer elected or appointed and empowered under and in accordance with the chapter and bylaws of a corporation, including a person holding an official position, or standing in a representative capacity of the employer, and including officials elected or appointed by the state, counties, school districts, area education agencies, municipal corporations, or cities under any form of government, and including members of the Iowa highway safety patrol and conservation officers, except as hereinafter specified.
>
> "Workman" or "employee" shall include an inmate as defined in section 85.59.
>
> 3.The following persons shall not be deemed "workers" or "employees":
>
> ....
>
> b. An independent contractor.

The Iowa Supreme Court stated in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1213, 146 N.W.2d 261 (1967):

> This court has consistently held it is a claimant's duty to prove by a preponderance of the evidence he or his decedent was a workman or employee within the meaning of the law, and he or his decedent received an injury which arose out of and in the course of employment. See section 85.61, Code, 1962.
>
> And, if a compensation claimant establishes a prima facie case the burden is then upon defendant to go forward with the evidence and overcome or rebut the case made by claimant. He must also establish by a preponderance of the evidence any pleaded affirmative defense or bar to compensation. (Citations omitted.)

Given the above, the court set forth its standard for determining an employer-employee relationship in Caterpiller Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981). The court stated in part:

> I. The employer-employee relationship. As defined in section 85.61(2), The Code, an "employee" is a "person who has entered into the employment of, or works under contract of service...for an employer." Factors to be considered in determining whether this relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. McClure v. Union, et al., Counties, 188 N.W.2d 283, 285 (Iowa 1971). (Emphasis added.)

If a claimant has established a prima facie case for an employer-employee relationship, the defendant may assert the affirmative defense that claimant was an independent contractor. The test for meeting the burden of proof on this affirmative defense goes back to Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254 (1931), wherein the court states:

> An independent contractor, under the quite universal rule, may be defined as one who carries on an independent business, and contracts to do a piece of work according to his own methods, subject to the employer's control only as to results. The commonly recognized tests of such a relationship are, although not necessarily concurrent, or each in itself controlling: (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer....

It is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship of independent contractor. Hassebroch v. Weaver Construction Co., 246 Iowa 622, 67 N.W.2d 549, 553 (1955).

Claimant has established a prima facie case for an employer-employee relationship. The right of selection was plainly in the hands of the employer's agent. The employee was responsible for the payment of wages claimant received and apparently had the right to terminate or discharge claimant; a fact evidenced by claimant's layoff throughout the summer months. Likewise, the employer's agents had the right to control the work. Mr. Freizen testified that he indicated the date and place where claimant was to work on any given project. Claimant testified that on the injury date, Mr. Freizen directed him to return to work from a work break. Claimant testified his work hours were recorded through time cards and he was paid an hourly rate of $5.00. All of these indicate the employer controlled the time, place and matter of work. Mr. Freizen indicated claimant was free to work his own hours since it was up to claimant to complete the contract and get paid. The record belies this, however. Claimant testified he was directed when to begin and leave work. Mid-Iowa certainly had an interest in claimant completing his work in a timely matter in order that the whole project be completed as scheduled. The record as a whole indicates the employer's agents controlled the manner of claimant's work sufficiently to accomplish this end. Further, the employer was identified as the entity for whose benefit the fence posts were set and as the authority in charge of the work. Claimant's apparent willingness to take directions from Mr. Freizen demonstrates this; as does the fact that the poles set as well as other materials were purchased and supplied by Mid-Iowa.

Defendant asserts the affirmative defense that claimant was an independent contractor by way of oral agreement between the parties. Defendant has not met its burden of proving such. Granted, claimant testified on cross-examination that under an oral agreement he and Jerry Thomas, Jr., were to be independent contractors who initially were to supply their own fuel and gas and pay their own insurance. While further evidence relating to such was not presented, it was not established that these obligations continued throughout the course of the work relationship. Neither was a contract for performance of the work at a set price established. Mr. Freizen testified that claimant was to receive a set sum for each job performed. Claimant testified he was paid $5.00 per hour and his hours were recorded via time cards. While one might well disassemble as to an hourly wage, the use of time cards is readily veritiable and it is not likely claimant manufactured this detail of his relationship with Mid-Iowa. Therefore, claimant's version is accepted as more credible. Further, Mr. Freizen testified no bids were taken for the job claimant performed and that he, not claimant, determined the prescribed payment. Such is more indicative of an employer-employee relationship than of independent contractor status. Further, time cards demonstrate claimant was paid by time worked and not by an individual job. Likewise, claimant did not hire assistants and was directly supervised himself rather than having any right to supervise his own employees. Mid-Iowa supplied supplies and materials used, the most essential being the fence poles. Furthermore, claimant's work as a fence pole setter is not an independent business or distinct calling, rather it was an integral part of the business of Mid-Iowa Construction and Fencing. For the above cited reasons, the record fails to evidence the independent contractor status defendant alleges for claimant and the affirmative defense fails.

Our next concern 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 October 12, 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 injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

"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.

Horseplay which an employee voluntarily instigates and aggressively participates in does not arise out of and in the course of his employment and, therefore, is not compensable. Wittmar v. Dexter Mfg. Co., 204 Iowa 180; 214 N.W. 700; Ford v. Barcus, 261 Iowa 616, 623; 155 N.W.2d 507.

Claimant has demonstrated an injury arising out of and in the course of his employment. Claimant alleges that his injury occurred after he had returned to work when an axe handle flew from a coworker's hand and hit his finger while the finger was positioned on a fence post which claimant was attempting to set. Claimant concedes that he and another worker were "messing" around" prior to the injury but asserts he had returned to work. Defendant's witness alleged claimant and the coworker had been directed to return to work but had not done so and that claimant was injured when the coworker attempted to hit a rock claimant pitched, missed and hit claimant's finger. Neither claimant nor defendant's witness appeared a sterling example of credibility. Claimant's version of the incident is accepted as the more plausible, however. The nature of claimant's injury suggests his hand was lying flat in a stationary position when the incident occurred, a fact supported by claimant's story. Further, the medical history claimant apparently gave Dr. Flapan indicates the injury occurred while claimant was driving a fence post. Unless claimant is clearly more sophisticated regarding workers' compensation than he demonstrated at hearing, it is unlikely he dissembled in reporting his injury to the doctor. Thus, the report also supports claimant's version of the injury incident.

Claimant now must demonstrate a causal relationship between his injury and his current disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 12, 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 (1967).

The medical records submitted established that claimant required outpatient surgical repair of a boutonniere deformity of his left ring finger and that such followed from his work injury. Claimant testified that he now has no strength in the finger and "can't grip nothing." No medical evidence expressly supporting claimant's current complaints or their relationship to his injury was presented. On the other hand, evidence suggesting that claimant's problems predated his injury also was not presented. Claimant's loss of strength and inability to grasp with the finger are logical if somewhat minimal results of the injury to the digit, especially when supported by evidence of the need for surgical repair of his injury. Thus, claimant has established the requisite causal relationship between the injury and the disability.

The nature and extent of claimant's disability and his benefit entitlement, if any, must be determined.

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Section 85.34(2)(d) provides weekly compensation during 25 weeks for the loss of a third finger. Compensation is proportionate for a lesser impairment to the digit.

No rating of permanent partial disability to claimant's finger was presented. Claimant has been released to return to work, but he continues to complain of loss of strength and grip in the affected digit. Determination of the impairment resulting from such from the facts presented is within the realm of expertise of this agency under its statutory authority. Claimant is found to have a permanent partial disability of fifteen percent of his left ring finger.

Claimant testified he was not released to return to work until January 5, 1982. While unclear from the record, it appears claimant was unable to return to work from the date of his injury onward. Under section 85.34(1) claimant is entitled to healing period benefits from his injury date until January 5, 1982 for all dates on which he actually did not work.

Section 85.27 provides that claimant is entitled to payment of all medical costs relating to a compensable injury. The medical costs in evidence relate to claimant's work incident. He is accordingly entitled to payment of those costs.

Claimant's rate of weekly compensation remains to be decided. Claimant testified he was married; that he has two children; that he earned $5.00 per hour when injured; and that he worked a 40 to 50 hour week. It appears from this nondisputed testimony that claimant was a regular full-time employee of defendant who routinely worked at least forty hours per week. Claimant's weekly rate will be computed on that basis. Claimant had only returned to work several weeks before his injury. Therefore, section 85.36(7) provides the basis of computating his weekly rate. Under that section, claimant's gross weekly wage for a forty hour work week was $200. His weekly rate for a married individual with four exemptions and an October 1981 injury is $132.96.

FINDINGS OF FACT

Claimant was setting fence posts for defendant Mid-Iowa Construction and Fencing on his injury date, October 12, 1981.

Claimant was paid a flat rate of $5.00 per hour and time cards were used to record the hours he worked.

Claimant was directed where to work, when to begin and end work, and when to return to work following work breaks.

Defendant Mid-Iowa Construction and Fencing furnished the fence poles set and its agents dug the holes into which the poles were set. Mid-Iowa supplied other materials claimant used in his pole setting duties.

No bids were taken for the position of pole setter. The employer determined the amount of payment claimant received as a pole setter.

Claimant was an employee of defendant and not an independent contractor on October 12, 1981.

Claimant was injured on October 12, 1981 when an axe handle which a coworker was swinging hit his left ring finger while the finger rested on a fence post claimant was attempting to steady.

Earlier, during a work break, claimant had been throwing rocks which the coworker had attempted to hit with the axe handle.

The employer's agent had directed claimant to return to his work duties and claimant had done so prior to his injury.

Claimant was not engaged in horseplay when injured.

Claimant received outpatient surgery for repair of a boutonniere deformity of his left ring finger as a result of his injury.

Claimant currently has no strength or grip in the injured finger.

Claimant incurred medical costs in the amount of one thousand, seven hundred ninety-three and 12/100 dollars ($1,793.12) as a result of his injury.

Claimant is married with two children. He earned a gross weekly wage of two hundred dollars ($200) for a forty (40) hour week when injured.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant was an employee of defendant on October 12, 1981.

Claimant received an injury arising out of and in the course of his employment on October 12, 1981.

Claimant's current disability is causally connected to his injury of October 12, 1981.

Claimant is entitled to permanent partial disability resulting from his October 12, 1981 injury of fifteen percent (15%) of a third finger.

Claimant is entitled to healing period benefits from his injury date until January 5, 1982.

Claimant is entitled to payment of medical costs in the amount of one thousand, seven hundred ninety-three and 12/100 dollars ($1,793.12) as enumerated in the order below.

Claimant's rate of weekly compensation is one hundred thirty-two and 96/100 dollars ($132.96).

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant permanant partial disability benefits for three point seventy-five (3.75) weeks at the rate of one hundred thirty-two and 96/100 dollars.

Defendant pay claimant healing period benefits at the rate of one hundred thirty-two and 96/100 dollars ($132.96) from his

jury date until January 5, 1982.

Defendant pay claimant the following medical costs:

Mercy Hospital Medical Center	$ 67.50
Iowa Lutheran Hospital	688.12
Des Moines Anesthesiologists	176.00
Orthopedic Associates	861.50

Defendant pay accrued amounts in a lump sum.

Defendant pay interest pursuant to section 85.30.

Defendant pay costs of this action pursuant to Industrial mmissioner rule 500-4.33.

fendant file a final report when this award is paid.

Signed and filed this 31th day of December, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARRY LEINBAUGH, On Behalf of :
ANDY LEINBAUGH, Deceased, and :
OANN LEINBAUGH, :
:
Claimants, :
: File No. 697119
s. :
: A P P E A L
ARMLAND FOODS, :
: D E C I S I O N
Employer, :
:
nd :
:
ETNA CASUALTY, :
:
Insurance Carrier, :
Defendants. :

FILED
NOV 30 1984
IOWA INDUSTRIAL COMMISSION

INTRODUCTION

Claimant appeals from an arbitration decision in which it as held that the decedent, Randy Leinbaugh, did not sustain an njury arising out of and in the scope of his employment on anuary 27, 1982.

The record on appeal consists of the transcript of the rbitration decision; claimant's exhibits 1 through 5; defendants' xhibits 1 through 6; and the briefs and filings of all parties n appeal.

ISSUE

The issue on appeal as stated by claimant is:

1. Randy Leinbaugh's injury and death was causally connected ith his work at Farmland Foods.

REVIEW OF THE EVIDENCE

The decedent, Randy Leinbaugh, was twenty years old at the ime of his death.

Nine years earlier, decedent sustained a concussion while laying kick football at school. In May of 1973 decedent lapsed nto a coma at school and was transferred to an Omaha hospital. Daniel L. McKinney, M.D., was decedent's doctor at the time.

> Dr. McKinney later did a -- what is called a ventricular atrial shunt with a halter valve which is a -- it's about the size of a -- maybe half of a straw, that went from the vent at the top of his head down in back of his right ear, down the right side into his heart. He had a valve back of his right ear that he was supposed to pump periodically to make sure the shunt was working.
>
> After he was released from the hospital we went back to Dr. McKinney on a twice-a-year basis and was later limited to once a year, mainly to have the length of the shunt x-rayed. If he grew to an abnormal height, he would have to have more surgery.
>
> Q. To lengthen the shunt?
>
> A. To lengthen the shunt, yes. At that time Dr. McKinney told us that it was not important if the valve didn't work, that Randy's condition was fine, he would never need it, one in a million chance; and Randy then came home and was fine.
>
> Q. And by "need it," you're speaking of the surgery and the placement of the shunt or this pump; is that correct?
>
> A. Pardon?
>
> Q. When you said "need it" a moment ago, you're speaking of?
>
> A. The replacement of the length of the shunt. If -- if he grew and the shunt got short, he would have some kind of reaction and he would need this to be lengthened and put into his heart. (Transcript, pages 64-65)

After the shunt was in place there was no subsequent medical care pertaining to the shunt. (Tr., p. 66)

The decedent went on to graduate from high school in the spring of 1980. Shortly thereafter, decedent went to work for defendant employer as a maintenance person. Decedent's responsibilities included servicing the trucks, maintaining the trucks, and changing the brakes. His work hours were 6:30 a.m. to 3:30 p.m. (Tr., pp. 20, 42)

On January 27, 1982 claimant, decedent's father, received a telephone call from Eldon Hardekopf, an employee of the defendant employer. Claimant testified that Hardekopf told him that Randy "had been scooping snow and chopping ice and he had passed out." Claimant stated that he and his wife went directly to the hospital at Crawford County in Denison to see decedent. Decedent was in a coma when they reached the hospital. Thereafter, decedent was transported by life flight to Omaha, Nebraska. (Tr., pp. 24-26 Decedent died from a intracerebral hemorrhage due to consequence of ruptured arteriovenous anomaly. (From Deposition Exhibit 2, p. 13)

Eldon Hardekopf is the fleet maintenance supervisor at defendant employer. Hardekopf stated that he first saw decedent on January 27, 1982 at about 8:00 a.m. Decedent was "checking his trailers, pre-tripping his trailers when I first saw him." From 8:00 a.m. until about 12:00 p.m. decedent was in the "process of cleaning the lot off, removing snow and ice and so forth." Hardekopf testified that the job was not physically demanding. (Tr., pp. 106-107)

Hardekopf remembered that decedent then went to lunch. After lunch decedent's jobs included sweeping, picking up tools, and cleaning up tools. It wasn't until the 3:00 p.m. break that Hardekopf noticed decedent was having physical problems. Hardekopf recalls the incident.

> A. He came to my desk, opened the drawer to get some -- a bottle of aspirins, took the lid off the aspirins and took a few in his hand, and probably a half dozen or whatever run out of his hand on the floor, just didn't have control over it like he should have.
>
> I said, "Randy, what's the matter?" He kind of looked up at me strange and said, "Huh?" I said "What's the matter, Randy, don't you feel good?" "Huh? I don't know." I said, "What did you do, Randy, get in some bad dope or something?" "Huh? I don't know." Then he kind of put his hand up to his forehead, had kind of long hair, brushing his hair because he was rubbing his head a little.
>
> And about that time Ralph Greeder came in the office, and he noticed Randy was having problems. And he asked Randy the same thing, "What's the matter," and Randy replied the same way. And then he started weaving, moving in a -- he was losing it. And I told Ralph to put Randy in the pickup, run him up to nurse -- Mary's office, which is our nurse, and that's the last I saw of Randy until just before the ambulance got there.
>
> When I -- when Ralph got back from the office, he told me that she had called the ambulance and

they had him laying down, and I went right back up to the office about the same time the ambulance got there and that's --

Q. Okay. Is there -- Did you have any any other contacts with Randy that day other than what you've just described?

A. No.

Q. No?

A. No. I followed the -- or I went to the hospital. I was there when -- Larry and Roann came to the hospital, but that was -- I was just there. (Tr., pp. 108-110)

Ralph Greeder is a mechanic and shop foreman at defendant employer. Greeder stated that on January 27, 1982, decedent arrived to work at 6:30 a.m. Greeder recalled decedent was performing his usual routine of checking the trailers. Greeder stated that after the job, Randy and he cleared away ice. Greeder recalls the incident:

A. We got out the hot water steamer, I suppose it was about four to six inches in spots, and kind of used the hot water and pressure to cut into pieces. And we used an ice scraper, I guess, or -- scraper more or less -- to split it and break it into pieces, and then we had a shovel -- scoop shovel and broom. And they had a payloader -- the people that clean the yard off had a payloader out there, and we'd push it in front of the payloader, or slide it into the shop to melt, so it could be just be taken away.

Q. Payloader did the actual lifting?

A. Yeah, picked it up and took it over, yeah.

Q. Now, as I understand, a payloader is a small four-wheel type of --

A. Big one.

Q. -- scoop shovel?

A. This was a big one.

Q. Okay. So you and Randy would have done then -- Who would have been doing just the actual chipping with the long ice chipper or whatever?

A. Chipper or whatever. It's like a hoe that's been straightened out, about six by six, and just breaks it into pieces, and pushed it here and pushed it there.

Q. Okay. Is that pretty much what you and he did for the next part of the -- that morning?

A. Pretty much during the morning, yes.

Q. Okay. Would you have actually been scooping snow and shoveling it to the side or anything?

A. Oh, nothing -- no scooping like that, because the snow was pretty well cleaned off. All that was left was ice.

Q. So what you were doing was chipping the ice that was there and chipping it so the payloader would scoop it up, pick it up?

A. Mm-hmm (Yes).

Q. Yes?

A. Yes.

Q. How long did you then do that job, you and Randy?

A. We went, like I say, till around 11:15, 11:30, because I went to lunch and I was done. I mean, we were done already with the job and -- when I went to lunch about 11:30.

Q. So you finished it sometime prior to 11:30?

A. Yes.
(Tr., pp. 79-82)

Greeder was not with Randy again until 12:30 p.m. At that time Randy was sweeping the shop, cleaning up and putting things away. Greeder described the work as light work. (Tr., p. 85) At approximately 3:00 Greeder was in Hardekopf's office when Randy entered the office. Greeder discribes the incident:

A. I was ready to go home and Randy walked in the office to -- He opened the drawer, took a bottle of aspirins from the desk drawer. And I was in there talking to Eldon about making sure all the work was done for the day that had to go out, and Randy come in and got the aspirin bottle. He dumped them in his hand, ended up dumping the whole bottle out. I asked him what was the matter and he said he just didn't really know.

Q. Okay. What -- what happened next or what was said next?

A. Well, we just kind of talked to him a little bit and decided something was definitely wrong, and I took him up to the nurse's office there in the plant.

Q. Okay. About what time would this have been then?

A. Between three and three-fifteen, because Randy went to break at three.

Q. So this incident with the aspirin would have happened when he was still on break already?

A. Yes, he was on break.

Q. How long into the break would it have been?

A. I don't really remember. All I know is he had a half a can of pop left.

Q. He would have been off long enough to drink -- get the pop and drink something?

A. Yes.

Q. Did you -- did you talk to him anymore? Was he able to -- were you able to talk to him any or just --

A. Just -- just -- All we did was ask him, "What is wrong?" And Randy said "I really don't know," more or less held his head, and said "I don't know." (Tr., pp. 85-86)

John Ang is a mechanic with the defendant employer. (Tr., pp. 118-119)

Ang arrived at work at 8:00 a.m. on January 27, 1982. He said Randy was checking the units at that time. After completing this job, he and decedent began working "with some snow and ice down in front of the shop doors." Ang stated the job was not a particularly strenuous one. (Tr., pp. 118-124)

Ang testified that at about 3:10 p.m. the following incident occurred.

A. Well, we went to break at three and this happened shortly after. And -- and --

Q. Okay. When you say "this," what do you mean by this?

A. That he -- that something was wrong with him, and he just got up and left when we were at break.

Q. Okay. How -- how long then or about what time then would it have been when you first gave some sign of him having problems. What -- what's the best or closest time you can come up with?

A. I suppose 3:10.

Q. Okay. What problems are we talking about? What did you observe about him?

A. Well, he just -- he just got up and left. He never said a word to anybody or anyone or --

Q. Okay. Did you see him anymore after he got up and left?

A. No.

Q. Do you know where he went?

A. Not at the time, no.

Q. Okay. Subsequently you found out?

A. Yes.

Q. Did you see him anymore that day then after he got up and left at about 3:10 or so?

A. (Moves head in a negative manner.)

Q. Did he -- did he comment? Did he comment to you about anything before he left? Did he say anything?

A. No.

Q. Did you say anthing to him?

A. No.
(Tr., pp. 126-127)

Ang testified that during the time he worked at defendant employer, decedent seemed to be in good physical and mental shape. (Tr., p. 120)

There were several medical experts who gave their opinions as to decedent's condition.

First, in a report dated January 27, 1982, Dr. McKinney related the following:

> This 20 year old male entered the hospital because of lapse into coma. This patient's pertinent history dates to 1973 when he was admitted to this hospital because of a subarachnoid hemorrhage. The patient at that time underwent angiography which revealed left parietal arteriovenous malformation. The patient's bleeding subsided but he then developed hemorrhagic hydrocephalus and was treated with a right ventriculoatrial shunt. The shunt has functioned satisfactorily and the patient has done quite well. He has been considered of normal intelligence and has led a very active life. He was having no symptoms whatsoever until about 3:30 PM on January 27, 1982, when while shoveling snow he suddenly collapsed. It was noted in the E.R. of his local hospital that he was unresponsive and that his left pupil was dilated. He was brought to this hospital by hellicopter [sic] and on the trip his right pupil also dilated. The patient is not vertbalized [sic] nor has he responded to verbal stimulation.
>
> ....
>
> IMPRESSION: SPONTANEOUS INTRACEREBRAL HEMATOMA SECONDARY TO RUPTURE OF ARTERIOVENOUS MALFORMATION.
> (From Deposition Ex. 2, p. 56)

Later, in March of 1982, Dr. McKinney reported:

> The patient did well following this [the installation of his ventriculo-atrial shunt in 1973] and had no further difficulty until the afternoon of January 27, 1982, when while shoveling snow he suddenly collapsed and became totally unresponsive.
>
> ....
>
> While it is possible that the intracerebral hemorrhage which Randy suffered in January, 1982, may have been coincidental, I think it is quite possible that the straining activity of shoveling snow may have accounted for rupture of one of the veins of the arteriovenous malformation leading to the intracerebral hematoma which lead [sic] to his death.
> (From Dep. Ex. 2, p. 47)

Next in a report dated July 19, 1982, Paul From, M.D., stated:

> The questions [sic] basically arises as to whether or not shovelling snow could raise the blood pressure high enough to produce rupture of an arteriovenous malformation earlier than would have happened before. It is true that activity will raise the blood pressure, and this should occur if the heart rate is increasing, else one would be in significant hemodynamic difficulty, but the shoveling of snow is not a cause of tremendous increase in blood pressure as this activity is not a great cause of an increase in Mets (metabolic equivalents). In addition, Mr. Leinbaugh was doing very little work in the 2 1/2 to 3 hours preceding his actual time of rupture. Rupture of an angioma is a cause of intracranial hemorrhage, including intracerebral, subarachnoid, ventricular and rarely subdural hemorrhage.
>
> ....
>
> From a legal standpoint, any aggravation for causation in this case would be associated with the strain of shovelling, but this had occurred at least 3 hours prior to the onset of his problem. In addition, if Mr. Leinbaugh was used to his job, and this was part of his job, and there was little else unusual about the environment or circumstances, and his health was good, I do not believe there could have been any causal relationship between his job and the rupture of the aneurysm as occurred. We have above discussed the natural history of aneurysms rupturing at any time. This could well be the case here, as 9 years had passed from the original episode to the second episode.
>
> ....
>
> The intracerebral hematoma, of course, did lead to his death, but, I believe was the result of a rupture on a natural basis of this dreaded abnormality.
> (From Dep. Ex. 2, pp. 15-19)

Finally, in a deposition taken on May 4, 1983, Dr. From as to the immediate cause of death, stated:

> A. The rupture was the bottom-line cause of death. Without having ruptured, I'm sure Randy Leinbaugh would not have died the day he did. The immediate cause of death or complications which came about is basically a respiratory system, because of alterations in nerve functions to his lung tissue and respiratory system, secondary to the rupture. The rupture was the primary cause. The actual immediate cause was a respiratory problem.
> (From Dep., p. 15)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that decedent received an injury on January 27, 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 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.

The claimant has the burden of proving by a preponderance of the evidence that decedent's injury of January 27, 1982 is causally related to the death 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).

ANALYSIS

In the case at bar, the critical issue is whether a causal connection exists between the decedent's employment and his injury. Since such a question is within the domain of experts, an examination of the opinions of the experts, Dr. McKinney and Dr. From, is mandatory.

On the one hand, it was Dr. McKinney's opinion that the straining activity of shoveling snow may have accounted for rupture of one of the veins of the arteriovenous malformation leading to the intracerebral hematoma which led to his death. Further, in Dr. McKinney's reports, he specifically stated that decedent was shoveling snow at the time injury occurred. Dr. McKinney stated that decedent had no symptoms until about 3:30 p.m. on January 27, 1982, when he collapsed while shoveling snow. (From Dep. Ex. 2, pp. 21, 35, 47, and 56)

However, this history appears to be inaccurate and incomplete. Testimony from Eldon Hardekopf, Ralph Greeder and John Ang are contrary to Dr. McKinney's history. Each one of these co-workers stated that at the time of injury decedent was on afternoon

break. In fact, all three individuals testified that it had been at least three hours since decedent had done any kind of "snow shoveling." Also, all three men stated that the snow shoveling was light work which required little physical exertion.

Conversely, Dr. From stated that there was no causal connection between the decedent's job and the rupture of the aneurysm. Dr. From based his opinion upon the fact that the shoveling of snow is not a cause of tremendous increase in blood pressure as this activity is not a great cause of an increase in metabolic equivalents. In addition, Dr. From based his opinion on the testimony of decedent's co-workers who stated decedent was doing little work in the 2 1/2 to 3 hours preceding his actual time of rupture.

Decedent was a very active and athletic individual whose work at defendant employer sometimes did involve heavy labor. However, as has been stated above, decedent had ceased shoveling snow as early as 11:30 a.m. and did little physical labor the rest of the day before the rupture occurred at approximately 3:15 p.m.

The opinion of Dr. From carries greater weight than that of Dr. McKinney because of the accuracy and completeness of the history relied on.

Wherefore the decedent has not sustained an injury arising out of and in the course of his employment.

As a caveat it is noted that even if the death were to have arisen out of the employment, it is questionable that dependency of the claimants could be established.

FINDINGS OF FACT

WHEREFORE it is found:

1. That the claimant is the natural father of the decedent.

2. That the decedent was twenty years old at the time of his death.

3. That decedent, at the time of his death, was a full time employee at Farmland Foods in Denison, Iowa.

4. That decedent had a preexisting condition in that in 1973 he fell and struck his head at school which eventually demonstrated a congenital left parietal arteriovenous malformation which was treated with a right ventriculo-atrial shunt.

5. That on January 27, 1982 decedent arrived at Farmland at his usual time and commenced work at approximately 6:30 a.m.

6. That claimant engaged in some chipping and ice removal prior to 11:30 a.m.

7. That after 11:30 a.m. only routine physical labor was performed.

8. That at 3:00 p.m. decedent, Randy Leinbaugh, went to his normal afternoon break. At approximately 3:10 p.m. he first demonstrated signs of having some physical problems. Prior to that time he had demonstrated no outward signs of any physical problems, nor did he voice any complaints to any of his co-employees.

9. That at approximately 3:10 p.m. he asked for some aspirin from his supervisor. He then had difficulty even pouring the aspirin out and spilling them on the floor. Very soon thereafter he became unresponsive.

10. That his condition worsened rapidly and he was taken by ambulance from the Farmland Foods plant to the Denison Hospital and shortly thereafter he was taken to Archbishop Bergan Hospital in Omaha for treatment.

11. That immediately prior to his collapse on January 27, 1982, Randy Leinbaugh had been an active young man in apparent good physical condition.

12. That the cause of decedent's death was in intracerebral hemorrhage due to consequence of ruptured arteriovenous anomaly. His course, subsequent to the initial onset of problems, was complicated by bronchial pneumonia and tension pneumothorax.

13. That the rupture which occurred on January 27, 1982 was the result of the natural progression of a congenital abnormality which first manifested itself in approximately 1973 after a fall when Randy Leinbaugh struck his head.

CONCLUSION OF LAW

THEREFORE, it is concluded:

That claimant has failed to prove by a preponderance of the evidence a causal relationship between his job and the injury that occurred on January 21, 1982.

ORDER

THEREFORE, it is ordered:

That claimant shall be denied any benefits by these proceedings.

That defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 30 day of November, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

1108.50; 1402.30; 1402.40
1402.60; 1801; 2206; 2501
Filed October 2, 1984
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DALE J. LEWIS, Claimant, vs. DON HESS AND COMPANY, Employer, and FIREMAN'S FUND INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	FILE NO. 739442 A R B I T R A T I O N D E C I S I O N
DALE J. LEWIS, Claimant, vs. ANDREWS CONCRETE, INC., Employer, and IOWA NATIONAL MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 504698 R E V I E W - R E O P E N I N G D E C I S I O N
DALE J. LEWIS, Claimant, vs. WHITE FARM EQUIPMENT CO. Employer, and HARTFORD INSURANCE GROUP, Insurance Carrier, Defendants.	:	FILE NO. 425689 R E V I E W - R E O P E N I N G D E C I S I O N

1108.50; 1402.30; 1402.40; 1402.60; 1801; 2206; 2501

Fifty-two year old married claimant who suffered from preexisting degenerative disc disease injured his back while attempting to climb into his employer's truck. Claimant sought and received immediate medical care and returned to work at an unspecified time which could have been the fourth day following the injury.

Claimant's credibility concerning his description and demonstration of his symptoms and complaints was greatly impaired by his previous denials of having prior back problems which were well documented by the evidence. It was also compromised by direct conflicting testimony from his employer and a witness who testified to the effect that claimant's action in bringing this case was a scam. It was also compromised by claimant's recent criminal conviction for welfare fraud.

Held: Claimant failed to prove entitlement to any benefits for permanent disability. Since claimant failed to show the date of his return to work it cannot be determined if he is entitled to any compensation for temporary disability. Claimant awarded medical expenses, travel expenses and costs.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DALE J. LEWIS, Claimant, vs. DON HESS AND COMPANY, Employer, and FIREMAN'S FUND INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	FILE NO. 739442 A R B I T R A T I O N D E C I S I O N FILED OCT [illegible] IOWA INDUSTRIAL COMMISSIONER

DALE J. LEWIS, Claimant, vs. ANDREWS CONCRETE, INC., Employer, and IOWA NATIONAL MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 504698 R E V I E W - R E O P E N I N G D E C I S I O N

DALE J. LEWIS, Claimant, vs. WHITE FARM EQUIPMENT CO., Employer, and HARTFORD INSURANCE GROUP, Insurance Carrier, Defendants.	:	FILE NO. 425689 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 decision is the result of the consolidation of the three above entitled cases brought by the claimant, Dale J. Lewis. The case against Don Hess and Company, employer, and Fireman's Fund Insurance Companies, insurance carrier, is in arbitration. The case against Andrews Concrete, Inc., employer, and Iowa National Mutual Insurance Company, insurance carrier, is in review-reopening and the case against White Farm Equipment Company, employer, and Hartford Insurance Group, insurance carrier, is also in review-reopening. The two review-reopening proceedings seek only medical benefits available under section 85.27 of the Code of Iowa.

Claimant alleges that he sustained a compensable injury to his back on July 27, 1983 and seeks compensation for disability and payment of medical expenses. Claimant alternatively alleges that in the event the medical expenses he has incurred are not held to be the responsibility of the defendants in the arbitration proceeding, the same are the responsibility of the defendants in the review-reopening proceedings. The hearing commenced July 26, 1984 in the Cerro Gordo County Courthouse at Mason City, Iowa. The case was considered fully submitted upon the conclusion of the hearing. The record in this proceeding consists of the testimonies of Dale J. Lewis, Jeanne Lewis, Cheryl Lewis, Stanley G. Ingle, Donald J. Hess and Don Tasy. The testimony of Patricia Hauge was entered into the record as an offer of proof only and is not considered in this decision. Claimant's exhibits 1 through 17 inclusive, including exhibit 4a were received into evidence and defendants' exhibits A, B, E and I were received.

ISSUES

The issues identified by the parties with regard to the arbitration proceeding are: whether claimant received an injury which arose out of and in the course of his employment on July 25, 1983; whether there is a causal relationship between the alleged injury and any disability which claimant presently exhibits; whether claimant is entitled to compensation for temporary disability, healing period or permanent partial disability and; whether claimant is entitled to payment of medical expenses, mileage and other benefits provided by section 85.27 of the Code of Iowa, particularly with regard to whether there is a causal relationship between the alleged injury and the expenses. In the two review-reopening proceedings the only issue relates to claimant's entitlement to benefits under section 85.27 of the Code of Iowa, particularly whether the injuries established by the respective memorandums of agreement have any causal relationship to the medical expenses which claimant has incurred. The parties stipulated that the amount charged for the medical services which claimant received was fair and reasonable. It was also stipulated that in the event of an award claimant's rate of compensation is $203.06 per week.

REVIEW OF THE EVIDENCE

Dale J. Lewis testified that he was born August 13, 1930 and dropped out of school while in the ninth grade. He stated that he has no other formal education or training. He stated that he is married and has four minor children living with him.

Claimant testified that during the 1970's he worked for White Farm Equipment Company and Andrews Concrete, Inc. He stated that with White he worked in the foundry and earned approximately $1,400.00 per month. He stated that he was injured on September 5, 1974 while bending over hooking gear casings. He related that he was treated by D. E. Fisher, M.D., and missed three weeks, four days of work as a result of the injury. He stated that he had not experienced any back problems prior to that occurrence and that he subsequently went back to work with White and continued to work until his employment was terminated in 1976.

Claimant testified that while working for Andrews Concrete, Inc., he was a ready-mix delivery driver. He stated that he earned approximately $235.00 per week. He stated that in 1978 he was picking up a cement chute when he suffered his second back injury which caused him to be off work for one day. He denied having any back problems between the time he was injured at White in 1974 and the 1978 injury which occurred while working for Andrews Concrete. Upon his return to work he stated that his back problems seemed to be cleared up.

Claimant testified that he returned to work at White on the night clean-up shift until 1979 for which he earned $516.00 per week. After leaving White in 1979 until he started working for Don Hess and Company in 1983 he did some carpentry work as a self-employed individual.

Claimant stated that he had surgery on veins in his legs in 1980 and a problem with his right eye in 1982. He denied having any back problems after November, 1982 until the time he started working for Hess in 1983. He denied suffering any other injuries since 1978. He confirmed that he had received a back x-ray in 1979 and that he saw Bruce Harlan, M.D., in November, 1981 for back complaints which had arisen without the occurrence of any specific incidence.

Claimant testified that when working for Don Hess and Company he drove a truck hauling ammonia and LP tanks. He stated that he started in June, 1983 and performed the job without problems until the injury on July 25, 1983. He stated that he hauled tanks all over the State of Iowa and that the work varied to some extent relating to the amount of loading and

driving. He stated that tightening chains which hold the tanks on the truck was a lot of strain but that the balance of the work was not heavy.

Claimant testified that on July 24, 1983 he took the truck home so that he could leave early the following morning to pick up a tank in Iowa City, Iowa. He related that at approximately 1:00 a.m. on July 25, 1983 he got up, went to the truck, put the key in, climbed up to enter it and that something snapped in his back causing him pain in the middle of his back. He stated that his wife came out and helped him back into the house where he laid on a heating pad until he was taken to the emergency room at the hospital where he was seen by Dr. Harlan. Claimant stated that having the truck at his home was done with the knowledge and consent of Don Hess and that later, following his release from the hospital, he called Hess and reported the injury. He indicated that Hess told him to take time off work and suggested that he see E. J. Ridder, D.C., in Clear Lake, Iowa. Claimant stated that after seeing Dr. Ridder his back felt better and that he subsequently did make the trip to Iowa City which had originally been intended for July 25. He stated that he did not perform any work subsequent to that trip. He identified the check admitted into evidence as exhibit I as a loan which he received from Don Hess after the last run he made to Iowa City. He stated that he had not been paid for that run and that he felt that he had been underpaid in prior weeks. He stated that he decided to treat the loan as payment for past due earnings and has not repaid it.

Claimant stated that subsequent to the Iowa City run his back got worse without any relationship to any particular identifiable incident. He stated that he went back to Dr. Harlan for care. He stated that on August 22, 1983 he received a letter terminating his employment with Hess. He denied being given reasons for the firing. Claimant testified that Dr. Harlan referred him to Wayne E. Janda, M.D., who treated him on a regular basis thereafter and continues to do so up to the present time. Claimant stated that he has been seen by other physicians, taken medication and undergone other tests including a CT scan. He stated that he went to physical therapy but that he thought it was harmful to him.

Claimant testified that he was released by Dr. Janda to return to work on March 5, 1984 but that his condition has subsequently worsened.

Claimant testified that he has not worked since July 25, 1983 except for the run to Iowa City. He denied performing any roofing, painting or other carpentry work. He stated that he has looked for work but found none. He stated that he has had no income from any source whatsoever since his employment was terminated. He stated that he plans to go ahead with vocational rehabilitation but he has no present plans for employment. He stated that his interest lies in the area of truck driving.

Claimant stated that he presently experiences pain in his left leg and that the middle of his back bothers him. He feels that he has not fully recovered and that the 1983 injury was the worst injury to his back which he has ever experienced. He did not feel that his prior back problems were significant. He stated that he is presently unable to perform carpentry work as he had done in the past. He denied having any other physical problems or limitations.

Claimant stated that he does not read well and does not know the meaning of terms such as "degenerative disc disease, herniated disc or protruding disc." He stated that he feels the term "arthritis" is related to getting old. He related that he was given a clean bill of health by John M. Baker, M.D., when he was examined shortly prior to commencement of work with Don Hess and Company. He stated that he did not tell Dr. Baker of his prior back injuries or of the arthritis which had been previously diagnosed. He related that he was not asked about his back.

Claimant testified that the employer's answers to interrogatories indicated that he had been fired as a result of allowing an unauthorized person to drive the truck. He stated that his wife had backed the truck up to a dock during the Iowa City run. He stated that Hess did not seem to be upset when told about it and that the termination letter came approximately three weeks later. He stated that he has never been told that he was terminated because he could not communicate well with customers. He denied ever running the truck without sufficient oil. He stated that he was never told that his wife should not drive and he denied that she ever did drive except for the incident at Iowa City.

When recalled following the testimony of Don Tasy, claimant stated that when Tasy was at his residence he could not see the stairsteps. He related that Tasy volunteered his symptoms to him, sent him to Attorney Kinsey and gave him money without being asked for it. Claimant denied throwing horseshoes or carrying a battery and stated that Tasy had cleaned the battery terminals and jumped the car to start it. He admitted that he had phoned Tasy on some occasions and admitted telling Tasy that he had experienced previous back problems. He admitted that he had obtained a job to paint a house but stated that his wife and children did the actual work.

Claimant stated that he has been receiving ADC and was recently charged with fraud related thereto. He stated that he did not commit fraud but received a sentence of 60 days, suspended, and a fine of $200.00 which has not been paid in full.

When discussing exhibit 17 claimant stated that he does not know what he told the investigator regarding prior back injuries.

Jeanne Lewis testified that she was married to claimant in October, 1980 and that they have lived together continuously thereafter except for a separation of approximately two months in early 1982. She stated that she did not recall claimant having any back trouble or making complaints of back pain prior to July, 1983 except for some complaints involving his upper back and neck. She stated that he could do heavy work such as carrying a bundle of shingles which weighed approximately 90 pounds up a ladder and onto a roof. She stated that prior to his injury he engaged in swimming, bowling, dancing and rough-housing with the kids. Claimant's spouse testified that in the early morning of July 25, 1983 she was standing on the porch of their home watching claimant walk around the truck. She stated that she did not see him fall to the ground but that when she did see him he was bent over and appeared to be in pain. She stated that she helped him into the house where he lay down but that when such did not provide relief she took him to the hospital. She stated that she transported him to see Dr. Ridder who provided relief but that the relief was short lived. She stated that after he quit seeing Dr. Ridder his condition worsened.

She stated that claimant has not returned to the condition he was in prior to July 25, 1983. He complains of pain and is restricted in the manner in which he moves. She stated that weather seems to affect his condition as does walking or extended sitting. She stated that he takes extra strength Tylenol and Motrin.

She related that since the injury he has not done any painting or carpentry work. She stated that he formerly shoveled snow and mowed the lawn but since the injury she and the children have performed those tasks.

Cheryl Lewis testified that she has been claimant's daughter-in-law for approximately five and one-half years and resides in Mason City, Iowa. She stated that prior to July 25, 1983 claimant was very active. He had helped her move, and in doing so, lifted heavy objects such as a refrigerator and stove. He also performed roofing with her husband. She related that he previously had not expressed any physical complaints and that he exhibited no observable back problems. She stated that since July, 1983 he appears to be in pain. She stated that he seems older as far as his activities go and he stays at home and rests. She related that she recently had moved but had not asked him to help.

Stanley G. Ingle testified that he married claimant's oldest daughter in 1973 and has known claimant since. He stated that prior to July, 1983 claimant was very active and played ball, bowled and performed roofing. He stated that he had no knowledge of claimant having any back problems at that time. Ingle stated that subsequent to July, 1983 claimant is just not himself. He stated that he no longer plays ball or plays with the children. Ingle stated that claimant lived with him for approximately a week in November, 1983 and that claimant had trouble getting up and out of bed. He stated that in his opinion claimant has not returned to the condition which he was in prior to July, 1983.

Donald J. Hess testified that he operates his own business in Clear Lake, Iowa which engages in the purchasing and selling of used LP and anhydrous tanks. He stated that he employs one truck driver and that he had hired claimant in June, 1983. He stated that claimant worked as needed and was paid by the mile.

Hess testified that he was notified of claimant's injury on July 25, 1983 when claimant's wife phoned. He related that he advised her that claimant should go to the doctor but stated that he did not know to whom claimant went. He stated that he suggested Dr. Ridder on the day of the injury or possibly later.

Hess stated that after claimant had seen Dr. Ridder claimant told him that he was greatly improved. He related that claimant stated that he felt fine.

Subsequent to the injury he had claimant make one run to Iowa City. He stated that there was little work as the end of the season had arrived and he decided to terminate claimant's employment. He related that the reasons for termination involved claimant's inability to communicate with customers, claimant's lack of experience as shown by an occasion when the truck had been operated without sufficient oil and for letting his wife drive the truck. He stated that he also believed that claimant had falsified a claim for medical expenses. He stated that he gave claimant notice of termination by letter and had discussed the problems with claimant prior to the termination. He stated that he believed that claimant's wife had driven the truck in Montana. Hess stated that he does not believe that he hired a replacement for claimant until the following spring and expressed uncertainty concerning who had replaced claimant.

Hess related that he loaned claimant $200.00 in order to keep claimant out of jail for falsifying something with welfare. On cross-examination he indicated that he was unsure of what the $200.00 was needed for but that it could have been back rent.

Hess stated that claimant gave no indication that his back problems were continuing and that he had reapplied for work on several occasions.

Don Tasy testified that he has resided in Mason City, Iowa

for six years and is presently employed as a truck driver for Holiday Express, which position he obtained in April, 1984. He stated that his wife is related to claimant's wife whom he met in a hospital waiting room in August, 1983. He related that at that meeting he discussed with claimant's wife that he was a truck driver and that he was off work as a result of a work related injury. He stated that claimant's spouse said that claimant would like to meet him and she invited him to their residence.

Tasy testified that approximately two days later he went to claimant's home at about 9:00 a.m. He stated that he was invited into the house and that claimant was summoned from the upstairs. He stated that claimant came running down the stairs and congratulated him for getting a workers' compensation settlement. Tasy stated that they discussed trucking and that claimant told him that he was in a similar predicament. He stated that claimant told him that he had fallen out of a truck. Tasy went on to say that claimant asked about his symptoms, his doctors and his lawyer.

Tasy testified that claimant said that when he hurt his back it only hurt for awhile but that he had been layed off and was going to get even. Tasy stated that he was at the house for a few hours and that one and one-half hours or more was sitting at the kitchen table. He stated that they got up, went outside and that claimant indicated that he was not presently experiencing any symptoms. He stated that claimant opened the garage door and carried out a dead battery. He related that claimant also told him that he had been playing horseshoes and that he had painted a house on 15th street for which his wife received the pay. Tasy stated that claimant told him he had a doctor's appointment and needed to get the car started. Tasy stated that he loaned claimant $40.00 at claimant's request.

Tasy related that the symptoms which claimant described at hearing were the same symptoms which he had related to claimant except that his own involved the other leg and were higher on his back. He stated that claimant phoned him several times and that one Sunday evening claimant expressed concern about the possibility that x-rays which were scheduled would not show anything. He related that claimant had also called on other occasions asking about borrowing money. Tasy stated that he knew what claimant was doing was wrong and he notified Hess about what was going on. Tasy stated that Attorney Kinsey was the lawyer that handled his workers' compensation case. He denied driving for Don Hess or of ever having any intention of driving for Hess. He stated that Hess did not pay enough. He also related that he started looking for work in November, 1983 following his recovery and that he found work at the first place where he applied.

Exhibit 1 is a statement and records from D. E. Fisher, M.D., relating to claimant's 1974 injury. It notes that x-rays were taken and showed a normal sacral spine. It indicates that the injury was diagnosed as an acute lumbosacral strain and no physical impairment rating was made.

Exhibit 2 is documents regarding an accident of July 25, 1978 which was diagnosed to be an acute back sprain incurred while claimant work for Andrews Conrete, Inc. It indicates that claimant was off work from July 26, 1978 through August 2, 1978 and that no permanent disability was expected.

Exhibit 3 is a radiographic report dated May 29, 1979. It is interpreted to show claimant to have lipping at the L4 and 5 level and narrowing at the L5-S1 disc space indicative of mild degenerative changes with disc space narrowing.

Exhibit 4 is the emergency room record from July 25, 1983 which diagnoses claimant as having a low back strain and possible mild lumbar disc disease. It includes an x-ray report which shows lipping at the L4-L5 level but indicates that there is no sufficient disc space narrowing, indicative of degenerative changes.

Exhibit 4a is a report from Dr. Harlan dated September 2, 1983. Dr. Harlan states that it is his impression that claimant suffers from back pain due to a disc disorder in the lumbar region of his spine and that on August 22, 1983 he found definite evidence of lumbar disc disease. He opines that claimant had been totally disabled due to his back problem from July 25, 1983 through the date of the report and that he referred claimant to Dr. Janda for continuing care.

Claimant's exhibit 5 is a report from Wayne E. Janda, M.D., dated September 8, 1983 wherein he opines that claimant has radiculitis of his left leg secondary to lumbar disc protrusion/ herniation as a result of an injury which occurred at work according to the history claimant related. He opines that claimant's absence from work since July 25, 1983 is a result of the work injury. The progress notes are attached as part of exhibit 5. An entry dated November 4, 1981 indicates that claimant was seen with complaints of a two or three day history of discomfort in the lower left back. The examination noted a 20 degree limitation in left flexion, straight leg raising tests which were essentially negative and tenderness to percussion in the low back region. A lumbosacral muscle strain was diagnosed. Entries of September 17, 1981 and February 25, 1983 also make reference to complaints of musculoskeletal pain. An entry dated November 22, 1982 indicates that claimant was prescribed Motrin for arthritis. At an entry dated September 15, 1983 Dr. Janda indicates that claimant is suffering from radiculitis or radiculopathy of the left leg secondary to lumbar disc protrusion/ herniation related to an injury at work which occurred July 25, 1983. He indicates that claimant will need hospitalization.

Exhibit 6 is a report from Dr. Ridder dated December 14, 1983. It relates that he treated claimant on July 26 and 27 and that claimant failed to return for an appointment which had been scheduled on July 29, 1983. He assessed claimant's condition as a very mild left mechanical sacroiliac strain. He indicates that claimant had a simple condition which would have allowed him to be back to work in a few days.

Exhibit 7 is a CT scan report which shows changes in the facet joints at L4-5 and L5-S1 with a mild bulge of the L5-S1 disc centrally but without lateral herniation. The radiologist's impression was of extensive hypertrophic arthritis in the facet joints at L4-5 and L5-S1 with slight narrowing of the lateral recesses over L5, mild bulge of the L5-S1 disc centrally, narrow neural foramen at L5-S1 on the right.

Exhibit 8 is a report from Sant M. S. Hayreh, M.D., dated October 4, 1983. He relates examining claimant on October 3, 1983 and finding no obvious muscle atrophy, normal muscle tone and strength except a slight weakness of the ankle dorsi-flexion and extensor hallcius longus on the left. Sensory examination showed a dulling of light touch and pin prick on the outer aspect of the left leg and on the medial aspect of the left leg and on the dorsal of the left foot. Straight leg raising test was positive at 75 degrees on the right and 60 degrees on the left side. Mild tenderness was noted to deep percussion at the L4-5 and L5-S1 region.

Dr. Hayreh's impression was that claimant has low back pain secondary to underlying degenerative arthritis of the lumbar spine with left L-5 radiculitis.

Exhibit 9 is additional reports from Dr. Janda. Exhibit 10 is a report from Dr. Janda dated April 4, 1984 wherein he opines that claimant's condition was materially aggravated or caused by the injury of July 25, 1983 when he was climbing up into his truck and felt something pop or snap in his back. He also opines that claimant has a permanent partial impairment of 20 percent of the whole person of which one-half is related to his preexisting arthritis and the other half to the injury of July 25, 1983. The progress notes attached indicate that claimant plateaued and was released to return to work without specific restrictions on Monday, March 5, 1984.

Exhibit 11 is a report from Dr. Fisher dated June 7, 1984. In the report Dr. Fisher states:

> X-rays show mild L5-S1 joint narrowing suggesting degenerative disc disease and some facette joint early arthritis. A CAT scan done in September of 1983 shows a definite spinal stenosis at L4-5 and more severe at L5-S1 with lateral stenosis and narrowing and in my opinion a herniating disc at L5-S1 which is chronic. (emphasis added)
>
> It is impossible to make any estimate as to what relation his acute symptoms have had to a long-standing disease.
>
> As a longstanding laborer and truck driver he has been degenerating his lumbar facette joints and discs for many years.
>
> ...
>
> I do not think his current back problem is a result of the injury that he had Wednesday, September 4 of 1974 at White Farm Implement Company.

Exhibit 14 is a list of unpaid medical bills which total $1,191.72. Exhibit 15 is a charge from Dr. Janda in the amount of $36.00 for a medical report. Exhibit 16 is a claim for mileage seeking $68.16 based upon 284 miles at $.24 per mile.

Exhibit 17 is a transcript of a telephone interview with claimant which, at page 6, shows claimant to have denied previous back problems.

Exhibit A is a deposition of Peter D. Wirtz, M.D., taken June 29, 1984. It relates that Dr. Wirtz examined claimant on May 14, 1984. Dr. Wirtz opines that no permanent impairment resulted from the injury of July 25, 1983 and that claimant should have healed from it in not more than 12 weeks. He states that claimant does not have a herniated disc and describes the injury as a slight aggravation of a preexisting condition. At page 44 Dr. Wirtz indicates that claimant's injuries of 1974 and 1978 were temporary conditions. He went on to state that the bulging of a disc as shown by the CAT scan is evidence that the disc is degenerating. Commencing at page 48 he indicates that any of claimant's medical treatment rendered more than six weeks after the injury of July, 1983 would be related to claimant's ongoing disc degeneration and unrelated to the injury. Commencing at page 60 Dr. Wirtz summarized his opinions as follows:

> Q. Doctor Wirtz, you stated a little bit earlier here that if, in fact, herniation is diagnosed at this time, it would not affect the opinions that you rendered. Why is that?
>
> A. Because he doesn't have herniation of a disc.

Q. Again, based on a reasonable degree of medical certainty, what is your opinion with regard to the duration and any permanency resulting from the injury of July of 1983?

A. That he would have more than likely a severe restriction of activities from the time of the injury for four weeks or so, lesser disability with eventual return of activities between six and twelve weeks to where he was prior to the injury.

Q. What is your opinion with a degree of reasonable medical certainty as to the percentage of disability actually resulting from the July 1983 injury?

A. That he didn't suffer any impairment to his lumbar spine as related to that accident.

Q. What is your opinion with any degree of reasonable medical certainty as to how much of the ten percent disability to the lumbar spine is attributed to the underlying degenerative disease?

...

Q. In stating your opinion give the correct characterization of the disability, if you would.

A. This patient's lumbar disc disease would be in the range of ten percent impairment of the body as a whole.

Q. That impairment then in your opinion is attributed solely to the underlying degenerative disc disease?

A. Yes.

ANALYSIS AND APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on September 5, 1974, July 25, 1978 and July 25, 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).

Claimant and his spouse testified to an occurrence of July 25, 1983. The injury was promptly reported and claimant sought immediate medical care as shown by exhibits 4 and 6. It is found and concluded that claimant did receive an injury on July 25, 1983 while climbing into his truck.

"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).

Claimant's occupation was that of a truck driver. He had the truck at his home for the purpose of leaving on a run for his employer. There is nothing to indicate that claimant's use of the truck was unauthorized, personal or anything contrary to what he stated at hearing. It is therefore concluded that the injury arose out of and in the course of claimant's employment with Don Hess & Company.

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.

The claimant has the burden of proving by a preponderance of the evidence that his 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, 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).

Exhibit 3 clearly shows that claimant had preexisting disc degeneration. As shown by exhibit 5 he was diagnosed as having a lumbosacral strain on November 4, 1981 for which there was no identified inciting incident or activity. He had been prescribed Motrin as early as September 17, 1981. Drs. Janda, Fisher, Hayreh and Wirtz all agree that claimant suffers from disc degeneration. It is clear that claimant did have preexisting disc degeneration.

Dr. Janda, as shown in exhibit 10, is of the opinion that claimant does have a permanent partial impairment as a result of the July 25, 1983 injury. He feels that claimant is presently 20 percent impaired of which 10 percent is due to the injury of July 25, 1983 and the balance to his preexisting degenerative arthritis. He released claimant to return to work on March 5, 1984.

As shown in exhibit A, Dr. Wirtz is of the opinion that claimant suffered no permanent impairment as a result of the July 25, 1983 injury. He feels that claimant has a 10 percent permanent functional impairment of the body as a whole due to the degenerative arthritis. He also indicated that in his opinion claimant's recovery from the injury should have been completed within 12 weeks. In exhibit 11 Dr. Fisher indicates that claimant has a chronic herniating disc at L5-S1 and indicates that it is not possible to determine the relationship of the July 25, 1983 injury to his longstanding disc degeneration.

Dr. Hayreh, as shown in exhibit 8, found claimant to have low back pain secondary to underlying degenerative arthritis of the lumbar spine with left L5 radiculitis. He expressed no opinion concerning recovery time or permanent impairment.

Dr. Ridder characterized claimant's recovery time as a few days and gave no indication that there would be permanent impairment as a result of the injury.

There is no showing that there has been any objectively discernable physical change in claimant's back as a result of the injury. Claimant, his wife, son-in-law and daughter-in-law testified that the injury caused the onset of continuing pain from which he has not recovered. There is conflicting evidence in the record from Don Tasy that claimant's pursuit of this claim is basically a fraudulent scam. In resolving this conflicting evidence the undersigned considers it notable claimant hauled only one load for Hess subsequent to the injury and that such was apparently done in early August. When discussing whether or not his wife had driven during that run claimant characterized it as occurring three weeks prior to the time he received the termination letter. Claimant testified that he received the termination letter on August 22, 1983, the same date as he saw Dr. Harlan. Claimant did not return for his third scheduled appointment with Dr. Ridder and Don Hess testified that claimant told him that Dr. Ridder had been of great benefit. At hearing claimant himself indicated that Dr. Ridder had been of benefit but that the benefit was short lived. Claimant stated that his symptoms returned but he gave no indication as to why he did not return to Dr. Ridder who had previously helped his condition. Claimant has not been hospitalized. Whenever Dr. Janda had recommended hospitalization, namely September 15, 1983, October 5, 1983 and as late as December 30, 1983 there was always a reason why claimant chose not to be hospitalized at that time. On January 9, 1984 claimant had improved to where hospitalization was no longer indicated. When claimant was interviewed as shown in exhibit 17 he expressly denied having any prior back problems. The subjective history in exhibit 4 contains a denial of previous back problems. Claimant has

recently been convicted of some form of welfare fraud. Claimant's appearance and demeanor was observed while he testified at hearing. The conflicts which exist in the record of this case raise a substantial question concerning claimant's credibility. A review of the medical records shows his symptoms to be somewhat inconsistent at some points. On July 7, 1984, when seen by Dr. Fisher, claimant jumped with twinges and spasms when his hips were moved but had negative straight leg raising tests. He could forward flex to approximately eight inches off the floor, and he could extend his back 15 degrees. When claimant was seen by Dr. Wirtz approximately three weeks earlier, he could not extend or flex. As shown at page 33 of exhibit A, claimant's straight leg raising was to 80 degrees bilaterally which should have allowed him to flex 80 degrees. It is therefore found and concluded that claimant has failed to establish his own credibility in this proceeding and such detracts from the weight given to his own testimony and all other evidence which is based upon his relation or exhibition of symptoms. Claimant had incidents of back pain in 1974, 1978 and 1981 which quickly resolved. The activity of climbing into a truck, without falling or other trauma, would not normally be expected to cause injury of any type. The expectation of such an activity causing permanent impairment is remote. Claimant did return to work at some unspecified date near August 1, 1983. He did not express having any significant amount of difficulty in performing his work during the run to Iowa City. He did not seek further medical care of any type until August 22, 1983. It appears that claimant was available for work subsequent to the Iowa City run but that there was simply no work available for him to perform. It cannnot be concluded that he was disabled from performing the regular duties of his employment during early August, 1983. Only Dr. Janda indicates that claimant has suffered any permanent impairment as a result of the July, 1983 injury. Even though he is the treating physician his opinion is based, to a large degree, upon claimant's description of his symptoms. The greater weight of the evidence is that claimant suffered no permanent impairment as a result of the July, 1983 injury. There is no showing, however, that the termination of claimant's employment was related to his physical condition. It does not appear from the record that he has made reasonable efforts to find employment. Accordingly, an award of disability under the critera recognized in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) is not warranted. Drs. Janda and Wirtz agree that claimant has a 10 percent functional impairment as a result of his degenerative arthritis. It is very likely that claimant suffers significant discomfort from that affliction. Such has not, however, been shown to be causally connected to the injury of July 25, 1983. The opinion of Dr. Janda which relates that claimant has a total impairment of 20 percent, of which 10 percent is related to the injury is rejected due to its reliance upon claimant's subjective complaints for its foundation. The opinion of Dr. Wirtz is consistent with those expressed by Drs. Hayreh, Fisher and Ridder and will be adopted.

Dr. Wirtz indicates that none of claimant's present problems are related to the injuries he sustained with White Farm Equipment Company or Andrews Concrete, Inc. Dr. Fisher indicates that claimant's present complaints are not related to the injury at White Farm Equipment. There is no medical evidence which relates claimant's present condition to either of those incidents and, accordingly, it is found and concluded that any medical expenses claimant incurred are not related to the injuries of 1974 or 1978.

Claimant has not introduced evidence of the day on which he returned to work and it cannot be ascertained whether or not he is entitled to any compensation for temporary total disability when the three day waiting period of section 85.32 is considered.

Defendants' liability under section 85.27 will be limited to those charges incurred on July 25, 1983. It is noted that the charges from Dr. Ridder apparently were paid by the employer as were the emergency room charges from the hospital and Dr. Harlan. In accordance with exhibit 16, claimant will be allowed travel expense for 44 miles, that being the travel to Dr. Ridder and to the emergency room.

FINDINGS OF FACT

1. On July 25, 1983 claimant was a resident of the State of Iowa and his place of employment was in the State of Iowa.

2. Claimant was injured on July 25, 1983 when he felt a snap in his back while climbing into his truck.

3. At the time of injury claimant was employed by Don Hess & Company working as a truck driver.

4. Following the injury claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of the injury from July 25, 1983 until an unspecified date near August 1, 1983 when claimant returned to work.

5. The injury claimant sustained was in the nature of an aggravation of an underlying preexisting degenerative disc disease. The injury did not change the course of the disease or result in permanent physical impairment.

6. Claimant was 52 years old at the time of injury, married and had four dependent children residing with him.

7. Claimant's rate of compensation is $203.06 per week.

8. Claimant received medical care for the injury at St. Joseph Mercy Hospital on July 25, 1983 for which claimant has made no claim. On that same date while at the hospital he incurred charges of $20.00 with Radiologists in Mason City, P.C., which charge has not been paid by defendants. While hospitalized claimant was seen by Dr. Harlan whose charges of $35.00 have been paid by defendants. On July 26 and 27, 1983 claimant received treatment from Dr. Ridder whose charges have not been submitted for payment. When claimant was seen by Dr. Harlan on July 25, 1983 he prescribed medication which claimant obtained at Easter's Pharmacy at the cost of $17.95. All the foregoing care and resulting expenses were reasonable and necessary for treatment of claimant's injury and the amounts charged for those services and prescription medication were fair and reasonable.

9. In receiving the medical care heretofore listed, claimant traveled a total of 44 miles.

10. Claimant has not returned to work in any capacity since the one trip he made for Don Hess & Company subsequent to the injury.

11. Claimant did not perform any work for his employer for approximately three weeks after the last trip before his employment was terminated on August 22, 1983.

12. The termination of claimant's employment was related to a lack of work and had no relationship to his injury.

13. Claimant is not motivated to return to work.

14. Claimant lacks credibility.

15. Claimant's description of his continuing symptoms is entitled to little weight due to the status of his credibility.

16. Claimant does continue to experience a moderate amount of discomfort which is related to his degenerative disc disease and not to the injury.

17. The injury claimant sustained did not change the course of his degenerative disc disease.

18. All evidence which relies upon claimant's description and demonstration of his symptoms and complaints is given little weight. This includes the testimonies of claimant's witnesses and the opinions and conclusions of Dr. Janda as they relate to claimant's disability and its cause.

19. The injuries claimant sustained while employed by White Farm Equipment Company and Andrews Concrete, Inc., are not a proximate cause of claimant's present condition.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and its parties.

On July 25, 1983 claimant sustained an injury arising out of and in the course of his employment with Don Hess and Company.

Claimant has failed to prove that the injury caused any permanent disability when the same is measured in industrial terms.

As a result of claimant's failure to specify the date he returned to work, he has failed to establish whether he is entitled to compensation for temporary disability.

Claimant has established his entitlement to payment of medical bills in the total amount of $37.95 and for reimbursement of travel expenses in the amount of $10.56.

Claimant is entitled to recover the costs of this proceeding including a charge of $36.00 for a medical report from Dr. Janda.

White Farm Equipment Company, Hartford Insurance, Andrews Concrete, Inc., and Iowa National Mutual Insurance Company have no responsibility for the medical expenses which claimant incurred. Claimant has failed to establish a causal connection between the injuries which he sustained with those employers and the medical care for which he seeks reimbursement in this proceeding.

ORDER

IT IS THEREFORE ORDERED that claimant not receive any compensation for temporary disability, healing period or permanent disability from any of the defendants in this proceeding.

IT IS FURTHER ORDERED that the defendants, White Farm Equipment Company, Andrews Concrete, Inc., Hartford Insurance Company and Iowa National Mutual Insurance Company shall have no responsibility to claimant for any of the medical expenses, travel expenses or costs which he has incurred.

IT IS FURTHER ORDERED that the defendants, Don Hess & Company and Fireman's Fund Insurance Companies pay claimant's medical bills with Easter's Pharmacy in the amount of seventeen and 95/100 dollars ($17.95) and with Radiologists of Mason City, P.C., in the amount of twenty and no/100 dollars ($20.00).

IT IS FURTHER ORDERED that the defendants, Don Hess & Company and Fireman's Fund Insurance Companies pay claimant's transportation expenses incurred in receiving medical care in

the total amount of ten and 56/100 dollars ($10.56).

IT IS FURTHER ORDERED that defendants, Don Hess & Company and Fireman's Fund Insurance Companies, pay the costs of this action including thirty-six and no/100 dollars ($36.00) to claimant for the cost of medical reports from Dr. Janda.

IT IS FURTHER ORDERED that defendants file a final report in this proceeding within twenty (20) days from the date of this decision.

Signed and filed this 2nd day of October, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN W. MAHLBERG,

Claimant,

vs.

COUNCIL BLUFFS DRY WALL, INC.,

Employer,

and

INA-AETNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 745455

A R B I T R A T I O N

D E C I S I O N

FILED

OCT 2 3 1984

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by John W. Malhberg claimant, against Council Bluffs Dry Wall, Inc., employer, and INA-Aetna Insurance Company, insurance carrier, for benefits as a result of an alleged injury on September 12, 1983. On June 27, 1984 this case was heard by the undersigned at the courthouse in Council Bluffs, Iowa. This case was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, John Wooldridge, James T. Mings, Byron G. Meek, George R. Wickman, Tim Waldron; claimant's exhibits 1 through 7 and defendants' exhibits A, C, E and F.

ISSUES

The issues presented by the parties at the time of the pre-hearing and the hearing are whether claimant received an injury arising out of and in the course of his employment; whether there is a causal relationship between the alleged injury and the disability on which he is now basing his claim; and the extent of temporary total or healing period and permanent partial disability benefits.

EVIDENCE PRESENTED

John Wooldridge testified that he is the owner and president of Council Bluffs Dry Wall, Inc. He advised that he has been operating the business since he repossessed it from a contract purchasor in late 1982. He stated that Council Bluffs Dry Wall, Inc., is in the business of selling supplies and actual contracting of dry wall work. Mr. Wooldridge stated that he has had as many as 24 to 25 employees and as few as three to four employees during his years of business. Mr. Wooldridge stated that in recent years he has allowed his employees to work for other contractors when he was unable to keep them employed. In such instances the employees were always required to first fulfill their duties for Council Bluffs Dry Wall, Inc. Mr. Wooldridge stated that employees were paid on the contracting jobs on the basis of so many cents per square foot. For noncontracting work such as material handling the employees were paid on an hourly basis. All employees were paid by check and state and federal withholding taxes were always deducted.

Mr. Wooldridge testified that he has known the claimant since the claimant first began to work for Council Bluffs Dry Wall, Inc., in 1971 or 1972 as an apprentice rocker. The claimant ceased his employment in 1975 or 1976 but was reemployed by Wooldridge individually on a project in Wyoming in March of 1981. When Wooldridge repossessed Council Bluffs Dry Wall, Inc., in November of 1982, the claimant returned to Iowa and once again began employment for Wooldridge and Council Bluffs Dry Wall, Inc. In September 1983 the claimant was one of four employees for Council Bluffs Dry Wall, Inc., which included George Wickman, Tim Waldron and the claimant's brother, Andy Mahlberg. John Wooldridge testified that in September of 1983 he was contacted by one Byron Meek concerning the purchase of materials and supplies for a home in the Lake Manawa area that Meek had contracted to dry wall. Mr. Wooldridge stated that he had known Meek for some time prior to this and that Meek had at one time been an employee of his. Wooldridge stated that he agreed to deliver the requested material to Mr. Meek at the Manawa job site. Mr. Wooldridge denied that he was a contractor on the Manawa project or that he had any agreement with Meek to provide employees from Council Bluffs Dry Wall, Inc., to perform the dry wall work in the Manawa house.

Mr. Wooldridge testified that on September 12, 1983 his employees reported to work at 7:30 a.m. as was the usual practice. Due to a lack of work he advised the employees that if they desired to work, Mr. Meek had a job available for them at the Manawa project. He stated that it was understood by himself and the other employees that they were under no obligation to go and work for Meek and that he was merely advising them of the availability of the work rather than directing them to perform said work. He advised that his dry wallers had oftened worked for other contractors when Council Bluffs Dry Wall, Inc., did not have work available for them. He advised that the claimant and Tim Waldron then left and went to the Manawa project. Mr. Wooldridge said he learned later that day from Waldron that the claimant had been injured at the Manawa house.

Mr. Wooldridge stated that he may have talked to the claimant at some time while he was in the hospital; however, it would have not been the day of the accident. He denied that he told the claimant that he was covered by the workers' compensation insurance of Council Bluffs Dry Wall, Inc., and further denied that he told Byron Meek that it was his desire to get rid of the claimant. Mr. Wooldridge stated that after claimant was released from the hospital he came to Council Bluffs Dry Wall, Inc., and advised Wooldridge that he was quitting. Mr. Wooldridge stated that Council Bluffs Dry Wall, Inc., did not pay either claimant or Tim Waldron for the work they performed on the Manawa house. He also denied that he ever told Byron Meek that he would pay them for that work.

James T. Mings testified that he is the owner and operator of K and M Contractors, Inc., a building construction firm in the Council Bluffs area. He advised that he was the general contractor on the construction project at Lake Manawa. He stated that he subcontracts different types of jobs for his projects and that he subcontracted the dry walling on the Manawa house to Byron Meek. He stated that the usual practice is for Meek to purchase the material and to provide the labor for which Meek receives a single bill for the dry walling work. Mings stated that he had no contract with Council Bluffs Dry Wall, Inc., to perform the work and that when the work was finished he received a bill from Byron Meek and a check was paid to Meek. He identified the bills as respondents' exhibits E and F.

Byron G. Meek testified that he is the owner and operator of Meek Dry Wall Company, Inc. He advised that he subcontracted with James T. Mings to perform the dry wall work at a home in Lake Manawa. According to Meek he was working on the project with Council Bluffs Dry Wall, Inc., although he actually bid the house himself. According to Meek, John Wooldridge called him on a Sunday night prior to September 12, 1983 and told Meek that he would supply his people to perform the job at the Lake Manawa project if Meek would do some work for Council Bluffs Dry Wall, Inc., at a project in Wood Hill. Meek stated that he was at the Wood Hill home on the morning that the claimant was injured.

Meek stated that on Tuesday morning following the accident he had a conversation with John Wooldridge at which time Wooldridge told him that he had spoken to the claimant and told the claimant that he would be covered by the workers' compensation insurance of Council Bluffs Dry Wall, Inc. According to Meek, Wooldridge asked him to pay the claimant and others; however, Meek said no because that was not part of the deal. Later Wooldridge sent Meek a bill for material used in the Lake Manawa project but not for the labor. Byron Meek stated that he has not paid anyone for the labor performed on the Lake Manawa home.

On cross-examination, Meek admitted that he had on occasion

used the employees of Council Bluffs Dry Wall, Inc., when there was no work for them at their regular place of employment. On each such occasion in the past, Meek had himself paid those employees. Meek admitted that he did not have any workers' compensation insurance to cover the claimant. He further admitted that he always paid his employees cash and did not take federal or state withholdings or social security out. Meek further stated that on occasion when he was using the employees of Council Bluffs Dry Wall, Inc., that Wooldridge would remove those people from Meek's projects if Council Bluffs Dry Wall, Inc., had work to be done.

The claimant testified that he is 31 years of age, divorced and has two dependent children. He advised that he is presently employed with R.W.F. Construction Company where he operates a backhoe and loader tractor. He is presently working in Cedar Falls, Iowa.

Prior to his employment with R.W.F. Construction Company, claimant was employed with Council Bluffs Dry Wall, Inc. He stated that he first started with Council Bluffs Dry Wall, Inc., in 1972 and continued in that employment until approximately 1977 or 1978 at which time he started his own dry walling business. He revealed that this business continued until January of 1980 when he went to Wyoming to work for John Wooldridge. After Wooldridge repossessed Council Bluffs Dry Wall, Inc., in November of 1982, claimant returned to work for Wooldridge as a paper and rocker for Council Bluffs Dry Wall, Inc.

The claimant admitted that he would on occasion work for other contractors if Council Bluffs Dry Wall, Inc., did not have enough business to keep him busy. On such occasions he would be paid directly by the contractor for whom he was working. He revealed that this was the situation in September of 1983 when he worked for Byron Meek. The claimant stated that on September 12, 1983 he reported to work at Council Bluffs Dry Wall, Inc., and was told by John Wooldridge to go to the Lake Manawa home because Meek was going to the Wood Hill project. Claimant stated that he reported to the project in the Lake Manawa area and received an injury that day when he fell off a scaffold. As a result of the fall, claimant was hospitalized for about three days and received a rather severe injury to his right shoulder. Because of this injury claimant stated he would not be able to work as a dry waller any longer.

Claimant stated that he had worked on the Manawa project on September 1, 1983 for approximately five hours. At that time Meek told him where to start working and what work to be doing. Claimant stated that he had on other occasions refused to work for Meek because Meek did not pay enough money. Claimant admitted he was never told by John Wooldridge that he would be paid by Council Bluffs Dry Wall, Inc., for the work he did on the Lake Manawa home.

George R. Wickman testified that he is a self-employed dry waller who in the summer and fall of 1983 was employed by Council Bluffs Dry Wall, Inc. He advised that he knows the claimant and he knows Byron Meek. Mr. Wickman testified that during 1983 he worked for a number of different dry wallers, including Council Bluffs Dry Wall, Inc., because of the slow down in the construction industry. He stated that he always understood that when he was working for other contractors he would be paid by them.

Mr. Wickman testified that he worked at the Lake Manawa project on September 1, 1983 during which time he assumed he was working for Byron G. Meek and he would be paid by Byron G. Meek as had been their past practice. Mr. Wickman stated he was working on the Lake Manawa house on September 12, 1983 and that he has not been paid for his labor. Mr. Wickman further stated that he has been told by Byron G. Meek that Meek would not pay him because Meek did not want to be held liable for the injury to the claimant which occurred at that project on September 12, 1983.

Tim Waldron testified that he is a dry waller for Council Bluffs Dry Wall, Inc., and has been so employed for approximately one year. He stated that he knows the claimant and worked with him at Council Bluffs Dry Wall, Inc. He also stated that he would on occasion work for other contractors when Council Bluffs Dry Wall, Inc., did not have enough business to keep the dry wallers busy. On those occasions the other contractors would be responsible for paying. Mr. Waldron stated that approximately one week prior to September 1, 1983 he was asked by Byron G. Meek if he would be willing to go to work on the Lake Manawa project. Mr. Waldron stated that on September 1, 1983 he delivered material to the Lake Manawa project on behalf of Council Bluffs Dry Wall, Inc. He stated that he was paid by Council Bluffs Dry Wall, Inc., to make the delivery. He stated that after the truck was unloaded he went to work on the Lake Manawa house. He advised that during the time he worked on the house he was directed in his employment by Byron G. Meek.

Tim Waldron testified that when Meek directed him to perform some work on some rather high ceilings he refused to do so at which time Meek advised him that it was Meek who was paying for the job and that Waldron would do as he was told. Mr. Waldron testified that it was always his understanding that he was employed at the Lake Manawa home project by Byron G. Meek. Waldron testified that he was working at the Lake Manawa home on September 12, 1983 and that it was always his understanding that he was working at the direction of, under the supervision of, and was to be paid by Byron G. Meek. He stated that he has not been paid for any of the work performed on the Lake Manawa home.

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 September 12, 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 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 preonderance of the evidence he or his decedent was a workman or employee within the meaning of the law, and he or his decedent received an injury which arose out of and in the course of employment. See section 85.61, Code, 1962.
>
> And, if a compensation claimant establishes a prima facie case the burden is then upon defendant to go forward with the evidence and overcome or rebut the case made by claimant. He must also establish by a preponderance of the evidence any pleaded affirmative defense or bar to compensation. (Citations omitted.)

Given the above, the court set forth its latest standard for determining an employer-employee relationship in 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 283, 285 (Iowa 1971). (Emphasis added.)

ANALYSIS

Claimant commences his argument with the correct proposition that the workers' compensation statute is to be construed liberally for the benefit of the injured worker. It does not follow from that proposition that the evidence should be liberally construed to the benefit of the injured worker. It remains the claimant's burden to establish the employer-employee relationship by a preponderance of the evidence. In this case he has failed to carry his burden.

First, whether or not Byron Meek used the employees of Council Bluffs Dry Wall, Inc., when there was no work available for them at their regular employer was entirely up to him and the employees. As illustrated by the testimony of Mr. Waldron, Meek made it clear that he was the employer and that he would direct his employees as he saw fit. Second, Byron Meek was at all times responsible for the payment of wages. This was the understanding of each of the employees; it had been the prior practice and there is nothing in this record which would indicate otherwise. Meek admitted to one of the employees that he would not pay the wages simply because he wished to avoid the liability under the workers' compensation statutes. In addition, Meek retained the right to discharge or terminate any of the employees who were working at the Lake Manawa project.

It is also clear from the evidence that Meek at all times controlled and directed the work of the dry wallers. Finally, it is clear that the workers were performing a contract which inured to the benefit of Byron Meek. It was Meek, and Meek only, who entered into the contract with the general contractor to do the dry walling work and there is absolutely no evidence that Council Bluffs Dry Wall, Inc., had any involvement whatsoever in the performance of the dry walling work at the Lake Manawa project.

Most importantly, it is clear that it was the intention of the parties that the claimant at all times be the employee or an independent contractor for Byron Meek. It is specifically found that John Wooldridge, the president of Council Bluffs Dry Wall, Inc., did not admit liability to the claimant. It is also specifically found that he did not engage in any conversation with Byron Meek in which he admitted an employee-employer relationship between himself and the claimant at the time of the injury. There is virtually no doubt that the claimant, Meek and Wooldridge understood at all times that claimant was working for Meek, at the direction of Meek, and on behalf of Meek. It is clear, then, that none of the factors which tend to establish an employer-employee relationship are present in this case as between claimant and Council Bluffs Dry Wall, Inc. Accordingly, it must be found that no such relationship exists and, therefore, claimant has failed to establish that he received an injury

arising out of and in the course of employment with Council Bluffs Dry Wall, Inc.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On September 12, 1983 claimant received an injury when he fell while working on a house in Council Bluffs, Iowa.

2. At the time of his injury claimant was not working at the discretion of Council Bluffs Dry Wall, Inc.

3. At the time of his injury claimant was not working under the direction of Council Bluffs Dry Wall, Inc.

4. At the time of claimant's injury Council Bluffs Dry Wall, Inc., was not liable to claimant for payment of wages for the work he was doing.

5. At the time of claimant's injury Council Bluffs Dry Wall, Inc., had no authority to fire or discharge claimant from the work he was doing.

6. At the time of claimant's injury claimant was not doing work which was to the benefit of Council Bluffs Dry Wall, Inc.

7. At the time of claimant's injury it was not the intention of the parties that he be an employee of Council Bluffs Dry Wall, Inc.

8. There was no contract between Byron Meek and Council Bluffs Dry Wall, Inc., that Council Bluffs Dry Wall, Inc., would provide its' employees to Meek for the Lake Manawa house project.

9. Council Bluffs Dry Wall, Inc., has made no admission that claimant was in their employ on September 12, 1983 at the time of the injury.

CONCLUSION OF LAW:

THEREFORE, IT IS CONCLUDED:

Claimant has failed to prove there was an employer-employee relationship between himself and Council Bluffs Dry Wall, Inc., at the time of his injury on September 12, 1983.

ORDER

IT IS THEREFORE ORDERED:

Claimant shall take nothing from these proceedings.

The costs of this action are taxed to the claimant.

Signed and filed this 31st day of October, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN McCORD, Claimant, vs. MAX NICKOLAISEN d/b/a ONAWA TRUCK & EQUIPMENT, Employer, Defendant.	:	File No. 755998 A R B I T R A T I O N D E C I S I O N

FILED
DEC 28 1984
IOWA INDUSTRIAL COMMISSION

INTRODUCTION

This is a proceeding in arbitration brought by John McCord against Max Nickolaisen d/b/a Onawa Truck Equipment, employer. Claimant alleges that he sustained an injury on December 28, 1983 which arose out of and in the course of his employment. He seeks compensation for temporary total disability and payment of medical expenses.

The hearing commenced on October 30, 1984 in the Woodbury County Courthouse at Sioux City, Iowa and was fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of John McCord, Mike Christensen, M. Thomas Gordon, D.O., and Max Nickolaisen. Also in the record are claimant's exhibits 1 and 2.

ISSUES

The issues presented by the parties are whether claimant received an injury which arose out of and in the course of employment; whether there is a causal relationship between the alleged injury and any disability; whether claimant is entitled to benefits for temporary disability; a determination of claimant's entitlement to benefits under section 85.27 of the Code; and a determination of the proper rate of compensation in the event of an award. It was stipulated by the parties that the amount charged for the medical services which claimant received was fair and reasonable.

REVIEW OF THE EVIDENCE

John McCord testified that he resides at Blencoe, Iowa; that he is married; and that on December 28, 1983 he had one child living at home with him.

Claimant stated that he is a truck driver and that he commenced employment with defendant employer in the spring of 1983. He testified that he was employed by the defendant employer on December 28, 1983 and that his earnings were $4.25 per hour. He stated that he generally worked a ten hour day and that he worked five and one-half days per week.

Claimant testified that on December 28, 1983 he was engaged in hauling corn to Council Bluffs, Iowa. He stated that he was injured while involved with the second load of the day. Claimant testified that workers at the place where the corn was to be delivered inspected the load and required that the tarp over the back of the truck be removed. He stated that the wind was blowing and that in attempting to put the tarp back on the truck it was caught by the wind and lifted him off the ground injuring his left wrist. He stated that it was painful and that Mike Christensen, another driver who was present, helped him place the tarp back on the truck. Claimant stated that he informed Max Nickolaisen of the injury when he returned to the employer's place of business that evening.

Claimant testified that he had hurt his right wrist on another occasion and that he thought that this injury to his left wrist was merely a strain. He stated that he continued to work for approximately two weeks using a wrist band but that on January 16 he went to the doctor for complaints of the flu. The doctor also removed the wrist band, looked at his wrist, x-rayed it and informed him that it was fractured. Claimant stated that during the time he had continued to work while wearing the wrist band his wrist was painful.

Claimant testified that he did not report to work on the 16th and that he had informed Nickolaisen that he was going to see the doctor. After seeing the doctor he stated that he went to talk to Nickolaisen and informed him that he had a broken wrist. He stated that he told his employer that he couldn't work. He stated that his employer wanted him to drive trucks from Atlantic. Claimant denied being told by the employer that he could work answering the telephone.

Claimant testified that pursuant to instructions from his attorney he returned to his employer's place of business and was told that he had been replaced.

Claimant testified that he asked Nickolaisen about insurance coverage and that Nickolaisen would not tell him if he had workers' compensation insurance. He stated that Nickolaisen told him that the company would not pay his bills and that he would have to use his own insurance.

Claimant denied receiving any injury to his left wrist between December 28, 1983 and January 16, 1984. He stated that

the doctor showed him the x-rays and that he could see that the bone was broken.

Claimant testified that he filed for unemployment and that his claim was contested. He stated that he obtained other employment before the hearing date had arrived and did not go to the hearing.

Claimant testified that the employees at Onawa Truck & Equipment consisted of the claimant, Nickolaisen's son and one other employee.

Mike Christensen testified that he resides at Onawa, Iowa and is a truck driver. He stated that on December 28, 1983 he was engaged in hauling for his employer to the Pillsbury Plant at Council Bluffs, Iowa. He stated that the day was cold, cloudy and windy. He estimated the temperature to have been in the range of zero degrees to ten degrees above. Christensen stated that while putting the tarp on claimant's truck, the wind caught the tarp in the middle and picked claimant up approximately two feet off the ground. He stated that claimant said that he hurt his wrist at that time. He stated that he assisted claimant in placing the tarp back on claimant's truck and that claimant then assisted him in placing the tarp back on the truck which he was driving.

M. Thomas Gordon, D.O., testified that he is an osteopathic surgeon and has practiced medicine since he graduated from the College of Medicine and Surgery in Des Moines, Iowa in 1950.

Dr. Gordon stated that he saw claimant on January 16, 1984 at his office and that claimant informed him that he had injured his wrist working with a tarp in a strong wind. He stated that x-rays revealed a fracture of the distal end of the fibula [sic]. He stated that he reduced the fracture, applied a plaster cast and saw claimant thereafter on eight other occasions. He stated that the cast was removed on February 14, 1984 and an aluminum splint applied. He stated that he released claimant to return to light work on March 5, 1984 and to full duty on March 14, 1984. He stated that at the time of release the wrist was still swollen and claimant was still experiencing pain in wearing the splint but that he allowed claimant's return to work upon claimant's request. Dr. Gordon also described claimant's injury as a fracture of the radius and stated that the terms "radius" and "fibula" are sometimes used interchangeably.

Dr. Gordon stated that when he saw claimant on January 16, 1984 it was his impression that the fracture was of recent origin. He stated that a break such as claimant exhibited would cause immediate excruciating pain. He stated that it would have been painful for claimant to have worked with the fracture and didn't think that he could have endured the pain. He stated that use of a wrap or brace on the wrist would have made it less painful and he agreed that claimant did have a relatively high pain threshhold.

Dr. Gordon initially stated that the fracture showed no sign of healing and that if it had occurred on December 28 some healing would be expected. He stated that the arm was swollen and that there was hemorrhage in the arm which did generally indicate an older fracture. He stated that in his opinion it was unlikely but remotely possible that the fracture had occurred on December 28.

Max Nickolaisen testified that he is the owner of Onawa Truck & Equipment. He stated that he has owned the business fourteen years and that it is a used truck dealership which also engages in hauling.

Nickolaisen stated that he did not bring his wage records to hearing but that he thought claimant was earning $4.00 per hour and that claimant normally worked a 40 hour week with some overtime. He stated that claimant's average gross earnings were in the range of $40 to $160 per week. He stated that claimant's replacement now earns $4.25 per hour and that he can't swear that claimant's pay rate was $4.00 per hour. He stated that his employees normally started work between 7:00 and 8:00 a.m. and that they were usually back by 5:30 p.m. He stated that it was possible but unlikely that they would work more than eight hours per day. He stated that they did not always work on Saturday mornings.

Nickolaisen testified that on the morning of January 16, 1984 claimant came to the shop with a broken wrist. He stated that he reprimanded claimant for not reporting the injury as it was necessary that it be reported to the state. He agreed that claimant was engaged in hauling corn in December 1983 and that the trucks had tarps. He stated that he does not recall what the trucks had tarps. He stated that he does not idea how late he or claimant was doing on December 28 and had no idea how late he or claimant had worked on December 28. He stated that he was sometimes, but not always, at the shop when the drivers returned. He stated that he often saw the drivers at night at the local Eagles Club and that when claimant first told him of the injury, claimant had indicated that it had occurred in the first part of December.

Nickolaisen testified that he had frequently seen claimant wear a brace on his right wrist prior to January 1983 but that he had not seen claimant wear a brace on his left. He stated that he observed claimant at work, at the Eagles Club in the evenings and at the coffee shop in the mornings but that he never did observe a wrap on claimant's left wrist.

Nickolaisen testified that when claimant reported the injury on January 16 he told claimant that he could stay and work and answer the phone and drive trucks from Atlantic. He stated that the trucks were small with a two ton chassis cab and that they had power steering and an automatic transmission. He stated that claimant refused to stay and simply left the place of business. Nickolaisen testified that claimant had driven to the place of business in his automobile and that he felt that driving the small trucks was little different from driving a car. Nickolaisen stated that no one at his place of business is hired to specifically answer the phone and that such is done by whoever is present at the time the call is received. He stated that by making the offer to claimant he was, in effect, creating a job for claimant.

Nickolaisen testified that when claimant subsequently returned to work he told him that he didn't need him any more. He was uncertain of the date when claimant sought to return to work but stated that he was carrying his lunch bag with him. He stated that he could not recall who was hired to replace claimant or when such hiring occurred.

Nickolaisen testified that he received a letter from Iowa Department of Job Service which stated that claimant was not entitled to unemployment benefits. Claimant's exhibit 1 is a collection of medical bills which reflect treatment for claimant's fractured wrist. The charges for that care total $243.

Claimant's exhibit 2 is a return to work release from Dr. Gordon effective March 14, 1984.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on December 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).

Claimant and Mike Christensen testified to an event which occurred December 28, 1983. Such an incident is one which could reasonably result in a fractured radius. Dr. Gordon testified that when he saw claimant on January 16, 1984 he was of the impression that the injury to the wrist was recent. He made little attempt to attain a precise history from claimant as he felt such was unnecessary for treatment. He stated that it was possible that the fracture was older but that such possibility was remote. Claimant testified to wearing a wrap on the wrist following the injury to ease the pain and Dr. Gordon agreed that such would reduce the pain from the injury. Nickolaisen testified that such a wrap was not worn. Dr. Gordon testified at hearing and it was apparent that he had little independent recollection of the incident. The notes he had with him which he used to refresh his memory were hand written and lacked significant detail. It was apparent from his demeanor that he had not previously considered whether the fracture was of recent origin or whether it could have occurred as early as December 28, 1983. It was likewise apparent from his testimony that the time when the fracture occurred was of little importance to him for purposes of treatment. After observing all the witnesses as they testified it is found that in this case, the remotely possible did in fact occur and that claimant did fracture the radius in his left wrist while placing the tarp back on his truck on December 28, 1983 as he has testified.

Claimant testified that he wore a wrap on his wrist following the injury. Nickolaisen testified that he did not see such a wrap. It should be noted that this occurred in late December and early January, the time when individuals normally wear long sleeve shirts, even when indoors. Claimant could have easily worn a wrap on the wrist without it ever being detected by Nickolaisen and claimant's testimony regarding the same is accepted as correct.

At the time the injury occurred claimant was performing his employer's business during the normal work day, on the payroll, at a time and place consistent with his employment duties. It is therefore found and concluded that claimant did sustain an injury on December 28, 1983 which arose out of and in the course of his employment with Max Nickolaisen d/b/a Onawa Truck & Equipment.

Under section 85.27 of the Code of Iowa an employer is required to provide an injured employee with reasonable care for the injury. In this case it is found that the care provided by Dr. Gordon was reasonable treatment for the injury. The employer was aware that claimant was receiving care from Dr. Gordon and made no objection thereto. He has consistently denied liability and cannot claim that the care was unauthorized. Barnhart v. M. A. Q., Inc., 1 Iowa Industrial Commissioner Report 16 (Appeal Decision 1981). The amount of the charges has been stipulated to be fair and reasonable. It is therefore found and concluded that claimant incurred medical expenses in the amount of $243 in obtaining care for the injury of December 28, 1983 and that those charges are the responsibility of the employer.

Claimant seeks compensation for temporary total disability. Section 85.33 of the Code of Iowa, provides in pertinent part as follows:

> 1. 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.

2. "Temporary partial disability" or "temporarily, partially disabled" means the condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability....

3. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

It would be apparent that with his arm in a cast claimant would not be able to drive heavy trucks which is the type of employment in which he was engaged at the time of injury.

Claimant could, however, operate an automobile and perform a number of other functions during the time the cast and splint were on his arm. While he was not capable of returning to employment substantially similar to the employment in which he was engaged at the time of the injury, he was able to perform other work consistent with his disability. It would appear that if claimant could operate an automobile he could also operate a small truck which was equiped with power steering and an automatic transmission. He would also appear capable of answering the telephone. The evidence is in dispute as to whether claimant was actually advised that he could be engaged in answering the telephone but it is not in dispute that he was offered work which would have included driving the small trucks. Such is found to be suitable work consistent with his disability. Claimant refused to accept that work and under the provision of section 85.33(3) of the Code, he is not entitled to compensation for temporary disability during the period of refusal.

There is evidence in the record that claimant sought to return to work and was advised by the employer that he had been replaced. There is a great deal of uncertainty in the record regarding the date that such occurred. The charge slip from Dr. Gordon released claimant for "part-time" work which the doctor clarified to mean light duty work on March 5, 1984. Claimant had stated that the attempt was made after the case was removed. Exhibit 1 shows such to have been removed on February 14, 1984. Nickolaisen stated that he felt that claimant's attempt to return to work occurred later than the first part of February. In primary reliance upon the charge slip from Dr. Gordon of March 5, 1984 it is found and concluded that claimant attempted to return to work on March 5, 1984. Such ends the period of his refusal to accept work and ends the disqualification for compensation provided by section 85.33(3) of the Code. Claimant was relased for full time work effective March 14, 1984. Claimant is therefore entitled to benefits for temporary total disability and benefits for the period of March 5, 1984 through March 13, 1984, a span of one and two-sevenths weeks.

Claimant testified that he worked an average of 55 hours per week and earned $4.25 per hour. The employer chose to not bring its pay records to hearing even though such were presumeably available and it was apparent that a dispute regarding claimant's earnings existed. Claimant testified with certainty regarding his hours and rate of earning. Nickolaisen testified as to his impressions and recollection of claimant's hours and rate of pay but could not swear that such were precise or correct. It is therefore found that claimant's testimony regarding his hours of work and rate of pay is correct. Such computes to earnings of $233.75 per week. This rounds to $234 per week. Claimant's exemptions are himself, his spouse and his dependent child. This would result in a rate of compensation of $155.18 per week.

FINDINGS OF FACT

1. On December 28, 1983 defendant was employed as a truck driver by Max Nickolaisen d/b/a Onawa Truck & Equipment.

2. Claimant fractured the radius of his left wrist on December 28, 1983 when he was lifted into the air by a tarp which he was attempting to place on his truck at a delivery point in Council Bluffs, Iowa.

3. At the time of injury claimant was performing the duties assigned by his employer without any deviation therefrom.

4. Following the injury claimant continued to work on his normal work days until January 16, 1984 at which time the fracture was identified. Thereafter he was medically incapable of performing work employment substantially similar to that he performed at the time of injury from January 16, 1984 until March 14, 1984 when claimant became medically capable of returning to employment substantially similar to that in which he was engaged at the time of injury.

5. During the time of January 16, 1984 through March 13, 1984 claimant was able to perform other work consistent with his disability and was offered suitable work by his employer which claimant refused until March 5, 1984 when claimant sought to return to work.

6. There is no evidence that claimant's injury resulted in permanent impairment.

7. At the time of injury claimant was married with one dependent child.

8. At the time of injury claimant was earning $233.75 per week.

9. Following the injury claimant received medical care from M. Thomas Gordon, D.O. The care was reasonable and necessary for treatment of the injury.

10. In obtaining medical care for the injury claimant incurred expenses of $243.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and its parties.

The injury claimant sustained to his wrist on December 28, 1983 arose out of and in the course of his employment with Max Nickolaisen d/b/a Onawa Truck & Equipment.

Claimant is disqualified from receiving temporary disability benefits until March 5, 1984 when he offered to return to work by virtue of section 85.33(3) of the Code.

Claimant is entitled to benefits for temporary disability under the provisions of section 85.33 of the Code for the period of March 5, 1984 through March 13, 1984.

Claimant's rate of compensation is $155.18 per week.

Defendant is financially responsible for claimant's medical expenses in the amount of $243 under the provisions of section 85.27 of the Code of Iowa.

Claimant's period of disability extended beyond the fourteenth day of disability after the injury and the waiting period of three days before compensation begins provided by section 85.32 of the Code has been met even though claimant has been disqualified from receiving benefits during that waiting period through the operation of section 85.33(3) of the Code.

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant one and two-sevenths (1 2/7) weeks of compensation for temporary total disability at the rate of one hundred fifty-five and 18/100 dollars ($155.18) per week commencing March 5, 1984. The entire amount is past due and owing and shall be paid in a lump sum together with interest pursuant to section 85.30 of the Code.

IT IS FURTHER ORDERED that defendant pay claimant's medical expenses pursuant to section 85.27 of the Code in the amount of two hundred forty-three dollars ($243) incurred with M. Thomas Gordon, D.O., of Wolpert and Wolpert, P.C.

IT IS FURTHER ORDERED that defendant pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

IT IS FURTHER ORDERED that defendant file a final report within twenty (20) days from the date of this decision showing payment of all amounts ordered herein.

Signed and filed this 28th day of December, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HERMAN L. MEYER,

Claimant,

vs.

RAY E. PAULEY CO., INC.,

Employer,

and

UNITED STATES FIDELITY & GUARANTY CO.,

Insurance Carrier,
Defendants.

File No. 697182

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED

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IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening for the recovery of benefits as the result of an injury on March 10, 1982 brought by Herman L. Meyer, claimant, against Ray E. Pauley Co., Inc., employer, and United States Fidelity & Guaranty Company, insurance carrier. This case was heard before the undersigned on October 2, 1984 at the courthouse in Cerro Gordo County, Mason City, Iowa. The matter was considered fully submitted at the conclusion of the hearing.

The record in this matter consists of the testimony of claimant; claimant's exhibits A through E; and defendants' exhibits 1 through 8. It was stipulated by the parties that claimant's rate of compensation is $329.48, that it is 119 miles from Mason City to Des Moines and that it is 90 miles from Mason City to the Mayo Clinic in Rochester, Minnesota. Defendants' objections to exhibits A and E are hereby overruled.

ISSUES

The issues presented by the parties at the time of the pre-hearing and hearing in this matter are whether there is a causal relationship between the injury and the disability upon which the claim is based; whether claimant is entitled to temporary total disability, healing period and permanent partial disability; whether the claimant was authorized to receive certain medical treatment and whether that treatment is causally related to the injury.

EVIDENCE PRESENTED

Claimant testified he is married and has two children. He stated he is presently employed at Agri-Industries as a maintenance worker where he earns $9.10 per hour and regularly works a 40 hour week. He said he started at Agri-Industries on November 20, 1983. Immediately prior to his employment with Agri-Industries claimant was employed at a delivery service but quit due to low pay. He had worked there for about a week. Earlier in 1983 claimant had worked for Modern Structures for seven to ten weeks but was laid off due to lack of work. Claimant revealed that for the remainder of 1983 he received unemployment compensation.

Claimant testified that in 1982 his only employment was with the defendant, Ray E. Pauley Co., Inc. Claimant had worked off and on for the defendant since 1967 or 1968. He stated that his employment terminated on June 22, 1982 due to lack of work. Ray E. Pauley Co., Inc., went out of business shortly thereafter.

Claimant explained that on March 10, 1982 he received an injury to his left foot when he fell about three or four feet off a stepladder. He advised that at the time of the accident he was fitting duct work on a hood he had installed at the Mason City High School. He was working for the defendant at the time. Claimant said that after he fell he writhed in pain on the floor for awhile and then returned to defendant's place of business to report the injury and seek medical attention. He indicated that his foreman advised him he could see his own physician if he so desired.

Claimant testified he then went to the emergency room at a local hospital to see his family doctor, John M. Baker, M.D. Claimant advised that due to Dr. Baker's absence he was seen by a Dr. Ryal. Dr. Ryal examined claimant's left foot, had x-rays taken and wrapped the ankle. Claimant said he was then sent home. Claimant later got some pain pills because of the discomfort.

Claimant stated that he continued to suffer pain so he again went to see his family physician, Dr. Baker. Claimant, however, again saw Dr. Ryal who offered no new diagnosis or course of treatment. Claimant indicated that on his next visit at the doctor's office, about a week later, he was able to see Dr. Baker. He could not recall that Dr. Baker prescribed any different treatment than Dr. Ryal. Claimant said he continued to see Dr. Baker who released him to return to light duty work on May 10, 1982. He advised that he worked light duty until the doctor released him to full duty on May 20, 1982 even though he was continuing to suffer pain.

Claimant stated that after his return to work he continued to suffer pain which would become severe after two hours or so on his feet and as soon as ten to fifteen minutes if he had to work on a ladder. Claimant testified that due to this continued pay he asked Dr. Baker if he could see a specialist. Dr. Baker referred him to Thomas L. DeBartolo, M.D., an orthopedic surgeon. Claimant stated he could not schedule an appointment with Dr. DeBartolo until June 23, 1982.

Claimant recalled that Dr. DeBartolo took x-rays of his foot and first tried a splint. After this, high laced boots and ultrasound were used but claimant continued to suffer pain in the left foot. He stated that he saw Dr. DeBartolo about six times until perhaps November 1982. Claimant also stated that shortly after he began seeing Dr. DeBartolo he was contacted by the insurance carrier and began receiving workers' compensation benefits again although he had been receiving unemployment compensation. Claimant stated that the workers' compensation benefits were paid from June 23, 1982 to December 10, 1982. An appropriate credit was made for the unemployment compensation payments he had received after his layoff from defendant on June 22, 1982.

Claimant explained that because of the continuing pain in his left foot he again requested another opinion. He was referred to Kenneth A. Johnson, M.D., an orthopedic surgeon at the Mayo Clinic in Rochester, Minnesota. Claimant stated that he saw Dr. Johnson on only one occasion and that no new treatment was prescribed, but the doctor did advise increased exercise and use of the ankle.

Claimant testified that he continued to suffer pain, so in April 1983 he went to Des Moines, Iowa, to see William G. Sprague, D.P.M. He admitted that prior to seeing Dr. Sprague he did not contact or seek permission from Ray E. Pauley Co., Inc., or U. S. Fidelity & Guaranty Company. He stated that Dr. Sprague prescribed some orthopedic devices which failed to improve his condition. He stated that Dr. Sprague diagnosed a "neuroma" which was surgically removed from his left foot. He recalled that he saw Dr. Sprague about six times.

Claimant testified that he continues to suffer pain in his left ankle.

Claimant testified that there is a bill of about $150 outstanding to Dr. Johnson. Also that he himself paid Dr. Sprague $750 and that he has traveled 2,429 miles seeking medical treatment for his left ankle.

Medical reports from John M. Baker, M.D., were submitted as defendants' exhibits 1 and 6. Exhibit 1 is a physician's report from Dr. Baker to U. S. Fidelity & Guaranty Company dated May 20, 1982. That report indicates that claimant suffered a severe sprain to his left ankle which was equal to a fracture. It also indicates no permanent disability to the ankle. Exhibit 6 is a letter directed to Andrew J. Ryan from Dr. Baker dated June 10, 1983. That letter also indicates that no fractures were detected in the ankle; that claimant had full range of motion in the left foot; and that claimant was still complaining of pain on March 10, 1983 but that there was a good prognosis.

Reports from Thomas F. DeBartolo, M.D., were submitted as defendants' exhibits 3, 4 and 5. Exhibits 3 and 4 are physician's reports to U. S. Fidelity & Guaranty Company to which Dr. DeBartolo's progress notes are attached. Exhibit 5 is a letter dated December 14, 1982 to U. S. Fidelity & Guaranty Company. According to the progress notes, claimant was first seen by Dr. DeBartolo on June 23, 1982. At that time the doctor noted tenderness in the ankle region, but x-rays and stress radiographs were normal. The doctor indicates the possibility of continued inflammation and recommended anti-inflammatory medication. Dr. DeBartolo's remaining notes indicate claimant was seen several times, the last time being November 23, 1982. Atlhough physical therapy was tried, claimant continued to complain of pain. Overall, little, if any, improvement in claimant's condition was noted. In the letter of December 14, 1982 to U. S. Fidelity & Guaranty Company, Dr. DeBartolo specifically states he could make no objective findings of significant injury to claimant and that he never placed any restrictions on claimant's acitivities.

Defendants' exhibit 2 is a letter dated April 1, 1983 to "Whom It May Concern" from Kenneth A. Johnson, M.D. Dr. Johnson states he examined claimant on November 30, 1982. Dr. Johnson found claimant's left ankle to be quite stable. He found no bony or ligamentous abnormalities which would account for claimant's symptoms. He recommended that claimant increase his standing tolerance and return to work.

Claimant's exhibits B, C, D and E and defendants' exhibit 7 are reports of varying detail and clinical notes from William G. Sprague, D.P.M. The first of these reports is dated April 27, 1983 and is directed to Andrew Ryan. That letter contains a detailed statement of claimant's history as it relates to his foot injury. After examination, Dr. Sprague diagnosed (1) mild pes planus bilateral feet which possibly became aggravated by the injury of March 10, 1932 and (2) possible neuroma in the second interspace left foot which caused pain to radiate to his digits. In a follow-up letter to Mr. Ryan dated June 30, 1983, Dr. Sprague confirmed the diagnosis of Morton's neuroma. He stated that he believed the neuroma was present for some time and most likely preexisted the injury of March 10, 1982. In a letter dated October 10, 1983 to claimant's counsel, Dr. Sprague stated that he could not diagnose the etiology of claimant's left ankle pain. He opined that the pain was from claimant's injury. Attached to that letter were Dr. Sprague's clinical notes.

Exhibit E is an attending physician's statement concerning an application by claimant to his insurance company for disability benefits. The doctor indicates a diagnosis of (1) chronic pain of the subtalar joint and (2) Morton's neuroma, both conditions relating to the left foot. Dr. Sprague states that the condition arose March 10, 1982 and that the pain in the subtalar joint arose out of claimant's employment. In his letter dated February 27, 1984 to claimant's attorney, Dr. Sprague discussed the pain in the left foot specifically. He stated:

> The original ankle pain has now located in the sinus tarsi area of the left foot. Sinus tarsi syndrome can be caused by ankle and foot injuries. As the pain in the sinus tarsi area did not start until after March 10, 1982, I am concluding that the pain is probably caused by the injury. Sinus tarsi syndrome is a vague entity which is difficult to diagnose and to treat. The treatment for the syndrome includes casting, physical therapy, injection therapy using steroids, and lastly, surgery. There is, however, no guarantee that any of these modalities will permanently eliminate the pain.
>
> From the symptoms the patient exhibited during his last visit, I would conclude that the patient has a possible sinus tarsi syndrome of the left foot, possibly secondary to the trauma suffered on March 10, 1982.

Claimant's exhibit A and defendants' exhibit 8 represent information provided by E. J. Ridder, D.C. These confirm that claimant complained periodically about his feet to his chiropractor. Dr. Ridder provided no treatment for claimant's foot condition.

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 March 10, 1982 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 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.

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

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.

ANALYSIS

Claimant is found to be very believable about his foot problems. There is no question that he has continued to suffer pain in his left foot since March 10, 1982. It is also clear that claimant is not a malingerer as evidenced by his continued working in spite of his pain. Analysis of the medical evidence, however, demonstrates that not all of his problems arose out of his employment with the defendants. The only medical evidence submitted concerning the Morton's neuroma establishes that there is no causal relationship between the neuroma and the fall off the ladder on March 10, 1982. It would appear, however, that claimant's continuing pain was not caused by the neuroma. Notwithstanding its removal, claimant has continued to suffer.

There is but one finding concerning the cause of claimant's continued pain in the left ankle. It would appear that most of doctors did not address the question of causation once they were satisfied there was no objective evidence of injury to the ankle. Dr. Sprague did conclude that claimant was suffering from a "vague entity" which he labeled sinus tarsi syndrome. Dr. Sprague said this was probably the result of the injury because the pain did not appear until after the injury. None of the physicians assigned any impairment to claimant's foot.

Even if it is assumed that Dr. Sprague is correct and claimant's pain is the result of his injury, he has shown no impairment. The fact that claimant has a full range of motion in the ankle and continues to use the foot in his employment and daily activities makes a finding of impairment more difficult. Pain that is not substantiated by clinical findings is not a substitute for impairment. Claimant therefore should take nothing further from these proceedings.

Claimant clearly did not seek permission to see Dr. Sprague nor was most of the treatment offered by Dr. Sprague related to the injury. Accordingly, claimant must bear this expense on his own. Defendants are, however, obliged to pay for the services of Dr. Johnson and reimburse claimant for his trip to Rochester.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On March 10, 1982 claimant fell off a ladder while in the course of his employment.

2. As a result of the fall, claimant suffered a severe sprain to his left ankle.

3. Claimant was off work as a result of his injury from March 11, 1982 to May 10, 1982.

4. Claimant has continued to suffer pain in his left ankle since March 10, 1982.

5. Claimant also suffered from a Morton's neuroma which was surgically removed from his left foot on August 26, 1983.

6. Claimant's injury of March 10, 1982 did not cause the Morton's neuroma.

7. Claimant has not suffered a permanent impairment to his left foot as the result of the injury of March 10, 1982.

8. Claimant was paid compensation from March 11, 1982 to May 10, 1982.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

On March 10, 1982 claimant received an injury arising out of and in the course of his employment.

There is a causal relationship between claimant's injury and a temporary total disability from March 11, 1982 to May 10, 1982.

Claimant has failed to prove by a preponderance of the evidence that he suffered a permanent partial disability as a result of his injury.

ORDER

IT IS THEREFORE ORDERED that claimant shall take nothing further from these proceedings.

IT IS FURTHER ORDERED that defendants pay Kenneth A. Johnson, M.D., one hundred fifty dollars ($150) for services rendered.

IT IS FURTHER ORDERED that defendants reimburse claimant for one hundred eighty (180) miles of travel at the rate of twenty-four cents ($.24) per mile.

The costs of this action are taxed to the defendants.

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

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALBERT W. MORGAN,	:	
Claimant,	:	File No. 692323
vs.	:	A P P E A L
JAMES STARCEVIC,	:	D E C I S I O N
Employer,	:	
Defendant.	:	

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STATEMENT OF THE CASE

Defendant appeals from a proposed decision in arbitration wherein claimant was awarded benefits based upon a finding of a permanent partial disability of 22 1/2 percent. Certain medical expenses were also awarded. The record on appeal consists of claimant's exhibits 1 through 17; defendant's exhibits A through H; the deposition testimony of James Starcevic and Albert W. Morgan; and the briefs and filings of the parties.

ISSUES

Defendant failed to submit an appeal brief within the specified period of time. Therefore, the issues on appeal will be those before the deputy in the arbitration proceeding.

The issues are:

1. Whether there is an employer-employee relationship.

2. Whether claimant's present disability is causally related to the September 9, 1981 injury.

3. Whether claimant is entitled to healing period and permanent partial disability benefits.

4. Whether claimant is entitled to benefits under Iowa Code section 85.27.

REVIEW OF THE EVIDENCE

The parties stipulate that the time off work due to the injury was for the period of September 9, 1981 to May 18, 1982. If an employment relationship is found, claimant's healing period would run to May 18, 1982.

At the time of the hearing, claimant was 35 years old. He is married and has two dependent children. (Transcript, page 15) Claimant dropped out of school in the ninth grade and his subsequent training was in welding. (Tr., p. 15) His previous job experience has included work in gas stations, construction and assembly welding. He has also worked as a truck driver. (Tr., pp. 16-17) In late August or September of 1981 claimant contacted defendant for a job as a driver. (Tr., p. 19) Claimant testified he heard defendant was looking for a driver. Claimant went to defendant's house and asked him about driving a truck for him. (Tr., p. 20)

A. Well, I asked him about driving. He said at the present time he wasn't leasing or needing no drivers but he said he would take my phone number. And I give him my folks' phone number to get ahold of me and that's about the basic of what it broke down to.

Q. After that initial meeting, did you contact Mr. Starcevic again or did he call you?

A. He called me.

Q. Did he ask you to come talk to him about driving?

A. Yes, he did.

Q. Did you go talk to him?

A. Yes, I did.

Q. Do you remember roughly when that was?

A. No. I don't remember the date. It was early September, 6 or 7, something like that.

Q. Of 1981?

A. Yes.

Q. Did you go to his house?

A. Yes, I did.

Q. Did he offer you a job at that time?

A. Yes, he did.

Q. Did you reach an agreement with him about when you would start driving?

A. Yes, I did.

Q. And when was that to be?

A. It was the following morning I was to take my first load.

Q. Was there any discussion with Mr. Starcevic at that time of how you would be paid?

A. He said he paid 26 percent of the load.

Q. Was there any mention of a lease at that discussion?

A. I heard that he operated under a lease. I asked him if he wanted me to sign a lease and he said not yet.

Q. Could you speak up a little bit. I'm having trouble hearing you.

A. I heard that he had run under leases. I asked him if he wanted me to sign a lease at that time. He said no, he asked his drivers to drive a week or two to see if they was going to treat the equipment right.

Q. Did he then ask you to sign a lease that day?

A. No.

Q. Did you offer to sign a lease that day?

A. Yes, I did.

Q. Did Mr. Starcevic tell you what kind of cargo you would be hauling for him?

A. Said he hauled coal and some grain.

Q. Did he tell you where you would be hauling your loads to?

A. No, because he said to wait and see where the loads were for.

Q. Did he tell you what you would be responsible for as far as maintenance of the truck was concerned?

A. Just greasing it and wet it, do minor light repair.
(Tr., pp. 20-22)

Claimant testified he met defendant on the morning of September 8 and drove in claimant's pickup to "the Bussey corner" where defendant parked his trucks. Claimant stated defendant showed him how to shift the truck and dump the load. (Tr., pp. 26, 69) The two drove in the truck back to the mine office. Claimant testified defendant gave him a "ticket" and route instructions. (Tr., p. 26) Claimant explained a ticket is a slip of paper that indicates what to load and where to take it. (Tr., p. 25) Claimant's understanding was that he was driving on a probation period and that within two weeks defendant "could do whatever he seen fit to me." (Tr., pp. 26-27) Claimant delivered the first load to Iowa City and returned the truck to be loaded for the next delivery. The next day, he went back to the Bussey corner, picked up his truck and left for Marshalltown. (Tr., pp. 27-28) Claimant pulled into the power plant at Marshalltown where he was to deliver his load. (Tr., p. 78) Claimant testified he got up on the truck to pull the tarp down, slipped and fell on his "bottom side." (Tr., p. 28; Morgan Deposition, p. 32) Claimant waved down help and was taken by ambulance to Marshalltown Hospital. He was x-rayed at the hospital on September 9, 1981. (Claimant's Exhibit 11) Claimant was not admitted and was driven home by a friend. (Tr., p. 29) Later that night claimant called James McConville, M.D., and was taken by ambulance to St. Josephs Mercy Hospital. (Tr., p. 30; Cl. Ex. 17)

Dr. McConville testified by deposition that he examined claimant on the evening of September 9, 1981 in the emergency room. Claimant complained of pain in the low back and buttocks and inability to urinate. (Cl. Ex. 17, p. 4) Claimant was admitted and x-rayed the next day. The x-rays showed a compression fracture of L-1. Dr. McConville talked to the physician in Marshalltown that had seen claimant. Dr. McConville believed the Marshalltown x-ray had not included the L-1 area. (Cl. Ex. 17, pp. 5-6) Dr. McConville explained a compression fracture as a collapse or shortening of the vertebra caused by a compression type injury. Dr. McConville believed the fracture was causally related to claimant's fall from the truck. (Cl. Ex. 17, pp. 7-8)

Claimant was hospitalized from September 9 to September 17. He was sent home when he was able to be ambulatory part of the time. Claimant remained on bed rest at home. On September 30 claimant was able to do limited walking. Claimant continued on medication and was seen in followup by Dr. McConville over the next eight months. (Tr., pp. 8-12) Dr. McConville noted steady improvement in claimant's ability to walk and lift. (Cl. Ex. 15) On May 18, 1982 Dr. McConville released claimant to return to truck driving duties. (Cl. Ex. 15) Dr. McConville testified that during the period of treatment, claimant was totally disabled. (Cl. Ex. 17, p. 12) Dr. McConville stated he believed claimant had a "permanent disability insofar as his first lumbar vertebra is permanently partially compressed about fifty percent." (Cl. Ex. 17, p. 12) Dr. McConville stated he had no opinion as to percentage of permanent disability as he had no experience in evaluating percentage. (Cl. Ex. 17, p. 16) Dr. McConville stated that while claimant was hospitalized he was receiving medication. When claimant was sent home, he was prescribed Tylax for pain and Soma, a muscle relaxant. Both would have a sedating effect. (Cl. Ex. 17, p. 17)

Claimant was seen in consultation by Jack W. Brindley, M.D., on September 9, 1981 and in subsequent followup. Dr. Brindley advised bed rest and a Jewett hyperextension brace. As claimant's fracture healed, Dr. Brindley initiated an exercise program to strengthen the muscles of the back and abdomen. (Cl. Ex. 5) Dr. Brindley noted that claimant was "a very obese man with a very protuberant abdomen." (Cl. Ex. 5) The doctor found it likely claimant would be subject to low back problems with increased incident because of the compression fracture. On September 29, 1982 Dr. Brindley reported findings of a whole body physical impairment of 15 percent. Dr. Brindley made his determination using guidelines of the manual for orthopedic surgeons in evaluating permanent physical impairment. (Cl. Ex. 5)

Claimant testified that while he was in the hospital he was visited by defendant. Claimant stated that during the visit, defendant gave him a paper to sign "for insurance reasons." Claimant testified he was on medication, reads poorly, and didn't read the paper before signing. Claimant stated he did not date the document. (Tr., pp. 32-34) Claimant testified he later learned defendant did not have medical insurance on claimant. (Tr., p. 35)

Claimant testified he has applied for work since the injury. He tried to work in welding and couldn't stand being on his feet. He also drove a truck to Tucson, Arizona and couldn't stand the pain. He is not presently employed. (Tr., pp. 38-39) Claimant stated he was paid for the loads he hauled for defendant. (Tr., pp. 39-40) The truck claimant drove had defendant's name on the side of it. Claimant stated that oil for the trucks was available at the Bussey corner. (Tr., p. 91) Claimant testified that under the agreement he had with defendant he would receive 26 percent of the loads. (Tr., p. 96)

Claimant stated in his deposition that his previous injuries had included knee surgery in 1972 or 1973 and he had no other medical problems prior to the September 9, 1981 injury. (Morgan Dep., pp. 32-33) At the hearing, claimant recalled he had injured his back in 1970 while hunting. Claimant testified he pulled some muscles when he tripped over a log. (Tr., pp. 80-81)

James L. Starcevic, defendant in this action, testified that he is in the trucking and farming business. He has been trucking for seven to eight years and runs the business out of his home. (Tr., pp. 98-99) Defendant testified that when he began trucking, he hired people to drive as employees. In 1981 he changed to a lease agreement with his drivers to stop turnover and to avoid payment of unemployment and workers' compensation benefits. (Tr., p. 100) Defendant stated he met claimant when claimant came to his home in August or September of 1981. Defendant testified he discussed the leasing arrangement with claimant but didn't promise him a job. (Tr., pp. 101-102) Defendant wanted to talk to a Bob Conger on whether claimant was all right as a driver. (Starcevic Dep., p. 16) Defendant stated claimant returned to his house a week later and again asked for a job.

> A. I told him that I was needing an operator and he would have to sign a lease agreement and that in the past there may have been some of my drivers I put on a probation but under the lease agreement there was no probation period.
>
> Q. Did you have him sign a lease that day?
>
> A. No.
>
> Q. Why?
>
> A. I had to go in the house and look up the truck numbers and put the equipment, you know, the equipment numbers on the lease; and at that time I was working on something in the garage and I didn't take the time to do it.
>
> Q. Did the two of you agree that he would start to drive one of your trucks?
>
> A. Yes.
>
> Q. When was he to begin?
>
> A. Tuesday morning, day after Labor Day.
>
> Q. On this second meeting did you show him a copy of your standard form lease?
>
> A. No.
>
> Q. Did you talk to him about social security?
>
> A. Yes.
>
> Q. What did you tell him?
>
> A. I told him that he'd have to get a federal identification number, that he would be self-employed, and he would have to send in his own social security and his income tax quarterly. (Tr., pp. 103-104)

Defendant stated his usual practice was to have drivers sign leases before they began driving. (Tr., p. 106) He used a lease agreement whether the driver was temporary or permanent. (Tr., p. 112) Defendant testified he forgot to take the lease with him on the day claimant began driving. Defendant first admitted and then denied giving claimant the ticket at the mine office. Defendant explained he had confused claimant with the driver who later replaced him. (Starcevic Dep., p. 18; Tr., pp. 105-106) Defendant agreed he "may have suggested a route" for claimant to follow in delivering the load. (Tr., p. 107)

Defendant testified that he had claimant sign the lease when he visited him in the Centerville Hospital. The lease was dated September 8 because that was when defendant had filled it out. (Tr., pp. 109-111) Defendant stated that claimant read the lease before signing it. Claimant appeared to be in some pain but was alert. (Tr., p. 113) Defendant stated he had in the past terminated three drivers who had signed lease agreements. (Tr., pp. 114-118) Defendant stated his drivers were responsible for minor maintenance but not major repairs. (Tr., p. 121) Defendant has an oral agreement with the mining company and coal hauling is 99 percent of his business. (Tr., p. 119) Defendant testified he was not responsible for sending drivers to work or telling them they have to go, but if the drivers didn't haul the mine's coal, the mine could refuse to load those trucks. (Tr., pp. 127, 137) Defendant stated his drivers were paid twice a month. The drivers turn in copies of the tonnage they haul and receive 26 percent of the gross amount. (Tr., pp. 129-130) Loads are assigned to each truck by the mining company dispatcher. (Tr., p. 130)

Dennis Kaestner testified that he operates a truck for defendant on a lease agreement. Mr. Kaestner stated he hauled for persons other than defendant. The truck owner is paid for the load first and then pays the driver. (Tr., pp. 143-144) Mr. Kaestner stated he maintained his own truck although it was not required in the leasing agreement. (Tr., pp. 143-144) Mr. Kaestner reports his income as self-employment. (Tr., p. 145) He understands that defendant has the power to fire him. Mr. Kaestner testified that defendant's name is on the permits for the trucks to run on the Iowa highways. (Tr., p. 148)

Donna Starcevic, wife of defendant, testified that she is a co-owner of the trucking business. (Tr., pp. 149-150) She recalled that the first time claimant came to their house, defendant explained the terms of the lease. Mrs. Starcevic

stated she was present during some of the conversation and then left. (Tr., p. 151)

The lease agreement in question provides as follows:

> 1. Lessee shall operate and control the said vehicle and equipment and make such arrangements as Lessee determines, in his sole discretion, as to the use of the vehicle and equipment, so long as such use is directly involved with the earning of a livelihood.
>
> 2. The Lessor shall provide licenses, all necessary permits, parts, tires, oil and fuel for the use of said vehicle and equipment and liability insurance.
>
> 3. Lessee shall pay to Lessor for such use (rental) of such vehicles and equipment a sum equal to 74% of the gross income earned by Lessee through the use of such vehicle and equipment. Lessee shall in addition to the above rent, pay to Lessor 100% of all fuel surcharge.
>
> 4. Lessee shall not assign or sublet this lease, nor shall any other person operate or use said vehicle and equipment, except that Lessor may operate said vehicle and equipment at any time Lessee, for any reason, does not.
>
> 5. Lessor shall have the right to terminate this lease and to immediately stop Lessee's use of said vehicle and equipment, if at any time it appears to Lessor that Lessee has not complied with the terms of this Lease.
>
> 6. The Lessor and Lessee understand and agree that this is not an employment contract and the Lessor and Lessee agree that the Lessee shall not be Lessor's employee for any purpose. Cl. Ex. 1)

APPLICABLE LAW

Iowa Code section 85.61(2) defines a "worker" or "employee" as follows:

> [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,...

Iowa Code section 85.61(3) 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 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 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) whether the party sought to be held as the employer is 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 of 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, 1396, 244 N.W. 667, 250 N.W. 740 (1933).

The work "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, 1400, 244 N.W. 667.

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

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).

Iowa Code section 85.27 provides in relevant part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies 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.

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 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

Defendant seeks dismissal of claimant's action by reason of a determination of another agency in which one of defendant's drivers was held to be an independent contractor. The deputy

correctly noted that different statutes and case law are applicable The decision of Job Service on a question of unemployment benefits for another party is not binding on this agency in claimant's action for workers' compensation benefits.

The first issue on appeal questions the existence of an employment relationship between claimant and defendant. Applying the factors of Henderson to the evidence, it is found that the test of an employer-employee relationship is met.

Defendant exercised a right of selection by withholding approval of claimant as a driver until defendant had checked on claimant's reputation as a responsible driver. Moreover, it was claimant's understanding that he was on a two-week probation period before defendant would make a final decision on whether to hire him.

Defendant had the responsibility of paying claimant's wages. Claimant's earnings were based on a percentage of the loads he hauled, but he collected no monies on his own. Claimant would have been paid by defendant on a twice monthly basis.

Defendant, claimant and Mr. Kaestner have all testified that defendant had the right to terminate a driver.

It appears equally evident that defendant controlled the work. Under the terms of defendant's agreement with the mining company, his drivers were expected to haul coal from the mine. There is no evidence that claimant was free to choose his own pickup and delivery areas or to deviate from the system of receiving his "tickets" from the mine office. There is indication that even his delivery route was "suggested" to him.

At the time of the work injury claimant was delivering coal. Defendant has testified that coal hauling is 99 percent of his business and it must be assumed coal hauling makes up a large portion of his business earnings. Therefore, defendant received the benefit of the work claimant was performing.

As to intent of the parties, claimant's testimony indicates he believed himself to be working for defendant. The truck he drove bore the name of defendant. He was instructed in operating the truck, where to leave it and how to pick up new delivery assignments. The percentage he received in earnings and the method of pay were all determined for him by defendant.

Although defendant has portrayed himself as a participant in a leasing agreement rather than an employer, terms alone do not establish a non-employment relationship. By defendant's own admission, he changed from an employee-employer system to a leasing agreement in 1981 for the purpose of avoiding payment of unemployment and workers' compensation benefits. There is no indication that other changes in his employment policies were instituted along with the leasing system. Defendant is free to call his relationship with the drivers whatever he chooses, but under the applicable law this agency finds the relationship one of employer-employee.

The second issue on appeal is whether claimant's disability is causally related to the September 9, 1981 work injury. James McConville, M.D., examined claimant on September 9, 1981 and reported that claimant suffered a compression fracture at L-1 that was causally related to the fall from the truck. Claimant remained in the hospital for eight days and slowly recovered at home over the next eight months. During this period, Dr. McConville reported that claimant was totally disabled. On May 18, 1982 Dr. McConville released claimant to return to his driving duties. Claimant was further evaluated by Jack Brindley, M.D., who on September 29, 1982 reported that claimant had a whole body impairment of 15 percent as a result of the compression fracture. The medical evidence sufficiently establishes a causal relationship between claimant's disability and the September 9, 1981 work injury.

With respect to defendant's third issue, claimant is entitled to healing period benefits from September 9, 1981 to May 18, 1982, the date of his release to return to work. In determining the extent of permanent partial disability, the deputy considered the functional impairment rating of 15 percent in addition to factors of claimant's limited formal education and reading difficulties. The deputy believed that claimant could, in the future, perform restricted driving or welding duties. The evidence supports a finding of a permanent partial disability of 22 1/2 percent.

The fourth issue on appeal concerns medical benefits. Claimant has submitted statements of medical expenses incurred in the treatment of the September 9, 1981 work injury. Under the provisions of Iowa Code section 85.27, these expenses represent reasonable medical services and supplies and will be allowed.

The parties were unable to agree a rate of compensation. The deputy found a rate of $233.40 using the earnings of the blue, red and white trucks. However, the earnings records for the white truck do not meet the statutory standard of continuous employment over a 13 week period when work was available to the other drivers. Therefore, the combined earnings of the drivers of the blue and red trucks over the six semi-monthly pay periods prior to claimant's injury (which cover 13 weeks and 1 day) have been divided by 13.143 and then again by 2 to yield an average gross weekly earnings figure of $421.05. ($5,190.75 + $5,876.83 = $11,067.58 ÷ 13.143 = $842.09 ÷ 2 = $421.05) Claimant is married and entitled to four exemptions. His applicable rate of compensation is $253.61 per week.

FINDINGS OF FACT

THEREFORE, it is found that:

1. Claimant is thirty-five (35) years old.

2. Claimant is married and has two (2) children.

3. Claimant left school in the ninth grade.

4. Claimant had subsequent training in welding.

5. Claimant's previous work experience has included general labor, welding, and truck driving.

6. In September of 1981 claimant began driving for defendant.

7. Defendant's drivers operate under a leasing agreement.

8. Claimant did not sign a leasing agreement before he began driving.

9. Claimant was injured when he fell from his truck on September 9, 1981.

10. Claimant received emergency treatment at Marshalltown Hospital and was released.

11. Claimant was examined by James McConville, M.D., at St. Joseph's Hospital later in the evening of September 9, 1981.

12. Claimant incurred a compression fracture at L-1 as a result of the work injury.

13. Claimant was totally disabled for eight (8) months.

14. On May 18, 1982 claimant was released to return to driving duties.

15. Claimant has a whole body impairment of fifteen percent (15%) as a result of the September 9, 1981 work injury.

16. Claimant signed a leasing agreement with defendant after claimant was injured.

17. Defendant had the authority to hire and discharge claimant.

18. Claimant was instructed by defendant as to the operation of defendant's truck.

19. Defendant's trucking business involved hauling coal for a mining company.

20. Claimant's duties were to pick up and deliver coal from the mine.

21. Defendant had the right to control claimant's work.

22. Defendant benefitted from claimant's coal hauling duties.

23. Claimant was to be paid twice monthly on a percentage basis.

24. Defendant had changed the nature of his business to a leasing arrangement to avoid unemployment and workers' compensation benefits.

25. Claimant's rate of compensation is two hundred fifty-three and 61/100 dollars ($253.61) per week.

CONCLUSIONS OF LAW

THEREFORE, it concluded that:

Claimant has established by a preponderance of the evidence that he was an employee of defendant at the time of the September 9, 1981 work injury.

Claimant has established by a preponderance of the evidence that the disability upon which he bases his claim is causally related to the September 9, 1981 work injury.

Claimant is entitled to healing period benefits from September 10, 1981 to May 18, 1982. Claimant is entitled to benefits based upon a permanent partial disability of twenty-two and one-half percent (22 1/2%).

The average weekly earnings of other employees similarly employed with defendant who worked when work was available was four hundred twenty-one and 05/100 dollars ($421.05)

Claimant is further entitled to medical benefits as provided under Iowa Code section 85.27.

The decision of the deputy is affirmed with a modificatio as to applicable rate.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant healing period benefits

from September 10, 1981 to May 18, 1982 at a rate of two hundred fifty-three and 61/100 dollars ($253.61) per week.

That defendant pay unto claimant permanent partial disability benefits for one hundred twelve and one-half (112 1/2) weeks at a rate of two hundred fifty-three and 61/100 dollars ($253.61) per week.

That defendant pay interest pursuant to Iowa Code section 85.30.

That defendant pay the following medical expenses:

Mach Ambulance Service	$ 75.00
Appanoose County Ambulance	61.50
J. B. McConville, M.D.	240.00
Jack W. Brindley, M.D.	78.00
Marshalltown Area Community Hospital	62.75
St. Joseph Mercy Hospital	1,751.88
C. D. Bendixon	25.00
West End Drug	148.00
Willer Pharmacy	127.12

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

That defendant file a final report when this award has been paid.

Signed and filed this 14 day of December, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CONNIE MORRICAL, Claimant, vs. GLENWOOD STATE HOSPITAL-SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	FILE NO. 731493 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 Connie Morrical against Glenwood State Hospital-School, employer, and State of Iowa, insurance carrier. Claimant alleges that she sustained a compensable injury to her back on April 11, 1983 and seeks compensation for healing period, permanent disability and benefits available under section 85.27 of the Code of Iowa.

The hearing commenced August 28, 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, Richard Maher. The defendants appeared through their attorney, Shirley Steffe, Assistant Attorney General. The case was considered fully submitted upon conclusion of the hearing. The record in this proceeding consists of the testimony of the claimant and exhibits 2 and 4 through 32 inclusive.

ISSUES

The issues presented by the parties at the time of hearing are: whether a causal connection exists between claimant's injury of April 11, 1983 and any disability which she presently exhibits; a determination of claimant's entitlement to benefits under the workers' compensation law; and a determination of claimant's entitlement to benefits for medical care under section 85.27 of the Code of Iowa. Defendants contend that part of the medical care claimant received was unauthorized. It was stipulated by the parties that in the event of an award the proper rate of compensation is $145.88 per week. It was further stipulated that the defendants have paid claimant for eight and six-sevenths weeks of healing period benefits covering the periods of April 11, 1983 to May 15, 1983 and June 21, 1983 to July 17, 1983. It was further stipulated that defendants have paid claimant 50 weeks of compensation commencing July 18, 1983 representing compensation for a ten percent permanent partial disability.

REVIEW OF THE EVIDENCE

Claimant testified that she is 41 years of age, married and has a 17 year old son living at home who is a junior in high school. She testified that she has an eighth grade diploma and has completed a 60 hour nurse's aide course and a 40 hour medication aide course.

Claimant testified that she worked in a nursery filling orders from bins for approximately eight years. She stated that the work was seasonal and that the pay was $.90 per hour when she started which was at age 16. She has worked for approximately one year sewing labels into garmets for which she was paid $1.25 per hour. Claimant testified that she had not worked outside the home since 1962 or 1963 until she commenced work at Tabor Manor in 1979. During the years when she was a full-time housewife she also assisted her husband training horses and in their farming operation. Claimant testified that she was employed at Tabor Manor for approximately three years where she worked as a nurse's aide. Her duties included lifting. She described the patients as cooperative and helpful but left that position to earn better wages with the defendant employer in September or October of 1982.

Claimant testified that while employed at the Glenwood State Hospital-School she worked 40 hours per week and earned $5.44 per hour at the time of her injury. She stated that her duties were very broad and included housekeeping duties such as dusting, laundry, care of floors, moving furniture and lifting heavy mattresses. She also provided patient care which involved lifting fully grown adults. She stated that some of the patients were uncooperative and that she engaged in lifting consistently throughout the entire work day.

Claimant testified that on April 11, 1983 she was lifting a 170 pound 76 year old male patient from a bathtub when she felt pain between her shoulder blades and running down into her right leg. She stated that she reported it to the doctor who was making rounds at the time and that he told her to take off work and that if she was not better within three days that she should see her own doctor. She stated that her complaints did not subside and that she sought care from K. D. Rodabaugh, M.D. She stated that he took x-rays, prescribed medication and directed her to rest and apply heat. She related that she returned to see Dr. Rodabaugh on the following Monday and that over the weekend she had experienced pain in her back, muscle spasms and pain in her right leg. She reported that the defendants sent her to be examined by Behrouz Rassekh, M.D., who released her to return to work on May 16, 1983. She stated that she felt she had improved by that time but that she had not fully recovered and was still experiencing pain down her right leg and in her lower back.

Claimant testified that she did not feel very good when she returned to work and that the bending and lifting made her get worse. She stated that she continued to work until June 22 when she could not tolerate any further lifting. She stated that the pain had grown worse and that her leg was numb.

Claimant testified that she then went to her family doctor and Dr. Rassekh. She underwent a myelogram at Mercy Hospital where she was hospitalized for approximately five days. She related that Dr. Rassekh advised her that the myelogram showed nothing and directed her to return to work. She stated that she was not able to return to work, however.

Claimant testified that she returned to Dr. Rodabaugh who referred her to Thomas C. Bush, M.D., in Omaha, Nebraska. She stated that she was sent to Methodist Hospital, underwent a scan and was instructed by him to stay off work with no lifting or bending. She related that she saw Dr. Bush on two occasions.

Claimant testified that she is not presently employed and that she does not know of any job which she could perform. She stated that she is unable to sit for extended periods. She stated that she can bend to take clothes out of the dryer or to clean a bathtub but could not do the work at the Glenwood School. She testified that she saw M. C. Fernald, D.C., commencing in May, 1984. She related that he performed an x-ray and a physical examination. She stated, "He has been the only one to help me and make me feel better at all." She stated that she has received 16 treatments from him and that after the treatments she feels good for approximately a week. She stated that he has placed no specific restrictions on lifting or bending but has instructed her to wear support hose and to place a lift in her shoe. She stated that she is not presently taking any prescription medication. She felt that the medication the other physicians had previously prescribed had made her slow and did not help her condition.

Claimant testified that her prior health had been good. She recalled an ulcer of approximately 10 years prior. She denied the existence of any prior back injuries or lifting restrictions. Claimant denied suffering any other major back injuries since April 11, 1983. She stated that her back problems have continued

to persist since April 11, 1983 and that she saw Dr. Fernald for treatment of the symptoms which began on April 11, 1983.

On cross-examination claimant agreed that she commenced work for the defendant employer in October, 1981 and stated that she had been there one and one-half years at the time of injury.

Claimant testified that Dr. Rodabaugh had given her a release to return to work in May, 1983 but that the release prohibited bending or lifting. She stated that Dr. Rassekh verbally told her to avoid bending or lifting but apparently did not make such an entry in writing.

Claimant testified that on June 21, 1983 she initially went to Dr. Shin, the doctor at the Glenwood facility, and that Dr. Rassekh subsequently admitted her to the hospital. She also underwent physical therapy and related one other office call when Dr. Rassekh told her to return to work on July 18, 1983.

Claimant testified that she sought care from Dr. Fernald on her own and made an appointment to see him. She denied suffering any injury putting cows back in but stated that on one occasion she saw the doctor after an incident of picking up clothes from the floor. She stated that Dr. Fernald had not, to her knowledge, been given reports or records from other doctors and denied telling him that she had not worked since April, 1983.

Claimant also testified that prior to the time she last returned to work at the Glenwood facility she received a letter which told her that her employment would be terminated if she did not return. She stated that the facility apparently did not want her to work if she had restrictions and that the girl in the workers' compensation office did not find any job at the facility for her which did not involve bending or lifting.

As shown in exhibit 19 Dr. Rodabaugh was of the opinion that claimant suffered an acute lumbosacral strain while working at the Glenwood State School. In exhibit 20, at the end of the first paragraph, he states that when claimant was released to return to work in April, 1983 she was advised to avoid bending at the waist or heavy lifting. On the second page he states that she requested a return to work release on July 14, 1983 which he granted.

Dr. Rodabaugh, on the second page of exhibit 20, related that on August 23, 1983 claimant returned and that he referred her to Dr. Bush and prescribed Norgesic. He goes on to relate that claimant has degenerative disc disease and had suffered a lumbosacral strain. He stated that he felt that she had a degree of temporary disability running through September 1, 1983 and that he would defer to Dr. Bush with regard to permanent disability.

In his most recent report of February 6, 1984 Dr. Rassekh states, in the third paragraph, that he advised claimant that she could return to work on July 18, 1983 if she did not have to do repeated bending or lifting. In the fourth paragraph he states that he found no objective deficit when he examined claimant on February 2, 1984. In the fifth paragraph he opines that claimant has a ten percent permanent partial disability of the whole body due to restrictions on lifting and repeated bending. He states that he believes that she could return to an occupation which does not require repeated bending or lifting and which requires only occasional twisting motions.

In exhibit 21, a report dated May 9, 1983, Dr. Rassekh stated that he examined claimant on May 6, 1983 and believed that she had a lumbosacral sprain. In it he releases her to return to work on May 16, 1983 but states that it is possible that she may have recurrence of pain. In exhibit 23, a report of June 21, 1983, he relates that he examined claimant on June 21, 1983. In the fourth paragraph he states that she has degenerative disc disease associated with some musculature ligamentous injury and that with repeated lifting, bending and twisting she will have periodic back pain.

Exhibit 24 is a report from Dr. Bush dated September 8, 1983 in which he agrees that claimant's myelogram was normal and that a CT scan showed only a central-posterior disc herniation. He characterized her pathology as minimal but present. He advised that she quit heavy lifting or bending and assigned a permanent disability rating of ten percent of the body as a whole. In it he states that she will probably reach her maximum healing in the next 30 to 60 days. In exhibit 27, a report dated July 10, 1984, Dr. Bush states that he feels that claimant reached her maximum level of recuperation November of 1983 and that she had recuperated to the point that she could return to her previous work.

Exhibit 28 is a report from Dr. Fernald dated July 10, 1984. He also opines that claimant has a ten percent permanent partial disability.

Exhibit 31 contains a return to work certificate from Dr. Rassekh dated July 9, 1983. It states that claimant may return to work on July 18, 1983. It also relates that it would be preferable if she did not have to do repeated bending or lifting over 50 pounds. Exhibit 31 also contains an inter-office memo dated July 1, 1983 addressed to Wan Young Shin, M.D., from Edie Blasingame, LPT, which relates that claimant received physical therapy on June 23 and 24. The preceeding page of the exhibit is another memo dated June 24, 1983 between the same persons wherein Blasingame found claimant's complaints of low back pain to be justified.

Exhibit 29 is a medical bill from Dr. Fernald in the amount of $488.00.

Exhibit 17 is a summary of claimant's other medical expenses. At hearing it was stipulated by the parties that the State agreed to pay all the medical bills listed on the exhibit except the charge of $30.00 from Freemont Mills Medical Center incurred September 30, 1983.

Exhibit 18 is claimant's statement seeking compensation for travel expenses. It was stipulated by the parties that defendants have already paid claimant the sum of $52.32 representing 218 miles of travel.

Claimant testified that the charge at Freemont Mills Medical Clinic incurred September 30, 1983 was for her back and that she did not go to Dr. Rodabaugh for anything else.

ANALYSIS AND APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on April 11, 1983 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).

Claimant is found to be credible in her testimony regarding the incidents of April 11, 1983 and subsequent thereto. It is therefore found and concluded that claimant sustained an injury to her back in the nature of a lumbosacral strain on April 11, 1983.

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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 11, 1983 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).

Apportionment of disability between a preexisting condition and an injury is proper only when there was some ascertainable disability which existed independently before the injury occurred. Varied Enterprizes Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Claimant has been diagnosed by Drs. Bush, Rassekh and Fernald as having a ten percent permanent partial disability of the body as a whole related to her back. She has also been diagnosed as having degenerative changes in her back. It is likely that degenerative changes existed prior to April 11, 1983. It is equally probable that she was relatively asymptomatic prior to April 11, 1983 by virtue of her testimony and by virtue of the

employment in which she had been engaged continually prior to the date of injury. There is no medical opinion in the record which directly states that claimant's disability is or is not related to the injury of April 11, 1983. That incident is, however, recited consistently in the medical histories contained within the reports. When all the evidence in the case is considered, it shows that claimant was asymptomatic prior to April 11, 1983 but now has a ten percent disability based upon the symptoms which began April 11, 1983. It is found and concluded that a causal connection exists between claimant's disability and the injury she sustained on April 11, 1983.

Claimant's formal education is limited. She has not demonstrated a propensity for further education. Her work history is likewise limited. She has not returned to work and has not sought reemployment. She is experiencing a significant amount of discomfort and her degenerative condition does restrict the activities in which she can engage. She is 41 years old and her age would not render extended retraining unfeasible. It is unlikely that she can return to work as a nurse's aide in view of the fact that very few of the positions for which she would be qualified would be in a setting which did not require lifting of patients. Unfortunately, she has no recent work experience in other fields upon which to rely.

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."

IT IS THEREFORE FOUND AND CONCLUDED that when claimant's disability is measured industrially that she has sustained a disability which is equal to 20 percent of total disability.

In this case claimant has two healing periods, the first ended May 15, 1983 for which she has been fully paid according to the stipulation. The second began June 21, 1983 and ran at least through July 17, 1983 for which the defendants have paid claimant healing period compensation. The termination of that healing period was tied to the release which had been issued by Dr. Rassekh. That release contained restrictions on bending and lifting which would not have permitted claimant to have engaged in employment substantially similar to that in which she was engaged at the time of the injury. Therefore, the healing period had not ended under the provisions of section 85.34 of the Code of Iowa. In this case claimant's second healing period is terminated by her reaching the point that significant improvement from the injury is not anticipated. The only specific evidence on that point is the opinion of Dr. Bush as contained in exhibits 24 and 27. Sixty days from September 8, 1983 would extend into the month of November. It is therefore found and concluded that claimant reached the point of maximum significant improvement on November 1, 1983 and that such terminates her second healing period.

Claimant's testimony regarding the symptoms for which she was receiving care from Dr. Rodabaugh on September 30, 1983 is accepted and the charge of $30.00 incurred on that date will be held to be the responsibility of the defendants.

Claimant seeks payment of her bills incurred with Dr. Fernald. Under section 85.27 of the Code of Iowa the employer is given the right to select the worker's medical care. The record in this case does not substantiate the existence of an emergency, refusal to provide care or any other condition which would permit the claimant the right to unilaterally choose her medical care. From the record of this case it appears that the first knowledge defendants obtained of claimant seeking care from Dr. Fern arose from the notice of service under Rule 4.17 served on July 11, 1984. There is no indication that claimant ever requested the defendants to provide care by Dr. Fernald or communicated a desire for further care at or about the time she commenced treatment with Dr. Fernald. Additionally, defendants' request for production of documents served January 17, 1984 requested all bills. Claimant did not produce the bill of Dr. Fernald or give indication, prior to July 11, 1984, that bills were being incurred. A party is bound at hearing by his discovery responses. White v. Citizens National Bank of Boone, 262 N.W.2d 812 (Iowa 1978). Under Rule of Civil Procedure 125(b)(2) claimant was required to disclose the existence of the medical charges being incurred with Dr. Fernald if she is to be reimbursed for them. Defendants will not be held responsible for the charges incurred with Dr. Fernald or for the travel expenses which claimant incurred in obtaining care from Dr. Fernald.

FINDINGS OF FACT

1. On April 11, 1983 claimant was a resident of the State of Iowa and was employed at the Glenwood State Hospital-School in the State of Iowa.

2. Claimant was injured on April 11, 1983 when she suffered a lumbosacral strain while lifting a patient at her place of employment.

3. At the time of injury claimant was employed by the Glenwood State Hospital-School working as a nurse's aide.

4. Following the injury claimant was medically incapable of performing work in employment substantially similar to that she performed at the time of the injury from April 11, 1983 until May 16, 1983, the date upon which she returned to work. Claimant was then subsequently medically incapable of performing work in employment substantially similar to that she performed at the time of the injury commencing on June 21, 1983 and extending to November 1, 1983 when she reached the point that it was medically indicated that further significant improvement from the injury was not anticipated.

5. The lumbosacral strain which claimant suffered aggravated a preexisting, previously asymptomatic degenerative disc condition and resulted in a permanent impairment of ten percent of the body as a whole.

6. Claimant is 41 years of age, married and has one dependent child.

7. At the time of injury claimant was earning $5.44 per hour, working a 40 hour week and her rate of compensation is $145.88 per week.

8. The medical care which claimant received as summarized in exhibit 17 was reasonable and necessary for the treatment of the injury which she sustained.

9. The medical care which claimant received from Dr. Fernald was not authorized by the employer.

10. The charges incurred for claimant's authorized medical care totals $754.00.

11. In traveling to obtain medical care for the injury claimant traveled a total distance of 1,338 miles of which 480 was for care provided by Dr. Fernald leaving a balance of 858 miles which is the responsibility of the defendants.

12. Claimant is presently restricted in her ability to bend and lift. She experiences continuing pain and discomfort.

13. Claimant's education is limited to the eighth grade but with recent courses in the areas of nurse's aide and a medication aide.

14. Claimant has no demonstrated skill for successfully completing higher education but appears to be of at least average intelligence and gave no indication of emotional instability.

15. Claimant is not highly motivated to return to work and has not sought employment since she last worked in June, 1983.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and of its parties.

The injury claimant sustained to her back on April 11, 1983 arose out of and in the course of her employment with Glenwood State Hospital-School.

The injury claimant sustained was in the nature of an aggravation of a previously dormant degenerative condition in her back.

When all previously paid healing period compensation is credited claimant is entitled to receive an additional 14 2/7 weeks of healing period compensation commencing July 18, 1983.

When the previously paid compensation for permanent partial disability of 50 weeks is credited, claimant is entitled to receive an additional 50 weeks of compensation for permanent partial disability.

Claimant's medical expenses and travel expenses incurred in seeking care from Dr. Fernald were unauthorized and are not the responsibility of the employer. All other medical expenses as summarized on exhibit 17 are the responsibility of the defendants in the total amount of $754.00 of which defendants have paid $57.50 and have agreed to pay the balance.

Defendants are responsible for 858 miles of travel at the rate of $.24 per mile which totals $205.92. When given credit for $52.32 previously paid defendants have a remaining responsibility in the amount of $153.60.

In order to simplify computations the first 14 2/7 weeks of payments made by the defendants for permanent partial disability compensation will be credited to fully satisfy the healing period obligation with a resulting increase of the amount of unpaid compensation for permanent partial disability so that there remains unpaid 64 2/7 weeks of compensation for permanent partial disability payable commencing July 2, 1984 which is the day following the end of the payments which defendants have previously paid to claimant.

Defendants' liability for interest pursuant to section 85.30 of the Code of Iowa shall run from July 2, 1984 upon installments of compensation which were unpaid as they became due.

Claimant's industrial disability is 20 percent of total disability.

Claimant's healing period ended November 1, 1983.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant sixty-four and two-sevenths (64 2/7) weeks of compensation for permanent partial disability at the rate of one hundred forty-five and 88/100 dollars ($145.88) per week commencing July 2, 1984. Defendants shall pay all weekly installments which are now due and owing in a lump sum together with interest thereon pursuant to section 85.30 of the Code of Iowa.

IT IS FURTHER ORDERED that defendants pay claimant's unpaid medical bills pursuant to their stipulation in the total amount of six hundred ninety-six and 50/100 dollars ($696.50).

IT IS FURTHER ORDERED that defendants pay claimant's travel expenses in the amount of one hundred fifty-three and 60/100 dollars ($153.60).

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 26th day of November, 1984.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EILEEN OSBORN,	:	
Claimant,	:	File Nos. 677952 697956
vs.	:	ARBITRATION
IOWA VETERANS HOME	:	AND
Employer,	:	REVIEW-
and	:	REOPENING
STATE OF IOWA,	:	DECISION
Insurance Carrier, Defendants.	:	

FILED
DEC 1 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

These are proceedings in arbitration and review-reopening brought by the claimant, Eileen Osborn, against her employer, Iowa Veterans Home, and its insurance carrier, State of Iowa, to recover benefits under the Iowa Workers' Compensation Act as a result of injuries allegedly sustained August 5, 1981 and March 14, 1982.

These matters came on for hearing before the undersigned deputy industrial commissioner at the office of the Iowa Industrial Commissioner in Des Moines, Iowa, November 2, 1984. The record was considered fully submitted on that date.

A review of the industrial commissioner's file reveals that in file number 677952, a first report of injury was filed August 12, 1981 and a memorandum of agreement August 19, 1981, and that in file number 697952, no filings have been made.

The record in this case consists of the testimony of claimant and of Ronald Eugene Beesley, and of the designated reports of John R. Walker, M.D., in claimant's exhibit 2; and of the designated portions of claimant's exhibit 3. Defendants' objections to claimant's exhibit 1 and to nondesignated portions of claimant's exhibits 2 and 3 are sustained.

ISSUES

The issues for resolution in both files are:

1) Whether there is a causal relationship between claimant's injury and her disability; and

2) Whether claimant is entitled to benefits and the nature and extent of any such entitlement.

REVIEW OF THE EVIDENCE

Claimant, Eileen Louise Osborn, testified in her own behalf. Claimant is 24 years old, single, and lives in Mitchellville. Claimant stated that she is a high school graduate and certified as a nurse's aide. She stated that the latter certification involved a sixty hour course in the care of the elderly. Claimant gave a work history of working as a nurse's aide at a variety of care centers in the Burlington, Iowa, area before beginning employment with the Iowa Veterans Home on March 31, 1980.

Claimant stated that she had had no back problems while working at the Burlington homes and had no back pain or indication of back problems when she began work at the Veterans Home. Claimant reported that on November 24, 1980 she had an incident at home when she was cleaning her stove. She stated that even though she first experienced pain that day when she tried to stand up while cleaning her stove, she went to work. She was hospitalized the following day. Claimant reported that she injured herself at work in the summer of 1981, apparently on August 4, 1981. Claimant reported that she was hospitalized following the August 1981 work incident. She recalled experiencing back pain. Claimant stated that she did not recall how long she was hospitalized after that work incident, but that she did return to work in October 1981. Claimant could not recall whether she had any activity restrictions when released for work in October 1981. Claimant reported that she continued to have difficulties throughout the winter of 1981-1982 even though she performed her work duties.

Claimant indicated that she again injured her back at work on March 14, 1982. She reported that she experienced severe back pain accompanied by muscle spasm and radiation of pain into her leg when she attempted to transfer a patient. Claimant was again hospitalized. She reported that she was transferred by ambulance from the Marshalltown Hospital to the Mayo Clinic. Claimant indicated that she received workers' compensation benefits during March, April and May 1982 as a result of this incident. Claimant related that she was off work from March 14 to October 25, 1982. She indicated that the Veterans Home terminated her employment on August 12, 1982.

Claimant disclosed that on October 25, 1982, she began work at "Toledo." Claimant described her duties as the observation and treatment of the socially unacceptable behavior in juvenile girls adjudicated delinquent. She stated that the job involved no physical care other than observation and supervision. She indicated that she did not use her nurse's aide training in her position and the position involved no lifting. Claimant explained that the position at Toledo resulted from a state vocational rehabilitation referral and that the position was a state merit employment position. Claimant revealed that her salary at the Veterans Home had been $5.40 per hour and that her salary at Toledo was $5.79 per hour. Claimant then disclosed that in the summer of 1984 she accepted a state merit promotion to a better paying position at the Womens Reformitory in Mitchellville. Claimant characterized her position at Mitchellville as supervisor of residents. She stated that her duties involved caring for the immediate needs of inmates as necessary. Claimant acknowledged receiving three weeks of specialized training at the medium security facility in Mount Pleasant before beginning her duties at Mitchelville.

Claimant reported that she first saw Dr. Walker in January of 1983. She explained that the doctor performed a complete orthopedic examination and performed surgery in May of 1983. Claimant stated that she was off work from May 1983 through October 19, 1983 as a result of her surgery and received no workers' compensation benefits during that time. Claimant expressed her belief that the surgery performed was a fusion at the fifth lumbar interspace. Claimant stated she had had back pain from August 1981 until her surgery in 1983. Claimant characterized her medical bills as a result of her hospitalization and surgery in 1983 as being a "little bit" over $14,000. Claimant stated that she now has occasional back pain with weather changes. She characterized her back pain as infrequent when compared to the pain she had before surgery. Claimant stated that she avoids physical activity and that per Dr. Walker's directions she avoids lifting, shoveling, aerobics, and any other strain to the lower back. Claimant recited that her present position does not require that she move about continuously. Claimant represented that she has no specific skills to assist her in the job market and that she has had no training in clerical work.

On cross-examination, claimant acknowledged the Iowa Veterans Home is a division of the Iowa Department of Social Services and that the Toledo facility is also a division of the Iowa Department of Social Services. She agreed that Mitchellville is a division of Iowa Department of Corrections. It was established that the Iowa Department of Social Services has recently divided into the Department of Human Services and the Department of Corrections. Claimant agreed that she has intellectual ability, but expressed her belief that she is physically limited. Claimant further agreed that she has passed three merit employment examinations and has received each merit job for which she has applied. Claimant acknowledged that her back incident from cleaning her stove at home occurred prior to her August 5, 1981

work incident. Claimant agreed that she had an at-home back incident when she rolled over in bed prior to August 5, 1981, but stated that that incident was a function of a work incident. Claimant could not recall any March 10, 1982 back incident. Claimant agreed that she was off work approximately from December 2, 1980 to December 31, 1980 as a result of the at-home incident. Claimant agreed that when she returned to work following that incident, she was released with a 25 pound lifting restriction. Claimant then stated that Dr. Lund had said nothing further in regard to any restriction. She expressed her belief that she considered her recovery complete. Claimant acknowledged receiving long term disability benefits in 1982 until her work return on October 25, 1982. In response to questioning by defense counsel, claimant agreed that part of her back problem is congenital.

Claimant indicated that she did not reapply for work at the Veterans Home before beginning work at Toledo. She agreed that her pay rate increased with her transfer to Toledo and that she was hired at Toledo even with her back condition and resulting restrictions. Claimant acknowledged that her salary at the Veterans Home was presently $11,315 per year; that her salary at the juvenile facility at Toledo was approximately $11,819 per year; and that her salary at the Womens Reformatory at Mitchellvil is approximately $15,547 per year when her shift differential was included. Claimant agreed that she has not worked at other correctional facilities in Iowa. She stated she speculates from her in-service training that there would be physical problems if she attempted to do so. Claimant stated that she had no formal educational training for her duties, but has had occasional, on-job, in-service training.

Claimant reported she would have to check her records before she could indicate the number of nonwork back injuries she had had in late 1980. She indicated that the November 1980 stove incident was her only earlier, nonwork back incident. Claimant agreed that she was off work during October 1980, but stated she could not remember why. Claimant denied that she continued to have back problems from October 1980 to January 1981. She expressed her belief that she "needed help to get those muscles loose to do the job she was hired to do."

Claimant explained that in the summer of 1982 she received long term disability payments of $349.44 per month. These amounts were paid from July 21, 1982 through October 25, 1982. She then received $50 per month benefits after her work return. Claimant further acknowledged that she received disability benefits of $401.35 per month when off in May 1983 and that these continued until the work return on October 5, 1983. On redirect examination, it was established that there is a ninety day waiting period before long term disability payments are made. Claimant indicated that the women's reformatory is Iowa's only known minimum security facility. On recross-examination, claimant agreed that she has been employed at the women's reformatory for approximately three months and she does not intend to leave that position.

Ronald Eugene Beasley was called as a witness by defendants. Mr. Beasley stated that he is a supervisor at the women's reformatory and has been employed there for one and one-half years. He stated that he has been claimant's supervisor for approximately two weeks. He reported the claimant's job title is correctional officer and as such she earns $622.40 biweekly. He indicated that there are 26 pay periods during each year.

Claimant's exhibit 1 is a handwritten medical report of John R. Walker, M.D. Defendants objected to the exhibit on the grounds that they did not receive notice of service of the exhibit. Defendants' objection is sustained. Claimant's exhibit 2 is a packet of medical reports regarding claimant. The packet includes letters of transmittal from claimant's attorney to defendants' attorney regarding the February 8, 1984 medical report of Dr. Walker; the January 10, 1983 medical report of Dr. Walker; the July 27, 1983 medical report of Dr. Walker; and the July 7, 1983 medical report of Dr. Walker. Defendants objected to the exhibit on the grounds they had not received notice of service of same. Claimant responded that per claimant's request for continuance, two of Dr. Walker's reports were given to defendants. A prehearing order A of this agency filed March 24, 1983 states that medical reports are to be received and exchanged by May 6, 1983. A primary purpose of Rule 500-4.17 is to permit the opposing party the right to cross-examine witnesses concerning medical information. Insofar as defendants were not served with copies of medical reports, there is no evidence that the right to cross-examine has been preserved in regard to such reports. However, the aforementioned letters of transmittal indicate those reports which defendants have actually received. Defendants could have preserved their right to cross-examine concerning the received reports. Those reports shall be part of the evidence in this matter.

Defendants' objection is sustained as to all other doctors' and practitioners' reports contained in claimant's exhibit 2.

The January 10, 1983 report of Dr. Walker states the following history:

> The above captioned 22 year old female, first experienced a home injury which consisted of a low back pain and strain after she had bent over cleaning her own stove in her own kitchen. When she stood up she experienced pain and difficulty moving around and some severe low back pain. She [sic] laid down briefly and then went to work at the Iowa Veterans Home and was sent home because of the pain. On November 25th she was hospitalized in Marshalltown by Dr. Axel Lund for bed rest, heat and therapy and discharged on December 5th, improved, but not completely well. On December 12th she was driving when she again developed some severe low back pain that radiated down her right leg posteriorly and laterally to the knee with numbness in her right foot. She was off work December 23, 1980 until January 1, 1981 and saw Dr. Lund again who referred her to the Mc Farland Clinic in Ames, Iowa. She was seen there by Dr. Brodersen who I believe is an orthopedic surgeon at this clinic. She continued to have low back pain but got along fairly well. On August 5, 1981 while working at the Iowa Veterans Home, she was assisting a patient up while someone went to get help and immediately noted severe low back pain. She did finish the last hour of her shift but had pain. The patient was doing fairly well but still had problems. The following morning the patient was admitted to the hospital by Dr. Lund with the same symptoms as before. She was admitted for bed rest, heat and therapy again but did not have any traction. She was discharged on August 11, 1981 but did not do well at home. On the 17th of August she developed very severe pain with muscle spasms and was re-admitted for another ten days. She did improve and was able to return to work on October 8, 1981. Her employers tried to put her on a unit which required less lifting, however, on March 14, 1982 again, while assisting a patient on transfer, the patient again began to fall and she had immediate severe back pain again. She was admitted to the Marshalltown Hospital by Dr. Lund on March 15, 1982 and on the 31st of March, 1982, she was referred to St. Mary's Hospital in Rochester, Minnesota. There she was told that she could do no more lifting and to do daily Isometric exercises and discharged on April 3, 1982. She has not returned to nursing since this time.

The report notes that views of the lumbar spine were taken and that these reveal a completely sacralized fifth lumbar vertebra, stated to be actually a transitional vertebra. The report further states that it appears claimant has only four lumbar vertebrae rather than the usual five, giving evidence of congenital anomaly. The disc space between L5 and the sacrum is described as rudimentary and thin. The report further states that the pars space interarticularis is thin at L5 on both the right and left and there appears to be a slight increase in sclerosis in the region of the right sacroiliac joint.

The report further notes that physical examination revealed that claimant was tender with a positive instability sign at L4 and L5 and L5 and S1. It notes that her right sacroiliac joint was extremely tender and that most straight leg raising tests and pelvic torsion tests produced pain in the right sacroiliac joint. It notes that claimant has about 30 degrees of dorsiflexion and can come only within fourteen inches of touching her fingers to her toes. It reports that bending forward, flexion, and extension are painful for claimant. It also notes that claimant has ten degrees of painful extension and five degrees of painful side bending from right to left and from left to right and that pelvic torsion is restricted and uncomfortable. The report recites the following opinion:

> OPINION: This patient is suffering from two problems, and possibly even three. The first problem is the chronic, painful, sacroiliac sprain on the right, superimposed upon a congenitally anomalous area, consisting of a sacralization of the 5th lumbar vertebra. This may very well be producing some of her leg pain and radiation of pain in to the right lower extremity. Secondly; she has a sprain in the L-4, L-5 region with instability. Thirdly; it is very possible that she does have a herniated lumbar disc with sciatica on the right side as well as the so called telalgic type of radiation of pain that would occur from the sacroiliac affectation or problem on the right.

The July 7, 1983 report of Dr. Walker states that on May 27, 1983 claimant underwent a Smith-Peterson interarticular arthrodesis on the right because of chronic, painful, sacroiliac, post-traumic problem. He reports that claimant got along very nicely until about a week or two postoperatively when she noticed a stinging pain in the right sacroiliac region. This was characterized as some type of muscle or soft tissue problem.

The July 27, 1983 report of Dr. Walker states that claimant was seen in the office today and she "has a beautiful fusion." The report notes that claimant turned over in bed and pulled some muscles loose but has not displaced the graft and is doing well. The February 8, 1984 report of Dr. Walker notes that claimant is doing fairly well and opines that she has a permanent partial impairment of twelve percent of the body as a whole.

Claimant's exhibit 3 is certain medical statements relative to claimant. Defendants objected to the exhibit on the grounds of lack of foundation and relevancy. It is noted that claimant has not specifically pled the issue of entitlement to payment of medical costs under section 85.27. However, pleading before this agency is not an exercise in rigid formality. Defendants had knowledge that claimant was seeking medical treatment and

certainly that she was incurring medical costs. Claimant, at hearing, testified that she underwent surgery at Schoitz Memorial Hospital under the care of Dr. Walker. Insofar as the medical costs evidenced in the exhibits are related to care by Dr. Walker or to claimant's surgical treatment at Schoitz, those statements of costs are admitted into evidence. Admitted are: A statement of Orthopaedic Specialists dated January 10, 1983 in the amount of $180; a statement or Orthopaedic Specialists dated January 10, 1983 in the amount of $60; a statement of Clinical Radiologists, P.C., dated May 17, 1983 in the amount of $145; a statement of Orthopaedic Specialists in the amount of $1,966; a statement of Schoitz Memorial Hospital in the amount of $10,844.55; and a statement of Waterloo Anesthesia Group, P.C., in the amount of $338. Also included in the exhibits are a number of Blue Cross-Blue Shield explanation of health care benefit forms. It is impossible to determine from these which of the charges evidenced relate to claimant's surgery and other medical treatment. Therefore, defendants' objection as to lack of foundation is sustained regarding these. It is noted that the medical bill would be the best evidence of any charges incurred and recorded on the explanation of health care benefits.

APPLICABLE LAW AND ANALYSIS

We may consider the issues presented in both files simultaneously since they are substantially similar. Our first concern is whether claimant's current disability is causally related to either of her injuries.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of August 5, 1981 and March 14, 1982 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).

The requisite causal connection between claimant's work injuries and her current disabilities is not found. The record contains ample evidence demonstrating claimant experienced severe back problems of a nonwork nature at least nine months before her August 5, 1981 injury. Indeed, claimant was hospitalized for almost a month following a back injury in her home in November 1980. This supports the conclusion that claimant's severe back problem preexisted her August and March work incidents. Furthermore, the medical evidence presented does not causally relate claimant's back problem to her work. In Dr. Walker's January 10, 1983 report, he opines that claimant's physical problems result from a chronic, painful sacroiliac sprain on the right, superimposed upon a congenital sacralization of the fifth lumbar vertebra; and from a sprain in the L-4,L5 region with instability; and from a possible herniated lumbar disc. Claimant's disc herniation was confirmed and surgery was performed May 27, 1983. Certainly, claimant's congenital problem is not work related. The record does not establish that her disc herniation resulted from either of her work incidents. It is as likely this condition resulted from her earlier at-home stove incident. Indeed, the fact that claimant only experienced problems at work following that incident suggests her recurrent problems stem from that accident and not from either work incident. Claimant's work incidents did aggravate the symptoms of her preexisting conditions, however. She, therefore, was entitled to temporary total disability benefits during the time when she was actually unable to work as a result of those aggravations. The filings with this agency reflect that claimant has been paid such benefits.

Because claimant has not established a causal relationship between her work incidents and any current disability, the issue of permanent partial disability benefit entitlement need not be addressed. It is noted, however, that even had claimant shown the requisite causal relationship, she has demonstrated no loss of earnings as a result of her work incidents. Claimant's employer has promoted her twice since her work incidents. Each job transfer has resulted in higher hourly and annual wages and has decreased the level of demanding physical labor in which claimant must engage. A permanent partial disability rating of twelve percent of the body as a whole is in record. Claimant, herself, characterizes her back pain as infrequent when compared to the pain she had before surgery and as related to weather changes, however. This suggests that her continuing physical problems are not great and do not unduly restrict her in performing her current work duties.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant has a congenital sacralization of the fifth lumbar vertebra.

Claimant injured her back at home in November 1980.

Claimant temporarily aggravated her back condition in work incidents on August 5, 1981 and March 14, 1982.

Claimant received temporary total disability benefits during the time she was unable to work following those incidents.

Claimant underwent an interarticular athrodesis on May 27, 1983.

The disc herniation treated by this procedure was as likely related to claimant's earlier at-home incident as to claimant's later work incidents.

Claimant's continuing physical problems are not of a serious nature consisting only of mild back pain related to weather changes.

Claimant has received two work promotions resulting in a greater salary and less physical demands than those upon her at the time of her work incidents.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established a causal relationship between her work incidents of August 5, 1981 and March 14, 1982 and any disability.

Claimant is not entitled to permanent partial disability benefits as a result of her work incidents.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from these proceedings.

Defendants pay costs of this action pursuant to Industrial Commissioner rule 500-4.33.

Signed and filed this 31th day of December, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLIFFORD OVERTON,	:	
Claimant,	:	File No. 724424
vs.	:	A R B I T R A T I O N
OSCAR MAYER FOODS CORPORATION,	:	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 February 16, 1984, 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 February 28, 1983. The record consists of the testimony of the claimant; the depositions of Hyman J. Hirshfield, M.D., and Irwin T. Barnett, M.D.; claimant's exhibits 1 through 7; and defendant's exhibits A through E.

ISSUES

The issues for determination are:

1) Whether claimant sustained an injury arising out of and in the course of employment;

2 Whether there is a causal connection between the alleged injury and the disability; and

3 The nature and extent of disability.

STATEMENT OF THE EVIDENCE

Claimant, married and the father of one child, was 53 years old at the time of hearing. He had worked for Oscar Mayer since April 1, 1968. Claimant testified that in November 1981 he had a job as a cleanup person. He was under restrictions at the time, being confined to a weight of less than 25 pounds and was instructed to engage in no twisting or bending. In December 1981 and January 1982 the job consisted of handing out cleanup

supplies. His duties required him to bend down to get soap out of a barrel about six times an hour. He was also required to count dirty cleaning rags and was required to drag a 200 pound drum of bleach onto a stand. A certain amount of bending to the floor and standing on a cement floor was required.

Claimant testified that on January 5, 1982 he told his supervisor that the bending was making his back feel worse. The claimant testified that he also told the foreman again on January 8, 1982. On January 9, 1982 claimant contacted his family physician, Gerald J. Cooper, D.O. Claimant testified that the nature of his employment was not discussed at that time. Claimant next testified that he saw Hyman J. Hirshfield, M.D., a Chicago internist, on April 7, 1983. (Dr. Hirshfield's opinion will be discussed in more detail at a later point in this decision.)

Claimant also saw Richard L. Kreiter, M.D., a Davenport orthopedist. Claimant testified that he no longer can bend or walk a great distance. He testified that his wife has to assist him in dressing. His wife must help him dry off after bathing. He feels that he can only do a portion of the lawn when it needs mowed. He takes aspirin and Darvon occasionally. He testified that the pain in his low back radiates primarily into the left leg to his foot. He indicates that the sensation is much like that felt after a bee sting. Claimant testified that he did not go to the company nurse immediately following the injury because the company nurse was not in and the medical facility was closed. He also testified that he has left shoulder and neck pain.

On cross-examination, claimant testified that he had had prior injuries. He first went on light duty in 1977. In September 1972 claimant recalled that he hurt his back while lifting heavy barrels of meat. Claimant complained to the supervisors in the area and was "laid off." He received sick leave and unemployment.

Claimant complained to Dr. Cooper in 1968 of back pain, although his recollection would indicate that this may have been in 1972. Claimant stated that since 1972 he had been under restriction (a weight limit) for some period of time. Claimant testified that from 1974 to 1976 he had some back pain on about an annual basis. From 1976 on he was placed on permanent light duty by Dr. Cooper. In 1977 he was placed on a 25 pound weight restriction with instructions not to twist or bend. After 1977, claimant testified that he continued to have problems with his back. Claimant testified that he missed work in February 1980, in March 1980 and in April 1980, and Dr. Cooper was his treating physician at that time.

Before claimant was employed at Oscar Mayer, he was employed as a general farmhand. He testified that he did not have back problems and had treated with Dr. Cooper at any and all times when back problems would occur. Claimant did not personally give written notice of the injury, but conceded that Dr. Cooper may have given the required notice. Claimant testified that he had a further examination by Dr. Hirshfield in October 1983.

Claimant's first examination, however, was by Dr. Cooper. Reports submitted by Dr. Collins are primarily in a form for illness and accident disability. None of these reports show an occupational injury. The diagnosis is uniform in stating that claimant sustain a low back strain with probable degenerative disc disease with low back pain. Osteoarthritis, mild of the lumbosacral spine was the diagnosis given. Dr. Carter examined claimant and found him to have no distress. Claimant's gait was stable and he walked on his heels and toes without difficulty. Claimant was able to squat and rise from a squatting position without evidence of weakness. Claimant could flex forward to 90 degrees and nearly touch his fingertips to the floor in front of him. He had about 75 percent lateral bending and rotation and there was no paraspinous spasm. His straight leg raising was negative, but he showed tight hamstrings. Claimant's strength was good, knee and ankle jerks were intact, sensation was intact, and circulation was intact. A review of x-rays of the lumbosacral spine showed narrowing of the L5-S1 disc base with some degenerative changes not of a great degree. Dr. Carter diagnosed claimant's condition as a degenerative L5-S1 disc disease with mild osteoarthritis of the lumbosacral spine.

Dr. Cooper opined that he believed that the prognosis for improvement of claimant's condition was very poor. He made the statement that repeated bending and twisting would aggravate the neck and back pain if it were due to degenerative disc disease or osteoarthritis. He stated that either one of these conditions could cause a recurrent back pain.

Claimant was examined by J. H. Sunderbruch, M.D., on March 4, 1983. Dr. Sunderbruch could find no positive signs of pathology. He did not feel that claimant was disabled within the meaning of the occupational health policy. Dr. Sunderbruch felt that claimant could do sit-down jobs.

Dr. Hirshfield examined claimant on April 7, 1983. Dr. Hirshfield noted that the claimant was able to flex forward to 50 degrees and extend backwards 15 degrees. Straight leg raising from a supine position was 50 degrees on each side. X-rays of the cervical spine showed osteophytic spurring of C3, C4, C5 and C6 with bridging anteriorally between C5 and C6 and between C4 and C5. X-rays of the lumbar spine showed osteophytic spurring at L1, L2, L3 and L5. There was narrowing of the lumbosacral disc space. Dr. Hirshfield diagnosed claimant's condition as a strained injury of the left cervical trapezius muscles with associated myositus and impairment of motility of the neck. He also diagnosed osteophytic spurring of the cervical spine. Additionally, he diagnosed bilateral lumbosacral strain with sciatic radiation on each side. He noted left radiculopathy, herniated disc syndrome of the lumbar area, osteophytic spurring of the lumbar spine. He concluded that claimant sustained a recurrent injury to the neck and lower back superimposed upon previous injury, accounting for his permanent partial disability of 40 percent of each leg and permanent partial disability of ten percent of the left forearm. He stated that claimant was precluded from performing most industrial functions.

Another examination was conducted by Dr. Hirshfield on November 7, 1983. Dr. Hirshfield concluded at that time that claimant had reached a state of permanency with respect to healing and that the estimate of permanent partial impairment was the same as previously mentioned.

Dr. Hirshfield said there should not be a significant difference between an examination conducted by him and another physician on the same given day. (The leg examination by Dr. Barnett on the same day tended to be somewhat in variance with Hirshfield's evaluation.) Dr. Hirshfield felt that claimant had aggravated his preexisting condition (page 21).

Claimant was examined by Irwin T. Barnett, M.D. Dr. Barnett's examination revealed that claimant had 50 percent forward flexion, ten percent backward flexion and fifteen degrees left and right lateral flexion. The Ely sign was slightly positive bilaterally. The Gaenslen sign was positive bilaterally. The Faber sign was negative bilaterally. Straight leg raising was performed to 70 degrees on the right and to 55 degrees on the left. The Lasegue sign was slightly positive on the right and postive on the left. The achilles and patella reflexes were hyperactive bilaterally. Flexion motions of the cervical spine were 40 degrees forward and 30 degrees backward. Left lateral flexion was 30 degrees and right lateral flexion was 20 degrees. Rotation of the right was restricted 40 degrees and the left ten degrees from normal. X-rays taken at that time showed considerable arthritic change and a fuse spur of formations. There was some flattening of the third, fourth and fifth cervical disc spaces with localized spur formations and contractions of the nural canal. Interior calcification was seen at the lower margin of the sixth cervical vertebra. X-rays of the cervical spine also showed an irregularity involving the rib on the first side close to the spinal attachment. X-rays of the lumbar spine showed no bony pathology. There was narrowing of the fifth lumbar interspace. Spur formations and arthritic changes were seen in the lower lumbar spine. Dr. Barnett reached the diagnoses of (1) residuals of a low back injury with bilateral sciatic nerve root irritation; (2) narowing of the fifth lumbar disc space; (3) residuals of an injury to the cervical spine with cervical nerve root irritation; (4) cervical spinal arthritis; (5) flattening of the third, fourth and fifth cervical disc spaces with an irregularity involving the first rib on the right side possibly secondary to chip fracture; and (6) arthritis of the lumbar spine. Dr. Barnett indicated that it was probable that claimant aggravated a preexisting cervical spinal arthritis and disc abnormality as well as the lumbar spine arthritis and disc abnormalities. He noted that the claimant had a straight leg raising test on the right positive at 70 degrees and 55 degrees positive on the left. Lasegue sign was slightly positive on the right and positive on the left indicating nerve root irritation in both the lower extremities. Both achillies and patella reflexes were hyperactive bilaterally. He thought that this was secondary to nerve root irritation due to disc pathology. Dr. Barnett thought that claimant had a loss of use of 50 percent of the left lower extremity, 30 percent of the right lower extremity and 45 percent of the left upper extremity.

Dr. Barnett testified in his deposition that claimant did not report any prior back condition which was disabling. He then testified as follows:

> A. This could have been a direct result of the accident.
>
> Q. Isn't it equally possible that it could have been a pre-existed event of January of '82?
>
> A. Anything is possible. You're asking me possibilities. I would say without looking at prior X-rays, it would be difficult to really ascertain, but I would say that calcification areas such as this usually are the result of traumatic incident, and with the history of trauma to the man's neck, I would say the probability of the calcification as a result of his work related injury is more prevelent than being pre-existent to his accident.

APPLICABLE LAW

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

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 5, 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 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.

ANALYSIS

Based on the foregoing principles, it is found that claimant has failed to establish his claim by a requisite preponderance of the evidence. Although two doctors who testified in this case were able to give the necessary causal connection to find in claimant's favor, it is interesting to note that claimant's original treating physician, Dr. Cooper, did not appear to make any statement with regard to causal connection. Although not determinative of the issue in full, the consistent attribution to nonoccupational sources by Dr. Cooper was most enlightening. Dr. Cooper saw claimant a number of times and perhaps was in the best spot to ascertain whether the injury was directly related to employment or that claimant's previous preexisting condition was significantly activated thereby. Although claimant's condition of degenerative disc disease can be disasterous, the measure of damages is not sufficient in and of itself to dictate an award in claimant's favor. In all cases, claimant must prove that the condition was caused by or aggravated significantly be employment. This, claimant has not done. Therefore, claimant must not and will not prevail.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on January 5, 1982.

2. Claimant alleged that he sustained an injury on January 5, 1982 of which injury was work related.

3. Claimant has failed to prove by a preponderance of the evidence that a work-related activity caused an injury.

4. Claimant failed to prove by a preponderance of the evidence that a work-related activity aggravated his preexisting condition.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties in the subject matter.

2. It will be ordered that claimant take nothing from these proceedings.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

Costs of this proceeding are taxed to defendant.

Signed and filed this 27th day of November, 1984.

Joseph M. Bauer
JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD J. PELZER,	:	
Claimant,	:	FILE NO. 724213
vs.	:	A R B I T R A T I O N
LEVINE'S,	:	D E C I S I O
Employer,	:	
and	:	
IOWA KEMPER INSURANCE,	:	
Insurance Carrier, Defendants.	:	

FILED
DEC 27 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Donald J. Pelzer against Levine's, employer, and Iowa Kemper Insurance Company, insurance carrier. The petition filed herein characterizes the proceeding as one in review-reopening but there is no prior decision, memorandum of agreement or agreement for settlement and it is properly considered as a proceeding in arbitration. Claimant alleges that he sustained a compensable injury on January 13, 1983 by twisting his knee while alighting from a ladder.

The hearing commenced at the Pottawattamie County Courthouse in Council Bluffs, Iowa on August 31, 1984. The case was fully submitted upon conclusion of the hearing.

The record in the proceeding consists of the testimonies of Donald J. Pelzer, Harold E. Hanson, Dennis Pelzer, Barbara Carolyn Pelzer, Sam Levine and Darrin Cook. Exhibits 1 through 16 were also received into evidence.

ISSUES

The issues presented by the parties are: whether claimant sustained an injury which arose out of and in the course of his employment; whether there is a causal relationship between the alleged injury and any disability which claimant sustained; a determination of the nature and extent of any disability which is related to the alleged injury; and a determination of claimant's entitlement to benefits available under section 85.27 of the Code of Iowa, particularly as to whether or not claimant's medical expenses were related to the alleged injury. Defendants raise the defense of lack of authorization. Claimant's counsel expressly stated that there is no allegation that claimant's injury extends into the body as a whole.

It was stipulated by the parties that in the event of an award claimant's rate of compensation is $191.78 per week; that the amount charged for the medical services rendered to claimant is fair and reasonable; that to date claimant has been paid compensation in the amount of $4,219.16 with the last payment having been paid on July 7, 1983 and that claimant has received compensation for mileage in the amount of $62.40 paid on April 25, 1983 and $93.60 paid on April 28, 1983.

Defendants objected to the opinion of James Dinsmore, M.D., concerning claimant's disability as appears in exhibit 9 at page 19, line 7 and on page 48 at lines 19 through 23 on the ground that he fails to use the American Medical Association Guides to Evaluation of Permanent Impairment. Industrial Commissioner Rule 500-2.4 recognizes the AMA Guides as a guide for determining permanent partial disabilities but the rule expressly states: "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 Guides." Defendants' objection is overruled.

REVIEW OF THE EVIDENCE

Donald J. Pelzer testified that he presently resides at Clinton, Arkansas, and that until April 1, 1984 he had resided at Griswold, Iowa. His wife is Barbara Pelzer.

Claimant testified that he is presently employed at All Area Automotive in Clinton, Arkansas, where he commenced employment on May 31, 1984. Claimant stated that he had worked at Levine's for 12 years as the parts manager. He stated that his employment was terminated when he left due to an injury to his left knee.

Claimant testified that prior to January 17, 1983 his health was good. He denied any particular problem. He stated that he had a broken left femur in 1956 which ached in wet, cold weather but generally caused no other problem. He stated that his left knee would sometimes become swollen and painful.

Claimant testified that on January 17, 1983 he was at work getting a part from the top shelf using a wooden step ladder. He stated that as he climbed down and turned to take the part to the counter, he twisted his left knee and immediately experienced excruciating pain. He stated that the knee buckled but that he caught himself from falling with his right leg. He denied

having any similar pain on previous occasions.

Claimant testified that he reported the incident to Sam Levine and Ruth Watters, the bookkeeper. He stated that the accident happened at approximately 8:30 to 9:00 a.m. and that he went back to work. He stated that he called B. J. England, M.D., reported what had happened and was referred to James Dinsmore, M.D.

Claimant testified that he was examined by Dr. Dinsmore on January 19, 1983 and that Dr. Dinsmore performed arthroscopic surgery on his knee at Methodist Hospital in Omaha, Nebraska on February 2, 1983. Claimant stated that on approximately January 20, 1983 he discussed the first surgery with his employers, Morris and Sam Levine, and that Sam stated, "Do what you have to do." He agreed that he had not talked to a representative of the insurance carrier prior to that first surgery.

Claimant testified that following the arthroscopic surgery his knee continued to swell extensively if he engaged in much standing. He related that Dr. Dinsmore administered a steroid injection which helped briefly but that the pain and swelling returned in two or three days.

Claimant testified that he reentered Methodist Hospital on March 15, 1984 and underwent an osteotomy on March 16, 1984. Claimant related that following the surgery he was treated with a walking cast which was removed the last week of May. He stated that Dr. Dinsmore released him to perform light work on the last week of July, 1983. He described the restrictions as to involve no carrying or lifting and that he essentially perform paper work. Claimant testified that prior to the time the osteotomy was performed, his brother, the Levine shop foreman, advised him that Sam Levine had said that he need not return to work. Claimant testified that he did not work after the injury until he obtained his present job in Arkansas. Claimant stated that he fractured his tibia this past spring while loading a safe to move to Arkansas.

Claimant testified that the distance from his home in Iowa to the places in Omaha, Nebraska where he received medical treatment was 65 miles and that he made 11 such trips. Claimant testified that Dr. England had previously treated his knee using a wrap and Oxylid, a deflammitory medication. He stated that he saw Dr. England on January 3, 1983 with a chest cold. He was examined, received medication and did not go to work on January 3 or 4, 1983. Claimant stated that he advised Dr. England at that visit that his knee had started bothering him over the weekend and that he was taking Oxylid for it. Claimant stated that the pain he experienced on January 3, 1983 was nothing like the pain of January 17, 1983. Claimant denied slipping and falling while off work during the Christmas holidays. He stated that Darrin Cook was formerly his assistant at Levine's but that Cook now holds claimant's former position. He stated that Cook was not present when he came off the ladder and injured his knee. He stated that he advised Cook that he hurt his knee coming off the ladder and told Cook that if Sam Levine asked what had happened that such was what to tell him. Claimant denied that the other conversations related by Cook in exhibit 14 had ever occurred.

Claimant acknowledged that Richard Jacobson, another Levine employee, stated that claimant's knee was bad when he returned to work on January 5, but claimant denied such and stated that his knee was normal at that time.

Claimant agreed that he exhibited a limp from time to time over the years and stated that he did not recall showing his knee to Jacobson and Cook when he returned to work following the Christmas holidays. He denied having his leg positioned up on a desk at work a great deal of the time. He agreed that he probably had a limp on his return to work after the Christmas holidays.

Claimant stated that he had crepitation over the years, took Oxylid since a back injury in 1971 and did not dispute that he had preexisting degeneration in his knee. He agreed that he had experienced problems with both knees over the years.

Claimant denied telling Cook that he was going to injure himself prior to the time it happened and admitted that shop rumors had spread that another employee had received a settlement from workers' compensation. He could not explain why Jacobson would say that he told him that he had slipped and fallen on ice over the Christmas holidays.

Harold E. Hanson testified that he operates a grain elevator at Griswold, Iowa, and that claimant is his son-in-law. He stated that on January 15 and 16, 1983 claimant helped him move into a new home. He stated that in doing so claimant moved beds, a stove, a TV and other household items and went up and down stairs without making complaints of discomfort. He stated that he has known claimant since claimant was a boy and agreed that claimant exhibited limping and had recurring problems with his left leg. He stated that he did not know if claimant raised his knee when sitting as he did not pay much attention but stated, "I suppose maybe he did."

Dennis Pelzer testified that he is presently employed at All Area Automotive in Clinton, Arkansas, and that he had formerly worked at Levine's until he resigned in July, 1983. He acknowledged that claimant had prior problems in both knees but denied telling Cook or Jacobson that claimant had fallen on ice over the Christmas holidays. He stated that when claimant returned to work on January 5 he did his job without any apparent problems.

Barbara Carolyn Pelzer testified that claimant phoned her and reported being hurt at work. She denied that claimant had fallen or hurt his knee over the Christmas holidays and stated that he had bowled on New Year's Eve. She related discussing the injury with Sam Levine one day after work and that Sam told claimant to get his knee taken care of. She stated that Sam told him that he knew what it was like to go through life with a bad leg.

Sam Levine testified that he operates a Chrysler Plymouth dealership in Atlantic, Iowa, which has eight or nine employees. He stated that claimant had worked there for 11 or 12 years. He stated that the decision to terminate claimant's employment had been made prior to the time of the alleged injury and that the reason for the discharge was the poor economy and that claimant was the most highly paid in the parts department.

Levine testified that claimant had complained a good many times concerning his left knee and walked with a limp. He stated that claimant took time off from work to go to the doctor for his knee on occasion. He stated that when sitting at a desk claimant would habitually elevate and rub his knee.

Levine testified he is interested in the welfare of his employees but did not recall that the injury was reported to him on January 17. He stated that he got his information from Ruth Watters. He stated that the conversation of which claimant's spouse testified could have taken place but that he did not recall it. He stated that he was aware claimant was seeing a doctor in Omaha, but that he gave no permission for the second surgery as the insurance carrier handled the matter. He stated that the carrier never interviewed anyone in the shop until June, 1984 and that Cook and Jacobson did not know that a workers' compensation action was pending until the time their depositions were taken.

Levine stated that he had no policy on which doctor an injured employee should see and that the employee selects his own physician.

Darrin Cook testified that he is 21 years old and began employment at Levine's on November 2, 1982 as claimant's assistant in the parts room. Cook testified that January 3, 1983 was a Monday and that an ice storm had occurred on the preceding Sunday. He stated that claimant generally came to work with his brother, Dennis, but that on January 3, claimant was not there and Cook stated that claimant's brother told him that claimant had fallen on the ice and hurt his knee. Cook stated that when claimant returned on January 5, he was limping more than he had previously and that claimant pulled up his pant leg and showed his knee which was swollen and starting to turn black and blue. Cook stated that later in the day claimant told him and others that he had slipped on ice and fallen.

Cook testified that claimant had told Sam Levine that Cook was a terrible worker but that prior to the time claimant's son-in-law was discharged, claimant had described Cook as a good worker. Cook stated that at the end of the day Sam Levine reported the conversations which had occurred between Levine and claimant.

Cook testified that on two occasions claimant told him that it would be easier if Cook would tell Sam that claimant hurt his knee at work. Cook stated that on one occasion when claimant was on a ladder, he told Cook that he could fall off the ladder and make it happen. He stated that on January 17, claimant did not tell him that he had been injured. Cook stated that he did not know that a workers' compensation claim was pending until June, 1984 when his deposition was taken. Cook testified that after January 5, 1983 claimant was not up and down as he previously had been, but he sat at the desk, too hurt to move. He stated that claimant did not have his leg up and was sore on the following days.

Cook testified on cross-examination that claimant never said anything directly about slipping on ice and that all such information came from claimant's brother, Dennis. He also stated that he was not present on January 17, 1983 when the first report of injury was completed.

When claimant was recalled to testify on rebuttal, he stated that he recalled talking to a representative of the insurance carrier by telephone on several occasions and also by correspondence. He stated that following the arthroscopic surgery, the representative told him that further surgery would be covered but that after the osteotomy had been performed, coverage was denied. He stated that Cook was present when the first report of injury was filled out.

Exhibit 1 is a collection of reports from Dr. Dinsmore and Dr. England. On the first page of the exhibit Dr. Dinsmore opines that claimant has a permanent disability in the range of 15 to 20 percent of the left lower extremity based upon an examination performed February 7, 1984. The last two pages of the exhibit are a report from Dr. England dated May 16, 1983 which shows claimant having treatment for his knees since May 28, 1975.

Exhibit 2 is a collection of reports from Nebraska Methodist Hospital, relating to the surgeries which claimant underwent. Also included are the pathology reports. The surgery of February 2, 1983 is shown as an arthroscopic partial medial meniscectomy

of the left knee. The surgery of March 16, 1983 is described as a valgus osteotomy of the distal left femur with nail plate fixation.

Exhibit 3 is Dr. Dinsmore's records. Exhibit 4 is a collection of claimant's medical expenses.

Exhibit 5 is a collection of claimant's payroll and time records. The first page indicates that claimant received full pay for the pay periods running through the pay period ending February 4, 1983 and that part of such time was paid sick leave.

Exhibit 6 is a collection of records from Nebraska Methodist Hospital.

Exhibit 7 is claimant's affidavit of costs.

Exhibit 8 is the deposition of B. J. England, M.D., taken October 24, 1983. Dr. England related that he had been claimant's family physician since 1959 and that claimant had a long history of a painful and swollen left knee. At page 14 of the deposition Dr. England stated that claimant walked with a swaying gait and that an entry of his records dated May 28, 1979 showed claimant unable to completely flex his knee.

At page 19 of the deposition the following appears:

Q. Here's something. 1-17.

A. Okay. We did make a note, because we called over and arranged the appointment for him. That was it.

Q. There was one on 1-3.

A. Okay.

Q. What was that about?

A. Left knee bothering. Old car injury. Pain with pivoting. Yesterday the knee had swelled and then had less pain. Yeah, that's where I underlined it, because I couldn't understand that. And he had a little crepitation and I have down full range of motion on that. I apparently wasn't picking up any flexion of the disturbance he had and he had Oxalid, so I just had him use it.

Dr. England stated that pivoting was likely to bother a knee. (Deposition page 20). Dr. England stated that Dr. Dinsmore's post-operative diagnoses of degenerative arthritis, medial compartment of the left knee, degenerative tear of the medial meniscus of the left knee, and chondromalaise of the patella with arthritis of the left knee would be in agreement with his own. (Dep. p. 21). A subsequent turning with resulting pain was related in Dr. England's records. (Dep. p. 22)

Exhibit 9 is the deposition of Dr. Dinsmore taken October 19, 1983. Concerning the relationship of the alleged injury to claimant's surgeries, the following conversation appears:

Q. Dr. Dinsmore, do you have an opinion based upon a reasonable medical certainty whether there's a causal connection between the incident which occurred at work on January 17th, 1983, when the patient twisted his knee while stepping down from a ladder, and the torn meniscus which you repaired during the course of arthroscopic surgery on Feruary [sic] 2nd of 1983? Is there a causal connection between those two incidents?

A. Yes, I have an opinion.

Q. What is that opinion?

A. I feel there's a definite connection. Before this occurred, he was, as far as I know, getting along quite well. As a result of this injury, why he necessitated the surgery.

Q. And, Doctor, do you have an opinion based upon a reasonable medical certainty whether the osteotomy performed by you on March 16 of 1983, was necessitated by the injury which Mr. Pelzer suffered at work?

A. I have an opinion, yes.

Q. And what is that opinion, Doctor?

A. Well, my opinion is that had he not sustained the injury, I don't feel that he would have been in my office at this particular time. Therefore, I have to feel that there is a definite factor involved.
(Dep. pp. 17 & 18)

Dr. Dinsmore stated that claimant had not then reached optimum recovery and that he felt that the rehabilitation process would continue to occur for upwards to a year. (Dep. p. 17) He stated that claimant had a permanent impairment of 30 percent of the left lower extremity but that a final rating should wait until full rehabilitation had occurred. (Dep. p. 18 & 19) Dr. Dinsmore stated that he felt claimant's permanent impairment would give him the inability to squat and climb ladders. (Dep. p. 21) Dr. Dinsmore released claimant to light duty at work on July 26, 1983. (Dep. p. 22 & 23)

Dr. Dinsmore stated that the arthroscopic surgery revealed a tear of the medial meniscus and that it was a degenerative type tear but that how much of the tear was fresh and how much was old was difficult to tell. (Dep. p. 30)

Dr. Dinsmore stated that claimant had a fracture of his left femur which healed in a bent position causing a deformity called a "varus knee" which places the weight-bearing load on the medial aspect of the knee joint which causes it to wear out. (Dep. p. 34)

Concerning the results of that deformity the following discussion occurred:

Q. And that condition, if he did have the complaints that I've referred you to over a period of years from '75 almost up to the date of his accident, as a matter of fact, as I understand it as late as January the 6th of '83, complained of pain in his knees, would that be consistent with the wearing out that he's suffering because of what you observed on Exhibit 4?

A. Consistent, yes.

Q. And as regard to the meniscus itself, as the knee joint wears out, what is happening to the meniscus, if anything?

A. Frequently it will wear, too.

Q. And is that why or one of the reasons you say you don't know when the tear took place and call it a degenerative tear?

A. It looks degenerative. But you don't know how much of that has been changed as a result of an injury. I mean you can't really tell that. You can have a degenerative tear and have more tearing on top of it.

Q. So that the Commissioner understands the problem that is presented as shown in Exhibit 4, and what you've described happens to the knee joint, if I line up 25 of these people with that looking femur, are all 25 of them likely to have a wearing out of the knee joint because of the increased pressure on those places you've indicated?

A. These 25 have gone 25 years, have they?

Q. Yes, sir?

A. I wouldn't want to say all of them would, but I'd say the majority would.

Q. And as a matter of fact, you, as an orthopedic physician like many other of your fellows, predict that those type of things will happen, do you not?

A. That's right.

Q. And you can predict for example, if that, what's shown on Exhibit 4, was a new break and somebody--it had healed that way, as shown on Exhibit 4, and I was a young man 18, you would be able to predict to me that without further surgery, I'm likely to have knee problems?

A. I could predict it, yes.
(Dep. p. 35 & 36)

Dr. Dinsmore stated that the osteotomy surgery would have been recommended and desirable prior to January of 1983 but that the surgery would never really be imperative. (Dep. pp. 39-43)

Dr. Dinsmore associated the tear of the meniscus to the work related accident based upon claimant's relation of the problems. (Dep. p. 43) He stated that claimant had a degenerative tear which was preexisting but that the injury aggravated claimant's preexisting problem. (Dep. pp. 44 & 45)

Dr. Dinsmore stated that he used a guide issued by the American Academy of Orthopedic Surgeons to rate impairments and that he felt that the AMA Guide was insufficient because it was based strictly on range of motion and nothing else. (Dep. p. 48)

Exhibit 10 is claimant's discovery deposition.

Exhibit 11 is a deposition of Richard Ray Jacobson taken May 24, 1984. In his deposition Jacobson testified that he was the shop foreman at Levine's Chrysler-Plymouth and that he had been employed there for approximately ten years. He related that he had observed claimant having trouble with his knees over the years and had no knowledge of claimant injuring his knee while alighting or getting down from a ladder. He stated that claimant's brother told everyone at the business that claimant had fallen

on the ice over the weekend of the Christmas holidays and hurt his leg but that claimant had made no such statement directly. Jacobson recalled that when claimant returned to work following the Christmas holidays, he could hardly walk. He stated that as time passed claimant's condition improved but not greatly and that claimant had shown his knee which the witness described as swollen. Jacobson stated that after approximately two weeks, claimant still had quite a limp but that he did get himself back into a position where he could do his job. He stated that claimant could get parts but that Darrin did most of it. At page 9 of the deposition the following appears:

> Q. Did Don ever mention to you in January of 1983 that he had fallen on the ice at home?
>
> A. Just in general. He had--at break or something, we'd be there talking and he would mention about falling. Just in general.
>
> Q. Did Don ever say that he'd hurt his leg while he was working on the job, getting down from a ladder or something?
>
> A. No.

Exhibit 12 is a deposition of George Lagios taken by telephone May 17, 1984. Lagios stated that the employers decide what physician is to be used. (Dep. p. 8) He stated that he was not aware that either surgery was to be performed until after it had occurred. (Dep. p. 9)

Exhibit 13 is a set of five x-rays which show the deformity of claimant's femur, the resulting misalignment of his left knee and the result following the osteotomy.

Exhibit 14 is Darrin Cook's deposition.

Exhibits 15 and 16 are claimant's answers to interrogatories.

ANALYSIS AND APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 17, 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).

This case turns upon whether or not claimant was injured on January 17, 1983 as he described in his testimony. That incident has been related by him repeatedly at hearing, in his deposition and in the medical history which he has given in the course of his treatment. He has specifically denied that he fell on the ice or injured his knee to any appreciable extent over the Christmas holidays preceding January 3, 1983, but he did admit to a slight aggravation which occurred during that time and which quickly resolved. Claimant's brother and spouse denied any falling incident. Harold Hansen stated that claimant helped him move on the weekend preceding January 17, 1983. At no point in the evidence did claimant clearly and directly tell anyone that he had fallen on the ice. All such testimony regarding such an incident comes from statements allegedly made by claimant's brother on or about January 3, 1983.

It seems strange that Levine's would hire an assistant for claimant and then, in approximately two months, decide to terminate claimant's employment due to a bad economy, with the decision having been made before claimant's injury but announced subsequent to it. Cook now has claimant's old position and Jacobson now has the position formerly held by claimant's brother. Claimant, his brother, Cook and Sam Levine all testified at hearing and their appearance and demeanor were observed. It is therefore found that claimant did not fall and injure his knee over the Christmas holidays and that he did injure his knee on January 17, 1983 when turning as he had stepped off a ladder in the parts room at Levine's Chrysler-Plymouth in Atlantic, Iowa.

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.

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 claimant has the burden of proving by a preponderance of the evidence that the injury of January 17, 1983 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).

A cause is proximate if it is a substantial factor in bringing about the result. It need not be the only cause. Blacksmith v. All American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

Claimant's knee had been troublesome for many years. He had always been able to work, with only a few isolated absences, prior to January 17, 1983. Dr. Dinsmore characterized the incident as the aggravation of a preexisting condition and stated that if claimant had not sustained the injury he did not feel that claimant would have been in his office at the times he saw claimant. It is therefore found that claimant's injury was a traumatic injury and was not merely the manifestation of the normal course of his preexisting physical impairment.

It is clear that claimant had a preexisting disability which was ascertainable and existed independently before the injury of January 17, 1983. Apportionment of his present disability is indicated. Varied Enterprises Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). In his most recent report, exhibit 1, Dr. Dinsmore placed claimant's permanent partial disability at 15 to 20 percent of the left lower extremity. In exhibit 9 at page 38 he placed claimant's preexisting impairment in the range of 10 to 15 percent of the knee. Such ratings, although inconsistent with the AMA Guides, stand uncontradicted and will be adopted. Accordingly, it is found and concluded that claimant sustained a permanent partial disability of five percent of the left lower extremity as a result of the injury of January 17, 1983.

Dr. Dinsmore related the injury to both surgeries which claimant underwent. There is no medical opinion evidenced in the record which is conflicting. At first glance it would appear that the osteotomy which was performed to provide better alignment of claimant's knee joint was rendered necessary because of the old fracture of the femur. Such is essentially true. It is a procedure which could and possibly should have been previously done. This case is, however, much like Hamilton v. Dailey Industries Inc., III Iowa Industrial Commissioner Report 118, Appl. Decn. 1982, Appl. to District Court, Affirmed; Appl. to Supreme Court, Affirmed by Court of Appeals (unreported). In Hamilton, claimant had a preexisting osteomyelitis as a result of a gunshot would he suffered while serving in Viet Nam. His work related injury caused a flareup of the osteomyelitis and claimant eventually elected amputation of his leg to resolve the condition. The work related injury was slight, but the results were substantial and held to be work related. In this case, claimant was suffering from the misalignment of his knee joint which resulted from the earlier fracture of his femur. The actual injury he sustained was slight. Arthroscopic surgery would normally be expected to resolve the injury. Claimant's deformity was such that a normal resolution did not occur and it was necessary to perform the osteotomy in order to obtain a resolution of the results of the January 17, 1983 injury. It is therefore found and concluded that a causal relationship does exist between the injury of January 17, 1983 and both surgeries which claimant underwent.

Under section 85.27 of the Code of Iowa the employer has the right to select the care an injured employee will receive and the responsibility to promptly provide reasonable care. George Lagios stated that the insurance carrier allows the employer to make that determination and Sam Levine stated that his company allows the employee to select his own medical care. Claimant initially saw Dr. England and then went, through a referral, to Dr. Dinsmore. This was all accomplished without objection from

the employer or insurance carrier. Neither sought to actively follow the course of claimant's treatment. Where an employer fails to monitor the care an employee is receiving it cannot later complain that the care was unauthorized. Zimmerman v. L. L. Pelling Co., II Iowa Industrial Commissioner Reports 462 (App. Decn. 1982). Lagios subsequently stated that the first surgery was authorized because at the time he thought that a work related injury occurred but that the second injury was not authorized because the employer denied the compensability of the injury. If the employer denies the compensability it cannot guide the medical treatment. Barnhart v. M.A.Q. Inc., I Iowa Industrial Commissioner Report 16 (Appl. Decn. 1981). It is therefore found and concluded that claimant's medical care was not, in any part, unauthorized and that defendants are liable under the provisions of section 85.27 of the Code of Iowa for the costs thereof as shown in exhibit 4.

Claimant's healing period ended at the earlier of the three events specified by section 85.34 of the Code of Iowa. He returned to work on May 31, 1984. He was released to return to light duty work in July, 1983 but the light duty restrictions did not make him medically capable of returning to employment substantially similar to that in which he was engaged at the time of injury. Dr. Dinsmore's answer at page 17 of exhibit 9 relating to it taking upwards of a year for claimant to arrive at optimum recovery appears to compute that year from the date of the second surgery as indicated in the answer which first appears at the top of page 17 in exhibit 9. Claimant fractured his tibia while moving to Arkansas on approximately April 1, 1984. Engaging in the type of activity from which the fracture resulted would indicate that claimant had either reached the end of significant medical improvement or that he was capable of returning to employment substantially similar to that in which he was engaged at the time of the injury by the time of the move which claimant indicated as being April 1, 1984. Claimant's surgery was performed March 16, 1983, and it is accordingly found that his healing period ended one year thereafter, namely March 15, 1984. It appears that claimant was paid for all work performed through February 4, 1983, and his healing period will accordingly start on February 5, 1983. This computes to a total of 57 6/7 weeks.

Claimant's affidavit of costs is consistent with Industrial Commissioner Rule 500-4.33 except that the expert witness fee charged by Dr. Dinsmore will be limited to $150.00 in accordance with Iowa Code section 622.72.

FINDINGS OF FACT

1. On January 17, 1983 claimant was a resident of Iowa, employed by Levine's Chrysler-Plymouth in Atlantic, Iowa working as a parts manager.

2. On January 17, 1983 claimant was injured when he twisted his knee after alighting from a ladder in the process of obtaining a part from the parts bin at his employer's place of business.

3. Following the injury, claimant was medically incapable of performing work in employment substantially similar to that he employed at the time of the injury periodically until February 2, 1983 when claimant underwent surgery. From and after February 2, 1983 claimant remained medically incapable of performing work in employment substantially similar to that he performed at the time of the injury until March 15, 1984 when he reached the point that it was medically indicated that further significant improvement from the injury was not anticipated, and he became medically capable of returning to employment similar to that in which he was engaged at the time of the injury.

4. Claimant has a 15 to 20 percent impairment of the left lower extremity. He had a preexisting 10 to 15 percent of the left lower extremity and sustained a five percent impairment of that extremity as a result of the injury.

5. Claimant's rate of compensation is $191.78 per week.

6. Claimant had a preexisting misalignment of his left knee joint arising as a result of a deformity of his left femur which resulted from an automobile accident.

7. The preexisting misalignment of claimant's knee interfered with the recovery from the injury of January 17, 1983.

8. The osteotomy performed March 16, 1983 was performed in order to permit claimant to recover from the injury of January 17, 1983.

9. Claimant had a preexisting degenerative tear in his medial meniscus.

10. The injury of January 17, 1983 was an aggravation of claimant's preexisting problem in his medial meniscus and a substantial factor in bringing about the two surgeries and claimant's disability.

11. The medical care which claimant received from Methodist Hospital, Dr. Dinsmore, Dr. Watters, the Center for Diagnostic Imaging and the Pathology Center was reasonable and necessary for treatment of the injury of January 17, 1983.

12. In obtaining medical care claimant incurred medical expenses, and the portion of which that has not been paid by the defendants is as follows:

Methodist Hospital	$3,819.09
Dr. James W. Dinsmore	1,635.25
Dr. Chester H. Watters, III	220.00
Center for Diagnostic Imaging	33.00
Pathology Center	152.30

13. The other expenses of claimant's treatment for the injury have previously been paid by defendants. In order to obtain medical care for the injury claimant traveled a total of 1,430 miles for which defendants have previously paid him $156.00.

14. In the prosecution of this case claimant incurred costs as shown in exhibit 7 in the total amount of $747.57.

15. Claimant continued to receive his regular pay and wages from his employer through February 4, 1983.

16. Claimant and the witnesses called by him to testify are credible.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and its parties.

The injury claimant sustained to his left knee on January 17, 1983 arose out of and in the course of his employment with Levine's.

The injury of January 17, 1983 was a proximate cause of claimant's two surgeries, the cost thereof and of his inability to work.

Defendants are entitled to credit for the payment of wages continued through February 4, 1983, and claimant's healing period runs from February 5, 1983 through March 15, 1984, a period of 57 6/7 weeks.

Claimant is entitled to receive 11 weeks of compensation for a five percent impairment of his left leg with payment thereof commencing March 16, 1984.

After all credit for previous payments is allowed, claimant is entitled to receive reimbursement of his medical expenses in the total amount of $5,859.64.

Claimant is entitled to compensation for his travel expenses, after credit for previous payments is allowed, in the amount of $187.20.

Claimant is entitled to reimbursement of his costs in the amount of $484.56.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant fifty-seven and six-sevenths (57 6/7) weeks of compensation for healing period at the rate of one hundred ninety-one and 78/100 dollars ($191.78) per week commencing February 5, 1983. Defendants shall receive full credit for the four thousand two hundred nineteen and 16/100 dollars ($4,219.16) previously paid which represents twenty-two (22) weeks of compensation leaving an unpaid balance due of thirty-five and six-sevenths (35 6/7) weeks.

IT IS FURTHER ORDERED that defendants pay claimant eleven (11) weeks of compensation for permanent partial disability at the rate of one hundred ninety-one and 78/100 dollars ($191.78) commencing March 16, 1984.

The entire amount of healing period and permanent partial disability compensation is past due and owing and shall be paid in a lump sum together with interest at the rate of ten percent (10%) per annum from the date each unpaid weekly payment became due.

IT IS FURTHER ORDERED that defendants pay claimant's medical expenses as follows:

Methodist Hospital	$3,819.09
Dr. James W. Dinsmore	1,635.25
Dr. Chester H. Watters, III	220.00
Center for Diagnostic Imaging	33.00
Pathology Center	152.30
Total	$5,359.64

IT IS FURTHER ORDERED that defendants pay claimant travel expense in the amount of one hundred eighty-seven and 20/100 dollars ($187.20).

IT IS FURTHER ORDERED that the defendants pay the costs of this action in the amount of four hundred eighty-four and 56/100 dollars ($484.56).

Defendants shall file a final report within twenty (20) days from the date of this decision.

Signed and filed this 27th day of December, 1984.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

REG L. PETERSEN,

Claimant,

s.

OWA BEER & LIQUOR
ONTROL DEPARTMENT,

Employer,

nd

TATE OF IOWA,

Insurance Carrier,
Defendants.

FILED

NOV 1 1984

IOWA INDUSTRIAL COMMISSIONER

File No. 649032

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed September 17, 984 the undersigned deputy industrial commissioner has been ppointed under the provisions of Iowa Code section 86.3 to ssue the final agency decision in this matter.

Defendants appeal from a decision filed May 30, 1984 which rdered them to pay healing period benefits, 100 weeks of ermanent partial disability and medical benefits.

The record on appeal consists of a transcript of the hearing; ortions of claimant's exhibit 1; claimant's exhibits 2 through ; sections six and seven of defendants' exhibit A and defendants' xhibits B through D. All evidence was considered in reaching his final agency decision.

This decision will modify the decision reached by the earing deputy.

ISSUES

The issues on appeal as stated by defendants are as follows:

1. Is there sufficient evidence to support the finding of a causal connection between Claimant's alleged injury and the injuries of which he now complains?

2. Is there sufficient evidence to support an award of healing period benefits for the period beginning on September 24, 1980, and running through June 30, 1982?

3. Is there sufficient evidence to support an award of permanent partial disability of 20% of the body as a whole?

4. In arriving at the figure of 20% of the body as a whole, the Deputy Industrial Commissioner erred in not making an assessment and then indicating how much he was increasing the award for the Employer's alleged refusal to offer or continue Claimant's employment.

5. The Deputy Industrial Commissioner erred in not receiving all sections of Defendants' Exhibit A into evidence.

STATEMENT OF THE CASE

Twenty-five year old single claimant who quit school in tenth grade, testified to a course in basic mechanics with no other vocational or on the job training. He did try to get a GED in late 1981 or early 1982. While he was in school he did dishes for a fast food establishment for a month. At the time he left school he was working part-time for a body and paint company doing cleanup, driving trucks, running parts and making minor repairs at minimum wages. The work required heavy lifting. After a year or more he went to another body repair company where he did body work and painting. He took a reduction in pay and again had to do heavy lifting in light body work. He was able to get some training in both body work and use of hand power tools. After three months he was laid off because of lack of work.

Claimant stated that before his injury he had no limitations relating to his health with no trouble lifting, bending, twisting or turning. He estimated he could lift up to 150 pounds. He denied missing work.

Claimant commenced work for defendant employer on June 2, 1978. He loaded three to four trucks a day, sometimes with assistance and sometimes with no help, and was paid between six and seven dollars an hour. A fully loaded truck would carry 1200 cases of liquor. After approximately eight months, he got a chauffer's license and was promoted to truck driver. His driving responsibilities included unloading. He received an increase in pay as well as insurance and retirement benefits. His work days ranged between twelve and seventeen hours for an average work week of forty two to fifty hours, although some weeks could be as little as fifteen or twenty hours.

Claimant recalled the circumstances surrounding his injury of September 24, 1980 thusly: He was going to northeastern Iowa. He left the warehouse between 11:30 p.m. and 12:30 a.m. He had no trouble unloading at his first two stops. At his third stop, Postville, he was unloading without help. He was a tenth of the way through the load. He heard what sounded like a snapping or breaking. He tried to hold cases on the track on which he was moving them. In the process of doing that he felt a snap in his back. He had pain between his shoulder blades. He finished unloading at a slower rate. As he went on to his next spot, he noticed bumps as he drove the truck and difficulty shifting. His pain became deeper.

During the rest of the day his pain increased in between his shoulders and into his lower left back. The pain went into the right side of his neck. He had a headache and became nauseous. He needed help to get out of his truck. He went to the hospital where x-rays were taken. He was given a slip to see Dr. Flapan. He saw Dr. Flapan who referred him to Dr. Friedgood, a neurologist, who hospitalized him for therapy.

Claimant asserted that although he complained of pain between his shoulders, the pain in his lower back was so severe that his doctors concentrated on that area. He also said that he had shooting pain in his lower left back and right neck, numbness in his left arm and weakness in his legs.

Eventually he tried to return to work with a limitation of twenty pounds. He did his regular work for two days and then quit because of severe pain. He was, at that point, referred by Dr. Friedgood to Dr. McClain. Dr. Connair treated him with manipulation.

Claimant testified to experiencing some periods of depression and negative feelings about himself and his ability to work. Claimant reported that he attempted to return to work in January of 1982. He was informed by Dick Kiefer that he could not handle the job and that he would have to be terminated.

Claimant said he was accepted for schooling for airline travel and ticket agencies, but that he did not have enough money to attend and he did not have a GED. He has tried self-employment by renting a building and by buying and selling cars. He does light body work himself and uses his father and brother to help with heavier things. He hires some work done at the body shop. He testified that a productive day would be "maybe three hours a week." He did not think he could be employed at light body work because he is unable to stand.

Claimant indicated that his activities have changed to the point that he sits at home and watches TV. He claimed that he is in pain and difficult to get along with. He takes aspirin. He uses care in bending to avoid strain to his back. He tries not to lift more than twenty pounds. He continues to have headaches, lower back pain with activity, knifing pain between his shoulders with activity, dizziness, and numbness in his left arm and sometimes in his left leg.

The gist of claimant's testimony was that he had not withheld any medical history from any of his doctors. Claimant disagreed that when he saw Dr. Flapan on September 29 the motion of his back was good and his discomfort was only occasional. Claimant was unsure whether on October 8, 1980 Dr. Flapan wished him not to return to work because of his lightheadedness. He assumed, however, he was referred to Dr. Friedgood because of the light-headedness.

Claimant said that he stayed at home most of the two weeks as he was told to but he thought that he had not stayed at home enough in that he was placed in the hospital for two weeks. He did not know whether or not he had been told to rest for an additional two weeks at work, but he said that if he had, that direction was in conflict with what Dr. Connair had told him. Later he was told he had not seen Dr. Connair at that time.

Claimant asserted that he was on either sick leave or leave of absence for all of 1981 and up through June of 1982 and that he was never told he must reapply for work. He denied seeking union help because of loss of his job. Rather he said he was seeking workers' compensation.

Claimant acknowledged falling and breaking his hand since September 24, 1980. He also had a cut on his other hand and had stitches when he was trying to collect money from someone. He finally recollected an incident of December 21, 1980 in which he was taken to the hospital emergency room after he was hit in the jaw. He did not recall talking to either Dr. McClain or Dr. Connair about that incident as it had not pertained to his back. He claimed that he had no back pain at the time of the incident.

Claimant asserted that when he was allowed by Dr. Friedgood to return to work he was cautioned not to exert himself and to be careful. He thought that he was limited to lifting not in excess of twenty pounds.

Claimant acknowledged receiving a letter of January 5, 1981 from Dick Andrews which told him his compensation benefits could be terminated unless he supplied additional medical data. He said that he presented what he had been given by the doctors.

Claimant remembered getting a letter from Ronald Fine and he admitted that he was angry with Fine. Claimant said that he trusted the state to determine whether his was a medical leave or workers' compensation matter. Claimant agreed that he

received a letter on June or July 1 of 1982 [sic] which said he was to report to work, and he did report. He claimed that he was told he would be terminated but that he got no letter terminating him. Claimant also acknowledged receiving a letter of June 11, 1981.

Richard L. Andrews, workers' compensation administrator for the state, wrote to claimant on January 1, 1981 to advise him that there was a lack of medical data to support his continuing disability and that his workers' compensation benefits would be terminated in thirty days.

A letter to claimant from Ronald D. Fine, personnel and property manager for the Iowa Beer and Liquor Control Department, dated May 7, 1981 indicated that if claimant did not present a written request for medical leave of absence without pay by May 15, 1981 he would be terminated and told him that he had been placed on medical leave in anticipation of getting a request.

A second letter from Fine dated June 11, 1981 informs claimant that information has been received from his doctor. It also explains that claimant is expected to report for work as of June 15, 1981 or he will be terminated.

A pay stub shows claimant worked twenty-four hours in the period from December 19, 1980 to January 1, 1981.

David L. Friedgood, D.O., neurologist, gave claimant a return to work slip for December 8, 1980. In a letter dated February 4, 1981 he reported his treatment of claimant for back pain after a work accident. He states that he last saw claimant on January 14, 1981 at which time claimant was suffering from a lumbosacral strain for which he was referred to Dr. Connair.

Claimant was first seen by Robert J. Connair, M.D., certified physiatrist on January 15, 1981 at which time he complained of back problems resulting from an injury at work when he bent over, lifted and twisted at the same time. Dr. Connair diagnosed a lumbosacral strain with cervical and thoracic dysfunction. Claimant was treated with osteopathic rehabilitation including corrective manipulation.

A letter dated February 10, 1981 from Roxanne R. Beck, secretary to Dr. Connair, states that claimant is unable to return to work and would be unable to perform his duties. A series of insurance forms from Dr. Connair signed by his secretary found claimant continuously, totally disabled and unable to return to his regular occupation.

On March 23, 1983 Dr. Connair wrote that although claimant had not reached his maximum healing, his condition had plateaued on or about January 1, 1982, the date he returned to work. He assessed no permanent impairment rating but he placed permanent restrictions on repetitive bending, lifting, twisting or stooping as well as a fifty pound weight limit for an indefinite period.

An x-ray record from December 21, 1980 shows that claimant had normal bilateral tempromandibular joints following being struck in the left side of the face.

APPLICABLE LAW AND ANALYSIS

The last issue raised by defendants will be considered first and that is whether the deputy erred in failing to receive all of exhibit A. The documents excluded are an emergency room visit on September 29, 1980, office visits on October 6, 1980 and October 17, 1980 as well as a phone call on October 8, 1980, a report of electromyography and nerve conduction, an emergency room report, a letter from Dr. McClain and a letter from Dr. Friedgood. The latter document is part of claimant's exhibit 1.

Defendants point out that claimant was asked through interrogatories to disclose each and every injury from birth to death. Claimant responded with these: tonsils and adenoids at age ten, left hand age eleven and severe cut to his hand when he fell into a snowblower. Defendants characterized the information sought to be admitted as "classic impeachment with no relevancy until claimant denied its existence."

Industrial Commissioner Rules 500-4.17 and 4.18 provide:

> 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).
>
> 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 decisionmaking 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.

Also relevant is a portion of Iowa Code section 85.27 which dictates: "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."

Part one of defendants' exhibit A clearly is relevant in that it relates to claimant's initial treatment. It should have been served. A similar finding can be made regarding Dr. McClain's letter. The report on electromyography is less vital in that the evaluation was ordered by Dr. Friedgood who presumably took those determinations into account in his treatment.

The exchange of medical information in workers' compensation cases is vital. Only page one of section 7 of the prepared exhibit might be under some conditions considered impeachment. No error is found on the part of the deputy in failing to admit all of defendants' exhibit A.

The next issue to be considered is whether or not there is evidence to support a finding of a causal connection between claimant's injury and his disability.

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

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).

It is important to keep in mind that "[a] cause is proximate if it is a substantial factor in bringing about the result. [Citations omitted] It only needs to be one cause; it does not have to be the only cause." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

Claimant testified prior to his injury he had no limitations on his movements; he could lift up to 150 pounds; and he had not missed work for health reasons. At the time of hearing claimant described an injury in which he felt a snap in his back and then pain between the shoulder blades. Later in the day the pain went into his lower left back and the right side of his neck.

Dr. Friedgood states his treatment of claimant was for a lumbosacral strain related to his accident at work. Claimant did not have radiating pain and his neurological was normal. Dr. Friedgood released claimant for return to work on December 8, 1980. Slightly more than a month after that release claimant was referred to Dr. Connair.

Dr. Connair first saw claimant on January 1, 1981. In his letter of March 23, 1983 he related his treatment of claimant to his work injury. Dr. Connair's reports consistently relate his treatment to the injury of September 24, 1980.

Defendants argue that no expert with a complete and accurate medical history connected claimant's present complaints to his injury. More specifically, defendants are concerned with the medical experts not having knowledge of claimant's injury to his jaw in December of 1980. The blow claimant received at that time was to the left side of his jaw. X-rays were confined to the tempromandibular joints. Presumably had he been making complaints of other portions of his body, additional x-rays would have been ordered. Although Dr. Connair has provided treatment to the thoracic and cervical areas of the spine, his diagnosis has remained lumbosacral strain. The medical evidence coupled with claimant's own testimony is sufficient to support a finding that claimant has disability which is causally related to his injury of September 24, 1980.

Defendants third and fourth issues will be combined for consideration as they both relate to the award of twenty percent permanent partial industrial disability. Defendants argue that the deputy has assigned an undisclosed amount based on "tradional

industrial ratings" to which he added an additional amount because "the Employer failed to retain or offer comparable work to the employee." They further purposed that the two figures should be broken down with specific findings made with respect to the various aspects going to make up the twenty percent.

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."

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).

As the commissioner has frequently pointed out, no weighting guidelines have been assigned by the court. The factors in industrial disability cannot be fragmented. They must be considered together. The deputy's decision showed that he gave consideration to the various factors. He made specific findings of fact relating to claimant's age, injury, education, permanent impairment, past work experience, present work situation and income and the termination of his employment. His analysis section contains this statement: "When all material factors are considered, it appears that claimant's disability, when measured industrially, is 20 percent." The deputy discussed the factors. He synthesized the evidence presented. He reached a conclusion. The undersigned agrees with the twenty percent assigned.

Claimant's injury was not as dramatically traumatic as some; however, prior to the injury he had no back complaints. Since his injury he has complained of headaches, low back pain, pain between the shoulders with activity, dizziness and left sided numbness. He has continued to seek medical care for his condition from Dr. Connair who relates his treatment to claimant's injury.

Claimant is permanently restricted from repetitive bending, lifting, twisting and stooping. Those restrictions make it unlikely claimant would be able to unload his truck as he did prior to his injury. On the other hand, he would not seemingly be barred from truck driving activity in which he neither loaded nor unloaded. Claimant's limitations also preclude his doing autobody work -- an occupational area in which he had some minimal on the job training. Claimant's earnings before he began work for defendant employer were not great, but at the time of his last work he was making $6.70 per hour. Claimant is attempting to run his own business. His earnings in that regard have been marginal. The deputy noted claimant's failure to seek employment on a regular basis and his contentment with his self-employment situation. Claimant has had a reduction in his actual earnings which range from slight in those months in which he earns as much as $1,000 to considerable in those months in which he gets $400 or even less.

Claimant is young, but his education is limited. His potential for further education or vocational rehabilitation was not explored. His attempt to get a GED was unsuccessful.

Claimant testified that he began talking to Kiefer about returning to work in the summer of 1982 at which time he thought he needed to return to work or face termination. He claimed that he was told he could not handle the job and must therefore be terminated. When he asked for work in the warehouse, there was no attempt made to accommodate him. In McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) which was followed by Blacksmith, 290 N.W.2d 348 the Iowa Supreme Court said at 192 that "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" and that "a claimant's inability to find other suitable work after making bona fide efforts...may indicate that relief should be granted."

The final issue and perhaps the most difficult one in this case is the nature of healing period. The hearing deputy awarded a period beginning September 24, 1980 and running through June 30, 1982.

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 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.

As can be seen in the statute, there are three points at which healing period can be terminated -- the return to work is achieved; maximum medical recuperation is accomplished; or capacity for returning to substantially similar work is reached. The record herein is not very clear, but it is known that claimant tried to go back to work on two occasions in late 1980. At some time he began his own business and at that point met the return to work standard. Because of restrictions on repetitive bending, lifting, twisting and stooping, claimant is incapable of going back to the job he was doing at the time of his injury. Therefore, the third ground for termination is not a viable alternative.

The hearing deputy ended healing period at a point where "further significant medical improvement could not be expected." This deputy commissioner agrees that the maximum medical recuperation test is the one to be applied, but she does not assent to the date chosen. This claimant had a lumbosacral strain. A healing period of more than twenty months is unusual in such a case. See Iowa Code section 17A.14(5). Claimant was referred by Dr. Friedgood in January to Dr. Connair. The insurance forms from Dr. Connair's were signed by his secretary as were letters from his office prior to March 23, 1983. Treatment notes from Dr. Connair indicate his treatment varied little from the time it was instituted. In his letter of March 23, 1983 Dr. Connair wrote: "Mr. Petersen has not yet reached his maximum healing period but he did reach a plateau on or about July 1, 1982 which is the date that he returned to work."

It seems probable that Dr. Connair was confused about claimant's attempt to return to work date. Claimant himself was confused about dates. Attorneys for the parties suggest events about which claimant was confused happened in 1981. The confusion in the record is not satisfactorily resolved. However, the greater weight of the evidence is that claimant's third attempt to return to work was on June 15, 1981. A letter from Fine instructs him to report on that date. Claimant's healing period will be found to end at that time. The undersigned is aware that claimant continued to receive treatment from Dr. Connair. The industrial commissioner repeatedly has held that healing period does not continue when a claimant is receiving medical treatment that is maintenance in nature. Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112 (Appeal Decision 1982).

Based on claimant's testimony at the time of hearing and the exhibits offered, the undersigned finds claimant's total mileage

to be 2,688 miles which entitles him to $568.40 based on the appropriate rate at the time the expense was incurred.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-nine years of age.

That claimant has a ninth grade education.

That claimant has some on the job training in vehicle body work and use of hand power tools.

That claimant has work experience as a dishwasher, cleanup person, truck driver and parts runner.

That claimant began work for defendant employer on June 2, 1978 as a truck loader.

That claimant has a chauffer's license.

That claimant was paid $6.70 per hour for his last work for defendant employer.

That claimant later became a truck driver for defendant employer.

That claimant's driving responsibilities included unloading.

That on September 24, 1980 claimant injured his back as he was unloading a truck.

That claimant attempted to return to work on two occasions.

That on claimant's third attempt to return to work he was told he could not handle the job and was terminated.

That claimant has a business of his own in which he buys and sells cars.

That claimant receives help in his business from his brother and father and hires some work done.

That claimant's earnings in his present business have varied, but he has made as much as $1,000 in a month.

That claimant's current complaints include headaches, lower back pain and pain between his shoulders with activity, dizziness and numbness in the left arm and sometimes his left leg.

That since his injury of September 24, 1980 claimant has had two injuries to his hands -- one a break and one involving stitches.

That claimant received emergency treatment on December 21, 1980 after he was hit in the jaw.

That claimant is permanently restricted from repetitive bending, lifting, twisting or stooping.

That claimant incurred medical and mileage expenses as a result of his injury on September 24, 1980.

That claimant's treatment by Dr. Connair varied little.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has permanent partial disability related to his injury of September 24, 1980.

That claimant is entitled to healing period benefits from September 24, 1980 to June 15, 1981.

That claimant has a permanent partial industrial disability of twenty (20) percent of the body as a whole.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant healing period benefits from September 24, 1980 to June 15, 1981 at a rate of one hundred fifty-seven and 47/100 dollars ($157.47).

That defendants pay claimant one hundred (100) weeks of permanent partial disability benefits at a rate of one hundred fifty-seven and 47/100 dollars ($157.47) per week commencing on June 15, 1981.

That defendants pay medical expenses incurred with Robert J. Connair, D.O., totalling one thousand sixty-five dollars ($1,065) including reimbursement to claimant for the amounts he personally paid.

That defendants pay claimant mileage expenses totalling five hundred sixty-eight and 40/100 dollars ($568.40).

That defendants pay all amounts due and owing in a lump sum.

That defendants be given credit for amounts previously paid.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33 including twenty-five dollars ($25) for a medical report from Dr. Connair.

That defendants file a final report within sixty (60) days from signing and filing of this decision.

Signed and filed this 19 day of November, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SEVIN PETTIE, Claimant, vs. J. I. CASE COMPANY, Employer, Self-Insured, Defendants.	:	File No. 514069 R E V I E W - R E O P E N I N G D E C I S I O N

FILED
NOV 26 1984
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding review-reopening brought by Sevin Pettie, claimant, against J. I. Case Co., self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on August 7, 1978. It came on for hearing on April 25, 1984 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 August 14, 1978. A memorandum of agreement was received on the same date. Claimant was paid temporary total disability.

The parties stipulated to a rate of $189.51.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, a report from F. W. Smith, M.D., dated August 1, 1978; claimant's exhibit 2, a group of exhibits from L. J. Twyner, M.D.; claimant's exhibit 3, records from defendant's medical department; claimant's exhibit 4, a letter and records from Steven R. Jarrett, M.D.; claimant's exhibit 5, reports from Franciscan Hospital; claimant's exhibit 6, letters and notes from Richard L. Kreiter, M.D.; claimant's exhibit 7, a letter and notes from Frank I. Russo, M.D.; claimant's exhibit 8, letters from Philip A. Habak, M.D., and records from Mercy Hospital; claimant's exhibit 9, a letter from Steven C. Chang, M.D., dated April 7, 1981; claimant's exhibit 10, a letter from C. R. Fesenmeyer, M.D., dated September 22, 1982; claimant's exhibit 11, office notes from Raymond W. Dasso, M.D.; defendant's exhibit A, a statement of claim signed by claimant on March 13, 1977; defendant's exhibit C, the deposition of claimant; defendant's exhibit D, the deposition of claimant taken in another action; defendant's exhibit E, a report regarding claimant's heart surgery; defendant's exhibit F, a report of a hospital admission of January 6, 1978; defendant's exhibit G, a memo from Dr. Habak dated August 30, 1982; defendant's H, physical therapy notes;

defendant's exhibit I, a letter from Dr. Fesenmeyer dated August 2, 1979; defendant's exhibit J, medical records from defendant; defendant's exhibit K, claimant's answers to interrogatories; defendant's exhibit L, the deposition of Dr. Fesenmeyer; and defendant's exhibit M, the deposition of Dr. Twyner. Defendant's objection to claimant's exhibits 6, B, 11A, and a portion of 11B are sustained. Claimant's objection to defendant's exhibit B also is sustained. Claimant submitted a brief.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury of August 7, 1978 and any disability he now may suffer and whether or not claimant is entitled to healing period or permanent partial disability benefits. There is also an issue as to the applicability of Iowa Code section 85.38(2).

STATEMENT OF THE CASE

Forty-five year old claimant who has an eighth grade education, testified of work experience as an assembler of hydraulic pumps and for a shoe company prior to beginning work for defendant in 1972. After a year of what he called short term disability beginning on April 15, 1980, he went on long term disability which amounts to $870 per month. He received some workers' compensation as a result of an injury on August 7, 1978.

At the time of hearing he recalled his injury thusly: He started work at 7:00 a.m. Because of a shortage of work, he was taken from his regular job and placed on pin dipping. The pins were used to make large chains for heavy equipment. Completed chains weighing about 1500 pounds were removed from a table by hoist. When he did not get a chain off fast enough, the operator started a new chain. He had to climb on the table which had oil on it. As he was yanking on something, he fell from the table into a tub for used parts scraping his low backside and left shoulder. He was upset. He was sent by his foreman to the nurse. His left middle finger was bleeding. A bandaid was applied to his hand. It was too late for him to see a doctor that day, but he saw Dr. Jarrett the following day. His upper neck and shoulder hurt. Dr. Jarrett did nothing that particular day, but eventually he used ultrasound to the upper neck and lower back and sent claimant to mental health for treatment in dealing with the death of his son who choked to death on December 9, 1977.

He also saw Dr. Fesenmeyer who checked his back and suggested he go to mental health. Dr. Fesenmeyer was seen both before and after the accident. Dr. Twyner put him on light duty before the accident. He also was sent to Dr. Kreiter whom he did not tell of his work injury. The latter physician gave him a brace with plastic stays and prescribed exercises. He also was placed under a twenty-five pound weight restriction. In December of 1979 he saw Dr. Russo who treated him with physical therapy. Dr. Verma, too, tried exercises for the low back. By the time he saw Dr. Verma, claimant's upper back and neck complaints had gone away.

Claimant reported that on April 1, 1980 he had a heart attack. Shortly thereafter he was switched from workers' compensation to accident and sickness and short term disability was started. He later had a second heart attack. He then had bypass surgery. He claimed that he last saw a doctor for right sided chest pain in 1982. He said that he is under no restrictions attributable to his heart condition and that he was released by Dr. Habak on November 15, 1982.

Prior to November 15, 1982 claimant had seen Dr. Fesenmeyer who did not restrict his activity. Even though the twenty-five pound restriction remained in force, he went back to his regular job in track assembly. The procedure at this time was changed so that he had to reach up for a gun which he pulled down. He had difficulty with chest pain when he tried to do this maneuver. He decided that the work of holding the gun was too heavy. Additionally, he complained of pain in his leg and low back because the work required standing. After four hours he went to the nurse who sent him home.

The following day he returned and talked to the foreman who suggested he go to the doctor. He labored for a portion of that day, but he had lots of pain in his leg and ankle and his left hip went out.

Claimant indicated that he sought treatment from Dr. Dasso on his own. He told the doctor what had happened at work. He was given a twenty-five pound restriction and a CT scan was scheduled.

He returned to work, but he took casual days. He was taken off his regular job and put on a broom. He was laid off on December 10, 1982 and put back on long term disability.

Claimant recalled that after he went back to work he saw Dr. Habak because of pain in his right chest. An EKG was done. Claimant reported seeing Dr. Dasso in February of 1983 and again in March of 1984. The latter visit was to get the doctor to complete some forms required by the group carrier.

At the time of hearing claimant had no doctor's appointment scheduled. He stated that he was under no restrictions because of his heart, but that he had a twenty-five pound restriction due to his back with no stooping, bending or twisting. Claimant asserted that he needs treatment as his left leg goes out and as he continues to have pain into his thigh. He experiences pain in his hamstrings and his ankle catches. After he sits he has pain above his hips above the belt line. Moisture in the air causes his back to hurt. He soaks in a hot tub to relieve the discomfort. Claimant said that his complaints can occur without activity.

Claimant denied injury to his back in an auto accident of December 25, 1977 in which his car was totalled. Although he admitted giving testimony regarding his back in a lawsuit in that matter, he denied the truth of that testimony. He offered that he was having financial difficulties. He expressed the feeling that he had clarified his untruthful answers before the end of the deposition. He agreed that he had said an industrial injury did not really hurt his back and that the injury was limited to his upper neck and shoulders. While he acknowledged making claim for group benefits, he did not recall stating in his claim that he had a severe back injury. He denied treatment by a Dr. Barker. Rather he said he was treated by Dr. Twyner.

He agreed that during the first six months of 1978 he had complained to Dr. Twyner that his back was banged up because of the car accident. He denied missing work time for that period. He said that it was Dr. Chang who kept him off work in early 1978.

Claimant with prompting recollected being treated in 1976 for diabetes, dizziness and headaches. He saw Dr. Hondo for the latter complaint. He was treated by Dr. Solace for depression. He also remembered being attacked and mauled by three persons in early 1977, having a fractured hand and eye abrasion and being off work from March 9, 1977 through May 3, 1977. He denied a muscle strain in both shoulders after his return and he did not recall seeing Dr. Smith.

Claimant said that he did not tell Dr. Jarrett that he had back pain because Dr. Jarrett could see that he was hurting, because the doctor noticed his scraped skin and because his neck pain was more serious. He pointed out that ultrasound was applied to both his upper and lower back. He did not remember telling the physician that his low back was giving him no trouble.

Claimant stated that he did not tell Dr. Twyner that he had low back pain for a year or a year and a half after a chain fell. Neither did he mention it to Dr. Kreiter, but Dr. Kreiter got the history from medical records.

Claimant first asserted that he was not struck by a chain in his upper or neck shoulder. Claimant did not know what he said when his deposition was taken, but he thought he probably did not understand. Ultimately claimant said that he had been hit by a chain where his neck joins the shoulder and that he told Dr. Jarrett that was the area that hurt. He did not think he mentioned his low back, but he thought the doctor had.

Claimant expressed the feeling that he did hurt his low back on August 7, 1978 and that all his low back complaints were traceable to that time rather than to any injury before or to his 1977 accident.

Claimant alleged that on his return to work in October of 1982 he had trouble working because of cramping in his leg, ankle and upper back. He denied going to first aid with a headache or telling the nurse that the headache was attributable to his being back to work too soon or that his heart was troubling him. He asserted that his knee went out after two or three hours. He first related having leg pain to an accident when he saw Dr. Dasso in 1982.

Claimant's deposition was taken in this matter on August 12, 1983. He said that the parts he worked with as a pump assembler would weigh an average of two to three pounds with the finished product weighing 400 or 500 pounds. That product was moved with a hoist.

Claimant described an injury in October of 1976. A chain fell from a rack. He caught the weight of it and it knocked him to the ground. He injured his low back for the first time and also his fingers. He denied any injury to his neck or right shoulder at that time. After this incident claimant noticed that his left hip started going out of place and had a catch in it. His right knee also had a catch. He had pain both in his low back and buttocks area and his knee. He was sent to Dr. Fesenmeyer who put him on light duty for brief intervals. He noted that after he worked for a period he would get pain in his hamstring and calf muscles.

Claimant said that he was not hurt in a car accident in December of 1977, but that his back was aggravated.

Claimant described the incident of August 7, 1978 as follows:

> A. And I was taking a chain off the table -- taking chains off tables for the machine operator and I guess I wasn't taking them off fast enough so he pushed one. The other chain pushed one off the back on the floor and it was all balled and crumpled up, the end of it sticking up in the air, so I went to my foreman and I told him what the machine operator had done. He told me -- he said, "If we get this one up and he push another one off, we'll change places, you run the machine and he'll become the pin dipper." So I was -- I went back to get the chain up, so I got up on the table and I hooked

it on the part that was sticking up with the intent of pulling it back on the table and the hook came loose. The tub had all the bushings from the table and I slipped down off the table, pressed between the tubs -- several tubs that were setting there. The end of it came loose and swung around on the hoist and hit me across the right shoulder and neck.

Q. When you fell off the table that you were standing on, did your body strike something?

A. The chain hit me. The end of the chain came down.

Q. Okay. I heard that part, but it sounds to me like you're falling off the table. Where did you end up? Did you land on the floor and hit the floor?

A. Between the floor and the tubs. The tubs were back against the table. I was in between them and the weight was pressing me backwards.

Q. What part of your body was struck by the chain?

A. My upper neck and shoulder (indicating).

MR. WESTENSEE: Point to which shoulder.

THE WITNESS: The right shoulder (indicating).

BY MR. SHEPLER:

Q. Just a momemt ago you gestured towards one of your shoulders; was that your left shoulder?

A. Yeah, left shoulder.

Q. And the area that you are pointing to in the upper back looked to me like you were pointing to near the base of your neck where your neck runs into the shoulders.

A. Yes.

Q. Is that the part where you were hit?

A. Yes.

Q. Was any other part of your body injured or damaged by the chain?

A. No.

Q. Was any other part of your body injured or damaged by your fall?

A. No. (Claimant's dep., dated August 12, 1983, pp. 21-23 11. 15-25, 1-25 and 1-16)

Claimant first saw Dr. Jarrett. The nurse at the plant directed him to mental health and the to Dr. Fesenmeyer who told him either to go to mental health or back to work. He did not move his shoulder or neck. He went back to Dr. Jarrett and then to mental health where he saw Dr. Chang. Claimant said he did not finish treatment with Dr. Chang and was dropped from the class. He got a release from Dr. Chang to return to work but he did not go back because Dr. Jarrett still had him under a twenty-five pound restriction.

He then saw Dr. Kreiter who gave him a twenty pound restriction and who placed him in a brace. By this time his neck was better and had gotten better during sauna treatments with Dr. Chang. He wore the brace when he tried to go back to work, but the brace did not help.

Dr. Verma provided him with a week of sauna treatment to his low back.

Claimant reported having two heart attacks in April of 1980 and having heart surgery. Claimant indicated he was permitted to return to work in terms of his heart about three months later with a twenty-five pound restriction. Claimant recollected that in 1982 he had asked the doctor to take off that restriction.

Claimant claimed that when he went back to work in November of 1982 he was having trouble walking, including cramps in his knees and his hip going out after he labored three to four hours. He went to Dr. Dasso because he did not think Dr. Fesenmeyer was a back doctor and because he did not like the way he had been treated by the doctor. He asserted that he had been told by the nurse that he would have to see his own doctor. Dr. Dasso gave him injections in his knee, ankle and back.

Claimant said his present complaint was back pain which he eases by getting into hot water and soaking. He alleged inability to be on his feet all day, to lift repetitively, to bend or to stoop for prolonged periods or to drive for long distances. More specifically he said that bending will give him twinges into his thighs and along his hamstrings in the right leg. He has pain in his right knee when he raises up from stooping down. After prolonged sitting he has a burning ache into his buttocks area.

Claimant reported having no visits planned to doctors because Dr. Dasso had not been paid by the company and he himself could not afford to pay him.

Claimant's final testimony was that he had low back, hip and knee problems as a result of his work injury in 1976 and before his automobile accident in which he had not hurt himself. Claimant indicated that his low back pain had been bothering him before the fall off the table in August of 1978 because he was seeing Dr. Fesenmeyer for it and being treated with pain pills and released from work. He claimed injury at work in 1976 and 1978.

Claimant gave a deposition in a case involving his claim against Mary L. Humes as a result of his car accident in 1977. In that testimony he said that he had completed ninth grade and started work for defendant on May 2, 1973. He explained that he was receiving long term disability because the company lacked work within his twenty-five pound weight limitation. He attributed the back injury responsible for his long term disability to the 1977 car accident.

Claimant explained that he last worked on August 7, 1978 because he on that date injured his upper neck, back and shoulder. He was questioned:

Q. How did that accident happen?

A. Well, I was up on a table dislodging a chain, and the horse gave and it spun and knocked me off the table.

Q. Did the chain fall on you or --

A. No, it didn't fall on me.

Q. How were you injured?

A. Well, when I fell, I hit against a tub that was down on the floor. (Claimant dep., August 7, 1981, pp. 8-9 11 20-25 and 1-3)

Later he said:

A. Yes. I was pin dipping and after I dipped the pins, I have to take the chain off the table. Well, the operator pushed the chain off the table and it balled up on the floor; and I hooked the horse to it and trying to lift it, and the horse came loose and knocked me off the table and I hit the end of the tub.

Q. What part of your body hit the end of the tub?

A. Neck and shoulder.

Q. Other than that August 7th, 1978 injury at work, have you received any other injuries at work since December 25th, 1977?

A. No.

(Claimant dep., August 7, 1981, p. 23 11. 3-16)

Claimant testified that Dr. Chang ordered pain shots for him after his car accident and that he was off work as a result of that accident from December 25, 1977 until March 3, 1978 or February 22, 1978 or February 2, 1978. He said that he went back to his regular job and then he was placed on light duty by Dr. Twyner some time in March. Claimant reported he was off and on work after his return because he could not keep up with the line due to his low back difficulties. When the company had no light duty, he would be placed on short term disability.

Claimant indicated that he injured a foot at work in 1974 and 1975. In 1976 he caught a chain and "wrestled" it to the ground. He was seen by Dr. Fesenmeyer and returned to work the following Monday. Claimant said that after the car accident in 1977 he was involved in another incident when a truck hit the side of his parked car. He denied any injury. He denied any fall on stairs.

Claimant testified that he does not feel he has recovered from his August 7, 1978 accident as he still has a problem with his neck and shoulder.

Claimant attributed his seeing Dr. Barker to low back pain resulting from the car accident.

Claimant reported being treated by Dr. Kreiter who gave him a back brace to wear as he worked as a result of his industrial injury; by Dr. Russo who hospitalized him for therapy for his low back strain from the car accident and by Dr. Jarrett for his upper neck and back as a result of the August 7, 1978 incident.

Regarding his car accident, claimant said that his car was struck in the side by another vehicle which ran a red light. His accelerator got stuck and his car hit a street light. He did not go to the hospital first because he was home on leave from being hospitalized for depression. When he returned to the hospital later in the evening, his low back had started to ache. Dr. Chang ordered a shot and x-rays. Claimant believed he left the hospital three or four days after the accident. He complained that as a result of the accident that when it gets damp or he

sits for a long time, he cannot straighten until he walks two or three steps. He said that the pain comes on with dampness, temperature changes or when he lies in bed too long.

Claimant denied ever having low back pain from lifting a chain at work. He also testified that he did not tell Dr. Twyner of low back pain resulting from tripping on stairs. He said that it was Dr. Twyner who said his pain was aggravated by lifting on March 3, 1978 rather than any statement he himself made. Then he said he did complain of low back pain as a result of lifting. Claimant responded "No" to a question regarding the correctness of a statement in a letter December 15, 1978 which was "Sevin Pettie, thirty-nine year old male has had a year-and-a-half to two-year history of low back pain which started when a chain fell on him at work." It was claimant's opinion that Dr. Twyner's statement was based on information he obtained from the records of Dr. Corden who had treated him for a urinary tract infection and later was angry with him for changing doctors. Claimant did not know why Dr. Fesenmeyer would have reported his injuring his back on July 8, 1976 as a result of trying to turn a 200 pound track. Also he did not agree with Dr. Fesenmeyer's saying in a letter of October 26, 1976 that he was having low back and right shoulder pain because a chain had fallen on his back.

Finally, claimant said that he had no injury to his back before the car accident in December 1977 and that he did not complain of a back injury until he first saw Dr. Twyner on March 3, 1978.

Company medical records show that in March of 1978 claimant developed a pinched nerve in his right hip. The following day he reported a back strain from his December 1977 accident. Dr. Twyner restricted him from heavy lifting and bending. He was off work from March 13, 1978 to May 22, 1978. He missed work again from May 24, 1978 to June 19, 1978.

On August 8, 1978 claimant alleged back strain from pulling on a heavy chain. An appointment was made for him to see Dr. Jarrett. Claimant apparently was allowed to return to work on August 21, 1978. When he tried to work, he again had back pain. He was sent to the doctor who seemingly told him to go to mental health or to return to work. Claimant returned to work on October 16, 1978. On November 2 he was placed on light work. Claimant was released for regular duty with a sacroiliac belt on December 11, 1978. Ten days later he was placed under a twenty-five pound weight restriction. In early 1979 claimant was returned to his regular work.

C. R. Fesenmeyer, M.D., first saw claimant for back complaints on January 31, 1974 at which time he told of strain in his back on the previous night while lifting putting chains on a table. Claimant had tenderness in the right side of his low back and a list to the left. Claimant was diagnosed as having an acute back strain. Claimant was given pain medication.

Claimant was next seen on July 8, 1976 at which time he told of slipping and straining his back as he tried to turn a 200 pound track. Tenderness was found in the low back. There was no radiation. Again the diagnosis was acute low back strain. Claimant was placed on light work and given a muscle relaxer.

Claimant returned in the fall with pain in his low back and right shoulder. For a third time the diagnosis was acute back strain. Claimant was given Butazolidin and placed on light work with limited lifting. Claimant continued to be seen until the end of the year with medication changes and use of a tranquilizer. Claimant's complaint shifted to soreness in all areas of his back. Claimant was last seen on December 6, 1976 at which time he reported his symptoms had subsided.

Claimant was then examined on August 21, 1978 after an injury at work for which he had been treated by Dr. Jarrett. He complained to Dr. Fesenmeyer of pain in the right hip and buttocks and left side of the upper back. A back strain was diagnosed. Claimant was told to return to work and he was given no restrictions.

Dr. Fesenmeyer examined claimant on September 22, 1982 and found that in spite of claimant's denial of chest pain at the time, he could not recommend return "to any type of factory work which requires lifting more than fifteen to twenty-five pounds, or which requires constant standing, walking, or climbing." Dr. Fesenmeyer did not believe claimant could work on an assembly line.

Lafayette J. Twyner, M.D., family practitioner, first saw claimant on March 6, 1978 for complaints of low back pain aggravated by lifting. Claimant had tenderness in the paraspinal muscles in the lumbar area. A diagnosis of paraspinal myofacial strain was made and claimant was treated with muscle relaxants and a diet. The doctor believed his treatment at the time probably was necessitated by claimant's auto accident.

When claimant was seen the following week he complained that his back condition was worsening because of constant bending at work. Claimant was given a light duty slip and Soma Compound was prescribed. Claimant was returned to full duty on March 24, 1978.

Claimant was again seen for low back strain on May 25, 1978. He was returned to light duty and placed on Equagesic with heat and a diet pill. The following week claimant continued to have tender paraspinal muscles in the lumbar area. On June 9 claimant's low back strain was combined with a urinary tract infection. On June 19, 1978 claimant was given a slip to return to work. Dr. Twyner stated that claimant "had a negative attitude toward work, and I gave him a return to duty slip and encouraged him to try to work with his problem."

Claimant was seen and hospitalized in August of 1978 for an ileus of his bowel.

On November 2, 1978 claimant gave a history of straining his back at work while lifting a heavy plate. He had tenderness in the paraspinal muscles on the left and again was treated with muscle relaxants. Physical therapy also was scheduled. Dr. Twyner said that "from the time that I had seen him in March through the many follow-ups that I saw him, he had developed a chronic low back strain syndrome" which he said could be permanent. Claimant was referred to Dr. Kreiter.

On December 13, 1978 claimant told of returning to work and being unable to work because of strenuous lifting. He was tender in the paraspinal muscles in the lumbar area.

Claimant was returned to his regular work on January 18, 1979 with a back brace. The doctor attributed claimant's treatment to the same problem for which he had been treating him since March of 1978.

Dr. Twyner observed that claimant had some low back pain related to his urinary tract infection. Dr. Twyner was unaware of a back injury at work in 1976.

Ultimately the doctor said, "it's possible or probable that these recurrent injuries aggravated by lifting could be traced to the original auto accidents" and that the strains were "aggravations of the same problem -- chronic low back strain."

A letter from Dr. Twyner dated August 29, 1978 recounts claimant's having been seen at the center by a Dr. Scott Corden on September 27, 1977 after a fall down some stairs. A diagnosis of low back syndrome-muscle strain was made.

In a letter dated December 15, 1978 Dr. Twyner notes a year and a half to two year history of low back pain starting when a chain fell on claimant at work. Reinjury was attributed to lifting heavy chains with severe low backaches occurring almost daily. The doctor's opinion was that claimant "has a chronic lumbosacral strain which is being continually aggrivated [sic] by the strenuous lifting, pulling, which his job requires, and he should be transferred to a job which is less strenuous."

On April 23, 1981 Dr. Twyner wrote: "Mr [sic] Sevin Pettie has been suffering from low back pain, which he states that the original injury to his back was from a car accident on December 25, 1977, and has been recurrent over the past which he attributes to lifting a heavy chain at work."

F. W. Smith, M.D., reported on August 1, 1978 seeing claimant on March 6, 1978 and subsequently on June 19, 1978 for low back strain, paraspinal myofacial strain and recurrent urinary tract infection.

S. C. Chang, M.D., admitted claimant to the hospital on January 6, 1978 because of acute progressive depression following the death of his son. Claimant had a history of prior hospitalizations and of temper outbursts. During this hospitalization claimant complained of back pain. X-rays of the lumbar spine were negative. Claimant left the hospital against medical advice with his condition not improved.

Steven R. Jarrett, M.D., saw claimant on August 10, 1978 and took a history of claimant's straining his neck as he was pulling chains. Claimant complained of pain in his neck, left upper trapezius and left deltoid region accompanied by numbness or paresthesia. He denied low back trouble.

On examination claimant had limitation in cervical motion and tightness and tenderness to palpation at the left cervical paraspinals and left upper trapezius. X-rays of the cervical spine evidenced no arthritic changes and disc spaces and the invertebral foramina were open and clear. Diagnoses of cervical strain and depression were made. The doctor expected claimant's strain to be controllable, but he saw the depression as another matter. Physical therapy was commenced.

By August 16, 1978 claimant's motion had improved with only a ten degree loss in left lateral flexion remaining. Dr. Jarrett expressed concern over the potential development of "a chronic lingering pain situation because of his emotional state with tension myalgia compounding the strain problem." He anticipated claimant's return to work the following Monday.

On August 29, 1978 Dr. Jarrett found claimant's cervical motion normal and wrote: "There is no objection from our standpoint for him working, however the Scott County Commnunity Mental Health Center has taken him off work."

Steven C. Chang, M.D., psychiatrist, reported that claimant was seen in the county mental health facilities sporadically from 1974 to 1978. He initially was seen and hospitalized for a severe anxiety attack, depressive feelings and an inability to control his anger.

Claimant returned on November 10, 1978 reporting his working for three weeks. He verbalized hostility toward his employer.

He complained of his neck and low back. Some mild limitation of motion on left lateral flexion increased which was diagnosed as myofascitis secondary to a strain three months before. Temporary lighter work was proposed.

Physical therapy was provided to claimant in December of 1979 and January of 1980. On claimant's January visit he complained of urinary problems. His back muscles remained sore to palpation. Claimant expressed concern about lifting at work because he was unable to bend his knees while lifting from tubs.

Richard L. Kreiter, M.D., saw claimant on December 8, 1978 on referral from Dr. Twyner with chief complaints of low back pain. Claimant gave a history of one and a half to two years of low back pain which started when a chain fell on him or when he twisted his back while lifting a chain. He told of injuries in March and August of 1978. Claimant reported being off work for five weeks at the time of this examination. Claimant's back was bothered by bending, lifting, stooping and his muscles drawing. He denied leg pain. He was able to rise from a squat. He was tender in the lumbosacral area. The doctor's impression was chronic lumbosacral strain. Medication, exercise, moist heat and use of a sacroiliac belt were recommended.

On December 20, 1978 claimant was assigned a thirty-five pound weight restriction.

In January pain complaints were confined to the lower back with slight buttocks discomfort. Claimant was tender in the lumbosacral area. Claimant was given a return to work slip for full duty as of January 19, 1979.

On February 21, 1979 the doctor recorded claimant's working for four hours before back pain started. Claimant claimed that his back hurt more after an auto accident. The doctor recommended claimant return to his regular job or back to one less strenuous.

Claimant returned on July 8, 1981. He spoke of neck and low back pain with a "hollow" type pain in his back going to his chest. Claimant was tender in the trapezius bilaterally and along the vertebral borders of both scapula, the lumbosacral area and the sciatic notches. Straight leg raising indicated tight hamstrings. Claimant's weight had increased more than twenty pounds. The doctor's impression was chronic lumbosacral pain with possible mild disc syndrome and chronic cervical pain. Exercise, vocational rehabilitation and a chronic pain clinic were suggested. The doctor did not think claimant should go back to work for defendant because of frustrations which were not helpful to his condition.

Frank I. Russo, M.D., saw claimant on December 20, 1979 at the request of defendant. Claimant gave a history of chronic low back pain and complained of constant aching in his back with occasional diffuse radiation into his lower extremities with symptoms exacerbated by prolonged standing or sitting.

On examination claimant had a seventy-five percent of normal range of motion and slight tenderness over the sacroiliac joint bilaterally. There was deconditioning of the abdominal musculature on bent knee situps. The claimant's spine was free of defects including arthritis. Dr. Russo's diagnosis was chronic lumbosacral strain with some continued deconditioning in the abdominal musculature. A back reconditioning program was prescribed with a lifting restriction of twenty to thirty pounds with avoidance of frequent bending, lifting or twisting.

When claimant was seen in January he reported his inability to go back to work because no job had been found for him. Claimant had virtually full range of motion. Straight leg raising was limited by hamstring tightness. Claimant was found to need a thirty pound weight restriction with a limitation on continuous bending and lifting.

Claimant was next seen on October 16, 1980 at which time he had a relatively normal range of motion in the lumbar spine with no gross tenderness or spasm. Straight leg raising elicited slight complaints of hamstring tightness bilaterally. There was no weakness in either lower extremity. Dr. Russo refused to "overrule" any weight restrictions placed on claimant by his cardiologist.

Claimant has been treated for cardiac problems by Philip A. Habak, M.D., and William Dipple, M.D. The latter performed a total cardiopulmonary bypass with a single aortocoronary vein graft to the right coronary artery following claimant's suffering an acute subendocardial infarction of the posterior wall in March of 1980 and a cardiac catheterization which showed a complete occulsion of the right mid-coronary artery.

Following an electrocardiogram and stress test on June 23, 1980 both of which were normal, Dr. Habak expressed his intent to obtain a copy of claimant's job description so that he could make a decision regarding claimant's work capabilities and restrictions. On July 17, 1980 Dr. Habak wrote that claimant would be released to return to work on August 25 with a twenty-five pound restriction.

Dr. Habak saw claimant on November 6, 1980 and noted that he continued to smoke two packs of cigarettes daily and had gained weight. Outside of mild hypertension, claimant was found to be doing well from a cardiac standpoint.

Stress testing was repeated on January 13, 1981 because claimant complained of recurrent chest discomfort which was associated with exertion. That test was terminated because claimant became exhausted and short of breath. No rhythm abnormalities were seen. Claimant was declared to have limited exercise tolerance and Sorbitrate and Inderal were prescribed.

Claimant returned on April 16, 1981. His examination was unchanged except for the development of tenderness in the left trapezius.

Dr. Habak did another evaluation of claimant on January 25, 1982 and wrote: "He still has difficulty returning to his previous job because of the weight lifting restriction. This was initially imposed because of the patient's back condition. I have maintained the same level although perhaps from a cardiac standpoint the patient could possibly lift more."

Claimant had a stress test on August 23, 1982 after he had occasional episodes of a burning sensation in his right upper chest. His electrocardiogram was normal. The stress test was terminated when claimant developed a leg cramp. He was found to have adequate exercise tolerance. On August 30, 1982 Dr. Habak wrote: "Based on his current cardiovascular status Mr. Pettie should be able to resume his previous occupation at this time."

Raymond W. Dasso, M.D., board certified surgeon, saw claimant on December 7, 1982 at which time he complained of pain in his lower back, left hip, left knee and right ankle. X-rays showed claimant's sacroiliac joints to be within normal limits with no evidence of fracture or dislocation. There was mild osteoarthritis in the lower lumbar spine. Claimant was diagnosed as having a mild to moderate severe lumbosacral strain, mild osteoarthritis of the lumbar spine, bilateral subgluteal bursitis, bursitis adjacent to the right heel and patellar misalignment in the left knee and was found to be totally disabled.

Computerized tomography was done before year's end and it was normal.

On December 23, 1982 claimant gave a history of being knocked off a table as he was trying to dislodge a chain and injuring his upper back and the left side of his neck.

Claimant was permitted to return to light work on January 18, 1983 with no lifting over twenty pounds and no excessive bending, stooping or twisting.

APPLICABLE LAW AND ANALYSIS

The first issue to be decided herein is one of causal connection. The claimant has the burden of proving by a preponderance of the evidence that the injury of August 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).

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). 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. U.S. Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1961).

The claimant's burden is a preponderance. Preponderance of the evidence means the greater weight of evidence, the evidence of superior influence of efficacy. Bauer v. Reavell, 219 Iowa 1212, 260 N.W.2d 39 (1935). A decision to award compensation may not be predicated upon conjecture, speculation or mere surmise. Burt, 247 Iowa 691, 73 N.W.2d 732 (1955).

This case is complicated by inconsistencies in claimant's answers to interrogatories, his testimony given in depositions, his testimony at the hearing and the histories he gave or failed to give his many examining and treating physicians.

Claimant's answers to interrogatories and his own testimony will be reviewed first.

Claimant's answers to interrogatories include an accident of ctober 1976 in which he had injury to his neck, low back and ight shoulder and a back injury in an automobile accident on ecember 25, 1977. No other injuries are acknowledged.

In deposition testimony, claimant said an incident in ctober of 1976 involved a chain falling from a rack and knocking im to the ground with injury to his low back and not to his eck or shoulder. Following this he had trouble with his left ip and with his right knee.

At the time of hearing he denied receiving any injury to his ack in the auto accident in December of 1977 and he denied the ruth of testimony he had given in a lawsuit relating to that ncident. In his deposition in this case he claimed both that is back was aggravated by the accident and that he had no njury as a result of the accident. Claimant declared in his eposition in the case against Mary Humes that it was the auto ccident which was responsible for the long term disability to is back. He said that he was given pain shots by Dr. Chang and nereafter had low back problems.

Claimant has had a multitude of health problems not all of nich have been orthopedic in nature. His regard for his own ell being is less than one would like in that he has continued o smoke and has failed to reduce his weight.

Medical evidence shows Dr. Fesenmeyer first saw claimant for ack complaints in early 1974, found tenderness in the right ower back and diagnosed an acute low back strain. In 1976 laimant had an incident which he described to Dr. Fesenmeyer as ccurring when he tried to turn over a 200 pound track. Later r. Fesenmeyer recorded a history of a chain falling off a rack nd onto claimant who then complained of low back pain.

Dr. Twyner's notes reflected a visit on September 27, 1977 t which time claimant told of low back pain following a fall on ome steps. Claimant's automobile accident happened in December f 1977. Notes from a hospitalization in January show claimant as complaining of back pain and neck strain at that time.

Dr. Twyner saw claimant on March 6, 1978 for low back pain hich he related to claimant's automobile accident. After a ourse of drug therapy, diet and light work, claimant was eturned to full duty. The same procedure was followed in May.

Regarding his injury of August 7, 1978, claimant said at the ime of hearing that he fell from a table which had oil on it nto a tub for used parts. He scraped his low backside and left houlder. Later he agreed that he was hit by a chain where his eck joins his shoulder. In his deposition he stated that he ell from a table between several tubs and then was hit across he right or left shoulder and neck by the end of a chain which as swinging in the air. He denied damage to any other parts of is body. His third version given in the case against Mary umes was that he was knocked off a table and hit a tub on the loor injuring his neck and shoulder.

Claimant reported on August 8, 1978 a back strain from ulling a heavy chain. Dr. Jarrett reported complaints of pain n the neck, left upper trapezius and left deltoid region. laimant denied low back pain. A cervical strain was the iagnosis. Dr. Jarrett's prognosis as of August 10, 1978 was hat claimant's strain would be controllable, but that the epression was another matter. An August 16, 1978 note from the herapist indicates claimant's left upper trapezius, post ervical musculature and left rhomboids were treated. Claimant id complain to the therapist of low back pain. By August 20, 978 claimant was assessed able to work, but he remained off ecause of recommendations by the mental health center. On ovember 10, 1978 claimant was found to have "a little myo- fascitis...secondary to probably the strain he had three months go." Lighter duty was suggested.

Claimant also was seen in August by Dr. Fesenmeyer whom he old of pain in the right hips and buttocks and left upper back, ut to whom he gave no history of injury. Dr. Fesenmeyer felt laimant came to him because he had been sent back to work by Dr. Jarrett. Dr. Fesenmeyer, too, told claimant to go back to work nd placed him under no restrictions.

Dr. Twyner saw claimant in November and took a history of a ack strain which occurred as claimant was lifting a heavy plate. Dr. Twyner attributed his treatment of claimant to the difficulty which had caused claimant to seek care in March of 1978. He thought claimant's back trouble was initiated a year and a half to two years before when a chain fell on him at work. Dr. Twyner recognized aggravation of claimant's condition stemming from the auto accident by lifting. He acknowledged some degree of low back pain would be attributable to claimant's urinary tract infection.

On December 23, 1982 Dr. Dasso took a history of claimant's being knocked off a table on August 7, 1982 [sic] when he was trying to dislodge a chain and having injury to his upper back and the left side of his neck. The doctor wrote: "Pt states that he notices soreness there when the weather changes otherwise it does not bother him too much."

There is some scant evidence in this record to support a causal relationship between claimant's injury of August 7, 1978 and his disability, but it falls well short of a preponderance. Claimant's first problem is multiple versions of the manner in which the injury occurred. Claimant's more frequent testimony of injury to his shoulder and neck at that time is corroborated by evidence from Dr. Jarrett who was the first doctor he saw after the incident, but who did not record the scraped skin to which claimant testified, and by the physical therapist's note. The latter refers to a complaint of low back pain.

The record viewed as a whole is not supportive of a finding of any permanent injury to claimant's low back in the incident on August 7, 1978.

Claimant's brief points to evidence which he said relates his complaint to work and, in fact, the evidence he refers to does make the connection. This case, however, is a review-reopening of the injury he received on August 7, 1978. Dr. Twyner's letter does not make that specific connection. Dr. Jarrett's letter anticipates that claimant's strain will be controllable and claimant will return to work. Dr. Russo's impression was a chronic lumbosacral strain. Claimant's August 7, 1978 injury was to the cervical and shoulder area. Dr. Kreiter's report was excluded, but had it been allowed Dr. Kreiter apparently did not know of claimant's auto accident; he made specific notes that Dr. Jarrett "gave no indication of significant back trauma;" and he concluded only that claimant's back "could have been reinjured at the time of the 1978 injury." An addendum to Dr. Dasso's report which also was excluded is similar. He wrote: "I feel that this recurring condition could be related to the accident on August 7, 1978." Consideration of that evidence would not help carry claimant's burden. Claimant's condition resulting from his injury of August 7, 1978 was temporary in nature only and claimant has been compensated for all of that temporary disability.

In light of this conclusion on causation, it is unnecessary to address any of the other issues raised in this matter.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-five years of age.

That claimant has an eighth grade education.

That claimant has work experience in pump and shoe assembly.

That claimant began work for defendant in 1972.

That claimant has received both long and short term disability payments.

That claimant was treated for tenderness in the right side of his low back in January of 1974.

That claimant was involved in an automobile accident on December 25, 1977.

That claimant was hospitalized in January of 1978 for acute progressive depression.

That during claimant's hospitalization in January of 1978 he made back complaints.

That claimant was off work from March 13, 1978 to May 22, 1978 and from May 24, 1978 to June 19, 1978 with back strains.

That claimant suffered a strain at work on August 7, 1978 as he was pulling a chain.

That claimant was treated for neck, left upper trapezius and left deltoid pain complaints in August of 1978.

That claimant received no injury to his low back in his accident of August 7, 1978.

That claimant was last seen in mental health on October 10, 1978.

That claimant returned to work on October 16, 1978.

That claimant had an acute subendocardial infarction.

That claimant underwent cardiopulmonary bypass surgery with a single aortocoronary graft to the right coronary artery.

That after surgery related to his coronary problems, claimant was released to return to work on August 25, 1980 with a twenty-five pound weight limitation.

That claimant has a recurrent back syndrome.

That claimant's most recent limitations placed by Dr. Dasso are no lifting over twenty pounds and no excess bending, stooping or twisting.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence a causal connection between his injury of August 7, 1978 and any permanent disability which he now may suffer.

ORDER

THEREFORE, IT IS ORDER:

That claimant take nothing from these proceedings.

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

Signed and filed this 26 day of November, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT G. PIPER,	:	
Claimant,	:	File No. 715116
vs.	:	A R B I T R A T I O N
DAVIS CONSTRUCTORS,	:	D E C I S I O N
Employer,	:	
and	:	FILED
UNITED STATES FIDELITY AND GUARANTY COMPANY,	:	DEC 11 1984
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This matter came on for hearing at the Bicentennial Building, in Davenport, Iowa, on December 20, 1983. The matter was appealed and the file was returned to this agency for decision.

A review of the commissioner's file reveals that an emplcyers first report of injury was filed on October 27, 1982. The record consists of the testimony of claimant, William G. Broderick and William Taylor; the deposition of William Roger Meyer, M.D.; and defendants' exhibit A.

ISSUES

The issues for determination are:

1) Whether claimant sustained an injury arising out of and in the course of his employment;

2) Whether there is a causal relationship between the alleged injury and the disability; and

3) The nature and extent of disability.

STATEMENT OF THE EVIDENCE

Claimant testified that he is presently on total disability from the Veterans Administration. He was last employed by defendant employer in August or September 1981 as a welder-fitter. During one period of his life he owned his own welding concern and has some vocational training in welding. Claimant testified that he has a tenth grade education. He testified that he has been a welder since 1948, although he has been in other occupations.

Claimant testified that on May 6, 1981 he was working for defendant employer and was welding on a strainer. He was told to empty a tank and while cleaning down the tank, he inhaled hydrochloric acid fumes and was overcome. He headed for the control room and took the rest of the day off. He didn't work the following day because of breathing problems. When he returned to work he was having problems breathing and testified that he could not get air. Claimant testified that he kept on getting sore throats. He went to the nurse and was sent to the doctor. Claimant testified that he was given some medication and that he returned to work the following Monday. Claimant continued to work until late August 1981.

After the above described incident, claimant had trouble breathing and had incidents of sweating and nose bleed. Claimant testified that his breathing problems became so bad that he could not climb stairs. Claimant was seeing William Roger Meyer, M.D., and was sent to the Veterans Administration Hospital where he say B. E. Hoenk, M.D. Claimant testified that he stopped working for defendant employer in August 1981 because he was laid off for reasons unrelated to the injury. Claimant did not attempt to get another job because he felt he could not do another job. He has attempted to weld and feels that he can only do this for about an hour at a time. He testified that he used to cut all of his firewood and that he cannot do so now. Claimant testified that the welding he does affects his breathing. When he has breathing problems, he takes oxygen. He testified that he has not been able to find work.

Claimant testified that in 1981 the Veterans Administration put him on oxygen and that the Veterans Administration supplies the apparatus but not the oxygen itself. Claimant testified that he consumes one bottle of oxygen every two weeks. Claimant testified that the VA takes care of his medications and that he goes to the Veterans Administration for medication.

On cross-examination, claimant admitted that he had had prior breathing problems dating back to 1976. These problems included troubles with breathing, high blood pressure, swelling of the legs and heart trouble. Additionally, the record indicates that claimant had some gout problems and a liver problem.

The claimant testified that the company nurse had sent him to Dr. Meyer who referred him to Dr. Hoenk at the Veterans Administration Hospital. Claimant testified that he used to smoke and quit when the VA placed him on oxygen. A fair reading of claimant's evidence in the medical evidence submitted in this case indicates that claimant may have had some difficulty in quitting smoking.

William G. Broderick was a maintenance man for Clinton Corn. He worked for defendant employer in May 1981 as a pipefitter and maintenance man. He observed nothing unusual in claimant's work habits prior to the May 6, 1981 incident, but observed that claimant could not keep up thereafter.

William Taylor was maintenance superintendent in 1981. He testified that he knew claimant and that he did not observe any change in claimant's work habits after May 6, 1981. However, he did note that claimant coughed more following May 6, 1981.

Dr. Meyer testified by way of deposition in this case. He is a surgeon and first saw claimant on May 8, 1981. He noted that claimant was wheezing and was short of breath. Claimant's color was ruddy, indicating to the doctor that claimant was working hard to get his breath. Dr. Meyer examined claimant's throat and noted that it was quite red. Dr. Meyer thought that claimant had inhaled gases subject to spilled hydrochloric acid. Claimant was treated by Dr. Meyer for some period of time. Treatment was conservative in nature. On June 1, 1981 claimant was still complaining of hoarseness and shortness of breath. Claimant had already been placed on a bronchodilator. Dr. Meyer caused claimant to be seen by Dr. Hoenk who diagnosed claimant's condition as chronic laryngitis and subacute laryngitis secondary to chemical irritation. Dr. Meyer testified as follows regarding causation:

> Q. Doctor, do you have an opinion based on reasonable medical certainty whether Mr. Piper's inhalation of chlorine gas on or about May of 1981, while at work aggravated his pre-existing chronic obstructive lung disease and his throat problems?
>
> A. I think it's entirely within medical certainty that this certainly could have aggravated his COPD.

On cross-examination, Dr. Meyer testified that claimant was a heavy smoker and that this would tend to aggravate chronic obstructive pulmonary disease. On July 30, 1981 claimant had a pulse rate of 112. He also testified that when he had first seen claimant he thought claimant would get over this within a period of 24 hours. He stated that x-rays showed claimant was suffering from chronic obstructive pulmonary disease both before and after the May 6, 1981 injury.

The records of claimant were reviewed by Joseph Kaplan, M.D. He wrote a report dated October 4, 1983 which was admitted into evidence as defendants' exhibit A. An excellent summary of the

tests is quoted below for informational value:

> The first pulmonary function studies done at the Veterans Hospital were on October 11th, 1977. These studies showed that Mr. Piper had an FEV1 of 76% of predicted and FVC of 101% of predicted. His blood gas studies showed a PO2 of 68, PCO2 of 34 and Ph of 7.48. Followup studies on August 20th, 1980 showed an FEV1 of 54% and FVC of 64%, which reflected a decline in pulmonary function of uncertain cause. The next studies available were on March 25th, 1981 which was one and a half months prior to the incident involving the inhalation of fumes. The studies from March showed an FEV1 of 58% of predicted with an FVC of 67% of predicted, however, after the inhalation of a bronchodilator, the FEV1 went to 66% and the FVC 79% indicating that there was an asthmatic component. The first pulmonary function studies available after the inhalation of fumes were done on August 14th 1981 and showed an FEV1 of 59% and an FVC of 63%. This result reflects no significant change when compared to the studies done one and a half months prior to the inhalation of hydrochloric acid fumes. Blood gas studies done at the same time showed a PO2 of 63, PCO2 of 45 and Pn 7.38. These blood gas results are slightly worse than the ones done in 1977, but when correction is made for aging, they are not significantly different. The next pulmonary function studies available were done on April 13th, 1982 and showed an FEV1 of 78% and FVC of 85%. Blood gas studies showed a PO2 of 73, PCO2 of 32 and Ph 7.47. Finally, the most recent studies which would reflect pulmonary function were the blood gas studies done on January 5th, 1983 which showed a PO2 of 74, PCO2 37 and Ph 7.26.

He followed with the statement that there was no significant long-lasting change in pulmonary function because of the May 1981 inhalation. Dr. Kaplan pointed out that claimant's pulmonary function improved between March 1981 and April 1982.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 6, 1981 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 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.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 85.33 provides that temporary total disability be paid beginning upon the fourth day of disability.

ANALYSIS

Based on the foregoing principles, it is found that claimant has presented sufficient evidence to indicate that he has sustained an injury arising out of and in the course of his employment on or about May 6, 1981. Claimant, however, failed to show that he was disabled from working for more than three days. The evidence in this case indicates that claimant had temporary effects because of the inhalation. However, since claimant did not miss more than three days of work because of the injury, he cannot recover unless he shows permanent disability as a result of that injury. The only evidence to consider with regard to permanency is that by Dr. Kaplan. The evidence shows that claimant's injury did not worsen, but did, in fact, improve.

Considering the above, it will be the finding that claimant sustained an injury arising out of and in the course of his employment, but that he is not entitled to workers' compensation because he has not proved permanency nor disablement beyond three days. It may well be that claimant suffers from permanent effect, but he has not proved by a preponderance of the evidence that that permanency was caused by the injury of May 1981.

FINDINGS OF FACT

1. Claimant was employed by defendant Davis Constructors in May 1981.

2. Claimant inhaled chlorine from hydrochloric acid fumes on or about May 6, 1981.

3. Claimant inhaled chlorine from hydrochloric acid fumes at work on or about May 6, 1981.

4. Claimant sought medical attention as a result of the injury which occurred on or about May 6, 1981.

5. Claimant was not disabled from working for more than three days as a result of the injury on or about May 6, 1981.

6. Claimant failed to prove by a preponderance of the evidence that the injury on or about May 6, 1981 caused permanent partial disability.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by Davis Constructors on or about May 6, 1981.

3. Claimant sustained an injury arising out of and in the course of his employment with Davis Constructors on or about May 6, 1981.

4. Claimant has failed to qualify for either temporary total or permanent partial disability compensation.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

Costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 11th day of December, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEWIS PREWETT,	:	
Claimant,	:	FILE NO. 731091
	:	R E V I E W -
vs.	:	R E O P E N I N G
GRIFFIN WHEEL COMPANY,	:	D E C I S I O N
Employer, Defendant.	:	

This is a proceeding in review-reopening brought by Lewis Prewett, the claimant, against Griffin Wheel Company, his employer and holder of a certificate of exemption as provided in section 87.11, Code of Iowa 1980, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on April 14, 1983 for which the claimant received healing period benefits until October 17, 1983 at the agreed weekly rate of $211.23. This matter was heard in Mount Pleasant on September 26, 1984 and considered as fully submitted at the conclusion of the hearing.

Based upon the undersigned's notes the record in this matter consists of the oral testimony of the claimant, his spouse, Robert Moss, Jerry Fenton and Larry Fintz as well as the evidentiary deposition of Charles F. Eddingfield, M.D., together with claimant's exhibits 1 through 15 and defendant's exhibits 1 and 2.

The issue in this matter is the nature and extent of claimant's disability.

Claimant, age 45, married, is a seven year production employee for the defendant. On April 14, 1983 a conveyor supporting a 1,250 pound wheel fell on claimant's right hand resulting in a severe crushing injury. Upon admission to the hospital, his admission record was, in part, as follows: (Claimant's Exhibit 15)

OPERATIONS

1. Open reduction of the 4th metacarpal with pinning. Surgical repair of lacerations of the palmar aspect of the right hand and dorsum of the right hand. Repair of abductor pollicis.

FINAL SUMMARY

> This 45 year old patient came into the hospital with an injured hand. He was seen in outpatient and it was recognized that he had a severe enough injury that he needed to be taken to surgery and surgical consultation was obtained with Dr. Eddingfield who did the surgery, including an open reduction of the metacarpal. The patient went through the surgery nicely and has been showing nice progress at the time of discharge from the hospital. The patient will remain under Dr. Eddingfield's care as an outpatient except for me to maintain enough contact so that I know the hand is coming along okay. The patient's overall general health is reasonably good and he will be followed regularly by myself also.

Fractures of claimant's right fourth and second metacarpals were noted. (Cl. ex. 15)

Dr. Eddingfield testified as to his findings as follows: (Deposition page 5, line 24 to page 6, line 2)

> A. Well, the hand had severe lacerations of the hand and he had lacerations on the back of the right hand and the end of the right wrist and also lacerations of the palmar aspect of the hand at that time too.

The doctor's current findings are as follows: (Dep. p. 7, l. 20 to p. 8, l. 3)

> A. Yes. The patient in my progress notes, which I am sure you have a copy of it, on the 25th of January does have some loss of the body of the muscles on the thumb and he can close his fingers completely and does have a range of motion of the thumb across the hand to the base of the third finger, we in a normal hand think they should go to the base of the fifth finger. Has some loss of sensation of the fingers and does have heat and cold, intolerance to this.

Dr. Eddingfield's medical opinion as to claimant's permanent functional impairment is as follows: (Dep. p. 8, l. 21 to p. 9, l.4)

> A. As I am sure you all know who deal with me, I find that difficult to give a fair evaluation of these in how much the hand can have use, but I also consider in medical terminology this loss of impairment of the hand and of the wrist and also of the forearm and there are a number of authorities that speak to that as forearm injuries and for the hand, wrist and forearm I would think that a permanent disability of this kind would be approximately 55 percent.

Bruce L. Sprague, M.D., upon referral by Dr. Eddingfield performed apraxia right median nerve on June 7, 1983 and reported as follows: (Cl. ex. 9)

> Following administration of right axillary block, routine Betadine scrub and alcohol prep of the right upper extremity was performed. The patient was draped in the routine sterile manner. Curvilinear incision was marked on the proximal palm of the distal forearm. The incision was incised after exsanguination of the right upper extremity and elevation of tourniquet to 250 mm. Median nerve was identified proximal to the area of crush injury and was protected as the transverse carpal ligament was divided. On release of transverse carpal ligament, there was found to be compression and scarring about the median nerve on the proximal palm to the recurrent motor branch. The median nerve was freed from the surrounding tissues and the operating microscope was brought in and with the use of the operating microscope, an internal neurolysis was performed. All fascicles were found to be intact. 250 mg. of Solu-Cortef were then placed in the wound and the incision was closed with interrupted 5-0 nylon horizontal mattress sutures. A small incision was made over the fourth metacarpophalangeal joint and the K-wires identified and then the K-wires removed. This incision was closed with interrupted simple 5-0 nylon sutures. Sterile dressings were applied. Compression dressing was applied. The patient tolerated the procedure well. Operating time was one hour.

Dr. Sprague reported his medical opinion concerning claimant's functional impairment in his report of April 6, 1984 as follows: (Defendant's ex. 1)

> The patient returns today following a crush injury of the right hand for a final permanent physical impairment rating. On examination today, the patient states he still has some pain involving the base of his right thumb and has some hypersensitivity involving the median nerve distribution of the right hand. He has full range of motion of the right elbow and full pronation and supination of the forearm. He lacks 20 degrees of dorsi-flexion of the wrist. He has full volar flexion. He has an adduction contracure of his thumb and is not able to oppose his little finger. He, basically, lacks about 30 degrees of circumduction of the CMC joint. He has full range of motion of the MP and IP joints of the thumb and full range of motion of the MP, PIP, and DIP joints of his fingers except for a 15-degree flexure contracture of the DIP joint of the ring finger. He has good thenar muscle function. On examination of the sensory return involving the right hand, he has 8-10 mm 2-point discrimination involving the median nerve, and he has a 6-7 mm 2-point discrimination involving his ulnar nerve.
>
> The lack of dorsiflexion of the right wrist is equal to 3% of the upper extremity. The decreased thumb motion is equal to 6% of the hand, and the decreased sensibility and motor weakness due to the median nerve distribution is equal to 20% of the hand. Therefore, he has a 25% impairment of his hand which should be equal to 22% of the upper extremity and combined with the 3% would give him a 25% impairment of the upper extremity. I trust this is the information needed in order to close this claim.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 14, 1983 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 sustained his burden of proof.

Claimant testified at length as to his current physical limitations. Claimant has thin skin on the top of his hand on which he wears a two and one-half inch square band-aid which affords protection. Claimant testified cold and wet weather cause pain and difficulty. Claimant indicates he has a grip problem, such as turning a door knob. Claimant is clumsy in tying a string, holding a pencil, turning the ignition key on his car and holding a coffee cup.

Claimant is a partner in a weekend tree trimming partnership. Both he and his partner testified that claimant is no longer able to hold up his end and that employees must now be hired to help on some jobs due to claimant's inability to perform as in the past.

Dr. Sprague in concluding that claimant has an impairment of the right arm does not appear to be taking claimant's skin condition and cold weather limitations into consideration.

Dr. Eddington, as attending physician, takes the loss of sensation and cold weather discomfort into account in rendering his opinion which is given the greater weight. (Dep. p. 20, l. 6-19)

It is concluded that the claimant has sustained a substantial functional impairment of his right hand which is found to be a 45 percent limitation.

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

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

2. That the claimant sustained an admitted industrial injury on April 14, 1983.

3. That the claimant has sustained a 45 percent functional impairment of his right hand thereby entitling him to 85 5/7 weeks of permanent partial disability.

4. That claimant's weekly rate of entitlement is found to be $211.23.

THEREFORE, IT IS ORDERED that defendant pay the claimant a period of permanent partial disability of an eighty-five and five-sevenths (85 5/7) week duration, together with statutory interest commencing on April 6, 1984.

Costs are charged to the defendant in accordance with Iowa Industrial Commissioner Rule 500-4.33 and shall include an expert witness fee of one hundred fifty and no/100 dollars ($150.00) payable to Charles P. Eddingfield, M.D.

Defendant is ordered to file an activities report within twenty (20) days of this decision.

Signed and filed this 28 day of November, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RALPH RAY,	:	
Claimant,	:	File No. 657865
vs.	:	APPEAL
IOWA BEEF PROCESSORS, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	

FILED
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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Due to the fact that all issues were not decided in the decision of the deputy and the matter must be remanded for further consideration, only the evidence supporting the reason for the remand will be considered at this time.

Defendant appeals from a decision styled in review-reopening in which claimant was awarded disability benefits to the extent of ten percent of the body as a whole for an injury which occurred November 21, 1980.

The record on appeal consists of the transcript of the proceeding together with claimant's exhibits 1 through 14; defendant's exhibits 1 through 5, 7, 8, 10 through 15, and 17; and the briefs and exceptions of the parties on appeal as well as the pleadings.

ISSUES

Whether or not claimant received an injury arising out of and in the course of his employment on November 21, 1980.

REVIEW OF THE EVIDENCE

Claimant was 49 years old at the time of hearing. Claimant is a married male who has three children. Claimant has an eleventh grade education. Prior to working for defendant, claimant's jobs included running a lathe in a machinery factory, working on a kill floor, and driving a truck. (Transcript, pages 14-15)

Claimant testified that in 1963 he became employed with defendant, working on the kill floor. He served in that capacity for ten years. The next nine years claimant drove a truck for defendant employer. (Tr., p. 14)

Claimant testified that he was involved in a work-related incident on November 21, 1980. Claimant recalled the incident:

A. Oh, I went down to the truck shed like any other morning, got the truck, took off. And we'd told them really what was wrong with them.

Q. What was wrong with the truck?

A. Everything in general.

Q. Well, tell us now. That doesn't help us much when you say everything in general.

....

A. The cabs are rusted, and we told them about it and they said drive it.

Q. What was the significance of the fact that the cab was rusted? Why was that important?

A. Old.

Q. Old?

A. And worn out.

Q. Worn out?

A. Right.

Q. Now, tell us, did something happen that day?

A. Yeah.

Q. What happened? Give us the details of it, Ralph.

A. Been driving, oh, probably three hours that morning moving trailers back and forth across the yard and down the road. And I was out in the backyard, and I come up. You could feel that cab, I don't know, float I guess is what you call it. Anyways, I come up through the gate, went down the road. I got about probably a hundred feet down the road, and I felt the cab lift up like that; and I hit the brakes.

Q. What do you mean lift up like that? Was that the whole truck --

A. Just the cab.

Q. Okay. Go ahead.

A. Just the cab come loose; and when I hit the brakes, it flipped it clear over. There's two locking pins on the back with J hooks, and that cab was so loose that it jumped away from those two pins. Well, it comes out away from them pins and it jumped up. When I hit the brakes, it just careened over.

Q. Forward?

A. Forward.

Q. The cab went forward?

A. Onto the pavement.

Q. Onto the pavement?

A. Onto the pavement.

Q. And you're behind the wheel. What happened to you?

A. I got flipped in the cab.

Q. Okay. Describe it for us.

A. I landed on my head in that cab. When she went over -- it's like the steering wheel's here, and I was laying on the floor.

Q. You went over with the cab down onto the concrete. How high off the ground would you have been sitting before the cab took off?

A. I'd say three and a half, four feet.

Q. Then you were propelled forward; is that right?

A. Yes.

Q. Ralph, this young lady is a court reporter, and she has to take down everything you say; and she can't take down a nod.

A. Okay.

Q. So you're propelled forward. You're still inside the cab; right?

A. Right.

Q. Now, tell us how you physically landed. Describe it for us in detail.

A. Well, when I went over, I landed on my head and my shoulder. Then I hung onto the steering wheel in there, and it was just like being flipped in there.

Q. Okay. Now, when you say you landed on your head, was it the top of your head, the side of your head?

A. Right there.

Q. Right on the top of your head?

A. Right on the top of my head.

Q. And then you also mentioned something about your shoulder. Tell us about that.

A. Well, evidently I twisted it in there or something.

Q. Okay.

A. When I went forward and I got throwed -- it's hard to explain because everything is backwards in that cab when you're over like that.

Q. You're talking about upside down?

A. Right.

Q. Were you knocked out?

A. No, shook up.

Q. Now, you're inside the cab. The cab's now down on the concrete flipped over. What happens then?

A. Well, you try and stop the truck some way or another and finally I found a brake.

Q. Was the truck still moving?

A. Oh, yeah.

Q. Here you're flipped over the truck's behind you?

A. No, there wasn't nobody on the road with me, but I was on the only one out there. It was about eight thirty in the morning, and when I found the brake, I tried to stop it. And then I let off the brake again, and it started moving again; and so I hit the brake again.

Q. This is while you're upside down?

A. Yeah.

Q. The truck kept moving forward?

A. Yeah, it was still moving. (Tr., pp. 15-20)

Claimant testified that a truck driver, who was in a nearby truck, saw claimant and went over to help claimant get out of the cab. (Tr., p. 20) Claimant recalled that his foreman, Lloyd Troop, soon came by to see what the problem was. Claimant recalled that he went home about an hour later. (Tr., p. 21)

Claimant testified that he immediately felt stiffness and soreness in his legs and right arm. Claimant stated that he began to have problems with his balance or equilibrium shortly thereafter. Claimant testified he also experienced problems with his hearing. (Tr., pp. 22-26)

Claimant testified that prior to November 21, 1980 he suffered from no injuries to his right arm and shoulder. On cross-examination, however, claimant was posed the following questions:

Q. Now, isn't it a fact that as far back as November of 1968 that you were treated for a strained right shoulder at Lutheran Hospital by Doctor Larson?

A. That I don't remember if I was or not.

Q. Are you denying it or just saying that you don't remember?

A. I don't remember.

Q. If the company has the record, then would you have any question that you had, in fact, been treated in 1968 for right arm and shoulder conditions?

A. Could have been.

Q. Now, Doctor Larson treated for you an injury on December 11, 1968, to the upper part of your right arm when you slipped on ice. Do you remember that?

A. No, I don't remember that.

Q. Do you remember that you had a recurrence of a strained right shoulder December 28, 1968?

A. No.

Q. Are you denying that it happened or you just don't --

A. No, I don't remember.

Q. Do you remember missing any time from work in 1968 for an injured right arm and shoulder?

A. No, I don't remember that.

A. No, I don't remember that.

Q. Again, you're not denying that you missed it. You're just saying you don't remember?

A. No, I'm not denying it either. It could have happened.

Q. Do you remember that you were treated by Doctor Kelley in 1968 for right arm and shoulder?

A. No.

Q. Do you remember being treated by Doctor Kelley in September of 1970 after you pulled muscles in your right shoulder?

A. 1970. It could have been.

Q. Again, you're not denying --

A. No, I'm not denying it.

Q. Do you remember that you saw Doctor John F. Kelly of Fort Dodge six or seven times in 1970 for your strained muscles of the right biceps?

A. I could have.

Q. Well, you did, didn't you?

A. Well, I could have like I say.

Q. And you had physical therapy up at the hospital even for that in 1970, didn't you?

A. When you start bringing it back all to me, why it's there.

Q. Sure. Then you've also had trouble with your left arm and shoulder, haven't you?

A. Yeah.

Q. You went down to Iowa City and were seen there in 1970 for that?

A. Yeah.

Q. Twice?

A. Yeah, I believe.
(Tr., pp. 47-49)

Claimant testified that such injuries had been mentioned to the doctors that treated him subsequent to the incident of November 1980. (Tr., p. 49) A review of these doctors' medical reports shows no history of claimant preceding the incident of November 21, 1980. (Claimant's Exhibit 1 through 14)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 21, 1980 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

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

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. Musselman, 261 Iowa 352, 154 N.W.2d 128.

ANALYSIS

Under our workers' compensation act, a worker 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 proximately caused by the injury.

A memorandum of agreement prohibits inquiry as to whether an employer-employee relationship existed and as to whether an injury on that date arose out of and in the course of employment. A memorandum of agreement has been filed for an injury which occurred January 3, 1979. No where in the record is there any evidence of a memorandum of agreement for an alleged injury of November 21, 1980. Thus, claimant has the burden to prove the incident under consideration is an alleged injury of November 21, 1980 which has been denied that he received an injury arising out of and in the course of his employment.

That an incident occurred on November 21, 1980 which arose out of and in the course of his employment does not necessitate a conclusion that it resulted in an injury and that disability which is now claimed is connected to it.

The opening paragraph of the proposed decision styled in review-reopening indicates an "admitted industrial injury which occurred on November 21, 1980." Review of the record discloses nothing in the form of a memorandum of agreement, admission in the pleadings, stipulation or other devise that admits an injury on November 21, 1980.

Nothing in the proposed decision which is really in arbitration supports finding of fact numbered 2 upon which the remainder of the findings rely.

THEREFORE, the proposed decision is vacated.

ORDER

WHEREFORE, this matter is remanded to the deputy who heard the case to make a determination indicating the evidence relied upon as to whether or not the claimant received an injury arising out of and in the course of his employment on November 21, 1980.

Signed and filed this 14 day of November, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAROLD ROBBINS,

Claimant,

vs.

CHITTENDEN & EASTMAN COMPANY,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

File No. 674757

A P P E A L

D E C I S I O N

FILED

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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision wherein claimant was awarded permanent partial disability benefits for 275 weeks at a rate of $213.75 per week.

The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 3; defendants' exhibits A and B; and the briefs and filings of all parties on appeal.

ISSUES

Defendants state the issues on appeal to be:

1. The Deputy erred in reaching the conclusion that the medical evidence causally connected Claimant's shoulder limitations to the original work injury.

2. There was insufficient evidence on which to hold that Claimant's functional overlay or pain behavior syndrome was causally connected to the original injury.

3. The award of fifty-five (55) percent disability to the body as a whole is not substantiated by the record.

REVIEW OF THE EVIDENCE

Claimant was 54 years old at the time of hearing. He is married and has an eighth grade education. Before his association with defendant employer, claimant drove a truck for North American Van Lines for 15 years. When claimant began working for defendant employer, he continued driving a truck. Claimant worked for defendant employer for seven years. (Transcript, pp. 6-8)

On June 16, 1981 claimant was involved in a work-related incident. Claimant describes the event:

A. I was unloading down at Springfield, Missouri, a dealer down there, and I had bedrails tied up -- I was supposed to have them tied alongside of the truck, but they didn't. They had one set tied and two sets behind that wasn't tied and I loosened the one set to let it down, the other set come down and hit my right elbow.

Q. Your right elbow?

A. Yeah.

Q. How much did they weigh approximately?

A. It was a waterbed, I'd say 150 pounds.

Q. How high was it above you initially?

A. It's -- well, they're seven foot, so I'd say three and a half foot above my head.

Q. It came down and hit your elbow?

A. Yeah.

Q. With Chittenden & Eastman, where did you work out of, what city?

A. Burlington, Iowa.

Q. Des Moines County?

A. Yes.

Q. You had driven to Springfield, Illinois?

A. Missouri.

Q. When this hit your elbow and came down upon it, what did you do?

A. It just made my arm numb is all.

Q. Made it numb?
(Tr., pp. 9-10)

After the incident, claimant began to drive back to Burlington but he stopped and stayed overnight in King City [sic], Missouri. At that time claimant put ice packs on his arm. Claimant recalls that he called into the office and advised the company dispatcher, Jim Vahn, about the incident. (Tr., pp. 10-11)

The next day claimant went to his family doctor in Fort Madison. Dr. McIllece put claimant's arm in a sling and recommended he go see Michael R. Wilson, M.D., in Burlington. (Tr., p. 11) Claimant went to see Dr. Wilson and he testified that Dr. Wilson sent him to Klein's Hospital to run a nerve test on his arm. Claimant testified that Dr. Wilson recommended surgery on his right elbow. In 1981 Dr. Wilson performed surgery on claimant's right elbow. (Tr., pp. 12-13)

In 1982 Dr. Wilson performed a second surgery on the right elbow. Following the second surgery, claimant's arm was placed in a cast for six weeks. (Tr., p. 14)

Claimant stated that late in 1982 Dr. Wilson advised claimant to go to Iowa City for further care of his arm. Claimant was referred to Bruce L. Sprague, M.D. Dr. Sprague performed a third surgery on claimant's right elbow at Mercy Hospital in Iowa City. After this surgery claimant's arm was in a cast for approximately two months. (Tr., pp. 15-17)

In 1983 claimant attempted to get his job back with defendant employer. There were no available positions at that time. (Tr., pp. 20-21)

Shortly thereafter claimant went to work for Watson Distributing as a truck driver. Claimant recalls how the job affected his arm:

A. I couldn't handle it in my arm. It hurt me so bad and up in my shoulder. I couldn't handle the shifting.

Q. The what?

A. The shifting.

Q. Are you right-handed?

A. Yes, sir.

Q. Is the shift in the right hand?

A. Yes.

Q. Are all semi trucks what I would call standard shift?

A. Yes.

Q. They are not --

A. They have some automatics.

Q. They do exist?

A. Yes.

Q. Have you ever been on one?

A. No.

Q. You mentioned something about your shoulder. How long had your shoulder bothered you as part of this arm?

A. Ever since the second operation.

Q. Had you told the doctor about that?

A. Yes.

Q. Did you tell Dr. Wilson about it?

A. No, Dr. Sprague.

Q. Is this shoulder stilI a problem for you?

A. Yes, sir.

Q. Is your right arm still a problem for you?

A. Yes, sir.

Q. The shoulder you are talking about, is that the right or the left?

A. Right.

Q. In handling the Milwaukee job, did you finish the job?

A. Yes, I went up and back.

Q. Up and back?

A. Yeah.

Q. When you got back, could you explain how your body was when you got back?

A. My right arm and right shoulder, well, it swelled up.

Q. Could you see it physically swollen up?

A. Yes.

Q. Could you describe that to us?

A. Yes, sir. I got a knot right there this morning, right here (Indicating) that comes up there and it pulls all my fingers right together.

Q. Are your fingers affected?

A. Yes.

Q. How are they affected?

A. They're numb.

Q. They are numb?

A. Yes.
(Tr., pp. 22-24)

Prior to June 16, 1981 claimant maintains that he was in good physical health other than missing part of his index finger on his right hand, and a previous ulcer. (Tr., p. 25)

Dr. Wilson is an orthopedic surgeon. He first saw claimant on November 3, 1981 under a referral from Dr. McIlece. Dr. Wilson made a diagnosis of a traumatic ulnar neuropathy at the elbow. He recommended ulnar neurolysis at the elbow with the thought that it may possibly need to be transposed in front of the elbow. (Claimant's Exhibit 3)

In his report dated August 9, 1983, Dr. Wilson stated:

> On December 2, 1981, he underwent ulnar neurolysis of the elbow. At that time, I did not transpose the nerve because there was a very distinct rather circumscribed area of compression, which I felt would likely be relieved by a simple neurolysis. Post-operatively, the patient did well for the first month, and then his symptoms gradually recurred. By around three months from the time of his first surgery, he was having a significant recurrence of his pain. At four months following the first surgery, his symptoms seemed to be increasing and recurrent, and I recommended that the elbow be re-explored and the nerve transposed. This was done in March, 1982. The nerve was found to be involved in dense scar posterior to the cubital tunnel. I performed a microscopic neurolysis of the scar and transposed the nerve anteriorly. Again, the patient initially did quite well and was relieved of his pain, but around 6-8 weeks following surgery, his pain gradually recurred.
>
> ....
>
> The patient continued to have an up and down course. That is, showing periods of improvement and then periods of deterioration, and I elected to have the patient evaluated by another hand surgeon, Dr. Sprague in Iowa City. My feeling was that either more extensive surgery transposing the nerve under the flexor muscles of the elbow, or nothing further would be indicated. The patient was first seen and evaluated by Dr. Sprague in July, 1982. Following that evaluation, Dr. Sprague's conclusions were similar to mine, that is to say he felt the patient had basically two options. One was to accept the symptoms that he had and the second was to proceed with repeat ulnar nerve exploration and transposition of the nerve deep to the flexor muscle origin at the elbow. The patient returned to my office asking what my advice would be. I told him that decision would be between the patient and Dr. Sprague, and that if the patient felt his symptoms were significant to justify a third operation, that he should proceed with it. The patient did undergo his third surgery by Dr. Sprague on August 10, 1982. That surgery involved a neurolysis of the nerve and the transposition underneath the common flexor origin. Dr. Sprague's operative report is available in the medical records.
> (Cl. Ex. 3)

Upon reexamination of claimant, Dr. Wilson discovered:

> Physical examination revealed significant limitation of shoulder motion, which has developed in the interim since I last saw the patient. He had from 0-120 degrees of abduction, only 30 degrees of external rotation, 45 degrees of internal rotation, and 120 degrees of forward flexion. Surprisingly, his biceps and forearm circumferences as measured with the tape, were equal bilaterally. He had a significant weakness of grip strength, with a grip of 68 lbs. per square inch on the left side, as opposed to 24 on the affected right side. Elbow motion was significantly limited from -30 to 105 degrees of flexion. He had full pronation and supination at the wrist, wrist dorsiflexion of 75 degrees, and palmar flexion of 75 degrees. He had persistent tenderness to palpation along his scar. His neck range of motion appeared normal. Thus, I think the patient presently has a significant physical impairment as evidenced by the loss of grip strength, the stiffness in the elbow and the stiffness in the shoulder.

Finally, Dr. Wilson calculated claimant's total physical impairment rating.

> Utilizing the American Medical Association's Guides to the Evaluation of Permanent Physical Impairment, I've calculated a total physical impairment rating of 25% physical impairment of the whole man on the basis of the following segmental calculations. The shoulder limitation of motion calculates to be 15% impairment of the upper extremity. The elbow limitation calculates to be 16% of the upper extremity, and together these total to 31% physical impairment of the upper extremity, which equates to a 19% physical impairment of the whole man. From the ulnar nerve loss of function and grip strength, there is a resultant 10% physical impairment of the upper extremity, which equates to 6% of the whole man. Thus, totaling the 19% and 6% impairments of the whole man, this equates to a 25% whole man physical impairment.
> (Cl. Ex. 3)

It was Dr. Wilson's medical opinion that "claimant is unable to return to work in his present capacity, and will not be able to do so in the future." (Cl. Ex. 3)

In his report dated January 11, 1982, Dr. Sprague stated that the first time claimant mentioned any problem with his shoulder was on September 13, 1982, when he complained about pain and stiffness involving the shoulder. (Defendants' Ex. A) However, it was Dr. Sprague's opinion that "it is probably not directly related to his workman [sic] compensation injury.

Further, Dr. Sprague stated:

> I feel that Mr. Robbin's permanent physical impairment is limited to his right upper extremity, and I basically feel it is limited to his ulnar nerve, and the last time I saw the patient I felt he would be entitled to a 10% impairment of the right upper extremity because of loss of sensibility and mild motor function loss involving his right upper arm. Unfortunately, I feel that all the other components of Mr. Robbin's problems are functional overlays and should not be compensible [sic].
>
> I think it is unfortunate that there are some patients that work very diligently not to improve their health. Whether or not this is true in Mr. Robbins' case, is up to the individual evaluator.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on June 16, 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 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).

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, 253 Iowa 285, 110 N.W.2d 660; Dailey, 233 Iowa 758, 10 N.W.2d 569.

Permanent partial disabilities are classified as either scheduled or unscheduled and Iowa courts have approved the use of functional and industrial methods of determination within the appropriate classification. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960). For instance, Iowa Courts have held that an employee with a permanent partial disability to a leg has a scheduled disability that required the determination of the percentage of impairment of his leg without regard to the industrial disability factors. Graves v. Eagle Iron Works, 331 N.W.2d 116, 117 (Iowa 1983).

On the other hand, nonscheduled disabilities can be to any part injured not found on the schedule. Nonscheduled disabilities are referred to as disabilities to the body as a whole. Simbro, 332 N.W.2d 886, 887.

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

The dispute in this case centers around whether or not the impairment caused by the injury to claimant's elbow extends beyond the scheduled member which in this case is the upper extremity. Dr. Sprague indicates claimant's impairment is limited to the right upper extremity and more specifically the elbow area. Dr. Wilson indicates claimant's injury produced impairment is in his elbow and later developed impairment in his shoulder. The combined effects however, create impairment which is limited to the right upper extremity. To determine the after effects of claimant's injuries are to the body as a whole would necessitate a finding that claimant's functional overlay or pain behavior is a permanent impairment to the body as a whole.

Dr. Wilson defined functional overlay or pain behavior in the following terms:

> Pain behavior refers to a psychological condition, which all people with persistent or chronic pain are subject to. It does not refer to a psychiatric diagnosis or an indication that a patient is malingering. Pain behavior simply means that the persistence of a symptom causes in the patient on the development of a pattern of behavior to accommodate that symptom which may not be related to the complaints of the condition that the patient has. Now, that's a long-winded way of saying that if you have something that you've been favoring for a long time and you take away the reason for your favoring it, you may employ a pain behavior.
>
> If that's the case, then, surgical treatment is not likely to get it well. If it's not the case and there is some reason, organic reason, some physical reason for the pain to persist, then surgery will help the complaint. And that's organic, and not the one that's pain behavior.

Perhaps the most significant segment of Dr. Wilson's definition of pain behavior, as it relates to this case, is where he states that "the persistence of a symptom" causes this developmental behavior in a patient.

In this case the lack of persistence or consistency of shoulder pain is an important factor.

For instance, Dr. Wilson stated in his narrative report on August 9, 1983, that claimant "continued to have an up and down course. That is showing periods of improvement and then periods of deterioration." Next, in his deposition dated June 6, 1983, Dr. Wilson testified that claimant's resurfacing of pain from time to time in his shoulder seemed to follow a pattern. Every time Dr. Wilson contemplated returning claimant to work, recurrences of pain and limitation of motion would reappear. (Cl. Ex. 1, p. 14)

Dr. Sprague stated on January 11, 1984 that the shoulder problem was probably not directly related to claimant's workers' compensation injury. Further, Dr. Sprague noted that "I think it is unfortunate that there are some patients that work very diligently not to improve their health."

On these facts, the evidence is not pursuasive that claimant has a condition of a permanent nature resulting from the injury to the elbow which extends the effects of the injury beyond the upper extremity.

Analagously, claimant has not proven by a preponderance of the evidence that the injury to his scheduled member created impairment to the body as a whole.

All injuries, even though confined to a specific member, have an effect to the body as a whole. The fact that a medical evaluator determines a rating of impairment to the body as a whole does not make the injury compensable as a body as a whole injury.

Dr. Wilson gave claimant a 25 percent whole man physical impairment rating using the American Medical Association's Guides to the Evaluation of Permanent Physical Impairment. Although this rating was obtained in an incorrect manner it is not important as claimant's impairment is found to be confined to the right upper extremity. Dr. Wilson gave claimant a 15 percent impairment rating to the upper extremity due to limitation of shoulder motion. He gave claimant's elbow limitation a 16 percent impairment rating to the upper extremity, and he gave claimant a 10 percent physical impairment rating to the upper extremity due to ulnar nerve, loss of function and grip loss.

Use of the combined values table in the AMA Guides discloses the total impairment to the right upper extremity to be 36 percent.

Dr. Sprague stated that claimant would be entitled to a 10 percent impairment of the right upper extremity.

The measurements of Dr. Wilson regarding the impairment to claimant's upper extremity will be used as they are more definitive as to the nature of the components involved in the evaluation.

FINDINGS OF FACT

WHEREFORE, it is found:

1. That claimant was fifty-four (54) years old at the time of hearing.

2. That claimant was a truck driver for seven (7) years with defendant employer.

3. That claimant was involved in a work-related incident on June 16, 1981.

4. That claimant sustained a traumatic ulnar neuropathy at the right elbow.

5. That claimant had surgery on his elbow on December 2, 1981.

6. That claimant underwent a second elbow surgery in March of 1982.

7. That claimant underwent a third elbow surgery on August 10, 1982.

8. That claimant now complains of pain spreading up his arm to his shoulder.

9. That claimant's pain is inconsistent in nature.

10. That claimant has an impairment of thirty-six percent (36%) of the right upper extremity.

11. That claimant does not have permanent impairment as a result of his elbow injury which extends into the body as a whole.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That claimant is entitled to ninety (90) weeks of permanent partial disability compensation at the rate of two hundred thirteen and 75/100 dollars ($213.75) per week. Healing period is not in issue.

WHEREFORE, the deputy's review-reopening decision filed March 30, 1984 is reversed.

THEREFORE, it is ordered:

That defendants shall pay claimant ninety (90) weeks of compensation at the rate of two hundred thirteen and 75/100 dollars ($213.75) per week less credit for amounts of permanent partial disability compensation already paid. Accrued payments shall be paid in a lump sum together with statutory interest.

That the costs are taxed to defendants pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 21 day of December, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DELMER JACK ROBERTSON,

Claimant,

vs.

NATIONAL OATS CO.,

Employer,

and

KEMPER INSURANCE CO.,

Insurance Carrier,
Defendants.

FILE NO. 693830

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED
JAN 30 1984
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Delmar Jack Robertson, the claimant, against his employer, National Oats Co., his employer, and Kemper Insurance Co., the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act as the result of an admitted injury he sustained on January 25, 1982. This matter came on for hearing before the undersigned deputy industrial commissioner in Cedar Rapids, Iowa on January 13, 1984. The record was considered fully submitted at that time.

Based upon the undersigned's notes of this proceeding, the record in this case consists of the testimony of the claimant; depositions of Fred J. Pilcher, M.D., and Barbara Campbell, M.D.; claimant's exhibits 1 through 3; and defendants' exhibits A through D.

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

Claimant's rate of weekly entitlement was stipulated to be $274.84.

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

Claimant, age 43, is married with one dependent child. His educational background indicates that he attended formal schooling through the 10th grade in Cedar Rapids, Iowa and had no further educational training or formal schooling after that time.

Claimant's work history indicates that he began his employment with the defendant, National Oats Company in Cedar Rapids, Iowa, on April 13, 1959 as a roll attendant and was similarly employed at the time of the hearing.

The claimant testified that he was working for the defendant, National Oats Company, on Janury 25, 1982. While working it became necessary for the claimant to adjust the rollers on a roll machine and that in order to adjust the rollers the claimant used a pry bar, which he inserted in a wheel in order to gain additional leverage. While in the process of adjusting the roll machine, the bottom of the pry bar slipped and the claimant struck the back of his right hand on an adjacent wheel. The claimant reported this injury to his employer and was taken to St. Lukes Hospital in Cedar Rapids, Iowa where x-rays were taken of the claimant's right wrist. The next day the claimant went to the company doctor, R. H. Rowe, M.D., who subsequently treated the claimant for his injury. The claimant testified that he was off work because of his injury until February 23, 1982 at which time Dr. Rowe released him to go back to work.

The claimant further testified that after his return to work, he continued to experience difficulties with his right hand. Dr. Rowe then referred the claimant to Fred J. Pilcher, M.D. The claimant saw Dr. Pilcher on May 28, 1982 and as a result of the examination by Dr. Pilcher, a carpal tunnel release operation was performed on July 7, 1982.

The claimant further testified that he experiences pain, numbness and a loss of strength in his right hand and that the same has not improved since the date of the original injury.

Dr. Pilcher testified by deposition on behalf of the claimant. He has been involved in the practice of medicine as an orthopedic surgeon in Cedar Rapids for five years. He testified that he saw the claimant on May 28, 1982 as a result of a referral from Dr. Rowe, the company physician. Dr. Pilcher testified that his examination of the claimant revealed that he had a positive Phelan's test, and that as a result of the examination, felt that the claimant had a mild carpal tunnel syndrome and some carpal instability or ligamentous injury from the blow that he received to his right hand on January 25, 1982. Dr. Pilcher further testified that on July 7, 1982 he performed a carpal tunnel release at St. Lukes Hospital in Cedar Rapids, Iowa on the claimant.

Dr. Pilcher further testified that he saw the claimant on July 26, 1982 for a follow-up surgical visit. He testified that at the time the claimant was still complaining and that the claimant did not feel there had been any significant improvement in his condition as a result of the surgery. He again saw the claimant on August 13, 1982 at which time the claimant advised him that his condition was unchanged other than he had gone back to work. Dr. Pilcher's examination found some localized tenderness in the ulnar aspect of the right wrist and also obtained some radiographs of the wrist. An examination of the radiographs did not reveal anything significant. At this time, Dr. Pilcher then injected the wrist with a combination of local anesthetic and a local steroid.

Dr. Pilcher next saw the claimant on September 10, 1982 at which time the claimant was still complaining of pain in the right wrist. He then referred him to Leland Hawkins, M.D. After examination by Dr. Hawkins, they discovered nothing of a significant nature.

Dr. Pilcher next saw the claimant on November 8, 1982 at which time his examination revealed that the claimant's grip was weaker on the right side and that he had an unusual distribution or loss of sensation with his thumb, the radial aspect of his index finger, part of the third finger and part of the fourth and fifth digits. Dr. Pilcher measured the claimant's grip and it was 80 pounds on the right and the left was 110 pounds. Claimant complained of pain especially when he gripped something and that his fingers were numb.

After the examination and evaluation on November 8, 1982, Dr. Pilcher evaluated the claimant. Dr. Pilcher's evaluation is contained in claimant's exhibit 2 which is a report addressed to the claimant's counsel and dated November 30, 1982. Dr. Pilcher states:

> This is a very difficult case to determine a permanent disability rating. If he had complete anesthesia of his hand, it would be a 100 percent impairment; however, it is a patchy loss and seems to involve both median and ulnar nerve. I arbitrarily rated a 25 percent loss to the digits one, two, and three and 20 percent to the fourth and fifth based on loss of sensation. This equates to a final permanent impairment of the hand of 24 percent.

Dr. Barbara Jean Campbell, M.D., testified by deposition for the defendants. Dr. Campbell testified that she is associated with the University of Iowa Hospitals and Clinics, Department of Orthopedics. She testified further that she evaluated the claimant on January 19, 1983 at the clinic at the University Hospital. Dr. Campbell testified that at the time of her examination the claimant's grip strength was tested at 20 pounds on the right and 75 pounds on the left side, that his grip strength and his key pinch were not as weak as those numbers signified. Dr. Campbell testified that she did not feel that the claimant was cooperative with the strength testing and it was her personal belief that he does not have any functional imparity of his hand. Dr. Campbell testified further that based on the information that she saw and his nerve conductions, that it sure seemed that he had a carpal tunnel syndrome and would have also done a release.

Dr. Campbell testified further that she agreed with the diagnosis of a carpal tunnel and that she would have followed the same procedure as Dr. Pilcher.

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

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

In applying the foregoing legal principles to the case at hand, it is clear that the claimant has sustained his burden of proof. Claimant had no physical complaints concerning his hand prior to the admitted industrial episode. Following the carpal tunnel release he has pain together with an unusal distribution of loss of sensation and two-point discrimination. (Pilcher dep., p. 21, l. 2) Dr. Pilcher's opinion as claimant's attending physician is given the greater weight in this decision.

THEREFORE, after having seen and heard the witness 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 January 25, 1982 the claimant was an employee of the defendant, National Oats Company.

3. That on January 25, 1982 the claimant sustained an admitted industrial injury.

4. That the claimant was unable to perform acts of gainful employment from January 25 until February 23, 1982 for which he was paid benefits.

5. That the claimant returned to work on February 23, 1982 and continued his duties with the defendant until July 7, 1982.

6. That the claimant continued to experience pain and numbness in his right hand and on May 26, 1982 was examined by Dr. Pilcher, an orthopedic surgeon in Cedar Rapids, Iowa.

7. That on July 7, 1982 Dr. Pilcher performed a surgical procedure known as a carpal tunnel release.

8. That the claimant was off work from July 7, 1982 until August 2, 1982 and returned to work for the defendant performing the same duties that he performed at the time he was injured.

9. That during the time that the claimant was off work he did not receive workers' compensation benefits, but did receive group insurance benefits. The parties have stipulated that the amount of said benefits should be deducted from the award in this case.

10. That after returning to work, the claimant continued to suffer pain and numbness in his right hand and returned to Dr. Pilcher on August 13, 1982 for a follow-up surgical visit. The claimant complained that his condition was unchanged and that he still had pain, numbness and a weakness in his right hand.

11. That the claimant again visited Dr. Pilcher on September 10, 1982 at which time Dr. Pilcher examined him. In addition, Dr. Leland Hawkins also examined the claimant and consulted with Dr. Pilcher, but their examination could discover nothing of a significant nature.

12. That on September 10, 1982 the claimant was still complaining of pain in his right wrist and numbness and weakness.

13. That on November 8, 1982 Dr. Pilcher examined the claimant and found that his grip was weaker on the right side and that the claimant was still complaining of pain and numbness in his right wrist and hand.

14. That the claimant bowls with a brace and has expressed medical permission to do so.

15. That Dr. Pilcher evaluated the claimant's disability on November 8, 1982 and found that there was a permanent partial disability of the claimant's right hand in the amount of 24 percent.

16. That the services rendered to the claimant by St. Lukes Hospital and Dr. Pilcher are causally related to the work injury sustained by the claimant.

17. That based on the record as a whole, the claimant has sustained a permanent partial disability to his right hand in the amount of 15 percent.

18. That certain items of medical and hospital expenses incurred by the claimant remain unpaid.

THEREFORE, IT IS ORDERED:

That the defendants shall pay unto the claimant healing period benefits for the period from July 7, 1982 until August 2, 1982 at the stipulated rate of two hundred seventy-four and 34/100 dollars ($274.84) per week subject to the provisions of section 85.38, Code of Iowa 1981.

That the defendants shall pay unto the claimant twenty-eight and five-sevenths (28 5/7) weeks of permanent partial disability benefits at the rate of two hundred seventy-four and 84/100 dollars ($274.84) per week.

That the defendant shall pay unto the claimant the following medical expenses in the event they remain unpaid as of the date below:

St. Lukes Hospital	$516.50
Dr. Fred J. Pilcher	566.00
Family Practice Associates	42.50

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

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

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

That the defendants shall file a final report within twenty (20) days from the date of this decision.

Signed and filed this 23 day of October, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GLADYS ROGGE,	:	
Claimant,	:	
	:	FILE NO. 760413
vs.	:	
	:	A R B I T R A T I O N
WILSON FOODS,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Gladys Rogge against Wilson Foods Corporation, a self-insured employer. Claimant alleges that she sustained a compensable injury as a result of ammonia inhalation on December 23, 1983. The hearing commenced August 13, 1984 in the Buena Vista County Courthouse in Storm Lake, Iowa. The case was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of Gladys Rogge, James Cuthrell, Arlis Frierich, John Ketelsen and Jeri Pletcher. Claimant's exhibit A was received into evidence.

ISSUES

The issues presented by the parties at the time of hearing are: whether claimant sustained an injury arising out of and in the course of her employment; a determination of the nature and extent of any disability which is causally connected with the alleged injury; a determination of claimant's entitlement to benefits under section 85.27 of the Code of Iowa; and, in the event of an award, a determination of the defendant's entitlement to credit under section 85.38(2) of the Code of Iowa. It was stipulated by the parties that in the event of an award claimant's rate of compensation is $199.98 per week, that she has been paid company sick pay benefits in the amount of $712.80 and that the medical bills which she has incurred are fair and reasonable.

REVIEW OF THE EVIDENCE

Claimant testified that she is single, with two children and has worked at Wilson Foods Corporation more than five years. Her normal job is trimming snouts on the head table. She stated that when she commenced her employment she was in good health.

She related that in the past she had undergone surgery for a hernia repair and that approximately a month ago she pulled a muscle in her ribs.

Claimant related an incident which occurred approximately three years ago when she was exposed to chlorine from a cylinder which had burst. She stated that it caused her to miss work and that she was paid workers' compensation benefits.

Claimant testified that on December 24, 1983 an ammonia leak occurred approximately 40 minutes prior to the end of her work shift but that she kept working and finished the shift. She stated that many people left the table coughing and with their eyes tearing. She stated that the exposure hurt her lungs, burned her throat and that her lungs felt full. She also related watery eyes and some nausea.

Claimant testified that she did not seek medical care immediately as she could not afford to miss work. She stated that following the incident she felt run down, that she had a sore throat and a cough. She recalled seeing a nurse at the plant whose name was Mary and stated that the nurse sent her to see Keith O. Garner, M.D., on January 13, 1983. She stated that she received care from him and continued to work until January 31, even though she was still experiencing the same problems. Claimant stated that she did not return to work until March 12. She stated that the doctor had released her to return a week earlier, but that she did not feel that she had recovered fully and took a week of vacation.

Claimant testified that while she was off work she had chest x-rays, blood tests and was given vitamins and medication. She stated that she lost her voice completely and sought care from her own doctor, Thomas M. Gary, M.D. She related that he kept her off work and gave her cortisone.

Claimant related being examined in the pulmonary department at the University of Omaha.

Claimant stated that presently chlorine and ammonia odors irritate her throat and that on the Tuesday prior to the hearing of this case the fumes at the plant were strong. She stated that she has not subsequently missed any work due to fumes.

On cross-examination claimant related that the incident occurred on the Friday before Christmas and that she went to work on the next scheduled work day which was a Tuesday. She related that she saw the nurse during the first full week of January.

On re-direct examination she stated that her condition did not improve following the exposure but that it gradually worsened.

James Cuthrell testified that he has been employed by the defendant slightly less than five years. He stated that on the day of the incident he was working approximately two or three feet away from claimant. He stated that the exposure caused him congestion, a headache and sore throat. He related that he kept on working. He denied seeking medical care. He stated that he has subsequently developed a rash which he believes is related to the exposure and that chlorine now causes him to have a sore throat. He stated that he missed no work as a result of the incident.

Arlis Frierich related having been employed by Wilson for 18 years. He stated that he was also working on the head table and exposed to ammonia which made his eyes water, his throat sore and caused difficulty breathing. He estimated that the exposure continued for approximately one hour. He stated that he was worse the following morning and saw his own physician who gave him antibiotics. He related that he had trouble for a couple of months following the incident which consisted of having a sore throat in the morning. He missed no work as a result of the incident.

John Ketelsen testified that he has been employed by Wilson for approximately 18 years and that he was the vice president of the local union. He stated that his responsibilities included employee benefits including workers' compensation, accident and sickness and others. He recalled that the ammonia leak was reported to him and that an attendant, called to repair the leak burned, his hands. He did not personally observe the leak.

Jeri Pletcher testified that she is the daytime plant nurse at Wilson Foods. She stated that she had no report of the ammonia leak. Pletcher stated that claimant came to the nurse's station on December 31 with a sore throat and other symptoms which accompany a cold. She recalled that Arlis Frierich also made similar complaints at approximately the same time. Pletcher related that she has access to the company records of workers' compensation and knows of no one else who missed any work as a result of the incident.

Claimant's exhibit A consists of seven subparts. The first is a report from Keith O. Garner, M.D., dated April 3, 1984 in which he states that, "there was no injury involved as her complaints pertain to reflux esophagitis". He goes on to state, "there is no conceivable way that this is work related".

The second part of exhibit A is a report of Thomas M. Gary, M.D., dated March 29, 1984. In it he states that he anticipates no permanency and that he feels that her respiratory tree has returned to normal. Attached is a second report dated March 20, 1984 in which he states that claimant's diagnostic evaluation was part of her "Workman's [sic] Compensation evaluation".

The third part of the exhibit is a report from Irving Kass, M.D., which relates that pulmonary function studies performed February 28, 1984 indicate that claimant has no permanent loss of function. Attached are progress notes which show claimant seeking medical care for complaints consistent with those of which she testified at hearing.

The fourth section is a report of LeeRoy E. Meyer, M.D., in which he states that claimant has no permanent damage from the incident. He goes on to state, "in addition, since the employee has been off work for nearly a month and continues to have a weak voice, difficulty swallowing and tiredness it is clear that her current problem is not the result of the ammonia exposure and the treatment that followed. All the symptoms related to a level of exposure suggested by the history should have cleared within a few days. Part of the symptomatology may have been due to a concomitant upper respiratory infection. The explanation for her current complaints, namely, persistent sore throat, weak voice and tiredness are most likely due to nonoccupational problems such as cardioesophageal disfunction with acid reflux and emotional stress."

The fifth portion of the exhibit is a note from Dr. Gary dated February 13, 1984 in which he states that claimant's illness is job related or aggravated.

The sixth portion is a report dated February 13, 1984 which indicates that claimant has laryngotracheitis, possibly chemically induced and possibly aggravated by medication.

The statements attached show medical bills from Cherokee Clinic which total $119.00 and charges in the amount of $14.00 from Dr. Gary.

ANALYSIS AND APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on December 23, 1983 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 evidence in this case clearly establishes that claimant was subjected to an ammonia leak at the place of her employment and it is therefore found and concluded that claimant has met her burden of proof in that regard.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 23, 1983 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).

The pulmonary function report and the opinion of Drs. Gary, Kass and Meyer clearly establish that claimant did not suffer a permanent impairment as a result of the injury. There is no indication that the injury resulted in any impairment in claimant's earning capacity which would entitle her to industrial disability benefits under the theory of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). She has clearly returned to work at her old position.

Claimant missed work, according to her testimony, from February 1, 1984 until March 12, 1984 when she returned. She stated that she had been medically released to return to work a week prior to the time that she actually returned. On February 13, 1984 Dr. Gary diagnosed claimant as having laryngotracheitis, possibly chemically induced and possibly aggravated by medication. On that same date he signed a note in which he states that claimant's illness is job related or aggravated. Such opinion conflicts with that of Dr. Meyer and of Dr. Garner. It was also made prior to the time that the endoscopic examination was performed on March 1, 1984. Claimant has been definitely diagnosed as having a prepyloric ulcer. Claimant has the burden of proving that her injury was a cause of her absence from work. From the evidence it is certainly possible that there may be a relationship; however, the evidence in this case does not render it more likely than not that such a relationship exists. Accordingly, claimant has failed to prove her entitlement to temporary total disability compensation.

Claimant seeks payment of certain medical bills. Claimant did suffer an exposure which could have reasonably been expected to cause irritation. Even though the injury did not require an absence from work, it would be reasonable that claimant should seek medical care. It is found that the charges from Cherokee Clinic, P.C., of January 13, 1984 and January 31, 1984 in a total amount of $70.00 are expenses of medical care which were reasonably necessary for treatment of claimant's injury and defendant will be responsible for the cost thereof. The charge of $14.00 from Dr. Gary on February 10, 1984 was likewise for the respiratory complaints which claimant expressed following the ammonia exposure and the same will also be held to be care related to that exposure for which the defendant is liable. Defendant will not be held responsible for the charge of $49.00 from Cherokee Medical Clinic which was incurred on July 3, 1984.

FINDINGS OF FACT

1. On December 23, 1983 claimant was a resident of the State of Iowa and her place of employment was with Wilson Foods Corporation in the State of Iowa.

2. Claimant was injured on December 23, 1983 when an ammonia leak occurred at her place of employment and she continued to work in the presence of ammonia fumes.

3. The injury claimant sustained caused an irritation of her respiratory system for which she sought medical care at Cherokee Clinic, P.C., on January 13 and 31, 1984 and from Thomas M. Gary, M.D., on February 10, 1984 which resulted in charges which totaled $84.00.

4. Claimant also suffers from a prepyloric ulcer.

5. Claimant's absence from work during February and March, 1984 is not shown to have been related to her exposure to ammonia which occurred on December 23, 1983.

6. Claimant did not suffer any permanent physical impairment from the ammonia exposure and has not suffered any impairment of her earning capacity as a result of the exposure.

7. The medical care which claimant received as heretofore found was reasonable and necessary for the injury which she sustained and the cost thereof was fair and reasonable in relation to the services which were actually provided.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and its parties.

The injury claimant sustained on December 23, 1983 arose out of and in the course of her employment with Wilson Foods Corporation.

The injury did not result in any temporary or permanent disability and claimant is not entitled to compensation for

temporary total disability, healing period or permanent disability of any nature.

The injury required medical care and defendant is responsible under the provisions of section 85.27 of the Code of Iowa for claimant's medical expenses incurred with Cherokee Clinic, P.C., in the amount of $70.00 and with Thomas M. Gary, M.D., in the amount of $14.00.

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant's medical expenses with Cherokee Clinic, P.C., in the amount of seventy and no/100 dollars ($70.00) and her medical expenses with Thomas M. Gary, M.D., in the amount of fourteen and no/100 dollars ($14.00). Defendant shall receive credit under section 85.38 of the Code of Iowa for any amount of those bills which it has previously paid.

IT IS FURTHER ORDERED that defendant pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

IT IS FURTHER ORDERED that defendant file a final report within twenty (20) days from the date of this decision.

Signed and filed this 24th day of October, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FREDERICK ROMANI,	:	
Claimant,	:	
vs.	:	File No. 608750
EBASCO SERVICES,	:	A P P E A L
Employer,	:	R U L I N G
and	:	
UNITED STATES FIDELITY & GUARANTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

FILED
NOV 2 1984
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant, pro se, appeals from a proposed ruling which awarded an attorney's fee of 30 percent of claimant's recovery in a review-reopening proceeding.

ISSUE

The sole issue for consideration in this appeal is the propriety of the proposed ruling on attorney fees. Claimant raises other issues, however, they are unrelated to the subject matter of the ruling which is on appeal.

REVIEW OF THE EVIDENCE

On March 27, 1980 claimant entered into an employment agreement with the law firm of Gleysteen, Harper, Eidsmoe, Heidman and Redmond. The text of the agreement is as follows:

> WHEREAS, Frederick Romani, hereinafter called the first party, desires to employ the law firm of Gleysteen, Harper, Eidsmoe, Heidman & Redmond, hereinafter called second party, to prosecute his claim for damages against Ebasco Services, and/or such other parties as second party may conclude may be liable for said damages, and
>
> WHEREAS, second party is willing to accept said employment.
>
> NOW, THEREFORE, it is understood and agreed between the parties as follows:
>
> 1. First party hereby employs second party to prosecute his claim.
>
> 2. Second party hereby accepts said employment.
>
> 3. After recovery, either by settlement or after trial in the lower court and after second party has been reimbursed for his reasonable expenses, the amount remaining shall be divided on the basis of 66 2/3% to the first party, less the court costs, and 33 1/3% to second party.
>
> 4. In the event of a retrial in the lower court or of an appeal to a higher court, the amount of recovery, after second party has been reimbursed for its reasonable expenses, shall be divided on the basis of 60% to first party, less the court costs, and 40% to second party.
>
> 5. It is agreed irrespective of the above that second party shall not be entitled to any share of any temporary total disability, healing period, or medical expenses (Section 85.27) paid voluntarily by the employer or the insurance carrier.
>
> IN WITNESS WHEREOF, we have set our hands this 27 day of March, 1980.
>
> /s/ _____
> FIRST PARTY
>
> GLEYSTEEN, HARPER, EIDSMOE, HEIDMAN & REDMOND
>
> /s/ BY: _____
> 200 Home Federal Building
> P. O. Box 3086
> Sioux City, IA 51102
>
> SECOND PARTY.

An original notice and petition for review-reopening consideration was filed on April 29, 1980. On November 25, 1980 a proposed decision by this agency found claimant entitled to a running award of healing period benefits. The decision was affirmed on appeal by the industrial commissioner and by the Woodbury County District Court.

On November 4, 1981 claimant and Mr. Harper applied for approval of the original fee agreement of March 27, 1980. The parties additionally sought approval of a supplemental agreement for employment which stated as follows:

> WHEREAS, the undersigned entered into an Agreement for employment of attorneys dated March 27, 1980.
>
> NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties agree as follows:
>
> 1. The attorney fees of Wiley Mayne, which fees now constitute a lien in Case #87384 Law, Ebasco Services, Inc., and United States Fidelity & Guaranty Company, Plaintiffs/Petitioners, vs. Frederick Romani, Defendant/Claimant, and Iowa Industrial Commissioner, Defendant-Respondent in the amount of $435.38 shall be paid by Fred Romani in conformance with the letter of D. M. Harper attached hereto and made a part hereof and marked Exhibit "A".
>
> 2. The attorney fees on the check for $17,784.00 and heretofore distributed shall be $7,113.60.
>
> 3. Contingent upon approval of Iowa Industrial Commissioner, future checks for disability benefits shall be divided on the basis of 70% to Frederick Romani and 30% to Gleysteen, Harper, Eidsmoe, Heidman & Redmond.
>
> 4. Any future costs to be paid by Frederick Romani.
>
> DATED this 30 day of Oct, 1981
>
> /s/ _____
> FREDERICK ROMANI, First Party
>
> GLEYSTEEN, HARPER, EIDSMOE, HEIDMAN & REDMOND
>
> /s/ BY: _____
> D. M. HARPER
> 200 Home Federal Building
> P.O. Box 3086
> Sioux City, Iowa 51102
> (712) 255-8838
>
> SECOND PARTY.

The original March 27, 1980 agreement for employment of attorneys and the supplemental employment agreement were approved by this agency in an order filed November 12, 1981. The lien of Wiley Mayne, referred to in the above supplemental agreement, was released on November 12, 1981.

On August 13, 1982 defendants filed a petition for review-reopening alleging that claimant had declined further medical care and contending that defendants had complied with the November 25, 1980 award. An answer was filed on behalf of claimant by Charles T. Patterson of the Gleysteen firm.

In an order filed November 10, 1982 defendants were directed under the provisions of Iowa Code section 85.27 to pay claimant's transportation expenses for a maximum of five round trips for evaluation by a medical facility.

The review-reopening proceeding was scheduled for hearing on February 1, 1984 at 1:00 p.m. Claimant did not come to Iowa, and the deputy hearing the proceeding was informed that morning that a settlement had been agreed to between the parties. At noon, the deputy was informed claimant was having "second thoughts" about settling. A long distance call was placed to claimant, and under oath, claimant testified that he had voluntarily authorized his counsel to settle for $21,893.38. Claimant indicated he was now dissatisfied with the amount of recovery. A hearing on the merits was set for February 1, 1984. A continuance was denied. At the time of the hearing, defendants moved for summary judgment on the basis that a settlement agreement had been reached. The motion was granted on February 6, 1984.

On February 14, 1984 the Gleysteen firm, through Mr. Patterson, applied for leave to withdraw as counsel. The Gleysteen firm further filed notice of lien for attorney fees, services, and costs. A hearing for approval of payment of the lien was sought.

Claimant, pro se, filed application on March 5, 1984 for reimbursement of claimant's attorney's travel expenses and the setting of a fair and just attorney fee. On March 5, 1984 an agreement and joint application for special case settlement was filed with this office. The documents specified a total settlement of $35,000 and bore the signatures of P. D. Furlong, attorney for defendants and Frederick Romani, claimant. On March 6, 1984 the joint application for a special case settlement was approved.

On March 9, 1984 defendants filed a resistance to claimant's application for approval of a fair and just attorney fee and reimbursement by defendants for attorney travel expenses.

On March 21, 1984 claimant, pro se, filed an application for an order reducing attorney fees to "3,500" [sic].

On March 26, 1984 claimant, pro se, filed an objection to the defendants' resistance to claimant's application. Claimant further requested the industrial commissioner to "overturn the Motion for Summary Judgment."

On March 28, 1984 Charles T. Patterson filed an affidavit of counsel, outlining the attorney services provided claimant since November of 1981. On April 9, 1984 claimant, pro se, filed a resistance to the affidavit of counsel.

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.

The elements which have a bearing on attorney fee include but are not limited to: the time spent; the nature and extent of the services; the amount involved; the difficulty of handling and importance of the issues; the responsibility assumed and the results obtained; as well as the professional standing and experience of the attorney. Under some circumstances a one-third contingent fee might be reasonable, but it should be based on the facts and circumstances of the particular case rather than the contract between the employee and his counsel. Kirkpatrick v. Patterson, 172 N.W.2d 259, 261 (Iowa 1969).

ANALYSIS

Claimant voluntarily entered into two agreements for employment with the Gleysteen firm in 1980 and 1981. Since that time this agency has accumulated a voluminous record of motions, briefs, depositions, proposed exhibits and other filings by the parties as the proceedings slogged to a conclusion. Issues raised have involved efforts to secure rehabilitation, transportation, and medical evaluation and treatment for claimant. Counsel for claimant has participated in hearings and prepared evidence in anticipation of litigation. He has been working on claimant's behalf for approximately 28 months.

The percentage called for in the employment agreement is in line with charges made by local attorneys in workers' compensation cases, and claimant's counsel is experienced in this area of practice. Under the circumstances of the case, the legal services performed for claimant support a finding that a 30 percent contingency fee is not unreasonable.

FINDINGS OF FACT

1. Claimant entered into two employment agreements with the law firm of Gleysteen, Harper, Eidsmoe, Heidman and Redmond.

2. On March 27, 1980 claimant agreed to pay 33 1/3 percent of his recovery less expenses to the Gleysteen firm.

3. On October 30, 1981 claimant agreed to pay 30 percent of his future disability recovery to the Gleysteen firm.

4. Counsel is experienced in workers' compensation proceedings and has actively represented claimant's interests for 28 months.

5. A 30 percent contingency fee for legal services received by claimant is not unreasonable.

CONCLUSIONS OF LAW

WHEREFORE, it is found.

A contingency fee of thirty percent (30%) of claimant's recovery is not unreasonable.

THEREFORE, an attorney's fee of thirty percent (30%) of recovery is allowed. The proposed decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered that an attorney's fee of thirty percent (30%) is allowed.

Signed and filed this 20 day of November, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TORREY W. ROSTER, Claimant, vs. D. C. TAYLOR COMPANY, Employer, and THE TRAVELERS INSURANCE CO., Insurance Carrier, Defendants.	File No. 747504 A R B I T R A T I O N D E C I S I O N

FILED
DEC 1 1984
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in arbitration brought by Torrey Roster, claimant, against D. C. Taylor Company, employer, and Travelers Insurance Company, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury of June 11, 1982. It came on for hearing on October 15, 1984 at the Iowa County Courthouse in Marengo, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file contains no filings.

At the time of hearing the parties stipulated that claimant was off work beginning on June 11, 1982 and returned to work on September 15, 1982. Additionally they stipulated that Missouri benefits were received in the amount of $3,007.73 and medical expenses totalling $2,050.25 were paid.

The record in this matter consists of the testimony of claimant, Cheryl Roster, Jeff Evans and Scott Allen Hilmer; claimant's exhibit 1, a report from Terry J. Weis, D.O., dated September 5, 1984; claimant's exhibit 2, a letter from Dr. Weis dated December 2, 1982; claimant's exhibit 3, records from Normandy Osteopathic Hospitals; claimant's exhibit 4, a report from Grant Izmirlian, M.D., dated January 23, 1984; claimant's exhibit 5, office notes regarding claimant's recuperation in Iowa; claimant's exhibit 6, tax forms from 1982; claimant's exhibit 7, a letter from David Fitzgerald and William Mahler dated April 19, 1982; claimant's exhibits 8 through 11, employee statements of earnings; claimant's exhibit 12, a bill from Normandy Orthopedics, Inc.; claimant's exhibit 13, a report of injury filed with the division of workers' compensation in

Missouri; defendants' exhibit B, various records from Dr. Weis; defendants' exhibit E, a summary of the payroll register; defendants' exhibit F, payroll records; defendants' exhibit G, filings with the division of workers' compensation in Missouri; and defendants' exhibit I, the employee master file pay rates. Claimant's objection to the testimony of Hilmer was overruled. Claimant's objection to defendants' exhibit E was considered in weighing the evidence as was defendants' objection to exhibit 6. Defendants' objection to claimant's exhibit 8 is overruled. The parties submitted briefs which were helpful to the undersigned.

ISSUES

The issues in this matter are whether or not the Iowa Workers' Compensation Act applies to claimant's injury; 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 may suffer; whether or not claimant is entitled to healing period and to permanent partial disability benefits and the rate of compensation in the event of an award.

STATEMENT OF THE CASE

Twenty-four year old married claimant, who has a tenth grade education, testified to work experience as a gas station attendant at $2.50 per hour, as a factory worker at $5.50 per hour and as a tuck pointer at $8.00 per hour. He began work for defendant employer on April 1, 1980. He was in Vinton, Iowa, when he was called by Marvin Roster in Shellsburg to come to work in Iowa City. He did roofing using a single ply system called Benoit.

Claimant stated that he worked continuously until June 11, 1982 doing jobs in Missouri, Illinois, Kentucky, Minnesota, Iowa and Kansas. When a job was finished, he was told by defendant employer where to go for the next. He was earning $5.50 to $6.00 per hour.

In November of 1981 he transferred to the St. Louis branch. He agreed prior to going to St. Louis that his earnings would be $8.00 per hour. One of his reasons for going to Missouri was to earn more money. In spite of the transfer he claimed that he kept the Vinton address and had his mail sent to Vinton and then forwarded to the company in St. Louis. He worked out of the St. Louis branch during the week and returned to Vinton on weekends. Some of the trips to Iowa were in his car, some were made in the Hilmer van and others were made in the company truck. Trips in the company truck used company gas and sometimes included compensation for driving time. Items were picked up from or delivered to the company warehouse in Shellsburg, Iowa.

When he first went to Missouri, he stayed in a motel which was paid for by the company; however, at some point travel expense was ended and claimant started staying in the company warehouse where he slept in a van. Claimant acknowledged taking a bed, dresser and pots and pans to Missouri where they were kept in the warehouse. He did not have the money to make a deposit on an apartment. He applied for a Missouri driver's license on which he used the company address. As a reason for seeking a Missouri license, claimant gave his poor driving record in Iowa which saddled him with a high insurance rate. Claimant asserted that from November of 1981 and until the time of his injury, he had no intent to make Missouri his permanent address. He decided to call Missouri his home in October of 1983 prior to his marriage in November of that year.

In 1982 he filed an Iowa tax return as a resident and a Missouri return as a nonresident.

Claimant was unsure if he did any work in Iowa between November 1981 and June of 1982. Claimant thought his first work out of the St. Louis branch was a week on a library in the city. He then spent four months in Illinois. Thereafter he worked in Missouri.

Claimant described defendant employer's business in St. Louis as consisting of an office warehouse combination with around eight employees. The warehouse housed various equipment including a bobact, wheelbarrow, rock hoppers, hand tools and two trucks.

Claimant recalled the circumstances of his injury as follows: He was working at the University of Missouri in St. Louis as a foreman earning $11.00 per hour. He and his friend Scott Hilmer were planning to go to Iowa. They were unloading equipment off a roof on Hilmer's job. The lowering was being done with a power hoist. He was riding on a twelve horse engine on the hoist. A brake failed. The hoist crashed to the ground. He fell three or four stories. He landed sitting flat on the ground with his legs straight out. When he got up, he could not stand to sit. He was taken to the hospital across the street. He was experiencing pain in his lower back, tailbone and "rearend."

After being in the hospital eight days he returned to Vinton to recuperate. He was at bedrest and under restricted activity for two months.

On September 15, 1982 he returned to work as a roofing foreman. He did work in Missouri, Illinois, Georgia, South Carolina and Florida.

Claimant stopped working for defendant employer in September of 1983. At the time he quit, he was working in Florida with the Florida division. He left because his pay was to be lowered. He applied for unemployment benefits in Missouri, but he did not receive any. He obtained a new job at a higher rate of pay.

Claimant's current position entails doing substantially the same work as he performed for defendant employer. He obtained the work through the St. Louis union. He did not tell his present employer of his back trouble and as far as he knew the employer continues to be unaware of his problem. He avoids heavy work and tries to look for lighter jobs. He finds that he is less stiff and sore on his new job because he is not working as hard. He averages thirty-two hours a week at a union journeyman's rate of $16.15 per hour. He gets home from work and "that's it." He continues to work in roofing because of the good salary and the necessity for feeding his family.

Claimant claimed that before his June 11, 1982 injury he was in good health, had no pain doing his job, had no broken bones and was under no physical limitations.

Claimant reported that since his injury his back has gone out five times. He has had to resort to bedrest to ease his discomfort. He has trouble getting out of bed and at times gets out on his hands and knees. He no longer engages in sports or other vigorous activities. Driving long distances makes his back sore and he must stop to rest. He also has back pain with snow shovelling and mowing. He has pain with heavy lifting. He takes no pain medication and no longer wears his once prescribed back brace.

Claimant alleged that before his injury he would lift seventy-five pounds by himself. Although equipment used in roofing is moved by a hoist to roofs, it must then be moved to where it is to be used. He said that many of the roofers' tasks require working on the hands and knees with as much as four hours being spent in that position. He indicated that laboring in that position leads to lower back tightness and leaves him worn out.

Claimant agreed that Dr. Weis has been his treating physician and that he was sent to Dr. Izmirlian by one of his attorneys for a one time one-half hour examination.

Claimant testified that he was a member of an Iowa union when he first started work for defendant employer. With assistance of the company he became affiliated with the union in Missouri. He did not know the meaning of the union shop until September 1983. He asserted that he was unaware when he went to Missouri that he could expect the prevailing union rate.

Cheryl Roster, claimant's spouse since November 12, 1983, testified to meeting him in April of 1983. She stated that he no longer either shovels snow or mows. When he comes home from work, he sits, unwinds and then is on the couch "pooped." Although he is not a complainer, she has observed that he gets up carefully, walks slowly and has trouble getting started in the morning.

The witness recalled an incident in which claimant was on the floor. When he was unable to get up because of trouble with his back, she made him go to the hospital.

Roster listed taking the children to the park, zoo or movies as activities in which the family engages.

Jeff Evans, who was manager of the St. Louis division in 1981 and 1982 testified in both claimant and defendants' cases. He said that the St. Louis division opened in February of 1980 and closed in October 1983 with the last project completed in June of 1983. The office served eastern Missouri and the southern half of Illinois with most of the business in the St. Louis area. Three jobs outside the area were within an hour's drive. Fifteen to eighteen roofers and three office staff were employed. Most of the St. Louis employees came out of the St. Louis union and were Missouri residents. Evans said that both he and the company expected employees to reside in Missouri. Residing in Missouri, however, was not a requirement of employment. The building housing the company was leased with 800 feet in office space and an additional 2,000 plus feet in warehouse. Materials for some projects were drop shipped from Cedar Rapids. Others were obtained from the Shellsburg warehouse. Still others were purchased by Cedar Rapids and then shipped direct from the factory to St. Louis. The office closed because of borderline profits and because the company obtained a major contract with Sears to handle all Sears roofing.

Corporate headquarters for the company are in Cedar Rapids, but the company has projects in thirty states. Branches in 1982 were located in Chicago; Omaha; Kansas City, Kansas; Milwaukee; Minneapolis and Louisville. In addition to the various local divisions, a national division has been created to handle projects outside the territory of each division. A new division was set up in Fort Lauderdale in 1982.

Outlying braches do their own marketing and staffing. Some functions were retained in Cedar Rapids which keeps payroll and maintains some employee records as well.

Evans, who was responsible for and familiar with the union management agreement, was unsure of claimant's status with the union before he got to St. Louis; however, he knew claimant worked until April 1982 before his transfer as a journeyman was completed. He explained the company's philosophy to pay an employee what the employee was thought to be worth. They did not feel claimant was journeyman material. Evans asserted that claimant knew prior to the time he got to St. Louis that he

would not be getting union wages. He was given wage increases as he grew in skill. In addition to his salary claimant was paid travel expenses in an effort to ease his transition to Missouri. Union rules did not require payment for travel. Union wages were to be paid under the bargaining agreement. Evans acknowledged that as of April 1982 when claimant became a union member he should have been paid union wages. As the witness recalled, claimant was not a foreman on the library job or on the music building project. He did work as foreman in Alton, Illinois, and on the Washington University project.

Regarding claimant's accident, Evans said that he understood the day after claimant's injury that claimant was lowering a motor and fell off a firewall. At least a year later he learned a story consistent with most of claimant's testimony.

Scott Allen Hilmer, a member of defendant employer's national company who was at the time of hearing working in California and who has his own workers' compensation claim pending in Missouri, testified to having been a member of the St. Louis union and to knowing the qualifications necessary to be a journeyman. A sixty percent apprentice must go to class and obtain 2,000 to 2,500 hours in order to become a journeyman. It was his opinion that claimant met neither the qualifications for a journeyman nor foreman under union guidelines.

Hilmer reported that he and claimant came to Iowa on weekends to visit their families and claimant's girl firend. They would travel in his van or sometimes in a truck to pick up materials in Shellsburg. He agreed that he had lived in a motel, in an apartment and in his van during the time he worked in St. Louis.

A letter from David Fitzgerald and William Mahler of the United Union of Roofers, Waterproofers and Allied Workers, Local No. 2 states that effective as of May 1, 1982 a foreman would earn $15.35 per hour, a journeyman $14.45, a kettleman $12.65, a sixty percent apprentice $8.31, an eighty percent apprentice $12.08 and a ninety percent apprentice $12.46.

Payroll records show claimant was paid the following amounts in March of 1982 with exclusion of overtime pay: $400, $440, $340, $315, $65, $330, $400, $390, $407, $374, $594, $231 and $99. Union dues were first deducted from claimant's check on April 5, 1982.

A statement of earnings of September 29, 1980 lists withholding for both Iowa and Kentucky. A November 30, 1981 statement lists Iowa, Illinois, Missouri and Minnesota. An April 5, 1982 statement shows Iowa and Missouri.

Nineteen eighty-two tax forms filed by claimant were filed in Iowa and in Missouri as a nonresident claiming residency in Iowa.

A Missouri first report of injury indicates claimant was injured on June 11, 1982. Claimant was paid $3,007.73 in workers' compensation benefits under the Missouri act.

On June 11, 1982 claimant was admitted to the hospital with a chief complaint of low back pain after falling twenty to thirty feet and landing on his buttocks with his legs and hips extended.

Claimant was examined by Terry J. Weis, D.O., who found tenderness at T11, T12 and L1 with marked lumbar muscle spasm. Straight leg raising was to ninety degrees bilaterally. Reflexes were intact and there was no neurological deficit to fine touch. Claimant had a fracture at T12. He was treated with a lumbosacral corset and analgesics. He was dismissed from the hospital in an improved condition on June 15, 1982.

Claimant was seen for some portion of his recuperation period in the Vinton Clinic in Iowa.

Dr. Weis performed follow-up examinations and then released claimant for work on October 11, 1982. Subsequent to that release, claimant continued to be seen with low back complaints for which he was treated with osteopathic manipulation and rest.

Dr. Weis reported last seeing claimant on August 6, 1984 at which time he had a sprain of his low back. He had no muscle spasm and his neurological was unremarkable. Claimant was given a final diagnosis of a fracture of the twelfth thoracic vertebra and an acute lumbosacral sprain. Claimant's permanent partial disability rating was fifteen percent.

Grant Izmirlian, M.D., saw claimant on December 31, 1983 at which time he gave a history of working on a power hoist seventy-two feet in the air, falling that distance, and landing in a sitting position with legs outstretched. He told the doctor of immediate low back and neck pain and indicated that he was given diagnoses of a compressed fracture of T12 and of cervical and low back sprains. As additional history, he said that he wore a corset for six months, was in bed for two months and returned to work three months after the injury.

Claimant gave current complaints of daily low back pain particularly when he worked on his knees or stooped over and in the morning when he gets up. Claimant indicated that driving or sitting for more than two hours results in pain in his back; that he can no longer ride his motorcycle; ride horses or play ball; that he workr at a slower pace and that he does moderate lifting and seeks help with heavier lifting.

Examinations of claimant's back showed spasm at T9 through L2 bilaterally which was most pronounced at T11 and T12. Claimant was able to bend with discomfort. Straight leg raising was to eighty degrees on the right with pain and to ninety-five degrees on the left with pain. The doctor assigned a rating of twenty-five percent to the body as a whole.

APPLICABLE LAW

The first issue to be considered is whether or not the Iowa Workers' Compensation Act applies to this injury. Iowa Code section 85.71 which refers to injuries to workers laboring outside the borders of Iowa and which governs the industrial commissioner's subject matter jurisdiction, 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.

There is no dispute in this matter regarding the place of claimant's contract which was Iowa or the place of his injury which was Missouri.

Claimant does not contend that either subsection 3 or 4 of 85.71 is applicable to him and clearly they are not. He was not working outside the United States and Missouri Workers' Compensation Law was applied to him. Claimant contends that he falls under either 85.71(1) or 85.71(2).

The Iowa Supreme Court in Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981) indulged in this interpretation of section 85.71: "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 state or some other state and he regularly works in this state, or if he is domiciled in this state.'" They then said: "The plain meaning of the enacting clause indicates that the employee must perform the primary portion of his services for the employer within the territorial boundries of the State of Iowa or that such services be attributable to the employer's business in this state."

Next the court noted that section 85.71 was patterned on the model act and cited section 7(d)(4) of the Counsel of State Government's Model Act, Comprehensive Workmen's Compensation and Rehabilitation Law (1963) and interpreted it thusly by saying at 533 "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."

The holding in the case at 534 was "That domicile in Iowa alone is not sufficient to entitle an employee who has sustained an injury outside the state to benefits provided by the Iowa Workers' Compensation Act. There must be some meaningful connection between domicile and the employee-employer relationship." See also George H. Wentz v. Sabasta, 337 N.W.2d 495 (Iowa 1983).

This deputy commissioner finds claimant to fit within the analysis provided in Iowa Beef Processors. As the supreme court concluded regarding claimant Miller, the undersigned concludes that claimant in this case was at all times relevant domiciled in Iowa. Claimant's living arrangements after his transfer to Missouri were transient -- a motel and a later a van in defendant employer's warehouse. He went back to Iowa on weekends and he returned to Iowa to convalesce. He filed an Iowa tax return and a Missouri return as a nonresident. His mail was sent to Vinton and then forwarded to the company in St. Louis. Claimant expressed no intent to make Missouri his home until October 1983.

Claimant at the time of his injury was attached to the St. Louis branch, but his work was being done for an Iowa Corporation and clearly claimant's employment activities, wherever they were done, were attributable to his employer's business, which was roofing contracting. Evans testified that the company has projects in thirty states. Claimant indicated that he had done work in Iowa, Minnesota, Kentucky, Illinois, Missouri, Kansas,

Georgia, South Carolina and Florida. Although the divisions around the country have some autonomy, corporate headquarters retains payroll and accounting functions and does some centralized purchasing and shipping. Claimant's weekend trips to Iowa sometimes were made in a company vehicle and sometimes entailed hauling materials from Iowa to Missouri. While there might be times when workers would work out of a division, that occurrence would seemingly depend on the geographic location of the work. The Iowa Workers' Compensation Act applies to claimant's injury.

The second issue to be considered 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 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).

Claimant's testimony was that he landed flat on the ground when a brake on a power hoist failed. He was taken to the hospital where he was admitted and treated for his injuries. The record supports a finding that claimant's injury arose out of and in the course of his employment on June 11, 1982.

Likewise, the record supports a conclusion that claimant's disability is related to his injury of June 11, 1982.

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

At the time of hearing the parties stipulated claimant was off work from June 11, 1982 until September 15, 1982 when he returned to work. That time will be awarded in healing period.

The next issue to be decided is claimant's degree of permanent partial disability.

As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 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 frequently has said:

> 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 a young man with a long work life ahead of him. He is not a high school graduate. His primary work experience has been as a roofer and he seemingly performed that work with enough proficiency to be made a foreman. He continues to work in the roofing industry at a higher rate of pay than that he was receiving with defendant employer when he first quit his job because his salary was to be lowered. He claims that he avoids heavy work and seeks out lighter jobs.

Claimant asserted that before his falls he was in good health with no physical limitations. In that fall, he fractured his spine at T12. Dr. Weis, claimant's treating physician, rated claimant's permanent partial disability at fifteen percent. Dr. Izmirlian rated claimant's impairment at twenty-five percent. At the time of the latter examination in December of 1983, claimant had back spasms. There was no muscle spasm when Dr. Weis evaluated claimant on August 6, 1984. Claimant has decreased his activity and he continues to complain. His complaints and the reduction in his activity were verified by his spouse.

Claimant's motivation at this point seems good to keep working and to support his new family. His potential for rehabilitation has not been explored. He certainly is young enough to seek out a new career in lighter work. Such a change in all likelihood initially would result in a substantial reduction in claimant's actual earnings.

In determining claimant's industrial disability, slightly greater weight is being given to Dr. Weis' opinion in that he was claimant's treating physician and his examination has been the most recent. Lemon v. Georgia Pacific Corp., I Iowa Industrial Commissioner Report 204 (Appeal Decision 1981); Clement v. Southland Corporation, I Iowa Industrial Commissioner Report 56 (1981). The fact that claimant has higher hourly earnings now than at the time of his injury does not preclude a reduction in his earning capacity. Hankins v. Hunget, II Iowa Industrial Commissioner Report 181 (1981); Bruce v. John Deere Waterloo Tractor, 34 Biennial Report of the Industrial Commissioner (1979).

After reviewing the Iowa case law, conducting the analysis set out above and reaching the findings of fact given below, this deputy industrial commissioner concludes that claimant has a permanent partial industrial disability of twenty percent.

The remaining issue is that of rate. Claimant contends that his rate should be based on what he should have been paid under union management agreement rather than what he actually was paid. Iowa Code section 85.36 provides that "[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." The rate cannot be based on what might have been. This agency does not handle the enforcement of labor management agreements and can offer no remedy to claimant in that regard. Cases cited by claimant in support of his position are distinguishable in that they relate to entitlement to exemptions rather than to weekly earnings.

On the other hand, claimant is correct that his rate is to be based on thirteen complete weeks and that those weeks containing time off due to illness, vacation or other causes should be excluded in favor of complete weeks. Lewis v. Aalf's Manufacturing Co., I Iowa Industrial Commissioner Report 206 (Appeal Decision 1980); Schotanus v. Command Hydraulics, Inc., I Iowa Industrial Commissioner Report 294 (1981). It appears that the rate information offered in evidence at the time of hearing may contain less than complete weeks. In the absence of thirteen complete weeks, the undersigned is unable to find a rate. However, based on the discussion herein, the parties should be able to agree to claimant's rate by using his acutal earnings in thirteen complete weeks prior to his injury. In the event an

agreement cannot be reached, an application for rehearing should be made.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-four years of age.

That claimant has a tenth grade education.

That claimant has work experience as a gas station attendant, factory worker, tuck pointer and roofer.

That claimant began work for defendant employer on April 1, 1980.

That defendant employer is in the roofing contracting business.

That defendant employer's corporate headquarters are in Cedar Rapids, Iowa.

That accounting and some purchasing and shipping functions are retained in Cedar Rapids.

That defendant employer has had and continues to have branch offices.

That defendant employer's work is in a number of states.

That claimant's work, wherever it was performed, was attributable to defendant employer's business in Iowa.

That claimant was hired in Iowa to work in Iowa City.

That claimant was living in Iowa at the time of his hiring.

That claimant transferred to the company's St. Louis branch in November of 1981.

That after his transfer to Missouri, claimant continued to return to Iowa for weekends.

That some of claimant's weekend trips to Iowa were made in the company truck using company gas.

That claimant was sometimes compensated for driving time in the company truck.

That claimant occasionally picked up items in Iowa and delivered them to Missouri.

That claimant has worked for defendant employer in Iowa, Minnesota, Kentucky, Illinois, Missouri, Kansas, Georgia, South Carolina and Florida.

That prior to June 11, 1982 claimant was in good health.

That on June 11, 1932 claimant suffered a fall as he worked at a job site.

That as a result of his fall claimant fractured his spine at T12.

That claimant has a functional impairment to his spine.

That claimant has had a reduction in his earning capacity.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant's injury is covered by the Iowa Workers' Compensation Act.

That claimant suffered an injury arising out of and in the course of his employment on June 11, 1982.

That there is a causal relationship between claimant's injury of June 11, 1982 and the disability on which he now bases his claim.

That claimant has established entitlement to healing period benefits from June 11, 1982 until September 15, 1982.

That claimant has established a permanent partial industrial disability of twenty (20) percent.

That claimant's rate cannot be determined based on the record as it presently exists.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant healing period benefits from June 11, 1982 until September 15, 1982 at a rate to be determined by the parties.

That defendants pay unto claimant permanent partial disability benefits for hundred (100) weeks beginning September 15, 1982 at a rate to be determined by the parties.

That defendants be given credit for amounts of compensation paid under the Missouri Act.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33 including the cost of a medical report from Dr. Weis.

That defendants file a final report in ninety (90) days.

Signed and filed this 18 day of December, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GAIL (DAVIS) SCOFIELD, Claimant,	:	
vs.	:	File No. 531753
W. A. KLINGER, INC., Employer,	:	R E V I E W - R E O P E N I N G D E C I S I O N
and	:	
MARYLAND CASUALTY COMPANY, Insurance Carrier, Defendants.	:	

FILED
DEC 28 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Gail (Davis) Scofield, claimant, against W. A. Klinger, Inc., employer, and Maryland Casualty, Insurance Carrier. Claimant seeks further benefits as a result of the injury which occurred February 23, 1979 as established by the agreement for settlement filed February 25, 1980 and the memorandum of agreement filed March 21, 1979.

The matter was scheduled for hearing on November 1, 1984 at the Woodbury County Courthouse in Sioux City, Iowa. Counsel for the respective parties appeared and advised the undersigned that they had settled the issue of claimant's entitlement to compensation for permanent partial disability by paying her an additional five percent disability of the body as a whole. They also advised the undersigned that they were unable to reach any agreement concerning claimant's claim for medical expenses. Concurrent therewith, the parties submitted what the undersigned has marked as claimant's exhibit 1, which is a collection of claimant's medical expenses, and what the undersigned has marked as exhibit 2, which is a collection of medical reports. The parties stated that the only issue relating to those medical bills is whether there is a causal connection between the injury and the bills. It was specifically stated that authorization was not at issue. No other testimony or evidence of any nature was introduced and the matter was fully submitted upon the medical reports and bills which were provided to the undersigned by counsel.

REVIEW OF EVIDENCE

The first four pages of exhibit 2 pertain to claimant's treatment from James F. Eisele, D.C. The third page, dated April 22, 1980, shows that claimant received chiropractic manipulation during March and April 1980. The fourth page appears to be a standard surgeon's report form dated March 19, 1980. The history it contains recites the fall of February 23, 1979. The description of the injury states: "Chronic sprain/strain syndrome of the sacroiliac and lumbar joints with attendant muscular weakness and myofascial[sic]/fibrocitis." In the remarks portion of the report it states: "Deformity of vertebral body end plate may or may not be due to trauma to the lumbar spine."

The next five pages of exhibit 2 are records from Rex L. Morgan, M.D., which appear to be his progress notes commencing February 23, 1979 and ending May 30, 1979. The history shown is of the February 23, 1979 fall. The complaints, noted generally, refer to claimant's left lower extremity and lower spine. It should be noted, however, that an entry of March 6, 1979 reflects a complaint of discomfort in the low and mid back. The entry of April 2, 1979 reads: "...States upper back much better - Tailbone still sore..."

The next three pages of the exhibit are communications involving Gerald K. Newman, L.P.T. In a report dated February 22, 1983 he states:

> This 37 year old lady is seen initially for evaluation of primary complaint of cervical pain and occipital headache. The onset of the sympto-mology was two years ago with midline cervical pain extending into the occipital area and complaint of clustering headache true of the frontal, parietal, and temporal lobes....
>
> She also has had some complaint of lower lumbar pain. She shows some reversal of the lumbar curve when sitting but this is quite subacute at this time....
>
> Straight leg raising is to 90 degrees. She does the knee to chest, chin to chest maneuver without any increasing pain. She shows full range of motion in the neck. She is quite supple also throughout the low back. She has no complaint of radiculitis into the lower extremities.
>
> I really think that 90% of her symptomology can be explained by the temporal mandibular joint dysfunction....

The subsequent two pages of exhibit 2 are a report from Cesar H. Rojas, M.D., dated December 22, 1982. It contains the following:

> The patient was seen the first time on July 9, 1982, with chief complaints of headaches, neck pain, pain between the shoulder blades, and low back pain. Reportedly she had the above mentioned symptoms for the past two years. Her history reveals that twenty years ago she was in a rearend automobile accident and eleven years ago a motorcycle accident, at which time she had three fractured ribs. The patient has been seen by numerous doctors, including chiropractors, with only temporary relief of her symptoms.

Dr. Rojas found abnormalities in claimant's cervical, thoracic and lumbar spine and provided treatment.

The report of Harry V. Robison, M.D., dated February 28, 1983 relates that he examined claimant on February 19, 1982 for complaints of headaches. It was his impression that claimant suffered from a depressive syndrome and he provided treatment.

The report of Wagner, Johnson, & Rasmus, P.C., dated March 1, 1983 reflects treatment for a "Tempro-Mandibular-Joint disorder.

The report of E. M. Mumford, M.D., dated February 28, 1983 states in part:

> Gail Scofield was evaluated in the office July 22, 1981 in connection with lower back and neck pain. She related the onset of her pain to a fall on the ice about three years prior to this. Following an extensive orthopedic exam and review of x-rays we felt she was probably having symptoms on the basis of tension rather than any orthopedic problem.

In his report of February 25, 1983 John J. Dougherty, M.D., states in part:

> An examination was carried out and x-rays were taken and a diagnosis was made of:
>
> 1. Previous contusion of the low back, with possible lumbosacral sprain, questionable healed fracture of the sacrum, with a mild scoliosis to the right in the lumbar spine and a congenital anomaly in the low back, consisting of what appears to be a spina bifida occulta of L-5 and S-1 appears to be an asymmetry and questionable disturbance in the facets at L-4-5 bilaterally, questionable early narrowing of the L-5/S-1 disc space.
> 2. Questionable slight asymmetry of the sacroiliac joint.

It was my conclusion at that time, that she probably had a fractured sacrum, which appeared to be healed, with a large angulated coccyx. I also felt that she was getting along satisfactorily and I did not feel I had anything to suggest as far as any further treatment.

The report of Allen W. Bronson, D.C., dated March 3, 1982 states:

> The patient reported that she has been having very severe pain in her upper back, neck running down her left arm and up into the back of her head, since having some infected teeth about one year ago. She stated that the pain is getting worse recently and complained of headaches in the occipital region; weakness and fatigue; nervousness and depression. She also stated that it felt like she had knots in the left side of her neck and in the left side of her back next to her shoulder blade. Also, frequent ear noises.

His examination revealed abnormalities in claimant's cervical and thoracic spine. He provided treatment. In the New York Life Insurance Company form, which is the last page of exhibit 2, Dr. Bronson, in block 14, indicated an injury or first symptom date of October 24, 1981. In block 23 he diagnosed claimant's condition as a "Traumatic strain of the cervico-thoracic spine...." with complications.

Official notice is taken of the agreement for settlement filed February 25, 1980, its attached medical reports and the order which approved it.

Official notice is also taken of claimant's review-reopening petition and the answer to that petition.

APPLICABLE LAW AND ANALYSIS

Under section 85.27 of the Code of Iowa an employer is required to provide an injured employee with reasonable care for the results of the injury. An injured employee, however, has the burden of proving by a preponderance of the evidence that the injury is a cause of the medical care and that the care was reasonably necessary for the injury. A cause is proximate if it is a substantial factor in bringing about the result, it need not be the only cause. Blacksmith v. All-American, Inc. 290 N.W.2d 348, 354 (Iowa 1980). The question of 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 v. Fisher, 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).

In the record available to the undersigned there is no expert medical opinion which either claims or denies a causal relationship between claimant's fall of February 23, 1979 and any problem with her temporal-mandibular joint, cervical spine, thoracic spine, head or neck. Claimant's injury, as set forth in the agreement for settlement and attached medical reports, involve her low back and sacrum. No mention is made in those reports concerning her head, cervical or thoracic spine. The entries in Dr. Morgan's progress notes of March 6, 1979 and April 2, 1979 shows complaints regarding the upper and middle back having been expressed shortly following the fall. Nothing subsequent thereto appears regarding complaints in the area of claimant's cervical or thoracic spine until she sought treatment from Dr. Mumford on July 22, 1981. He found no orthopedic problem and felt that her symptoms were a result of tension. When claimant had been previously seen by Dr. Dougherty on February 1, 1980 her complaints were of pain in the lower back and tailbone as shown in his report dated February 25, 1983. When claimant was treated by Dr. Eisele no mention was made of claimant's upper back as shown in his surgeon's report of March 19, 1980. The history claimant gave to Dr. Bronson related the onset of her symptoms to a time when she had infected teeth. In the history claimant gave to Dr. Rojas the occurrences of being rearended in an automobile accident and also being involved in a motorcycle accident were elicited.

It is certainly possible that a fall of sufficient severity to fracture a person's sacrum could also cause problems in the cervical and thoracic spine. It is even possible that such a fall could cause a problem in the person's temporal mandibular joint. The record of this case, however, is devoid of any expert medical opinion which ties the problem in claimant's mid and upper back and her jaw to the fall of February 23, 1979.

There is likewise no expert medical opinion which denies that such a causal relationship could exist. In this case the onset of symptoms, as reflected by the record, was not immediate. The stress of a fall into a sitting position would be expected to cause stress upon the person's entire spine. Such is not true, however, of the temporal mandibular joint. It is therefore found and concluded that claimant has failed to prove that the injury of February 23, 1979 extended into her temporal mandibular joint. She has therefore failed to prove the existence of a causal relationship between the fall, the joint disfunction and the expenses she incurred in treating it.

The record in this case suggests a number of sources for the problems in claimant's headaches and the problems in her cervical and thoracic spine. These include tension, being rearended in an automobile collision, a motor cycle accident and the fall of February 23, 1979. The onset of claimant's symptoms in those areas is not shown to have occurred promptly following the fall, the first record of such complaints being made to any medical practitioner appearing to have been on July 22, 1981 as recited in the report of Dr. Mumford. Until that time all complaints which she made were limited to the area of her low back and tailbone. The record in this case does not render it more likely than not that the fall of February 23, 1979 played a substantial factor in producing the symptoms of claimant's headaches and the problems in her cervical and thoracic spine. It is therefore found and concluded that claimant has failed to prove that the fall of February 23, 1979 resulted in injuries to her head, cervical spine or thoracic spine. The expenses which she incurred in obtaining treatment for her headaches and the problems in her cervical and thoracic spine are not shown to have a causal relationship with the fall of February 23, 1979.

Upon review of the medical reports and bills as a whole, it would appear that claimant's medical expenses with R. L. Morgan, M.D., in the amount of $383.13 are the responsibility of the defendants. The same were incurred for complaints dealing with the injury to claimant's sacrum, low back and left lower extremity. Dr. Eisele's charges total $276. According to his report which appears as the fourth page of exhibit 2, the treatment that he provided was to the area of claimant's low back and sacrum. His charges are also found and concluded to be the responsibility of the defendants.

Claimant's expenses with Dr. Rojas were primarily for treatment of the cervical and thoracic spine. However, the charges of $90 and $75 which appear as the first two entries on his bill and the electroencephalogram of $150 which appears as the fourth charge on the first page of the bill were in the nature of diagnostic procedures necessary to properly diagnose claimant's complaints and provide appropriate treatment. Those complaints included claimant's low back. The same is true of the first three charges on the second page of his bill which are for x-rays. The office visit of September 30, 1982 for re-examination and re-evaluation for which $30 was charged is also found to be related to claimant's complaints involving her low back. The remaining charges for sonodynator treatment to her cervical and thoracic spine in the amount of $30 each are not the responsibility of the defendants. Accordingly, defendants' responsibility for payment of the charges of Dr. Rojas is a total of $581.

Claimant's charges with Dr. Mumford include treatment which was primarily centered in her cervical region. His report states that she was placed on pelvic flexion exercises which would normally be used for a low back problem. From his report it appears that claimant was evaluated on July 22, 1981 and the charges of that date as shown on his bill are $131. The report shows August 25, 1981 to have been related only to her headaches with tenderness in the neck and shoulder area. The bill contained a charge of $11 for that visit. As with the bill of Dr. Rojas the charges for evaluation in the amount of $131 shall be the responsibility of the defendants. Once the evaluation led to treatment which was primarily related to claimant's neck and cervical region those charges will not be the responsibility of the defendants. Defendants are therefore responsible for payment of $131 of Dr. Mumford's bill.

The report and bill from Mr. Newman contain only a reference to a complaint of lower lumbar pain. From the balance of the report and the actions which follows it is clear that, as stated in the first line of the report, the primary complaint was cervical pain and occipital headache. It cannot be concluded that his charges were for treatment of the injury of February 23, 1979. The same holds true with the charges from Wagner, Johnson & Rasmus, P.C.

The report of Dr. Robison makes no reference to any complaints of pain in claimant's low back or treatment of her low back. His charges cannot be found to be the responsibility of the defendants.

The charges of Dr. Moore are unexplained and are not the responsibility of the defendants.

The charges of Dr. Dougherty in the amount of $202 were for examination and evaluation of claimant's complaints of pain in her low back and tailbone. It does not appear that he provided any treatment. It appears, however, that his charges were incurred in performing an examination and evaluation which his report of February 25, 1983 states was for the Maryland Insurance Company. In view of such it will be the responsibility of the defendants to pay the cost of the exam which they requested.

Dr. Bronson's report of December 22, 1981 to New York Life Insurance Company, notes, in block 14, an injury date of October 24, 1981 and makes no reference to the lumbar spine or sacrum. His narrative report of March 3, 1982 does not diagnose any problem in claimant's low back. His charges are not shown to be related to the injury of February 23, 1979 and are not the responsibility of defendants.

The charges from Smith Chiropractic Center are unexplained and will not be the responsibility of the defendants.

The bill from St. Lukes is also unexplained and will not be the responsibility of the defendants.

FINDINGS OF FACT

1. Claimant fell while performing the duties of her employment on February 23, 1979.

2. Following the fall claimant received her initial medical care from R. L. Morgan, M.D.

3. The complaints claimant voiced immediately following the fall were centered in her lower back and left lower extremity.

4. Claimant did not voice complaints of headache or involving her cervical or thoracic spine until July 22, 1981.

5. The evidence is conflicting regarding the precise time when the claimant suffered the onset of complaints involving her head, neck, middle and upper back.

6. The injuries which claimant sustained in the fall of February 23, 1979 were limited to the area of her lumbar spine, sacrum, coccyx and left lower extremity.

7. In treating the injuries which claimant sustained in the fall she incurred medical expenses as follows:

R. L. Morgan, M.D.	$383.13
James F. Eisele, D.C.	276.00
Cesar H. Rojas, M.D.	581.00
E. M. Mumford, M.D.	131.00
John J. Dougherty, M.D.	202.00

The remaining medical bills submitted by claimant in exhibit 1 are not shown to have been expenses incurred for treatment of the injuries claimant sustained in the fall of February 23, 1979.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and of the parties hereto.

Claimant sustained an injury which arose out of and in the course of her employment on February 23, 1979.

That injury is a proximate cause of the medical expenses which claimant incurred for treatment of her lower back, sacrum and left lower extremity as previously set forth.

That injury is not shown to be a proximate cause of the medical care which claimant received for her headaches, temporal mandibular joint, cervical and thoracic spine.

ORDER

IT IS THEREFORE ORDERED that defendants pay the following medical expenses:

R. L. Morgan, M.D.	$383.13
James F. Eisele, D.C.	276.00
Cesar H. Rojas, M.D.	581.00
E. M. Mumford, M.D.	131.00
John J. Dougherty, M.D.	202.00

Defendants shall receive credit for any amounts thereof which have been previously paid by them and any credit to which they are entitled under section 85.38(2) of the Code.

IT IS FURTHER ORDERED that defendants pay the costs of this action including fifty dollars ($50) for a medical report from Dr. Dougherty and forty dollars ($40) for a medical report from Dr. Eisele, all pursuant to Industrial Commissioner Rule 500-4.33(6).

IT IS FURTHER ORDERED that defendants shall file a final report within twenty (20) days from the date of this decision.

Signed and filed this 28th day of December, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAURA SCOTT,	:	
	:	
Claimant,	:	
	:	File Nos. 466987/673599
vs.	:	
	:	A R B I T R A T I O N
HINSON MANUFACTURING COMPANY, INC.,	:	
	:	A N D
Employer,	:	
	:	R E V I E W -
and	:	
	:	R E O P E N I N G
LIBERTY MUTUAL INSURANCE CO., and NATIONAL UNION FIRE INSURANCE COMPANY,	:	D E C I S I O N
	:	
Insurance Carriers, Defendants.	:	

INTRODUCTION

File No. 673599 is a proceeding in arbitration brought by Laura Scott, claimant, against Hinson Manufacturing Company, Inc., employer, and Liberty Mutual Insurance Company, insurance carrier, for benefits as a result of an injury on June 22, 1981.

File No. 466987 is a proceeding in review-reopening brought by Laura Scott, claimant, against Hinson Manufacturing Company, Inc., employer, and National Union Fire Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on March 4, 1977. Claimant's rate of compensation on the March 4, 1977 injury as stipulated by the parties is $146.14.

A hearing was held before the undersigned on August 17, 1983. The cases were considered fully sumbitted upon submission of the parties' briefs on September 9, 1983.

The record consists of the testimony of claimant, Miller Scott, Jr., Nadine Schmidt, Norman Bevard and W. Dave Johnson; claimant's exhibits 1 through 12; defendant National Union Fire Insurance Company's exhibits A through J; and defendant Liberty Mutual's exhibits AA through GG.

ISSUES

The issues presented by the parties at the time of the pre-hearing and the hearing in case number 673599 are whether the claimant received an injury arising out of and in the course of employment; whether there is a causal relationship between the alleged injury and the disability upon which she is now basing her claim; the extent of temporary total, healing period and permanent partial disability benefits to which she is entitled; and the rate of compensation.

The issues presented by the parties at the time of the pre-hearing and the hearing in case number 466987 are whether there is a causal relationship between the alleged injury and the disability upon which she is now basing her claim; and the extent of permanent partial disability benefits to which she is entitled.

EVIDENCE PRESENTED

Claimant testified she is 39 years old, married with four children. She stated that she has been married for about 20 years. She disclosed that she is a high school graduate and has had about six months training at Hawkeye Tech in Waterloo, Iowa, in the area of blueprint reading which she took to secure employment with defendant employer.

Claimant revealed the following employment history: During high school she performed janitorial services for St. Francis Hospital; after high school she was married and worked for about seven years as a full time homemaker and mother; from 1969 to 1972 claimant worked as a nurse's aid at the American Nursing Center; in 1973 she worked for about two or three months for defendant employer, but quit because of the dirt and noise involved with her particular job; following this employment she undertook the aforementioned vocational training and was rehired by defendant employer on June 3, 1974; she has had no other job since her employment with defendant employer.

Claimant testified that prior to March 4, 1977 she had on two occasions been treated for back injuries. She stated that the first of these injuries occurred at home. She revealed that she saw a doctor concerning this injury only once and was told it was a pulled muscle. She stated that her second back injury occurred while working for defendant employer. Claimant recalled that as a result of this injury, she was treated at Sartori Hospital, given pain pills and returned to work the next day. Claimant indicated that she lost only part of a day and suffered no pain in her legs from that incident.

Claimant testified that the next injury to her back occurred March 4, 1977 while working on a "Mannheim roof." Claimant stated that this is a cap roof weighing 400 to 500 pounds. She stated that there were five employees working on this roof and they had to hold it up in the machine. She remembers that as the night went on she began to experience pain in her legs. She contends that she felt a sudden jerk in her back following which she could hardly walk.

Claimant testified that she advised her foreman of the injury and was instructed to go home. Claimant went home that night and returned to work the next day, but informed her foreman she was in too much pain to continue. Her foreman then sent her to Sartori Hospital, where she was given an x-ray examination and told to return home. Claimant stated that by the time she got home she was in so much pain her husband called the hospital again and was admitted to the hospital the following day.

Claimant stated she was in the hospital for about a week, then returned home and was at home for about a month before returning to work. Claimant said that upon her return to work, she was placed back at her previous job in the press room. Claimant indicated she worked a couple of days before once again having to take off work because of her back pain. She stated that this time defendant employer sent her to Bernard Diamond, M.D.

Claimant said Dr. Diamond kept her off work and treated her with medication and therapy. Although this treatment was at first effective, claimant said it did not last and she eventually was required to have back surgery.

Claimant testified that the back surgery was performed May 17, 1977. She stated that she was off work for about five months, returned to work in October and was again placed in the press room. Claimant expressed uncertainty about how long she worked in October and whether she was off work again. In any event, claimant said that she was placed on light duty in the fabric room with a 25 pound weight restriction imposed by the doctor. She stated that she also did light duty work on the paint line and wrapped coil. Claimant indicated that each of these jobs required bending and lifting 10 to 25 pounds. Claimant testified that she suffered continuous pain during this time, but was able to perform the job duties. Claimant was uncertain when, but the 25 pound weight lifting restriction was increased to 45 pounds.

On cross-examination, claimant stated that the increased weight lifting limit was made in early 1978. Claimant revealed that in 1981 the weight restriction was removed entirely. She stated that defendant employer had encouraged her to see the doctor to get the weight limit removed. In May 1981 she transferred back to the press department and was working in this department when she suffered the June 22, 1981 injury.

Claimant recited the following series of events surrounding the June 22, 1981 incident: Claimant was operating a small press in the press department; she was required to lift 45 to 50 pound parts up in the machine; she expressed her concerns about lifting the parts to the foreman; after running the machine for awhile her legs started to hurt; as she continued the pain began to shoot down her legs and her toes were tingling; she told the foreman she could not continue and he told her to go home.

Claimant testified that the pain she experienced was more severe than she had ever suffered before, including the March 1977 injury. Although claimant returned to work the next day, she was unable to complete her shift. Claimant stated that the following day she went to the doctor who sent her back to work. She indicated that she was present for the eight hour shift but spent the time piddling around. Claimant stated that after this day she was told by defendant employer to go home because the work was too heavy and they had nothing for her to do.

Claimant revealed she was referred to a different doctor for treatment. Claimant reported that this physician released her to return to work in December 1981 or January 1982 with a 25 pound weight limit. Claimant stated she reported back to defendant employer, but was told they had no work available within the 25 pound weight lifting restriction. Claimant stated that she then went back to the doctor and at her request he lifted the restriction. Claimant testified that she again returned to defendant employer, but was laid off on January 11, 1982. According to claimant, defendant employer closed its plant in April 1983.

Claimant relayed, in considerable detail, the differences in her condition between the March 4, 1977 injury and after the June 22, 1981 injury. According to claimant, following her March 4, 1977 injury and subsequent surgery, she was making progress. She noted that pain was a continuing problem; however, she was eventually able to return to almost normal activity. She revealed that she was able to do her job even though there was a weight restriction; that she could do most of her household chores; and that she had no noticable problems riding in a car. Claimant stated that she had considerable pain and discomfort after the June 1981 injury and was not, in fact, able to perform a number of her prior activities. She stated that these difficulties were continuous up to the time of the hearing. Claimant stated that she had trouble standing on her feet for more than three or four hours and difficulty walking long distances.

Claimant testified that she has sought numerous positions, most of which were in retail sales, because she could no longer do heavy, industrial or manufacturing type work. Claimant stated that she did not believe she could perform the type of work she had done prior to the injury. Finally, claimant testified that she had no office skills such as typing, shorthand

or bookkeeping, but indicated she would be willing to take training in that area.

Miller Scott, Jr., testified that he had been married to the claimant for about 20 years. He stated that claimant had one back injury which he could recall prior to 1977. According to Mr. Scott this caused claimant some discomfort but went away in short order. Mr. Scott stated that after the back surgery in May 1977, his wife was eventually able to do most of the activities she had done before, including work. Mr. Soctt said that after the June 22, 1981 injury claimant was greatly restricted in her activities; they could no longer go for walks together; she could not bring laundry up the stairs; and she found it necessary to stay in bed much longer after exerting herself.

Nadine Schmidt testified as to the accuracy and manner of Hinson's employee attendance records and that claimant was laid off work when she returned in January 1982.

Norman Bevard testified he had been employed by defendant employer for 33 years and that most of the time he acted as supervisor at the standard heating plant which manufactured parts, hardware for weatherbreaks and enclosures and tractor covers. Mr. Bevard stated that the Standard Heating plant was a small shop of 30 or 40 people with whom he had daily contact. Mr. Bevard said he knew claimant, that she was a good, productive employee, and could not recall claimant being absent due to back problems.

W. Dave Johnson testified that he had twice been employed by Hinson; first, from 1973 to 1976, then from June 1979 to March 1983. He stated that he was the supervisor of the airline plant and was also the safety director. As part of his job, Mr. Johnson walked through the airline plant daily. Mr. Johnson stated that he knew claimant was aware of her back problems and that he had only observed one occasion when it appeared to bother her. Mr. Johnso testified that claimant had an excellent attitude, excellant productivity and unimpeachable integrity. In addition, he stated claimant's absences were not excessive.

Claimant's present situation is perhaps best set forth by exhibit 1, a letter from Arnold E. Delbridge, M.D., dated January 3, 1983. Dr. Delbridge made the following summary:

> Laura Scott was seen on November 3, 1982. At that time she was found to lack thirty degrees of forward flexion. She lacked ten degrees of extension of her lumbar spine and she lacked ten degrees of side to side bending to each side. She lost ten degrees of rotation to each side. She continues to have pain in her right leg. I was unable to demonstrate muscle weakness but she does limp somewhat. She used to be a bowler but she doesn't any more because she is afraid that she will hurt her back. I feel now as I did when I saw her on October 8, 1982 that she should not go back to a heavy lifting job however I think as of October 8, 1982 she could be doing a lighter job if that could be arranged.
>
> Considering her loss of motion of her back my feeling is that she has as 12% impairment on the basis of her lost motion. Dr. Diamond invaded two disc spaces which would be a 10% impairment. As mentioned, I cannot demonstrate definite muscle weakness in her right leg at this time but she does have pain. I feel that she has a 22% impairment of the body as a whole as a result of the sum total of her various injuries up to this time.
>
> In response to the second item on your August 6, 1982 letter I feel that she achieved maximum recovery from her June 22, 1982 injury on November 1, 1981. At that time I suggested a return to work but suggested a restriction in her lifting of twenty pounds for four weeks. I then suggested a repeat exam to see if we could change that at a later date. She did not go back to work at that time because they were unable to accept a twenty pound lift limit on her job.
>
> As you know I did not see Laura Scott prior to her exam in my office on July 14, 1981 so I don't know to an exact extent how much she was disabled prior to that time. She was apparently able to work at the job she is currently unable to hold. My feeling at this time is that she has a 22% impairment of the body as a whole. Dr. Diamond had previously rated her at 15%. She now has a 22% impairment, a difference of 7% which would represent the functional disability suffered as a result of the June 22, 1981 injury.
>
> I received a letter from you on September 29, 1982 concerning whether or not her injury of June 22, 1981 was a new injury or a continuation of her previous problem.
>
> As mentioned to her insurance company, I felt that the incident on June 22, 1981 could very well not have happened had she not had previous back difficulties. However there is no doubt that there was an episode at that time which aggravated a pre-existing condition in her back. I do not believe that her present status is a result solely of her 1977 injury because she has additional impairment at this time as compared to the impairment Dr. Diamond gave her after her first injury. My feeling is that the injury she suffered on June 22, 1981 was an aggravation of her past condition.
>
> In reading further in your letter I feel that there may be some confusion regarding which injury caused which problems but my feeling is that Laura Scott had an injury episode on June 22, 1981 which aggravated a previously less than perfect back. As a result she suffered additional impairment and also as a result she has not been able to return to her previous job.
>
> It is my feeling that Laura Scott will have to have restrictions on such things as amount of lifting, stooping and bending indefinitely into the future. I would recommend at this time that she have a twenty-five pound lift limit. I would ask that she stoop or bend no more than ten or fifteen times per hour and that she be allowed to sit down approximately one-half hour out of every three hours of work. I believe if these conditions are met it is very likely that Mrs. Scott can return to work. I do not expect her to return to her previous employment.

The evaluation to which Dr. Delbridge referred was by Bernard Diamond, M.D. dated November 16, 1977 in which he stated:

> I last saw this patient on November 14, 1977. She says that the last time she went back to work they put her on heavy work which was lifting weights of perhaps 50 lb. to 60 lb. all day long and they told her there was no light work for her and her back bothered. At present she bends moderately well. There is some mild pain at the L5 area on flexion and she has excellent straight raising and vascularity and sensation of limbs is good, as is power.
>
> Naturally this patient should not go back to heavy persistent lifting. She can do mild to moderate work and I recommended that she go to Vocational Rehabilitation. I felt there was no need to see her further unless she had more trouble. At present I would say she has a disability of 15% permanency of the entire body.

This evaluation was given by Dr. Diamond after he performed the May 17, 1977 surgery. The surgery was performed pursuant to Dr. Diamond's diagnosis of "lordosis, lumbar spine, with nerve root pressure with prolasped disc." (See exhibit 2) The surgery performed by Dr. Diamond was a "laminectomy, decompression facetectomy, neurolysis, removal of fourth and fifth disc, local bone grafts on the left L-4 to sacrum." (exhibit 2)

A letter from Jitendra D. Kothari, M.D., to Hinson on March 17, 1981 establishes the extent of claimant's recovery from the March 4, 1977 injury. In that letter Dr. Kothari stated:

> Mrs. Scott was in the office today. This letter is regarding her back injury and back surgery. As you will recall, she had back surgery by Doctor Diamond in 1977 and has done fairly well. She has been on job restriction until recently. She was laid off and returned to work this week. She describes dull aching discomfort in her lower back. She denies any tingling, numbness, or weakness in the lower extremities.
>
> Back examination shows the back incision is well healed. She had good range of motion in the lumbar spine. She could walk on her tip toes as well as on her heels. Neurological examination including straight leg raising, reflex, sensory, and motor examinations was essentially unremarkable and normal.
>
> She is fit to return to her regular job.

Both Dr. Kothari and Dr. Delbridge expressed opinions concerning the relationship between the March 4, 1977 injury and the June 22, 1981 injury. Dr. Kothari expressed an opinion in his April 21, 1982 letter to claimant's counsel, which stated.

> According to my chart notes, Mrs. Scott had back surgery in May 1977 by Doctor Diamond. Her back pain and leg pain did improve so, she returned to work in December 1977. According to my chart notes, she said that she had been working in a different job at work and more recently as a paint line attendant. That required her to lift parts up to 50-60 lbs weight. She experienced more back pain. In other words, her previous back condition and back pain were aggravated.
>
> On 8-13-79, the patient was sent in by her company to check whether her restriction could be lifted. She had 30 lbs weight restriction. I told the patient that she had a back condition and back surgery and she had to be careful with her back. I

advised her to stay away from strenous [sic] jobs. A letter to that effect was given on August 13, 1979.

Then Mrs. Scott returned to the office on 3-17-81 and wanted to discuss her back injury and back surgery with me. Apparently, she was laid off. She described that she had dull aching pain in her lower back. She was able to walk on her tip toes as well as on her heels. Neurological examination including straight leg raising, reflexes, sensory, and motor examinations was essentially normal. She wanted to return to her regular job.

Again with due understanding and discussion with the patient, she was given a release for regular job with the understanding that her back pain could get worse.

Then Mrs. Scott returned to the office on 6-23-81 at which time she told me that she was doing fairly well since she returned to work until the day before when she experienced pain in the right hip and right leg areas. Her surgical incision from the previous surgery was well healed.

I advised her to wear the back support and she may return to work. If she could not return to work, she should then return to the office for further check up.

In short, Mrs. Scott had back surgery in 1977. Since then, she had recurrent episodes of back pain and some leg pains and this is an aggravation of her old injury. Any type of hard, strenous [sic] work would be more likely to cause her to have back pain. Apparently, she does not want to accept the permanent restriction at her job.

Dr. Delbridge expressed a similar opinion in his letter of ıly 14, 1981 to Liberty Mutual, which stated:

Laura Scott was seen at your request on July 14, 1981. She has a history of an old problem for which she had surgery on in 1977 by Dr. Diamond. Apparently she had considerable back pain at that time. Since her surgery she has been having less pain but still has episodes of low back and even some leg pain at times.

Recently she was doing some heavy lifting at work or what she describes as heavy lifting and began having back pain. She had to stop working.

She then saw Dr. Kothari who recommended that she use a back brace and return to work and see him in six weeks.

This apparently was not satisfactory to the company because they were concerned about her welfare.

At the present time she says she has a lot of back pain. She also has some right thigh pain. This is the same side that she had trouble with before.

On x-ray, AP, lateral, obliques and upshot views of the lumbar spine we see a little sclerosis at L4-5. We see that tnere is a partial laminectomy and foraminotomy of the L5 vertebra. The foraminotomy is on the right. There are a couple of drops of myelogram dye viewed as well.

After reviewing her x-rays and taking her history I examined her. She has some limitation of motion of the lower back specifically on side to side bending and flexion. She has positive straight leg raising at about seventy degrees on the right and symmetrical reflexes. She heel and toe walks quite well.

My feeling is that this problem that she has is a continuation of problems that she has had ever since her previous back injury. I don't really think that this is a separate injury. I think it is an aggravation of an old problem....

In a November 24, 1981 letter from Dr. Delbridge to Liberty Mutual, he stated that he had released her to return to work on November 2, 1981 with a weight lifting restriction of 20 pounds, see exibit DD. Apparently the weight lifting restriction was unacceptable to the employer, exhibit CC. On January 11, 1982 Dr. Delbridge released claimant to return to work with no restrictions.

Finally, claimant introduced her exhibit 10, showing the total number of hours worked by claimant during the 13 weeks prior to the June 22, 1981 injury and her gross pay. According to this exhibit, claimant worked a total of 600.5 hours. She received a total gross pay of $4,824.97. Her gross pay for that last week she worked was $299.88 which was for a 40 hour week.

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 June 22, 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 also has the burden of proving by a preponderance of the evidence that the injuries of March 4, 1977 and June 22, 1981 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). The expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. a 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).

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).

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.

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.

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

As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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 84.34(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 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(6) provides:

> In the case of an employee who is paid on a daily, or hourly basis, or by 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

The claimant and defendants have previously stipulated that the injury of March 4, 1977 arose out of and in the course of employment. This injury culminated in surgical procedures on claimant's back and resulted in what Dr. Diamond opined was a 15% permanent partial disability of the body as a whole. While this rating is an element to be considered, it is well established that consideration must also be given to the injured employee's age, education, qualifications, experience and ability to engage in employment for which she is fitted.

A review of the evidence shows that at the time of the March 4, 1977 injury claimant would have been about 33 years old. She was a high school graduate with six months of vocational training in blueprint reading. Her experience was limited to custodial, nursing aid, homemaking and manufacturing employment. Due to changes beyond her control, she could not work as a nurse's aid without additional training. It would appear that her primary qualification was manufacturing. In addition, claimant had suffered no serious back problems of consequence.

As a result of the injury claimant was restricted in the amount of weight she could lift for a considerable time. Even after the weight restriction was lifted, claimant remained susceptible to subsequent back injuries.

It is abundantly clear that in spite of the March 4, 1977 injury claimant remained highly motivated and pursued her employment even though she continued to suffer pain. After her recovery from the surgery she returned to work at Hinson and was a productive employee even with the weight lifting restrictions. The record shows, however, that Hinson was not entirely satisfied with the restrictions and encouraged her to get the limit lifted. This is an indication that Hinson felt the weight lifting restriction did limit claimant's utility to them. In addition, after the second injury and second imposition of a 25 pound weight lifting restriction, Hinson stated they had no further employment to offer her. Claimant's injury of March 4, 1977 substantially limited her earning capacity in the field of manufacturing. Claimant's injury of March 4, 1977 resulted in a 25 percent industrial disability.

Claimant has established by a preponderance of the evidence that she suffered an injury on June 22, 1981 arising out of and in the course of employment. Both the facts as given by claimant and expert medical opinions substantiate that this injury was an aggravation of a preexisting disability. The record does not support the conclusion that the injury of June 22, 1981 was proximately caused by the March 4, 1977 injury. The proximate cause of the June 22, 1981 injury was the strenuous work claimant was compelled to do on that date. The mere fact that claimant had a preexisting injury does not relieve the employer of liability for disability. Claimant is entitled to recover to the extent of the additional disability suffered.

In the instant case, Dr. Delbridge gave claimant a total functional disability rating after the June 22, 1981 injury of 22 percent of the body as a whole. The additional functional disability suffered as a result of the June 22, 1981 injury was the seven percent. As discussed above, however, functional disability is only one element to consider in determining industrial disability. The degree of functional disability is not necessarily related proportionally to the degree of industrial disability.

The record shows that claimant did not acquire additional skills, education or training between the 1977 and the 1981 injuries. She simply got four years older. Her experience and qualifications were expanded only in the field of manufacturing.

Even though claimant made a remarkable recovery from the 1977 injury, she has not been able to do so from the 1981 injury. After the 1977 injury claimant eventually reached the point where she could return to virtually every preinjury activity in which she had engaged. Since the June 1981 injury, however, she was not offered employment by Hinson, she has not been able to resume normal household chores, she is subject to a 25 pound weight lifting restriction, she is required to sit down every three hours, she cannot stoop or bend more than 10 to 15 time per hour, she has been under continuous medical care and suffers from constant pain.

In addition to the above, claimant has not been able to find work within the restrictions imposed upon her. It is unlikely that she will be able to return to employment in manufacturing with the restrictions imposed. The record discloses that manufacturing is the area in which claimant is most suited to work. It should also be noted that claimant's prior work experience and education do not seem to lend themselves to substantial rehabilitation efforts and in fact defendants have not offered rehabilitation. Perhaps the most favorable fact in claimant's future remains her sincere and determined desire to find employment. It does not appear that claimant has lost any of her previous motivation in spite of the disability from which she now suffers.

Weighing all of these factors and giving due considereation to the general and specialized knowledge unique to the commissioner, claimant has suffered an additional 35 percent industrial disability.

Since the parties have stipulated that the appropriate rate applicable to the first injury should have been $146.14, benefits will be awarded on that basis.

The clamant has established that she obtained maximum recovery from her injury on November 1, 1981. The parties stipulated that claimant was paid benefits for a period of 12 weeks and 3 days by Liberty Mutual. Claimant has also established that in the 13 weeks prior to the injury she worked a total of 600.5 hours. Compensation during her last week of employment was $299.99 for 40 hours. This equates to an hourly rate of 7.497, not including overtime. Multiplying 600.5 by $7.497 equals $4,501.948, which divided by 13 equals a gross weekly wage of $346.30. Accordingly, claimant's rate of compensation is found to be $220.79.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, the undersigned makes the following findings of fact and conclusions of law:

DIVISION A. File No. 466987

Finding 1. On March 4, 1977 claimant sustained an injury to her back while working in the press room.

Finding 2. As a result of the injury and subsequent surgery claimant suffered a 15 percent functional disability of her body as a whole.

Finding 3. At the time of the March 4, 1977 injury claimant was 33 years old, had limited experience and limited skills confined to manufacturing. She was a high school graduate with vocational training in blueprint reading.

Finding 4. As a result of the injury of March 4, 1977 claimant was placed on a weight lifting restriction for about three and one-half to four years and suffered from a continuing ache, however, she was able to return to most of her preinjury activities, including employment.

Finding 5. Claimant was paid weekly benefits for a total of 109 6/7 weeks at a weekly rate of $135.86. Included in the 109 6/7 weeks of benefits was 75 weeks for permanent partial disability.

Finding 6. The proper rate of weekly compensation should have been $146.14.

Finding 7. As a result of the injury of March 4, 1977 claimant suffered a 25% industrial disability.

Conclusion A. Claimant has proven by a preponderance of the evidence that on March 4, 1977 she suffered an injury to her

back arising out of and in the course of employment.

Conclusion B. As a result of the injury of March 4, 1977 claimant has suffered an industrial disability of twenty-five (25) percent.

THEREFORE, defendants are to pay thirty-four and six-sevenths (34 6/7) weeks of healing period benefits at the rate of one hundred forty-six and 14/100 dollars ($146.14) and one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of one hundred forty-six and 14/100 dollars ($146.14)

Defendants are to be given credit for all previous benefits paid for healing period benefits up to one hundred thirty-five and 86/100 dollars ($135.86) per week and for all previous permanent partial disability benefits paid up to one hundred thirty-five and 86/100 dollars ($135.86) per week.

Defendants shall pay the costs of this proceeding, which is one-half of the costs of both of these cases.

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

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

DIVISION B. File No. 673599

Finding 1. On June 22, 1981 claimant sustained an injury to her back while working for defendant employer in the pressroom.

Finding 2. The injury of June 22, 1981 was an aggravation of a preexisting condition.

Finding 3. As a result of the injury claimant was off work from June 23, 1981 and was not capable of returning to substantially similar employment until December 1, 1981.

Finding 4. Not including overtime and premium pay, during the 13 consecutive calendar weeks prior to the injury claimant earn a total of $4,501.948, based on an hourly rate of $7.497.

Finding 5. As a result of the injury of June 22, 1981 claimant suffered an additional functional impairment of her body as a whole of seven percent, bringing her total functional disability of her body as a whole to 22 percent.

Finding 6. At the time of the injury of June 22, 1981 claimant was 37 years old, had a high school diploma and six months vocational training in blueprint reading. Her work experience and skills were confined to manufacturing and that is the area for which she was most suited to work.

Finding 7. Following the injury of June 22, 1981 claimant was limited to lifting 25 pounds; could not bend or stoop more than 10 to 15 times per hour; was required to sit for a half hour out of every three; could not perform normal household chores; has been under continuous medical care; and suffers from constant pain.

Finding 8. Following the injury of June 22, 1981 Hinson would not reemploy claimant under the restrictions imposed by the doctor and she has not been able to find employment though she has made a sincere effort to do so.

Finding 9. As a result of the injury of June 22, 1981 claimant has suffered an additional 35 percent industrial disability.

Finding 10. At the time of the injury of June 22, 1981 claimant was married with four minor children at home.

Conclusion A. On June 22, 1981 claimant suffered an injury arising out of and in the course of her employment.

Conclusion B. As a result of the injury of June 22, 1981 claimant has suffered an additional industrial disability of thirty-five (35) percent.

Conclusion C. Claimant's rate of weekly compensation is two hundred twenty and 79/100 dollars ($220.79).

Conclusion D. Claimant's healing period is from June 23, 1981 to November 1, 1981.

THEREFORE, defendants are to pay eighteen and six-sevenths (18 6/7) weeks of healing period benefits at the rate of two hundred twenty and 79/100 dollars ($220.79) and one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of two hundred twenty and 79/100 dollars ($220.79).

Defendants are to be given credit for all previous benefits paid for healing period benefits.

Defendants shall pay the costs of this proceeding, which is one-half of the costs of both of these cases.

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

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

Signed and filed this 21st day of October, 1984.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN C. SHAW, Claimant, vs. MEDUSA AGGREGATES COMPANY and CESSFORD CONSTRUCTION COMPANY, Employers, and THE TRAVELERS and UNITED STATES FIDELITY AND GUARANTY CORPORATION, Insurance Carriers, Defendants.	File No. 660645	A P P E A L D E C I S I O N

FILED
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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants Cessford Construction Company and United States Fidelity and Guaranty Corporation appeal from a proposed arbitration decision in which claimant was awarded healing period for 60 4/7 weeks at a rate of $201.63, and permanent partial disability for 300 weeks at the same rate as a result of an alleged injury on October 16, 1980.

The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 36; Medussa Exhibit A; Cessford exhibits A through M; and the briefs of all parties on appeal.

ISSUES

Defendants state the issues on appeal to be:

I. Claimant failed to establish by a preponderance of the evidence that he suffered an injury or disability which arose out of and in the course of his employment with Cessford Construction Company.

II. Even if claimant is to be granted benefits for any reason, he has failed to establish by a preponderance of the evidence entitlement to anything more than nominal benefits and certainly nothing approaching the 60 percent awarded, which Cessford believes was erroneous.

REVIEW OF THE EVIDENCE

Claimant was fifty-five years old at the time of hearing. Claimant is married. Claimant has an eighth grade education with a GED. (Transcript, page 64)

Prior to 1961, claimant worked as a baker. Claimant stated that the job involved emptying 100 pound flour sacks as well as mixing the doughs, and lifting the doughs in and out of mixing machines. Claimant testified that he was a baker for approximately 15 years. (Tr., pp. 69-71)

Claimant testified that after 1961 his work involved running heavy equipment. Claimant stated that the job involved loading trucks, charging bins, road work, and "various things that needed done around the asphalt plant." Claimant testified that the running of heavy equipment involved continuous bending, stretching, lifting, and controlling the machine. Claimant stated that he also performed mechanical repairs and typical maintenance on his own equipment. (Tr., pp. 65-68)

On October 16, 1980 claimant was involved in a work-related incident. Claimant recalls the incident:

> A. We was in the scale house, me and Hardy [sic] Blankenship, going over the next day's jobs; and we heard a large explosion, and Jerry Haley hit--got his dump truck into high-tension wires. And it has always been arranged before this that Hardy [sic] would get necessary people, handle the situation, phone who had--who needed to be phoned for these types of emergencies, and I was to go outside in the field and watch it there.
>
> I run out the door, and somewhere shortly thereafter, my backbone, terrific amount of pain in it, and it felt like it did a complete turnover; and my right leg give [sic] out, and I went down, and I got up and got out there where Jerry Haley was. And I watched him so he would not get out of his truck because I thought possibly if he made contact with the ground, he'd be electrocuted. I didn't know whether still electricity going through the truck or--
>
> ....
>
> A. I didn't know whether it was still electricity going through the truck or not, and I stayed there with the truck and the driver and watching in the area so no one would come down the hill and touch that truck and get electrocuted.

Q. Okay. Now, is this the only time at work that you were actually around when a truck got hung up in electrical wires?

A. As near as I can recollect.

Q. What time of day was it that this happened?

A. I would say somewhere in the afternoon around 4:00, but I'm not certain on that.

Q. Were you to get off somewhere soon after that?

A. Yes.

Q. Now, you've indicated that Jerry Haley was driving the truck. Was he an employee of Cessford?

A. No, he was private, Haley's Trucking Company.

Q. So would private trucking companies come into the place you work to--

A. Yes.

Q. --pick up loads?

A. Yes.

Q. You described coming out of the scale house and running. How were you-- How were you feeling at the time?

A. I don't understand.

Q. Well, how did you feel about the accident that was taking place right then at that moment?

A. Well, it was, you know, that was it. I mean, you know, I didn't give it much thought but to get out there and see what was happening and throw switches if need be, but this was a main power line so there was no switch I could throw, so I watched the situation, kept everyone away until it was, you know, cleared up. If it be on our circuit, which it wasn't-- and I don't remember the power company that run the service out there--but there was nothing I could throw to cut the electricity off because it was from the main power line.

Q. What caused you to run?

A. Urgency to get out there right away to keep from losing a life.

Q. When was the last time prior to that date that you remember running?

A. Well, that goes way back. Probably not since '73.
(Tr., pp. 74-76)

Claimant testified that after the incident, he told Harty Blankenship about the fall. Claimant recalled he went home one to two hours after the incident. (Tr., pp. 77-78)

Prior to October 16, 1980, claimant suffered from back problems. Claimant testified that the pain he felt from this incident was much more severe than prior back pains. Claimant testified that he now spends about two-thirds of his day laying down. (Tr., pp. 80-84)

Burton Stone, M.D., an orthopedic surgeon, examined claimant in October of 1981. In his report, Dr. Stone recalled that he had initially seen claimant back in 1973 as a result of a work-related back injury. Dr. Stone stated that "x-rays showed moderately advanced degenerative arthritis of the lower lumbar spine with narrowing of the 3rd, 4th and 5th lumbar disc spaces" at that time.

In regards to claimant's present complaint, Dr. Stone's evaluation revealed:

> My evaluation of Mr. Shaw is that he does have degenerative arthritis of the lumbar spine which certainly can account for a fair amount of the local back discomfort that he experiences. It would certainly seem reasonable to me that the fall that he took in October of 1980 re-aggravated the degenerative changes in the back and was also most likely a severe muscle strain.
>
> At the present time I believe that much of his back discomfort can be explained by the amount of arthritis he has and the residuals of the muscle strain. The leg pain, the complaints of numbness and tingling, however, are strictly subjective and there is no objective evidence to support any type of nerve root problem or sciatic problem.
>
> I do believe that this man should respond to an intensive program of physical therapy with some anti-inflammatory medication; and, in my opinion, he should be capable when this is over of performing some type of light work not requiring any bending or stooping, not requiring any lifting beyond 20 pounds. (Cl. Ex. 3)

Claimant's medical history is repeated by W. B. Gelman, M.D. Dr. Gelman's report in 1973 noted:

> Admitted to the hospital on 8-7-83 from Dr. Stone's care in Burlington. The patient had injured his back on 7-23 and he had immediate low back pain requiring admission to the hospital on the 24th. Prior complaints consisted of low back with right leg problem which was relieved by rest and this occured [sic] approximately one year ago. At the present time his discomfort is aggravated by walking. It is relieved by rest. The examination indicates he moves without apparent discomfort. The back shows no muscle spasm or limitation of motion. There are no localizing tenderness. The deep tendon reflexes are normal and equal bilaterally and there is a negative straight leg raising on both sides. No sensory or muscle weakness. The x-rays were sent in and showed some degenerative changes at 4-5 and 3-4. Additional x-rays were sent in and showed some degenerative changes at 4-5 and 3-4. Additional x-rays taken are Blick's and flexion extension views which showed rather pronounced facet changes in the above mentioned vetebra [sic]. But there is some evidence of hypermobility and abnormal mobility at 3-4 and 4-5.
>
> DIAGNOSIS: Primary lumbar instability with degenerative disc disease aggravated by trauma. In view of the patient's rather remarkable improvement shortly following admission. It was deemed avisable [sic] to proceed with the myelogram as a diagnostic procedure. It was felt that this type of situation if it requried [sic] surgery, would necessitate a fusion in addition to disc removal and in view of improvement in his symptomatology this therapy was not indicated. He will be continued for additional conservative treatment and fitted with a low back support and dismissed to Dr. Stone's care shortly. (Claimant's Exhibit 7)

In a letter dated July 20, 1981, Steven R. Jarrett, M.D., a specialist in physical medicine and rehabilitation, disclosed the results of his examination of claimant. He stated in part:

> He tells me that in October, 1980 a co-worker was trapped in some wires and he ran to help him. He fell on his face and since that time has had marked low back pain with radiation in the leg as previously mentioned. He indicates it has been this severe in the past but since October, 1980 he has been "unable to get over it". He states previously this type of pain would last a few days. He would take off work and within a few days he would be okay. He complains of weakness in the right leg and uses a straight cane for ambulation. He indicates he saw Dr. Gelman initially in October, 1980 for an examination but the patient intimates that because it was not a workman's [sic] compensation case, he had no follow-up.
>
> ....
>
> IMPRESSION: 1) Probable degenerative disc disease.
> 2) Anxiety and depression.
> 3) Possible lumbar radiculopathy.
>
> RECOMMENDATIONS: It is quite difficult to ascertain how much of this gentleman's complaints are secondary to phychophysiologic causes and how much are due to actual organic pathology in regards to his lumbar spine. I recommended to Mr. Shaw that in order to try and piece these together, he should have electrodiagnostic studies, Bone Scan, review of his previous myelogram with possibly a new one, as well as, psychologic work-up. Mr. Shaw questioned as to whether this could be performed by Dr. Stone in Burlington and I do not see any reason why it could not. Mr. Shaw then indicated to me that this would probably be the course of action that would be taken, and therefore, no follow-up appointment was made. It should also be noted that prior to leaving, Mr. Shaw asked us for pain medication but because we were not undertaking any treatment and were not following him, we explained to him that we could not prescribe any.
> (Cl. Ex. 2)

Claimant has not returned to work since the incident of October 16, 1980.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on October 16, 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 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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 16, 1980 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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.

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).

The existence of permanent injuries may sometimes be inferred from other than expert medical evidence for example where full recovery has not been accomplished at the time of hearing. Kaltenheuser v. Sesker, 255 Iowa 110, 121 N.W.2d 672 (1963).

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

The 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.

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, 288 N.W.2d 181.

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. Id. at 181.

ANALYSIS

Claimant presents a rather simple scenario for the injury: He was running and fell. Defendants rebut claimant's description with testimony of witnesses who were in the area at the time and who did not see claimant run or fall. (Cessford exhibit K was taken into the record. It was a transcript of a recorded statement of one Harty Blankenship that was admitted, apparently, for the limited purpose of impeaching claimant. Although it contains a description of what the witness saw claimant do, that description has not been considered in evaluating the substantive decision here.)

There seems to be no reason to disbelieve claimant's version. The other witnesses could easily have been distracted in the situation and not seen what was happening to claimant.

On the other hand, the medical evidence is more difficult to evaluate because of claimant's own conflict. His exaggerated actions in his visits to Dr. Gelman and Dr. Jarrett show that it was difficult for them to even come to any diagnosis of his condition. By the time he visited Dr. Stone, nearly one year had elapsed since the injury. Although Dr. Stone's evidence may be somewhat suspect because of that time interval, it is nevertheless unrebutted. Taking claimant's description of the injury and Dr. Stone's relating of that injury to claimant's problem, it is concluded that a causal relationship exists between the injury and the resulting disability.

The extent of claimant's disability is another matter, however. His background is a matter of record. That he has a permanent impairment may be inferred because of the long lasting effect of claimant's symptoms since the injury. The severity of that impairment was apparently impossible for Drs. Gelman and Jarrett to gauge accurately because of claimant's exaggerations. Even Dr. Stone emphasizes the subjective nature of claimant's complaints. Therefore, it is concluded that claimant's impairment is not a significant component in his industrial disability. The record fails to reveal enough evidence to support the contention that the employer's refusal to re-hire claimant was because of the injury.

Considering that claimant does have a minor impairment and considering the other elements of industrial disability, claimant should be able to return to the type of employment to which he is accustomed. Whatever disability he has affects his future in a relatively minor way. His permanent partial disability for industrial purposes is found to be 15 percent.

WHEREFORE, the findings of fact, conclusions of law and order of the proposed decision have been modified.

FINDINGS OF FACT

1. Claimant is a 55 year old married male.

2. Claimant was employed by the defendant, Cessford Construction Company, on October 16, 1980.

3. While claimant was on duty on October 16, 1980, at his employer's premises, a truck became entangled in high power electrical lines.

4. Claimant perceived the situation to be a life threatening emergency.

5. While running to the scene to render assistance claimant fell.

6. Claimant had significant preexisting degenerative arthritis.

7. The running and falling which occurred aggravated that preexisting degenerative arthritis.

8. Prior to October 16, 1980 claimant suffered occasional severe pain in his lower back which could be resolved by rest and medication.

9. Claimant now suffers greater pain than prior to his injury but the extent of that pain is somewhat masked by exaggeration and "pain behavior."

10. The underlying clinical basis for the changes in claimant's condition has not been identified to a reasonable degree of medical certainty. The negative EMG does not, by itself, completely exclude the possibility of a herniated disc.

11. It is likely that some of claimant's present complaints are a result of the injury claimant sustained October 16, 1980. A causal connection between the injury and the disability is found to exist.

12. The injury claimant sustained on October 16, 1980

resulted in permanent partial disability.

13. Defendants failed to provide claimant with prompt medical care which was reasonably suited to his injury.

14. Claimant incurred medical expense in the amount of $1,771.77 in obtaining medical care for the injury.

15. The amount charged for the medical services rendered is reasonable.

16. Claimant incurred $109.76 in travel expense in order to obtain medical care for the injury.

17. Both defendant employers and their insurance carriers had knowledge of the injury and of the potential for a claim not later than December 15, 1980.

18. This action was commenced September 20, 1982.

19. Claimant's significant recuperation from the injury ended December 14, 1981 and no further improvement of his condition is shown to have subsequently occurred.

20. Defendant Cessford paid claimant $2,203.60 in voluntary payments.

21. All persons who testified at the hearing are credible to the extent of their personal knowledge and observations.

22. Claimant completed the eighth grade in school and has a GED.

23. Claimant's work experience consists of heavy equipment operation, crushing plant operation, asphalt plant operation and work as a baker. Claimant has no other demonstrated work skills.

24. Claimant is not highly motivated to return to gainful employment.

25. It is likely that claimant will be able to return to gainful employment.

26. Claimant's rate of compensation payments for healing period and permanent partial disability is $201.63 per week.

27. Claimant had been employed by the defendant Medusa Aggregates Company prior to October 1, 1980.

28. While employed by Medusa claimant's back was subjected to stress through the normal day to day activities of his employment.

29. Any injury which claimant sustained while working for Medusa in the form of continuing trauma did not result in any temporary or permanent disability which extended beyond October 1, 1980.

CONCLUSIONS OF LAW

Claimant suffered an injury on October 16, 1980 which arose out of and in the course of his employment with Cessford Construction Company.

The injury claimant sustained was in the nature of an aggravation of a preexisting condition which changed the course of his preexisting degenerative disc disease.

Claimant's healing period following the injury ran from October 17, 1980 through December 14, 1981.

As a result of the injury claimant sustained a permanent partial disability of 15 percent of the body as a whole.

As a result of the injury claimant received medical care and incurred reasonable medical expenses in the amount of $1,771.70 and his cost of obtaining transportation to obtain medical care was $109.76.

Defendant, Cessford Construction Company, shall receive full credit for the $2,203.60 in voluntary payments which they paid.

Defendant, Cessford Construction Company, had actual knowledge of the injury and of the potential for a claim within 90 days from the date of the occurrence and this proceeding was commenced within two years from the date of the occurrence. Claimant has complied with all applicable statutes of limitation.

Claimant did not sustain any prior injury arising out of or in the course of his employment with Medusa Aggregates Company which resulted in any temporary or permanent disability which extended beyond the date of October 1, 1980.

ORDER

IT IS THEREFORE ORDERED:

That claimant take nothing from the defendant Medusa Aggregates Company and its insurance carrier, The Travelers.

That defendant, Cessford Construction Company, pay claimant sixty and four-sevenths (60 4/7) weeks of healing period benefits at the rate of two hundred one and 63/100 dollars ($201.63) per week commencing October 16, 1980.

That defendant, Cessford Construction Company, pay seventy-five (75) weeks of permanent partial disability benefits at the rate of two hundred one and 63/100 dollars ($201.63) per week commencing December 15, 1981.

That defendants pay all past due amounts in a lump sum.

That defendants shall receive credit in the amount of two thousand two hundred three and 60/100 dollars ($2,203.60) as a result of the voluntary payments previously paid.

That defendants pay claimant the sum of one thousand seven hundred seventy-one and 77/100 dollars ($1,771.77) as reimbursement for his medical expenses and one hundred nine and 76/100 dollars ($109.76) as reimbursement for his transportation expenses.

That defendants pay interest on all past due amounts pursuant to Iowa Code section 85.30.

That the costs of this action in the amount of sixty-five and 60/100 dollars ($65.60) are assessed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file an activity report in this case within twenty (20) days from the date payments are made pursuant to this decision.

Signed and filed this 28 day of November, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM SIGLIN,	:	
Claimant,	:	File No. 646916
vs.	:	R E V I E W -
JOHN DEERE COMPONENT WORKS,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
NOV 7 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, William Siglin, against his self-insured employer, John Deere Component Works, to recover additional benefits under the Iowa Workers' Compensation Act, as a result of an injury sustained on July 7, 1980.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Waterloo, Iowa July 5, 1984. The record was considered fully submitted on that date.

A review of the industrial commissioner's file reveals a first report of injury was filed on September 11, 1980.

The record in this case consists of the testimony of claimant, of Billie Cheney, of Lester Cheney, of Gerald B. Shaffer, Jr., and of Gerald W. Tedesprel; and of joint exhibits 1 through 9.

ISSUE

The sole issue for resolution is claimant's entitlement to additional permanent partial disability benefits.

REVIEW OF THE EVIDENCE

At hearing the parties stipulated that claimant's rate of weekly compensation is $288.86 and that any additional permanent partial disability benefits awarded will be added on to his present award. The parties also stipulated that all matters in the file including the record of and decisions in the original arbitration proceeding are part of the record in this proceeding.

Claimant, William Siglin, testified in his own behalf. Claimant was 43 years old at time of hearing. Claimant explained that on his injury date, he and a coworker were changing a circulating fan inside a "heat treat" furnace. Claimant passed out and apparently fell or was pushed into the furnace oil bath. Claimant stated he was later told he lost consciousness as a result of carbon monoxide fumes in the furnace. Claimant reported the first hearing in this matter was held on June 2, 1982 and described changes in his condition and circumstances since then. Claimant stated he was terminated in September 1982. Claimant explained that the employer found an automatic three day quit. Claimant disputed this and explained that after he had been off work one and one-half days he contacted his doctor, but could not visit him until the third day. Claimant stated he returned to work on the fourth day with a doctor's excuse, but it "all got turned around" and his doctor's excuse was not accepted. Claimant stated that before his injury he had performed strenuous mechanical repair work in either the foundry or the arc furnace. After his injury he could no longer tolerate the heat in those areas and the company physician had him reassigned to the overhaul floor. He described this as a light duty repair area where there is no smoke, dust, or fumes. Claimant reported he also worked in the milling area. He represented that after his injury, work left him extremely fatigued and short of breath. He relayed that he became nauseous on entering his employer's parking lot. He recited that because of his problems, he could only work one or two days at a time and, therefore, had been disciplined for absenteeism prior to his final dismissal. Claimant stated that before this, he had had no serious disciplinary problems and had "a perfect work record" with his employer.

Claimant opined that his breathing problems are definitely worse now than at the time of last hearing. He volunteered that he finds tasks such as carrying out the garbage very difficult and breathes rapidly after performing them. He stated he no longer can swim a 30 foot pool length and back even though he could do so a year ago. He indicated he could not wash more than one-half his car without resting and that he cannot carry groceries without becoming dizzy. He reported he attempted to wire his electric dryer and developed breath shortness such that he had to ask his stepfather to complete that task for him. Claimant disclosed that he can no longer mow his lawn and at times has difficulty starting his lawn mower. He volunteered that his 4 foot tall, 80 pound daughter can do both of these tasks. He claimed he needs three to four hours to trim his yard bushes since he had to rest at intervals. He opined trimming was a 15 minute job. Claimant agreed that he became flushed and short of breath when he attempted to lift a 47 pound typewriter in his counsel's office. He recited he had a similar reaction when he attempted to carry a 20 pound stack of books 25 feet. Claimant recalled having difficulty using five pound leg lifts required following leg surgery. He stated he can only climb one-half flight of stairs before he needs to rest. Claimant related that on a vacation in Colorado he walked 30 to 40 yards and became fatigued. He attributed this problem to the high humidity in the mountains. Claimant advised that at his doctor's recommendation, he is moving to Arizona. He explained that the low humidity and warmer climate there will not hinder breathing capacity as in Iowa. Claimant summarized his condition by stating that he is "pretty well off in an air conditioned room without physical activity, but who's going to do that all the time? You have to do something." Defendant's relevancy objection to testimony regarding claimant's entitlement to social security insurance benefits is sustained. Claimant identified exhibit 3 as unpaid pharmacy and medical charges related to his pulmonary problems.

On cross-examination, claimant explained that his three day quit work absence was related to a bleeding ulcer and not to his work related pulmonary problem. Claimant could not recall being disciplined in July 1982 as a result of his work absenteeism, but could recall disciplinary action taken in June 1982. Claimant could not recall the specific reasons for his absences but assumed they were related to his breathing problems. Claimant agreed he did not tell his company in January 1982 that his absences were related to his breathing difficulties, but stated the company knew he was under a doctor's care when absent in July 1982. Claimant explained his change of condition since the last hearing by stating the type and duration of physical activities in which he can now engage differs from that he could perform in June 1982.

On redirect examination, claimant agreed that to the best of his knowledge, exhibit 4 reports the first disciplinary action against him in the first year following his work return.

Delores Siglin, claimant's wife since November 20, 1982, testified in his behalf. She stated she has known claimant since their school days and started "keeping company" with him three or four months before their marriage. She opined claimant is "definitely worse" than he was in August 1982. She stated he can no longer walk without perspiring and becoming flushed. She related that she had to assist claimant in climbing a hill in Colorado. She reported that claimant could not use a screwdriver to remove one inch screws from his stereo cabinet or to install 1/2 inch screws in a curtain rod without needing to rest. She recited that claimant cannot help with vacuuming and that claimant had to rest before he could complete a museum tour during this year's vacation. She volunteered that he could complete the tours the previous year. She opined that humidity and cold are harmful to claimant.

Mrs. Billie Cheney, claimant's mother, testified in his behalf. She reported seeing claimant at least once per week and noting a gradual decline in his condition. She opined that she could "outwork" claimant and volunteered she is 70 years old, five feet tall, and weighs 129 pounds.

Lester Cheney, claimant's stepfather of 20 years, also testified for him. He opined that claimant's "capabilities have dropped off" and he "has gotten somewhat worse" than he was when the last hearing was held. He described an incident when claimant experienced great difficulty removing a carburetor. He opined that a healthy person could perform this task in five minutes. He relayed that claimant couldn't wire a clothes dryer, remove a camper thermostat, or use a staple gun without experiencing difficulty in breathing.

Gerald Shaffer, claimant's second shift supervisor at Deere's, was called as defendant's first witness. This gentleman said he became claimant's supervisor in overhaul in the summer of 1981. He recalled claimant's January 1, 1982 written warning and reported it followed an incident in which claimant did not return to work for one week following a medical release to return to work. The witness expressed his belief that claimant had had unexcused absences before January 1982 which had not resulted in formal disciplinary action. He represented that claimant had never stated his absences resulted from lung problems or related exhaustion. The witne s stated he had observed claimant following the first hearing and expressed his belief that: "Bill [was] the same employee after hearing as before. When Bill was there, I couldn't ask for a better employee." Claimant's objection to the witness' testimony regarding claimant's three day quit is sustained. The evidence establishes the witness was on vacation when that incident took place.

On cross-examination, it was established that prior disciplinary action against an employee is not considered in a current disciplinary hearing if the prior action occurred more than two years earlier. The witness agreed that before the previous hearing in this matter, claimant had stated he did not like being unable to "carry his load" for the witness. The witness reported he had seen claimant once since claimant's termination. He reported this was at a local "mini mart" and he did not speak with claimant. On redirect examination, the witness stated he saw climant at Janesville Days in August or July 1982. The witness indicated he saw claimant drinking "most of the afternoon." Claimant's objection to this testimony as irrelevant is overruled.

Jerald Tederspiel, a first shift supervisor in claimant's department at Deere, testified for defendant. Mr. Tederspiel stated he had observed claimant's job performance subsequent to his first hearing and had seen no reason why claimant could not perform his job when claimant was at work. He noted that claimant had worked first shift for five weeks in July and August 1982. The witness stated he observed no problem with claimant's work at that time and claimant had not indicated he was physically unable to work or that he was fatigued. The witness recalled participating in claimant's July 1982 disciplinary action hearing. He was then claimant's supervisor and reported discussions with claimant regarding his absenteeism. The witness indicated claimant did not attribute his absences to pulmonary problems either in these discussions or in the disciplinary hearing. The witness stated claimant had cited illness, car trouble, flat tires, "you name it" as reasons for his work absences. He explained that the three day quit policy is part of the company's union contract with its workers; that claimant had a "potential" three day quit earlier when claimant was in jail; and that action was taken in July 1982 because claimant had not reported his absence in any way.

On cross-examination, the witness reiterated his belief that claimant was not having physical problems in the summer of 1982. He reported he discussed claimant's problems with claimant on the floor before the shift began on several different occasions. He acknowledged he did not know whether claimant's coworkers assisted him and that during "lap shifts" he had only seen claimant for a few minutes two or three times per week. The witness stated he was aware of claimant's examination in Iowa City, but was unaware of any time claimant missed work because of respiratory problems. The witness stated claimant would have presented a doctor's slip had the company doctor taken him off work for such problems.

Joint exhibit 1 is the deposition of Donald C. Zavala, M.D., of May 20, 1983. The doctor is a professor of medicine at the University of Iowa with a specialization in pulmonary diseases. The doctor stated claimant's diffusing capacity, which he described as an index of the individual's ability to consume oxygen and give off carbon dioxide, had dropped from 45 percent when tested June 9, 1981 to 39 percent when tested November 16, 1982. The doctor stated as to the values of 45 percent and 39 percent:

> That's very abnormal and that in itself, without anything else, would classify him as being severely disabled.

The doctor defined work capacity as a measure of the amount of oxygen consumed in activity. He stated a normal response is an individual who can work more than 85 percent of their capacity. He reported claimant's capacity had fallen significantly from 63 percent in June 1981 to 52 percent in November 1982. The doctor explained that a normal individual should have an anaerobic threshold that is greater than 40 percent of predicted VO_2 maximum. He defined VO_2 maximum as the amount of oxygen an individual consumes. He noted that claimant had not been tested as regards his anaerobic threshold in 1981, but when tested in

November 1982 had an anaerobic threshold of only 25 percent of his predicted VO_2 maximum. The doctor explained regarding this finding:

> A. The relationship is that when you have a low anaerobic threshold that this takes the patient into a classification that's rather exclusive, namely they have to have circulatory impairment. Now, this circulatory impairment can be heart, it could be systemic or it could be lungs. But because of the low diffusing capacity, that takes us into the lung section. So from this we can say that this patient has circulatory impairment involving his pulmonary circulation.
>
> Q. So there's something interfering with the blood going through the lung?
>
> A. Absolutely.
>
> Q. Now, you said it could be heart, it could be systemic and it could be lung?
>
> A. Yes, because --
>
> Q. Now, wait a minute. Heart and lung are very easy to understand. Do you just want to state --
>
> A. Generalizing arteriosclerosis.
>
> Q. That's just a problem with the arteries?
>
> A. With aging, Also anemia. That's the other one.

The doctor then indicated claimant's EKG and cardiac reserve were normal and he concluded from this that claimant does not have cardiac impairment. The doctor noted that claimant's breathing reserve or oxygen remaining in his lungs after exertion is perfectly normal.

The doctor explained that V_D/V_T is lung dead space divided by total volume or the amount of air that moves in and out of the lung per breath and that the normal ratio is 0.3 to 0.35 at rest. He explained:

> Now, this test or this measurement is one of the most vital tests that we can do in exercise and it is an indication of what we call dead space ventilation. Dead space ventilation is where air is moving in and out of the lung without blood being present to pick up the gases and cause this exchange of oxygen and carbon dioxide. Now, the lung has dead space normally going down to the air sacs, just like a tube or a pipe. But when the air reaches the air sacs, then this gas exchange occurs. Normally the ratio is 30 percent to 35 percent. But in an abnormal lung where the blood vessels are knocked out, nonfunctional, then air can move in and out of the air spaces with no blood there to pick it up. Therefore it acts as dead space. If this dead space increases normally in relationship to tidal volume, then the V_D/V_T will not go down below .25. So physiologically it is a very important test.

The doctor indicated that on claimant's June 1981 test his V_D/V_T started at 0.44 "which is abnormally high" and dropped only to 0.4 on exercise; on claimant's November 1982 test his V_D/V_T started at 0.42 and ended at 0.44, a reversal of direction, which the doctor characterized as "indicating an even greater abnormality." The doctor then discussed claimant's A-a gradient, the gradient is oxygen between the air sac and the blood. He explained that with exercise this gradient normally falls to practically zero. He stated as regards claimant's test results:

> In this case, the first gradient at rest, that is, in the first test, was 12 and it increased to 14 at the end of exercise. This is abnormal because it should have fallen. Even though both tests are normal, within normal limits, it's a normal response for it to rise. It indicates that there is some abnormality in the gas exchange. But on the second test it increased from 14 at rest to 38, which is much more abnormal, the second test than it was the first test.

The doctor recited that in the second series of tests the difference between the amount of carbon dioxide in claimant's blood and that in his expired breath was measured. Claimant's result is zero or less. The doctor represented that this result was consistent with the abnormal A-a gradient and abnormal V_D/V_T and that the three results demonstrate claimant has a mismatching or abnormality of his ventilation and his perfusion in his lungs. The doctor concluded that claimant's combined test results show he has a "markedly reduced capacity to work, that his anaerobic threshold is crossed at a very low level, which would be equivalent to a normal walking pace" meaning he could only maintain this (activity) for a very short time. The doctor opined these findings were "consistent with injury secondary to aspiration of quenching oil on July 7, 1980. The doctor stated, on the basis of the test results, claimant is 100 percent disabled as a result of his pulmonary problems. He indicated he used criteria of the American Thoracic Society identical to those published in the journal of the American Medical Associaton in arriving at the disability figure. The following discourse ensued as regards to why the doctor concluded claimant was 100 percent disabled.

> A. Because this man can't perform even ordinary activity without being short of breath and uncomfortable because of his low anaerobic threshold.
>
> Q. And by ordinary activity, you mean --
>
> A. And because of his lactic acidosis. By ordinary activity, I would say walking faster than a slow pace down the hallway or climbing stairs.
>
> Q. Or walking at a normal pace would -- I think you indicated would --
>
> A. We'd have to define what a normal pace is. A normal pace for me might not be a normal pace for you. But I would say walking four miles an hour he would be incapable of doing.
>
> Q. What would -- Based on your doing laboratory work and checking, would you -- what would the range of normal walking be?
>
> A. He could walk two miles an hour.
>
> Q. And what would be the range of normal walking? Would it be --
>
> A. The average range is three miles an hour for a normal walk.
>
> Q. And he would be beneath that?
>
> A. It would be close.
>
> Q. And what else -- What other types of activities -- You say he couldn't climb stairs without rest. I take it he can do it, but --
>
> A. He can do it, but then he would have to pause and rest to clear the lactic acid out of his blood.

The doctor stated lactic acidosis produces metabolic acidosis which "is intolerable to the body." He explained that severe acidosis produces death and that an individual can't perform activity when severely acidotic. The doctor recited that when tested in November 1982 claimant initially had a normal pH of 7.42 and "ended up severely acidotic with a pH of 7.31. When tested in June 1981 claimant initially had a pH of 7.43 and ended with a pH of 7.39. The doctor stated the change in claimant's test results indicated claimant's condition had deteriorated. The doctor opined that if claimant's condition continued to degenerate at the pace it had in the interval between his two tests he would have serious consequences such as pulmonary hypertension, heart failure, and death. The doctor opined claimant could perform sedentary work with a small amount of walking at his own pace.

On cross-examination, it was established that the doctor's 100% impairment rating was based on his opinion and not on a specific medical guide. The doctor explained that claimant would be classified as severely disabled under the criteria of the American Lung Association. The doctor stated neither the American Lung Association or the Journal of the American Medical Association have criteria for exercise. It was elicited that under the American Lung Association Guide a 39 percent diffusing capacity equates to severe impairment since impairment includes any capacity of less than 40 percent.

On questioning as to what he meant when he stated claimant was 100 percent disabled, the doctor stated:

> A. I'm stating that this man could do sedentary work, but that if his work involves activity, then in my opinion he's 100 percent disabled.
>
> Q. So what you're telling us is that he is 100 percent disabled in a work sense from certain types of work?
>
> A. Yes.
>
> Q. Not that he is totally unable to work at something?
>
> A. Correct.

Questioning ensued as to the reasons underlying the doctor's change from the 60 percent disability rating he assigned claimant in March 1982 and the 100% assigned at time of the present deposition:

> Q. I'm wondering, Doctor, as between your testimony given on March 25th of '82, which was based on your June of '81 exam, and your testimony today, based on your November of '82 exam, how much difference there really is in the actual physical activities, the types of activities in which Mr. Siglin can engage.
>
> A. I know there's a difference because of the results of his pulmonary -- of his exercise test.

There has been a decrease of his work capacity of 11 percent, a drop from 63 percent to 52 percent. I know that. That's a measured fact. I know that on talking with the man that he tells me now that he can no longer, for all practical purposes, climb stairs, that he can take a step or two now, pause and wait, take a step or two, pause and wait. Whereas before he could go up the flight of stairs, then would pause and wait.

Q. Now, are those the factors you used to increase his disability estimate from 50 to 60 percent to 100 percent?

A. Those factors plus the fact of his low anaerobic threshold and the factor of the desaturation of his blood with activity, which he did not have before.

On redirect examination, the doctor opined that claimant's condition had become "measurably worse" between his first and second evaluations and stated it was not possible to say whether claimant's conditon would continue to worsen. The doctor explained regarding the AMA Guidelines:

> The AMA guidelines deal primarily with people that have ventilatory or cardiac impairment, impairment of the heart or in their ability to breathe as it may relate to emphysema or pulmonary fibrosis. It does not have criteria geared to this particular type of impairment which we're calling pulmonary circulatory impairment, where we're using a diffusing capacity to measure that impairment and where we're using exercise physiology to measure that impairment. The AMA Guidelines do not cover this point. This patient is a very unusual case with a very unusual injury that is manifesting itself differently than the average pulmonary impairment.

On recross-examination, the doctor clarified that claimant was seen in his lab on three occasions, including February 7, 1982, but formal exercise testing was only carried out in June 1981 and November 1982. On further redirect and recross-examinati it was established that the doctor's testimony in his March 1982 deposition included conclusions drawn following claimant's limited exercise testing in the laboratory in February 1982, but did not include conclusions arrived at as a result of data ascertained from the November 1982 tests. The doctor recited that his increased impairment rating resulted from the new data elicited in November 1982. Deposition exhibits 1, 2 and 3 were reviewed in the disposition of this case.

Joint exhibit 2 is an April 30, 1984 medical report prepared by D. P. Schleuter, M.D., head of the section of pulmonary medicine of the Medical College of Wisconsin. The doctor examined claimant April 12, 1984 and examined earlier test data and medical depositions in this case, including joint exhibit 1 in preparing his conclusions. The report is extensive and states in relevant part:

> According to the recommendations of the American Thoracic Society (6), working at his own pace, work output can be sustained for an eight hour period if one does not exceed 40% of his attained VO_2 maximum and for shorter periods of time one can work effectively at about 50% of achieved VO_2 maximum. The former, therefore, would be equivalent to an oxygen consumption of 0.805 L/min and the latter to 1.01 L/min. Based on these values he should be able to do light work as indicated on the enclosed work capacity form. The ATS document also concludes that if a VO_2 maximum of 15 ml/Kg/min cannot be reached the participant should be considered impaired for practically all types of labor. Mr. Siglin's VO_2 maximum was 35.4 ml/Kg/min, considerably above this level.
>
> I have enclosed two tables which summarize the pulmonary function data that was available to me for review. Table I lists the results of spirometry, lung volumes, diffusing capacity and arterial blood gas studies. Screening spirometries performed at John Deere are also included. Since specific data is not available from 2/17/82, I have compared our data to that of 6/9/81. There is no significant change in the FVC and a slight (16%) decrease in $FEV_{1.8}$. Lung volumes improved over this period of time. The diffusing capacity did not change significantly - 13 vs 13.9 on the 4/12/84 study. Since different predicted values are used in the laboratories, it is preferable to compare the actual values obtained rather than the % [sic] predicted.
>
> Table II lists the results of the exercise studies. Since the data from the studies performed on 2/17/82 and 4/14/82 is limited, I have not included them in the table. Rather than make comparisons between all of the various parameters, I will focus on those items which would demonstrate deterioration in his work capacity or that were emphasized in previous testimony. There was no significant change in the V_D/V_T ratio although as pointed out earlier because of the CO_2 error the V_D/V_T ratio is overestimated in our study. Oxygen consumption increased from 1600 ml/min on 6/9/81 and 1320 ml/min on 11/16/82 to 2013 ml/min on 4/12/84. Although the $(A-a)D_{O_2}$ was 14 mmHG on 6/9/81 it was 39 mmHg on 2/17/82 and 38 mmHg on 11/16/82 but decreased to 30.6 mmHg on 4/12/84. Probably the most important parameter to note is the Work Capacity which was 63% on 6/9/81, 52% on 11/16/82 and 71% on his most recent study on 4/12/84. In conclusion, this data would support the fact that his work capacity had actually increased between 6/9/81 and 4/12/84 and that his disability had not increased.

An attached interpretation of the April 12, 1984 test results states:

> Overall exercise capacity was fair, but patient was in a poor state of muscular conditioning due to lack of regular exercise. He was exhausted at the conclusion of the 10 minutes of exercise.

An attached work activity sheet completed by Dr. Schlueter states claimant can perform medium work involving lifting 50 pounds maximum with frequent lifting or carrying of objects weighing up to 25 pounds; that claimant can stand/walk one to four hours; can sit or drive three to five hours; can use his hands for simple grasping, pushing and pulling, and fine manipulating; can use his feet for repetitive movement; can bend, squat, climb; can perform overhead work occasionally; and can perform work at shoulder level with both hands.

Joint exhibit 3 is certain medical expense statements relative to claimant.

Joint exhibit 4 is a copy of the report of claimant's disciplinary action hearing of July 23, 1982. Joint exhibit 5 is a copy of claimant's employee's record card dated July 23, 1982 and carrying the notation "DISC HRNG-3 DAYS." Joint exhibit 6 is certain medical and company records relative to claimant's absence from work and termination by Deere in August 1982. Generally, these establish that claimant was off work for medical reasons from August 24 through August 31, but neither contacted a doctor until August 26 nor the company until at least August 30, all of which violated company policy and the provisions of the union contract. Joint exhibit 7 is the union grievance relative to claimant's termination filed in claimant's behalf and records of actions taken. These include a union withdrawal of the grievance dated March 17, 1983. Joint exhibit 8 is an employment activity sheet recording claimant's release date as September 2, 1981 and noting his last day worked as August 23, 1982.

APPLICABLE LAW AND ANALYSIS

The sole issue before us is whether claimant has established he is entitled to additional permanent partial disability benefits in this review-reopening proceeding.

Section 86.14(2) provides:

> 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.

In a review-reopening proceeding in which the claimant is seeking additional compensation after a previous award of disability, he must show a change of condition since the previous award which would entitle him to an additional award. Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940). Claimant has the burden of showing by a preponderance of the evidence his right to compensation in addition to that awarded by a prior adjudication. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969). Unless there is more than a mere scintilla of evidence of increased incapacity of the employee, a mere difference of opinion of experts as to the percentage of disability arising from the original injury would not justify a finding of change of condition. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957).

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."

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is

placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. Id. at 181.

Claimant has not sustained his burden of showing a change of condition since the previous award which, would entitle him to an additional award. Claimant relies on the medical evidence presented by Dr. Zavala and the testimony of his lay witnesses to establish his entitlement. The lay evidence presented appears cumulative of that presented at the original hearing. It does not suggest a deterioration in claimant's condition so significant as to justify an additional award.

Dr. Zavala in his March 1983 deposition assigned claimant a disability rating of 100 percent. This is substantially greater than that the doctor assigned when originally deposed in May 1982. The doctor opined that testing in November 1982 indicated claimant's conditon had deteriorated since original testing at the University of Iowa in June 1981. He also indicated that equipment available at the university in November 1982 permitted more sophisticated testing than that available in June 1981. Cross-examination elicited that the 100 percent disability rating the doctor assigned is subjective only and does not relate to standards established in the medical profession or claimant's inability to perform activity per se. Indeed, the doctor opined claimant could perform sedentary work involving limited walking even with his current pulmonary difficulties. Cross-examination also revealed that claimant's 39 percent diffusing capacity in November 1982 would result in a classification of severe impairment under American Thoracic Society and American Medical Association guidelines where diffusing capacity of less than 40 percent is considered severe impairment. The lack of objective criteria to support Dr. Zavala's conclusions is troubling. Also troubling is the fact that the doctor's depositon was taken in March 1983 and discusses test results obtained in November 1982. Even the March 1983 date represents a period of 15 months from the time of hearing. Thus, the doctor's testimony is not entirely enlightening as regards claimant's current condition. On the other hand, Dr. Schlueter evaluated claimant April 12, 1984 and prepared his report April 30, 1984. He reports that claimant's actual diffusing capacity rather than the percentage did not change significantly from June 1981 to April 12, 1984 only from 13 to 13.9. He notes no significant change in claimant's V_DV_2 ratio during that interim but notes that claimant's oxygen consumption increased during that time. He states claimant's work capacity has changed from 63 percent in June 1981 to 52 percent in November 1982 to 71 percent on April 12, 1984. He concludes that the foregoing data supports the inference that claimant's work capacity has increased between June 1981 and April 1984 and that claimant's disability has not increased. Dr. Schlueter appears to be an objective observer of claimant's symptomatology. His evaluation and report is more current than the last information concerning claimant's condition obtained from Dr. Zavala. For this reason, his conclusions are given greater weight. It cannot be said that claimant's medical condition has changed so significantly as to justify a greater benefit award.

Because claimant's disability is industrial disability, other changes in claimant's circumstances must be considered. Specifically, claimant is no longer working for Deere Component Works. Thus, we must consider whether the principles enunciated in the Blacksmith case apply here.

Claimant's position at hearing apparently was that his work release was unjustified. The evidence considered as a whole does not support this conclusion, however. Claimant was aware that company policy and his union contract required him to report a work absence and that an unexcused absence of three days would result in his termination. He nonetheless did not report his absence and did not seek a doctor's excuse for his absence until six days had lapsed. Such blatant disregard of the company's policy and his own union contract on claimant's part counters any allegation of unfair refusal to give work on defendant's part. Thus, claimant has not proven he is entitled to an increased benefit award under the Blacksmith rationale.

Claimant seeks payment of certain medical expenses evidenced in joint exhibit 3. No showing that these are causally related to claimant's work injury has been made. Therefore, these are disallowed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained an injury to his lungs arising out of and in the course of his employment July 7, 1980 when he passed out in a heat treat furnace and fell into quenching oil.

Claimant's condition was evaluated June 9, 1981 and November 16, 1982 by Dr. Zavala and April 12, 1984 by Dr. Schlueter.

No significant medical change in claimant's condition occurred between his evaluation in June 1981 and his evaluation in April 1984.

Claimant's measured work capacity has actually increased during such time.

Claimant's life activity restrictions have not increased significantly since the date of last hearing in June 1982.

Claimant was terminated by the employer in August 1982 when claimant violated a three day absence without excuse provision of his union contract.

Claimant's termination was not an employer refusal to provide any work following a work injury.

Claimant's disability has not increased since the original award in this matter.

Claimant's medical expenses evidenced in joint exhibit 3 are not related to his injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established that he is entitled to additional permanent partial disability benefits.

Claimant has not established that he is entitled to payment of medical and pharmaceutical expenses evidenced in joint exhibit 3.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from these proceedings.

Defendants pay costs of this proceeding.

Signed and filed this 7th day of November, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GERALD L. SUNDALL,	:	
	:	File No. 661542
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
JOHN MORRELL & COMPANY,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED
DEC 28 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Gerald L. Sundall, claimant, against John Morrell & Company, a self-insured employer, for further benefits as the result of an injury on January 24, 1981. The matter was heard before the undersigned on May 31, 1984. The matter was initially considered fully submitted at the conclusion of the hearing; however, pursuant to a ruling filed August 8, 1984 the record was reopened to receive the deposition of Edmund L. Markey, M.D. That ruling indicated that the record would remain open for a period of 30 days after the filing of the deposition of Dr. Markey to allow defendant to submit rebuttal evidence if they so desired. More than 30 days has elapsed since the filing of the deposition and defendant has not indicated any desire to file rebuttal testimony. The matter is, therefore, considered fully submitted.

The record consists of the testimony of claimant; claimant's exhibits 1 through 4; defendant's exhibit A; and, the aforementioned deposition of Edmund L. Markey, M.D.

ISSUES

At the time of the pre-hearing and hearing on this matter the parties indicated that the issues to be resolved at this hearing are whether there is a causal relationship between the injury of January 24, 1981 and the disability upon which this claim is based and whether claimant is entitled to permanent partial disability benefits as the result of his injury. Pursuant to the memorandum of agreement previously filed in this case, claimant's rate of compensation in the event of an award is $243.74.

EVIDENCE PRESENTED

Claimant testified he is 30 years old, married and has two minor children ages six and four. He said he is a native of Estherville, Iowa, and graduated from high school there in 1972. As part of his high school curriculum, claimant took several industrial arts courses. He said that he was also active in football, wrestling and track. He has no post high school educational or vocational training.

Claimant revealed that after high school he worked construction for about a year building grain bins. He said this job required manual labor but not necessarily heavy labor. From there claimant went to work for T. V. Iverson putting up cement elevators. He was at this job for about a year, quitting in 1974. Following this position he went to Younglove Construction putting up silos which also was a job of about one year in length. Claimant testified that he then began working at a local night club known as the Filling Station as a comanager. His responsibilities as comanager included personnel, inventory acquisition and bartending. He was employed at the Filling Station for approximately two years when he began to work for Shyrock Painting Company spray painting houses and farm buildings. Claimant stated that he was then employed for the Rock Island Railroad for a couple of years as a brakeman until 1980 when the railroad went into bankruptcy. He said that in August 1980 he began his employment with the defendant. Prior to starting his employment with defendant he was required to take a physical examination which he passed successfully and was allowed to begin employment with no work restrictions.

Claimant said he started at the beef packing plant on the loading dock where he would carry quarters of beef weighing 170 to 250 pounds into semitrailers. He said he worked on the dock about three weeks and then was transferred to the fabricating department where he was deboning meat. In this position claimant worked with a knife and repeatedly lifted and threw beef weighing 90 to 140 pounds onto tables. He described the job as heavy, vigorous work. Claimant recalled that on January 24, 1981 he went to work at approximately 6:30 a.m. He was performing his regular work packing the meat into the boxes as it passed him on the conveyor belt, and as he was lifting some meat and putting it into the boxes, he began to experience severe neck and shoulder pain. He stated that he advised his foreman of this situation and the foreman sent him to the company nurse. The company nurse then referred the claimant to a chiropractor who performed manipulation on the neck, but this was not successful. The chiropractor then referred the claimant to D. E. Wolters, M.D., who examined the claimant and had him admitted to the hospital and placed in cervical traction. Claimant said this began to help relieve the pain after two or three days.

Claimant said he was released from the hospital around the first of February in 1981. He said he was not able to immediately return to work and was referred to a physical therapist for hot packs on his neck, ultrasound treatment and a home traction machine. He said that Dr. Wolters then referred him to Dr. Markey. He was off work for about eight weeks and received regular workers' compensation checks. He said that Dr. Markey conducted an EMG test and prescribed medication which gave some temporary relief from the pain. Claimant said he was experiencing a severe burning sensation in his left shoulder. He continued on physical therapy and returned to work in the spring of 1981. Claimant advised that following his return to work he was placed under a light duty restriction, but the defendant did not provide light duty for him. For economic reasons claimant was laid off in April 1982. Claimant testified that since he was laid off by the defendant he has had several odd jobs painting houses and doing some remodeling work which he described as less than heavy work. He advised that he continues to have problems doing heavy lifting and experiences severe pain in his shoulder. Claimant continues to take medication prescribed by Dr. Markey and continues to experience the burning sensation in his shoulder.

Claimant testified that he has seen a neurologist in Mankato, Minnesota, and that he last saw the neurologist about two months prior to the hearing. There were no plans for him to return to see the doctor. Claimant advised that he could no longer do heavy lifting and did not believe he could perform the job at the defendant even if it was available. He stated that his recreational activities occasionally cause problems as well.

On cross-examination, claimant admitted that he received a light duty return to work from the doctor on March 16, 1981. He also admitted that from May 26, 1981 to January 1983 he did not see any doctor for his neck or shoulder problems. Further he conceded that he worked his regular job without restrictions for about a year until he was laid off in April 1982.

Claimant further testified on cross-examination that he has been playing basketball and volleyball once a week and has been continuing to do so. He also revealed that he manages and plays on a softball team. Claimant stated that in 1975 he broke his collar bone and was required to wear a brace for a period of time.

Claimant's exhibit 4 is a copy of the deposition of claimant taken in June 1983. In that deposition claimant reveals that he worked from March 1981 until the first part of May or last part of April 1982. The deposition also reveals that claimant did not seek medical attention between March 1981 and January 1983. Claimant revealed in that deposition that during the summer of 1983 he painted a few houses and was regularly involved in sports activities such as basketball, volleyball and softball. Claimant contended, however, that he has had continuous problems with his neck and shoulder on an intermittent basis since January of 1981.

Claimant's exhibit 1 is a letter from Edmund L. Markey, M.D., to Dr. Wolters concerning an examination conducted by Dr. Markey or the claimant on February 17, 1981. Dr. Markey indicates that claimant's x-rays indicated a possible foraminal narrowing at levels three and four of the cervical spine. He also notes that there was some tenderness over vertebraes C5 and C6. Dr. Markey diagnosed cervical strain without nerve root irr tation. He recommended that claimant obtain an EMG and return to see him following that test. Claimant's exhibit 2 is an x-ray report from A. C. Rice, M.D., dated March 16, 1982. Dr. Rice indicated the following in his x-ray report:

> The current examination is compared with previous exam of 1-30-81. On that exam the cervical spine was straightened possibly secondary to paravetebral [sic] muscle spasm. On this examination the curvature is reversed. That is usually seen in individuals with persistent paravetebral [sic] musc'e spasm. Suggestion is no [sic] obtain radiographs in flexion and extension to determine the degree of limitation of motion, caused by spasm of paravetebral [sic] muscles. If this patient cannot extend or flex to any degree, or if flexion and extension are extremely limited then one can conclude that reversal of the curvature of the cervical spine is secondary to paravetebral [sic] muscle spasm and is not the consequence of position.

Claimant's exhibit 3 are copies of the hospital records from claimant's hospital admission in January 1981. These records reflect claimant's course of treatment while admitted to the hospital.

Defendant's exhibit A contains medical reports from a number of different doctors including Dr. Wolters, Dr. Markey and W. R. Kennedy, M.D. The report from Dr. Kennedy is an electromyography report dated March 14, 1984. This report indicates that claimant suffers from a chronic neurogenic change in the muscles with a left C6 nerve root innervation. Dr. Kennedy stated that it was indicated that there had been Wallerian degeneration of many axons in the C6 nerve root. Dr. Kennedy indicates that recovery has taken place by intramuscular collateral reinnervation by the surviving axons. He stated that as a result he believed that claimant had normal strength except for supination that is very minimally weak. In a July 21, 1983 letter to claimant's attorney, Dr. Markey indicates that claimant was suffering from a C6 radiculopathy secondary to impingement in the cervical region. Claimant was apparently having some shoulder problems; however, the doctor believed that there would be little likelihood that claimant would suffer a disability to his shoulder. He did indicate, however, that claimant may have continuing problems with the cervical area and that it may be necessary to arrive at a disability rating in the future.

Edmund L. Markey, M.D., testified by way of deposition filed November 1, 1984. Dr. Markey testified that he is an orthopedic surgeon having obtained a medical degree at Wayne State University and concluding his training in orthopedic surgery at the University of Wisconsin. He is presently practicing in Mankato, Minnesota, and has been so for the past four years. He stated that he is board certified. He further stated that the practice of orthopedic surgery concerns the care and treatment of diseases and injuries of the bones and joints or of the skeletal system.

Dr. Markey testified that he saw the claimant for the first time on February 17, 1981. He said that he had been referred to him by Dr. Wolters for an evaluation of an injury that he received on the job some four weeks earlier. Dr. Markey took a history from the claimant which included complaints of back and left shoulder pain which claimant indicated began to appear over a period of time but was not related to any specific incident. He advised that he was told by claimant that his job involved repeated lifting of heavy pieces of meat on a conveyor belt. Dr. Markey revealed that at the time he saw claimant that claimant had been off work for about four weeks and had pain that extended from the base of the neck into the shoulders and pain radiating down his arm. Claimant was also suffering from some numbness in the left thumb and believed that he was somewhat weaker on the left side. There was some indication of limitation of motion in the head and neck.

Dr. Markey said that he conducted an examination of the claimant and found some very slight limitation of motion of the neck and some tenderness over the C5, C6 area of the spine. Although the doctor felt that the neurological examination was within normal limits, he believed that an EMG study should be done. He revealed that there was an EMG study done at a later time which confirmed nerve root irritation at the C5, C6 level. Dr. Markey diagnosed a nerve root lesion which indicated a radiculopathy occurring in that area. He described radiculopathy as irritation, inflammation or damage to the nerve root as it exits the spinal cord.

Dr. Markey examined the claimant again on March 10, 1981 at which time the claimant indicated that he was feeling somewhat better but still had some pain. Claimant indicated to the doctor that he believed he could return to work, that he was feeling stronger but still suffered from some weakness in the triceps and biceps of the left arm. Dr. Markey recommended that the claimant be treated with physical therapy and rest.

Dr. Markey advised that claimant was seen for a follow-up

examination on December 30, 1982 because of an exacerbation of the symptoms which had occurred two weeks prior to the examination. Claimant could not recall any particular event which precipitated the exacerbation of the pain. The doctor recommended a repeat of the EMG study and prescribed steroidal, anti-inflammatory medication and a muscle relaxant. He was seen again on January 5, 1983 after an EMG study was conducted which confirmed chronic C6 radiculopathy. Dr. Markey adjusted claimant's medication and instructed him on an exercise program. At that time claimant's pain was intermittent and would increase or decrease relative to the amount of activity he was performing.

Claimant was seen again on July 21, 1983 with continued complaints of pain in his neck and shoulder and a near constant burning pain on the posterior aspect of the left shoulder at the base of the neck. The doctor said that the claimant explained to him that he had been painting some houses over the past four weeks and this seemed to increase the pain and aggravate his condition. The claimant's condition was somewhat relieved by physical therapy measures such as hot packs, rest, traction and medication. The doctor said he examined claimant and found his condition consistent with previous examinations. Claimant was seen again on September 7, 1983 with considerable improvement in his symptoms. Claimant told the doctor that he was better if he avoided heavy activities; however, during the summer he had painted several houses and since fall had begun cutting wood which seemed to aggravate his neck and shoulder. The doctor injected Cortisone into the upper shoulder area of the claimant. Follow-up injections of Cortisone were done on October 17 and December 7, 1983. Claimant indicated to the doctor that these injections seemed to help somewhat, but claimant still complained of intermittent pain particularly after shoveling snow for several days.

Dr. Markey stated that based upon his examination of the claimant on December 7, 1983 claimant was suffering approximately five percent permanent partial impairment to his cervical spine. He stated that this would equate to approximately two and a half percent of the body as a whole. On the critical question of whether or not claimant's condition was causally related to the injury of January 1981, the doctor responded "who knows." Dr. Markey indicated that the work injury certainly could have caused the problems claimant was suffering from, but indicated that there could have been a number of other things which could have caused the problem such as daily living, a hard sneeze or cough or a wrong move. He stated that most of the time it was not possible to determine the cause of the problem. Dr. Markey did state that he had no reason to believe that claimant was not being honest with him in describing the circumstances of his injury.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 24, 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. 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Expert evidence indicating a possibility coupled with other testimony, nonexpert in nature, that claimant was not afflicted with a particular condition prior to the injury is sufficient proof upon which to base an award. McClenahan v. Des Moines Transit Co., 257 Iowa 293, 300, 132 N.W.2d 471 (1965).

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, 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).

ANALYSIS

The record firmly establishes that claimant has an impairment to the cervical spine. This has been shown through neurological tests. The last neurological test indicates that claimant's condition is somewhat improved because of the natural rebuilding process of his body. It is clear, however, that he does suffer some permanent impairment which was assessed by Dr. Markey at two and a half percent of the body as a whole. Claimant's testimony confirms the results of the neurological tests.

The experts do not go beyond a possibility when it comes to the question of whether or not claimant's impairment is causally connected to the January 1981 work injury. There are several matters in the record which would support the conclusion that there is no causal relationship. For instance, from March 1981 to December 1982 claimant sought no medical attention. In addition, a review of the medical evidence suggests that claimant was most affected by the problem in the cervical spine following strenuous activities such as painting houses or shoveling snow. In many cases these factors alone would defeat claimant's contention that a causal relationship exists.

In the instant case, however, the record shows that claimant suffered neurological impairment immediately following the January 1981 work injury. Further, the claimant's testimony is that he did not suffer any problems with his neck or shoulder prior to January 1981. Claimant is entitled to credibility. His disclosure that he has been able to paint houses, shovel snow, play softball, basketball and volleyball since his injury is almost brutally honest. It would seem that a person who so fully shares with his doctors and this deputy the wide variety of strenuous activities he has been able to do since his injury would not conceal or misrepresent the facts of how that injury occurred. Thus, the testimony of Dr. Markey, coupled with that of claimant creates a greater likelihood that there is a causal relationship between the injury and the disability.

The record shows that no specific limitations have been imposed upon claimant by his doctors. Dr. Markey indicated claimant would have few problems if he acted judiciously while using his back. Not only have the doctors not imposed limits, but claimant himself has maintained a vigorous and active life. It would appear he suffers little in his daily activities save intermittent pain when he overexerts.

Claimant has a high school education and although he has been primarily employed at jobs requiring only physical labor, he does have some managerial experience. It would appear the only thing claimant should really avoid is repetitious, heavy lifting.

Claimant's recovery time was short even though he has been bothered off and on with his neck and shoulder for three years. His age is such that he has ample time to obtain skilled training or education in a vocation in which he could avoid heavy lifting. He is obviously well motivated since he returned to work as soon as was possible and has continued to support himself and his family with odd jobs as they were available. Claimant's present

condition appears stable and he appears intellectually and emotionally able to continue in the work force. Based upon the above, claimant has established an industrial disability of four percent.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On January 24, 1981 claimant received an injury arising out of and in the course of his employment.

2. As a result of his injury, claimant was off work from January 21, 1981 to March 16, 1981.

3. Claimant's injury caused C5, C6 radiculopathy.

4. As a result of the C5, C6 radiculopathy, claimant has a minimal degree of permanent partial disability.

5. Since his injury claimant has been able to engage in a variety of strenuous activities.

6. Claimant is credible and highly motivated.

7. Claimant continues to suffer some pain and a burning sensation in his left shoulder particularly after strenuous activity.

8. Claimant's disability is not readily apparent.

9. Claimant is 30 years old and a high school graduate.

10. Claimant has no specific limitations on his activities.

11. Claimant's rate of compensation is $243.74.

12. Claimant has been paid all healing period benefits due him.

13. Claimant has an industrial disability of four percent of the body as a whole.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that there is a causal relationship between his work injury and the disability upon which this claim is based.

Claimant has proven by a preponderance of the evidence that as a result of his injury he has suffered a four (4) percent industrial disablity.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant compensation for twenty (20) weeks at the rate of two hundred forty-three and 74/100 dollars ($243.74) commencing March 16, 1981. All accrued payments shall be paid in a lump sum. Interest shall accrue from the date of this decision.

Costs are taxed to the defendant except for the costs of the deposition of Edmund L. Makrey, M.D., which is assessed to the claimant.

Defendant shall file a final report within thirty (30) days of the date of this decision.

Signed and filed this 28th day of December, 1984.

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY TEEL, Claimant, vs. HAROLD R. McCORD, Employer, and FARM BUREAU MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 411444 A P P E A L D E C I S I O N

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IOWA INDUSTRIAL COMMISSION

Claimant appeals from a proposed declaratory ruling in which it was determined that benefits on the award of permanent partial disability would commence as payments became due after the last period of healing on February 14, 1981 and interest would commence on accrued benefits from the date of the award and on future benefits as they became due. The rate of interest was also in issue but is not contested in this appeal.

Claimant received serious burns in February 1974 which disabled him initially for a period of three months. Thereafter he returned to work for over a year when he again received some surgery for his condition as a result of the burns. In 1976 he consulted James O. Stallings, M.D., who recommended a course of treatment consisting of five surgeries over a two year period. These were not commenced until 1978. The last operation was performed in 1980 and the claimant returned to work after this operation February 14, 1981. Between each of the operations claimant returned to work. The series of operations were all designed to improve the claimant's condition and lessen his disability.

Even subsequent to the final operation further surgical procedure was recommended by Dr. Stallings. This recommendation was disputed by other medical opinion and apparently ruled out by the claimant.

APPLICABLE LAW AND ANALYSIS

In addition to the applicable law set out in the proposed declaratory ruling the case of Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981) has relevance.

> By the very meaning of the phrase, a person with a "permanent disability" can never return to the same physical condition he or she had prior to the injury. Thus, we believe that "recuperation" as used in this statute refers to that condition in which healing is complete and that extent of the disability can be determined. (citation omitted) The healing period may be characterized as that period during which there is reasonable expectation of improvement of the disabling condition, and ends when maximum medical improvement is reached. (citation omitted) That is, it is the period "from the time of injury until the employee is as far restored as the permanent character of his injury will permit." (citations omitted) Thus, the healing period generally terminates "at the time the attending physician determines that the employee has recovered as far as possible from the effects of the injury. Armstrong Tie & Rubber Co., 312 N.W.2d 60, 65.

While it is true claimant went back to work for his employer at intervals between his surgeries it was with the knowledge that further medical care was contemplated which would improve his condition. To apportion permanent partial disability to each of those periods between surgeries when work was being performed, when the permanent partial disability could not be established until after the series of surgeries, would be an untenable result in this case.

For these reasons and those set out in the applicable law and analysis section of the proposed declaratory ruling the decision of the deputy is affirmed.

FINDINGS OF FACT

1. On September 30, 1982 a review-reopening decision was filed in this matter wherein claimant was awarded 150 weeks of compensation at the rate of $84.00.

2. Prior to the entry of the award the defendants have admitted compensability of the claim and paid compensation for all the time claimant was off work as a result of the injury.

3. The review-reopening decision did not contemplate the accural of interest prior to the date of the decision.

4. The review-reopening decision was filed after the effective date of the amendment to section 535.3, The Code,

which raised the interest rate on judgments to 10 percent.

5. Under the review-reopening decision of September 30, 1982, compensation was to commence February 14, 1981.

6. Defendants paid the award on March 39, 1983.

CONCLUSIONS OF LAW

The rate of interest on accrued payments is ten percent per annum.

Interest began to accure on September 30, 1982.

Signed and filed this 20 day of November, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY TEEL,

Claimant,

vs.

HAROLD R. McCORD,

Employer,

and

FARM BUREAU MUTUAL INSURANCE COMPANY

Insurance Carrier, Defendants.

File No. 411444

D E C L A R A T O R Y

R U L I N G

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IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding for a declaratory ruling brought by the employer and insurance carrier against Gary Teel, claimant, requesting a declaration of the rights, liabilities and duties of the respective parties as they relate to the interest obligation arising out of a decision entered September 30, 1982. By stipulation and agreement of the parties the issue herein can be determined without oral hearing and the record may be deemed to consist of all information contained in the industrial commissioner's file. The matter was considered fully submitted upon the filing of claimant's reply brief.

There are two issues to be resolved: (1) what is the proper rate of interest to be applied to the award; and, (2) when does interest begin to accrue.

RELEVANT EVIDENCE CONSIDERED

The industrial commissioner's file shows that claimant, Gary Teel, received an injury arising out of and in the course of his employment on February 4, 1974. As a result of this injury, claimant received first, second and third degree burns. Between his date of injury and February 13, 1981 claimant was off work for numerous periods of time as a result of his injury. When he was not off work because of the injury he was employed on a full-time basis. Claimant was paid compensation for his time off work.

Claimant filed a petition for review-reopening on May 12, 1976. For a variety of reasons not relevant here, a decision on claimant's case was not rendered until September 30, 1982. As a result of that decision, claimant was found to be 30 percent industrially disabled and defendants were ordered to pay 150 weeks of compensation at the rate of $84.00. The order provided that "[i]nterest is to accrue pursuant to section 85.30, Code of Iowa." On March 29, 1983 defendants paid the principal amount of the award, $12,600. Defendants have not yet paid any accrued interest.

APPLICABLE LAW AND ANALYSIS

The Rate of Interest:

Section 85.30, The Code, 1983 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 section 535.3 for court judgments and decrees.

Section 535.3, The Code, provides:

> Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

Section 535.3, The Code, is retrospective in character, thus interest on judgments shall be at 10 percent even for actions filed before the effective date of the amendments. Janda v. Iowa Industrial Hydraulics, Inc., 326 N.W.2d 339 (Iowa 1982).

Defendants make numerous and well reasoned arguments as to why section 535.3, The Code, should not be applied retroactively in a workers' compensation case. Unfortunately for them, the arguments they set forth were rejected in the Janda decision and are not going to be adopted here. Further, defendants' efforts to distinguish Janda from the issues in this case are unpersuasive. Therefore, it must be concluded that the rate of interest is 10 percent pursuant to sections 85.30 and 535.3, The Code.

B. The accrual of interest.

Each party argues cases which would support their positions. Claimant cites Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979) while defendants rely upon Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). In Farmers Elevator the court held that under section 85.30, The Code, interest began to accrue from the date the compensation became due, which in that case was the eleventh day after the injury. The court found that the legislation intended the interest provision to act as a penalty and encourage employers to pay compensation in a timely manner. In Bousfield, however, the court held that compensation did not become due until a determination of additional liability had been made. These cases are not irreconcilable and there are substantive distinctions which must be made.

The Farmers Elevator case was a proceeding in arbitration. The arbitration proceeding established defendants' liability, but did not create the liability. The liability was created 11 days after the injury and compensation payments became "due" at that time. In Bousfield the matter was one of review-reopening. In that case the liability for additional payments was created by the decision. The instant case, however, must not only be determined on this distinction but on the overall intent to encourage prompt payment of compensable claims for discussion. See Sloan v. Great Plains Bag Corp., Vol. III Iowa Industrial Commissioner Reports, 237 (1983).

In the instant case, the employer did acknowledge the compensability of the claim and paid compensation. The employer continued to pay compensation over the pendency of this action whenever claimant was off work. A review of the file indicates that the long delay between the filing of the petition and date of decision was in significant part attributable to claimant. Under these facts the scenerio more closely fits within the Bousfield guidelines than Farmers Elevator. Therefore, interest accrues from the date of entry of the review-reopening decision.

It should also be noted that Deputy Bauer's decision orders that interest "is to accrue." It is fair to assume that if he had intended that interest should accrue before September 30, 1982 he would have used the past tense instead of the present tense. Clearly, the original decision provided only that interest would accrue from the date of the decision.

The review-reopening decision does not state or find when compensation is to commence, but it will be assumed that it was to commence following claimant's last healing period which ended February 13, 1981. Compensation then is payable from February 14, 1981 for 150 weeks with interest accruing on weekly payments commencing September 30, 1982. Accordingly, 32 5/7 weeks had accrued at the time of the decision which amounts to $2,747.98.

Defendants are liable for interest at 10 percent on that amount from October 1, 1982 to March 29, 1983, a period of 180 days. Accrued interest is therefore $135.52 [calculated 180/365 X 10% X $2,747.98]. Using the 10 percent interest table in the 1982 Iowa Workers' Compensation Laws publication at page 154, claimant is entitled to $52.50 interest on the payments which accrued between the date of the decision and March 29, 1983. Therefore, claimant is entitled to interest in the amount of $188.02.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On September 30, 1982 a review-reopening decision was filed in this matter wherein claimant was awarded 150 weeks of compensation at the rate of $84.00.

2. Prior to the entry of the award the defendants had admitted compensability of the claim and paid compensation for all the time claimant was off work as a result of the injury.

3. The decision of Deputy Bauer did not contemplate the accrual of interest prior to the date of the decision.

4. The decision of Deputy Bauer was filed after the effective date of the amendment to section 535.3, The Code, which raised the interest rate on judgments to 10 percent.

5. Under the review-reopening decision of September 30, 1982, compensation was to commence February 14, 1981.

6. Defendants paid the award on March 29, 1983.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

The rate of interest on accrued payments is ten (10) percent per annum.

Interest began to accrue on September 30, 1982.

ORDER

IT IS THEREFORE ORDERED that defendants shall pay unto claimant one hundred eighty-eight and 02/100 dollars ($188.02) as interest on accrued compensation payments in conformity with the review-reopening decision filed September 30, 1982.

Signed and filed this 16th day of July, 1984.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT VAN BLAIR, JR.,	:	
Claimant,	:	
vs.	:	File Nos. 708833/708216 716004
DOBBS HOUSES, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	FILED
LIBERTY MUTUAL INSURANCE COMPANY,	:	DEC 31 1984
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from two proposed arbitration decisions wherein claimant was denied disability benefits. Claimant appeals from a third proposed arbitration decision wherein claimant was awarded temporary total disability benefits. Claimant was also awarded certain medical expenses.

The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 33; defendants' exhibits A through O; and the briefs and filings of all parties on appeal.

ISSUES

Claimant states the issues on appeal are:

1. It was error for the deputy industrial commissioner to ignore competent medical evidence concerning permanent restrictions on Bob Van Blair and to conclude that the claimant had not sustained any permanent partial impairment.

2. It was error for the deputy industrial commissioner to fail to award mileage expense when said issue was supported by the evidence.

3. An award of industrial disability in this case should also reflect the fact that the employer terminated claimant because of his work-related injuries.

4. It was error for the deputy commissioner to conclude that only the July 12, 1982, injury was compensable.

5. It was error for the deputy commissioner to conclude that significant employee-employer [sic] problems existed prior to the injuries sustained by the claimant.

6. As stated, the deputy industrial commissioner's observations about the demeanor of Frank Meade [sic] are irrelevant.

7. It was error for the deputy industrial commissioner to conclude that claimant failed to show physical impairment because of work-related injuries.

8. It was error for the deputy industrial commissioner to incompletely recite portions of medical examinations conducted for the claimant.

REVIEW OF THE EVIDENCE

Claimant was 35 years old at the time of hearing. He is single and has no children. Claimant is a high school graduate. Claimant entered North Iowa Area Community College but left before receiving any academic credits. He later attended Kirkwood Community College; has taken correspondence courses at the University of Iowa and has attended the Culinary Institute of America in Hyde Park, New York. (Transcript, pages 46-49)

As an adult male, claimant has had a wide range of jobs. He has been a construction worker, cook, maitre d' and salesperson. (Tr., pp. 54-58)

Claimant was hired by defendant employer on September 1, 1981 as an assistant manager. Defendant employer is a restaurant in the Des Moines airport terminal. Claimant described his job responsibilities as follows:

> A. That I had included supervising basically the morning shift. There was another assistant manager and another supervisor that more or less handled the afternoon shift. My responsibilities included opening up in the morning. I was on the job at five o'clock every morning. We opened up the restaurant for service at six o'clock.
>
> My responsibilities included opening up. There was a head waitress by the name of Sandy Fuller and she also had keys to open up and many times she would be there at a quarter to five, ten to five and sometimes she would beat me there but it wasn't necessary for her to be there. I would open up. I would normally turn the lights on, go into the back kitchen, unlock the door, unlock the back door because we always locked it at night, turn the grill on, turn the deep fryers on, turn the heat lights on, get that stuff on to get it warmed.
>
> Then I would go up to the second floor of the Dobbs Houses main office and get the guest checks for the waitresses. I would record them on a guest check log book. We would write down who we issued all the guest checks books to and whatnot and then we would fill out their sheet saying who we issued the beginning and the ending guest checks to.
>
> I would try to make sure that all keys were there. There were many times employees could not be there. In the event employees did not show up at five o'clock -- at six o'clock in the morning, it's hard to get other employees and many times I would have to assume their responsibilities on top of my other responsibilities.
>
> Q. What type of employee responsibilities would you perform during a workday?
>
> A. I would cook in the kitchen. It was my responsibility to give the cooks a half hour break, give the cashier a half hour break, rotate -- this is working with a full shift. There were some days when it was a zoo in there. Delayed flights during the snowy weather people couldn't get to work, there were many times when I would have to wait tables, cashier and cook.
>
> We have glass racks and these glass racks the waitresses will fill approximately, oh, I don't know what it is, 30, 40 glasses in a rack and they would fill them with ice and fill them with water and it was my responsibility -- not my responsibility but they would ask my help and I would carry these and set them at their individual stations.
>
> My responsibilities then would change occasionally. Frank Mead would have me do a guest check audit. I did this for a couple months in the morning. I would sometimes help the cooks on the second floor kitchen.
>
> (Tr., pp. 14-16)

On October 27, 1981, claimant was involved in a work-related incident. Claimant recalls the event:

Q. What happened next?

A. It was a chilly day outside and rather than walk the distance outside back in, I figured I would just take the elevator back up to the third floor. Well, I opened up the outside door and I pushed open the inside because when -- it has two doors. When it opens the top goes like this (indicating) and when it closes it goes like this (indicating). That's the same. Well, the inside door is the same. It's the wooden-type door. I flipped both of them open and I turned to Bruce and I said, "Let's just take the elevator back up."

As I was stepping the inside elevator door -- I ran into it. It caught me right in the middle of the head. I fell against the inside of the elevator just holding my head. I never seen red before except for this time and I don't know what the medical reason why I would and I could taste blood. I had a -- a very severe pain to me.
(Tr., p. 10)

Claimant testified that he had a throbbing pain and headache the rest of the work day. After work claimant noticed a ringing in his ears. Claimant testified that he notified his immediate supervisor, Frank Mead, both orally and in handwriting of the accident. (Tr., p. 11) Claimant did not seek any medical attention at that time. (Tr., p. 19)

On May 15, 1982, claimant was involved in a second work-related incident. Claimant describes this incident:

A. I would be glad to. On this particular morning, I don't know if it was a Saturday or what, but Mike Reitz, who is a storeroom manager in charge of purchasing, in charge of restocking and keeping a par inventory of sandwiches and all this sort of stuff in the coffee shop, he wasn't there and the cook -- they were running out of peach halves.

We use peach halves on a little piece of lettuce as a garnish. They were out and it's the cook's responsibility in the morning to prep all these things and then put them in the refrigerator. They normally have anywhere from -- they used to have -- you have got to remember I am talking in past tense because they are remodeling everything. They needed six to eight trays of peach halves in there.

On other sandwiches the plates were garnished with pickle slices. Okay. They were out and Michael Reitz was not there. We worked basically with one dishwasher. If you are busy you can't -- the dishwasher doesn't have keys to the storeroom anyway, so I had to go downstairs to get the peaches. The elevator wasn't working. I carried -- there is a stairway that goes to the downstairs storeroom directly into the downstairs kitchen and I carried those up there and gave them to the cooks and during the course of the day there were many problems -- because Mike Reitz wasn't there, there were products that they would be out of and I would get them.

Q. Did this give you any particular problem that you had to be the person running the stock up the stairs?

A. It --

Q. From an employment standpoint, I mean.

A. No. It was part of my responsibility. If a job needed to be done, it fell on me. Somebody didn't show up, it fell on me.

Q. Did you make more than one trip carrying products up the stairs on this particular day?

A. Yes, I did. I don't know how many trips I made but Dobbs Houses, they have a log book in the storeroom as well plus invoice sheets and all these things have to be written down and I imagine that I must have made ten trips, I will say.

Q. What would you estimate that the boxes -- were you carrying up a box or individual cans?

A. It's a case of six number ten cans and I would estimate the weight to be anywhere from 20 to 30 pounds, maybe 40 pounds.

Q. You mentioned that the elevator was out. Was this the same service elevator that we have talked about in reference to the October 27th injury?

A. The elevator had been -- that elevator was out many times. As a matter of fact, one of my high school friends works on that elevator, a person by the name of John Zimmer.

Q. Bob, while you were carrying these products up those stairs, did you experience any physical pains or limitations during your workday?

A. Not at that time I didn't.

Q. When was the first time that you noticed something unusual?

A. When I got home that evening and started to relax and whatnot. I would normally go to bed early, you know, because I have to get up at four o'clock in the morning and I was relaxing in the afternoon and my back just started to stiffen up and what I would do I would just take a hot shower in the morning and again I figured, well, it's just minor. It will go away and --
(Tr., pp. 20-23)

Claimant did not fill out a daily accident report nor did he miss any work because of this episode. (Tr., p. 23) Claimant did seek medical attention from Daniel Keat, D.C., on May 20, 1982. (Claimant's Exhibit 12)

On July 12, 1982, claimant was involved in a third work-related incident. Claimant recalls this incident:

A. On July 12th that situation came about because Frank Mead wanted me to do a purveyor's order for Pegler and some of these other companies.

Q. Tell us what a purveyor order is.

A. You go through and there's normally, depending on your business -- depending on whether there are delayed flights, you order your french fries, your hamburger, your different meats, your canned goods, your mayonnaise and all this sort of stuff and we normally work on somewhat of a par inventory.

You go through and we have par inventory sheets. You count them products that are there. You write it down and then your par is you subtract the numbers and you know what you are going to order. It keeps it real simple unless you have delayed flights and then you order a little extra.

I was in the process of doing that and I started downstairs in the storeroom. I finished downstairs. I went upstairs to the upstairs freezer and I was getting ready to do that. Well, another assistant manager had ordered several bags of ice because -- the ice machines would malfunction every once in a while but instead of stacking them to the side out of the way, they were stacked right in the middle of the freezer.

Now, in the freezer you only have about four feet to work with because you have shelves that's at least 18 inches wide on each side of the freezer. They were stacked high. I couldn't get around them. You had to get to the end to get your orange juice, your steakes, french fries and whatnot.

There was a space to the left that they would fit in real neatly so I just grabbed them, swung them to the left and made a stack a little bit higher than I was.

Q. Approximately how many bags of ice are we talking about?

A. Probably 20.

Q. What would you estimate their weight was?

A. Probably about 50 pounds.

Q. Did you move all 20 bags of ice?

A. Yes, I did.

Q. Did you have any particular physical pains or complaints at that time?

A. It was cold in the freezer and, yeah, at that time there was no physical discomfort to me.

Q. Bob, when you say no physical discomfort, were you still experiencing discomfort as a result of the May 15th incident when you were carrying the cans?

A. No.
(Tr., pp. 27-30)

Claimant testified he had pain in his back that evening. He had trouble walking, couldn't bend, and his upper body was twisted. (Tr., p. 31) Claimant did not fill out a daily shift accident report but did submit a written letter to Frank Mead

concerning his injuries of May and July of 1982. (Cl. Ex. 26) Claimant continued to work until July 19, 1982. Claimant testified that on July 19, 1982 the following incident took place:

A. Okay. On that day I was assuming my normal responsibilities and we had started off the day with -- looked like a good thunderstorm coming in or whatever and I had called in another waitress and whatnot and the air conditioning wasn't working at that time. We had the back door to the kitchen open and I would be helping cook because at the time I remember -- when you have one cook and you have omelettes and eggs over easy and scrambled eggs and you are only working with one cook so somebody has to help her, so we would work two female cooks.

I was doing my normal responsibilities. I was dizzy. My back hurt. My neck hurt. It seemed like my eyes were not focusing right probably because I was dizzy and I was not in shape at all to work. Frank Mead came in and I was literally leaning against this wall. He says, "What's wrong with you?" I said, "I'm dizzy." His exact words to me were, "Go home. Get out of here. It's no big deal. Go home."

Q. The record should reflect that you were saying that with inflection. What was his demeanor? How did you feel? What did it mean to you, the way he said it to you?

Q. What did Mr. Mead's comments mean to you, Bob?

A. Again, it was -- it was very intimidating to me. It hurt me emotionally to think that I couldn't even talk to my boss about injuries that I had and have him respond in a civil manner. The company has many good policies but I don't think Frank Mead practiced all of those policies.

Q. Did you leave work that day?

A. I left work at approximately 9:15 that day under Frank Mead's direction. I left immediately. I said, "Okay, I will."
(Tr., pp. 35-36)

After this incident, claimant went home and called Frank Mead's boss, Frank Martin, in Dallas, Texas. Claimant testified that he told Martin he was seeking medical treatment, and Martin ended the conversation by responding "Fine Mr. Van Blair. You do whatever the doctor tells you to do." (Tr., pp. 36-38) At this time, claimant also discussed with Martin the problems he was having with Frank Mead. (Tr., p. 37)

Frank Mead is general manager of defendant employer. Mead also testified to the July 19, 1982 incident. Mead stated:

A. It's approximately 10:00 a.m. in the morning. I walked back to the dining room and he came walking out of the kitchen and I think we were busy that morning and he looked like he was perspiring and he said, "I feel bad. I'm dizzy." I said, "Why don't you take off and go home?"

Q. Did you say this, sir, in a sarcastic or derogatory manner of any kind, to your present recollection?

A. I had no reason to say this in a sarcastic way.

Q. That is my question. Did you say it in a sarcastic fashion?

A. No.

Q. Did you have any ill feeling or ill will toward Mr. Van Blair because he had said he was dizzy and did not feel well?

A. No.

Q. Incidentally, had Mr. Van Blair, to your knowledge, gone home early on other occasions?

A. Well, normally I let everyone -- you know, not everyone but ususally if it was slow or something we let our supervisors or managers take off early on different days.

Q. If you do not need them on a particular day?

A. That's right.

Q. Had Mr. Van Blair taken advantage of that opportunity and gone home on occasion?

A. Yes, he had.

Q. As of July 19, 1982, had Mr. Van Blair reported to you any injury, any accident, any incident or event in which he claimed to have been injured in any way?

A. No, sir.

Q. He has testified here earlier today that sometime, I am not sure about the dates, between, let's say July 12 and July 18 or 19 that he did sustain a back injury lifting and stacking some bags of ice, which he moved about two feet in a refrigerator. Did he mention any such event or incident to you at that time?

A. No, sir.
(Tr., pp. 198-199)

Subsequently, claimant sought medical treatment from Richard W. Evans, D.O., on July 20, 1982. (Cl. Ex. 20) Dr. Evans referred claimant to Joseph Doro, D.O., on July 26, 1982.

Within a week, claimant was admitted to Des Moines General Hospital where he saw Michael Stein, D.O., David Friegood, D.O., and Larry Richards, D.O. (Tr., p. 42) On August 10, 1982 claimant was referred by Dr. Stein to Robert J. Connair, D.O. (Cl. Ex. 1) Dr. Connair began treating claimant twice a week to correct claimant's structural imbalance and cranial malalignments with a concomitant complaint of tinnitis. In a letter dated April 22, 1983, Dr. Connair concluded that the structural imbalances as well as the cranial malalignment were a result of injuries suffered while claimant was an employee of defendant employer. (Cl. Ex. 1)

Dr. Connair also stated that he could not say with certainty that the structural imbalance was due to this particular injury or if it was the aggravation of a preexisting defect, but he stated that "it was certainly possible that this injury was the precipating factor in the structural imbalance in the back. (Cl. Ex. 1)

Claimant testified that Dr. Connair released him to return to work on September 16, 1982. (Cl. Ex. 2) Subsequently, claimant called the defendant employer's personnel manager, Terry Wisebrick, in Memphis, Tennessee in regards to returning to work with defendant employer. Wisebrick told claimant that the release form given by Dr. Connair wasn't valid because no restrictions were on it. (Tr., p. 69)

Thereafter, on September 27, 1982 Dr. Connair sent a written letter to Frank Mead at defendant employer with specific restrictions contained regarding claimant.

Claimant testified that the following events occurred:

Q. Bob, had Frank Mead asked you to come into the office -- strike that. Let me start over. Had Frank called you and asked you to come into the office and discuss your job with him?

A. What we were discussing is how I could get back to work.

Q. Did he call you on the phone?

A. Yes. He's called me several times.

Q. Did you then go into the office?

A. Yes, I did.

Q. Would Frank Mead have talked with you at that time about your job or how you were going to get back to work?

A. Now, are we referring to the time I took the second release to him?

Q. Yes.

A. I took that to him and gave it to him. He said he was going to have to make a couple telephone calls and I went home. He called me sometime later and wanted to talk to me and I believe it was on a Monday or so and I had a super bad headache from Doctor Connair's cranial manipulation and everything and so I called Frank because Frank said he wanted to talk to me about the job.

He said he's not going to talk to me on the telephone and he hung up on me. So I immediately, within a half hour, went in to discuss, as he says, the job with him. He refused to talk to me.

Q. On the phone?

A. He refused to talk to me.

DEPUTY INDUSTRIAL COMMISSIONER: In person?

THE WITNESS: In person. I went to the office and he refused to talk to me.

Q. Did you then leave the office?

A. Yes. We had a very slight conversation and I did leave.
(Tr., pp. 71-72)

On October 4, 1982 claimant received a letter informing him that he had been fired. (Cl. Ex. 29) The letter stated that his dismissal was because "it has been discovered that you made a number of false statements on the employment application which was signed by you on August 25, 1981." (Cl. Ex. 29) Claimant testified that no other reason was given for his termination. (Tr., p. 73)

Frank Mead also testified to the series of events involving claimant. He testified:

> A. Well, he -- came into my office and the secretary was there also and he had this doctor's release from Doctor Connair stating that he was able to return to work. I don't know what date. Anyway, he was able to return to work. During the conversation Mr. Van Blair was still complaining of all the pains and aches and all the ailments that he had and I said, "You sound like you are worse off now than when you left. Your doctor did not require any restrictions?" He said, no, but during the conversation in listening to his conversation there had to be some kind of restrictions, I'm sure, of a person in that condition so I told him I would get back with him later and that's when I sent a letter to Doctor Connair requesting the medical release if this patient had any restrictions so we could know what position or what kind of job duties he could perform under these conditions.
>
> Q. You have already said that you have jobs which are either light duty or medium duty or something else. Where could you have placed Mr. Van Blair in a job if he did in fact have medical restrictions?
>
> A. He could have went to the office.
>
> Q. What would he have done there?
>
> A. Paperwork.
>
> Q. Well, you have a secretary for that, don't you?
>
> A. Well, we -- they always have more than they can do anyway.
>
> Q. So you would have had work available for him?
>
> A. That's right.
>
> Q. What happened after you wrote to Doctor Connair and inquired as to any medical restrictions placed upon Mr. Van Blair?
>
> A. Okay. Mr. -- Doctor Connair sent me a letter stating back that he asked Mr. Van Blair what restrictions he thought he needed and he listed what restrictions that he gave.
>
> Q. Those are the restrictions contained in Doctor Connair's letter, which is now in evidence?
>
> A. That's correct.
>
> Q. Did you at some point suggest to Mr. Van Blair that he resume work under the restrictions provided by Doctor Connair?
>
> MR. DUTTON: Would you read the question?
>
> MR. HOFFMANN: Well, I will strike the question. Let me ask it again.
>
> Q. Did you offer Mr. Van Blair work compatible with whatever Doctor Connair had said in his letter?
>
> A. We called Mr. Van Blair to come into the office to discuss his job and he refused. He said he was sick that day and he would be sick the next day and he refused to come in to discuss the job, you know, opportunity, whatever he could do.
>
> Q. What happened after that, if anything?
>
> A. Well, he refused to come in and then approximately at 2:30 in the afternoon he barged into my office and I was in conference with another supervisor at the time and I told him I would see him and he refused to leave and he became very belligerent, very hostile and used profane language and then he walked out.
>
> Q. Did he in fact ever resume work with you or with Dobbs Houses in Des Moines under the terms of the restrictions imposed by Doctor Connair?
>
> A. No, he did not.
>
> Q. Such work was available to him?
>
> A. Yes, it was.

In reference to claimant's dismissal, Mead testified that he fired claimant for falsehoods on his job application. (Tr., p. 211) Further, Mead described claimant as immature, very cocky, couldn't take criticism, couldn't tell no one what to do, very hyper, very insecure, and very nervous. (Cl. Ex. 31, p. 10)

Prior to the July 1982 and September 1982 incidents, Mead stated he had no problems with claimant until April 16, 1982. Mead recalls that day as follows:

> A. Okay. Just -- it was just that I wanted to have a conference with Mr. Van Blair concerning his work performance relating to other areas that I felt like he hadn't got involved in that as an assistant manager was supposed to replace me should be involved in and I was going over several areas and he became very hostile and walked out.
>
> Q. You say walked out. Where did this conversation take place?
>
> A. In my office.
>
> Q. Where is your office located, sir?
>
> A. On the second floor of the airport terminal.
>
> Q. Do you have a private office there?
>
> A. Yes, I do.
>
> Q. Did this conversation take place in that private office?
>
> A. Yes.
>
> Q. Was the door open or closed or do you know?
>
> A. I don't remember.
>
> Q. Were there other people in the office at the time?
>
> A. Yes, there was.
>
> Q. Who would have been in the office, and I do not mean on that specific instance, but who would normally be in your office besides yourself?
>
> A. For one, I know for sure was Suzanne Duenow.
>
> DEPUTY INDUSTRIAL COMMISSIONER: How do you spell the last name?
>
> MR. HOFFMANN: D-u-e-n-o-w.
>
> Q. What was Suzanne's position at the time?
>
> A. Secretary.
>
> Q. To yourself?
>
> A. Yes.
>
> Q. You think she was there at the time?
>
> A. Yes, I know she was.
>
> Q. Did you and Mr. Van Blair come to verbal blows, so to speak? Were there any loud raised voices, anything of that sort?
>
> A. I didn't raise my voice. He stormed outside and he said, "I don't have to take this goddamn shit."
>
> MR. VAN BLAIR: I did not.
>
> Q. Mr. Van Blair left and when did you next see him or hear from him?
>
> A. That was on the 16th. We didn't hear nothing from him.
>
> Q. 16th of April?
>
> A. April of --
>
> Q. Of 1982.
>
> A. That's right.
>
> Q. Go ahead.
>
> A. We hadn't heard nothing from him. When -- we had to have somebody to close up and open up, and we arranged our schedules and I had the secretary, Suzanne, to call him to bring his keys in. We need them to -- to operate with.
>
> Q. What did you think the situation was at the time, that he was still an employee or had resigned or quit or what?

A. I thought he had quit.

Q. Did he in fact bring the keys in?

A. He brought them back in that Saturday afternoon and returned them to Suzanne.

Q. The parking lot card or whatever, it was brought in then too?

A. Yes.

MR. DUTTON: Are we talking about April or 1982?

DEPUTY INDUSTRIAL COMMISSIONER: Yes.

Q. When after he brought in the keys and the parking thing did you next have any contact with Mr. Van Blair?

A. When he brought the keys back that afternoon for Suzanne to close the operation up that night, he was very hostile and said I had fired him the day before.

Q. Said you had fired him the day before?

A. I had fired him the day before and then, which I talked to her the next day and heard the conversation that went on and then I had -- I called him on the 19th to return to the office and discuss the situation to let him know that he wasn't fired.

Q. You are still talking about the 19th of April of 1982?

A. '82, right.

Q. You called him and told him he had not been fired?

A. Right, he misunderstood.

Q. What did he say, if anything?

A. He said he misunderstood or he did not know what was going on.
(Tr., pp. 196-197)

Mead further testified that during the next few months, he did not observe claimant having any physical difficulties. As Mead stated, "in fact he made a big improvement of his work performance." Mead testified that the next time he had a problem with claimant was on the already mentioned July 19, 1982 incident. (Tr., pp. 197-198)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on October 27, 1981, May 15, 1982, and July 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).

The claimant has the burden of proving by a preponderance of the evidence that the injuries of October 27, 1981, May 15, 1982, and July 12, 1982 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman, 261 Iowa 352, 154 N.W.2d 128.

If claimant has an impairment to the body as a whole, an industrial disability is to be considered. 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 impairment does not directly correlate to disability. Birmingham v. Firestone Tire & Rubber Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 149 (1981). Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

In Parr v. Nash Finch Co., I Iowa Industrial Commissioner Report 256 (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.

ANALYSIS

On appeal, the first issue raised by claimant deals with whether claimant is entitled to permanent partial disability benefits. Claimant bases his contention upon the fact he now has weight lifting and physical restrictions imposed upon him by Dr. Connair. It must be stated at the outset that claimant is correct in noting that it is possible for claimant to suffer no permanent partial impairment from an injury and yet still be entitled to industrial disability. It has been stated on numerous occasions that:

> 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).

In the case at bar, there is sufficient evidence in the record to support the deputy's finding of no permanent partial disability. After the first two injuries claimant had returned to his regular duties without restriction.

While it is true that Dr. Connair has given claimant certain physical restrictions after his last injury, they are not indicated as permanent. Claimant had previously been released to return to his regular duties with the employer. It is not apparent that the restrictions placed on claimant were for conditions related to his last injury.

Mileage expenses related to obtaining medical care should be awarded. There is sufficient evidence in the record to support a finding of seventy-eight trips to Dr. Connair at sixteen miles roundtrip each. (Cl. Ex. 4 and Tr., p. 53, l. 23 - p. 54, l. 11) Mileage expenses incurred by claimant as a result of visits to Dr. Connair's office, were related to authorized medical care related to the injuries.

Next, claimant contends that an award of industrial disability should be granted because claimant's termination was because of his work-related injuries. In sustaining the deputy's finding, sufficient evidence in the record indicates that there were several reasons for claimant's dismissal. To begin with, there were falsifications in the claimant's application which reflect discrepancies between claimant's resume and actual work experience. Second, it is obvious that claimant and Mead did not see eye to eye on many issues. Frank Mead described claimant as cocky, immature, insecure, and very hyper. Claimant described Mead as a man who was difficult to work for. Not only do both men give their sides of the story but other witnesses corroborate or refute each men's recollection of events.

Opal Stephenson was another assistant manager. She stated that Mead was a strict but fair boss. Stephenson said Mead was always fair with claimant. Suzanne Duenow characterized Mead's relationship with his employees as very good.

Finally, it has not gone unnoticed that claimant has worked at Babe's, the Elbon Club, the Des Moines Club, the Town Pump, Fox Construction, the Long Horn Lounge, S and J Construction, and the Hotel Fort Des Moines before going to work for defendant employer. Not only were most of these jobs short lived but claimant's salary also fluctuated at each one of these jobs. Claimant claims that he quit most of these jobs and gave a variety of reasons for doing so. Claimant has not met his burden in showing that his work-related injuries were the cause of his termination.

In sustaining the deputy's finding that only the injury of July 12, 1982 is compensable, a review of the medical evidence reveals that Dr. Connair concluded "I cannot say with certainty that the structural imbalance was due to this particular injury or if it was the aggravation of a preexisting defect." Second, claimant continued to work after both the October 27, 1981 injury and the May 15, 1982 injury. Claimant was not observed by others, except his girlfriend, as having any physical limitation during this period. Claimant sought no medical treatment after the first injury. Claimant sought chiropractic treatment after the second injury but no remarkable findings by Dr. Keat appeared. Without any medical evidence which causally relates these injuries to claimant's current disability, the deputy's decision must stand.

The next issue involving the relationship between claimant and Frank Mead has already been addressed and need not be discussed further.

Claimant contends that the deputy's observations about the demeanor of Frank Mead are irrelevant. As the trier of fact during the proceeding, the deputy can observe the demeanor of a witness in order to evaluate the credibility to be given the testimony of that witness. Claimant contends because the deputy did not make a finding as to the relative credibility of Mead and the claimant, the award should be substantially increased to include an award for permanent partial disability. No rational basis for such conclusion is noted.

The deputy was also correct in stating that claimant has shown no physical impairment. It has been established that claimant has neither a functional impairment nor industrial disability. Therefore, claimant has no permanent condition which is compensable.

Finally, expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Further, the weight to be given to such an opinion is for the finder of fact. The defendants' contention that the deputy incompletely recited portions of medical examinations lacks merit.

WHEREFORE, the consolidated arbitration decision is affirmed with slight modifications.

FINDINGS OF FACT

WHEREFORE, it is found:

1. That claimant was thirty-five (35) years old at the time of hearing.

2. That prior to working for defendant employer, claimant worked for numerous restaurants for short periods of time.

3. That claimant was hired by defendant employer on September 1, 1981.

4. That claimant hit his head at work on October 27, 1981.

5. That claimant sought no medical treatment at this time.

6. That claimant hurt his back at work on May 15, 1982.

7. That claimant sought the help of a chiropractor after this injury.

8. That claimant hurt his back at work on July 19, 1982.

9. That claimant sought medical treatment at this time.

10. That claimant incurred mileage expenses for seventy-eight (78) round trips to Dr. Connair of sixteen (16) miles each associated with such treatment.

11. That claimant was disabled from July 19, 1982 through September 15, 1982.

12. That claimant did not sustain permanent disability as a result of his work injuries.

13. That claimant was fired for reasons unrelated to his injuries by defendant employer on October 4, 1982.

14. That claimant's rate of compensation is one hundred seventy-seven and 19/100 dollars ($177.19) per week.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That claimant has not proven by a preponderance of the evidence that he sustained any disability as a result of an injury arising out of and in the course of his employment on October 27, 1981.

That claimant has not proven by a preponderance of the evidence that he sustained any disability as a result of an injury arising out of and in the course of his employment on May 15, 1982.

That claimant has not proven by a preponderance of the evidence that his termination on October 4, 1982 was because of his work-related injuries.

That claimant has proven by a preponderance of the evidence that the injury of July 12, 1982 arose out of and in the course of his employment and resulted in temporary disability of eight (8) weeks and three (3) days.

That claimant is entitled to the following medical expenses:

Dr. Connair	$3,015.00
Neurological Associates	385.00
Des Moines General Osteopathic Hospital	1,844.65

That claimant will be reimbursed amounts paid to Dr. Connair.

That claimant is entitled to be paid eight and three sevenths (8 3/7) weeks of temporary total disability compensation at the rate of one hundred seventy-seven and 19/100 dollars ($177.19) per week.

Claimant will be reimbursed for transportation expenses at the rate of twenty-four cents ($.24) per mile incurred which are related to care provided by Dr. Connair.

ORDER

That defendants pay unto claimant eight and three-seventh (8 3/7) weeks of temporary total disability compensation at the rate of one hundred seventy-seven and 19/100 dollars ($177.19) per week.

That defendants pay unto claimant the following approved medical expenses:

Dr. Connair	$3,015.00
Neurological Associates	385.00
Des Moines, General Osteopathic Hospital	1,844.65
Reimbursement to claimant (Connair bill)	95.00
Reimbursement to claimant for transportation	299.52

Accrued sums are payable in a lump sum together with statutory interest.

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

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

Signed and filed this 31 day of December, 1984.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY F. WALKER,	:	File No. 741065
Claimant,	:	R E V I E W-
vs.	:	R E O P E N I N G
SHELLER-GLOBE CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
OCT 12 1984
IOWA INDUSTRIAL COMMISSIONER

This is proceeding in review-reopening brought by Terry F. Walker, claimant, against Sheller-Globe Corporation, self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on August 5, 1983. It came on for hearing on September 18, 1984 at the Henry County courthouse in Mount Pleasant, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received August 12, 1983. A form 2 shows the payment of ten weeks and two days of healing period benefits as well as the payment of medical expenses.

At the time of hearing defendant agreed that claimant's injury arose out of and in the course of his employment. The parties stipulated to a rate in the event of an award of $218.70 per week and to a conversion date for the change from healing period to permanent partial disability of October 17, 1983.

The record in this matter consists of the testimony of claimant, Christine Ann Hartley, Jack L. Jones, Franklin L. Ellis and Beverly E. Bartholomew; claimant's exhibit 1, the admission record from Keokuk Area Hospital; claimant's exhibit 2, the deposition of Albert E. Cram, M.D.; claimant's exhibit 3, a bill from S. Kantamneni, M.D.; defendant's exhibit A, a report from Robert R. Schulze, M.D.; defendant's exhibit B, notes from Bartholomew and Hartley; defendant's exhibit C, a note from Bartholomew and defendant's exhibit D, a report from Robert R. Kemp, M.D. The parties submitted briefs.

ISSUE

The sole issue in this matter is claimant's entitlement to permanent partial disability.

STATEMENT OF THE CASE

Twenty-seven year old single claimant who has an eleventh grade education, testified to commencing work for defendant on March 30, 1976. He recalled the circumstances surrounding his injury of August 5, 1983 as follows: An injection nozzle was being heated with a torch. There was a pressure buildup. Gas ignited. He was burned on his right arm from the upper portion almost to his wrist. He reported to first aid and he was sent to the hospital.

While he was in the hospital he was treated by Dr. Kemp with whirlpool and daily physical therapy. He was seen by someone from the psychiatric department who tried to calm his nerves. He was in the hospital for two and a half weeks. He was released to return to work in October and he was paid compensation for his time off.

When he returned to work, he went to a different machine. He asserted it is harder to do his work since his burn in that he must use his right arm to pull an insert from the machine. Claimant told of experiencing a tingling in his fingers after he does work. He acknowledged that he had no physical reason to leave his job and that he plans to continue working for defendant. He has been able to work overtime and he has worked more hours since his injury than he worked before. His wages have increased since his injury as a result of union negotiations. He himself is a member of the United Rubber Workers.

Claimant listed his present complaints as pain with movement of his arm, tightness in the skin, additional sweating of his arm, greater strain with use of the right arm, sensitivity of the skin to heat and cold and chafing. Claimant reported that he must use a cream on his arm to keep the mositure in. He wears long sleeves the year round. He tries to stay out of the sun. He has throbbing pain in his upper arm.

Christine Ann Hartley, an LPN with an associate degree who has been an industrial nurse for defendant for eight years, testified to knowing claimant and to having been on duty the day he was burned. She stated that claimant has not been in to complain of his arm. She has observed his riding a ten speed -- an activity with which she noted no trouble.

Forty-five year old Jack L. Jones, who has worked for the company for seven and one-half years and who was claimant's supervisor at the time claimant was injured, testified to telling claimant to start up the machine which caused his injury. The two are now on different shifts. Jones indicated that the department worked seven days a week with much opportunity for overtime.

Forty-year old Franklin L. Ellis, a twenty-two year employee for defendant who has been a foreman for seven and a half years and who is claimant's current supervisor, testified that he is happy with the manner in which claimant does his job. He said that there is overtime available and that claimant has been performing it. He said that claimant has made no complaints of an inability to do his work.

Beverly E. Bartholomew, who has worked for defendant since 1977 and who is a first aid attendant and workers' compensation clerk, keeps the workers' compensation records and has access to personnel files. She testified that claimant has reported to first aid for a laceration of his left wrist, but he had not been seen for any problems with the burns on his arm.

Hospital records show claimant was admitted to the hospital on August 5, 1983 with deep partial thickness burns of the right arm. He was seen by S. Dalisay, M.D., to whom he gave a history of a torch blowing up. The burn was described as extending from the anteriolateral aspect of the upper arm to the wrist. The consultant made note of a possibility of debridement under general anesthesia or a split thickness graft.

The debridement was carried out on August 13, 1983.

Claimant was discharged on August 22, 1983 to pursue therapy. He was released for work on October 17, 1983.

Albert E. Cram, M.D., director of the University of Iowa burns center and the emergency treatment center, saw claimant on February 15, 1984 and took a history of a plastic material exploding or catching fire resulting in a burn to claimant's right arm.

Claimant complained of tightness on movement, intermittent throbbing pain in the upper arm most noticeable and severe at night and discomfort with sudden weather changes particularly with heat. On examination the doctor observed definite permanent cosmetic changes, including loss of hair follicles and loss of elasticity. Range of motion in the joints was full. Claimant was continuing to use a mositurizing cream.

Dr. Cram explained the damage thusly:

> Well, a deep second degree burn injury destroys the epithelium or the outer layer of the skin and it destroys a portion of the deeper layer, the dermis of the skin. The dermis contains hair follicles, it contains sweat glands, it contains sebaceous glands. The sweat glands participate in helping control body temperature. The sebaceous glands produce materials, the oils which keep our skin from drying out and becoming too dry and therefore easily -- being easily injured. So the second degree burn destroys a varying amount of those sort of skin appendages, and in addition, as the second degree, the deeper second degree burn wound heals frequently there's a change, a permanent change in color of the skin due to loss of some of the pigment forming cells in the skin, and there's a loss of elasticity during the healing of a deeper burn injury and this loss usually persists. There are changes in the blood supply to the deeper layer of the skin in a healed second degree burn so that the ability to control the temperature in that area of skin is impaired to a certain extent. (Cram dep., pp. 7-8 ll. 18-25 and 1-10)

He also discussed damage to the circulatory system:

> Well, it's an injury to the vessels -- destruction really to the vessels that were in this area, and as the wound heals new blood vessels grow in. But for reasons that aren't entirely clear these vessels are not under as good an autonomic control in terms of their ability to dilate when the body is too hot and to constrict when the body is trying to conserve heat. So that the blood vessels in a deep second degree or a third degree burn don't respond quite in the normal fashion to changes in body temperature. (Cram dep., pp. 8-9 ll. 18-25 and 1)

He verified claimant's complaints of discomfort with weather changes and he described an inability of the burned area to accommodate to extremes of temperature. He also noted that the collagenous material which replaces the dermis is less elastic making it slightly more prone to injury from a shearing force. There is also a slightly higher probability of skin cancer in the burned area.

Dr. Cram rated claimant's disability of the whole person secondary to the burn at four percent. He acknowledged the burn was confined to the right upper extremity and that claimant has full range of motion of the extremity. He testified:

> Well, it's about half of his arm. I guess if I was going to say -- if I was going to try to estimate the disability in that fashion I would say that his arm is fifty percent disabled in the sense that half the arm was burned, and the changes that I'm referring to that affect his ability and performance are related to that. (Cram dep., p. 12 ll. 18-23)

Later he returned to his original estimation of four percent of the body. The specialist purposed that claimant should protect the burn area from exposure to extreme heat or cold, from sunlight and from shearing forces.

Robert R. Schulze, M.D., dermatologist, saw claimant on July 10, 1984 and assigned a rating of four percent of the body.

APPLICABLE LAW AND ANALYSIS

The sole issue in this matter is the degree of claimant's permanent partial disability.

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).

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).

Although both examining physicians in this matter have given claimant body as a whole ratings which incidentally are identical, his impairment will be confined to his right upper extremity.

Claimant testified to various persisting complaints. Most of these complaints were verified by Dr. Cram, and particularly those of dryness of the skin, loss of elasticity, decreased ability to control temperature and discomfort with weather changes. It is apparent the physician considered these various aspects in assessing his rating. The doctor explained that circulatory changes might occur because blood vessels post burn are not as good at controlling body changes; however, he stated: "I think the burn in this case is small enough that it probably won't effect his overall bodily ability to control body temperatur Dr. Cram noted that about half claimant's arm was burned, but that he has full range of motion and slightly abnormal sensory changes. Ultimately he stayed with the four percent body as a whole impairment.

Defendant in this matter have offered twenty weeks of permanent partial disability and that, under the circumstances, seems fair. Twenty weeks of permanent partial disability is the equivalent of eight percent of an upper extremity.

At the time of hearing claimant offered a bill of $323 from S. Kantamneni, M.D., a psychiatrist. Claimant testified that following his burn he was seen by someone from the psychiatry department. The discharge summary states: "The patient became very emotionally distraught during his treatment because he didn't like being in the hospital but this has somewhat subsided now." There was some question as to whether or not defendant might have paid the bill. If they have not done so, they should do so.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-seven years of age.

That claimant has an eleventh grade education.

That claimant's work history has been confined to his work for defendant which he commenced in March of 1976.

That on August 5, 1983 claimant suffered burns to his right upper extremity as he was working on a machine at his job.

That claimant's burn required hospitalization and subsequent physical therapy.

That claimant was paid healing period benefits for his time off work.

That claimant was released to return to work on October 17, 1983.

That claimant experiences tingling in his fingers after he does work.

That claimant has been able to work overtime and has worked more hours since his injury.

That claimant continues to complain of pain with movement of his arm, tightness in his skin, additional sweating of the arm, greater strain with its use, sensitivity of the skin to heat and cold and of chaffing.

That claimant must apply cream to his burned area.

That claimant has not complained to the industrial nurse of his arm.

That claimant has not missed further work because of his burns.

That claimant's foreman is happy with the manner in which claimant is performing his job.

That claimant has a functional impairment as a result of the burn.

That claimant's functional impairment is confined to the right upper extremity.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has a functional impairment of his right upper extremity of eight (8) percent which entitles him to twenty (20) weeks of permanent partial disability benefits.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant twenty (20) weeks of permanent partial disability benefits at a rate of two hundred eighteen and 70/100 dollars ($218.70).

That defendant pay the amount of this award in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30.

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

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

Signed and filed this 12 day of October, 1984.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID WEST,	:	
	:	
Claimant,	:	File Nos. 682910
	:	713452
vs.	:	
	:	ARBITRATION
QUAKER OATS,	:	
	:	AND
Employer,	:	
	:	REVIEW-
and	:	
	:	REOPENING
IDEAL MUTAL INSURANCE COMPANY,	:	
	:	DECISION
Insurance Carrier,	:	
Defendants.	:	

FILED

INTRODUCTION

This is a proceeding in review-reopening brought by David Michael West, claimant, againt Quaker Oats, employer, and Ideal Mutual Insurance Co., insurance carrier, for the recovery of further benefits as the result of an injury on August 20, 1981. This is also a proceeding in arbitration brought by claimant against the employer and insurance carrier for benefits as a result of an injury on September 13, 1982. A hearing was held before the undersigned on July 19, 1983. The actions were considered fully submitted upon the receipt of the depositions on September 1, 1983.

The record consists of the testimony of claimant and David Norton; claimant's exhibits 1 through 3; defendants' exhibits A through C; and the depositions of Joe Stones, Dan Waite, Herman Kurk and James W. Turner, M.D.

ISSUES

The issues presented in the review-reopening are whether there is a causal relationship between the injury and the disability on which he is now basing his claim; the extent of permanent partial disability benefits he is entitled to; whether claimant's medical treatment was authorized by defendants; whether section 85.38(2) applies; and whether claimant is entitled to 86.13 benefits. The issues presented in the arbitration are whether claimant received an injury arising out of and in the course of his employment with defendants; 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; his rate of compensation; whether 85.38(2) applies; and whether claimant is entitled to 86.1 benefits.

FACTS PRESENTED

Claimant testified that in January of 1980 he hurt his back while working for defendant employer when he was lifting 100-150 pound bags of Pure Gold cornmeal off a conveyor and stacking it on a skid. Claimant indicated he lost some time as a result of that injury and was paid some workers' compensation. Claimant stated the next time he injured his back was in August 1981. At that time he received an injury arising out of and in the course of his employment with defendant employer when while putting weights in a scale packer he was unable to straighten up. Claimant revealed he was seen by the company physician, W. R. Basler, M.D., and also was seen by James W. Turner, M.D. Claimant again missed time from work and was paid workers' compensation benefits. Claimant stated:

> Q. Did you suffer any subsequent problems?
>
> A. Yes, September of '82. I believe it was September 13th. I was working on cleaning some overhead pipes, and I went to check the back to make sure I had it cleaned and the ladder slipped out from under me. I was left there hanging on the pipes. When I swung back, I hooked my foot on the ladder and pulled it back over and got myself down.
>
> Q. What did you do when you came down?
>
> A. I tried to straighten up and tried to get myself back in shape. I couldn't afford to lose any more time from work.

Claimant revealed he didn't report this incident to his supervisor.

Claimant testified he went home and started taking a hot bath to make his back feel better when the telephone rang. Claimant stated that while getting out of the tub to answer the phone he experienced a spasm in his leg, slipped down and struck the mid and lower part of his back on the tub. Claimant disclosed that he just laid there in the tub until his wife got home to help him out of the tub. Claimant testified that he went to work the following day with pain in his back. He asked his supervisor for permission to go to the plant hospital, was seen by the plant physician and told to go home and rest and put some heat on his back. Claimant revealed he returned to work on December 12, 1982.

Claimant testified he continued to work even though he still was in pain and discomfort. Claimant described pain on his right side and left side and radiating down into his buttocks and leg. Claimant indicated he took some time off because of back pain, but worked most of the time until he was laid off in January of 1983 with other workers. Claimant indicated he was called back to work on February 28, 1983, but while shoveling corn again injured his back. Claimant testified he worked until March 4, 1983 when he was seen by Dr. Turner and hasn't returned to work since. claimant indicated that defendants did not pay him workers' compensation following the September 1982 injury, but group insurance paid part of his medical bills.

Claimant indicated he would like to take some classes so that he would not have to depend on his physical strength to make a living. Claimant stated he started swimming at the YMCA at Dr. Turner's recommendation.

On cross-examination, claimant revealed that during the first part of 1980 he injured his back when he slipped on some ice. Claimant indicated he was walking at the time for exercise as suggested by a physician. Claimant testified that since January of 1980 he has had difficulty with his back. Claimant testified that he did not report the September 13, 1982 injury until the following day. Claimant revealed that after his injury he went to the locker room and laid down on a bench. Later, when he returned to his station his supervisor was present and wanted to know where he had been. Claimant stated he had gone to the bathroom.

Herman Kurk, who testified by way of deposition, indicated he works for defendant employer as supervisor of bulk products and was claimant's supervisor on September 13, 1982. Mr. Kurk disclosed that on that date claimant's job was working on overhead pipes and equipment, which was cleanup work. Mr. Kurk revealed the job required bending but no lifting.

Mr. Kurk testified that on the morning of September 13, 1982 he had a problem locating claimant because he wasn't where he was suppose to be for at least a half hour. Mr. Kurk indicated claimant said he had been away from his job to go to the bathroom. Later that day claimant met with Mr. Kurk and the union steward to talk about the incident. Claimant never mentioned an injury earlier that day. Mr. Kurk stated that on the 14th claimant complained about back pain but did not tell him it was a on-the-job injury.

Dan Waite, who testified by way of deposition, indicated he works for defendant employer as an ingredient handler and worked in the same department as claimant. Mr. Waite disclosed that he represented claimant as a union steward in a discipline case in front of Herman Kurk. At that time, he talked to claimant, but claimant did not say anything about injuring his back.

Joe Stone, who testified by way of deposition, stated he is department manager of the bulk products department of defendant employer. Mr. Stone indicated that based on records, he was able to say claimant worked for his department that day. Mr. Stone testified he was unable to find anyone that claimant reported his September 13, 1982 injury to.

David Norton testified that he is manager of labor relations for defendant employer and has held that position for two years. Mr. Norton testified that in September 1982 claimant was paid at a rate of $10.10 per hour and usually would work a 40 hour week. Mr. Norton also revealed that claimant missed two weeks of the 13 weeks because of bronchitis. Claimant also missed other times because of illnesses.

James W. Turner, M.D., who testified by way of deposition, indicated he is an orthopedic surgeon and last saw claimant for back complaints on August 26, 1976. Dr. Turner stated:

> Q. Have you seen Mr. West periodically as a patient since that time?
>
> A. I have seen him a number of times. He was not seen again from that time until December of 1981, and from December 1981 to July 15th of 1983 he was seen 13 times in the office, plus he was hospitalized for five days in March 1983.

Dr. Turner testified that when he saw claimant on December 18, 1981 it was because of an acute exacerbation of a chronic lumbar strain. Dr. Turner stated:

> Q. Okay, did you continue to treat him following this report?
>
> A. At that time he was placed on a back support, given some lifting restrictions and I tried to work on some job modifications to get him into building up his back and tummy muscles, and yet still keep working. From that time, he was seen on the 6th of January, was seen again on the 23rd of February.
>
> I commented on the 23rd of February that he had improved and had been doing well, then he fell while running on the ice landing his [sic] right thigh and buttocks, and on exam I did motion of the back, reflexes which were intact, good movement of

limbs, and I felt he sustained a contusion and mild strain and that I would protect him with light duty for a week or ten days and then should do full duty.

I did not feel warranted in taking another set of X-rays. I said recheck if painful. I did not see him again until the 13th of October.

Q. As of that time, February of '82, what was the status then of his aggravation, exacerbation [sic] in August?

A. He was still symptomatic in that he still was complaining of some pain, but I felt he was improving and I felt that prior to this fall in February that, if I understand it, he would have been back to regular work had it not been for the fall.

I thought he had been and then we took him off, put him on protected duty or light work for a week or ten days after that fall, after that time.

Q. And is the reason for that then causally associated with the fall, in your experience?

A. I think it's, you know, another aggravation of an aggravation and I honestly don't know where he fell, whether at home or work or what. I didn't know. I didn't put that in the record.

Q. Well, it's interesting you make that reference. He describes the fall somewhat differently. Did you, as a part of his exercise program, prescribe that he do any running?

A. I think that I have strongly encouraged him to do as much walking, light jogging as possible. We also have been trying to work out ways of getting him into the Y to work on swimming, and there are programs for the Y coverage, but I had certainly recommended that he try to get into some light jogging, running -- not heavy running, not the 20-mile a day type -- but just a good exercise type.

Q. Well, is what he described and you recorded in your history consistent with some aspect of an exercise program that you had recommended?

A. Certainly.

Q. And do you have an opinion based on reasonable medical probability as to whether or not injuries sustained in August of 1981 and any exacerbation resulting from the fall on the ice while running resulted in any permanent impairment of function?

A. Yes, I have an opinion.

Q. What is your opinion, sir?

A. I did not at that time feel that we had reached a point of where we had permanent damage or permanent disability to where I had given him any disability rating. I had not been asked to rate him and I did not feel that we had enough findings to want to put a permanent rating on him primarily because it would have been minimal, and I feel it probably would have interfered with some of his job classifications which I felt it was much more important to keep him fully working if possible.

Dr. Turner next saw claimant on October 13, 1982. Dr. Turner indicated that claimant's problems appeared to get more specific at this time. Dr. Turner disclosed that the tests at that time did show enough evidence of disc protrusion to warrant surgery, but opined that claimant had sustained a smaller disc herniation. Dr. Turner revealed that claimant improved from moderately well to quite well until a March 4th note which indicated claimant hurt his back while shoveling flour. Dr. Turner revealed that claimant was hospitalized on March 19, 1983. Dr. Turner stated:

A. At this time, I felt that, although we did not have localizing signs, I thought we might have had an aggravation of the L4-5 disc. In other words, we had previously done a CAT scan and there was a marginal or minimal herniation, and at this point I felt that perhaps we should go farther in our evaluation, and we did and he was admitted to the hospital on March 19th.

At that time, a myelogram was done. This was within normal limits. It did not show or add any further evidence of more disc herniation or problem than what we had been aware of on the CAT scan; therefore, I continued to treat him on a very conservative basis working on rehabilitative type of activities like exercising, trying to get him into programs at the Y and reconditioning and I have spent a great deal of time talking to him on frankly just changing types of jobs that don't require bending and lifting, and I believe he is making an effort at this point to get some training out at Kirkwood.

Q. Do you have an opinion based on reasonable medical probability as to the cause or causes of the aggravation or exacerbation of his condition in March?

A. I would attribute this to the position that he described of shoveling. Sometimes it isn't so much how much one has to lift or to shovel, but the position in which one has to work from in doing it.

Q. But you associate it then causally to a specific event or --

A. Episode.

Q. Or period of --

A. If what he told me was true back at a different job, something he had not done before in which he was working in a stooped or semi-stooped position, I can directly attribute that to giving him the increase in symptoms we had in March for which I went ahead and hospitalized him, did a myelogram, and again came up with the conclusion we have a very marginal negative EMG, negative myelography.

These do not alter the diagnosis of a small disc herniation because I think that is a pretty firm diagnosis. What they offer to me is that I am not in a position to recommend any other form of treatment other than the rehabilitative efforts that have been made and I felt a great deal of frustration of not keeping him in a working situation, and that's why I have taken a lot of time trying to encourage him to try to get into job retraining.

Dr. Turner opined that prior to the March 1983 injury claimant has already suffered some permanent impairment of five percent of the man. Dr. Turner indicated it would be speculation to determine which of the prior injuries caused what percentage of disability.

In a report dated December 18, 1981 Dr. Turner stated:

David West is a 26-year-old Quaker Oats employee who was examined on December 16, 1981, and states that in August he injured his back. At that time they were packing oats and he was lifting weight of approximately 50-60 lbs. He felt something snap and giving sensation in his back. He was off work initially approximately six weeks and then was returned to light duty. Present light duty has about a 50 lb. weight limitation. He has been working on weight reduction and states that he has lost about 10-15 lbs. Presently, he is not taking any medications. He has not used a back support.

On examination he is a moderately obese young man, does not have a list or limp, lacked a 10" of touching his toes in forward flexion. He did not have a positive Trendelenburg or Rhomberg test. He could heel and toe walk. Straight leg raising was limited at 85° bilaterally by hamstring tightness. Knee reflexes 1+, ankle reflexes 1+ bilaterally. I do not find any specific weakness or sensory deficits.

X-rays reveal no significant evidence of disc space narrowing or anomaly in the lumbar spine.

I feel that he has a chronic lumbar strain.

At this time I feel that he could benefit from the addition of an anti-inflammatory agent such as Motrin. This was prescribed for working periods. I would recommend a four-stay LS corset. This use of the corset makes an exercise program even more important. This has been stressed to the patient. The 50 lb. weight limit that the patient states he presently had on the restricted work may be high if it must be lifted in awkward positions. I would hope that some slight further job modifications could be made to keep him working.

In a report dated March 6, 1980 L. C. Strathman, M.D., stated:

HISTORY: This 24-year-old who works at Quaker states he hurt his back lifting bags at Quaker about the middle of January. He was off work for about a month. He has gone back to work but continues to complain of some sorenss [sic]. Has been taking some muscle relaxants. He states that his job requires him to lift 100 pound bags. He has worked at Quaker for about two years. The pain is localized to the lower thoracic and upper lumbar area. I do not get a history of referred pain.

EXAMINATION: Reveals an overweight, young man. His abdomen is protruberan. He states he weighs over 212 pounds. He stands erect but as he tries to bend forward he does a lot of jerking motion but comes within a few inches of touching the floor. When I have him side bend, he bends a few degrees

and then jerks back to the upright position. He extends about ten to twelve degrees without discomfort. He walks on toes and heels. Reflexes are symetric at the knee and ankle. He shows no discomfort with straight leg raising but some hamstring tightness as one approaches 90 degrees. He has difficulty doing a situp and has difficulty lifting both legs off the table. In the prone position, he complains with compression from the mid-thoracic area to the upper lumbar region. No discomfort over the lumbosacral area and the gluteals are symmetrical. He shows no sensory loss.

X-RAYS: The AP and thoracic spine show no asymmetry. On the lateral view I am seeing no wedging or aberration of the vertebral bodies themselves. The AP lumbar view shoes [sic] a slight asymmetry of the lower facets with a slight deviation of the spine apex to the left in the mid-lumbar region. The obliques show no defects in the pars and the facet relationship appears symmetrical. On his lateral view we are seeing some residual of Schmorl's nodes particularly at 5-1, a lesser amount at the other vertebra. Some flattening of his lumbar lordosis.

IMPRESSION: This gentleman's symptoms are postural, aggravated by his overweight condition.

DISPOSITION: I discussed with him that he should get some weight off and we talked to him about a lumbar flxion exercise program. He should be a little careful with his lifting for a while and do more leg bending and less acute flexion and lifting from that position.

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 September 13, 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 claimant also has the burden of proving by a preponderance of the evidence that the injuries of August 20, 1981 and September 13, 1982 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman, 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 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).

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."

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).

Iowa Code section 85.36(6) states in pertinent part:

> 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 pertient 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.

ANALYSIS

The undersigned observed claimant's demeanor, listened to all of his testimony and found the claimant to be credible.

Claimant has met his burden of proving he received an injury arising out of and in the course of his employment with defendant employer on September 13, 1982. Defendants presented evidence that claimant did not complain of any injury in a meeting with his supervisor or union representative which took place shortly after lunch on September 13, 1982. Claimant testified that the injury occurred in late afternoon at approximately 2:30 or 2:45. The testimony of claimant's supervisor and union representatives placed the meeting shotly after lunch. Claimant would not have exhibited signs of an injury prior to its occurrence. Defendants also urge that claimant failed to inform his supervisors of his injury when it occurred as required by company policy. Claimant's

failure to give notice of his injury at the time it occurred would not change the fact of its occurrence and notice of the injury is not an issue before the undersigned.

Defendants also denied liability of the September 13, 1982 injury because of claimant's fall in the bathtub later that evening. The only evidence presented regarding the tub incident was claimant's testimony and he revealed that he was in the tub because of his earlier injury at work. The greater weight of evidence supports a finding that any injury or diability that arose from the tub incident was causally related to his injury at work earlier that day.

Claimant has also met his burden in proving he has some permanent physical impairment as a result of the August 20, 1981 and September 13, 1982 injuries. Although claimant had injured his back in 1976, it is apparent from the August 26, 1976 report of Dr. Turner that no permanent impairment resulted from that injury. Dr. Turner opined claimant has an impairment of five percent of the body as a result of the two injuries. Dr. Turner disclosed that it was just speculation to determine which injury caused more of the impairment. However, permanent impairment is only one of the factors in determining a person's industrial disability.

Claimant is 28 years old, has a GED and has taken courses toward a degree in business at an area community college. The majority of work that claimant held prior to working with defendant employer was physical in nature and required heavy lifting. Claimant started working for defendant employer in the summer of 1978. Although claimant had some prior back injuries, the evidence did not indicate he had any permanent impairment because of those injuries and had no effect on his ability to do heavy labor. The greater weight of evidence indicates that claimant was in a job which did not require as heavy of lifting when he had his September 13, 1982 injury. At the same time the December 18, 1981 report of Dr. Turner discloses that at that time not much impairment would result from the first injury. After a complete review of the evidence it is determind that claimant has an industrial disability of two percent as a result of his injury on August 20, 1981 and an industrial disability of eight percent as a result of his injury on September 13, 1982.

The parties have raised the issue of rate on the September 13, 1982 injury. The record indicates that claimant actually had gross earnings of $337.15 per week for the thirteen weeks prior to his injury. Claimant showed that during that thirteen week period he missed work because of sickness. The parties did not furnish the undersigned with the weekly earnings for any specific week, but claimant testified that if he hadn't missed work because of his bronchitis he would have worked forty hours a week and was paid at a rate of $10.10 per hour. It is found that claimant's rate is $253.77.

The defendants raise the question of whether the medical bills after the September 13, 1982 injury was authorized under section 85.27. Defendants denied liability for the bills on the grounds that claimant's Septemer 13, 1982 injury did not arise out of and in the course of his employment. Defendants cannot claim that they are not responsible for medical bills and at the same time require claimant to go to physicians of the defendants' choice. Defendants are responsible for reimbursement for those medical bills.

After a review of the evidence, it is determined that a legitimate dispute as to whether claimant's September 13, 1982 injury arose out of and in the course of claimant's employment. Claimant has failed to show that defendants' failure to commence benefits was unreasonable.

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 August 20, 1981 claimant was injured while working for defendant employer.

FINDING 2. On September 13, 1982 claimant was injured while working for defendant employer.

FINDING 3. Prior to August 20, 1981 claimant had injured his back but no permanent impairment resulted.

FINDING 4. On September 13, 1982 claimant injured his back at home while taking a hot bath to help relieve his pain from the injury which occurred at work.

CONCLUSION A. Claimant's injury at home in his bathtub the evening of September 13, 1982 was causally related to his injury at work earlier that day.

CONCLUSION B. On September 13, 1982 claimant received an injury arising out of and in the course of his employment.

FINDING 4. Claimant has a permanent impairment of five percent (5%) of the body as a whole as a result of the August 20, 1981 and September 13, 1982 injuries.

FINDING 5. After his August 20, 1981 injury claimant was placed on a job which did not require heavy lifting.

FINDING 6. Claimant is twenty-eight (28) years old.

FINDING 7. Claimant has taken courses in a community college toward a degree in business.

FINDING 8. The majority of the work claimant held prior to his employment with defendant employer was physical in nature.

FINDING 9. Not much impairment resulted from claimant's August 20, 1981 injury.

CONCLUSION C. Claimant met his burden in proving an industrial disability of two percent (2%) as a result of his August 20, 1981 injury.

CONCLUSION D. Claimant met his burden in proving an industrial disability of eight percent (8%) as a result of his September 13, 1982 injury.

FINDING 10. Claimant's actual wages for the thirteen (13) weeks preceding his injury was three hundred thirty-seven and 15/100 dollars ($337.15) per week.

FINDING 11. Claimant missed work in the thirteen (13) weeks prior to his injury because of illness.

FINDING 12. If not for the illness, claimant would have worked forty (40) hour weeks at a rate of ten and 10/100 dollars ($10.10) per hour.

CONCLUSION E. Claimant's rate is two hundred fifty-three and 77/100 dollars ($253.77) for the September 13, 1982 injury.

FINDING 13. Defendants denied liability for claimant's medical bills after September 13, 1982.

CONCLUSION F. Claimant's medical bills were not unauthorized.

FINDING 14. Defendants had a legitimate question regarding liability for claimant's September 13, 1982 injury.

CONCLUSION G. Claimant is not entitled to 86.13 benefits.

ORDER

THEREFORE, defendants are to pay unto claimant twelve and six-sevenths (12 6/7) weeks of healing period benefits at a rate of two hundred fifty-three and 77/100 dollars ($253.77) per week. Defendants are to pay unto claimant ten (10) weeks of permanent partial disability benefits at a rate of two hundred five and 54/100 dollars ($205.54) per week and forty (40) weeks of permanent partial disability benefits at a rate of two hundred fifty-three and 77/100 dollars ($253.77) per week.

Defendants are to reimburse claimant for his medical expenses with regards to the September 13, 1982 injury, but are to be given credit for any benefits paid under their group plan.

Defendants are to reimburse claimant eight and 64/100 dollars ($8.64) for mileage.

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 defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendants shall file a final report upon payment of this award.

Signed and filed this 24th day of October, 1984.

David E. Linquist

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVE WIKERT,

Claimant,

vs.

CITY OF CEDAR FALLS,

Employer,
Self-Insured,
Defendant.

FILE NO. 663479

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED

OCT 20 1984

IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Steve Wikert, the claimant, against his employer, the City of Cedar Falls, self-insured, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on December 19, 1980 wherein the claimant sustained a low back injury. Claimant was paid temporary total and healing period benefits through July 31, 1981 at a weekly rate of $189.99. However, based upon a salary of $308.00 per week, claimant being married and having one child at the time of injury, claimant is entitled to a rate of $192.86.

This matter was heard in Waterloo on December 28, 1983 and considered as fully submitted at the time of the hearing. In this decision we will concern ourselves in determining the claimant's disability, if any.

Based upon the undersigned's notes the record in this matter consists of the oral live testimony of the claimant, his spouse, Mark Tichy, Ward Stubbs and L. W. (Duke) Young as well as commissioner's exhibit 1, consisting of claimant's answers to interrogatories, claimant's exhibits 1 through 6 and defendant's exhibits A through D.

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

Claimant, age 30, married with one dependent child at the time of his injury has been employed by the employer as the city's cultural supervisor since June of 1977. His duties consisted of administering cultural programs, classes and events and municipal gallery exhibits in coordination with and for the city and the surrounding area as well as the Cedar Falls School System. These duties specifically involve physically moving entire art exhibits from one location to another with little or no assistance.

On December 19, 1980 the claimant transported an art display from Cedar Falls to Des Moines during which process he began to suffer pain and stiffness. The exact mechanism of the injury was unclear. The claimant attributed it to the physical activity involved in loading and unloading as well as to the extremely cold weather conditions made worse by the fact that the city owned van which he was using had a defective heater thereby exposing him to extremely cold temperatures. Whether in fact the heater was defective, the city having testified that it was tested and appeared to be in working order or not, it is clear that the claimant suffered an injury during his delivery of the exhibit which immediately surfaced on the date of the delivery and which immediately caused him to curtail his physical activites. It is further clear that the employer treated this as a compensable injury by ultimately making payment of healing period benefits.

The claimant had no preexisting condition that contributed to his condition on December 19, 1980 and no evidence is found that an injury subsequent to the December 19 incident has occurred. The employer speculates that the claimant may have sustained an injury when lumber was delivered to his home on the date following the injury. This allegation fails in light of the testimony that the claimant did no loading or unloading or lifting and, in fact, did absolutely nothing to assist the lumber company employees other than to guide some lumber through a second floor window.

Subsequent to the injury which occurred on a Friday, claimant worked on Monday and Tuesday preceding Christmas, but on Wednesday, while off work, his condition required him to seek assistance from a chiropractor. He was under chiropractic care but was able to work during the first two weeks of January following the New Year's day, but after which time he was taken off work by D. B. MacMillan, M.D., his family physician for bedrest. When no improvement occurred, he was referred to Arnold E. Delbridge, M.D. Dr. Delbridge's medical report dated April 20, 1981 (Claimant's exhibit 1) states, in part, as follows:

> Mr. Wikert at this time is not near ready to return to work on a full time basis. It may be two to four months before he could return on a full time basis unless his recovery is speeded up noticeably.
>
> I feel that Steve Wikert definitely has low back pain with radiculitis. The fact that he had a negative myelogram is not particularly remarkable in the sense that in about 25% of disc cases the myelogram is negative. Even in some cases where there is a disc there is also a negative CT scan as well. My diagnosis of Steve Wikert at this time is lumbar disc syndrome.

Claimant was unable to do any work during the period that he was under Dr. Delbridge's treatment from January 30, 1981 through April 5, 1981. At that time he was granted a partial release allowing him to work two hours per day for the period of April 6 through April 17. This was then increased to three hours per day during the period of April 22 through May 8, four hours per day during the period of May 11 through May 22, five hours per day during the period of May 26 to July 3 and six hours per day during the period of July 6 through July 31 at which time he was released to work eight hours per day.

On September 1, 1982 Dr. Delbridge issued permanent restrictions that the claimant should work no more than eight hours per day and should not engage in lifting items weighing more than 25 pounds nor should he lift any items while ascending steps.

On November 10, 1982 Dr. Delbridge submitted a disability report to the defendant setting forth the following:

> Steve Wikert has no neurologic deficit of his lower extremities and as you know he has had no surgery. He has lost forty degrees of forward flexion, a 4% impairment. He lacks ten degrees of extension of his lumbar spine, a 1% impairment. He lacks ten degrees of side to side bending to each side, a 4% impairment and he has full rotation. Totaling up the various impairments we find that he has a 9% whole man impairment as a result of his loss of motion of his lumbar spine.

The functional disability rating of nine percent was substantiated by Thomas A. Carlstrom, M.D., in a medical report dated February 1, 1983 (Cl. ex. 5). No weight is given to Dr. Carlstrom's speculation that half of the nine percent disability might be attributed to an aggravation of the claimant's symptoms on the day following his delivery to Des Moines in light of the fact that no evidence was produced that the claimant performed "relatively heavy exertion following the van drive". Up to the date of hearing the claimant has continued to suffer pain as well as to be restricted in his daily activities, both work related and non-work related. After an unusally long healing period it has been necessary for him to return to physical therapy on at least two occasions and it has been necessary for him to see Dr. Delbridge as recently as 60 days prior to hearing. Because of continuing back pain he is fitted for a back brace which he continues to wear between 10 and 14 hours per day. Claimant also is found to be unable to work more than eight hours per day and has been issued a 25 pound weight restriction.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 19, 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 applying the foregoing legal principles to the case at hand, it is apparent that the claimant has bourne his burden of proof in establishing by a preponderance of the evidence that his current impairment is causally connected to the work activity which is under review.

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."

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. * * * *

In applying the foregoing legal principles to the case at hand, it is concluded that the claimant has sustained an industrial disability of 20 percent of the body as a whole. Claimant, a young man, has a permanent physical abnormality. His ability to advance in his career will be restricted by his physical limitations. Future employment opportunities will be diminished due to prospective employers' reluctance to hire persons with pre-existing back abnormalities.

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

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

2. That the claimant sustained an admitted industrial injury on December 19, 1980 which injury arose out of and in the course of his employment.

3. As a result thereof, the claimant has been paid healing period benefits at a rate of $189.99 rather than the correct rate of $192.86.

4. That the claimant has sustained a functional impairment of the body as a whole in the amount of nine percent, all of which results from the injury under review.

5. That as a result thereof, the claimant continues to suffer pain and is subject to substantial employment restrictions.

6. As a result thereof, the claimant has sustained a 20 percent industrial disability of the body as a whole.

THEREFORE, IT IS ORDERED that beginning on November 10, 1982, defendant pay the claimant a hundred (100) week period of permanent partial disability benefits at the weekly rate of one hundred ninety-two and 86/100 dollars $192.86. That all accrued benefits are payable in a lump sum together with statutory interest. That the defendant pay the claimant an additional two and 87/100 dollars ($2.87) for all weeks during which healing period benefits were paid at the incorrect rate.

IT IS FURTHER ORDERED that the defendant shall pay the claimant mileage and transportation expenses in the sum of one hundred seventeen and 04/100 dollars ($117.04).

IT IS FURTHER ORDERED that the costs of this action are charged to the defendant in accordance with the Iowa Industrial Commissioner Rule 500-4.33 and shall include thirty and no/100 dollars ($30.00) for the cost of the medical report of Arnold E. Delbridge, M.D., dated April 28, 1981 and seven and no/100 dollars ($7.00) for costs of service of the witness subpoena served on Mark Tichy.

IT IS FURTHER ORDERED that the defendant file a claim activity report within twenty (20) days from the date of this decision.

Signed and filed this 23 day of October, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CAD WILLINGHAM, JR.,	:	File No. 687819
Claimant,	:	REVIEW -
vs.	:	REOPENING
OSCAR MAYER AND CO.,	:	DECISION
Employer, Self-Insured, Defendant.	:	

FILED
OCT 24 1984
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Cad Willingham, Jr., claimant, against Oscar Mayer and Company, a self-insured employer, for the recovery of further benefits as the result of an injury on November 17, 1981. Claimant's rate of compensation as indicated by the rate agreement filed December 4, 1981 is $256.05. A hearing was held before the undersigned on September 13, 1984 at the Bicentennial Office Building in Scott County, Davenport, Iowa. The case was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, David J. Seronal, Harold Schwiker, Jr., Douglas Nelson, Dale Potter, and Vernon Keller; and claimant's exhibit A.

ISSUES

The issues presented by the parties at the time of the pre-hearing and the hearing are whether the claimant's disability is causally related to the injury of November 17, 1981 and the extent to which claimant may be entitled to permanent partial disability benefits.

EVIDENCE PRESENTED

Claimant, age 44, testified that he grew up in Mississippi where he quit high school in the 10th grade to go to work and help support his family. Claimant stated that in his early employment career he was a kitchen worker at " Old Miss," had washed cars and done general unskilled labor. In 1963 he moved to Iowa and soon started working for the defendant. During his 21 years of employment he has done a variety of jobs. Claimant recalled that prior to November 17, 1981 he had missed worked on only two occasions and had received 10 or 11 letters from the employer in recognition of perfect attendance.

Claimant stated that on November 17, 1981 he was boning hams at table 12. He explained that as he was lifting about a 20 pound ham he felt a pain going down his back. He stated that he reported the incident to his foreman and went to the first aid station where he was given pain pills and sent back to work. Claimant testified that his pain continued so he saw the company physician. He stated that he was eventually admitted to the hospital where it was determined that he was suffering from a ruptured disc. He stated that the disc was surgically removed following which he was off work about 12 weeks. Claimant admitted he was paid compensation during his time off.

Claimant disclosed that after his surgery and return to work he was placed on a number of restrictions by his doctor. These restrictions initially involved a limited number of work hours and a weight lifting limit; however, they have evolved over time since the injury to the point where claimant is now allowed to work up to a 44 hour work week and may lift up to 30 pounds. He advised that he is also restricted from bending, reaching and stretching or twisting to the right which has prevented him from being able to transfer to a number of different jobs. Claimant advised that when he returns home from work after an average day his back is often sore and painful. Claimant stated that over the course of a four to six week period his back will develop enough pain that he is required to take three or four days off to recuperate. He stated that at the present time he occasionally has enough back pain that he is unable to sleep at night. He occasionally drags his right leg and has difficulty climbing stairs.

Claimant stated that at one time he received a warning about the amount of time he had missed from work. Claimant stated that he went to his supervisor concerning this warning and was told later that it was torn up. Claimant said that he had also received a warning for taking too long to go to the restroom which he attributed to his inability to walk quickly enough. Claimant stated he is presently employed at Oscar Mayer, although at the time of hearing there was a layoff due to a labor dispute. Claimant expressed some worry and doubt about his ability to continued at his present employment until retirement.

David J. Seronal testified that he has been employed at Oscar Mayer for 29 years. He advised that he knew the claimant both before and after his injury of November 17, 1981. According to Mr. Seronal, claimant does not appear to be able to perform his job as well now as he did prior to his injury. Mr. Seronal testified that he has observed that claimant appears to be in pain on occasion while lifting, twisting or bending.

Harold Schwiker, Jr., testified that he also has known the claimant before and after his injury of November 1981. He believed that claimant was able to do his job better before his injury than after it.

Douglas Nelson testified that he is employed by the North Central Rehabilitation Service as a rehabilitation counsellor. He testified as to his professional qualifications and indicated that he was familiar with the local job market in the Davenport area. Mr. Nelson advised that he had seen and evaluated the claimant at the request of claimant's counsel. He outlined the types of tests which were administered to the claimant. Mr. Nelson indicated that prior to the injury of November 1981 claimant was in a position to do heavy industrial labor where the wage level ranged from $7 to $12 per hour. It was his opinion that claimant would no longer be able to do heavy manual labor and that if he were to seek a job today, he would earn $5 or $6 per hour. Mr. Nelson opined that claimant suffered an industrial disability of 64 to 55 percent. He admitted on cross-examination, however, that his opinion was based upon the assumption that claimant was no longer employed at Oscar Mayer.

Dale Potter testified that he is a supervisor in the ham bone department at Oscar Mayer. He stated that claimant does a very good job at the present time and that he had other people working for him with less capability than the claimant. He confirmed that the attendance report which the claimant received for missing work as a result of his back was discarded and removed from the claimant's records.

Vernon Keller testified that he is the safety and security manager at Oscar Mayer and Company. He advised that it is part of his job to handle workers' compensation cases for the defendant. He stated that he arranged for claimant to receive medical treatment and surgery on his back. He stated further that claimant has not been paid any permanent partial disability as a result of his injury. He advised that the defendant has attempted to follow all of the restrictions imposed upon the claimant by his physician. On cross-examination, Mr. Keller advised that the claimant is in no jeopardy of losing his job because of the time off work because of his back condition.

Dennis Miller, M.D., testified by way of deposition which was included as claimant's exhibit A. Dr. Miller stated that he received a medical degree from the University of Iowa College of Medicine in 1959; that he performed his internship at Philadelphia General Hospital for one year and then returned to the VA Hospital in Iowa City for a year of general surgery; that following this he went to the University of Texas at Galveston for four years of orthopedic residency training. Dr. Miller stated that following his residency training he served two years in the Public Health Service in Staten Island, New York and has since been employed in private practice in Davenport, Iowa.

Dr. Miller testified that he first saw claimant on December 17, 1981 at St. Lukes Hospital. At that time he saw him at the request of Dr. Sam Choi, a neurologist, and Dr. Casper, a colleague of the family physician, Dr. McCabe. The doctor stated that he conducted an examination of the claimant on December 17, 1981 just a few hours after a myelogram was performed. At that time the doctor noted a sensory loss on the claimant's lateral three toes, some pain radiating down the lateral side of his foot, the absence of a right ankle jerk and that straight leg raising on the right side was positive at 45 degrees. The doctor stated that he also reviewed the myelogram which was performed on the claimant which showed a filling defect at L5, S1 on the right side. Based upon the history given him by the claimant, the physical findings found upon examination and the myelogram, the doctor concluded that the claimant was suffering from a herniated intervertebral disc at L5, S1 on the right.

Dr. Miller stated that on December 21, 1981 he performed a laminectomy and a discectomy removing the ruptured part of the disc at L5, S1 on the right. He did not perform a fusion of the spine. He revealed that the claimant was discharged from the hospital on December 26, 1981. Dr. Miller testified that he next examined claimant on December 31, 1981 at which time he noted that the claimant was doing reasonably well. The staples were removed and he noted that the wound was well healed except for the central area where there was a slight overlap of skin. The claimant was advised at that time to gradually increase his activity but to avoid any lifting, bending or any strenuous activities. Dr. Miller stated that he saw the claimant a number of times over the past few months following the surgery and that the claimant would on several occasions complain of pain from his employment at Oscar Mayer. Dr. Miller attempted to explain the types of restrictions to which the claimant is subject. He advised that there are a number of complicated factors involved in arriving at the appropriate restriction, but as a general rule claimant should not do any continued heavy lifting, twisting or bending. He established a weight lifting limit of 30 pounds. It was the doctor's opinion that the claimant would continue to be able to perform his job at Oscar Mayer given some reasonable effort on the part of all parties to accommodate the particular problems from which the claimant suffers. The doctor felt that the claimant would continued to suffer some pain and that he would on occasion have to be off work for two or three days at a time in order to give his back a chance to recuperate from his activities. Dr. Miller assessed a functional impairment of the claimant equal to 15 percent of the body as a whole.

A review of the remainding evidence indicates that claimant does indeed have some restrictions on the amount of weight he can lift and the number of hours each week he should be working. The attendance records of the claimant confirm that since his injury he has missed more work than he did prior to his injury. Also included in the documentary evidence is the report of the vocational rehabilitation counsellor which reiterates his conclusion of industrial disability and provides information concerning the basis of that opinion. According to the records, claimant was released by Dr. Miller to return to work on Monday, March 22, 1982.

APPLICABLE LAW

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

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).

ANALYSIS

There is no question in this case that the disability that claimant suffers is the result of the herniated disc he received in November of 1981 and subsequent surgery. The most important question to be resolved is what is that disability and how can it be determined.

As the report of the vocational rehabilitation expert points out, this individual has a number of factors working against him in the employment area. Clearly this man has no marketable skills which would give him any opportunity other than that as a general laborer. With such limited skills, it is clear that claimant's impairment would adversely affect his earning ability. It must be remembered, however, that claimant's earning ability is also affected by factors not related to his injury, such as his limited education and prior experience as well as a limited job market in the vicinity in which he lives. The supreme court of Iowa in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) indicated that an employee's discharge from employment following a work-related injury may indicate an industrial disability has been sustained even though there may be no functional impairment as a result of the injury. Conversely, it would seem logical to conclude that an employee who is at no risk of losing his employment in the forseeable future and who continues to be employed by the same employer may have an industrial disability which is less than might otherwise be expected as a result of the functional impairment.

In the instant case, the defendant has demonstrated its willingness to continue to have claimant in its employ. This willingness has been demonstrated by their cooperation with the claimant on what he says are his physical limitations and their willingness to accommodate his particular needs. From all indications at the hearing this claimant will continue to be employed by the defendant for some time into the future. Claimant expressed his concern about being able to continue in his job to age of retirement as a result of his injury; however, it is not clear at this time whether he will or will not be able to continue. It is clear that claimant does need to be off work periodically to allow his back to be rested. It is clear that claimant continues to suffer pain while employed and that his activities have been restricted. Thus, it is apparent that the claimant has suffered some degree of industrial disability and loss of future earning capacity.

Although claimant's education, age, and prior work experience are factors which would increase his industrial disability, his current employment and ability to function therein are counterweights to this problem. The type of injury received by the claimant and the severity of it are also indications of a substantial degree of industrial disability. It is clear, however, that the medical procedures undertaken to rectify the damaged disc have been quite successful in this case. It would not be uncommon for an individual to take as long as a year to recover from the type of surgery this claimant underwent. In his particular case, he returned to work within about 12 weeks after the surgery and has been employed since his return. All of these factors taken together would indicate that although claimant received a significant injury and resulting impairment, his industrial disability is not greater than the actual functional impairment which he suffered. Accordingly, claimant has established by a preponderance of the evidence that as a result of his injury of November 1981 he suffered an industrial disability equal to 15 percent of the body as a whole.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. Claimant is 44 years old, married and has two dependent children.

2. Claimant quit high school in the 10th grade and has obtained no additional education or training.

3. On November 17, 1981 claimant suffered an injury to his back while at work.

4. The injury to claimant's back was a herniated inter-vertebral disc at L5, S1 on the right.

5. On December 21, 1981 claimant was operated on to remove the herniated disc.

6. Claimant was off work following his injury from November 17, 1981 to March 22, 1982.

7. Claimant now suffers a significant permanent partial impairment to his body as a whole because of the injury of November 17, 1981.

8. Claimant continues in the employ of defendant.

9. Claimant is not in jeopardy of losing his job because of his injury.

10. Claimant continues to miss work occasionally because of his back pain.

11. Claimant has no specialized training or skills.

12. Since November 17, 1981 claimant has suffered pain and a restricted range of motion.

13. Defendant has made substantial efforts to accommodate the particular needs of claimant's back condition.

14. Claimant's rate of compensation is $256.05.

15. Claimant has an industrial disability equal to 15 percent of the body as a whole.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that on November 17 1981 he received an injury arising out of and in the course of his employment.

Claimant has proven by a preponderance of the evidence that there is a causal relationship between that injury and a permanent partial disability of fifteen (15) percent of the body as a whole.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant weekly compensation benefits at the rate of two hundred fifty-six and 05/100 dollars ($256.05) for a period of seventy-five (75) weeks commencing March 22, 1982. All accrued payments are to be paid in a lump sum together with statutory interest.

IT IS FURTHER ORDERED that the costs of this action are taxed to defendant.

IT IS FURTHER ORDERED that defendant file a claim activity report upon payment of this award.

Signed and filed this 24th day of October, 1984.

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

1402.40; 1802; 1803
2101; 2206; 2504; 3202
Filed October 24, 1984
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHIRLEY E. WILLIS, Claimant, vs. LEHIGH PORTLAND CEMENT COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Insurance Carrier, and STATE OF IOWA SECOND INJURY FUND, Defendants.	:	FILE NO. 636588 A R B I T R A T I O N D E C I S I O N

1402.40; 1802; 1803; 2101; 2206; 2504; 3202

Claimant suffered three separate injuries. The first two were to her left knee and the third was to the body as a whole. The first knee injury resolved quickly and left no identified permanent impairment. The second knee injury resulted in prolonged absence from work and medical care and was found to have caused 5 percent impairment of the knee. Claimant had a preexisting 5 percent impairment of her other knee. Industrial disability was placed at 7 1/2 percent. The employer was ordered to pay 11 weeks of compensation and the Second Injury Fund 26 1/2 weeks.

The third injury came from a fall. At time of hearing claimant was off work with back trouble. Such was found to be the third part of her healing period which had been twice interrupted by returns to work. Where the only medical evidence available at the time of the second part of the healing period related it to the fall, the failure to pay compensation was held to be unreasonable and a section 86.13 penalty was imposed. A running award of healing period was ordered.

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INTRODUCTION

This is a proceeding in arbitration brought by Shirley E. Willis, the claimant, against Lehigh Portland Cement Company, her employer, Travelers Insurance Company, the insurance carrier, and State of Iowa Second Injury Fund, based upon an alleged injury of May 19, 1980. The case is entitled to be in review-reopening; however, there appears to be no memorandum of agreement, agreement for settlement or prior award and the matter is properly in arbitration. The hearing was consolidated with the files numbered 662523 and 691096 which refer to alleged injuries of January 11, 1981 and December 31, 1981 respectively. The hearing commenced on July 27, 1984 at the Cerro Gordo County Courthouse in Mason City, Iowa. The case was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of Shirley E. Willis, Brad Petersen and Amber Anderson. Also in the record of this case are claimant's exhibits 1 through 37, inclusive, and defendants' exhibits A, B and C. It should be noted that the exhibits also include 8a and 8b.

ISSUES

The issues identified by the parties at the time of hearing and which appear in the pre-hearing order and pre-trial conference

notes are: whether claimant sustained an injury arising out of and in the course of her employment; whether there is a causal connection between any such alleged injury and claimant's present state of health; a determination of the nature and extent of any disability which claimant has experienced; claimant's entitlement to benefits under section 85.27 of the Code of Iowa; claimant's entitlement to benefits from the Second Injury Fund; and a determination concerning whether claimant is entitled to additional benefits for wrongful denial or delay of compensation under the provisions of section 86.13 of the Code of Iowa. It was stipulated by the parties that in the event of an award in this case that claimant's rate of compensation would be $217.39 per week. It was also stipulated that with regard to the injury of May, 1980 that claimant was not off work long enough to warrant payment for temporary disability.

REVIEW OF THE EVIDENCE

Brad Petersen gave no testimony which had any bearing or relationship to the alleged May, 1980 injury.

Amber Anderson testified that she has lived with claimant since prior to May 19, 1980. She related that she recalls the incident of May 19, 1980 involving claimant's knee. She stated that claimant did not exhibit any problems with her left knee prior to May 19, 1980 and has had continuing knee problems since, including the wearing of splints. She stated that claimant has limped and complained between the times of her two knee injuries and that the second knee injury made it worse.

Shirley Willis testified that she is 53 years of age, has never married and has lived in Mason City, Iowa most of her life. She related that she graduated from high school in 1949 but has no other formal training. She has worked in a grocery store wrapping meat and as a cashier. She has worked in a packing plant using a knife in the pork kill floor, wrapping smoked meat, carrying mail through the plant and as a keypunch operator in the data processing department. Claimant testified that she has also worked as a bartender.

Claimant began working for the defendant employer in August, 1975 doing yard labor which involved shoveling. As time passed she worked as a control operator of a kiln burner, as a control operator for a mill and as a control operator for the turbine. She has been a mix control operator performing laboratory work and has performed general labor in the nature of shoveling, operating a jackhammer and other similar strenuous activities. She described the job of mix control operator as light work which involved picking up and testing samples of material at various stages of the production process but stated that the climbing of stairs which was involved with it caused her some problems.

Claimant denied having any recollection of an incident in 1966 involving complaints of back pain but did not deny that such could have occurred.

Claimant related an incident which occurred at Lehigh in 1976 when she was being trained at the blending bins and slipped which caused her to twist and experience severe back pain. She received treatment from D. E. Fisher, M.D., and Gerald L. Brady, M.D. The treatment consisted of bedrest and exercises. The injury caused her to miss approximately two months of work for which she received sick pay and medical benefits from the employer's group carrier. She denied receiving any workers' compensation benefits.

Claimant related being involved in an auto accident in late June, 1977. She stated that while driving home, following the collision, her neck and low back started hurting. She related that the collision resulted in her filing a lawsuit which was settled for $9,000, of which she received $6,000. She stated that her back has bothered her since that accident and has never been as good as it was before the accident. She stated that her neck complaints have resolved. Claimant missed approximately two or two and one-half months of work following that accident.

Claimant testified that on May 19, 1980 she hit her left knee on a step while climbing at the Lehigh Plant. She stated that she had a patellectomy in approximately 1974 on her right knee which was performed by Dr. Fisher but that she had no prior problems with her left knee. She stated that the May, 1980 injury caused her to miss only a couple days of work. She recalled that she went to the hospital emergency room and was treated by Adrian J. Wolbrink, M.D. She related that the left knee condition improved but did not completely go away.

Claimant testified that on January 11, 1981 she was shoveling under a conveyor belt when the belt started running and the handle of the shovel struck her left knee. She related that she continued to work until some date in February, 1981 but was then off work until she requested a return to work slip in August, 1981.

After her return to work claimant continued to work until December 31, 1981 when she was assigned to loosen frozen material from a hopper. She stated that she was working with Brad Petersen and that they had tried using shotgun slugs, pry bars and a jackhammer to free the frozen material which had wedged in the hopper. She related that in the process of doing so, the material suddenly caved-in and that they both fell approximately eight to nine feet when the material on which they were working collapsed beneath them. Claimant testified that she fell partly on Petersen and that she fell mostly on her left side. She described the parts of her body which she felt as having been injured as her left shoulder and arm, her low back and her left leg. Claimant stated that she initially saw B. K. Wasiljew, M.D., and was then sent to Paul H. Gordon, M.D., who referred her to Dr. Wolbrink.

Claimant stated that since the fall her left collarbone is depressed, but that prior to the fall she had no problem with her clavicle or sternum. She stated that Dr. Wolbrink did not treat her clavicle. Claimant testified that she returned to work on May 17, 1982 and continued working until October, 1983. She stated that during that time span she experienced pain in her left knee while climbing stairs and pain in her back while carrying the pail of material samples which weighed 40 or 50 pounds.

Claimant stated that she received some care at Mayo Clinic and that an injection in her left shoulder helped. She stated that presently any strenuous use of her left shoulder makes it feel sore.

Claimant testified that Wayne E. Janda, M.D., hospitalized her in October, 1983 during which time she had a CT scan. She stated that she still is under Dr. Janda's care at the present time.

Claimant stated that she is presently off work under Dr. Janda's care and that she has been informed that her old job at Lehigh has been discontinued. She stated that Dr. Wolbrink has restricted her to lifting 15 pounds or less and to limit shoveling and climbing of stairs. She stated that Dr. Janda has limited her lifting to 40 pounds and restricted stair climbing. She related that Dr. Janda and John R. Walker, M.D., have recommended surgery on her back but that no one has recommended surgery for her knee. She related that she is reluctant to have surgery and that none is scheduled.

Claimant testified that she wears a Tens Unit frequently and that she has a lumbar corset which she does not wear.

Claimant testified that she has joined the "Y" and has worked out at the Nautilus Center. She feels that her condition is presently improving.

Claimant stated that she presently experiences pain on the right side of her lower back and down the outside of her right leg. She stated that at times the pain has extended into her left leg. She described it as something which comes and goes. She admitted having back pain prior to December 31, 1981, but stated that the sharp shooting pains which she now has are much more severe. Claimant stated that her left arm is significantly weaker than the right but that she presently experiences no problems involving her ears, right knee or elbow.

Claimant stated that since the injury of December 31, 1981, she can no longer engage in sports such as bicycling and her yard work. She related that she has hired someone to do some of her yard work and shoveling but that she has done some of it on occasion. Claimant stated that she initially did the heavy housework in her home, but that since 1981 Mrs. Anderson has done all the laundry, cooking and cleaning. She related that when furniture has to be moved they do it together.

Claimant testified that her condition worsened subsequent to May, 1982 but that she has made recent improvement. She feels that she has not regained the state of health which she experienced prior to December 31, 1981.

Claimant recalled falling from a ladder in 1968 and an incident of aggravating her back while shoveling snow in 1978 as well as other aggravations to her back. She stated that her back has always bothered her since 1976 when she slipped at work, but that the pain is no longer tolerable. Claimant denied experiencing any other specific incidents or injuries subsequent to May 17, 1982.

Claimant testified that Dr. Janda has given no indication of when she will return to work. She felt that her job in the lab permitted her to move around enough to be able to tolerate it.

Claimant stated that her back pain is her overriding concern and the main reason why she cannot work. She stated that the condition of her knee does not prohibit her from working at her old job and that the knee and shoulder only cause problems for her on heavy exertion.

Exhibit 8b indicates that claimant was seen at North Iowa Medical Center by Dr. Wolbrink on May 20, 1980 with complaints involving her left knee. She was diagnosed as having a contusion of the knee. Such is confirmed on the last page of exhibit 7 at the entry dated May 20, 1980. The entry dated May 23, 1980 indicates that claimant was returned to work on May 23, 1980.

At page 30 of exhibit 33 Dr. Wolbrink opined that the May, 1980 incident was a material aggravation of claimant's knee problems. He has consistently, however, held the opinion that the problem in claimant's knee is chondromalacia and that the injury of May, 1980 did not cause any permanent impairment in claimant's left knee as he confirmed at pages 74 through 77 of exhibit 33. In exhibit 21 Dr. Walker opined that claimant suffered a one percent functional impairment of her knee in the May, 1980 injury. In his report he notes a slight narrowing of the medial joint line on the left knee and calcification overlying the head of the fibula, posteriorly. He makes no reference to chondromalacia. As shown in exhibits 22, 23 and 27 Dr. Janda relates the problem in claimant's left knee to preexisting

degenerative changes and work related trauma. He does not, however, at any point, identify any particular work related injury to claimant's left knee. He finds that she has a five percent permanent physical impairment of her left leg as a result of combined trauma and preexisting factors to her left knee.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on May 19, 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).

Claimant is found to be a credible witness on her own behalf. It is found and concluded that she did strike her knee while climbing steps on May 19, 1980 as she testified.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 19, 1980 is the cause of the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (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).

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).

Claimant only missed a short amount of work as a result of the injury. Dr. Wolbrink in exhibit 20 stated:

> Enclosed is a copy of my emergency room note from May 20, 1980. You will note that my examination shows that there was crepitation of the patella. Crepitation at that time would indicate that there was some chondromalacia of the patella existent at that time which could not possibly have occurred from a fall the previous day. Also, the patient had chondromalacia of the patella on her other knee severe enough so that she had a patellectomy. Chondromalacia of the patella is usually a bilateral disease in a person of her body type. Therefore, as stated in my letter of March 10, "The basic underlying problem of her left knee is chondromalacia of the patella. In my opinion, episodes of pain have been aggravations of this underlying disease; and injuries at work have not been a factor in increasing the impairment in the knee."

Only Dr. Walker specifically relates any permanent impairment to the May, 1980 injury and he relates only a one percent impairment. It is found that claimant was suffering from chondromalacia of the patella on her left knee prior to May 20, 1980. It is also found and concluded that while the injury may had caused some residual discomfort, it did not cause any permanent impairment of the left knee. The opinion of Dr. Wolbrink is adopted over that of Dr. Walker on the ground that Dr. Wolbrink was the treating physician and also due to the fact that the injury is perceived to have been minor as evidenced by claimant's early return to work and the absence of any continuing medical care following the injury.

Although it was not identified as an issue in the case, it appears that the injury to claimant's knee occurred nearly three years prior to the date the petition was filed in this case. It should be noted that in Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763, 768 (1969), the Iowa Supreme Court stated: "In view of the nature of the special limitation section 85.26 imposes on the right of recovery it was not necessary for defendants to plead it as a special defense under section 86.14." Under such case a claimant has the burden of proving compliance with section 85.26 of the Code of Iowa. Payment of medical expenses alone does not extend the time during which an action can be commenced. Beier Glass Co. v. Brundige, 329 N.W.2d 280 (Iowa 1983). Even when the considerations of Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980) are considered, it appears that in the exercise of reasonable diligence claimant should have discovered that there was a possibility that she had suffered a permanent impairment to her knee as a result of the accident of May 19, 1980 more than two years prior to the date the petition in this case was filed. It is not necessary, however, to make a determination of whether or not the case was commenced in a timely manner as it has been concluded that claimant did not suffer any permanent impairment as a result of the injury.

FINDINGS OF FACT

1. On May 19, 1980 claimant was a resident of the State of Iowa and was employed at Lehigh Portland Cement Company in the State of Iowa.

2. Claimant was injured on May 19, 1980 when she struck her left knee on a step while climbing steps at her employer's plant while performing her duties.

3. Following the injury claimant was medically incapable of performing work in employment substantially similar to that she performed at the time of the injury from May 20, 1983 until May 23, 1983, the date upon which claimant returned to work.

4. The injury caused no permanent impairment in claimant's left knee or leg.

5. Claimant was suffering from chondromalacia of the patella prior to May 19, 1980.

6. Claimant is a credible witness.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and its parties.

The injury claimant sustained to her left knee on May 19, 1980 arose out of and in the course of her employment with Lehigh Portland Cement Company.

The injury of May 19, 1980 did not result in any permanent impairment of claimant's left knee or leg and the amount of time during which she was off work was not sufficient in order to justify payment of benefits for temporary total disability.

Claimant's failure to establish that she suffered a permanent impairment as a result of a work related injury on May 19, 1980 does not entitle her to receive any benefits from the Second Injury Fund of the State of Iowa.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding. The costs of this action are assessed against the defendants pursuant to Industria' Commissioner Rule 500-4.33.

Signed and filed this 24th day of October, 1984.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHIRLEY E. WILLIS, Claimant, vs. LEHIGH PORTLAND CEMENT COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Insurance Carrier, and STATE OF IOWA SECOND INJURY FUND, Defendants.	FILE NO. 691096 R E V I E W - R E O P E N I N G D E C I S I O N FILED OCT 21 1994 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Shirley E. Willis, the claimant, against Lehigh Portland Cement Company, her employer, Travelers Insurance Company, the insurance carrier, and State of Iowa Second Injury Fund. Claimant seeks further benefits as a result of the injury of December 31, 1981. Claimant's rate of compensation is $231.37 per week as established by the memorandum of agreement on file and by the stipulation of the parties given at hearing.

The hearing commenced on July 27, 1984 at the Cerro Gordo County Courthouse at Mason City, Iowa. The hearing was consolidated with the hearing of claimant's cases against these same defendants as contained in file numbers 636588 and 662523.

The record in this proceeding consists of the testimonies of Shirley E. Willis, Brad Petersen and Amber Anderson. The record also contains claimant's exhibits 1 through 37 inclusive, together with exhibits 8a and 8b. The defendant, Lehigh Portland Cement, introduced exhibits A, B and C.

ISSUES

The issues presented by the parties at the time of hearing are: whether there is a causal connection between the injury of December 31, 1981 and any disability which claimant exhibits; a determination of the nature and extent of disability related to that injury; a determination of whether claimant's medical expenses are related to that injury; and a determination of whether claimant is entitled to additional benefits under the provisions of section 86.13 of the Code of Iowa for unreasonable delay or denial of compensation. The petition indicates that the Second Injury Fund of Iowa is also a defendant and claimant's entitlement to benefits from such are also in issue.

REVIEW OF THE EVIDENCE

Brad Petersen testified that he has been employed by the Lehigh Portland Cement Company for five years and that on December 31, 1981 he was claimant's foreman. He related that he recalled an incident when he and claimant were working to loosen frozen blue clay which would not flow in a hopper. He stated that the hopper is eight or ten feet high. Petersen related that he and claimant were standing on clay which was approximately level with the top of the hopper, but that the clay had been undermined. He related that they had been using a jackhammer to loosen the clay and that suddenly the undermined material gave way with him and claimant falling. Petersen stated that he landed with claimant on his back. He did not know which part of claimant's body made contact with anything else. He stated that claimant was able to get out of the hopper by herself and that he did not recall if she made any complaints of pain. He stated that he was not injured in the fall. He could not recall whether claimant had finished the shift or if she had worked under him on any successive days. Petersen described the fall as sliding down with the material and stated that they slid approximately five feet before coming to a stop.

Shirley Willis testified that she is 53 years of age, has never married and has lived in Mason City, Iowa most of her life. She related that she graduated from high school in 1949 but has no other formal training. She has worked in a grocery store wrapping meat and as a cashier. She has worked in a packing plant using a knife in the pork kill floor, wrapping smoked meat, carrying mail through the plant and as a keypunch operator in the data processing department. Claimant testified that she has also worked as a bartender.

Claimant began working for the defendant employer in August, 1975 doing yard labor which involved shoveling. As time passed she worked as a control operator of a kiln burner, as a control operator for a mill and as a control operator for the turbine. She has been a mix control operator performing laboratory work and has performed general labor in the nature of shoveling, operating a jackhammer and other similar strenuous activities. She described the job of mix control operator as light work which involved picking up and testing samples of material at various stages of the production process but stated that the climbing of stairs which was involved with it caused her some problems.

Claimant denied having any recollection of an incident in 1966 involving complaints of back pain but did not deny that such could have occurred.

Claimant related an incident which occurred at Lehigh in 1976 when she was being trained at the blending bins and slipped which caused her to twist and experience severe back pain. She received treatment from D. E. Fisher, M.D., and Gerald L. Brady, M.D. The treatment consisted of bedrest and exercises. The injury caused her to miss approximately two months of work for which she received sick pay and medical benefits from the employer's group carrier. She denied receiving any workers' compensation benefits.

Claimant related being involved in an auto accident in late June, 1977. She stated that while driving home, following the collision, her neck and low back started hurting. She related that the collision resulted in her filing a lawsuit which was settled for $9,000, of which she received $6,000. She stated that her back has bothered her since that accident and has never been as good as it was before the accident. She stated that her neck complaints have resolved. Claimant missed approximately two or two and one-half months of work following that accident.

Claimant testified that on May 19, 1980 she hit her left knee on a step while climbing at the Lehigh Plant. She stated that she had a patellectomy in approximately 1974 on her right knee which was performed by Dr. Fisher but that she had no prior problems with her left knee. She stated that the May, 1980 injury caused her to miss only a couple days of work. She recalled that she went to the hospital emergency room and was treated by Adrian J. Wolbrink, M.D. She related that the left knee condition improved but did not completely go away.

Claimant testified that on January 11, 1981 she was shoveling under a conveyor belt when the belt started running and the handle of the shovel struck her left knee. She related that she continued to work until some date in February, 1981 but was then off work until she requested a return to work slip in August, 1981.

After her return to work claimant continued to work until December 31, 1981 when she was assigned to loosen frozen material from a hopper. She stated that she was working with Brad Petersen and that they had tried using shotgun slugs, pry bars and a jackhammer to free the frozen material which had wedged in the hopper. She related that in the process of doing so, the material suddenly caved-in and that they both fell approximately eight to nine feet when the material on which they were working collapsed beneath them. Claimant testified that she fell partly on Petersen and that she fell mostly on her left side. She described the parts of her body which she felt as having been injured as her left shoulder and arm, her low back and her left leg. Claimant stated that she initially saw B. K. Wasiljew, M.D., and was then sent to Paul H. Gordon, M.D., who referred her to Dr. Wolbrink.

Claimant stated that since the fall her left collarbone is depressed, but that prior to the fall she had no problem with her clavicle or sternum. She stated that Dr. Wolbrink did not treat her clavicle. Claimant testified that she returned to work on May 17, 1982 and continued working until October, 1983. She stated that during that time span she experienced pain in her left knee while climbing stairs and pain in her back while carrying the pail of material samples which weighed 40 or 50 pounds.

Claimant stated that she received some care at Mayo Clinic and that an injection in her left shoulder helped. She stated that presently any strenuous use of her left shoulder makes it feel sore.

Claimant testified that Wayne E. Janda, M.D., hospitalized her in October, 1983 during which time she had a CT scan. She stated that she still is under Dr. Janda's care at the present time.

Claimant stated that she is presently off work under Dr. Janda's care and that she has been informed that her old job at Lehigh has been discontinued. She stated that Dr. Wolbrink has restricted her to lifting 15 pounds or less and to limit shoveling and climbing of stairs. She stated that Dr. Janda has limited her lifting to 40 pounds and restricted stair climbing. She related that Dr. Janda and John R. Walker, M.D., have recommended surgery on her back but that no one has recommended surgery for her knee. She related that she is reluctant to have surgery and that none is scheduled.

Claimant testified that she wears a Tens Unit frequently and that she has a lumbar corset which she does not wear.

Claimant testified that she has joined the "Y" and has worked out at the Nautilus Center. She feels that her condition is presently improving.

Claimant stated that she presently experiences pain on the right side of her lower back and down the outside of her right leg. She stated that at times the pain has extended into her left leg. She described it as something which comes and goes. She admitted having back pain prior to December 31, 1981, but

stated that the sharp shooting pains which she now has are much more severe. Claimant stated that her left arm is significantly weaker than the right but that she presently experiences no problems involving her ears, right knee or elbow.

Claimant stated that since the injury of December 31, 1981, she can no longer engage in sports such as bicycling and her yard work. She related that she has hired someone to do some of her yard work and shoveling but that she has done some of it on occasion. Claimant stated that she initially did the heavy housework in her home, but that since 1981 Mrs. Anderson has done all the laundry, cooking and cleaning. She related that when furniture has to be moved they do it together.

Claimant testified that her condition worsened subsequent to May, 1982 but that she has made recent improvement. She feels that she has not regained the state of health which she experienced prior to December 31, 1981.

Claimant recalled falling from a ladder in 1968 and an incident of aggravating her back while shoveling snow in 1978 as well as other aggravations to her back. She stated that her back has always bothered her since 1976 when she slipped at work, but that the pain is no longer tolerable. Claimant denied experiencing any other specific incidents or injuries subsequent to May 17, 1982.

Claimant testified that Dr. Janda has given no indication of when she will return to work. She felt that her job in the lab permitted her to move around enough to be able to tolerate it.

Claimant stated that her back pain is her overriding concern and the main reason why she cannot work. She stated that the condition of her knee does not prohibit her from working at her old job and that the knee and shoulder only cause problems for her on heavy exertion.

Exhibit 8b indicates that claimant was seen at North Iowa Medical Center by Dr. Wolbrink on May 20, 1980 with complaints involving her left knee. She was diagnosed as having a contusion of the knee. Such is confirmed on the last page of exhibit 7 at the entry dated May 20, 1980. The entry dated May 23, 1980 indicates that claimant was returned to work on May 23, 1980.

Amber Anderson testified that she has known claimant since the 70's and has resided with claimant since prior to May 19, 1980 when her husband went into a nursing home. She recalled the 1980 incident involving claimant's knee. She stated that claimant had exhibited no problems with her left knee prior to May 19, 1980 but that claimant had continuing problems with the knee thereafter. She stated that claimant limped and complained between the time the two knee injuries occurred and that the second knee injury made claimant's condition worse.

Amber testified that following the December 31, 1981 injury, claimant complained of pain all the time and was up a lot at night walking and lying on the floor. She stated that since the injury claimant does little in the way of housework and that the witness now does all the washing and all the housework including making the beds. She stated that claimant does do some vacuuming and some shoveling and mowing. She felt that claimant's condition is worse now than it was on December 31, 1981. Anderson confirmed that claimant had back problems before December, 1981, but that her present problems are worse.

At pages 64 and 65 of exhibit 33, A. J. Wolbrink, M.D., indicated that in his opinion claimant's lower back is presently 20 percent impaired of which 10 percent is due to degeneration, five percent due to injuries which occurred in the 1970's and five percent due to the December 1981 injury. At pages 70 and 71 he opined that the December 1981 injury caused more degeneration

Wayne E. Janda, M.D., indicated in exhibit 29 that claimant has a 25 percent impairment in her back, all of which is due to the fall. In exhibit 27 he had indicated that she probably had a preexisting impairment. In exhibit 26 he stated that the fall probably aggravated whatever preexisting condition claimant had. He also opined that claimant's hospitalization which occurred in October, 1983 related more to the injury of December 31, 1981 than to any preexisting condition and that the complaints which she then exhibited were primarily related to the injury of December 31, 1981. In exhibit 23 Dr. Janda had opined that claimant had a 15 percent impairment of her spine which was a combined result of preexisting factors and trauma.

John R. Walker, M.D., indicated through exhibit 21 that he felt that claimant had a 22 percent impairment of her back of which 10 percent was related to the fall of December 31, 1981. He also indicated that she had an eight percent impairment of the body as a whole due to the painful sternoclavicular dislocation

As shown in exhibit 18 Brad B. Hall, M.D., related that claimant had hypertrophic changes in her lumbar spine with slight narrowing at the L2, 3 and 4 interspaces. He did not impose an impairment rating or give any opinion concerning the cause of that condition.

Sant M.S. Hayreh, M.D., in exhibit 31 opined that claimant suffers from musculoskeletal low back pains secondary to underlying degenerative arthritis of the lumbar spine. In the report he acknowledges that the CT scan had shown a small herniated disc at midline and to the right of the L4-5 level with vacuum disc phenomenon at the L4-5 interspace. He does not indicate any impairment rating nor does he comment upon whether or not the injury of December 31, 1981 plays any part in claimant's present condition.

Exhibit 17 is a report from T. F. DeBartolo, M.D., who found claimant to have degenerative arthritis of the spine and to be in a condition where her back was chronically irritated by repetitive muscle strains. He did not give any indication of an impairment rating or of the effect of any injury.

G. I. Tice, M.D., had previously found claimant to have a 20 percent disability of her back as shown in exhibit 8a which is dated May 7, 1979. He found her to have a chronic low back strain with some characteristics of an osteoarthritis.

Exhibits 3, 4, 5, 6, 7, 8 and possibly others confirm that claimant had experienced pain in her low back prior to December 31, 1981. Exhibits 5 and 6 show a diagnosis of degenerative arthritis having been made in 1976 and 1978 respectively. Exhibit 25 contains a CT scan which finds claimant to have a small extruded disc fragment to the right of midline just below the L4-5 interspace and a vacuum disc phenomenon at the L4-5 interspace.

Following the injury claimant was seen at the North Iowa Medical Center Emergency Room by B. K. Wasiljew, M.D., as shown in exhibit 11. The x-ray report, exhibit 12, which was taken at that time, showed degenerative changes which had increased since claimant's last preceeding x-ray with intervertebral discs adequately maintained and no definite fractures seen. The claimant was thereafter followed by Paul H. Gordon, M.D., as shown in exhibit 13. Claimant was thereafter cared for by Dr. Wolbrink until she was released to return to work on May 17, 1982 as shown by exhibits 14, 15 and 16. Exhibit 16 indicates that claimant's complaints continued beyond May 17, 1982.

The claimant ceased treating with Dr. Wolbrink but was seen by Dr. DeBartolo in June, 1982, at the Mayo Clinic in February, 1983 and by Dr. Walker in May, 1983.

In July, 1983 claimant was evaluated by Dr. Janda and thereafter began receiving care from him. On October 17, 1983 claimant was hospitalized as a result of her back complaints as shown in exhibit 24. She remained off work thereafter until she was released to return on Tuesday, January 3, 1984 as shown on the last page of exhibit 27. Claimant thereafter continued to work until March 21, 1982 when Dr. Janda found her to be disabled for work as shown in exhibit 2. Claimant's status of being disabled from work continues through exhibit 32 through the last entry which is dated July 12, 1984.

ANALYSIS AND 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. It does not establish the nature or extent of disability. Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (Iowa 1975).

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 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 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).

All doctors who have expressed an opinion concerning the cause of the condition of claimant's back, namely Walker, Janda and Wolbrink, have found that claimant suffered an injury to her back in the December 31, 1981 incident. Even though some of the reports of other physicians could possibly be construed to attribute all of claimant's impairment to degenerative changes, the causal connection found to exist by Drs. Wolbrink, Walker and Janda between the injury and claimant's back is adopted.

Claimant is found to be a credible witness and her relation of the condition of her collarbone to the injury is adopted. Such is confirmed by Dr. Wolbrink at page 49 of exhibit 43 and

in exhibit 14.

Following the injury of December 31, 1981 claimant did not return to work until May 17, 1982 when released by Dr. Wolbrink as shown in exhibits 15 and 16. Such is a span of 19 weeks, three days. Thereafter, claimant continued to work through October 16, 1983. On October 17, 1983 claimant was hospitalized at St. Joseph Mercy Hospital and she continued to remain absent from work through January 2, 1984 when she was released to return to work by Dr. Janda as shown in exhibit 27. In exhibit 26 Dr. Janda opines that the October, 1983 hospitalization was related to the injuries of December 31, 1981. Claimant then continued to work, during 1984, until March 22, 1984 when Dr. Janda found her to be disabled from work. It should be noted that his finding of disability is shown on the first page of exhibit 32 in an entry dated March 21, 1984. The last entry in the record of this case is an entry in exhibit 32 dated July 12, 1984 wherein Dr. Janda found claimant to still be disabled for work, with a recheck to be scheduled four weeks later, a date subsequent to the date the hearing was held in this case. This span from October 17 through January 2 is 11 weeks, one day. The span of March 22, 1984 through July 27, 1984, the date the hearing in this matter was conducted is 18 weeks, two days. It was stipulated by the parties that claimant had been paid compensation for the time she was off work ending May 17, 1982. Claimant seeks compensation for the subsequent absences from work.

Healing period ends upon a return to work or at the point of maximum medical recovery. Continuing to receive medical care which is maintenance in nature does not extend the healing period beyond the point when the claimant actually stopped improving. Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (Iowa 1981). Derochie v. City of Sioux City, 2 Industrial Commissioner Report 112 (1982) District Court Appeal, Remanded for Settlement. A healing period can be interrupted by a return to work but then continue on concurrent with a subsequent absence from work. Claimant's initial absence which ended with her return to work on May 17, 1982 would constitute healing period. The second absence, October 17, 1983 through January 2, 1984 involved hospitalization and care which ultimately resulted in a return to work. Since it has previously been concluded that the absence which began in October, 1983 was a result of the December, 1981 injury, it is likewise concluded that this second absence from work is also healing period. Claimant continued to receive medical care while she was working during 1984. Her most recent absence from work has been accompanied by medical care. She is undergoing physical therapy through the Nautilus program and performs other exercises. She receives medication. Even though she is working at recovery she seems to be making little real progress when exhibit 32 is closely examined. Dr. Janda has not, however, given any indication that she has reached a plateau in her recovery efforts and there is no other physician who has indicated that further improvement of her condition could not be expected. It is therefore found and concluded that claimant is in a healing period as of the time of hearing. Claimant will be granted a 29 3/7 weeks of healing period benefits covering the second and third absences from work running up to and including the date of hearing. She will thereafter be given a running award which will remain in effect until it is terminated by her return to work, by reaching maximum improvement or by becoming able to return to work as provided by statute.

Benefits for permanent partial disability are generally payable upon the end of the healing period. Claimant's healing period in this case has not ended. Although it appears likely that permanent disability will result, the extent of such cannot be determined until her recovery is complete. From the record it appears that claimant's condition is approaching a plateau where further significant improvement cannot be expected unless claimant elects to have surgery or some other substantial change in the type of medical care which she is receiving.

Under the provisions of section 85.27 of the Code of Iowa, defendants are liable for the expense of medical care which is reasonably necessary to treat the injury which claimant sustained. Claimant's exhibit 34 lists medical expenses which total $5,880.02. Of that amount $77.50 was found to be the responsibility of the defendants in a companion case arising from the January 11, 1981 injury. Upon review of medical bills contained in exhibit 34 in comparison with the other evidence in the record, it is found that the same are expenses incurred for treatment of claimant's back and that the treatment was necessary as a result of the injury of December 31, 1981. It is therefore found and concluded that defendants are responsible for payment of claimant's medical expenses as shown on exhibit 34 in the total amount of $5,802.52, the only exclusion being the bill to American Prosthetics, Inc., in the amount of $77.50 which was found to be the responsibility of the defendants in a companion case.

Claimant seeks additional benefits based upon the alleged unreasonable delay or denial of compensation in accordance with section 86.13 of the Code of Iowa. Since the payment of benefits for permanent disability is not yet due, the lack of payment of compensation for permanent partial disability cannot be held to be unreasonable. It is specifically found and concluded that defendants' failure to pay any compensation for permanent disability is not an unreasonable denial or delay of benefits.

With regard to the third healing period, the one which commenced March 22, 1984, it cannot be said that the failure to pay benefits was unreasonable. The undersigned found the question of whether such was a healing period or merely maintenance of her condition to be a close question. The type of care which she received is not greatly different from the care which would normally be maintenance in nature for a person who has significant degenerative arthritis.

With regard to the healing period which commenced October 17, 1983, the defendants' failure to pay is found to be unreasonable. There is no medical opinion which indicates that such hospitalization was not a result of the injury and Dr. Janda, the authorized treating physician, specifically stated in exhibit 26 that it was a result of the injury. Defendants will be assessed a 50 percent penalty for the unreasonable failure to pay compensation during claimant's second healing period in an amount equal to five and four-sevenths weeks of benefits.

As shown in claimant's exhibit 35 she seeks compensation for travel necessary to obtain medical care. Upon a comparison of the exhibit with the other records in this case the dates and amounts shown appear correct. It is found that all mileage incurred, commencing with the entry of January 2, 1982, was for treatment of the injury claimant sustained December 31, 1981. One hundred eleven miles were traveled prior to July 1, 1982 for which she is entitled to compensation at the rate of $.22 per mile. Six hundred eighty-five miles were traveled subsequent thereto for which she is entitled to compensation at the rate of $.24 per mile. This totals $188.82.

Claimant seeks compensation for costs which, under Industrial Commissioner Rule 500-4.33 include the reasonable cost of two medical reports. The reports contained in exhibit 36, $90.00 from Mayo Clinic and $60.00 from Orthopaedic Specialists are fair and reasonable and will be included in the costs of this proceeding with sheriff's fees in the amount of $6.25 as shown in exhibit 37. Defendants will be ordered to pay the costs of this proceeding.

FINDINGS OF FACT

1. On December 31, 1981 claimant was a resident of the State of Iowa working at her place of employment in the State of Iowa when she was injured when she fell when attempting to dislodge frozen material from a hopper.

2. Following the injury claimant was medically incapable of performing work in employment substantially similar to that she performed at the time of the injury from January 1, 1982 until May 17, 1982 when claimant returned to work. Claimant was similarly disabled from October 17, 1983 until January 3, 1984 and from March 22, 1984 up to and including July 27, 1984. Claimant remains medically incapable of performing work in employment substantially similar to that she performed at the time of the injury and it has not been medically indicated that further significant improvement from the injury is not anticipated.

3. Claimant's rate of compensation is $231.37 per week as established by stipulation of the parties.

4. Claimant received medical care which was reasonable and necessary for the injury from Drs. Wolbrink, Gordon, Wasiljew, DeBartolo, Hall, Janda, Walker and Hayreh with care being rendered at St. Jospeh Mercy Hospital and in North Iowa Medical Center Emergency Room.

5. In obtaining that medical care claimant incurred expenses in the amount of $5,802.52.

6. Claimant is presently restricted in her ability to bend, walk, lift and carry. She continues to experience pain.

7. Claimant has a high school education with no further educational pursuits.

8. Claimant has work experience as a meat cutter, meat wrapper, punch operator, mail distributor, bartender, retail sales clerk and as a control operator of the machines at the defendant employer's place of business as well as work which is essentially moderate to heavy labor.

9. Claimant appears to be well motivated, emotionally stable and of at least average intelligence.

10. Claimant had a preexisting impairment in both knees and in her back as a result of degenerative disease and prior injuries. This incident caused an injury to claimant's back in the nature of an aggravation of her degenerative disc disease and a sternoclavicular dislocation.

11. In obtaining treatment for the injury claimant traveled a total of 796 miles of which 111 were performed prior to July 1, 1982.

12. Defendants' failure to pay healing period compensation for the period from October 17, 1983 through January 2, 1984 was unreasonable. Defendants' failure to pay any compensation for permanent disability was not unreasonable.

13. Claimant incurred expenses of $150.00 in obtaining two medical reports as shown in exhibit 36 and service fees of $6.25.

14. Defendants have paid claimant all healing period benefits due through May 16, 1982.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHIRLEY E. WILLIS,	:	
Claimant,	:	
vs.	:	FILE NO. 662523
LEHIGH PORTLAND CEMENT COMPANY,	:	R E V I E W -
Employer,	:	R E O P E N I N G
TRAVELERS INSURANCE COMPANY,	:	D E C I S I O N
Insurance Carrier,	:	FILED
and	:	OCT 24 1984
STATE OF IOWA SECOND INJURY FUND,	:	IOWA INDUSTRIAL COMMISSIONER
Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Shirley E. Willis, the claimant, against Lehigh Portland Cement Company, her employer, Travelers Insurance Company, the insurance carrier, and State of Iowa Second Injury Fund. Claimant seeks further benefits as a result of the injury which occurred January 11, 1981. Claimant's rate of compensation is $246.64 per week in the event of an award as established by the memorandum of agreement filed March 5, 1981 and as confirmed by the stipulation of the parties at commencement of the hearing.

The hearing commenced on July 27, 1984 at the Cerro Gordo County Courthouse at Mason City, Iowa. The hearing in this case was consolidated with the hearing in the cases which have been commenced by claimant against the same defendants in files numbered 636588 and 691096.

The record in this case consists of the testimonies of Shirley E. Willis, Brad Petersen and Amber Anderson. The record also contains claimant's exhibits 1 through 37 inclusive, including exhibits 8a and 8b. The defendants' exhibits A, B and C were received into evidence.

ISSUES

The issues presented by the parties at the time of hearing are: whether there is a causal connection between the injury of January 11, 1981 and any disability which claimant has experienced; a determination of the nature and extent of any disability which is related to that injury; a determination of claimant's entitlement to benefits available under section 85.27 of the Code of Iowa; a determination of claimant's entitlement to benefits from the Second Injury Fund of Iowa; and a determination of claimant's entitlement to benefits available under section 86.13 of the Code of Iowa for the allegedly unreasonable delay or denial of compensation.

REVIEW OF THE EVIDENCE

Brad Petersen gave no testimony which had any bearing or relationship to the alleged injury.

Amber Anderson testified that she has lived with claimant since prior to May 19, 1980. She related that she recalls the incident of May 19, 1980 involving claimant's knee. She stated that claimant did not exhibit any problems with her left knee prior to May 19, 1980 and has had continuing knee problems since, including the wearing of splints. She stated that claimant has limped and complained between the times of her two knee injuries and that the second knee injury made it worse.

Shirley Willis testified that she is 53 years of age, has never married and has lived in Mason City, Iowa most of her life. She related that she graduated from high school in 1949 but has no other formal training. She has worked in a grocery store wrapping meat and as a cashier. She has worked in a packing plant using a knife in the pork kill floor, wrapping smoked meat, carrying mail through the plant and as a keypunch operator in the data processing department. Claimant testified that she has also worked as a bartender.

Claimant began working for the defendant employer in August, 1975 doing yard labor which involved shoveling. As time passed she worked as a control operator of a kiln burner, as a control operator for a mill and as a control operator for the turbine. She has been a mix control operator performing laboratory work and has performed general labor in the nature of shoveling, operating a jackhammer and other similar strenuous activities. She described the job of mix control operator as light work which involved picking up and testing samples of material at various stages of the production process but stated that the climbing of stairs which was involved with it caused her some problems.

Claimant denied having any recollection of an incident in

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and its parties.

The injury claimant sustained to her back and clavicle on December 31, 1981 arose out of and in the course of her employment with Lehigh Portland Cement Company.

Claimant is entitled to healing period benefits for the periods of October 17, 1983 through January 2, 1984 and March 22, 1984 through July 27, 1984, all dates inclusive.

Claimant is entitled to a running award of healing period benefits from and after July 27, 1984.

Defendants' failure to pay compensation for permanent disability was not unreasonable where the healing period has not ended.

Defendants failure to pay benefits for healing period during October 17, 1983 through January 2, 1984 was unreasonable where the only medical evidence in the record relating thereto found the same to be a result of the injury of December 31, 1981. As a penalty under section 86.13 of the Code of Iowa for the unreasonable denial of compensation, defendants shall pay claimant 5 4/7 weeks of compensation payable in a lump sum upon entry of this decision.

Failure to pay compensation during the healing period which began March 22, 1984 was not unreasonable where it could reasonably be believed that claimant may have already attained maximum medical improvement.

Defendants are responsible for claimant's medical expenses, transportation and court costs.

ORDER

IT IS THEREFORE ORDERED that the Second Injury Fund of Iowa has no liability in this proceeding.

IT IS FURTHER ORDERED that defendants pay claimant eleven and one-seventh (11 1/7) weeks of compensation for healing period at the rate of two hundred thirty-one and 37/100 dollars ($231.37) per week commencing October 17, 1983.

IT IS FURTHER ORDERED that defendants pay claimant eighteen and two-sevenths (18 2/7) weeks of compensation for healing period at the rate of two hundred thirty-one and 37/100 dollars ($231.37) per week commencing March 22, 1984.

IT IS FURTHER ORDERED that defendants pay claimant weekly compensation for healing period as a running award commencing July 28, 1984.

IT IS FURTHER ORDERED that defendants pay claimant a penalty under section 86.13 of the Code of Iowa in an amount equal to five and four-sevenths (5 4/7) weeks of compensation at the rate of two hundred thirty-one and 37/100 dollars ($231.37) per week payable in a lump sum upon entry of this decision.

IT IS FURTHER ORDERED that defendants pay to claimant the sum of five thousand eight hundred two and 52/100 dollars ($5,802.52) for medical expenses and one hundred eighty-eight and 82/100 dollars ($188.82) for travel expenses incurred in obtaining medical care.

IT IS FURTHER ORDERED that all past due amounts shall be paid in a lump sum and that defendants shall receive any credit to which they are entitled under section 85.38 of the Code of Iowa and for amounts of compensation of medical expenses previously paid which are not reflected in this record.

IT IS FURTHER ORDERED that defendants shall pay interest pursuant to section 85.30 of the Code of Iowa on all amounts of healing period benefits and permanent partial disability compensation which were not paid at the time the same became due.

IT IS FURTHER ORDERED that defendants pay the costs of this action in the amount of one hundred fifty-six and 25/100 dollars ($156.25).

Defendants will file an activity report within twenty (20) days from the date of this decision.

Signed and filed this 24th day of October, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

1966 involving complaints of back pain but did not deny that such could have occurred.

Claimant related an incident which occurred at Lehigh in 1976 when she was being trained at the blending bins and slipped which caused her to twist and experience severe back pain. She received treatment from D. E. Fisher, M.D., and Gerald L. Brady, M.D. The treatment consisted of bedrest and exercises. The injury caused her to miss approximately two months of work for which she received sick pay and medical benefits from the employer's group carrier. She denied receiving any workers' compensation benefits.

Claimant related being involved in an auto accident in late June, 1977. She stated that while driving home, following the collision, her neck and low back started hurting. She related that the collision resulted in her filing a lawsuit which was settled for $9,000, of which she received $5,000. She stated that her back has bothered her since that accident and has never been as good as it was before the accident. She stated that her neck complaints have resolved. Claimant missed approximately two or two and one-half months of work following that accident.

Claimant testified that on May 19, 1980 she hit her left knee on a step while climbing at the Lehigh Plant. She stated that she had a pateilectomy in approximately 1974 on her right knee which was performed by Dr. Fisher but that she had no prior problems with her left knee. She stated that the May, 1980 injury caused her to miss only a couple days of work. She recalled that she went to the hospital emergency room and was treated by Adrian J. Wolbrink, M.D. She related that the left knee condition improved but did not completely go away.

Claimant testified that on January 11, 1981 she was shoveling under a conveyor belt when the belt started running and the handle of the shovel struck her left knee. She related that she continued to work until some date in February, 1981 but was then off work until she requested a return to work slip in August, 1981.

After her return to work claimant continued to work until December 31, 1981 when she was assigned to loosen frozen material from a hopper. She stated that she was working with Brad Petersen and that they had tried using shotgun slugs, pry bars and a jackhammer to free the frozen material which had wedged in the hopper. She related that in the process of doing so, the material suddenly caved-in and that they both fell approximately eight to nine feet when the material on which they were working collapsed beneath them. Claimant testified that she fell partly on Petersen and that she fell mostly on her left side. She described the parts of her body which she felt as having been injured as her left shoulder and arm, her low back and her left leg. Claimant stated that she initially saw B. K. Wasiljew, M.D., and was then sent to Paul H. Gordon, M.D., who referred her to Dr. Wolbrink.

Claimant stated that since the fall her left collarbone is depressed, but that prior to the fall she had no problem with her clavicle or sternum. She stated that Dr. Wolbrink did not treat her clavicle. Claimant testified that she returned to work on May 17, 1982 and continued working until October, 1983. She stated that during that time span she experienced pain in her left knee while climbing stairs and pain in her back while carrying the pail of material samples which weighed 40 or 50 pounds.

Claimant stated that she received some care at Mayo Clinic and that an injection in her left shoulder helped. She stated that presently any strenuous use of her left shoulder makes it feel sore.

Claimant testified that Wayne E. Janda, M.D., hospitalized her in October, 1983 during which time she had a CT scan. She stated that she still is under Dr. Janda's care at the present time.

Claimant stated that she is presently off work under Dr. Janda's care and that she has been informed that her old job at Lehigh has been discontinued. She stated that Dr. Wolbrink has restricted her to lifting 15 pounds or less and to limit shoveling and climbing of stairs. She stated that Dr. Janda has limited her lifting to 40 pounds and restricted stair climbing. She related that Dr. Janda and John R. Walker, M.D., have recommended surgery on her back but that no one has recommended surgery for her knee. She related that she is reluctant to have surgery and that none is scheduled.

Claimant testified that she wears a Tens Unit frequently and that she has a lumbar corset which she does not wear.

Claimant testified that she has joined the "Y" and has worked out at the Nautilus Center. She feels that her condition is presently improving.

Claimant stated that she presently experiences pain on the right side of her lower back and down the outside of her right leg. She stated that at times the pain has extended into her left leg. She described it as something which comes and goes. She admitted having back pain prior to December 31, 1981, but stated that the sharp shooting pains which she now has are much more severe. Claimant stated that her left arm is significantly weaker than the right but that she presently experiences no problems involving her ears, right knee or elbow.

Claimant stated that since the injury of December 31, 1981, she can no longer engage in sports such as bicycling and her yard work. She related that she has hired someone to do some of her yard work and shoveling but that she has done some of it on occasion. Claimant stated that she initially did the heavy housework in her home, but that since 1981 Mrs. Anderson has done all the laundry, cooking and cleaning. She related that when furniture has to be moved they do it together.

Claimant testified that her condition worsened subsequent to May, 1982 but that she has made recent improvement. She feels that she has not regained the state of health which she experienced prior to December 31, 1981.

Claimant recalled falling from a ladder in 1968 and an incident of aggravating her back while shoveling snow in 1978 as well as other aggravations to her back. She stated that her back has always bothered her since 1976 when she slipped at work, but that the pain is no longer tolerable. Claimant denied experiencing any other specific incidents or injuries subsequent to May 17, 1982.

Claimant testified that Dr. Janda has given no indication of when she will return to work. She felt that her job in the lab permitted her to move around enough to be able to tolerate it.

Claimant stated that her back pain is her overriding concern and the main reason why she cannot work. She stated that the condition of her knee does not prohibit her from working at her old job and that the knee and shoulder only cause problems for her on heavy exertion.

Exhibit 8b indicates that claimant was seen at North Iowa Medical Center by Dr. Wolbrink on May 20, 1980 with complaints involving her left knee. She was diagnosed as having a contusion of the knee. Such is confirmed on the last page of exhibit 7 at the entry dated May 20, 1980. The entry dated May 23, 1980 indicates that claimant was returned to work on May 23, 1980.

As shown on the first page of exhibit 3, D. E. Fisher, M.D., opined that following the patellectomy of claimant's right knee in 1974, she had a partial physical impairment of five percent of the right lower extremity.

As shown in exhibit 20 and as confirmed at pages 74 through 76 of exhibit 33, A. J. Wolbrink, M.D., is of the unwaivering opinion that claimant suffered no impairment to her left knee as a result of any work related trauma. He relates all of the problem in claimant's left knee to a condition which he has diagnosed as chondromalacia of the patella.

Exhibit 21, John R. Walker, M.D., opines that claimant has a two percent permanent impairment of her left knee as a result of the shovel striking it in January, 1981. In his examination he found slight narrowing of the medial joint line on the left knee with calcification overlying the head of the fibula, posteriorly. He made no finding of chondromalacia.

In exhibits 22 and 23 Wayne E. Janda, M.D., opines that claimant has a five percent permanent physical impairment to the left leg which is a result of trauma and preexisting factors. In exhibit 27, a more recent report, he opines that all of the impairment in claimant's left leg is a result of work related trauma. He does not, however, identify any one or more of the three incidents upon which claimant seeks benefits as a cause for the impairment.

Exhibit 10 relates that claimant continued working until February 17, 1981 when Dr. Wolbrink took her off work. It relates a continuing course of treatment which extended until August 31, 1981 when claimant was released to return to work at her own request. The nature of the treatment evidenced by the exhibit includes application of a knee splint, rest and exercise. The entry dated July 1, 1981 indicates that claimant underwent an appendectomy and had recovered therefrom, but that her knee did not yet permit her to return to work.

ANALYSIS AND APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on January 11, 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).

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). It does not establish the nature or extent of disability. Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (Iowa 1975).

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 11, 1981 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all

other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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 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).

Claimant is found to be a credible witness. Her testimony describing how the handle of a shovel struck her knee is adopted as correct. As shown in exhibits 19 and 20 even Dr. Wolbrink agrees that claimant did suffer an injury to her knee. It is the issues of causation and permanency which are the main problems in this case. The testimonies of claimant and Amber Anderson established that prior to the injury of May, 1980, claimant's knee was asymptomatic. As shown in exhibits 19 and 20 claimant did, in all likelihood, have a preexisting chondromalacia of the patella which existed prior to May, 1980 and continued in existence up to the time of hearing. The opinions in this case are similar to those expressed in the case dealing with the May, 1980 knee injury. Dr. Wolbrink relates all of claimant's problem to the chondromalacia. Dr. Janda finds claimant to have an impairment due to work related trauma but does not specify which of claimant's three identified injuries caused the impairment. Dr. Walker assigns a two percent impairment to the January, 1981 injury. Dr. Walker also found claimant to have suffered an additional four percent impairment to the knee in the fall which occurred in December, 1981.

It appears to be undisputed that claimant has an impairment in the range of five percent of her right lower extremity. The injury of January, 1981 took claimant off work for a period of 27 weeks, six days. It required the application of a splint and prescription medication. Such a lengthy recovery time indicates that the injury was somewhat serious. Dr. Wolbrink finds claimant to have an impairment of not more than three percent as shown at pages 39 and 40 of exhibit 33. Claimant has testified that her left knee is not a major problem and that it is not as great a problem as her right knee had previously been. The range of the impairment ratings imposed by the three physicians is not great and their disparity is construed to be only a matter of degree and not a matter of major contradiction. It is therefore found that claimant has a five percent permanent impairment of her left lower extremity which is attributable to the injury of January 11, 1981. This finding is consistent with the opinion of Dr. Janda entered in exhibit 27. Even though claimant may have had preexisting chondromalacia of the patella, such was essentially asymptomatic prior to the injury of January 11, 1981. It may have caused claimant some pain and discomfort prior to January 11, 1981, but did not require claimant to miss work or require medical treatment except for that which was related to the prior injury of May 19, 1980. The condition of claimant's knee had not produced disability prior to the accident of January 11, 1981. Apportionment is proper only in those situations where a preexisting condition independently produces some ascertainable portion of the ultimate disability which existed prior to the employment related aggravation. Varied Enterprises, Inc., v. Sumner, 353 N.W.2d 407 (Iowa 1984).

Where an employee who has previously lost the use of one leg becomes permanently disabled by compensable injury which has resulted in the loss of another leg the employee's disability shall be evaluated industrially but 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 and the remainder of such compensation as would be payable for the degree of permanent disability involved shall be paid from the Second Injury Fund of the State of Iowa. Section 85.64, Code of Iowa. Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970). It is not necessary that the first loss of use have arisen from a compensable injury. Assay v. Industrial Engineering Equipment Company, 33 Biennial Report Iowa Industrial Commissioner 224 (App. Decn. 1977) (District Court Appeal dismissed). The liability of the defendant employer, Lehigh Cement Company and The Travelers Insurance Company will be limited to 11 weeks of compensation for permanent partial disability, the same to be payable commencing August 31, 1981.

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).

Claimant is a 53 year old high school graduate. A great deal of her work history involves physical labor although she does have limited experience performing office work. Following her return to work on August 31, 1981 she was able to perform her job as a mill laborer up until the injury of December 31, 1981. When the amount of disability which arose from the January 11, 1981 injury is measured industrially, it is found and concluded that the same is seven and one-half percent of total disability. The State of Iowa Second Injury Fund shall pay claimant 26 1/2 weeks compensation at the rate of $246.64 per week commencing November 22, 1981.

With regard to medical expenses the charge of $77.50 incurred February 6, 1984 with American Prosthetics, Inc., is related to claimant's knee and the impairment resulting from the injury of January 11, 1981. The remaining charges in exhibit 34 do not appear to be primarily related to care of claimant's knee.

Upon reference to exhibit 35, it is found and concluded that claimant made ten trips of six miles, round trip, between February 3, 1981 and October 5, 1981 for care of the knee which was necessitated by the injury of January 11, 1981. Defendants will therefore be ordered to pay claimant compensation for 60 miles of travel expense, 36 thereof at the rate of $.20 per mile and 24 miles at the rate of $.22 per mile. The resulting total is $12.48.

It appears that the issue of whether or not claimant sustained any permanent impairment as a result of the injury of January 11, 1981 was a good faith dispute upon which competent medical practitioners did not agree. Such is not a basis for an award under section 86.13 of the Code of Iowa.

FINDINGS OF FACT

1. On January 11, 1981 claimant was a resident of the State of Iowa and was employed by Lehigh Portland Cement Company working in the State of Iowa.

2. On January 11, 1981 claimant was injured while shoveling under a conveyor when the conveyor belt started, causing the handle of the shovel to strike her left knee.

3. Following the injury claimant continued to work until February 17, 1981 at which time she was medically determined to be incapable of performing work in employment substantially similar to that she performed at the time of the injury and she remained similarly disabled until August 31, 1981, the date upon which she returned to work.

4. As a result of the injury claimant sustained a five percent permanent partial physical impairment to her left lower extremity.

5. Claimant is a 53 year old unmarried female who has no dependents.

6. Claimant received medical care for the injury from Dr. Wolbrink and has received subsequent care from Dr. Janda, although the subsequent care has been secondary and incidental to care for claimant's back.

7. Claimant has incurred an expense in the amount of $77.50 for a brace for her knee, the same being reasonable and necessary for treatment of the results of this injury.

8. Claimant's knee presently causes problems on exertion such as climbing stairs.

9. Claimant is a high school graduate who has no other formal education or vocational training.

10. Claimant has work experience in a packinghouse, wrapping meat, grocery store clerk, keypunch operator and mail distributor in an office setting, in addition to the work which she has performed for the defendant employer.

11. Claimant does not exhibit the appearance of any emotional disturbance or lack of intellectual capacity. She appears to be well motivated.

12. Claimant had a preexisting chondromalacia of the patella which had not been disabling prior to the injury of January 11, 1981.

13. Claimant's prior injury to her left knee which occurred May 19, 1980, caused claimant to suffer some discomfort in her left knee but did not result in any actual permanent impairment

of the knee.

14. In obtaining medical care for the injury to her knee, claimant traveled a total of 60 miles of which 36 were traveled prior to July 1, 1981 and 24 were performed in 1981 after July 1.

15. Claimant had a preexisting impairment of five percent of her right lower extremity following a patellectomy which was performed in 1974.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and of its parties.

The injury claimant sustained to her knee on January 11, 1981 arose out of and in the course of her employment with Lehigh Portland Cement Company.

When the amount of disability which claimant contracted as a result of the injury of January 11, 1981 is measured in industrial terms, that disability is 7 1/2 percent of total disability.

Claimant is entitled under the provisions of section 85.27 of the Code of Iowa to the cost of a brace for her knee in the amount of $77.50 and compensation for travel expense in the amount of $12.48.

The liability of the defendant employer, Lehigh Portland Cement Company, for claimant's permanent disability is five percent permanent partial disability of the left lower extremity which converts to 11 weeks of compensation.

The liability of the Second Injury Fund of Iowa is 26 1/2 weeks of compensation when the employer's liability for 11 weeks of compensation is deducted from what claimant would be entitled to receive for a 7 1/2 percent industrial disability.

ORDER

IT IS THEREFORE ORDERED that defendants, Lehigh Portland Cement Company and Travelers Insurance Company, pay claimant eleven (11) weeks of compensation for permanent partial disability at the rate of two hundred forty-six and 64/100 dollars ($246.64) per week commencing August 31, 1981.

IT IS FURTHER ORDERED that the defendant, Second Injury Fund of the State of Iowa, pay claimant twenty-six and one-half (26 1/2) weeks of compensation for permanent partial disability at the rate of two hundred forty-six and 64/100 dollars ($246.64) commencing November 22, 1981.

IT IS FURTHER ORDERED that the defendants, Lehigh Portland Cement Company and Travelers Insurance Company, pay claimant eighty-nine and 98/100 dollars ($89.98) for the cost of a brace and mileage expenses.

IT IS FURTHER ORDERED that defendant, Lehigh Portland Cement Company and Travelers Insurance Company, pay interest pursuant to section 85.30 from the date each weekly payment of compensation for permanent partial disability became due. The defendant, Second Injury Fund of Iowa, shall pay interest pursuant to section 85.30 of the Code from the date of this decision.

IT IS FURTHER ORDERED that the defendants, Lehigh Portland Cement Company and Travelers Insurance Company, pay the costs of this proceeding.

All amounts which are past due are hereby ordered to be paid in a lump sum.

Each of the defendants are ordered to file a final report within twenty (20) days from the date of this decision.

Signed and filed this 24th day of October, 1984.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD H. WOOD,	:	
	:	File Nos. 414357
Claimant,	:	515137
	:	732636
vs.	:	
	:	A P P E A L
JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED
NOV 15 1984
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from two proposed review-reopening decisions wherein claimant was denied further disability benefits. Claimant was awarded certain medical expenses. Claimant appeals from an arbitration decision wherein claimant was denied any and all benefits.

The record on appeal consists of the transcript of the review-reopening and arbitration proceeding; claimant's exhibits 3 and 4; defendant's exhibits 1 and 2; the document filed by defendant on June 20, 1983 containing the dates of claimant's disabilities and rates of compensation, all interrogatories propounded and answered by the parties and all documents produced pursuant to request by the parties; the appellee's brief on appeal; and the filings of all the parties on appeal.

ISSUES

1. Whether the deputy industrial commissioner correctly ruled that the statute of limitations barred any recovery of further benefits arising out of the April 5, 1974 injury?

2. Whether the claimant is entitled to further benefits as a result of an alleged increase in disability in 1978 and 1979, arising out of the April 5, 1974 injury.

3. Whether the deputy industrial commissioner correctly denied benefits to the claimant for the May 24, 1981 injury.

REVIEW OF THE EVIDENCE

Claimant was forty-six years old at the time of hearing. He is married and has two children. Claimant has an eighth grade education. He worked on a farm prior to being hired in 1956 as a multiple drill operator. Claimant testified that he performed a wide range of jobs for defendant employer from 1956 to 1974. (Transcript, pages 20-22)

Claimant testified that he was a punch press operator on April 5, 1974. This job required operating "a five-ton press, or punch press, mechanical type, not hydraulic, and putting in dies and taking out dies and operating the machine, standing with one foot up all the time with the foot trip." (Tr., p. 24)

Claimant recalled an incident which occurred on April 5, 1974:

> Q. Would you tell us whether there was an incident that occurred on that date while you were working?
>
> A. Yes. In April I went to move a die, but I don't -- I'm not positive whether I was operating the machine at the time or if they asked me to clean up this area and put these dies away, it has been so long ago.
>
> But anyway, I went to pick up a die and at that time when I bent over to pick it up, it was just like, how do you explain it, somebody put a knife in my back, I went to the floor or to the cement.
>
> Q. How much did the die weigh?
>
> A. Oh, probably 75 pounds, 50 to 75 pounds.
>
> Q. You reported this, I presume?
>
> A. They took me to the hospital after a period of time. They took me to the dispensary and the doctor and the nurse had me there for a little while, and then they tried to get me up and they couldn't do that, I couldn't straighten up.
>
> They tried carrying me and the nurse said if I put any more weight on her I would break her back, which is probably true, so then they took me to the hospital. I spent from that afternoon until the following day at 10:00 with no doctor, no medical -- anything to help the pain.
>
> I went into spasms during the night and, in fact, I begged them to hit me in the head with a hammer or anything.
>
> Q. How long were you hospitalized?

A. Approximately two weeks.

Q. To your knowledge, were all the medical bills paid?

A. Yes.

Q. Was that treated as a worker's [sic] comp. situation?

A. Yes.

Q. Do you recall when you went back to work after that?

A. No, but the dates are here on this paper. On the 19th of April of '74.
(Tr., pp. 24-25)

Claimant testified that his back bothered him very little prior to this incident. (Tr., p. 26)

Concerning activities on July 28, 1978, claimant testified:

A. Well, I was a set up man, but this was during a shutdown period and it was on inventory and they had us painting machines. I was assisting around or helping as best I could.

The foreman required me, Mr. Lenny Young asked me to paint machines and I informed him at the time that I couldn't stand on the ladder and hold a paint sprayer to paint machines. I felt that it would, you know, give me more back problem.

He said, no, he said, "You go ahead, you can do it." I did it for approximately an hour-and-a-half or two hours, and I bent over to pick up a bucket of paint to refill my sprayer and my back went out again.

I did make it home. I told the foreman at the time and I also -- there was other workers there and it was an hour before the end of my shift, so I requested to the foreman that if I could get to the car and get home and lay down that possibly by Monday I would be all right. But when I got home -- a man helped me out of the plant, and when I got home I did get in the house and then I informed my wife and we decided I better get back down to the hospital down here.

We made it from the house out into the car and I went into spasms at that time and they got an ambulance from Dodgeville, Wisconsin, to haul me to the hospital. They took quite some time to get me out of the car, it was a small car, and I got down between the shifting lever and the seat.

Q. Were you hospitalized in Dodgeville as a result of that?

A. Yes. I was in Dodgeville one week in traction and I was in the Dubuque hospital one week in traction. Also there was two company men come up to see me in Dodgeville Hospital and one signed medical reports that I was injured at home, which we refused to do. (Tr., pp. 27-28)

Claimant testified that he was disabled for seven weeks and three days following this injury. (Tr., p. 30)

Claimant testified that on September 9, 1979, he injured his back while stepping out of his car at home. He recalled that he was off work for one or two weeks following this incident. Claimant testified that he received no workers' compensation benefits for this injury. (Tr., pp. 30-31)

Claimant recalled that subsequent to this September 1979 incident, he experienced a great deal of back pain. Claimant testified that during this two year period he had to sleep on the floor. (Tr., p. 32)

Claimant testified that he was on a fishing trip in Canada on May 24, 1981. Claimant testified to an incident which occurred on this day:

A. Well, I got in the boat and we were fishing and I just bent over to pick up a lure and, bang, it went out, or I couldn't move. My son-in-law and my cousin was there and they got me to shore and they carried me into the pickup truck.

We were backed into a lake and they hauled me home and called some neighbors up there in Canada, some people, and they carried me into the cabin and I laid there for, I don't know, approximately a week or five days before I could get to a doctor.

We called the company and we also called Dr. Meester and he said, "Stay laying on the floor," and he prescribed medication for me up there in Canada. And my cousin and his wife had to stay up, the other people had to come home and my wife, but they stayed up in Canada to take care of me because I was unable to get to the bathroom or anything, I was laying on the floor.

His wife and himself helped me, waited a week, and then they hauled me home in the back of a pickup truck on a mattress. (Tr., p. 33)

Claimant testified that the pain received in this incident was similar to the pain he experienced from the April 4, 1974 incident. He returned to work on about October 20, 1981. (Tr., pp. 34-36)

Claimant testified that he was at a car show in a park on May 26, 1983. He recalled that he bent down to pick up a board and his back went out. Claimant stated that two men carried him home. He returned to work on June 20, 1983. (Tr., pp. 38-39)

Claimant testified that at the time of hearing his back is still sore. He stated that there are certain activities such as hunting and fishing which he can no longer perform. (Tr., pp. 47-49)

On cross-examination of the claimant regarding his back condition prior to 1974 the record shows:

Q. Now, you claim the incident that everything refers back to is in April of 1974?

A. Yes.

Q. But you did have some back problems that you reported to the company prior to that, didn't you?

A. Yes.

Q. Can you relate to those with us?

....

Q. Prior to the April, 1974, back incident that you relate to.

....

A. My back would be tender at times and then it would get better, and on different times I asked to get off the job I was on, off of punch press because it seemed to irritate it more when I was standing on one foot.

If I was walking around or doing something on that order, then I seemed to get better, but when I got back on the machine and stand on one foot, then it seemed to irritate it a certain amount.

Q. Did you have an incident in November, 1961, where you were involved in a car accident, had injuries to your skull and spine and shoulders?

A. I banged the back of my head and my neck, yes.

Q. That was in a car accident?

A. In northern Wisconsin, yes.

Q. Did you also report an incident in September, 1971, where you complained of low back pain and related it to the rolling of a stock car?

A. Not relating to it, no.

Q. Well, these were incidents --

A. I didn't have no injury at the time when I rolled a stock car and as I said before, I don't really know why I even would have mentioned it unless I was -- and I used to be, I felt, a fair stock car driver, and I had a tendency to do a little bragging. It's the same as you might on golf if you had a 65, you know.

Q. But you did report those incidents to the medical department at Deere and Company?

A. I mentioned, apparently. I don't remember it, but I did mention apparently to the records there that I had a couple months prior to that, or whatever, I had tipped over a stock car, which we have very good safety precautions.

Q. Now, so it is fair to say that prior to April of 1974 you did have some back problems --

A. Absolutely.

Q. -- in your lifetime?

A. Yes.
(Tr., pp. 74-76)

The medical records concerning the claimant from the defendant employer disclose the following entrees:

14 Sep 71 Rt. lumbar pain. No incident of injury but onset about 1 wk. ago. Rolled stock car about 2 months ago although he had no injuries at that time. Diathermy Rx given. Darvon Compd. 1 and Maolate 1 now and adv. to repeat in 4 hrs. Does not think he can continue work although work is light. May leave to see IMD.

22 Sep 71 7:35 a.m. - Phone call from Guard Heeron that emp. just came thru gate, "thinks it is 6:50 a.m., and has a bump on his head and has an unsteady walk." 7:40 a.m. - emp. arrived at the dispensary. Released by Dr. Kapp for work today. LDW 14 Sep 71. Acute lumbar strain. States it is "either return to work or go into hospital for traction. Do not want to go to the hospital." Still has pain and is on medication. Negative Romberg. Believe unsteady gait is due to back pain but cautioned about the dangers of mixing alcohol and medications. States he struck rt. side of head on car door when getting out of car. Tiny lac. distal end rt. eyebrow cl., Meth. 9:10 a.m. - Brought to the dispensary via plain ambulance. Was found in washroom sleeping ? on table. Had never reported to work in dept. C/o back and lt. sided chest pain. Responds slowly, speech slurred. P. 76, BP 142/94. 02 per/mask. Sent to Mercy Hospital and adm. to care of Dr. Kapp via City Ambulance at 9:30 a.m. Wife notified.

4 Oct 71 In with release for today Dr. Kapp off due to Acute Lumbar strain LDW 22 Sept 71 States able to do regular work OK for work. Attempting to work-after 3 hrs recurring pain in rt leg - limps. Generally "doesn't feel well." Disapproved for work & adv. see LMD.

11 Oct 71 In with rlease [sic] for today Dr. Kapp, released for light work, no prolomged [sic] standing or heavy lifting. Unable to rel. for work to ret. & see Co. Dr. at 10:30 A.M. LDW 4 Oct 71 OK for work 11 Oct 71, but limited standing & lifting to 25# - disc. incentive work. 2 wks. & reevaluate. Referred to Personnel regarding job change.

29 Oct 71 Cont c light work - poss. job requiring less bending

8 Nov 71 Still complains of considerable low back pain. Diathermy Rx given and APCs 2 q3h (12)

22 Nov 71 Wishes to try req. work. OK.

....

21 Dec 72 C/O lumbar strain. Inc. lifting rack. Diathermy x 20 min. Molate [sic] 1 qid. Darvon Q4h Advise see CO. Dr. in A.M.

22 Dec 72 Mild spasm; Xray (employees request) Per phone report from Finley XRD - X-ray neg. for fracture. Rx: Ultra sound RX now and 2 xs later today, sitting job tonight, Darvon Compd. 1 and Maolate 1 each qid xs 5 days. Report during Holidays if having difficulty. Dr. Conzett Ultra sound Rx given. Emp. is dubious about returning to work tonight. Strongly urged to do so esp. to benefit from Rx. Was interviewed earlier about going to chiro by RPS. #1120 Reported to work on 2nd shift. Ultra sound Rx given. Will return at 8:45 p.m. for another Rx. Appears to be much improved. Ultra sound Rx. repeated. (Employer's Exhibit 1)

Claimant testified that from 1974 to the present he has been treated by two physicians: R. Scott Cairns, M.D., and Gerald L. Meester, M.D. (Tr., pp. 28-29, 35, 39, 78-79)

Claimant testified that he was treated by Dr. Cairns from 1974 to 1979. Claimant testified that Dr. Cairns has never given him a permanent partial disability rating. Claimant testified that he became unhappy with Dr. Cairns' services and was referred to Dr. Meester in 1979. (Tr., pp. 77-78)

In his deposition, Dr. Meester testified that he first saw claimant on April 23, 1979. Claimant has visited Dr. Meester periodically up until February 13, 1984. (Claimant's Exhibit 4, pp. 5, 14)

Dr. Meester testified that he gave claimant a five percent permanent physical impairment of the body as a whole. (Cl. Ex. 4, p. 20) Dr. Meester stated that "[t]he underlying physical cause which I believe to be the basis or the organic basis for this muscle spasm and pain is a central disc degeneration and rupture at L-4 and 5." (Cl. Ex. 4, p. 20)

Dr. Meester further testified that the impairment rating he gave claimant was "related to his original injury in 1974 and that pursuant injuries have been re-exacerbations and continuing on based on that original injury." (Cl. Ex. 4, pp. 20-21)

On cross-examination Dr. Meester was questioned:

Q. Does your history show that Mr. Wood was subject to a car accident sometime in 1971 where he had some possible injuries to his person?

A. No.

Q. It is also my understanding he was involved in a car accident in -- sometime in September of 1971 and reported to Deere and Company doctors that he rolled a car and as a result of that had low back pain. Does your record and history reflect that incident?

A. No.

....

Q. If a person complained about low back pain in September, 1971, Doctor, would that type of incident and your subsequent examinations and findings also indicate that the L-4, L-5 incident could relate back to possibly the car accident?

A. Potentially.
(Cl. Ex. 4, pp. 26-27)

Dr. Meester was questioned further about the lack of history prior to 1974:

Q. What history have you obtained other than what the patient has told you when you first saw him in April of 1979 that would lead you to believe that everything relates back to April of 1974?

A. Basically history is a major part of our determination, and Mr. Wood has not given me any reason to believe that what he has told me is untrue, so at this point I have what history he gave me and the fact that he had been hospitalized by Dr. Cairns and that's about it.

Q. If he would have given you a history of a car accident in 1971, would that have been important?

A. I'm not sure. I think I would have added that into the present history, yes.

Q. If he would have given you a history of a lumbar back problem that was causing him some concerns at that time, wouldn't that have been important in your diagnosis as to when his back problems might have commenced?

A. Yes, it may have been.

Q. So am I correct that it is a part of the history that would have an important part of your overall evaluation as to when his back problems did, in fact, commence?

A. That is -- yes, that information would have been an important part of determining that.

Q. Would it have also caused you possibly to have to obtain a copy of those X rays and treatment records back in 1971 to determine the full extent of the medical injury at that time to make your final evaluation?

....

A. I'm not sure it would have. I would have talked to the patient. Reading another physician's medical history, unless it is another orthopedic surgeon at that point I have found oftentimes really has very little value to me.

Q. The medical records at John Deere further, Doctor, show that on December 21, 1972, that he reported to the medical department with complaints of low back pain after he had lifted or pushed a rack while on the job and at that time he was treated with diathermy and his problem evidently subsided without any further medical treatment.

Would that also be consistent with the nature of the complaints that he gave to you when you started examining him as a relation back to a given incident?

....

A. I would have to know over what period of time

the patient's symptoms subsided, you know, the presenting complaints, the location of the pain, character of the pain, whether or not it involved his legs, how long it took them to go away.

Q. But it is my understanding he didn't mention any of those incidents to you in the history?

A. That's correct.

Q. He based his history strictly on the April, 1974, incident?

A. That's correct.
(Cl. Ex. 4, pp. 30-35)

Dr. Meester testified to a final opinion. He stated that claimant will be able to return to his occupational role as a tool set up man in the near future. (Cl. Ex. 4, p. 35)

APPLICABLE LAW

Section 86.26(2), Code 1983 as amended by Acts of the 70th GA, 1983 Session, Chapter 105, Sec. 3, provides in relevant part:

> An award for payments or an agreement for settlement provided by section 86.13 for benefits under chapter 85, 85A, or 85B, where the amount has not been commuted, may be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under the award or agreement. If an award for payments or agreement for settlement as provided by section 86.13 for benefits under chapter 85, 85A, or 85B has been made and the amount has not been commuted, or if a denial of liability is not filed with the industrial commissioner and notice of the denial is not mailed to the employee, on forms prescribed by the commissioner, within six months of the commencement of weekly compensation benefits, the commissioner may at any time upon proper application make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section 85.27. The failure to file a denial of liability does not constitute an admission of liability under this chapter or chapter 85A, 85B, or 86.

Similar provisions imposing a three year limitation on a review-reopening to three years from the last payment of weekly benefits were formerly contained in section 85.34, Code.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of April 5, 1984, July 28, 1978, and May 24, 1981 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 607 (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 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).

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson, 255 Iowa 1112, 125 N.W.2d 251; Yeager, 253 Iowa 369, 112 N.W.2d 299; Ziegler, 252 Iowa 613, 106 N.W.2d 591. See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

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

ANALYSIS

The deputy industrial commissioner correctly found that claimant is barred from further permanent partial disability benefits for the April 5, 1974 injury. Claimant's petition for review-reopening was filed September 16, 1981. Claimant was last paid weekly benefits for this injury on May 21, 1974. Accordingly, the petition for review-reopening was not filed within three years of the last date of payment of weekly benefits.

Claimant relies upon the reports and deposition testimony to establish the causal relationship between the injury of April 5, 1974, and his subsequent medical expenses. Specifically, claimant is stating that his injuries in 1978 and 1979 were causally related to the April 1974 injury. It was Dr. Meester's opinion that there was a significant relationship between claimant's lumbar back problems and the injury of April 1974. However, Dr. Meester did not have a full and accurate medical history of the claimant. Specifically, there was no history of claimant's back injuries in September and December of 1971.

The Iowa courts have held that, in determining whether an injury or disease has a direct causal connection with the employment or arose independently thereof, it is essentially within the domain of expert testimony and the weight to be given such an opinion is for the finder of the facts. However, when an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. Musselman, 261 Iowa 352, 154 N.W.2d 128, 133.

In fact, Dr. Meester stated that in determining when claimant's back problems arose, any back problems before 1974 would be an important factor.

Defendant employer's medical records of claimant indicate that claimant complained of back pain and was off work for about one month as early as 1971. In this case, Dr. Meester is the only medical expert presented by claimant. Dr. Meester is the only medical expert who has given any opinion as to the causal connection between the April 1974 injury and the subsequent medical expenses. Dr. Meester's opinion regarding the origin of claimant's back problems was made without the benefit of history regarding claimant's back injuries prior to 1974.

Finally, as to the validity of claimant's injury in May of 1981, it is clear that claimant's back problem did not arise out of or in the course of his employment. The record clearly shows that claimant was injured while on a fishing trip in Canada. Further, claimant's fishing trip was in no way work-related. The deputy was correct in finding that claimant's injury did not arise out of or in the course of his employment.

FINDINGS OF FACT

CAUSE NUMBER 414357

1. Claimant sustained an injury to his back in September 1971.

2. Claimant was off work about one month because of this injury.

3. Claimant injured his back in December 1972.

4. Claimant injured his back at work on April 5, 1974.

5. Claimant was off work from April 5, 1974 to May 13, 1974.

6. Claimant received benefits from April 5, 1974 to May 13, 1974; the last date of payment of compensation was May 21, 1974.

7. Claimant was paid all medical expenses except transportation as a result of the injury of April 5, 1974.

8. Claimant traveled a total of 300 miles for related medical treatment.

9. Claimant filed his petition in review-reopening on September 16, 1981.

10. More than three years expired from the date of last payment of weekly benefits to the date the review-reopening was filed.

11. Medical expenses incurred in 1981 are not related to the 1974 injury.

CONCLUSIONS OF LAW

Claimant received an injury arising out of and in the course of his employment on April 5, 1974.

Claimant is not entitled to further permanent partial disability benefits as a result of that injury.

Claimant is entitled to reimbursement for 300 miles of

travel for medical treatment as a result of the injury.

WHEREFORE, the proposed decision is affirmed.

ORDER

IT IS THEREFORE ORDERED that the defendant employer pay unto claimant thirty dollars ($30) for transportation expenses, to be paid in a lump sum.

IT IS FURTHER ORDERED that the costs of this action are hereby taxed to the defendant.

FINDINGS OF FACT

CAUSE NUMBER 515137

1. Claimant injured his back in September and December 1971.

2. Claimant injured his back at work on April 5, 1974.

3. Claimant injured his back at work on July 28, 1978.

4. Claimant injured his back at home on September 9, 1979.

5. The employer paid claimant benefits from July 28, 1979 to September 30, 1978 and from September 9, 1979 to September 29, 1979.

6. Claimant was paid medical expenses except transportation as the result of the injuries of July 28, 1978 and September 9, 1979.

7. Claimant traveled 900 miles for medical treatment in conjunction with the injuries of 1978 and 1979.

8. The medical expenses claimant incurred in 1981 and thereafter were not the result of the July 28, 1978 injury or September 9, 1979 exacerbation.

9. Claimant's disability is not the result of the July 28, 1978 injury or September 9, 1979 exacerbation.

CONCLUSIONS OF LAW

Claimant sustained an injury arising out of and in the course of employment on July 28, 1978.

Claimant's current disability is not causally related to his injury on July 28, 1978 or the September 9, 1979 exacerbation.

Medical expenses incurred by claimant in 1981 and thereafter are not causally related to the injury of July 28, 1978 or the September 9, 1979 exacerbation.

Claimant is entitled to reimbursement for 900 miles of travel for medical treatment as a result of the injuries.

ORDER

IT IS THEREFORE ORDERED that defendant employer pay unto claimant one hundred thirty-five dollars ($135) for transportation expenses to be paid by defendant.

IT IS FURTHER ORDERED that the costs of this action are hereby taxed to the defendant.

FINDINGS OF FACT

CAUSE NUMBER 732636

1. Claimant injured his back on May 24, 1981 while on a fishing trip in Canada.

2. Claimant's fishing trip was not for the benefit of his employer.

3. Claimant's July 1978 injury was not a substantial factor in causing the 1981 injury.

4. Claimant's April 5, 1974 injury was not a substantial factor in causing the 1981 injury.

CONCLUSIONS OF LAW

Claimant did not receive an injury arising out of and in the course of his employment on May 24, 1981.

Claimant's back injuries of April 5, 1974 and July 28, 1978 did not proximately cause his injury of May 24, 1981.

ORDER

IT IS THEREFORE ORDERED that claimant shall take nothing from these proceedings.

IT IS FURTHER ORDERED that costs of this action are hereby taxed to the defendant.

Signed and filed this 15 day of November, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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