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STATE OF IOWA
INDUSTRIAL COMMISSIONER DECISIONS

July 1, 1985 – June 30, 1986

ROBERT C. LANDESS
Industrial Commissioner

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No. 1

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Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
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TABLE OF CONTENTS

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Tower Publications, Inc.
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DECISION INDEX

SUBJECT INDEX

ASTHMA

ATTORNEY FEES

BACK INJURY

BLADDER INJURY

CARPAL TUNNEL

CAUSATION

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBORAH K. ABBEN, Claimant, vs. GOOD SHEPHERD NURSING HOME, Employer, and U.S. INSURANCE GROUP, Insurance Carrier, Defendants.	FILE NO. 732027 A R B I T R A T I O N D E C I S I O N FILED JUL 16 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Deborah K. Abben, claimant, against Good Shepherd Nursing Home, employer (hereinafter referred to as Good Shepherd), and U.S. Insurance Group, insurance carrier, defendants, for benefits as a result of an alleged injury on April 16, 1983 to claimant's back. On May 1, 1985, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The record consists of the oral testimony of claimant, Linda Heller, Jeffrey Abben, Mike Svejda, and Priscilla Waitek; claimant's exhibits 1 through 13, 14A and 14B, 15 through 22; and, defendants' exhibits K, L, R, S and T.

ISSUES

The issues presented by the parties at the time of the pre-hearing and hearing are as follows:

I. Whether claimant received an injury arising out of and in the course of employment;

II. Whether there is a causal relationship between the alleged injury and the claimed disability;

III. The extent of permanent disability benefits to which claimant may be entitled;

IV. The extent of temporary total disability or healing period benefits to which claimant may be entitled; and,

V. Claimant's rate of compensation.

The issues of medical benefits under Iowa Code section 85.27 and 85.39 were removed as hearing issues at the time of the hearing at the request of the parties as all such medical expenses including transportation expenses have been paid or will be paid by defendants.

REVIEW OF THE EVIDENCE

The following is a brief review of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

At the time of the hearing, the parties stipulated that claimant was off work after the alleged work injury from April 20, 1983 through August 23, 1983, less two days worked sometime during this period and from January 4, 1984 through January 19, 1984. The parties stipulated that this totals 20 5/7 weeks but in fact this totals only 19 6/7 weeks. Claimant indicated that she is not seeking any additional temporary total disability benefits or healing period benefits for any other absences from work and the only dispute with reference to healing period or temporary total disability benefits concerns the appropriate rate of compensation.

For the purpose of taxation of costs, the parties also stipulated that the bill of Dr. Walker for the preparation of his report in the amount of $45.00 has been paid on behalf of claimant by claimant's attorney.

Claimant is 21 years of age, married and has a high school education. As a requirement of her former nursing home employment with Good Shepherd, claimant received 12 weeks of training as a nurse's aide in the administration of drugs and geriatric care.

Claimant's testimony and the medical reports submitted into the evidence indicate that claimant fell from a horse when she was seven or eight years of age and suffered a neck injury but did not consult a physician at that time. Claimant explained that she has had a stiff neck since that time. In 1982, she received chiropractic treatments for her stiff neck from H. M. Abbens, D.C. Claimant's records at Good Shepherd indicate a few complaints to her superiors of back pain including low back pain. Claimant explained that prior to her work injury in April 1983, any reference by her to back pain meant only upper back or neck pain and stiffness. Claimant, her mother and her husband could not recall any incident of mid or low back pain during claimant's employment or any other time prior to the alleged work injury herein.

Claimant testified that her first employment after high school was with defendant, Good Shepherd. While in high school, claimant said that she worked part-time in restaurants as a cook and waitress and part-time with Good Shepherd. According to the assistant administrator of Good Shepherd, Mike Svejda, after claimant's graduation from high school, an opening developed at Good Shepherd for a four day per week nurse's aide and claimant was given the job. Svejda testified that a full time employee is defined at Good Shephed as working at least 30 hours per week in order to qualify for fringe benefits. Svejda said that he scheduled claimant to work 32 hours per week but she regularly worked more hours when necessary. Claimant's hourly rate of pay at the time was $4.41 per hour. Svejda added that claimant frequently missed work due to illness and injury prior to the accident. He also stated that if claimant had worked less than 32 hours per week after she became a full-time employee in August 1982, such absences would be due to illness, vacation or reasons personal to claimant and not because he scheduled her for less than 32 hours per week.

The facts surrounding the alleged work injury were not in real dispute at the hearing. Claimant testified that she strained her back while lifting a patient at Good Shepherd's nursing home on April 16, 1983. Claimant reported the incident immediately. Claimant described the pain as extending from below the shoulder blade down to her buttocks. Claimant waited a few days before first receiving treatment for this injury from her family physician, R. H. Heise, M.D. Dr. Heise treated claimant with rest and medication.

As her condition failed to improve, claimant began receiving treatment from Wayne Janda, M.D., an orthopedist in May 1983, a physician selected by Good Shepherd. Dr. Janda treated claimant with physiotherapy, rest and continued use of anti-inflammatory and pain medications. During Dr. Janda's treatment, claimant has hospitalized on two occasions for tests and therapy. Dr. Janda heavily emphasized weight lifting as a means of physical rehabilitation. Dr. Janda imposed restrictions upon claimant against lifting in excess of 30 pounds.

Claimant then became dissatisfied with Dr. Janda's treatment because she failed to improve and started seeing Robert E. McCoy, M.D., another orthopedist, in June 1983. Dr. McCoy's treatment was likewise conservative with emphasis on physiotherapy, especially walking. Dr. Janda and Dr. McCoy both stated that claimant had an over weight problem during this time which aggravated her back condition and both doctors urged claimant to lose weight. Claimant testified that she now has lost between 60 to 70 pounds pursuant to the advice of her physicians.

Upon a release to light duty by Dr. McCoy with no lifting over 20 pounds and no prolonged sitting, standing, walking or lifting, claimant started another job with a local motel as a desk clerk and she continues to hold this job at the current time. She did attempt to work as a maid at this motel but was unable to do so because of her back condition. Claimant is receiving approximately $3.50 per hour from her current employment but has no fringe benefits. Svejda testified that the cost of providing fringe benefits at Good Shepherd is approximately $.65 per hour for each employee. Claimant is currently seeking better employment in the Mason City area.

Claimant was off work due to her low back pain in January 1984 following two incidents of slipping on icy sidewalks. Dr. McCoy opined that these incidents were work related. It was after these incidents that Dr. McCoy prescribed a lumbosacral corset for claimant to wear. Claimant returned to work after this last period of time off work on January 20, 1984.

Claimant continues to experience recurring incidents of severe back pain after various types of physical activity. This pain is in the left middle back and extends downward to her buttocks. She also has tingling in both legs above the knee but this sensation occurs only occasionally. She currently takes non-prescription Tylenol for her pain and only occasionally takes muscle relaxants. She said that she must now limit the type of activity she can perform and can no longer be as active in sports and work activities as she had been in the past.

Dr. McCoy rates claimant as having a three percent permanent partial impairment of the body as a whole as a result of the work injury. Claimant sought another evaluation of disability from John R. Walker, M.D. Dr. Walker rates claimant as having an eight percent permanent partial impairment of the body as a whole and restricts claimant's lifting to 30 pounds with no repetitive lifting, bending or stooping. Both Dr. McCoy and Dr. Walker state that claimant should not return to nursing home work which requires lifting of patients.

Claimant's appearance and demeanor at the hearing indicated that she was testifying in a candid and truthful manner.

APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of 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 therein.

There is no real dispute in the evidence as to the occurrence of a back injury on April 16, 1983. Claimant and the members of her family who testified at the hearing are credible witnesses and their testimony that claimant had no prior low or mid-back problems before the alleged work injury is believeable. Although there were complaints of back problems contained in her work record, claimant's explanation that she was referring to her upper back and stiff neck problems, not to low back problems is reasonable. The preponderance of the evidence establishes a work injury as alleged in claimant's petition.

II. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of disability. 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

Claimant is seeking permanent disability benefits for her permanent back condition. The only physicians who have rated claimant's impairment in this case, Drs. McCoy and Walker, have causally linked permanent back impairment problems to her work injury. The only possible problem with causal relationship of the work injury to claimant's current condition would be the various injuries which occurred subsequent to the work injury, especially the incidents when she slipped on the sidewalk. First, Dr. McCoy, the primary treating physician, causally linked the 1984 slip incidents to her work injury apparently due to a proneness to injury after the original back injury at work. The more recent incidents of injury are a continuation of this proneness of injury. Claimant's uncontroverted and credible testimony establishes that she had a very active physical life prior to the injury and was able to perform strenuous physical activity with little or no problem. She was not, prior to the work injury, prone to any injury from simple physical activity. Therefore, even if these later injuries did worsen the condition, the worsened condition would still be directly related to the original injury. However, claimant testified that her condition did not change after these subsequent back injuries and this testimony is consistent with her medical records. The wearing of the back corset beginning in 1984 is simply Dr. McCoy's attempt to make claimant less prone to future injury. Consequently, claimant has shown by the greater weight of evidence that the work injury of April 16, 1984 is a significant cause of her current permanent disability.

III. Claimant must next establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As claimant has shown a permanent impairment to the body as a whole, an industrial disability has been sustained. The degree of permanent disability arising from the work injury must be measured pursuant to Iowa Code section 85.34(2)(u). Unlike scheduled members, disabilities under this provision are not measured solely by the extent of the loss or loss of use of a body member. Industrial disability is a loss of earning capacity resulting from the work injury. Diedeich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). The extent of an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Peterson v. Truck Haven Care, Inc., (Appeal Decision, Feb. 28, 1985).

Claimant's medical condition before the work injury was excellent and she had no functional impairments or ascertainable disabilities. Claimant was able to perform strenuous work with little or no problem. In April 1983, claimant suffered a serious injury to her back which affected the functioning of her body and this injury took several months to heal. After this work injury, claimant's medical condition changed significantly. She is experiencing intermittent pain in varying degrees and has developed a proneness to severe episodes of pain following physical activity since the date of the original work injury.

Claimant's primary treating physician, Dr. McCoy, has given claimant a permanent impairment rating of three percent of the body as a whole. Dr. Walker believes this to be eight percent. Both doctors permanently restrict her future physical activities by prohibiting heavy lifting and repeated lifting, stooping or bending. Both doctors also advise claimant not to return to nursing home work.

Claimant's medical condition prevents her from returning to her former work or to any other work which requires her to perform strenuous work or heavy lifting.

Claimant has suffered a significant loss in actual earnings as a result of her disability in that she now makes approximately $1.00 per hour less than she did at the time of the work injury and she no longer has fringe benefits.

Claimant is 21 years of age and must carry her disability for the rest of her working life but her age is favorable for retraining. See Walton v. B & H Tank Corporation, II Iowa Industrial Commissioner Reports 426 (1981).

Claimant has shown motivation to seek other employment within her physical limitations and she has done so. She is continuing to seek better employment at this time.

Claimant's education, youth and her demeanor at the hearing would indicate an above average potential for vocational rehabilitation.

After examination of all the factors, claimant has suffered a 15 percent loss in her earning capacity from her work injury of April 16, 1983.

IV. As claimant has established entitlement to permanent partial disability benefits, claimant is entitled to weekly benefits for healing period under Iowa Code section 85.34(1) for the time she was off work as stipulated by the parties. As previously indicated, the stipulated periods of time do not total as stated by the parties. Consequently, only the actual absences from work as shown by the evidence presented or 19 6/7 weeks shall be compensated in this decision.

V. The parties' dispute as to the rate of compensation centers around the calculation of claimant's gross wages as she is clearly married and entitled to two exemptions. Claimant feels that since she was paid bi-monthly, her bi-monthly income should be used to calculate the gross rate. Defendants contend that she is an hourly employee and the last 13 weeks of income should be used to calculate the average gross weekly wage. As claimant's hours vary greatly from week to week according to defendants' exhibit S, defendants are correct in turning to the previous 13 weeks to calculate the rate. However, this agency has consistently held that weeks which contain absences due to illness or vacation are not representative weeks and should be excluded from the calculation. Lewis v. Aalf's Mfg. Co., I Iowa Industrial Commissioner Reports 206 (1980). Defendant employer's administrator testified that although claimant was not guaranteed a specific number of hours, she regularly was scheduled for no less than 32 hours per week and the position she was given in August 1982 was a four day per week job. If claimant worked less than 32 hours per week, it was due to illness or vacation, not because of being scheduled less than 32 hours per week. In addition, she was given more hours on a regular basis, including overtime pay. However, overtime pay is not included in the rate calculation at only the straight time pay rate. See Industrial Commissioner Rule 500-8.2. Therefore, claimant's gross rate shall be calculated by going back in time from the date of the injury and adding together the total number of hours worked for 13 (representative) weeks or weeks with no less than 32 hours worked per week. The resulting total hours shall be multiplied by the hourly rate during this time of $4.41 per hour and the product divided by 13 to arrive at an average, representative, gross weekly rate of pay.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of Good Shepherd on April 16, 1983.

3. Claimant's job on April 16, 1983 consisted of a nurse's aide in a nursing home, specializing in geriatric care.

4. On April 16, 1983, while performing her work as a nurse's aide, claimant injured her back while lifting a nursing home patient.

5. Claimant suffered a neck injury from a fall from a horse in her childhood but only had a stiff neck following this incident.

6. Before April 8, 1983, claimant was able to physically perform her work for defendant, Good Shepherd, and any other work requiring strenuous physical labor with little or no problem.

7. Before April 1983, claimant had no mid or low back problems.

8. Subsequent to the work injury in April 1983, claimant developed a permanent functional impairment of her low back.

9. Subsequent to the injury of April 1983, claimant suffered further injuries to her back which were due, in part, to her proneness to back injury after the April 1983 work injury.

10. All subsequent injuries to claimant's back after the work injury of April 1983 only temporarily worsened claimant's back condition.

11. Claimant has a significant permanent partial impairment of her body as a whole from her back condition following the work injury.

12. At the present time claimant is restricted by her physicians from lifting in excess of 20 to 30 pounds and from repetitive lifting, bending or stooping.

13. As a result of her functional impairment and physical restrictions, claimant is unable to return to the position she held at the time of her work injury.

14. Claimant's work history consists mainly of nursing home work.

15. Claimant has suffered a significant loss in actual earnings from employment due to her work injury.

16. Claimant is motivated to find suitable alternative employment.

17. Claimant is 21 years of age, has a high school education and has average intelligence.

18. Claimant's demeanor and articulate manner at the hearing indicated that she has above average potential for successful vocational rehabilitation.

19. As a result of her work injury, claimant has suffered a loss of earning capacity in the amount of 15 percent.

20. As a result of her work injury claimant was absent from work for treatment of her back condition from April 20, 1983 through August 23, 1983 less two days worked during this period and from January 4, 1984 through January 19, 1984, all of which

occurred prior to claimant reaching maximum healing from her work injury of April 19, 1984.

21. At the time of the work injury herein, claimant was married, entitled to two exemptions and received gross weekly compensation from her employment of $154.00 per week.

22. Claimant's rate of compensation is $103.18 per week.

CONCLUSIONS OF LAW

I. Claimant has established by the preponderance of the evidence that on April 16, 1983 she suffered an injury arising out of and in the course of employment.

II. Claimant has established by a preponderance of the evidence that the injury of April 16, 1983 is a cause of permanent disability.

III. Claimant has established by a preponderance of the evidence entitlement to permanent partial disability benefits for 75 weeks at the rate of $103.18 per week.

IV. Claimant has established by a preponderance of the evidence entitlement to healing period benefits from April 20, 1983 through August 23, 1983 except for two days and from January 4, 1984 through January 19, 1984 at the rate of $103.18 per week.

ORDER

Accordingly, the following is ordered:

1. That the defendants shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of one hundred three and 18/100 dollars ($103.18) per week from January 20, 1984.

2. Defendants shall pay to claimant healing period benefits for nineteen and six-sevenths (19 6/7) weeks at the rate of one hundred three and 18/100 dollars ($103.18) per week.

3. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

4. Defendants shall receive credit for previous payments of benefits under a non-occupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2).

5. Defendants shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

6. Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33 which shall include the sum of forty-five and no/100 dollars ($45.00) for the preparation of the report of Dr. Walker.

7. This matter shall be set back into assignment for pre-hearing and hearing on the issue of entitlement to additional benefits under the penalty provisions of Iowa Code section 86.13.

8. Defendants shall file an activity report upon payment of this award as required by the agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 16th day of July, 1985.

Larry P. Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

6

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TIMOTHY L. ANDERSEN, Claimant, vs. IOWA BEEF PROCESSORS, INC., Employer, Self-Insured, Defendant.	:	File No. 717681 A P P E A L D E C I S I O N FILED AUG 27 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 28, 1985 this deputy industrial commissioner has been appointed under the provisions of Iowa Code section 86.3 to issue the final agency decision in this matter.

Defendant appeals from an arbitration decision filed May 16, 1985 in which it was ordered to pay medical expenses, healing period benefits and 100 weeks of permanent partial industrial disability.

The record on appeal consists of the transcript of the hearing; claimant's exhibits A through N and defendant's exhibits 1 through 11, 15 through 17 and 19. All evidence was considered in reaching this final agency decision.

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

ISSUES ON APPEAL

The issues on appeal as stated by defendant are:

I. Claimant did not present sufficient evidence at the hearing to prove that he sustained a compensable work injury on September 2, 1982.

II. Claimant did not prove that he sustained temporary disability, healing period, and permanent disability.

STATEMENT OF THE CASE

Twenty-seven year old married claimant who attended special education classes and cannot read or write, testified to work experience as a newspaper carrier, janitor, tiler and construction laborer. Claimant stated that his regular job for defendant was skinning out the back of the hide of cows with an air knife.

Claimant recalled the events of September 2, 1982 as follows: He was stripping hides. A cable broke on the stripper. He asked Larry Squire, the foreman, if the machine could be fixed and the foreman said he would do it at break. The machine continued to malfunction and it was not repaired when he got back from lunch. He was working on a stand. He turned to wash his hands. When he turned back, the chain was wrapped around the stand. He yelled for the chain to stop. He fell into the hide chute on his back and then down on a little step. He landed on the floor. Then he moved to shut off the shocker. He jumped over a bar and landed in the garbage can again on his back.

He asked the foreman if he could go home. The foreman requested he stay and his job was modified. Later Squire bandaged his back. He did light duty for awhile and then went to low back. He was placed on jobs that required bending and he repeatedly told his foreman that his back was not getting better.

Finally he was told by Squire he could see a doctor, but he was given papers for the group carrier. He saw a chiropractor who referred him to another doctor who kept him off work and then sent him for physical therapy and finally to Robert Hayne, M.D, who told him to watch his lifting. He had a CT scan and later a myelogram.

Claimant whose hourly rate at the time of injury was $9.86 indicated he would be unable to do the work he did before because it would hurt too much. He thought he had been fired for using foul language. He collected unemployment. At the time of hearing he had a sitting down job cutting up onions which allowed him some freedom of movement and paid $3.50 per hour. He claimed that his back continued to bother him with lifting or bending.

Claimant remembered a Duane Popp saying he was not injured at work, being unwilling to fill out an accident report and making him go through the group carrier.

Claimant recalled missing some work when he hurt his arm in a motorcycle accident.

Steven E. Taylor, a hide puller who was subpoenaed, testified to being four to six feet from claimant when he fell. His job was to run a control panel. He shut off the chain when claimant hollered and he saw him on his back on the floor.

Brent Sandholm, a bung dropper who was working eight feet down the chain from claimant on a stand six feet in the air, recalled claimant's yelling just before he fell and saw him slip off the stand, hit his back and fall to the floor; and then he saw him fall again.

Sid Long, who testified under subpoena and who was working ten feet from claimant at the rod and weasel, testified to seeing claimant fighting with the chain, slipping, falling, going down by the shocker and stepping into a bucket.

Joseph Sestak, a rosetter who was working eight or ten feet down the line from claimant, also saw claimant fall twice.

Debra Andersen, claimant's spouse of three years, testified regarding various medical and mileage expenses. She also told of keeping a diary relating to claimant's activity and pain.

Jim Johnson, personnel director for defendant since 1983 and prior to that time an hourly production worker who had not done the low back job, testified that defendant's plant has been closed since December 8, 1984. Company records show claimant qualified as a low backer on December 22, 1980 and continued on that job except for a short period when he was saving sweet breads. Documents revealed claimant was off work for nonwork injuries on July 15, 1982; July 28, 1982; August 23, 1982 and October 28, 1982. After the latter incident, claimant was off until August 1, 1983 when he returned to low back. Some workers at the plant were laid off on February 17 and others on February 18. Everybody came back on August 1, 1983.

Claimant was given two warning slips -- one for insubordination and a second for failure to perform his duty. After a second notice he was placed on indefinite suspension as of February 22, 1984.

Johnson recalled an incident on or about February 22, 1984: Claimant asked him if a doctor's appointment had been arranged for him for what this witness thought was his hand. When he was told no injury report had been sent by the foreman, claimant used profane language and was placed on indefinite suspension and then terminated.

Claimant received unemployment benefits after his termination. Claimant subsequently was offered a change in status from terminated to layoff with a return to his last bid job with full seniority when the plant reopens at the position of low back. Johnson thought low back was one of the easier jobs in the plant.

Katherine Bennett, who has a masters of science degree in counseling and personnel services and who is a certified rehabilitation counsultant, testified to interviewing claimant after reviewing medical reports and records. Claimant indicated he could stand stationary for five minutes, sit for thirty minutes and lift more than twenty-five pounds. No transferrable skills were discovered. She found claimant unable to read some of the testing material and she assessed his IQ in the dull normal range. She recommended claimant try to obtain training as a janitor and participate in adult education. She had no objections to claimant's returning to work for defendant. More of claimant's disability was attributed to his lack of skills than to his physical complaints. In a letter dated January 11, 1985 Bennett wrote that "[d]ue to his lack of reading and writing, we could estimate that he decreases his employment possibilities much more than does his minor 'chronic low back strain.'" She characterized the job market in Fort Dodge as depressed for all workers and she agreed that claimant would be easier to place even though he cannot read and write if he did not have a bad back.

Patsy J. Wright, M.A., certified rehabilitation counselor, reviewed claimant's medical records, noted claimant to be a candidate for a chymopapain injection, and evaluated claimant's work history. Claimant told her that he did not like work as a custodian, but that he would take whatever work was available. Testing showed claimant in the dull normal range and functionally illiterate. Wright, who recommended claimant be given some job seeking training, found claimant motivated, but she doubted he could succeed at a training program. She believed a "hands-on" on-the-job training program was needed. She thought claimant could do a simple, unskilled, light job that did not require physical effort or literacy.

Claimant had an x-ray of his lumbosacral spine on October 28, 1982 which was normal. He was treated with physical therapy from November 5, 1982 through November 16, 1982. At the time of his initial visit he denied radiation to his lower extremities.

Robert A. Hayne, M.D., saw claimant on November 17, 1982 and took a history of claimant's falling from a high stool. Thereafter claimant had pain in his low back and into his buttocks. Claimant reported that his work required excessive flexion. His examination was within normal limits except for marked limitation of motion.

On November 27, 1982 claimant had a CT scan which revealed a small central disc herniation at L4-5 with no nerve root compression and a central bulging disc annulus at L3-4.

In early February of 1983 Dr. Hayne wrote that claimant should not be lifting weights over forty pounds. Claimant was not released to return to work because his work required bending. Dr. Hayne admitted claimant to the hospital on June 26, 1983 for a myelogram which was normal. The doctor's final diagnosis was chronic low back strain.

On April 3, 1984 Dr. Hayne rated claimant's permanent partial disability at seven percent and expressed the opinion that claimant should wear a low back corset for support.

John J. Dougherty, M.D., saw claimant on May 23, 1983 and took a history of claimant's falling two and one-half to three feet and landing on his "rump." Claimant complained of numbness on the anterior thigh. On examination claimant had increased lordosis and kyphosis. X-rays suggested some narrowing at L4/5 and L5/S1.

Dr. Dougherty performed a second examination on March 23, 1984. X-rays of claimant's back showed sclerotic changes about the facet joints at L5, S1 and some narrowing. When the x-rays were compared with those from ten months before, there was not significant change. The doctor's diagnosis was "lumbosacral sprain superimposed upon an increased lordosis and kyphosis and what appears to be early narrowing of the L5, S1 disc space, probably an early degenerative disc." The doctor wrote, "I think he may have some problem in the future, but I don't think this is a direct result of the injury, and it would be my opinion that nothing more should be done....It would be my opinion that this patient could work, and I really don't think he has sustained any significant disability." In a letter dated March 27, 1984 he stated: "I do think he's probably getting some early narrowing of his lumbosacral disc space, and feel that he may have some discomfort and may have more in the future, but I would feel that as a result of the accident I question if he received any significant disability."

APPLICABLE LAW AND ANALYSIS

The first issue raised by defendant is the claimant's failure to prove a compensable work injury.

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

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

In addition to establishing that his injury occurred in the course of his employment, claimant must also establish the injury arose out of 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 testified to falling twice when a machine near his work station malfunctioned. That testimony was verified by other witnesses. The history given to Dr. Hayne comports with claimant's testimony. Claimant carries his burden on the arising out of and in the course of issue.

The more difficult question is whether claimant sustained any temporary total, healing period or permanent partial disability as a result of that injury.

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 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 (1955). The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). See also Musselman, 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).

One of defendant's contentions on this issue is that claimant was injured in 1982 in previous accidents. The employer's records show claimant was off work for nonwork injuries in July and August of 1982. In testimony he agreed to an accident with a motorcycle in which he hurt his arm. The hearing deputy provided the following analysis with which this deputy agrees. She wrote:

> Claimant apparently was off work for a motorcycle accident for a number of days in July and August 1982 with an August 30, 1982 work return. (Def. exh. 2) The medical evidence suggests claimant did not recite this history to his physicians. This fact is entitled to weight in assessing the probative value of all physicians' apparent presumption that claimant's condition results from his work incident. On the other hand, the doctors' presumption of a connection between the work incident and claimant's back pain and possible small central disc herniation at L4-5 and central bulging disc annulus at L3-4 is certainly understandable given the bodily trauma the injury, as described, would likely produce. The absence of other evidence of claimant's alleged motor vehicle accident(s) is also troubling. The exact date of any accident is not in evidence. Prehearing discovery would certainly have disclosed the details of any accidents, the physical trauma sustained in each, and medical treatment rendered for them. Neither party chose to introduce any information in this regard. One suspects that defendant certainly would have introduced this evidence had it favored its position. One, therefore, is forced to conclude that whatever physical trauma claimant sustained in a motor accident or accidents did not result in apparent back problems. Furthermore, claimant functioned at work from his motor accident work return through his work incident to late October 1982, albeit with a one week vacation within two weeks of his work incident. The first evidence of medical treatment is a physical therapy note of November 5, 1982. These facts also suggest that any motor vehicle accident of itself, was not sufficient to disable claimant and that, at minimum, his work injury was the incident that either produced his condition or aggravated his condition to the point where it became disabling. Thus, the greater weight of the evidence presented supports claimant's contention that his disability results from his work injury and claimant prevails on this issue.

A decision cannot be based on mere conjecture or surmise. Burt, 247 Iowa 691, 73 N.W.2d 732. It must be based on what is contained in the record. It would be improper to engage in speculation as to what might have happened to claimant in the absence of medical evidence.

Defendant argues that Dr. Hayne is the only physician providing claimant with a rating and that rating is not specifically attached to the injury of September 2, 1982. Dr. Hayne was one of claimant's treating physicians following the incident. There is no indication in the record that claimant had other back trouble. Dr. Hayne's letter shows that before he made the rating he reviewed claimant's file and CT scan and considered claimant's continuing discomfort. Dr. Hayne was not told of any other injuries.

Dr. Dougherty does not provide any impairment rating and there is some conflict in his opinion. At one time he wrote that claimant may have future problems which will not be a direct result of the injury. On another occasion he questioned whether claimant would have "significant disability" as a result of his accident.

While one might wish more medical evidence in this case, the evidence presented does allow claimant to preponderate on the issue of causal connection and his disability will be found to be permanent in nature. In reaching that conclusion greater weight is given to the opinion of Dr. Hayne who was a treating physician. See Lemon v. Georgia Pacific Corp., I Iowa Industrial Commissioner Report 204 (Appeal Decision 1981); Worshek v. Sporleder, Inc., 34 Biennial Report of the Industrial Commissioner 348 (Appeal Decision 1979); Reiland v. Palco, Inc., 32 Iowa Industrial Commissioner Report 56 (Review Decision 1975).

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.
>
> Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant is a younger worker. Presumably his body has more resiliency than might be found in an older worker and that is favorable to his physical rehabilitation. On the other hand, his work life is just beginning and he will have many, many years to contend with his back trouble.

There is no record of claimant's having physical problems other than those stemming from this injury. Claimant's functional impairment at this time is moderate. He was found in November of 1982 to have a central disc herniation at one level and a bulging annulus at another. He has had no surgical treatment to this point. He claims to be limited by pain.

Claimant attended special education classes, has an IQ in the dull normal range and is functionally illiterate. The hearing deputy observed that claimant had "limited social skills and little understanding of the likely consequence of inappropriate behavior." Claimant's capacity for book learning is virtually nonexistent making additional education unlikely for him.

According to the vocational experts in this matter, training of any sort other than that found in a situation specifically tailored to claimant's needs would be difficult. Claimant's job experience which Bennett said has not provided him with transferrable skills has been limited to work requiring good mobility and an ability to lift. Claimant was earning $9.86 per hour at the time of his injury. At the time of hearing his hourly wage was $3.50 per hour. He has had a decrease in actual earnings. The work he is doing allows him some opportunity to move around. He was able to perform the job of low backer after his injury. His work performance at the time of his termination was characterized as marginal. Claimant seemingly complained of an inability to do bending. As the low back job was said to be one of the lesser demanding positions in the plant from a physical standpoint, claimant's performance of that work does not evidence an ability to do physically demanding work of a heavy nature nor does it mean claimant could handle a broad range of manual labor jobs.

Bennett found claimant to be motivated. He seemingly followed up on suggestions she made. She said that claimant "had to persevere a great deal to find that employment [the work chopping onions]." Claimant did not obtain his new position easily. Fort Dodge is an economically depressed area. However, the industrial commissioner has stated:

> 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 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 (Appeal Decision 1981) (Dist. Ct. Aff'd, S. Ct. Appeal Dismissed).

The hearing deputy premised her award of industrial disability on the likelihood of claimant's returning to work with defendant. In that regard she wrote:

> Iowa Beef Processors' offer to return claimant to his former low backer position should his union so agree and should the plant reopen is commendable,... These efforts, unfortunately, were not conclusive at the time of hearing. The overall effect of claimant's mild physical impairment on his earning capacity must be considered in that light. When so considered, claimant's industrial disability is found to be 20 percent. This award is in part premised on claimant's likelihood of returning to work at full salary at Iowa Beef Processors. Should this not happen in the foreseeable future, circumstances will have changed so significantly as to justify review-reopening.

In affirming the award of twenty percent industrial disability, this deputy is relying on the same premise.

The final consideration is claimant's entitlement to healing period which defendant argues should begin two weeks after claimant's discharge from the hospital on June 28, 1983. Dr. Hayne at that time asked claimant to "curtail his activities for approximately two weeks" and then to see him for examination in six weeks. The hearing deputy correctly found that claimant's healing period terminated with his return to work. See Iowa Code section 85.34(1).

As there has been no appeal of the award of medical expenses, those ordered by the hearing deputy will be ordered herein with the exception that Dr. Hayne's bill will be awarded at $150 with defendant being given credit for amounts previously paid.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-seven years of age.

That claimant attended special education classes and is functionally illiterate.

That claimant has work experience as a newspaper carrier, janitor, tiler and construction laborer.

That claimant's work experience has failed to provide him with transferrable skills.

That any retraining program undertaken by claimant would need to be specifically designed for him.

That claimant is not a good candidate for additional education.

That on September 2, 1982 claimant fell twice on his back when the machine at his work station malfunctioned.

That claimant was off work for three nonwork injuries before September 2, 1982.

That the plant was shut down from February 17 or February 18, 1983 to August 1, 1983.

That the plant closed on December 8, 1984.

That claimant was terminated on February 28, 1984 after being suspended following an incident in which he used inappropriate language.

That claimant has been offered reinstatement.

That claimant received unemployment benefits after his termination.

That claimant was earning $9.86 per hour at the time of his injury.

That at the time of hearing claimant was earning $3.50 per hour cutting up onions.

That claimant has a seven percent permanent impairment to his back.

That claimant has good motivation.

That claimant returned to work on August 1, 1983.

That claimant incurred medical and mileage expenses which were related to his work injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence an injury which arose out of and in the course of his employment on September 2, 1982.

That claimant has established by a preponderance of the evidence his injury of September 2, 1982 is a cause of the disability on which he now bases his claim.

That claimant has established entitlement to permanent partial industrial disability of twenty (20) percent.

That claimant has established entitlement to healing period benefits for his time off work to August 1, 1983.

That claimant has established entitlement to medical and mileage expenses.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant one hundred (100) weeks of permanent partial disability at a rate of two hundred forty-one and 98/100 dollars ($241.98) commencing on August 1, 1983.

That defendant pay unto claimant healing period benefits at the rate of two hundred forty-one and 98/100 dollars ($241.98) for his times off work because of his injury from the date of injury September 2, 1982 through July 31, 1983.

That defendant pay amounts due and owing in a lump sum.

That defendant pay the following medical expenses:

Robert A. Hayne, M.D.	$ 150.00
Daniel Cole, M.D.	32.00
Trinity Regional Hospital	239.00
Iowa Methodist Medical Center	889.45
Medical Scanning Consultants	345.00
Prescription Charges	6.05

That defendant pay mileage expenses totalling two thousand one hundred twenty-one (2,121) miles at a rate of twenty-four cents ($.24) per mile.

That defendant pay lodging expenses of thirty-four and 55/100 dollars ($34.55).

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 activity reports as requested by this agency.

Signed and filed this 27 day of August, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES H. ANDERSON, Claimant, vs. PAULSON ELECTRIC CO., Employer, and IOWA NATIONAL MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 745306 A P P E A L D E C I S I O N

FILED
DEC 30 1985
IOWA INDUSTRIAL COMMISSIONER

Claimant appeals from a proposed arbitration decision in which he was denied any benefits as a result of an alleged injury of May 10, 1983 and a ruling denying his application for rehearing. The record on appeal consists of the transcript of the arbitration proceeding together with claimant's exhibits 2 through 8, 10 through 12, 14 through 17, and 20 through 23; defendants exhibits A through E; and the written briefs and arguments of the parties.

ISSUE

Claimant states the issue on appeal is the denial of the reopening of the matter for the taking of evidence from physicians at Mayo Clinic.

Defendants state the issues more broadly to include injury, notice, causation, disability, and entitlement to benefits.

REVIEW OF THE EVIDENCE

The evidence as recited in the statement of the case is amply and adequately set out in the proposed arbitration decision and will not be represented herein.

APPLICABLE LAW AND ANALYSIS

The applicable law and analysis of the proposed decision correctly and adequately cover the issues presented by defendant appellee and are adopted. The ruling on the application for rehearing correctly and adequately covers the issues raised by claimant appellant and is adopted.

By way of further expansion it is noted claimant sought to adduce additional evidence which could have been made available at the original hearing. To allow this to happen would result in a decision never reaching finality. If the parties were allowed to submit additional evidence of the nature sought to be admitted here, the tendency would be to accumulate a plethora of evidence directed to the deficiencies noted in the prior hearing. Such a result would cause each prior hearing to be a mere discovery proceeding.

The prescribed procedure in workers' compensation contested case matters provides and allows ample and adequate opportunity for prehearing discovery so that the hearing may include all matters which with the exercise of reasonable diligence could have been known and presented at that time. 15

FINDINGS OF FACT

1. Claimant is 49 years of age.

2. Claimant is a high school graduate.

3. Claimant served an apprentice program as an electrician.

4. Claimant performed a variety of tasks as an electrician and in so doing lifted from five to one hundred pounds, climbed and pulled.

5. Most of claimant's work for defendant employer has been in the operation of a service truck.

6. Claimant alleged injury on May 10, 1983.

7. Claimant filed his petition on October 10, 1983.

8. Claimant's action was dismissed on April 12, 1984.

9. Claimant refiled his action May 11, 1984.

10. Claimant last worked at Swiss Valley on April 12, 1983.

11. Claimant last worked on an ammonia compressor at Swiss Valley on April 7, 1983.

12. Claimant also worked on the ammonia compressor on April 5, 1983 and April 6, 1983.

13. Claimant stopped work on May 10, 1983 and did not work again in 1983.

14. Claimant entered the hospital on May 13, 1983 where he was treated for right upper lobe pneumonia.

15. Claimant had no exposure to ammonia in the week prior to his hospitalization for pneumonia.

16. The additional evidence claimant wished to present in a rehearing was available at the time of the original hearing with the exercise of reasonable diligence.

CONCLUSIONS OF LAW

Claimant's action was filed within the statute of limitation found in Iowa Code section 85.26(1).

Claimant has failed to establish by a preponderance of the evidence an injury arising out of and in the course of his employment.

Claimant's application for rehearing was properly denied.

WHEREFORE, the decision of the deputy is affirmed.

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 who recorded the proceedings.

That claimant pay the costs of this appeal.

Signed and filed this 30 day of December, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEE ALAN ANDERSON, Claimant, vs. PORTER'S AUTO PARTS, Employer, and AID INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 655072 A P P E A L D E C I S I O N FILED JUL 24 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed February 15, 1985 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 initially appealed from an arbitration decision filed November 29, 1984 in which he was denied benefits. This matter was then remanded to the hearing deputy for further action. A decision on remand was filed on April 24, 1985 which again denied claimant benefits. A second appeal was filed by claimant.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 16; defendants' exhibits A through G and commissioner's exhibits 1 and 2. All evidence was considered in reaching this final agency decision.

The decision on appeal will slightly modify that reached by the hearing deputy.

ISSUES ON APPEAL

The issues on appeal as stated by claimant are:

> I. Deputy Industrial Commissioner, Helmut Mueller's, decision in arbitration is insufficient in that said decision completely fails to set forth any rationale or a legal basis upon which his conclusions to deny claimant additional temporary total disability benefits may be supported.
>
> II. Deputy Industrial Commissioner, Helmut Mueller's, decision in arbitration improperly applied and/or failed to apply the proper legal standard prior to makinga [sic] conclusion as to claimant's permanent partial disability.
>
> III. Deputy Industrial Commissioner, Helmut Mueller's, decision in arbitration to deny claimant benefits is arbitrary, capricious, unreasonable and an abuse of discretion.
>
> IV. Deputy Industrial Commissioner, Helmut Mueller, erred in his finding that in order to award temporary total disability benefits and permanent partial disability benefits there must be a finding of objective medical evidence by the hearing officer.
>
> V. Deputy Industrial Commissioner's, Helmut Mueller, decision on remand does not comply with Iowa Administrative Code §17A.16(1) and §86.23 Code of Iowa (1985).

STATEMENT OF THE CASE

Forty year old divorced claimant, who has a degree in education and who recently received a teaching certificate, but who has been unable to obtain a position, testified to work experience at a machine and as a mechanic. He was offered a job as a teacher prior to getting his degree and had signed a contract, but he then decided he preferred to keep working for defendant employer. He claimed earnings as a mechanic-trouble shooter of $364 per week as well as use of a vehicle for $5 per week and parts and gas at cost. Use of the car apparently ended in July when it was sold. Thereafter he used a pickup. He valued this use at $100 a week. In addition claimant asserted that he had access to shop tools and equipment and that he was allowed to take trips.

Claimant recalled that prior to November 20 he had an incident which strained his back when he handed a customer a starter.

Claimant described his injury of November 20, 1980 as follows: He was carrying a keg of acid between buildings. He came to a door which opened out. He propped the acid, opened the door, stepped through with the acid and shut the door with his foot. The acid which weighed sixty pounds sloshed and something snapped in his back. He went to eat and noticed an inability to stand or to sit.

He was taken to Mercy Hospital. He eventually was seen by Dr. Flapan.

Around the first of December he returned to work. A customer came in seeking a water pump. He picked it up and felt pain which caused him to go lie down. He was taken to the hospital. He was then released on January 1 to go back to light duty. He was told by Paul Cole that no light duty was available and he was dismissed. He admitted it was possible he had been told in December of 1980 that he would no longer be employed by defendant employer as of January 1, 1981. He claimed, however, that he was under medication and did not recall the specifics of any conversations.

He received compensation benefits to January 11, 1981. He applied for unemployment benefits on January 4, 1981 and he said that if he had gotten a job he would have attempted to do it.

Claimant stated that because of his severe pain he was referred by Dr. Flapan to Iowa City for a second opinion from Dr. Lehmann whom he saw in April of 1981.

Claimant first obtained work on May 18, 1981 for an auto parts company overseeing three or four persons and answering the phone. He was paid $300 a week. He claimed that he had back pain whether he was working, sitting or standing, and which he relieved by hanging from pipes in the basement. He did not complain. After six weeks he was told the job was not working out.

He then worked as a mechanic earning $8 per hour. He took aspirin, muscle relaxants, pain pills and sleeping tablets. He had help with lifting. He noted difficulty with bending. He was laid off and the company was sold. He applied to the new owner, but he was not hired.

He obtained a job with relatives driving a truck at $5 per hour and then took a postition with the county sheriff's department. Prior to his employment he underwent a physical and he was placed under restrictions. His work as a jailer necessitated some bending. He still had pain, but he got along better until he flunked the civil service exam and was dismissed. Immediately prior to this time he hurt his knee and had knee surgery.

His present work is as a correctional officer in a state institution with a salary of $298 per week. The inmates are taken by bus to work sites. Riding the bus troubles his back. He also is bothered by standing and walking on hard surfaces. He indicated he takes in excess of twelve aspirin per day.

Claimant asserted that over the past year his back hurts more and he feels less capable of physical work. Claimant reported that since his injury he has been unable to engage in the athletic activities which he once enjoyed, although he has attempted to participate from time to time. However, he does do situps and legups to exercise.

Claimant last saw a doctor in October of 1983. He anticipated seeing the doctor in five to six months. He denied being told by Dr. Flapan in February of 1981 that he would not need to see him again.

Claimant, who did not think he was living with his spouse in November 1980, agreed that he had gone through "divorce syndromes."

Helen Warren, claimant's aunt and owner of a manufacturer of frozen foods, testified that claimant prior to his injury of November 20, 1980 was lively, active and cheerful. She recalled claimant's working for her company driving a truck, making deliveries on a fill-in basis for a few hours and not doing any lifting. She observed that her nephew would "pale down," "back off," lean against something or sit down. She also noted that at times when he had been sitting he would need to move. Warren acknowledged that claimant seemed blue and depressed after his divorce.

Pat McNally, who has dated claimant since June of 1981, testified that at that time sitting was difficult for him and he tired easily with his face becoming tense and white indicative to her of pain. She recalled that in the fall of 1981 he played some basketball and afterward would complain of pain. McNally observed that claimant tried more things when she first met him than he does now.

As to claimant's current difficulties, she stated that riding long distances is difficult, that he becomes depressed from pain, that his posture and color change with pain, that he is bothered by sitting and by kneeling in church, and that he is troubled by cold.

Richard Barta, treasurer and controller for Auto Parts Garage Company, testified that claimant began work for his company on May 19, 1981 at a wage of $300 weekly and terminated his employment on July 3, 1981 at which time he received a week's severance pay. A sales tax user's certficate dated April 10, 1981 was received from claimant, but there was no indication in his personnel file that claimant ever bought any equipment as records of that nature were kept elsewhere.

Dennis Pueschel, a former employee of defendant employer from 1972 until 1982 who did both general and counter work in the parts department, testified that claimant was his supervisor and also a member of the weekly basketball team on which claimant played on occasion in December of 1980 and January and February of 1981. Pueschel understood that claimant had been fired from his job. He recalled claimant's having a company car for his personal use, but he did not remember his using a pickup.

Caroline Porter, wife of Neill Porter and former mother-in-law of claimant, who with her spouse operated defendant employer, testified to doing bookkeeping at home, but visiting the shop often. She said that claimant whose duties were white collar and light in nature was manager of the parts department.

According to Porter, claimant sought chiropractic treatment in the fall preceding his injury for back trouble.

The witness said that discussions of claimant's termination as of January 1 had taken place the first week of December in the Porter home and that claimant had been told of dissatisfaction with his work in June and in September following the issuance of profit-loss statements. She did not think claimant tried to look for work in the interim. His claim for unemployment filed in January was contested on the basis of mismanagement.

Porter denied that claimant had been given permission to use the company vehicle for personal matters and she asserted that he had been reprimanded for doing so or that he was authorized for a company trip to Wisconsin. She agreed, however, that all employees were allowed to purchase gas and parts at cost or from the last parts catalog available.

Paul William Cole, a former employee of defendant employer who worked in accounts receivable, but who also worked the counter, testified to knowing and to working with claimant. He said that claimant was to have use of a car as salesman during working hours and after work for his personal benefit. Neill Porter declared that the pickup was not to be used for personal things. It was the opinion of the witness that claimant could have done ninety-nine percent of his job even with a restriction on lifting or excessive twisting or bending.

On rebuttal, claimant claimed that he had seen Dr. MacKenzie in the fall of 1979 rather than in 1980.

A final report shows claimant was paid weekly benefits of $211.30 from November 21, 1980 through December 7, 1980 and from December 31, 1980 to January 11, 1981. Defendant employer's answers to interrogatories indicate claimant was paid $360.40 per week.

Records from Polk County where claimant was employed as a deputy show claimant was examined by Julius S. Conner, M.D., who determined he should have a desk job with light duties and with no lifting over fifty pounds. He also was restricted from excessive twisting or bending. Claimant injured his right knee on June 10, 1982. Records show a denial of compensability regarding any claim for compensation.

Earliest medical records from Donald MacKenzie, D.C., show claimant was seen in January of 1979 complaining of mid to lower back pain apparently particularly at L4. Claimant told the doctor that he had been sleeping on the floor for over two years. Claimant was treated on at least a monthly basis through June.

Claimant was seen in the emergency department on November 20, 1980 with complaints of low back pain which came on as he was carrying acid and felt a snap in his back. His gave a history of previous episodes of back trouble. X-rays of the lumbosacral spine were negative. Claimant was diagnosed as having a lumbar strain.

Claimant was seen again in the emergency room on December 18, 1980 at which time he had multiple complaints which commenced as he was lifting. One of his diagnoses was a lumbar sprain.

Marshall Flapan, M.D., board certified orthopedic surgeon, testified to first seeing claimant on November 26, 1980 at which time claimant gave a history of feeling a snap in his back as he carried battery acid through a doorway. Claimant denied any radiation to his extremities and complained of tenderness in his intrascapular area and pain and tenderness in his low back. His movements were guarded, but his range of motion was good. Straight leg raising tests were negative and claimant's reflexes were normal. Claimant was diagnosed as having lumbosacral strain.

When claimant was seen on December 4, 1980, his lumbosacral strain was thought to be getting better.

Claimant called on December 18, 1980 and related a history of sudden weakness, shortness of breath, numbness and shaking as he was lifting something overhead. Although claimant's symptoms sounded like an anxiety reaction, claimant was asked to come to the emergency room. When claimant was seen on January 8, 1981, there was discussion of depression when claimant received his final divorce papers. No objective physical findings were present and claimant was released to return to light duty on January 12, 1981.

No objective findings were present at the time of claimant's next visit on February 5, 1981. The doctor believed that claimant would have been released for full duty at this point, although his notes did not reflect what was done one way or another.

Dr. Flapan reported having a phone call from claimant on March 11, 1981 at which time he told claimant he would refer him to Dr. Lehmann.

Claimant next was examined on August 18, 1982 at which time he told of being waterskiing two weeks before. Objective testing was normal. The doctor did not believe additional treatment was necessary and he thought claimant able to perform all work without restriction.

Dr. Flapan stated that claimant had no permanent functional impairment as a result of his work-related injury. He did not quarrel with Dr. Lehmann's rating. Neither did he consider giving claimant a rating based on pain alone. He agreed that because claimant had back trouble, he might have further difficulty.

Thomas R. Lehmann, M.D., board certified orthopedist, saw claimant on April 17, 1981 at which time claimant told of an on the job injury in November of 1980. Claimant spoke of being unable to work because of pain in his lower back which was worsened by sitting, bending or lifting and which was relieved by resting. Claimant told of some pain in his right hip. On examination, claimant had pain with flexion. He had tenderness in his low back. His left calf was two centimeters smaller than the right. Testing and x-rays were normal. Claimant was diagnosed as having discogenic low back pain with no neurological deficit. Claimant was given an exercise program and instructed to return.

Dr. Lehmann agreed that claimant in December of 1980 would have been able to engage in work not involving repetitive standing, stooping, bending, or lifting. He also agreed that emotional upheaval such as divorce may impact on one's perception of pain.

On May 8, 1981, claimant was found to have improved after his son manipulated his back. Claimant was to continue his exercises and to return in two months.

When claimant was seen on August 21, 1981, he told of being bothered by work with his pain exacerbated by lifting and relieved by lying down or sitting. Claimant was told to avoid heavy lifting and heavy physical activity.

Dr. Lehmann believed claimant to be temporarily totally disabled from November of 1980 to July of 1981.

After August 21, 1981, the orthopedist saw claimant on February 1, 1982; January 28, 1983 and May 27, 1983.

Dr. Lehmann believed that claimant's condition for which he treated him was either caused by his November injury or the November injury had aggravated a preexisting condition. It was the doctor's opinion that claimant has a functional impairment of five percent.

He stated that he preferred to rely on his own examination and the history given to him by claimant in preference to that taken by Dr. Flapan. The orthopedist was aware that claimant had been released for light duty and he thought that claimant could work; but he anticipated repetitive bending, lifting, carrying and twisting would aggravate claimant's pain. He testified that claimant gave a history consistent with a low back condition and consistent with his physical examination.

The physician thought claimant's complaints of his arm going to sleep and of problems with his neck were a postural condition.

APPLICABLE LAW AND ANALYSIS

Claimant initially reasserts the issues set out in his previous appeal which resulted in this case being remanded to the hearing deputy. Although the remand decision is not in total compliance with the remand order, no additional remand for findings and conclusions is possible as the hearing deputy has left the agency.

Claimant's major contention is that the hearing deputy erred in concluding that the absence of objective findings prohibits an award. He argues "a lack of 'objective' medical evidence is not a sufficient foundation on which to deny Claimant either temporary total disability or permanent partial disability benefits." In presenting his position he cites two Iowa Supreme Court cases which he says support the proprosition that direct expert evidence is not always essential to establish permanency. Rudd v. Grimm, 252 Iowa 1266, 110 N.W.2d 321 (1961) is viewed as having little applicability. Kaltenheuser v. Sesker, 255 Iowa 110, 121 N.W.2d 672 (1963) has only slight applicability; and as it contains at 117 the conclusion that "when symptoms from which permanent injury might be inferred are subjective only, medical testimony is required," it is not helpful to claimant's position. Both cases cited by claimant are tort matters rather than workers' compensation claims.

Workers' compensation cases contain standards for evaluation of medical evidence. Questions of causal connection are essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The testimony of the medical expert may be rejected when the opinion is based upon an incomplete and inaccurate history. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The weight to be given to expert opinion is for the finder of fact. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

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). 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, and that acceptance or rejection 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's brief argues admirably and well for his position, but his lack of candor destroys any possibility of his prevailing. The initial decision by the hearing deputy states that claimant's testimony "carries little weight." On remand, little weight was lowered to "no weight" and he wrote:

> Based upon 14 years experience and over 1200 such hearings, the undersigned concludes that claimant's reliability as a witness is in doubt. Claimant's inability to meet the eyes of the examiner plays a part in our decision to disbelieve the claimant. Claimant's version of his post injury activities is in our judgment a fabrication. Claimant paused significantly before answering seemly unsure of what type of impeachment evidence defense counsel was yet going to produce.

The hearing deputy went on to find:

> 2. That the claimant's testimony is rejected and found not credible.
>
> 3. That claimant's demeanor on the witness stand was such so as to cast doubt in the mind of the undersigned as to claimant's reliability.
>
> 4. That neither of the attending physicians were able to demonstrate objective physical findings in support of their medical opinions.
>
> 5. That neither of the physicians were aware of the claimant's basketball activities during January, February and March of 1981 at the time of their examinations.
>
> 6. That the claimant's claim for injury coincided with a petition of dissolution of marriage filed by his spouse who is the daughter of defendant employer.
> ....
>
> That the claimant has not established any entitlement to permanent partial disability in that it is found that the claimant is a malingerer.

There are discrepancies in claimant's testimony. His brief does explain some of the inconsistencies. However the hearing deputy was the person who actually observed claimant and listened to him testify. He made specific findings regarding claimant's testimony. Those findings cannot be overturned on the basis of a cold record on appeal.

After acknowledging that x-rays will not normally show soft tissue injuries, Dr. Flapan said that one criteria he uses in assigning ratings is the patient's subjective complaints. Dr. Lehmann in making a causal connection relied on the history he was given by the claimant. In light of the hearing deputy's findings, both doctors' opinions are tainted.

Claimant has been found to sustain an injury arising out of and in the course of his employment. He was paid two periods of temporary total disability -- November 21, 1980 to December 7, 1980 and December 31, 1980 to January 11, 1981. His employment records indicate he was working for the portion of December when benefits were not paid. An employee cannot collect workers' compensation benefits when he is working. Claimant was terminated from his job, and by January 4, 1981 he had applied for unemployment benefits. Dr. Flapan released claimant for light duty on January 12, 1981 and claimant would have been working but for his termination which was not related to his injury. Claimant was paid benefits to that date. Again, claimant's lack of candor colors the evidence.

A review of Dr. Flapan's notes provides these insights: When claimant was first seen on November 26, 1980 the doctor specifically noted claimant's moving in a guarded fashion. He was returned to work in early December. Thereafter, he had what the doctor felt was an anxiety reaction. The doctor's note of January 8, 1981 states that claimant "in no distress...moves about the examining room well." The rest of the examination is essentially the same as that at the time of injury. Dr. Flapan's assessment was low back pain with some psychophysiologic overlay. Claimant received his final divorce papers about the time of the January visit. He himself acknowledged having a "divorce syndrome". The record viewed as a whole does not support awarding any additional temporary total disability.

The hearing deputy's decision will be modified in one regard. Pay records and defendants' interrogatories clearly establish claimant's gross weekly earnings were $360.40 per week. At the time of his injury he was married and entitled to five exemptions.

The proper rate should be $225.42 rather than $211.30 paid by defendants. Defendants will be ordered to pay claimant an additional $58.50 in weekly benefits plus interest to compensate for the payment at the wrong rate.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty years of age.

That claimant is divorced from the daughter of the owner of defendant employer.

That claimant has a degree in education and a teaching certificate.

That claimant's work experience prior to his injury was as a machine operator and as a mechanic.

That claimant had a lumbosacral strain to his back when he was carrying acid on his employer's premises on November 20, 1980.

That claimant was seen beginning in January 1979 by a chiropractor for mid to lower back pain particularly at L4.

That claimant's employment was terminated on December 30, 1980 for reasons unrelated to his injury.

That claimant suffered a "divorce syndrome".

That since his injury claimant has worked at jobs similiar to that he did for defendant employer, as a trucker, as a jailer and as a correctional officer.

That claimant first obtained work on May 15, 1981.

That claimant is presently earning $298 per week.

That claimant applied for unemployment on January 4, 1981.

That claimant was earning $360.40 per week at the time of his injury.

That at the time of his injury claimant was a married person entitled to five exemptions.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant suffered an injury arising out of and in the course of his employment on November 20, 1980.

That claimant has failed to establish by a preponderance of the evidence entitlement to any additional temporary total or permanent partial disability benefits as a result of his injury.

That claimant has failed to establish entitlement to benefits under Iowa Code section 85.27.

That claimant has established entitlement to a rate of compensation of two hundred twenty-five and 42/100 dollars ($225.42).

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant an additional fifty-eight and 50/100 dollars ($58.50) to compensate for payment at the wrong rate.

That defendants pay interest on the additional fifty-eight and 50/100 dollars ($58.50) pursuant to Iowa Code section 85.30.

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

That defendants file an amended final report reflecting payment at the proper rate.

Signed and filed this 24 day of July, 1985.

Judith Ann Higgs

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAZEL MAXINE ANDERSON, Claimant, vs. WOODWARD STATE HOSPITAL - SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 656346 APPEAL DECISION

FILED
SEP 24 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from portions of a ruling on rehearing and order filed February 15, 1985 wherein it was ordered: "That in the event claimant has been paid all weekly compensation benefits due under the decision of March 26, 1984 that defendants be given credit for twenty-five (25) weeks of compensation against any future award of weekly compensation for permanent partial disability benefits."

ISSUE

Where an employer overpays weekly benefits in compliance with an award by the commissioner that is subsequently reduced, is the employer entitled to a credit against medical benefits?

APPLICABLE LAW AND ANALYSIS

The cases cited by the appellant; Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982) and Unified Concern for Children v. Caputo, 320 N.W.2d 643 (Iowa Ct.App. 1982) are inapposite. Those cases allowed a set off of the overpayment of healing period benefits against an award of permanent partial disability benefits. In the case before us we are addressing, not two types of weekly benefits, but, weekly benefits and medical benefits. As the deputy correctly set forth:

> The fact that the statute does not contain a provision allowing a set-off against medical benefits for overpayment of weekly compensation is, under the above principles, alone sufficient to defeat the defendant's contention in this matter. There are, however, other arguments which can also be marshalled against its position. First, medical benefits are distinguishable from weekly compensation benefits in that there is a statute of limitations on weekly benefits and no statute of limitations on medical benefits (after liability has been imposed on the employer). This indicates the high priority attached by the legislature to meeting the medical needs of an injured worker.
>
> In addition, the legislature has in specific instances provided for credits or set-offs of the employer's obligation. Over-payment of healing period, temporary total or temporary partial benefits may be credited against permanent partial disability benefits pursuant to section 85.34(4), The Code. The obligation for medical benefits may be reduced for benefits paid under a group insurance plan partially contributed to by the employer pursuant to section 85.38(2), The Code. Neither of these provisions could be so interpreted as to allow the type of set-off claimed by the state. If the legislature had intended such a set-off or credit, they surely would have said so.

CONCLUSION OF LAW

THEREFORE, the ruling on rehearing and order filed February 15, 1985 is affirmed and adopted.

Signed and filed this 24 day of September, 1985.

Robert C. Landess
~~ROBERT C.~~ LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARIE A. ARBOGAST, Claimant, vs. MCQUAY-PERFEX, INC., Employer, and LIBERTY MUTUAL INSURANCE COMPANY,	File No. 679213 A P P E A L D E C I S I O N FILED AUG 13 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed April 5, 1985 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 January 14, 1985 in which they were ordered to pay healing period and permanent partial disability benefits.

The record on appeal consists of the transcript of the hearing; claimant's exhibit 1 and defendants' exhibit A and B. All evidence was considered in reaching this final agency decision.

The decision of the hearing deputy is reversed.

ISSUES ON APPEAL

Defendants state the issues in this matter as "whether claimant suffered an injury arising out of and in the course of her employment; whether there is a causal connection between any injury claimant may have suffered and any present disability."

STATEMENT OF THE CASE

Forty-one year old married, five foot three inch claimant who weighed 140 to 160 pounds at the time of her injury and about 178 pounds at the time of hearing and who had weighed as much as 200 pounds, testified to quitting high school in her junior year but later obtaining her GED. She subsequently has received some training as a nurse's aide. She listed brief work experience for a calendar company, on an assembly line for a manufacturer of yokes for televisions, in a cafe-tavern as a waitress, and in a hospital in long-term care.

She reported beginning work for defendant employer in June of 1977 as a core pusher. She subsequently held positions as a machine operator, in paint and fin and in shell assembly with her longest time spent in the latter position which was her work at the time of hearing. She was medically disqualified from a dip pot job.

Claimant recalled the circumstances surrounding her alleged injury on June 26, 1981 as follows: She was assigned to the paint booth -- a place where she had not worked before -- to paint and undercoat the booth. The paint which was in gallon buckets, was poured into pans or trays. She bent to pick up a pan and "got a good whiff" down her throat. She felt dizzy and sick and had trouble catching her breath. She put the tray down and asked a coemployee to help her outside so she could breathe better. She remained outside for twenty to thirty minutes. When she went back in, the work day was nearly over so she collected her things to go home.

In the evening she experienced a headache.

Several nights thereafter she noticed an inability to catch her breath when she lay down. She asked her husband to take her to the emergency room. She was admitted to the hospital and given oxygen. She was x-rayed and medication was prescribed which gave her some relief.

After her release from the hospital, she was off a few days and then tried to return to work. When she entered the plant, she had tightening and spasm in her right lung.

Eventually she was referred to the pulmonary clinic in Iowa City. Her medication was changed. She returned for other visits. At the end of December she was allowed to try to go back to work and instructed to lose weight and quit smoking. The company required her to have a release from the doctor which she did not get until sometime in January and which restricted her from work on the paint line. She returned to work on February 8, 1982 and bumped into shell assembly. After this return to work, she was not off again for anything related to the June 19, 1981 incident, but she was off with back complaints and a broken finger.

Claimant reported having pneumonia as a child and again as an adult. She also had bronchitis. She said that she was hospitalized in early 1980 with pneumonia. She was back in the hospital a year later and treated with inhalation therapy.

Claimant claimed that she now has shortness of breath when she walks long distances or climbs stairs and in hot and humid weather. She no longer plays second base for the company softball team. She continues to bowl but she cannot bowl the number of consecutive games she once did. She claimed that certain cleaning substances and aerosals cause her to gasp for air. She takes Theo-dur, 200 milligrams, twice a day and has an inhalator spray to use.

Claimant declared that she is not troubled by the type of paint currently used on the line, but that she is bothered by other types.

Claimant acknowledged being a smoker, beginning smoking between ages thirteen and fifteen and smoking as much as a pack and a half a day. She admitted that she was advised by Dr. Bedell to quit smoking, but she had been unable to do so. Both Drs. Bedell and From have advised her to lose weight.

Claimant asserted that her time in the actual paint area would be fifteen to twenty minutes. Claimant agreed that neither of defendants had authorized treatment by Dr. Bedell. Claimant testified to having no trouble using a black paint which is regularly used in her department. She consulted with Dr. Bedell when she learned she would be working around paint again. She was told that as long as there was no toluene di-isocyanate (TID) in the paint, she could be around it.

Regarding her work performance, claimant was questioned:

Q. Are you having a problem performing your job at McQuay-Perfex now?

A. No, I'm not.

Q. Have you had any problem in the last year?

A. No, I haven't.

Q. Have you had any problem since February of 1982?

A. No. (Claimant's dep., p. 48 ll. 15-22)

Robert Arbogast, claimant's spouse of twenty years who has worked for defendant employer in maintenance for twelve years, testified that prior to June of 1981 claimant participated in sports and attended sporting activities. Her participation and attendance have decreased since June. He has taken over some household duties and he observed that claimant moves more slowly.

Arbogast indicated that in the weeks prior to the hearing claimant had been working overtime.

A material safety data sheet indicates that white spray booth coating paint contains 51.4 percent toluene by weight. According to the data, inhalation could result in an anesthetic effect and could irritate the respiratory tract or acute nervous system with headaches, dizziness, a staggering gait, confusion, unconsciousness or coma. Breathing vapors is to be avoided.

George N. Bedell, M.D., a specialist in internal medicine and lung disease, saw claimant on July 30, 1981 on referral from Lance Wessling, D.O., at which time he took a history of claimant's being in good health until June 26, 1981 when she inhaled paint fumes and became short of breath. She subsequently was hospitalized. She denied a prior history of asthma, but she acknowledged being a smoker for twenty-five years. He performed an evaluation and did pulmonary function studies.

Initially the doctor thought claimant had obstructive lung disease, but he, by December, determined that she had asthma which was exacerbated by her work and he suspected the exacerbation was due to a chemical in paint -- TDI.

The doctor assigned a disability rating of thirty-five percent of the body as a whole. He explained that such an impairment would limit the capacity for hard physical labor, running and maximal exertion. She also might have less recovery for dealing with hazards to her lungs and might tire more quickly in situations requiring exertion.

Dr. Bedell said that by December 8 claimant was able to return to a work environment with no fumes.

Regarding the material safety data sheets which he was given by claimant, he acknowledged that the toluene which was mentioned was different from TDI and that those precise words did not appear on the document. However, he had not used the document to arrive at his diagnosis. He was interrogated more specifically:

Q. And in connection with your medical reports including that on Exhibit B of July 6, 1984, you said, "bronchial asthma, probably caused by TDI"?

A. Right.

Q. In fact, I think most of your reports refer to TDI?

A. Right.

Q. Now, where did you get at any point from July 30, 1981, TDI in this equation involving this particular patient? Can you tell me where it arrived from?

A. Sure. It arrived from my knowledge that acute asthma just does not happen out of the blue to people who work with paints. So what I know from the medical literature, from books about toxicology, about acute development of asthma, that it does occur when TDI is present in paints. And so she had the classical history of asthmas caused by TDI.

Q. But, Doctor, what if this paint contained no TDI?

A. Well, I am not an expert on that.

Q. Well, what would be your diagnosis then, because as I understand you, you're saying that she has bronchial asthma caused by TDI, am I right?

A. No, you're exactly right. My diagnosis would still be that she had bronchial asthma, and I would still suspect that it was TDI. It's my understanding about this chemical that it does not have to be present in very high concentration. It can be present in very small amounts, that the patients who have TDI asthma are exquisitely sensitive to it so that the history is quite convincing, just the history is quite convincing. (Bedell dep., pp. 19-20 ll. 10-25 and 1-23)

He assumed the paint contained TDI.

The physician did not think that smoking itself would affect the development of asthma, but he said it could cause obstructive lung disease, bronchitis or emphysema. He believed it was conceivable that claimant's smoking could contribute to her disability. He agreed that he had ordered claimant both to quit smoking and to lose weight.

Dr. Bedell also agreed that claimant could have returned to work on July 31, 1981, but he did not tell her she could do so by being in a fume free environment. He did tell her that on December 2, 1981.

Claimant had told him of her hospitalizations for pneumonia which he claimed should not end up causing obstructive lung disease.

In a letter dated December 3, 1981, Dr. Bedell wrote: "Bronchial asthma is not caused by her work but it has been made much worse by her work."

Paul From, M.D., board certified internist, examined claimant on March 5, 1984 at the request of the insurance carrier. Claimant gave a history of working for about ten minutes with a paint brush and white spray booth paint containing the materials set out in a material data sheet and then experiencing severe shortness of breath. He knew of claimant's treatment in Iowa City and of repeated prior respiratory infections. Claimant reported sinusitis, shortness of breath doing her usual work and climbing stairs, and chest pain or tightness with exposure to chemical odors.

On examination the doctor found: "Percussion of the lungs was resonant with fair diaphragmatic motion. Breath sounds were fairly normal to what was call bronchovesicular. There were inspiratory and expiratory wheezes and squeaks, and expiration itself was prolonged, but there were no other adventitious sounds." (From dep., p. 7 ll. 14-20)

Dr. From decided that claimant was suffering from chronic obstructive pulmonary disease. Additionally, claimant had an obstruction to the flow of air which would place her in a category of having bronchitis, asthma or emphysema. The most common cause of those three maladies, according to the expert, would be heavy cigarette smoking.

Regarding possible causation from the paint exposure, Dr. From testified:

> Well, I don't think that she had enough exposure to any kind of a lung irritant and/or allergen to have produced chronic obstructive plumonary disease. You have to have usually more than one exposure, usually low-level continuing exposures or repeated episodes of exposure.
>
> In the description that I had of the ingredients of this enamel paint, really there are only irritants there. There are no allergens, as such.
>
> A local irritant could, of course, initiate some irritation along the bronchial mucosa, if it indeed got that far, but that's all it is, is an irritant. It would not produce anything permanent. It would not do anything except the most minimal of any temporary aggravation of anything.
>
> I think with the amount of exposure that she had, it would be open to some question as to whether even that might cause--have been enough exposure to cause any irritation.
>
> Certainly I don't think that exposure to toluene and the various ketones that were said to be in this enamel paint would produce chronic obstructive pulmonary disease from one short exposure. (From dep., pp. 12-13 ll. 12-25 and 1-10)

A twenty-five percent impairment based on lung disease was ascribed of which none was assignable to her exposure to the paint. He viewed the impairment as an outgrowth of claimant's disease process which was aggravated by tobacco smoke and changes in ventilation from a weight gain and hyperactivity of claimant's air passages to anything in the atmosphere of an allergenic nature.

Dr. From said that cigarette smoking would not cause an asthmatic condition.

The doctor believed that toluene is a local irritant rather than an allergen. He believed that to develop chronic obstructive pulmonary disease one would need repeated exposures. He also classified TDI as an irritant, but he said that if it were of certain particulate size it would get into the lungs and set up an allergic response. He again looked to his understanding of the exposure and said:

> Well, sir, if the information I have is correct, that she had only a very short exposure to these fumes, as such--she said in her deposition that she was bending over this can where the material was coming from and that she had not really used it. That seems to me to be a very short exposure and only one exposure, and theoretically, in the development of what we call allergy, there should be exposure to an allergen, time to develop antibodies in the body, reexposure to the allergen again so that those antibodies then come up and meet with it, and then a reaction ensues, and so from a one-time, very short exposure, I really doubt that you could get an allergic response within the body. (From dep., pp. 27-28 ll. 17-25 and 1-5)

Dr. From's letter in March of 1984 acknowledges a definite asthma.

APPLICABLE LAW AND ANALYSIS

The first issue on appeal is whether claimant suffered an injury arising 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, 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).

Testimony regarding her reaction on June 26, 1981 is uncontroverted and she will be found to have had an injury arising out of and in the course of her employment on June 26, 1981.

The real issue in this case is whether or not there is a causal connection between claimant's injury and any disability she now suffers.

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

An award of benefits cannot stand on a showing of a mere possibility of causal connection between the injury and the claimant's employment. An award can be sustained if the causal connection is not only possible, but fairly probable. Nellis v. Quealy, 237 Iowa 507, 21 N.W.2d 584 (1946). Questions of causal connection are essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. 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 v. U.S. Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1961).

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.

Claimant, who has a history of episodes of pneumonia, testified that on June 26, 1981 she was assigned to paint the paint booths. She became dizzy and sick over a fifteen to twenty minute period when she bent over a pan containing the paint. She performed no actual painting. She went outside for twenty to thirty minutes where she was able to breathe better. In the evening she had a headache. It was not until several nights thereafter following bowling that she noticed difficulty breathing. She was taken to the emergency room and she was hospitalized.
No evidence was offered regarding that hospitalization.

Dr. Bedell saw claimant more than a month after the painting incident. He received a history of claimant's being in good health, inhaling paint fumes, exerting herself and then finding breathing difficult. In 1981 Dr. Bedell first diagnosed chronic obstructive pulmonary disease and then bronchial asthma worsened by claimant's work. In 1983 he diagnosed bronchial asthma probably caused by toulene di-isocynate. That most recent change in diagnosis is unfortunate for claimant as it fatally links her condition to toulene di-isocynate.

As defendants aptly point out in their brief, there are distinct problems with the evidence presented by Dr. Bedell. First of all the doctor has jumped from diagnoses of chronic obstructive pulmonary disease to bronchial asthma aggravated by work to bronchial asthma probably caused by toulene di-isocynate. The latter diagnosis is clouded by the lack of any showing claimant was exposed to that compound. A material safety data sheet is part of the record, but whether or not that sheet relates to the paint to which claimant was exposed is not established. That sheet does not show that the paint contained toulene di-isocynate to which the doctor attributed claimant's asthma and the physician acknowledged that toulene and toulene di-isocynate are different. Some of what claimant argues regarding Dr. Bedell's testimony is true. He is a pulmonary expert. He is the treating physician. He did perform fundamental and objective tests. All those factors weighing in claimant's favor are overshadowed by the difficulties set out above.

The hearing deputy and claimant's brief make reference to Dr. From's failure to do testing. He did do testing. He did not do a Methacholine challenge. Nor did he do a complete lung function study, but neither did Dr. Bedell perform that test. Dr. From's testimony is not favorable to claimant. He found a single exposure unlikely to produce chronic obstructive pulmonary disease, that the paint contained only irritants and no allergens. Because they were irritants as opposed to allergens, repeated exposures would be necessary to develop the disease. He also characterized toulene di-isocynate as an irritant but due to its particulate size it could set up an allergic response. Some of the same problems exist with testimony from Dr. From as were pointed out in Dr. Bedell's testimony in that he in part based his opinion on claimant's being exposed to the chemicals listed on the material data sheet.

Dr. From said that none of claimant's impairment was traceable to the June 26, 1981 episode. Dr. Bedell found a permanent impairment to claimant's pulmonary system. For reasons discussed above a causal connection between the incident of June 26, 1981 and claimant's condition cannot be established. Therefore claimant is not entitled to any permanent partial disability.

Neither can claimant be awarded temporary total disability. Dr. From's testimony regarding irritants versus allergens is pursausive particularly in light of the clearing of her symptoms when she got away from the fumes. Dr. From believed claimant could return to work the day after the incident. Dr. Bedell found claimant able to continue her work on July 30, 1981, the time of his first examination. No information was offered regarding claimant's hospitalization after bowling. There is an absence of evidence connecting any of claimant's time off work to the incident of June 26, 1981.

FINDINGS OF FACT

That claimant is forty-one years of age.

That claimant became dizzy and sick and had trouble breathing when she bent over a paint pan on June 26, 1981.

That claimant's exposure to paint fumes was brief.

That claimant was hospitalized several days after the incident following an unrelated exertion.

That claimant was able to work the day after the paint incident.

That claimant had a "pneumonia type of condition" in February of 1981.

That claimant had pneumonia in 1980.

That claimant had pneumonia as an infant and "a few times as a kid."

That claimant had sinus trouble for several years.

That claimant has been a smoker since she was a young teenager and she continues to smoke.

That claimant's increase in weight contributed to her pulmonary trouble.

That claimant has worked regularly since February 8, 1982.

That claimant's exposure to paint fumes was brief.

That claimant has permanent impairment to her respiratory system.

That any permanent impairment to claimant's respiratory system is not a result of the paint incident on June 26, 1981.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant suffered an injury arising out of and in the course of her employment on June 26, 1981.

That claimant has failed to establish entitlement to any benefits under the Iowa Workers' Compensation Act as a result of her injury of June 26, 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 13 day of August, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

30

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KATHLEEN M. BAILEY,	:	
Claimant,	:	
vs.	:	FILE NO. 755293
VERCO ENGINEERED SALES,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
UNITED FIRE & CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

FILED
JUL 25 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Kathleen M. Bailey, claimant, against Verco Engineered Sales (hereinafter referred to as Verco), employer, and United Fire & Casualty Company, insurance carrier, defendants, for benefits as the result of an alleged injury to her tailbone from a fall on December 12, 1983. On May 15, 1985, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of the hearing.

ISSUES

The issues presented by the parties at the time of pre-hearing and hearing are as follows:

I. Whether claimant received an injury arising out of and in the course of employment;

II. Whether there is a causal relationship between the alleged injury and the claimed disability;

III. The extent of permanent disability benefits to which claimant may be entitled;

IV. The extent of temporary total disability or healing period benefits to which claimant may be entitled;

V. Claimant's rate of compensation; and,

VI. Claimant's entitlement to medical benefits under Iowa Code section 85.27.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The record consists of the oral testimony of claimant, Darrell Bailey, Judi Gard and John Lair; and joint exhibits 1-9. At the time of the hearing, the parties stipulated to the following matters:

1. Claimant's rate of weekly compensation in the event of an award of benefits from these proceedings shall be determined on the basis that claimant was married, entitled to two exemptions and received an hourly rate at the time of the injury of $3.35 per hour.

2. The medical bills submitted by claimant at the hearing were fair and reasonable but the issue of their causal connection to any work injury remained an issue to be decided herein.

3. The red line on exhibit 1, a plat of Verco's premises and surrounding grounds, depicts the correct property line between Verco's premises lying south of the line and the city street, known as 28th Street, lying north of the line.

Claimant, currently a housewife, is 58 years of age and was employed by Verco between August 10, 1983 and August 20, 1984. The record does not reveal the extent of her education or past employment experience, if any.

Claimant testified that she had no prior sitting or low back problems before the alleged work injury upon which she bases her claim. Claimant's duties at Verco consisted of the operation of a machine used in the manufacture of plastic parts, a job requiring sitting 75 percent of the time. Claimant testified that her normal work week, at the time of the alleged work injury, consisted of 40 hours; but she admitted on cross-examination that she frequently worked less. Claimant did not explain the reasons for her termination from the employ of Verco in August 1984.

The facts surrounding the alleged work injury are in dispute. Claimant and her husband testified that on December 12, 1983 she fell on ice in an area which is located on Verco's premises shortly after exiting a vehicle driven by her husband. The accident occurred only a few minutes before the start of claimant's normal shift at 7:30 a.m. Judi Gard, a witness and fellow employee, and John Lair, who holds a management position at Verco, testified that from their observations, claimant fell approximately three to five feet outside the boundary line of Verco's premises. Maps, diagrams and photographs of the area were introduced into the evidence to pinpoint the spot where claimant fell. At the time of the accident, there was no visible demarcation between the city street and Verco's property. The area was entirely gravel covered. A cement surface has now been constructed in the area which did not exist at the time of the fall but both Gard and Lair used the edge of this cement area as a reference point in their testimony. Gard's exact location at the time of the incident is not clear in the record but Lair stated he was inside a building looking through a window approximately 30 or 40 feet from the location of the fall. All witnesses agreed that employees at Verco regularly used the area where the fall took place in getting in and out of vehicles before and after their shifts. Also, claimant, Gard and Lair admitted that Verco hires a subcontractor to remove snow in the area during the winter months, but Lair added that this was not required by the city. Also, the area immediately adjacent to the area of the fall which is now paved was regularly used by Verco for unloading trucks and as a parking area for Verco management. Lair indicated that his family has an ownership interest in Verco.

Claimant injured her tailbone in the fall. Immediately after the injury, she left work and was initially treated by George Fieselmann, M.D., a general practitioner. Dr. Fieselmann attempted conservative treatment (pain medication and bedrest) of claimant's symptoms which primarily consisted of severe pain in the tailbone area. However, claimant failed to improve and she was referred to Dr. Williams Follows, M.D., an orthopedic surgeon. On March 18, 1984, claimant was admitted to the Spencer Municipal Hospital for a surgical procedure termed a coccygectomy or a removal of a portion of her tailbone. She was discharged from the hospital on March 21, 1984. Following a recovery from her surgery, claimant returned to work on May 1, 1984 upon a release by her physicians.

In his report of May 15, 1984, Dr. Follows states that he would anticipate that claimant "should be relieved of most of [her] coccyqueal pain." Three days later, Dr. Fieselmann states that claimant at the time had not been relieved of her pain and sitting continued to be very painful for her. The doctor added that claimant would need to continue taking "some medication and pain reliever for quite some time."

The record is not clear as to the full extent of claimant's current problems with sitting or her tailbone.

Claimant's appearance and demeanor at the hearing indicated that she was testifying in a candid and truthful manner.

APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that she received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of 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 therein.

The primary dispute in this case involves application of the going and coming rule. Generally, injuries while a worker is going to and from work which do not occur on employer's premises are not compensable. See Otto v. Independent School Dist., 237 Iowa 991, 994, 23 N.W.2d 915, 916 (1946). However, injuries on the employer's premises at or near employment hours are almost always compensable. See Lawyer and Higgs, Iowa Workers' Compensation-Law and Practice §6. Claimant and her husband were very credible witnesses. Their testimony pinpoints the location of the fall well within Verco's premises. Although Gard and Lair testified that the location of the fall was in the city street, their testimony cannot be given the greater weight. First, Lair was a considerable distance from the scene and neither he nor Gard could explain how they could locate the fall to be within only a few feet of the property line when they could not identify any point of reference in their view of the scene which would identify the property line. The cement surface did not exist at the time of the fall. Therefore, claimant and her husband were in a better position to know the exact location of the fall. Therefore, the greater weight of the evidence shows that claimant fell on Verco premises.

Although a finding of fact that claimant fell on Verco premises is made, the exact location of the fall is not critical to the issue of compensability. The Iowa Supreme Court in Frost v. S. S. Kresge, 299 N.W.2d 646, 648 (Iowa 1980) found that an injury occurred in the course of claimant's employment despite the fact that the claimant fell on a public sidewalk adjacent to employer's building. The court said that the site of the injury was so closely related in time, location and in employee usage to the work premises to bring the claimant within the zone of protection. Furthermore, the employer had exercised such control over the abutting sidewalk as to make it an extension of the business premises.

In this case, the area of the fall was commonly used by all employees as a location where they entered and exited their automobiles before and after work. Defendant maintained the area in the wintertime. The exact property line is certainly not critical to Verco's control of the area because the new cement surface was constructed by Verco beyond Verco's property line into the city street. Therefore, even if the fall had not been on the premises but only a few feet from the property line, there are sufficient facts under the guidelines of the Frost decision to conclude that claimant was in the course of her employment at the time of the fall.

II. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of disability. 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

The greater weight of evidence in this case shows a causal connection between the work injury and only temporary disability. Any permanent disability would have to be gleaned from either the physician's reports or claimant's testimony. Claimant's testimony is not clear as to the extent of her current and continuing difficulties and the doctor's reports are equivocal. Dr. Fieselmann and Dr. Follows appear to disagree as to claimant's prognosis approximately a year prior to the hearing with Dr. Follows stating that claimant should be relieved of most of her pain. Dr. Follows' opinions must be given the greater weight given his specialized knowledge. There were no doctors' reports submitted at the hearing to indicate what claimant's current condition may be.

III. Claimant's entitlement to temporary total disability benefits is governed by Iowa Code section 85.33(1). The record shows that claimant was off work from the date of injury until her return to work on May 1, 1984. Her employment ended in August 1984. There is no medical evidence or clear lay evidence from claimant that would indicate that she was unable in August 1984 to return to the type of work she was performing at the time of the injury. A causal connection between the work injury and her termination from Verco in August 1984 was not established. Therefore, her temporary total disability benefits should end on April 30, 1984.

IV. The parties dispute as to rate of compensation concerns the method of calculating the gross weekly rate of compensation under Iowa Code section 85.36. That section defines gross earnings to be the earnings to which the claimant would have been entitled had she worked the customary hours for the full pay period in which she was injured, as regularly required by the defendant employer. Claimant, on cross-examination, did indicate that she frequently worked less than 40 hours per week for various reasons but clearly indicated that her normal or customary work week consisted of 40 hours. Defendants did not offer pay records into the evidence which would indicate otherwise. Therefore, given the stipulated hourly rate of $3.35 per hour, claimant's gross weekly wage was $134.00 per week at the time of the injury. Using the agency benefit schedule for injuries from July 1, 1983 through June 30, 1984, claimant's rate of compensation for her work injury is $93.40 per week.

V. The medical evidence presented and claimant's uncontroverted testimony establishes the causal connection between the work injury of December 12, 1983 and the medical bills submitted in exhibit 5 for reimbursement under Iowa Code section 85.27.

FINDINGS OF FACT

1. Claimant and her husband were credible witnesses.

2. Claimant was employed by defendant Verco from August 10, 1983 until August 20, 1984 as an operator of a plastic manufacturing machine which required prolonged periods of sitting.

3. On December 12, 1983 while coming to work immediately prior to the start of her work shift, claimant slipped and fell on Verco's premises shortly after exiting a vehicle driven by her husband.

4. Claimant's fall on December 12, 1983 occurred in an area where Verco regularly removed snow in the wintertime and which is customarily used by Verco and Verco's employees for ingress and egress from Verco's building.

5. The fall of December 12, 1983 happened only a few minutes before the start of claimant's shift at 7:30 a.m.

6. As a result of the fall of December 12, 1983, claimant injured her tailbone which caused significant pain in her tailbone area necessitating her absence from work and the surgical removal of a portion of het tailbone.

7. Claimant was in good health before the work incident of December 12, 1983 and she had no tailbone pain or problems with sitting for long periods of time.

8. As a result of her work injury of December 12, 1983, claimant was absent from work from the date of injury until her return to work on May 1, 1984.

9. Claimant's customary gross weekly wage at the time of the work injury was $134.00 per week.

10. Pursuant to the stipulation of the parties, claimant is entitled to marital status and two exemptions in computing a rate of compensation for the work injury of December 12, 1983.

11. Claimant's rate of compensation for the December 12, 1983 injury is $93.40.

12. The medical bills listed in exhibit 5 are causally connected to the work injury of December 12, 1983 and pursuant to the stipulation of the parties the charges in those bills are reasonable and fair charges for the services rendered.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that on December 12, 1983 she suffered an injury arising out of and in the course of employment.

II. Claimant has established by a preponderance of the evidence that the injury of December 12, 1983 is a cause of temporary disability.

III. Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits for 20 weeks at the rate of $93.40 per week.

IV. Claimant has established by a preponderance of the evidence entitlement to medical benefits in the amount of $3,092.33.

ORDER

Accordingly, the following is ordered:

1. Defendants shall pay to claimant temporary total disability benefits from December 12, 1983 until May 1, 1984 totaling twenty (20) weeks at the rate of ninety-three and 40/100 dollars ($93.40) per week.

2. Defendants shall pay claimant the following medical expenses:

Spencer Medical Hospital	$2,226.65
William Follows, M.D.	435.00
George Fieselmann, M.D.	260.00
Medical Arts X-ray Service	18.00
Alfred Rice, M.D.	110.00
Prescriptions for Darvon	42.68

3. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

4. Defendants shall receive credit for previous payments of benefits under a non-occupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2).

5. Defendants shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

6. Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

7. Defendants shall file an activity report upon payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 25th day of July, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

JOAN A. BALDWIN,	:	File No. 656816
Claimant,	:	APPEAL
vs.	:	DECISION
UNITED CARE CENTERS, INC., d/b/a EMMETSBURG CARE CENTER,	:	
Employer,	:	FILED
and	:	SEP 30 1985
WESTERN INSURANCE COMPANIES,	:	IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed June 26, 1985 this 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 arbitration decision filed February 29, 1985 in which claimant was awarded healing period, 200 weeks of permanent partial disability and medical expenses.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 8; defendants' exhibits 1 through 3 and the deposition of Verland G. Rients, D.C. All evidence was cosidered in reaching this final agency decision.

This decision will reverse that of the hearing deputy.

ISSUES

The issues on appeal as stated by defendants are:

A. Did claimant sustain burder [sic] of proving by a preonderance [sic] of the evidence that she sustained an injury arising out of and in the course of her employment that is causally related to the disability on which she bases her claim?

B. Did claimant properly report her injury within the 90-day period as contained in section 85.23 of the code?

C. Did claimant sustain the burden of proving entitlement to industrial disability.

REVIEW OF THE EVIDENCE

Claimant, a thirty-five year old divorced mother of two sons and a high school graduate with additional training as a nurse's aide, testified to work experience in a bakery, cafe and in factories.

Claimant complained of constant lower back pain which in varying degrees goes into her right leg. She denied any leg pain prior to her alleged injury, but she said that she had an occasional backache.

Claimant recalled beginning work for defendant employer on October 2, 1979. She frequently was placed on the side of the home requiring the heavier lifting. She described an incident which she thought occurred on November 24, 1979 as follows: She and a woman named Cheryl were lifting a helpless patient, Eileen Murray. Cheryl was to bring the wheelchair into position; but they were talking, and Cheryl forgot to do it. She took a step to get the chair in position and felt something give. She told the nurse on duty that she took a step as she lifted the patient. She later informed the head nurse. She had pain in her right buttocks area. By a week after the incident she was limping and dragging her leg.

She went to Verland G. Rients, D.C., on December 19, 1979. On that date there was a crash during her shift and she found herself unable to run to see what had happen.

Claimant acknowledged being in the office of Steven W. Morrison, M.D., on both December 1 and December 9, 1979 without mentioning her back problem because her primary concern was a throat infection.

After a hospitalization which involved some treatment for her back, she did not return to work because she did not think she would be able to lift. She spoke with Lyman Bailey, the nursing home administrator, whom she told she had been hospitalized for her back. Later she took her resignation to him and asked if she would qualify for workers' compensation. He responded she would not because she had not filled out an injury report. She felt that he understood that she had injured herself while lifting the patient because he did not question her when she asked for compensation.

After her discharge from the hospital, she was given a back brace, but she was unable to wear it because it bothered her hip. Eventually she was referred to J. W. Fellows, M.D., Keith McLarnan, M.D., the Mayo Clinic and a Dr. Wolbrink. She said that she most recently went to Dr. Morrison because of a flare-up in her condition which left her with pain in her whole leg. Claimant acknowledged having problems with her back after dancing and when she was sitting on a horse.

Claimant denied being aware of the necessity of filing accident reports.

Claimant asserted that by the time of her hospitalization in December of 1979 she was "pretty well over" stresses in her personal life which included abuse by and threatening letters from her former spouse.

Claimant agreed that her attorney had suggested it would be a good idea for her to see her doctor right before hearing.

Claimant recalled applying for a job at a nursing home in March of 1980, but she has not worked since the time of her alleged injury.

James Daryl Baldwin, claimant's son, recalled delivering a note to the care center. He said that his mother had not had back trouble prior to that time, but she has since then had back trouble and her leg will give way.

Arlene Patee, claimant's mother, testified to seeing her daughter fall when her left leg goes out.

Lyman Bailey, Jr., administrator of defendant employer since December 1, 1978, testified that in case of injury employees are to fill out an incident report, to notify the person in charge, to see a doctor and to inform the employer of care being given. Records from the facility showed claimant did not work the weekend on which she alleged her injury to have occurred. Records reveal claimant did not work November 30 and December 1 when she became ill with her throat. She worked the weekends of December 8 and December 9 and December 15 and December 16. To the time of hearing claimant had not filed any incident report indicating she had been injured at her job.

Bailey indicated that he first knew claimant was making a claim for compensation on February 13, 1980 the day of her resignation. He denied having knowledge from any source prior to the time of her claim. After the petition was filed, he conducted an investigation which failed to uncover any information about the incident. He stated that there was no one working in the facility named Cheryl, but there was a woman named Cheri who is Dr. Morrison's nurse. He denied having any student help over the Thanksgiving holiday and he said that any student would be placed on the schedule.

Margaret McNally, granddaughter of the patient claimant claimed to be lifting at the time of her injury, testified that she did not know of any incident with her grandmother nor had her grandmother spoken of the situation.

Alice Burns, the nurse in charge on the day of claimant's alleged injury, testified she was not told of any injury.

Nena Jurries, presently director of nursing, testified that in 1979 she was a college girl who worked each weekend and that she did not work November 24, 1979. She was unaware of any incident in which claimant was injured.

Verland G. Rients, D.C., first saw claimant on December 17, 1979 at which time claimant told him about pain in her lower back, hips and legs which traveled to the upper part of her back and which came on a month before as she lifted a patient. Claimant had a slight left antalgic position and some limitation of motion. He felt claimant had a sprain injury of the fifth lumbar vertebra. He explained:

> At the time that the patient entered the clinic our diagnosis was a sprain of the fifth lumbar vertebra. All right. The patient was in a left antelgic [sic] position. The vertebra was chiropractically manipulated from left to right to reduce the spasm. In a sprain of a vertebral area you're dealing with ligaments, you're dealing with joint tissue. Upon loss of motion of the fifth lumbar vertebra because of the splinting action it's very normal for the disk above the area involved to enlarge and fill with fluid as a compensation to an injury. This follows normal procedure. And in this case one month was involved so it could follow a very normal procedure of swelling at the L-4 disk because of the sprain at the fifth lumbar vertebra. (Rients deposition, p. 34)

Claimant's spine was manipulated. Her condition was some changed when she was seen on December 21.

She failed to keep an appointment for January 30, 1980 and was not seen again until June 3, 1983 at which time x-rays were taken and compared with previous films which the doctor viewed as evidencing a disruption at L4, but he did not say there was protrusion at L4. He thought that in the interim between the two x-rays a splinting action occurred which is the body's means of trying to protect itself. The fluid in the L4 area was no longer present.

The physician said that pain in the hips or pain radiating to the legs could possibly be consistent with splinting. He stated that "[v]ery possibly" the condition for which he examined claimant was caused by her lifting a patient. Later he was questioned:

> Q. Now, you're using the word could. Do you have some reason to belive that swelling of the disk was not caused by the lifting incident which she described?
>
> A. Well, you're dealing with such a factor here that you can't make a positive statement in the fact that who are we to say that that swelling couldn't have been present even prior to the injury. With no records, no history of injury, without any observations I have no way of knowing. I can only assume that because of the procedures of the injury apparently to the fifth lumbar and from experience in the past that it can happen that the disk above it will swell to compensate. (Rients dep., p. 34)

Steven W. Morrison, M.D., who associates with Gerald J. Wieneke and Frank Veltri and who is a board certified family practitioner, testified to seeing claimant on December 28, 1979 and to admitting her to the hospital on that same day with a complaint of right-sided low back pain which had developed about a month prior to her admission as she was lifting a patient.

At the time she was hospitalized, the pain had moved to the lateral and posterior aspect of her thigh to about her knee. Claimant had a tonsillectomy during this admission. Straight leg raising was positive on the right. There was a loss of sensation over the upper leg and significant tenderness along the sciatic nerve path and slight tenderness in the right parasacral areas. She walked with a limp. X-rays showed a tilting of the spine at L4-5 with some straightening of the normal lordotic curve. The radiologist reported minimal sclerosis in the left sacroiliac joint. Claimant was treated with therapy and bedrest. Dr. Morrison causally related the condition to claimant's history of the lifting incident.

In September of 1980 claimant was hospitalized for a dialation and curettment. Notations were made of a long history of nervous tension related to family stress. Straight leg raising was halted by hamstring tightness at fifty degrees bilaterally. There was no sensory or motor loss.

On February 19, 1981 claimant was referred to Dr. Fellows who in turn referred her to Dr. McLarnan for a CT scan.

Claimant last was seen on March 2, 1984 at which time she had grinding of her hip joint, pain with twisting of the torso, pain into her right leg and instability in the right knee. She was referred to Dr. Wolbrink.

Dr. Morrison rated claimant's impairment at approximately five percent. He concluded:

> It would appear to me from the tests and evidence at hand that no clear-cut disk disease could be proven. That doesn't 100 percent indicate it is not possible. As with anything in science and medicine the more times you repeat a given examination or a given experiment or procedure the more reliable it becomes. But in the matter of myelography that has risks. So you don't subject the patient to repeat myelography just out of curiosity. You try to take a different approach to evaluate the information at hand.
>
> And that's what each of these physicians has done. In the final answer to your question it is quite possible to have a chronic lumbosacral sprain, chronic pain problem such as muscle spasm and a disk syndrome coming and going. It may bulge for a while, might retract. Many cases it can go for years and then having had go down. Others with proper management learn to live with it and get along quite well.
>
> I would have to conclude with evidence she probably does not have pressure on her, but that does not mean that she does not have pain. (Transcript, p. 46)

The doctor agreed that claimant was seen a number of times before and after her hospitalization of December 28, 1979 and did not complain of her back.

In an undated letter the doctor suggested claimant might have some underlying disease which could present problems in lifting and he proposed claimant should use care in lifting more than twenty or thirty pounds.

Peter W. Zevenbergen, ACSW, reported seeing claimant for family-related problems.

J. W. Fellows, M.D., saw claimant on March 10, 1981 at which time she was tender in the mid-line and both sacroiliac areas. Straight leg raising was negative to sixty degrees bilaterally. The doctor's impression was low back strain with possible nerve root pressure. Claimant was put on Clinoril and started on back exercises.

Approximately one month later claimant continued to have pain with decreased sensation in an L4 and S1 distribution. She was scheduled for an epidural block. A block was done in May. On June 1, 1981 a myelogram was carried out which showed a bulging disc at L4,5. A final diagnosis of back and leg pain of uncertain etiology was made.

In a letter dated July 21, 1981 Dr. Fellows noted that claimant's Minnesota Multiphasic Personality Inventory suggested a high degree of psychological contribution to her condition. The doctor proposed claimant might need psychiatric help, but might not be willing to accept it. He thought claimant should go back to work, but possibly not as a nurse's aide.

Keith McLarnan, M.D., saw claimant on June 8, 1981. Claimant reported some decrease in sensation over the L5, S1 and S2 dermatones on the right. There was some tenderness to palpation over the sacroiliac portions and perhaps the right sciatic notch. The doctor's impression was chronic lumbosacral strain with a history suggestive of a right-sided sciatica.

Miguel D. Cabanela, M.D., orthopedic surgeon, saw claimant on December 21, 1981. Claimant told of twisting herself lifting a patient, but not having pain until two to three days later. Claimant seemed nervous and limped favoring her right leg. Motion of her lumbar spine was restricted with tenderness over the entire lumbar area and the posterior greater trochanter bilaterally. She did not appear tender over the sciatic notch. Her reflexes were hyperactive. Strength in her lower extremities was symmetrical, but there was a tendency to give way on the right. X-rays were essentially normal. There was no evidence of any neurological deficit. A Minnesota Multiphasic Personality Inventory suggested a functional etiology. Dr. Cabanela concluded the majority of claimant's problems were functional and he found a significant component of tension myalgia. He found claimant unaccepting of his suggestion of a psychiatric evaluation. He could suggest no further treatment for claimant. His opinion did not change after he reviewed claimant's myelogram with a neuroradiologist.

APPLICABLE LAW AND ANALYSIS

The first issue raised by defendants is whether or not claimant has established by a preponderance of the evidence an injury arising 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, 405, 68 N.W.2d 63 (1955).

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

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

The hearing deputy found claimant was injured on Thanksgiving day. That seems an unlikely date of injury. If claimant had been injured on Thanksgiving, she would in all likelihood remember that as the date of the incident.

Defendants point out that claimant's petition alleges an injury of November 24, 1979; that she testified in her deposition to an injury on the weekend on November 24, 1979; and that she claimed at hearing an injury on the weekend on Saturday, November 24, 1979. Claimant asserts that the injury occurred as she was lifting Eileen Murray and being assisted by a college student named Cheryl. Claimant said the incident was reported to a nurse, and more specifically in her deposition to Eileen Murray's niece and to Alice Burns.

Bailey testified that claimant worked neither Saturday nor Sunday following Thanksgiving and that there were no college students working over Thanksgiving weekend. None of the nursing staff called to testify knew about an injury to claimant when it occurred. Neither, contrary to claimant's testimony, did they remember mention by claimant at other times. Claimant said she told Marie Klaffke about the incident. Bailey said Klaffke had no knowledge of such a report. As one of those nurse's, McNally, was the granddaughter of the woman alledgedly involved in the incident, it would seem that she would remember any such occurrence. McNally could not recall mention by her grandmother of a problem when she was being lifted.

Claimant was in the doctor's office on December 1, 9, and 12, 1979 and made no complaints of her back. Such conduct would not be consistent with her testimony that by a week after the injury she was limping and dragging her leg. While it would not be uncommon for a person to have an incident such as claimant described and then at a later time seek medical treatment when symptoms become greater, that was not the scenario offered by claimant. Dr. Rients saw claimant on December 19, 1979 and took a history of a lifting incident the month before. When the chiropractor was asked about causal connection he said that he could "only substantiate this by the honesty of the patient and the fact that she had given a history of no previous problems and stated to us in her case history that she lifted the patient and then the pain had arisen." She was seen on December 21, 1979 and then not again.

On December 28, 1979 she complained of low back pain stemming from a lifting incident about a month before. Dr. Morrison was questioned:

> Q. What is your opinion?
>
> A. I think it is most likely related to that event since I have no other history to give me any other reasons to suspect something else. (Transcript, p. 13)

Claimant worked through December 28, 1979 when she entered the hospital for her tonsillectomy. Thereafter she made no back complaints until September 12, 1980 at which time she had a urinary tract infection. Her petition for workers' compensation benefits was filed on January 8, 1981 and she was not seen for back complaints of an orthopedic nature until February 19, 1981.

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 v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). 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).

Any one flaw in claimant's case might not serve to defeat her claim. The totality of the evidence does not allow claimant to prevail. The record contains evidence which supports claimant's claim. That evidence is based on almost exclusively what claimant herself testified. Even favorable testimony presented might not be sufficient to carry claimant's burden as what she did is contradictory to what she said. She clearly cannot carry her burden in the face of the refuting evidence presented by defendants. Claimant cannot preponderate even by the weight of an eyelash. Her assertions and her conduct do not mesh and major allegations are rebutted by defendants.

In light of the conclusion on the arising out of and in the course of issue, there is no need to consider the other issues raised.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-five years of age.

That claimant is a high school graduate with training as a nurse's aide.

That claimant has brief work experience in a bakery, cafe, and in factories.

Claimant began work for defendant employer on October 2, 1979.

That claimant has not worked since the end of December 1979 and has applied for only one job in March of 1980.

That claimant claimed injury on a weekend and more specifically on November 24, 1979.

That claimant was not at work on November 24, 1979.

That claimant saw a doctor on December 1, 9, and 12, 1979 and failed to report back trouble.

That after claimant's hospitalization in December of 1979 she made no back complaints of an orthopedic nature until February 1981.

That claimant filed a claim for workers' compensation on January 8, 1981.

That claimant failed to tell McNally, Burns, and Jurries of any injury to her back.

CONCLUSIONS 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.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That each party pay the costs of producing its own evidence.

That defendants pay the costs of the attendance of the shorthand reporter at the time of hearing.

Signed and filed this 30 day of September, 1985.

Judith Ann Higgs

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM EARL BARNARD, Claimant,	FILE NO. 606812
vs.	R E V I E W -
WEST DES MOINES COMMUNITY SCHOOL DISTRICT, Employer,	R E O P E N I N G
and	D E C I S I O N
EMPLOYERS MUTUAL CASUALTY CO., Insurance Carrier, Defendants.	FILED SEP 24 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by William Earl Barnard, claimant, against West Des Moines Community School District (hereinafter referred to as school district), employer, and Employers Mutual Casualty Co., insurance carrier, defendants for the recovery of further benefits as a result of a work injury on September 21, 1979 to claimant's left foot. A memorandum of agreement for this injury was filed on October 15, 1979. Claimant is, also, basing his claim for disability upon a back condition allegedly caused by the work injury. On July 1, 1985, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing. Prior to the commencement of the hearing, the parties submitted a pre-hearing report which indicated the status of the issues at the time of hearing. This report was accepted and shall be included in the record of this case.

ISSUES

I. Whether there is a causal relationship between the work injury and the claimed disabilities; and,

II. The extent of weekly benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a brief summary of the pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The record consists of the oral testimony of claimant, claimant's exhibits 1 and 2 and defendants' exhibits A-F. At the time of the hearing, the parties stipulated to the following matters:

1. The work injury of September 21, 1979 is a cause of temporary and permanent disability.

2. Claimant's rate of weekly compensation in the event of an award of benefits from these proceedings shall be $116.93 per week.

3. There is no dispute as to the extent of entitlement to healing period benefits prior to December 16, 1983 and no dispute that claimant is entitled to and was paid healing period benefits from September 21, 1979 through March 17, 1980; from July 1, 1983 through December 15, 1983; and, from March 9, 1984 through July 26, 1984 for a total of 69 3/7 weeks. The dispute is that claimant contends that he is entitled to a running award of healing period benefits after December 15, 1983.

Claimant stated at the hearing that he is 54 years of age and has a high school education.

Claimant's testimony and the medical reports submitted into evidence indicate that claimant had back problems following a fall from a ladder in 1974. Claimant received workers' compensation benefits from this fall. Claimant's physicians describe claimant's past back problems as recurrent, acute low back strain with radiation of pain into claimant's legs. A myelogram in 1974 did not show evidence of any disc problem. The doctors had not given a permanent partial impairment rating for claimant's back prior to the work injury herein. Also, claimant had considerable trouble with phlebitis in his right leg prior to the work injury in September 1979. This condition caused symptoms consisting of recurrent swelling and pain while squatting and climbing stairs.

42

Claimant testified that his employment prior to the work injury consisted primarily of manual labor in jobs ranging from the operation of machinery and coal mining to janitorial or custodian work. However, since the work injury, claimant has had considerable experience, including supervisory work, in telephone sales and clerical work handling credit card payments. Claimant began working for the defendant school district shortly before the work injury on September 17, 1979 as a custodian. According to the director of maintenance for the school district, claimant was earning $4.20 per hour at the time of the work injury.

The facts surrounding the work injury are not in dispute. Claimant testified that on the date of injury he accidently locked himself inside the school complex after hours. While climbing over a security fence in an attempt to leave the complex, he fell and injured his left heel. Initially, claimant was treated by physicians at Iowa Lutheran Hospital in Des Moines, Iowa. The doctors at Iowa Lutheran diagnosed claimant as suffering from a left calcaneal fracture. Claimant was later referred to Peter D. Wirtz, M.D., an orthopedic surgeon, who treated claimant continually until he left the state of Iowa in 1984. Claimant's initial medical treatment by Dr. Wirtz was conservative and consisted of compression for the swelling and periodic limitations of activity. Such treatment was effective at first and claimant returned to work on a half-time basis in March 1980 and on a full-time basis approximately one month later. The evidence does reveal that claimant fell at the hospital a few days after the work injury but according to the hospital records, this fall was not serious and required no additional treatment.

Claimant testified that his back began to hurt in March 1980 from the gait he was compelled to assume after the heel injury. Dr. Wirtz's clinical notes mentioned the onset of claimant's back pain at that time, but the doctor did not indicate the cause. Dr. Wirtz's diagnosis of the condition was "disc degeneration with left leg radiation."

Claimant testified that he was laid off by the school district in May 1980. However, defendants have placed into evidence, as an exhibit during the deposition of the director of maintenance, a letter of resignation signed by claimant on May 2, 1980 indicating that he was leaving the employment of the school district for personal reasons. The employment records of the school district state that claimant left to assume other employment. Claimant neither explained this resignation letter during the hearing in this case nor did he indicate to what extent, if any, the work injury motivated the resignation. Starting in June 1980, claimant began working in telephone sales and later assumed the job as a supervisor in such sales activities. This employment lasted approximately two and one-half years.

Although medical treatment for claimant's left foot did not completely end in 1980, the frequency of such treatment greatly subsided in 1980 and 1981. On August 13, 1980, Dr. Wirtz rated claimant's permanent partial impairment from the work injury as nine percent of the left lower extremity and released him from his care. However, during the latter part of 1982, claimant began to have more frequent phlebitis type symptoms in his left foot and leg which consisted of persistent swelling and pain above and below the ankle area. After conservative treatment failed to improve claimant's condition and phlebitis was ruled out as a cause, Dr. Wirtz performed a surgical procedure upon claimant's left ankle area termed a left subtalar joint fusion on July 1, 1983. Dr. Wirtz causally connected the need for this surgery to the work injury of 1979. On December 22, 1983, Dr. Wirtz indicated, in his reports, that claimant's condition stablized and he increased claimant's permanent partial impairment rating following the surgery to 20 percent of the left lower extremity. Dr. Wertz felt, at the time, that claimant should resume full employment but must restrict his weight bearing on his left leg and walking.

Claimant's condition failed to improve as expected by Dr. Wirtz. In February 1984, claimant underwent a second operation to remove a metal staple or pin used in the fusion surgery. In March 1984, claimant developed a serious secondary infection in the surgical wound area. This infection took several months to heal. Finally, Dr. Wirtz released claimant from his care on July 18, 1984. The doctor stated at that time that his rating of claimant's permanent partial impairment remained the same and that claimant would not be able to resume work until the end of July 1984.

Also from March 1984 through July 1984, claimant stated that he worked two days per week in a credit card payment department of an oil company at the rate of $5.00 per hour. Claimant said that he used crutches during this time. In July 1984, claimant moved to the state of Kentucky and in September 1984, he started a new job with a school system doing much of the same work as he had done for the defendant school district herein. Claimant continues to work in this job at the present time. His current wage is $4.46 per hour and works approximately 37 hours per week during the school year.

Claimant testified that he continues to have problems with his left leg and foot with persistent swelling, pain and loss of motion. Although sitting causes him no problem, standing still for any more than 30 or 45 minutes compels him to change positions or sit down. Claimant states that he is continuing to receive treatment for his left leg from Agustin Sierra, M.D., an orthopedic surgeon at his current place of residence. Dr. Sierra stated in his report that he saw claimant on two occasions in the fall of 1984 at which time he prescribed a brace attached to an orthopedic high top shoe. Dr. Sierra recommends moderation of claimant's activities and to avoid excessive standing or walking. Dr. Sierra agrees with Dr. Wirtz's permanent partial impairment ratings. Claimant has not sought treatment for his back problems since March 1980.

Claimant said that he must limit his activities in his current job to his physical limitations. He said that he will fall without use of his leg brace. Walking and climbing ladders causes him considerable problems both in his leg and back. Claimant described a recent incident in which he fell a few feet off a ladder after catching his leg brace on the ladder framework. Claimant indicated that he has sought different, less demanding work but employers would not hire him after being informed of his physical problems.

APPLICABLE LAW AND ANALYSIS

A memorandum of agreement was filed for this injury. A memorandum of agreement conclusively establishes an employer-employee relationship and the occurrence of an injury arising out of and in the course of employment. Trenhaile v. Quaker Oats Co., 228 Iowa 711, 292 N.W. 799 (1940); Fickbohm v. Ryal Miller Co., 228 Iowa 919, 292 N.W. 801 (1940). It does not establish the nature or extent of disability. Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (1975). It cannot be set aside by this agency. Whitters & Sons, Inc. v. Karr, 180 N.W.2d 444 (1970).

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of disability. 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

Although the parties have stipulated that the work injury is a cause of permanent disability, the type of permanent disability is disputed.

Permanent partial disabilities are classified as either scheduled or unscheduled. 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); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

Claimant in this case is seeking permanent industrial disability arising from a body as a whole injury to his back rather than disability arising from a scheduled member injury to his left leg. The greater weight of evidence in this case only shows an injury and permanent impairment to the left leg, not to the body as a whole. Claimant has had a long standing recurrent back problem since 1974. Therefore, the opinions of medical experts as to causation of a recurrence of back pain after a work injury is extremely important. Claimant has not offered any such medical opinions. Claimant testified that he felt that the pain was due to his gait after the work injury. However, such self-serving opinions from a person not qualified to make orthopedic evaluations cannot be given much weight. Given such an extensive history of back problems and the lack of any medical evidence from qualified physicians that would establish a causal connection between the work injury and back pain, the preponderance of the evidence only shows that the work injury was a cause of a permanent scheduled member disability.

II. When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Graves, 331 N.W.2d 116 (Iowa 1983); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Industrial Commissioner's Rule 500-2.4 provides:

> The Guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under section 85.34(2) "a"-"r" of the Code. The extent of loss or percentage of permanent impairment may be determined by use of this guide and payment of weekly compensation for permanent partial scheduled injuries made accordingly. Payment so made shall be recognized by the industrial commissioner as a prima facie showing of compliance by the employer or insurance carrier with the foregoing sections of the Iowa Workers' Compensation Act. Nothing in this rule shall be construed to prevent the presentations of other medical opinion or guides for the purpose of establishing that the degree of permanent impairment to which the claimant would be entitled would be more or less than the entitlement indicated in the AMA guide.
>
> This rule is intended to implement section 85.34(2) of the Code.

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. Graves, 331 N.W.2d 116 (Iowa 1983). The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The evidence is rather clear that claimant suffered a 20 percent permanent partial impairment of the left extremity as a result of the work injury and complications in the treatment of the condition after the injury. The causal connection opinion of Dr. Wirtz is uncontroverted. Although the injury was only to the heel and ankle, there is clear involvement into the lower leg and surrounding muscles before and after the fusion surgery. Therefore, the extent of disability benefits is limited to 20 percent of the maximum number of weeks allowed for leg injuries -- 220. Claimant is then entitled to 44 weeks of permanent partial disability. Iowa Code section 85.34(2)(o).

As claimant has established entitlement to permanent partial disability, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34 from the date of injury until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of the injury; or until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

Prior to December 16, 1983 and for the period of time from March 9, 1984 through July 26, 1984, there is no dispute as to entitlement to healing period benefits. Claimant's contention that he is entitled to a running award after December 15, 1983, is not supported by the evidence. Furthermore, despite a rating of permanent partial impairment and a report indicating that Dr. Wirtz felt that claimant's condition had stablized on December 22, 1983, his healing period did not end at that time. Due to complications involving the metal pin inserted into the heel during the fusion surgery and the onset of secondary infection, claimant's treatment remained continuous until his release by Dr. Wirtz in July 1984. Dr. Wirtz stated that claimant would not be able to work until the end of July 1984 at the time of his release of claimant. Therefore, claimant is entitled to healing period benefits in addition to those period of times stipulated by the parties from December 16, 1983 through March 8, 1984 and from July 27, 1984 through July 31, 1984.

FINDINGS OF FACT

1. Claimant was in the employ of defendant school district at all times material herein.

2. Claimant's job on September 21, 1979 consisted of custodian work.

3. On September 21, 1979, while performing his work as a custodian, claimant injured his left heel and suffered a left calcaneal fracture.

4. As a result of the work injury, claimant underwent a surgical operation termed a left subtalar joint fusion and a subsequent surgery to remove a metal staple or pin inserted during the earlier fusion surgery.

5. Prior to the work injury, claimant had injured his back and has suffered from recurrent back problems since 1974.

6. Prior to the work injury, claimant suffered no impairments or disabilities of his left leg.

7. As a result of the work injury, claimant developed conditions of chronic swelling and pain of his left leg.

8. As a result of the work injury, claimant has suffered a 20 percent permanent partial impairment of his left lower extremity.

9. As a result of his work injuries, claimant was expected to improve as a result of treatment of his work injury during the following periods of time: from September 21, 1979 through March 17, 1980; from July 1, 1983 through December 15, 1983; and from March 9, 1984 through July 26, 1984 as stipulated by the parties and in addition from December 16, 1983 through March 8, 1984 and from July 27, 1984 through July 31, 1984.

10. Pursuant to stipulation of the parties, claimant's rate of compensation is $116.93 per week.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that the injury of September 21, 1979 is a cause of permanent scheduled member disability but failed to establish by a preponderance of the evidence that the injury was a cause of permanent industrial disability.

II. Claimant has established by a preponderance of the evidence entitlement to permanent partial disability benefits for 44 weeks and total healing period benefits for 81 6/7 weeks.

ORDER

Accordingly, the following is ordered:

1. Defendants shall pay claimant forty-four (44) weeks of permanent partial disability benefits at the rate of one hundred sixteen and 93/100 dollars ($116.93) per week from March 18, 1980.

2. Defendants shall pay to claimant healing period benefits from September 21, 1979 through March 17, 1980 and from July 1, 1983 through July 31, 1984 at the rate of one hundred sixteen and 93/100 dollars ($116.93) per week.

3. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

4. Defendants shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

5. Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

6. Defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

7. This matter shall be set back into assignment for pre-hearing and hearing on the bifurcated issue of entitlement to penalty benefits under Iowa Code section 86.13.

Signed and filed this 24 day of September, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL R. BJORKLUND,	:	
Claimant,	:	
vs.	:	File No. 692185
DEMCO, 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
AMERICAN MOTORIST INSURANCE COMPANY,	:	FILED JUL 23 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Michael R. Bjorklund, claimant, against Demco, Inc., employer, and American Motorist Insurance Company, insurance carrier, defendants, to the recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on February 2, 1981. It came on for hearing on June 4, 1985 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted on June 17, 1985 with the filing of the deposition of Jerome Bashara, M.D.

The industrial commissioner's file contains a first report of injury received January 21, 1982. A form 2A shows the payment of thirty-three weeks and four days of healing period and the payment of seventy-one and a quarter weeks of permanent partial disability which equates to twenty-eight and one-half percent of an arm.

The record in this matter consist of the testimony of claimant and Richard J. Goodwin; claimant's exhibit 1, a series of medical reports from William R. Boulden, M.D.; claimant's exhibit 2, a series of medical reports from Douglas S. Reagen, M.D.; claimant's exhibit 3, the deposition of Dr. Bashara; claimant's exhibit 4, wage records; claimant's exhibit 5, an emergency room record dated February 2, 1981; defendants' exhibit A, a form 2A; defendants' exhibit B, letters from Thomas A. Carlstrom, M.D.; defendants' exhibit C, a form from Job Service of Iowa; defendants' exhibit D, a summary of wage information. Claimant submitted a brief.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury of February 2, 1981 and any disability he now may suffer; whether or not claimant is entitled to additional healing period or permanent partial disability benefits and the proper rate of compensation.

STATEMENT OF THE CASE

Thirty-three year old right-handed, married claimant, father of one child who has been employed by defendant employer for nearly six years and who is not presently working because of a back injury, recalled the circumstances surrounding his injury of February 2, 1981 as follows: He had driven a boom truck to Newton. He had spotted some cement blocks where the customer wanted them. He was stacking wooden pallets against a telephone pole so that they could be loaded with a forklift. In that process, he injured his right elbow between pallets.

He went to the hospital for x-rays to see if anything was broken. He then was treated by Dr. Hopkins who gave him cortisone injections to the elbow. Although he had no time off, he had trouble lifting, pain and numbness. He was referred by Dr. Hopkins to William R. Boulden, M.D., who hospitalized him overnight for surgery beginning on January 5, 1982. He had therapy thereafter. He was released for light duty in March. After six hours he was laid off. Because he was continuing to have trouble with his arm and because he knew a second surgery was required, he decided to go ahead with that operation which was done on March 25, 1982.

He felt that the first procedure was "pretty successful," but the second did not achieve a very good result. Dr. Boulden referred him to Douglas S. Reagan, M.D., due to continued pain and numbness in his elbow and arm. Dr. Reagan did additional surgery but the arm stayed the same except that he could straighten it a bit more. Claimant said that the surgery was originally scheduled for January 1983, but as he was on layoff he had the surgery moved back so that he could return to work as soon as possible. He went back to his job on January 14, 1983 and he continued to work until his most recent injury. He said that he compensated for the problem with his right arm by using his left arm. He has done basically the same work as before including driving a semi and a boom truck and doing all the jobs in the plant.

Claimant's current complaints include these: Numbness in his fourth and fifth fingers and arm, loss of strength in the hand with weakness in the interosseous area, difficulty grasping things for long periods, an inability to straighten his arm, pain with some movements and a tingling sensation with others and greater reach with his left arm. He indicated that his pain depends on his activity. Too much activity causes a spike feeling in the center of his hand and at the incision site. He also notices more aching in damp weather. He covers his arm when it is cold. He takes no medication, but he uses a heating pad.

In addition to Drs. Hopkins, Boulden and Reagan, claimant was sent by the insurance carrier to see Thomas Carlstrom, M.D., whom he saw once before the surgery by Dr. Reagan and once after. He also saw Jerome Bashara, M.D., to see if his arm might be improved.

He compared the evaluation performed by the physicians: Dr. Boulden checked with the therapist, did electromyography, examined the arm and moved it about. Dr. Reagan checked him with pins and measured his movement with a goniometer. Dr. Carlstrom spent two or three minutes looking at his arm and feeling it and that was the extent of his exam. Dr. Bashara in a two hour examination x-rayed the arm, checked his movement, examined his hand and fingers, and evaluated his strength.

Claimant testified to various mileage he had incurred. He acknowledged that he had not made any demand for payment before hearing and that he was not aware of his entitlement to mileage expenses.

Claimant reported being paid at different rates depending on the work he was performing with some work paid hourly and other paid by the mile.

Claimant was unsure when he had done so, but he agreed that he had applied for and received unemployment. He said that he was aware that he was certifying that he was ready, willing, and able to work. He denied receiving both workers' compensation and unemployment at the same time.

Richard J. Goodwin, president and general manager of defendant employer since 1980 who has total administrative control of operations and custody and control of personnel records, testified to having a summary prepared based on information from the pay records. He indicated that a normal work week would be thirty-two hours and that the plant was shut down at Christmas week.

Claimant's exhibit 5 was considered for the sole purpose of establishing an emergency room visit by claimant on February 2, 1981.

Dr. Boulden saw claimant on October 29, 1981 and found him to have tennis elbow symptoms on the right. A release was performed on January 12, 1982. Thereafter, claimant was started on range of motion exercises and placed in an elbow brace. In late February claimant continued to have medial epicondylitis and he was injected with Triamcynalone and Xylocaine.

Claimant was released to return to work on March 19, 1982 with a restriction that he wear a tennis elbow strap.

On March 23 further evaluation was contemplated which showed an ulnar nerve palsy. It was determined that claimant needed to have his ulnar nerve moved from the posterior aspect of the elbow to anterior medial aspect of the elbow and that surgery was carried out in April.

In June of 1982 claimant developed a frank ulnar nerve palsy in his left arm with clawing of the fourth and fifth fingers. By the end of the month, claimant had a condition at the elbow which caused the doctor to wonder if there had been new scarring. The Tinel's was still positive. Arrangements were made for claimant to see Dr. Reagan.

In August of 1982 Dr. Boulden assigned an impairment rating of forty-two percent of the right upper extremity based on the orthopedic guide. He anticipated the figure might change if surgery were performed. Claimant was released to return to work on August 30, 1982.

Dr. Reagan saw claimant on July 14, 1982 and noted atrophy of the first dorsal interosseous and diagnosed an ulnar neuropathy of the right elbow of an unknown type. By November 29 claimant was scheduled for admission for surgery in January which later was moved to December 15, 1982. A neurolysis of the right elbow was done December 16. Claimant was released to return to work on January 15, 1983. Clawing was present in the fourth and fifth fingers. Median nerve function was intact. Sensation was decreased in the ulnar nerve distribution.

Although claimant denied any improvement after surgery, Dr. Reagan's examination showed that claimant had indeed improved. On May 11, 1983 an examination was done to establish an impairment rating which was found to be thiry-seven percent.

Thomas A. Carlstrom, M.D., saw claimant on November 9, 1982 and observed a great deal of atrophy in the intrinsic muscles of the hand. The Tinel's sign was present from the arm to the hand. The doctor suggested reexploration of the ulnar nerve by Dr. Reagan. He rated claimant's impairment based on mild motor loss and significant sensory loss at twenty-five to thirty percent.

Dr. Carlstrom next saw claimant on October 6, 1983. Extension at that time was to 80 degrees. Pronation and supination were normal. There was a Tinel's sign. The ulnar innervated muscles of the right hand and wrist were eighty percent of normal. There was clawing of the little and ring fingers. Claimant continued to complain of sensory dysfunction and weakness. Claimant's impairment was set at twenty to twenty-five percent.

Jerome G. Bashara, M.D., board certified orthopedic surgeon, examined claimant on June 26, 1984 and also reviewed various records and x-rays. He took a history of a pallet falling on claimant's right elbow producing a numb feeling from the elbow down to the ring and little fingers which was followed by a tennis elbow release, an injection for medial epicondylitis, a repair of the right ulnar nerve and epicondylectomy, release of the right ulnar nerve and neurolysis with excision of a subcutaneous tissue mass.

In order to evaluate claimant's condition, Dr. Bashara had electromyography and nerve conduction studies done. He believed electromyography showed an active right ulnar neuropathy with compression at the elbow. Dr. Bashara rated claimant's impairment at forty percent based on pain, weakness, loss of sensation and of motion, and on the AMA and Orthopedic Guides. He thought claimant should avoid activity involving repetitive motions which would aggravate his symptoms. The surgeon causally related claimant's disability to his injury. He did not, however, connect claimant's neck complaints. Nor did he think claimant's condition extended to his shoulders.

APPLICABLE LAW AND ANALYSIS

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

There is no evidence in the record to show that claimant's disability stems from any source other than his injury of February 2, 1981 and it is concluded that claimant has carried his burden of establishing a causal relationship between that injury and his disability.

Claimant stated at the time of hearing that his claim is for impairment to a scheduled member.

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores 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 has been seen by four physicians -- Drs. Boulden, Reagen, Carlstrom and Bashara. In August of 1982 Dr. Boulden used the Orthopedic Guide to rate claimant's impairment at forty-two percent. In November of 1982 Dr. Carlstrom provided a rating of claimant's impairment at from twenty-five to thirty percent and in October of 1983 at from twenty to twenty-five percent. In May of 1983 Dr. Reagen rated claimant's impairment at thirty-five percent. In June of 1984 Dr. Bashara assessed an impairment of forty percent based on pain, weakness, loss of sensation and motion and the AMA and Orthopedic Guides.

The ratings of Drs. Boulden, Reagen and Bashara are very close at forty-two, thirty-seven and forty percent respectively. Those ratings are being added together and divided by three to obtain a rating of forty percent. Dr. Carlstrom's ratings are ranging from twenty to thirty percent out of line with those of the other three doctors, and in light of claimant's testimony concerning Dr. Carlstrom's examination, little weight can be given to his estimation. See generally Grove v. Quality Products, Inc., II Iowa Industrial Commissioner Report 52 (Appeal Decision 1982); Lemon v. Georgia Pacific Corporation, I Iowa Industrial Commissioner Report 204 (Appeal Decision 1981); Purdy v. Adair County, I Iowa Industrial Commissioner Report 310 (Appeal Decision 1981); Carver v. Bay-Con Corporation, 34 Biennial Report of the Industrial Commissioner 67 (Appeal Decision 1978); Rieland v. Palco, 32 Biennial Report of the Industrial Commissioner 62 (Review Decision 1975); Strohmeyer v. Dubuque Packing Co., III Iowa Industrial Commissioner Report 244 (1982); Hamelton v. Midwest Carbide, III Iowa Industrial Commissioner Report 114 (1982). Claimant will be paid 100 weeks of permanent partial disability.

Claimant seeks an adjustment in healing period benefits. A form received by the industrial commissioner on April 13, 1984 shows the payment of healing period benefits from January 8, 1982 through March 18, 1982; from March 22, 1982 through August 3, 1982 and from December 16, 1982 through January 14, 1983.

Claimant claims and he testified he was hospitalized for surgery on January 5, 1982. No medical evidence was offered to verify that date and claimant's testimony stands uncontradicted. Claimant seemingly was released for light duty to begin on March 19, 1982 and he did return to work. Defendants properly terminated healing period at that time. However, after claimant worked less than a day he was laid off. At that point he was not working, he was not capable of doing substantially similar work and according to Dr. Boulden he had not reached maximum medical recuperation. Therefore, he should have gone back on compensation on March 20 and that period should have run through August 29, 1982 as claimant was released to return to work on August 30, 1982. Claimant's next hospitalization began on December 15, 1982. He was returned to work on January 15, 1983. As that date was a Saturday, healing period will be extended through January 16, 1983.

The final issue to be decided is that of rate. Iowa Code section 85.36 in the first unnumbered paragraph provides for 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, as regularly required by his employer for the work or employment for which he was employed...."

The Iowa Supreme Court has instructed that the workers' compensation law is "for the benefit of the working man and should be, within reason, liberally construed." Barton, 253 Iowa 285, 289, 110 N.W.2d 660, 662 (1961). See Rish v. Iowa Portland Cement Co., 186 Iowa 443, 451, 170 N.W. 532, 535 (1919). Decisions of this agency have placed emphasis on completeness thereby giving a liberal construction to benefit the working person. Incomplete work weeks are excluded. See Lewis v. Aalf's Manufacturing Co., I Iowa Industrial Commissioner Report 206, 207 (Appeal Decision Decision 1980); Aiello v. Alcoa, I-1 Industrial Commissioner Decisions 4 (1984); Schotanus v. Command Hydraulics, Inc., I Iowa Industrial Commissioner Report 294 (1981).

Claimant's exhibit 4 and defendants' exhibit D have been used to determine the rate in this matter for a married claimant with three exemptions. The following weeks and amounts were used:

1-29-81	$233.67
1-22-81	368.52
1-15-81	266.58
1-08-81	213.36
1-01-81	197.48
12-18-80	253.51
12-11-80	227.21
11-20-80	206.38
11-13-80	307.85
11-06-80	309.77
10-30-80	326.73
10-23-80	334.32
10-16-80	400.82

Overtime pay was figured at straight time. The week containing New Year's was included. Goodwin testified that the usual work week would be thirty-two hours. Claimant appears to have averaged about that much work. The week of January 1 provided him with thirty-two and three-quarters hours of work. Christmas week was excluded because the plant was shut down and claimant was paid only for Christmas day. The week of December 4 appears to have been a partial week and is excluded as well. The weeks included are believed by this deputy commissioner to be complete weeks which total an amount of $3,646.20 which when divided by thirteen yields an average gross weekly wage of $280.48 thereby entitling claimant to a weekly rate of compensation of $176.69.

Claimant at the time of hearing first raised the issue of payment of medical mileage expenses. He acknowledged he had not sought payment for those expenses before. While defendants cannot be expected to pay expenses of which they are not aware, they have paid in excess of $8,000 in medical benefits and it would seem safe to assume claimant had driven some miles for medical treatment. As medical benefits were not made an issue at the time of pre-hearing, no specific order will be entered. However, defendants are urged to the pay amounts claimant can substantiate.

There also seems to be some dispute between the parties regarding the amounts of weekly benefits paid. The easiest way to resolve that would seem to be for the insurance carrier to send claimant copies of the drafts paying his weekly benefits.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-three years of age.

That claimant is right-handed.

That claimant is married and entitled to three exemptions.

That claimant's gross average weekly wage in thirteen complete weeks prior to his injury was $280.48.

That claimant injured his right elbow as he was working at a job site and he sought emergency treatment on February 2, 1981.

That claimant was hospitalized for surgery performed January 15, 1982.

That claimant was released for light duty on March 19, 1982.

That claimant's second hospitalization for surgery began in April of 1982.

That claimant was released to return to work on August 30, 1982.

That claimant was hospitalized for surgery beginning December 15, 1982.

That claimant was to return to work on January 15, 1983.

That claimant has incurred mileage expenses because of his injury but for which he made no demand until the time of hearing.

That claimant has some motor and sensory loss and pain and weakness in his right upper extremity.

That claimant has a forty percent impairment to his right upper extremity.

That claimant was off work because of his injury from January 5, 1982 through March 18, 1982; from March 20, 1982 through August 29, 1982 and from December 15, 1982 through January 16, 1983.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence a causal connection between his injury of February 2, 1981 and the disability on which he now bases his claim.

That claimant has established entitlement to one hundred (100) weeks of permanent partial disability payments.

That claimant has established entitlement to healing period benefits from January 5, 1982 through March 18, 1982; from March 20, 1982 through August 29, 1982 and from December 15, 1982 through January 16, 1983.

That claimant has established entitlement to a rate of compensation of one hundred seventy-six and 69/100 dollars ($176.69) per week.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant one hundred (100) weeks of permanent partial disability benefits at a rate of one hundred seventy-six and 69/100 dollars ($176.69) with payments to commence on January 17, 1983.

That defendants pay unto claimant healing period benefits from January 5, 1982 through March 18, 1982; from March 20, 1982 through August 29, 1982 and from December 15, 1982 through January 16, 1983 at a rate of one hundred seventy-six and 69/100 dollars ($176.69).

That defendants be given credit for amounts previously paid.

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 activity reports as requested by this agency.

Signed and filed this 23 day of July, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVE BREESE,	:	
Claimant,	:	
vs.	:	FILE NO. 737814
IOWA PAINT MANUFACTURING CO.,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
U. S. INSURANCE GROUP,	:	
Insurance Carrier, Defendants.	:	

FILED
AUG 19 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Steve Breese against Iowa Paint Manufacturing Co., employer, and U. S. Insurance Group, insurance carrier. Claimant entitled his petition as one in review-reopening but the file shows no prior award or agreement for settlement and the action is properly characterized as a proceeding in arbitration.

Claimant alleges that he sustained a compensable injury to his back on June 22, 1983 and seeks compensation for temporary total disability or healing period, permanent partial disability and section 85.27 benefits.

The case was heard at Des Moines, Iowa on May 14, 1985 and was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of Steve Breese, James Hildman, Randy Varley, Judith Breese and Floyd Walker. Claimant's exhibit 1 through 6, 8, 9, 10, 12 and 13 and defendants' exhibits A, B, C and D were received into evidence. Exhibit D was received solely for whatever materiality it may have in regards to the authorization issue. Exhibits 7 and 11 were not received into evidence but are part of the record as offers of proof only.

ISSUES

The issues presented by the parties at the time of hearing are whether a causal connection exists between the injury and any disability or medical expenses. Claimant seeks payment of certain expenses of medical care and transportation under section 85.27 which defendants allege was unauthorized. Claimant seeks additional relief based upon an allegation that weekly compensation was terminated without a 30 day written notice of termination. Claimant seeks payment of $100 for a report from David B. McClain, D.O. The rate of compensation is an issue in this case. Claimant has made a claim for additional benefits under the fourth unnumbered paragraph of section 86.13 but such claim has been bifurcated from the main part of the case. Evidence on said claim was not received at hearing and this decision will not address the section 86.13 issue.

It was stipulated that claimant has been paid 50 1/7 weeks of compensation for temporary total disability; that claimant has not returned to work; and, that the amounts charged for the medical services which claimant has received are fair and reasonable.

SUMMARY OF EVIDENCE

Steve Breese testified that he is 30 years of age and married. He stated that he has two children, ages five and seven, from a previous marriage. The children reside with his former spouse and he is required by court decree to pay $25 per week child support but he does not claim the children as deductions for income tax purposes. He stated that his payments are not now current and he does not know if he was current at the time of injury.

Claimant stated that he graduated from high school in 1974 and has taken a one year course in auto mechanics. He related having a substantial amount of work experience in the area of auto mechanics. He has supervised other mechanics. Claimant has played the drums and bass guitar in a band. Claimant is also skilled in TV repair. He has been self-employed performing auto mechanics and TV repair. Claimant once worked briefly selling shoes in a department store. Claimant testified that he is now attending the local Area Community College.

Claimant testified that he started working for Iowa Paint Manufacturing Co. in June 1983. He stated that he was initially employed filling five gallon cans and was then moved to handling 55 gallon drums. He stated that on June 22, 1983 he was filling a 55 gallon drum with paint. He stated that the drum weighed approximately 600 pounds. He stated that as he started to move the drum it began to slip off the jack. He grabbed it in order to prevent spilling the paint and felt a pain which ran from his lower back up to his shoulder. Claimant testified that he remained at work the rest of the day but did little work. Claimant considered himself to have been in good physical condition at the time of the injury.

Claimant testified that at the time of injury he earned $6.00 per hour and worked eight hours per day.

Claimant testified that on the day of injury he soaked in the tub and rested when he got home following work. He stated that he felt worse the next day. He went to work, talked to his supervisor and an appointment was made for him to see a doctor at 10:30 a.m. Claimant stated that he was assigned to filling 55 gallon drums until it was time for him to go to the doctor's appointment. He stated that he worked slowly and that the worked caused a great deal of pain. He related receiving assistance from the union steward and a forklift operator.

Claimant testified that he was examined by Steve Eckstat, D.O., who directed him to go home, rest, soak and that a return visit was scheduled. Claimant received treatment under the direction of Dr. Eckstat which he felt was not beneficial. He stated that Dr. Eckstat released him to return to work if he felt better but that he did not feel better and the doctor then provided additional treatment. After approximately six months had passed, claimant was sent to the Mercy Pain Center.

Claimant testified that he has also received care from Robert J. Connair, D.O., upon the recommendation of his sister-in-law. Claimant stated that Dr. Connair is the only physician who has helped him and that the headaches and pain in his left arm which had their start at the time of the injury were relieved while he was receiving treatment from Dr. Connair. Claimant stated that the insurance carrier had authorized him to obtain treatment from Dr. Connair and had paid some of the bills but that a representative of the carrier subsequently stopped paying the bills and directed claimant to Dr. Eckstat only. Claimant stated that the insurance carrier has also recommended that he see Sinesio Misol, M.D. Claimant stated that he still goes to Dr. Connair because Dr. Connair makes him feel better.

Claimant testified that James L. Blessman, M.D., and Dr. McClain have recommended that he perform light duty work. He stated that Dr. Connair has recommended that he avoid all manual labor and playing the drums. He stated that Dr. Misol has released him to return to work without restrictions. He stated that Drs. Misol and McClain have recommended retraining.

Claimant testified that he had been contacted by Judy Steenhoek, a rehabilitation specialist, but that she did not assist him in obtaining retraining or employment.

Claimant testified that he has searched for lighter work and for work at garages and service stations. He related being hired at a Goodyear Store subject to a physical but that the physician who examined him would not recommend him for employment. He stated that he has tried to find work as a bus driver.

Claimant testified that he has done little in the music field since the injury but that he has done some auto mechanics on his own. He related that in 1984 he earned $1,400 performing mechanical work and approximately $1,500 playing in a band.

Claimant related that the state vocational rehabilitation service has recommended that he obtain training in electronics and that the courses he is now taking through the Area Community College are intended to enable him to enter the field of computer maintenance. Claimant does not feel that he can continue working on cars or playing in a band.

Claimant testified that he has spoken with Floyd Walker at Iowa Paint regarding returning to work but that he was advised that light duty work was not available.

James Hildman testified that he has known claimant since 1976. He stated that claimant has worked on his car as recently as last fall or summer. He stated that he has played in a band with claimant and that they are now forming a new group. He stated that claimant is now playing the drums. Hildman indicated that claimant had previously played a bass guitar but that he had found it too heavy after the injury.

Randy Farley testified that he has worked with claimant as an auto mechanic. He related that he has also observed claimant performing mechanical work since the injury. He stated that claimant did minor work such as tune-ups and carborator repair but did nothing heavy. He stated that claimant worked at his own pace and voiced complaints whenever he tried to overdo himself. Farley related that when he had known claimant prior to the time of the injury, claimant had no disability or physical problems.

Judith Breese testified that she has been married to claimant for approximately three years. She stated that claimant was previously very physically fit and active. She recalled the day when claimant came home making complaints of pain between his shoulder blades and on the left side of his spine. She stated that he went to work the following day contrary to her recommendations. She stated that claimant did everything which he had been directed to do since the injury. Mrs. Breese testified that the TENS unit was given to him at the hospital. She expressed the opinion that Dr. Connair had helped claimant but that the other medical practitioners had not.

Floyd Walker testified that he is the plant supervisor of Iowa Paint Manufacturing Co. and that he is familiar with claimant's accident. Walker testified that claimant has never requested any light duty work and has never brought in any return to work slips. He stated that he could have provided light dury work in the nature of sweeping floors and clean up for approximately six to eight weeks but that claimant would then either have to move back to his regular job or cease employment. Walker testified that following the injury he initially talked with claimant frequently and that he also reviewed reports with Judy Steenhoek. He did not know, however, what recommendations had been made by Dr. Misol.

Claimant's exhibit 1 is a statement from Mercy Hospital Medical Center in the amount of $10. Exhibit 2 is a bill from Robert J. Connair, D.O., which shows payments of $485 and an unpaid balance of $275. Exhibit 3 is claimant's mileage claim. Exhibit 4 is a copy of a letter documenting the claim made by claimant's counsel for $100 as reimbursement for the fee for a medical report. Exhibit 5 is a statement from Mid-Central Medical Limited in the amount of $312 representing rental charges for a TENS unit.

Exhibit 6 is a letter from U. S. Insurance Group to claimant dated May 8, 1984 which notifies claimant that temporary total disability compensation would terminate on June 8, 1984. Exhibit 7 remains in the record as an offer of proof only and was not received into evidence. Exhibit 8 conveyed exhibit 5 to U. S. Insurance Group. Exhibit 9 notified claimant's counsel that the services of Judy Steenhoek, rehabilitation specialist, had been terminated. Exhibit 10 is a communication from claimant's counsel to defense counsel. Exhibit 11 was not received into evidence but is part of the record as an offer of proof only. Exhibit 12 is the curriculm vitae of Dr. Connair.

Exhibit 13 contains a collection of medical records and reports dealing with claimant. Exhibit 14 is a report from Steven Eckstat, D.O., dated July 14, 1983.

Exhibit A is a collection of medical reports dealing with claimant. Exhibit B is the deposition of Sinesio Misol, M.D., taken January 22, 1985. Exhibit C is the deposition of Steven Eckstat, D.O., taken January 14, 1985. Exhibit D is a collection of written communications dealing with claimant's medical care.

APPLICABLE LAW AND ANALYSIS

The answer filed in this case by defendants admits that claimant sustained an injury on June 22, 1983. Claimant's testimony described the manner in which he was injured. It is therefore found that claimant did sustain an injury when attempting to control a 55 gallon barrell of paint which had slipped from its jack.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 22, 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).

In exhibit 13, Dr. Connair related the complaints involving claimant's upper back to the injury of June 22, 1983. Dr. McClain, as shown in exhibit 13, made a similar connection between the injury and claimant's employment activity. Dr. Misol indicated that an attempt to control a 600 pound barrell would be likely to produce injury. It is therefore found and concluded that the injury of June 22, 1983 which claimant described is a proximate cause of the disability which he has suffered and continues to suffer in the area of his upper back.

The physicians who have examined claimant have been consistent in diagnosing a muscle strain. It has most commonly been referred to as a sprain or strain of the trapezius muscle. References also appear to the cervical region, thoracic spine and shoulder. They are not, however, totally inconsistent and it is found that the injury of June 22, 1983 was a sprain or strain of claimant's trapezius muscle. This is an injury which could be expected to affect the thoracic spine, shoulder and cervical region.

The medical practitioners do not, however, appear to agree on the facts which would provide the basis for determining claimant's entitlement to compensation for healing period under Code section 85.34(1). At the time of hearing claimant had not returned to regular full-time gainful employment. Dr. Eckstat had initially released claimant to return to work on July 18, 1983 but then, as shown at page 12 of exhibit C, recommended that he remain off work as of August 1, 1983. It appears that the intended release was in the nature of a trial which was not successful. Dr. Misol indicated at page 10 of exhibit B that normal recovery for an injury of the type claimant suffered is six to eight weeks. Dr. McClain placed the recovery time at six months. Dr. Blessman released claimant to return to light duty work on April 1, 1984 and indicated that he should have been capable of returning to full duty approximately six weeks thereafter. Dr. Connair has consistently found claimant to be unable to work. None of the physicians who have treated or examined claimant have found any condition other than that related to the trapezius muscle injury. The primary factor which has kept claimant off work is his complaints of pain. This makes claimant's credibility a very important factor. Dr. Misol found no reason to doubt claimant's complaints of pain. Dr. Blessman gave no indication that claimant's complaints were invalid or unwarranted. Claimant did sustain a traumatic injury which was medically diagnosed. He appeared and testified at hearing where his appearance and demeanor were observed. It is found that claimant is a credible witness. Claimant had been placed on a course of medical care which led him to Dr. Blessman. Under the direction of Dr. Blessman he was released to return to light duty work on April 1, 1984 and it was indicated that he could resume full duties six weeks thereafter, which by computation would be May 13, 1984. Healing period must be determined to end at the time when the medical practitioners indicate that further recovery is not anticipated. It is not determined by hindsight. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984).

Claimant's injury was not to a scheduled member and his entitlement to compensation for permanent partial disability must be considered. Drs. Eckstat and Connair made no evaluation of permanent impairment. Dr. McClain gave claimant a six percent permanent impairment rating of the body as a whole. Dr. Misol, at page 25 of exhibit B, in discussing the issue of permanent physical impairments stated: "I may say, it appears to me that there is some degree, however, I cannot measure." Dr. Blessman through his recommendation of a TENS unit and the general tenor of his reports indicates that claimant would be experiencing continuing discomfort of some degree. Claimant makes complaints of pain which restrict his activities and limit the function of his body. It is clear that he has some amount of permanent physical impairment of the body as a whole as a result of the June 22, 1983 injury. Dr. McClain is the only one who made a rating and his rating of a six percent permanent partial impairment is adopted as correct.

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 impairment 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. Id. at 181.

The record in this case is confusing regarding claimant's attempt to return to work with Iowa Paint and the availability of work for claimant at Iowa Paint. It does appear, however, based upon the testimony of Floyd Walker, that if claimant had been unable to return to regular duties within six or eight weeks of his return to work that his employment would have been terminated. Even though the services of a rehabilitation specialist were employed in this case, there is no clear showing that claimant was made aware that the employer did, in fact, have a light duty position available for him. Likewise, claimant's own attempts at obtaining employment with some other employer are somewhat less than extensive.

Claimant is a high school graduate. He appears to be a quite resourceful and intelligent individual. His physical ailment restricts him from performing heavy physical labor but does not render him incapable of performing other types of gainful employment. Claimant appears to have the ability to be gainfully employed in occupations that do not require heavy physical labor. When evaluated industrially it is found that he has sustained a 10 percent permanent partial disability of the body as a whole as a result of the June 22, 1983 injury. Payment of compensation therefore should commence on May 14, 1984, the date following the end of claimant's healing period.

The $100 advanced by claimant's counsel for the report from Dr. McClain will be awarded to claimant as part of the costs of this action in accordance with Industrial Commissioner Rule 500-4.33(6).

The charge of $10 as shown in exhibit 1 appears to have been a publication from the hospital dealing with yoga. In claimant's discharge summary from Mercy Hospital it indicates that claimant underwent a stress management course which included yoga exercises. Such is therefore found to be a reasonable expense of claimant's medical care for which the defendants are responsible.

With regard to exhibit 5, the rental charges for the TENS unit, it is clear from the record that Dr. Blessman prescribed a unit and recommended that it be purchased if it were helpful. A note from Judy Steenhoek indicated that Dr. Blessman had anticipated that it would be used for only approximately two months. There is no indication in the record that Dr. Blessman ever indicated that the use should be discontinued or that the unit should not be purchased. Claimant testified that use of the unit was beneficial. The record is clear that Dr. Blessman, an authorized physician, prescribed the unit but defendants have not paid the rental charges for even the first month of its use. Since the record indicates that use of the unit was prescribed and that use has not been medically directed to be discontinued, the defendants will be responsible for the entire $312 owed to Mid-Central Medical Limited as shown on exhibit 5.

Claimant has an unpaid bill in the amount of $275 with Dr. Connair as shown in exhibit 2. It is clear from the record, including exhibit D, that authorization for claimant to receive care from Dr. Connair has been withdrawn. It does not appear that claimant's treatment by Dr. Connair was particularly effective and the withdraw of authorization cannot be said to be unreasonable. The crucial point is determining the time at which authorization was withdrawn and notice thereof conveyed to claimant. The second page of exhibit D indicates that such was clearly given to claimant's counsel on August 31, 1984. On page 21 of exhibit A it appears that claimant was told that he could go back to Dr. Connair if he felt it necessary on or about January 16, 1984. On the 17th page of exhibit A, in a report from Judy Steenhoek, the following statement appears:

> This specialist did telephone Carol McDougal on 2-1-84 about Steve returning to Dr. Connair. She stated that USIG would not assume responsibility for Dr. Connair's treatments. These were not recommended by the pain center. On 2-6-84 Steve telephoned this specialist. He was informed that if he choose to see Dr. Connair, it would be his expense.

It is therefore clear that the authorization was withdrawn and that such was communicated to claimant no later than February 6, 1984. Accordingly, any charges incurred by claimant with Dr. Connair after February 6, 1984 are unauthorized and are not the responsibility of the defendants. Those charges incurred before February 7, 1984 are, however, the responsibility of the defendants. As shown in exhibit 2 the balance prior to the office visit of February 7, 1984 was $75 and defendants are responsible for payment of an additional $75 of claimant's charges with Dr. Connair.

The remaining issue is claimant's entitlement to travel expenses. He would appear to be entitled to reimbursement for all travel shown on exhibit 3, the amount thereof being consistent with the medical reports and statements in the record, except for the amount of travel involved with Dr. Connair subsequent to February 6, 1984. Based upon exhibit 2 claimant is entitled to travel expenses for 22 visits to Dr. Connair. The trips total 470 miles and at $.24 per mile result in an entitlement of $112.80.

Claimant testified that he earned $6.00 an hour at Iowa Paint and worked eight hours per day. This would compute to weekly gross earnings of $240. Claimant testified that he has two minor children from a previous marriage which he is required to support by paying child support in the amount of $25 per week per child. He stated that he does not take the children as deductions for income tax purposes. The weekly rate of compensation is based upon spendable weekly earnings as defined in section 85.61. Whether claimant is entitled to include his children as dependents depends upon their status as dependents under the Internal Revenue code. Since claimant did not claim his children as dependents, his exemptions are limited to himself and his wife and the applicable rate of compensation is $156.12 per week.

FINDINGS OF FACT

1. On June 22, 1983 claimant was a resident of the state of Iowa.

2. Claimant was injured on June 22, 1983 while attempting to prevent a 55 gallon barrell of paint, which weighed approximately 600 pounds, from overturning and spilling.

3. At the time of injury claimant was employed by Iowa Paint Manufacturing Company performing the duties of his employment.

4. 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 22, 1983 until May 13, 1984 when claimant reached the point that it was medically indicated that further significant improvement from the injury was not anticipated.

5. Claimant is a credible witness and the other persons who testified at hearing are likewise found to be credible to the extent of their personal knowledge.

6. Claimant is 30 years of age, married and has two minor children. The children are not, however, his dependents for income tax purposes.

7. At the time of injury claimant earned $240 per week.

8. Claimant's rate of compensation is $156.12 per week.

9. Following the injury claimant received medical care from a number of sources including Robert J. Connair, D.O., Mercy Hospital Medical Center and Mid-Central Medical Limited. The care provided was reasonable and necessary for treatment of his injury except that no finding with regard to reasonableness or necessity is made with regard to the care claimant received from Dr. Connair subsequent to February 6, 1984.

10. Claimant presently experiences pain in his upper back and shoulder. He is limited in his ability to perform physical labor. Claimant has a six percent functional impairment of the body as a whole.

11. Claimant is a high school graduate and has a limited amount of training in the field of auto mechanics.

12. Claimant has work experience as a musician, auto mechanic and television repair person.

13. Claimant appears to be quite intelligent and of greater than average intellectual ability. He appeared emotionally stable but not particularly motivated to return to work with the defendant employer.

14. Claimant did not return to work with the defendant employer but it cannot be determined whether such was the result of a breakdown of communications or of claimant's lack of desire to return.

15. Claimant has not found other full-time gainful employment but has not made extensive efforts to do so.

16. On February 2, 1984 claimant was notified that further care from Dr. Connair was unauthorized.

17. In obtaining authorized medical care and treatment claimant traveled a total of 470 miles.

18. Claimant's counsel expended $100 in obtaining a medical report from Dr. McClain.

CONCLUSIONS OF LAW

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

The injury claimant sustained to his upper back on June 22, 1983 arose out of and in the course of his employment with Iowa Paint Manufacturing Company.

Claimant is entitled to 46 5/7 weeks of compensation for healing period.

Claimant is entitled to receive 50 weeks of compensation for permanent partial disability.

Claimant's medical care with Dr. Connair became unauthorized effective February 6, 1984 and the expenses incurred by claimant with Dr. Connair on or after February 7, 1984 are not the responsibility of the defendants.

Claimant's rate of compensation is determined by his dependents for income tax purposes and his only dependents to be used in computing the rate of compensation are himself and his spouse. His children, for whom he is not entitled to claim a dependency exemption for income tax purposes are not to be included in computing his rate of compensation.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant forty-six and five-sevenths (46 5/7) weeks of compensation for healing period at the rate of one hundred fifty-six and 12/100 dollars ($156.12) per week commencing June 22, 1983.

IT IS FURTHER ORDERED that defendants pay claimant fifty (50) weeks of compensation for permanent partial disability at the rate of one hundred fifty-six and 12/100 dollars (156.12) per week commencing May 14, 1984.

Defendants shall pay all past due amounts in a lump sum together with interest pursuant to section 85.30. Defendants shall receive credit against the foregoing award for the fifty and one-seventh (50 1/7) weeks of compensation which they have previously paid.

IT IS FURTHER ORDERED that defendants pay claimant's medical expenses as follows:

Robert J. Connair, D.O.	$ 75.00
Mercy Hospital Medical Center	10.00
Mid-Central Medical Limited	312.00

IT IS FURTHER ORDERED that defendants pay claimant's transportation expenses in the amount of one hundred twelve and 80/100 dollars ($112.80).

IT IS FURTHER ORDERED that defendants pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33 including one hundred and no/100 dollars ($100.00) for the cost of a medical report from Dr. McClain.

IT IS FURTHER ORDERED that defendants file a claim activity report as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 19th day of August, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVE BREESE,	:	
Claimant,	:	
vs.	:	FILE NO. 737814
	:	N U N C
IOWA PAINT MANUFACTURING CO.,	:	
Employer,	:	P R O
and	:	T U N C
U. S. INSURANCE GROUP,	:	O R D E R
Insurance Carrier, Defendants.	:	

FILED
SEP 9 1985
IOWA INDUSTRIAL COMMISSIONER

This matter comes on for reconsideration of the arbitration decision filed August 19, 1985. The issue under reconsideration is the number of exemptions allowed to claimant in determining the rate of compensation.

The Summary of Evidence which appears in the decision is adequate and will not be changed.

The last unnumbered paragraph of the Applicable Law and Analysis portion of the decision is stricken and in lieu thereof the following is substituted:

Claimant testified that he earned $6.00 per hour and worked eight hours per day. This would compute to gross weekly earnings of $240. Claimant testified that he is required by court order to support his two children from a prior marriage by paying child support at the rate of $25 per week per child. He did not know whether his support payments were current at the time of injury. He stated that he does not claim the children as exemptions for income tax purposes.

The weekly rate of compensation is based upon "spendable weekly earnings" as defined in section 85.61(11). In arriving at "spendable weekly earnings" payroll taxes are deducted from gross earnings in a sum "...equal to the amount which would be withheld...under the Internal Revenue Code of 1954 and regulations pursuant thereto as amended, as though the employee had elected to claim the maximum number of exemptions for actual dependency... to which the employee is entitled on the date on which the employee was injured", section 85.61(9)(a). A similar provision appears in section 85.61(9)(b) for state income taxes. This would seem to make the number of exemptions for rate purposes the same as the number of exemptions the person is entitled to claim for income tax purposes since the permissible withholding exemptions used in computing payroll taxes are determined by the actual exemption entitlement.

Under Internal Revenue Regulations in effect at the time of injury, and in the absence of any contrary provisions in claimant's divorce decree, claimant, as a non-custodial parent, would have benefited from a presumption that would entitle him to exemptions for his children if he paid support of at least $1,200 each per year. The obligation which appears from the record meets that standard. While it would be unusual for claimant to not claim exemptions to which he was actually entitled, such does not conclusively establish a lack of entitlement. The phrase "to which the employee is entitled", as appears in section 85.61 must be construed as if all conditions are favorable to the claimant in his economic and personal circumstances on the date on which he was injured. Biggs v. Donner, II Iowa Industrial Commissioner Report 34 (1982). Claimant is therefore entitled to four exemptions in computing his rate of compensation, namely himself, his spouse and his two children. The rate is therefore $161.18 per week.

The Findings of Fact are amended by striking paragraph 6 and inserting in lieu thereof the following:

6. Claimant is 30 years of age, married and has two minor children who he is entitled to claim as dependents for income tax purposes.

The last paragraph of the Conclusions of Law is striken and in lieu thereof the following inserted:

Claimant is entitled to four exemptions in computing his rate of compensation and the rate is $161.18 weekly.

The Order portion of the decision is amended by striking the first two paragraphs and inserting in lieu thereof the following:

IT IS THEREFORE ORDERED that defendants pay claimant forty-six and five-sevenths (46 5/7) weeks of compensation for healing period at the rate of one hundred sixty-one and 18/100 dollars ($161.18) commencing June 22, 1983.

IT IS FURTHER ORDERED that defendants pay claimant fifty (50) weeks of compensation for permanent partial disability at the rate of one hundred sixty-one and 18/100 dollars ($161.18) per week commencing May 14, 1984.

In all other respects the arbitration decision as originally filed, is ratified and confirmed.

Signed and filed this 7th day of September, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES E. CANNON, Claimant,	File No. 658601
vs.	A P P E A L
MISSISSIPPI VALLEY MILK PRODUCERS, Employer,	D E C I S I O N
and	FILED AUG 21 1985 IOWA INDUSTRIAL COMMISSIONER
AMERICAN MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	

By order of the industrial commissioner filed June 26, 1985 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 review-reopening decision filed April 2, 1985 in which they were ordered to pay healing period and 100 weeks of permanent partial disability benefits.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 3; defendants' exhibits 6 through 10, 16 and 21; and the depositions of C. H. Stark, M.D., and Warren N. Verdeck, M.D. All evidence was considered in reaching this final agency decision.

The decision herein will reverse that reached by the hearing deputy.

ISSUES

The issues on appeal as stated by defendants are:

1. The Decision entered is in error in that the evidence of records [sic] does not support a finding that any of claimant's disability for which he seeks compensation in this proceeding relate [sic] to the alleged incident of December 12, 1980.

2. The Decision entered in this case is in error in that the Claimant failed to produce satisfactory evidence that the injury alleged to have occurred on January 20, 1981 and/or the disability for which benefits are sought were proximately caused by the incident of December 12, 1980.

3. The Decision entered in this case is in error in that it failed to properly consider that the Claimant had congenital and degenerative back conditions prior to his injury of December 12, 1980 and that the alleged injury of December 12, 1980 did not aggravate those conditions.

4. The Decision entered in this case is in error in that it failed to properly consider that the medical evidence of record established that the Claimant sustained a new, independent and intervening injury on August 31, 1982 unrelated to the alleged injury of December 12, 1980 and/or the later injury of January 20, 1981 and that the injury of August 31, 1982 was the sole and proximate cause of all of the Claimant's disability and complaints after August 31, 1982 or that injury along with Claimant's congenital and degenerative conditions were the cause of the complaints asserted.

5. The Decision entered in this case is in error in finding that the Claimant's healing period continued for the interval between January 21, 1981 to June 14, 1982, and awarding additional healing period benefits to Claimant.

6. The Decision entered in this case is in error in finding that the Employer did not offer Claimant employment following the January 29, 1981 incident when the evidence of record established that the Employer offered the Claimant a light duty position by letter dated May 8, 1981 which the Claimant declined to accept.

7. The Decision entered is in error in that the evidence of record in this case does not support a finding that the Claimant has sustained a physical impairment of 10% which is causally connected to the alleged incident of December 12, 1980.

8. The Decision entered in this case is in error in that the medical evidence of record in this proceeding and any additional evidence does not support a finding of a 20% industrial disability causally connected to the alleged incident of December 12, 1980.

REVIEW OF THE EVIDENCE

Forty-five year old married claimant, father of three children, who has an eleventh grade education, testified to beginning work two years ago for a lumber company as a guard shack operator with pay of $4.15 per hour. At the time of hearing he was earning $7.00 per hour. Claimant testified to work experience as a busboy, stock boy, salesperson, assemblyman, grave digger, landscaper, delivery truck driver, checker and in other jobs. He also served with the air force as a cook.

Claimant recalled being injured twice at the dairy. He returned to loadout after his first injury. Initially he did specials and then truck moving. Claimant said that his first injury was December 21, 1980; in September and that it possibly could have been December 12. He stated that after his second injury he was told by C. H. Stark, M.D., not to go back to work. He discussed light duty with Stramer; and when he was told light duty was not available, he quit working. He then looked for other work and went to a skill center at Kirkwood College where he learned office procedures and improved his math skills. He stated that he cannot afford additional schooling.

Claimant compared his earnings in 1980 which were slightly over $20,000 with his earnings in 1984 which were approximately $12,000.

Claimant agreed that Dr. Stark suggested he might want to see an orthopedist and that he was sent to Wayne Verdeck, M.D., by the insurance carrier. Claimant reported being told not to do heavy lifting or to stand for long periods and to get off his feet if his back bothered him. He also was shown back exercises.

Claimant acknowledged having had surgery in January of 1984. He denied back trouble before December 12, 1980 other than minor aches and pain and a slight strain at one time. He was unable to recall any insurance claims for back injuries. He admitted that on August 31, 1982 as he was leaning over helping his wife clean the table, his back went out and he saw David Naden, M.D. In addition he saw Robert Brimmer, M.D., and James LaMorgese, M.D. Claimant injured his shoulder and the back of his knee in unrelated incidents.

Thomas C. Stramer, production manager for defendant employer, recalled receiving a letter dated January 30, 1981 relating to claimant. It was his understanding that as late as January claimant could do no lifting and that he decided to terminate his employment. Stramer reported that during the time of claimant's employment he had been absent for seventy-eight and one-half days and had been disciplined for his absences. When claimant was at work, he was a good worker.

Stramer remembered claimant's returning to work after the December 12, 1980 injury without restriction and he noted no difference in claimant's work performance. Neither did he recall claimant's taking time off from work thereafter. Regarding the incident of January 20, 1981 the manager understood that claimant had been released by Dr. Verdeck to return to light duty with no lifting over thirty pounds. He claimed that light duty was available for claimant although he did not know specifically what the job was.

Tax records show for 1977 income of $13,089; for 1978, $14,487.41; for 1979, $15,713.14; for 1980, $20,030.95; for 1980, $2,866 and for 1982, $3,340.44.

A letter from Matthew Jerabek, district claims manager for defendant insurance carrier dated May 12, 1981 tells claimant that work would have been available for him within the restrictions placed by Dr. Verdeck had he had not voluntarily terminated his employment and that his weekly benefits would terminate on June 7, 1981. A final report by defendant shows the payment of healing period from January 22, 1981 through June 7, 1981 and ten weeks of permanent partial disability for an injury of January 20, 1981.

C. H. Stark, M.D., who has been practiticing general medicine for fifty years, saw claimant in December 1980 and was told that claimant had developed pain while lifting a door. The Ely test suggested to the doctor possible sacroiliac strain. Other orthopedic tests were negative. Claimant was instructed to stay off his feet, apply heat and take a muscle relaxant. X-rays showed spina bifida occulta at L5 and sacralization of the right lateral process of L5 and "some sprain which is like an arthritic thing, around L-1."

The doctor said that the spina bifida would cause pain or disc degeneration and that the spurring seen in claimant's spine would be found in persons with degenerative joint disease.

Claimant asked to return to work when he was seen the following week. The doctor told him he should "get a pencil job" and prescribed strengthening exercises. Claimant also was provided with instructions in how to lift. When claimant was seen on December 19, 1980, he had full range of motion with "very little evidence of discomfort." Claimant was released to return to work on December 22, 1980.

Dr. Stark saw claimant for a lumbosacral strain which occurred on January 20, 1981 or January 22, 1981. He reported that claimant had a physical impairment before his accident, but claimant would have no permanent impairment and that claimant had decided to try another line of work. Claimant was last seen on January 27, 1981 at which time he was referred to an orthopedist, but not to anyone specifically. Dr. Stark diagnosed claimant's problem as an acute sacroiliac strain which he related to the December incident with the January episode being an aggravation.

Dr. Stark said he had no reason to believe claimant's strain was anything other than temporary. The doctor was willing to leave to orthopedists the proper approach to claimant's current care and treatment.

Warren N. Verdeck, M.D., orthopedic surgeon, first saw claimant on March 24, 1981 for evaluation of his back pain which started about December 13, 1980 as he was lifting a trailer door. Claimant denied prior back problems. X-rays showed a spina bifida, a partial sacralization and possibly some slight narrowing at the bottom disc in the back. Those abnormalities, according to the physician, would make claimant prone to back trouble with heavy activity, but none were caused by his work activity or related to his raising a door. Claimant had no leg complaints at that time and he denied numbness or weakness. As treatment, Dr. Verdeck proposed trigger point injections or physical therapy. He did not recommend a return to claimant's usual occupation because claimant was having pain.

Claimant was seen on two occasions in April and he had begun to have pain down his left leg. On April 16 the doctor wrote that claimant was capable of light work with no lifting over thirty pounds. Claimant was seen monthly thereafter. In July there was altered sensation over the dorsum and lateral side of the left foot.

A myelogram and electromyography were done, both of which were normal. A bone scan was normal except for increased uptake in the region of the left kneecap.

Martin F. Roach, M.D., saw claimant on June 8, 1981. He complained of occasional aching in his low back which was viewed as chronic. It was not thought that claimant could return to heavy activity and a permanent partial disability rating of two percent was assigned.

In February of 1982 Dr. Verdeck decided to have claimant seen by a vascular surgeon and he considered having claimant seen by a neurosurgeon for "a pain clinic type of evaluation."

Robert J. Brimmer, M.D., saw claimant on February 22, 1982 for pain in the upper left hip extending into the left lower extremity which was sharp and constant and increased by sitting, walking, lying down with his legs crossed or lying with his foot turned outward. Claimant reported hurting his back the year before. Claimant's pulses were intact and symmetrical. Other testing eliminated the possibility of significant arterial obstructive lesions.

James L. LaMorgese, M.D., reported offering claimant an epidural steroid injection after a CT scan failed to show evidence of boney encroachment. That injection was carried out and claimant failed to return for a follow-up appointment.

A history taken by David Naden, M.D., in August of 1982 suggested that claimant had either a new or a reinjury of his back. Claimant was admitted to the hospital after he bent to clear a table and had acute pain in his left lower back which radiated down both legs and numbness and tingling from the buttocks to the anterior lateral aspect of the thigh and down the front of the left leg. Straight leg raising was positive bilaterally. Claimant was discharged on September 11, 1982 with a diagnosis of acute facet syndrome of the lower back and instructed not to return to work. The discharge summary reported that "this new episode just hit him all of a sudden and so severe he couldn't take care of himself at home any more."

Dr. Verdeck who referred to pain going down both claimant's legs -- a condition which had not existed before believed that Dr. Strathman found claimant's injury in August to have resulted in his hospitalization at that time. Dr. Verdeck believed the condition for which he saw claimant in February of 1982 had cleared up.

Claimant was seen by L. C. Strathman, M.D., on October 7, 1982 at which time he told the doctor his pain went back to August. Claimant complained of discomfort in the lumbosacral area which was greater on the left and went into his buttock and sometimes his posterior thigh. Claimant had some guarded movements and difficulty performing some others. Claimant's discomfort was thought to be skeletal on the basis of a strain associated with anomalies.

Dr. Naden released claimant for work as of October 18, 1982.

Claimant was seen by Dr. Verdeck in April of 1983 for complaints of tenderness in the left lumbosacral region. He was injected with Xylocaine and Celestone. Claimant returned two months later. His medication was changed and he was referred to Iowa City for evaluation.

Dr. Verdeck acknowledged that secondary gain could possibly be an explanation for the back complaints claimant continued to make. He said that facet arthropy is a degenerative condition which would not be caused by the lifting the door.

A Dr. Jim Weinstein saw claimant on September 21, 1983 and took a three or four year history of low back pain which began in December of 1980 as he was lifting the back door of a semi and another lifting, twisting incident the following month. Claimant complained of pain in the lumbar region with radiation to the left hip. Claimant also reported leaning over the table, throwing his back out and remaining about the same after that incident.

X-rays showed a spina bifida at S1 and partial sacralization on the right. On examination claimant had an area of tenderness on the left side of his lumbosacral spine which caused pain to radiate to his left hip. Flexion was to eighty degrees with a right list. Extension was twenty degrees. Straight leg raising was positive on the left at eighty degrees.

The doctor's impression was that claimant's pain "could be secondary to facet arthropy." Claimant was given the option of conservative treatment or facet injection, and he chose conservative care.

Claimant returned in January after having the conservative care. Straight leg raising was positive in the supine position at sixty degrees and negative sitting. Head compression, skin rolls and the twist test were positive. No obvious neurological defects were found. Nor was there specific etiology for claimant's low back pain. Claimant was not given any restrictions, but note was made that he had been instructed on proper lifting.

APPLICABLE LAW AND ANALYSIS

Although it is defendants who have appealed in this manner, claimant's brief raises a point which must be addressed at the outset. Claimant states that he "is unable to find conclusive, explicit authority stating the standard of review applicable to the present review." Claimant then suggests that the same standard used for judicial review should apply on appeal to the commissioner.

There is authority for the standard of review and that authority is found in the Iowa Administrative Procedure Act in §17A.15. The industrial commissioner is the agency. In this case he did not preside at the reception of evidence. Subsection 2 of 17A.15 provides in part:

> When the agency did not preside at the reception of the evidence in a contested case, the presiding officer shall make a proposed decision. Findings of fact shall be prepared by the officer presiding at the reception of the evidence in a contested case unless the officer becomes unavailable to the agency.

The third subsection states:

> When the presiding officer makes a proposed decision, that decision then becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule. On appeal from or review of the proposed decision, <u>the agency has all the power which it would have in initially making the final decision</u> except as it may limit the issues on notice to the parties or by rule. In cases where there is an appeal from a proposed decision or where a proposed decision is reviewed on motion of the agency, an opportunity shall be afforded to each party to file exceptions, present briefs and, with the consent of the agency, present oral arguments to the agency members who are to render the final decision. [emphasis added]

It is clear from these sections that appeal within the agency is de novo.

The first issue raised by defendants is that claimant has failed to show any disability connected to his alleged injury of December 12, 1980. Use of the term "alleged" is improper in this case as a memorandum of agreement is on file and that establishes an employer-employee relationship and an injury arising out of and in the course of employment. Freeman v. Luppes Transportation Co., 227 N.W.2d 143, 149 (Iowa 1975). Claimant, however, bears the burden of establishing a causal connection between his injury and his present disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 12, 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).

There are three substantial complications in this case. The first is that claimant had a spina bifida occulta at L-5, a sacralization involving the lateral process of L-5, multiple spurring on the anterior portion of L-1 and slight narrowing at the bottom disc in his spine.

The second complication is a back incident in August of 1982 after which claimant was hospitalized. That episode was described by Drs. Naden and Strathman as a new injury. At that time claimant experienced pain down both legs which was a complaint he had not had before.

The third complication is that claimant had another injury on January 20, 1981, slightly more than a month after that which forms the basis for this action. A memorandum of agreement was filed for the January injury and claimant was paid healing period and ten weeks of permanent partial disability.

Claimant cites one authority that may be applicable to this proceeding, Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971) and defendants cite the other, DeShaw v. Energy Manufacturing Co., 192 N.W.2d 777 (Iowa 1971). In the latter case the Iowa Supreme Court made clear claimant's burden by saying at 780:

> When a workman sustains an injury, later sustains another injury, and subsequently seeks to reopen an award predicated on the first injury, he must prove one of two things: (a) that the disability for which he seeks additional compensation was proximately caused by the first injury, or (b) that the second injury (and ensuing disability) was proximately caused by the first injury.

In Langford claimant had an injury in 1967 and an injury in 1969. Claimant was not required to show that the 1967 accident was the sole proximate cause of his disability when he sought a review-reopening. Rather the court said at 670 that it was enough his condition was "directly traceable" to the initial incident.

There is little in the way of testimony from claimant himself regarding the December injury. His testimony was as follows:

COMMISSIONER MUELLER: What's the date of the first injury, counsel?

MR. NORRIS: There would have been --

COMMISSIONER MUELLER: Let the witness testify.

Q. Okay. Do you recall?

A. I believe it was December 21st of '80.

Q. Do you recall the date of the second injury?

A. January 12, '81.

Q. Could you be -- Could you be mistaken as to the --

A. The days, but one was in September, I know, and the other one was in January.

Q. Could it have been December 12 and January 21st?

A. Possibly. (Tr., p. 16)

He was questioned:

Q. And after the second -- After the first injury, I mean, you did go back to your employment, your regular work; is that right?

A. Yes, I did. (Tr., p. 15)

Later he was asked:

Q. Following the accident on December 12th of 1980, did you report that to anyone at the company?

A. That day, no.

Q. When did you report it?

A. I believe it was about a day or two later.

Q. You saw Dr. Stark with respect to that incident; is that correct?

A. Yes, I did.

Q. And Dr. Stark indicated that he thought you may have had a strain as a result of that incident; is that correct?

A. I believe he did, yes.

Q. He returned you to full duty?

A. Yes.

Q. No limitations?

A. No limitations at that time, no.

Q. He indicated you'd fully recovered?

A. Yes.

Q. And recommended you go back to work around the 22nd of December, ten days later?

A. I believe it was, yes. (Tr., p. 24)

In summary claimant's testimony regarding the first incident is that he saw only Dr. Stark who released him to full duty with no limitation and he returned to his usual job.

The other lay testimony of record comes from Thomas Stramer, production manager:

Q. Are you familiar with the incident that occurred on December 12 of 1980?

A. Yes.

Q. Do you recall when Mr. Cannon reported that incident to the company?

A. Yes.

Q. When was that?

A. Immeditately to the foreman.

Q. And he went to Dr. Stark?

A. Yes.

Q. Did Dr. Stark then subsequently release Mr. Cannon to return to full duty?

A. Yes, he did.

Q. Were there any restrictions made upon Mr. Cannon?

A. No, there were none.

Q. Did Dr. Stark release him by sending you some sort of letter or form?

A. Yes.

Q. That was in writing?

A. Yes.

Q. Did Mr. Cannon express to you any concern that he had when he came back to work, that he should not be doing certain jobs or he should be doing any light duty?

A. No.

Q. Did you notice any difference in his work performance between December 22 when he returned and January 20 of 1981?

A. No.

Q. Did he ask for any time off during that time that you recall for any pain that he was having in his back?

A. None that I recall. (Tr., pp. 47-48)

In evaluating the medical evidence it is important to keep in mind that claimant had a series of anomalies before any work injury to his back.

Dr. Stark saw claimant for both his December 1980 and his January 1981 injuries. He found the January incident an aggravation. His surgeon's report of February 17, 1981 states that the incident of January 20, 1981 was the only cause of claimant's condition. Dr. Stark found that by a week after the December incident claimant had full range of motion without a great deal of pain. Ultimately Dr. Stark, who last saw claimant on January 27, 1981, deferred to the orthopedists to determine what claimant's problems are and why he was having them.

Evidence from Dr. Roach includes an impairment rating, but his report is of little aid to claimant's cause as there is nothing that shows to what that rating is attributable.

None of the Cedar Rapids orthopedic surgeons -- Drs. Verdeck, Roach, Naden, and Strathman -- who saw claimant provided an opinion which is helpful to claimant's case; and for the most part, the notes made by that group suggest that claimant's disability, if he has any other than of a temporary nature, is related to an incident in August of 1982, more than a year and a half after the December 1980 injury. Facet arthropy, a degenerative condition, evidenced by claimant was not caused by any lifting.

Doctors at Iowa City also expressed the opinion that claimant's back pain could be secondary to facet arthropy. The history taken in Iowa City is not entirely accurate in that no return to work was recorded for December.

Claimant's burden is a preponderance. 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.

Claimant's burden in this case is particularly difficult because of his preexisting conditions and his subsequent episodes of back pain.

It is not possible to find that any disability which claimant may have is directly traceable to the injury in December of 1980. Nor can it be established that any disability claimant has was proximately caused by the December injury or that the January injury was in any way proximately caused by the December injury.

In light of these conclusions it is unnecessary to consider any of the other issues raised by defendants.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-five years of age.

That claimant has an eleventh grade education.

That claimant has work experience as a busboy, stock boy, salesperson, assemblyman, grave digger, landscaper, delivery truck driver, checker and cook.

That at the time of hearing claimant was a guard shack operator for a lumber company with earnings of $7.00 per hour.

That claimant suffered an injury arising out of and in the course of his employment on December 12, 1980.

That as a result of his injury on December 12, 1980 claimant has been paid six days of temporary total disability.

That claimant suffered an injury to his back which arose out of and in the course of his employment on January 20, 1981.

That as a result of his injury on January 20, 1981 claimant was paid healing period benefits from January 21, 1981 through June 7, 1981 and ten weeks of permanent partial disability.

That after claimant's December injury he returned to his regular job at which he worked without limitations or complaints.

That claimant had a preexisting spina bifida occulta at L5, a sacralization involving the lateral process of L5, multiple spurring in the anterior portion of L1 and slight narrowing at the bottom disc in the back.

That in August of 1982 claimant had another episode of back pain as he bent to clean a table.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence that any disability he now may suffer is directly traceable to an injury in December of 1980.

That claimant has failed to establish that any disability he now may suffer was proximately caused by the December injury or that the January injury was proximately caused by the December injury.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

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

Signed and filed this 21 day of August, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL E. CARSON, Claimant, vs. HOLMAN ERECTION CO., INC., Employer, and HOME INSURANCE COMPANIES, Insurance Carrier, Defendants.	FILE NO. 760419 A R B I T R A T I O N D E C I S I O N FILED SEP 27 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Daniel E. Carson, claimant, against Holman Erection Co., Inc., employer, (hereinafter referred to as Holman) and Home Insurance Companies, insurance carrier, defendants, for benefits as a result of an alleged injury on January 12, 1984 to claimant's back. On July 23, 1985, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

ISSUES

The parties have submitted the following issues for determination in these proceedings:

I. Whether claimant received an injury arising out of and in the course of employment;

II. Whether there is a causal relationship between the alleged injury and the claimed disability;

III. The extent of weekly disability benefits to which claimant is entitled; and,

IV. Claimant's entitlement to medical benefits under Iowa Code section 85.27.

SUMMARY OF THE EVIDENCE

The following is a brief summary of the pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The parties have submitted a pre-hearing report of certain matters pertaining to this case which was approved and accepted as a part of the record of this case. The record of the hearing consists of the oral testimony of claimant and Ward Vieter; joint exhibit 1 and claimant's exhibit A. The parties have stipulated to the following matters in the pre-hearing report:

1. Claimant's rate of weekly compensation in the event of an award of benefits from these proceedings shall be based upon gross weekly earnings in the amount of $522.80 per week, single marital status and entitlement to two exemptions.

2. The medical bills submitted by claimant at the hearing were fair and reasonable and causally connected to the claimed back condition but that the issue of their causal connection to any work injury was an issue to be decided herein.

Claimant stated at the hearing that he is 29 years of age and has earned his GED at Kirkwood Community College. Before his alleged work injury, claimant completed a three year apprenticeship program in iron work consisting of class room work and on-the-job experience. Claimant has been employed as an iron worker since graduation from this program.

Claimant described iron work as working with steel in the construction of steel and concrete buildings and bridges. Claimant said that iron workers are expected to be able to lift heavy weights and climb about steel girders on high buildings when necessary to perform various iron worker tasks.

Claimant's testimony and the medical reports submitted into evidence indicate that claimant had no prior low back problems before the alleged work injury upon which he bases his claim. However, in 1981, claimant had pain in his left upper extremity and shoulder area which, according to one of his physicians at the time, was due to a nerve root irritation at the base of the cervical or upper spine. Other physicians diagnosed the problem as a very mild carpal tunnel syndrome. However, claimant was released for full duty after approximately a month of conservative treatment, consisting of a limitation in activity and isometric exercises. Also, claimant also slightly injured a finger in September 1982, but has had no problems with this finger since the injury. In January 1983, subsequent to marital problems, claimant was hospitalized for an intentional overdose of medication. Claimant was diagnosed as having an adjustment disorder due to the marital problems along with depression. Claimant was discharged after a few days and the evidence in the record does not suggest any lingering psychological disorders at the present time.

Claimant began working for Holman in November 1983. Claimant's duties consisted of "busting rods" or carrying concrete reenforcement rods and laying steel mesh. Claimant testified that he was required to lift from 40 to 200 pounds when assigned to the task of busting rods. Ward Vieter, the general foreman, testified that he had to talk to claimant on a few occasions during his employment with Holman concerning absenteeism. Claimant blamed his frequent absenteeism on car trouble.

The facts surrounding the alleged work injury are in dispute. First, claimant is unsure as to the exact date. The medical records of claimant's physicians all state that claimant described to them a work injury in the latter part of December 1983. Claimant alleged in his petition an injury date of January 12, 1983. Witness Vieter testified that claimant did not work on that date and he was off work for two weeks during the Christmas season from the latter part of December 1983 to the first part of January 1984. Claimant testified that the actual injury date could have occurred anytime from the latter part of December 1983 to the latter part of January 1984.

Claimant said that on the date of the injury he slipped on some ice near either a storage area or loading dock for steel reenforcement rods. Claimant testified that he was on his way to the area either to get more rods or to retrieve a tool. Claimant stated that he fell backwards but unsuccessfully tried to catch himself with his hands in a twisting motion. After getting up from the first fall, claimant said that he immediately slipped and fell again. Claimant testified that he reported the incident to two of his immediate supervisors. The supervisors had asked him at that time whether he wanted to be examined by a doctor and claimant refused. Witness Vieter testified that he did not become aware of any claimed work injury by claimant until well after claimant had been laid off and at a time when the insurance carrier began to receive bills for claimant's treatment. In February 1983, for reasons unrelated to the work injury, claimant was laid off from Holman.

Claimant explained that the onset of pain after the fall was very gradual and was limited to the left leg. Initially, there was only numbness in a portion of his leg which claimant attributed to the use of his tool belt. However, eventually the numbness and pain spread to the entire leg. Claimant did not seek medical treatment for this problem until March 23, 1984 when he consulted Kenneth A. Searlock, M.D., a family practice physician. With increasing pain problems, Dr. Searlock hospitalized claimant for traction and consulted Leland G. Hawkins, M.D., an orthopedic surgeon. After a CT scan revealed the possibility of a herniated disc, a myelogram was performed which confirmed a herniated disc at the L5-S1 level of claimant's spine. Subsequently, claimant underwent chymopapin injection surgery by Dr. Hawkins on April 27, 1984. The medical records indicated that claimant suffered almost immediate relief of his leg pain following the chymopapin procedure although muscle spasms remained.

No records or reports from Dr. Hawkins or Dr. Searlock have been submitted to specifically show their opinions as to when claimant reached maximum healing after this chymopapin surgery or if claimant had permanent impairment as a result of the work injury. However, the office note of Dr. Hawkins on May 14, 1984 states as follows, "I have advised him (claimant) to allow the back to firm up a little bit but we would allow him to go to work as a welder and I don't think his back should cause him difficulty." The doctor also mentions in this note that claimant was involved in an auto accident apparently immediately before the May 14 visit as claimant still have lacerations and a black eye during the examination. Claimant did not discuss this accident during his testimony at the hearing. Although Dr. Hawkins did not describe any back problems as a result of this auto accident, he does make the statement that the accident "is going to confuse the issue a little bit." On June 14, 1983, in another examination of claimant, Dr. Hawkins notes that claimant had only experienced pain when he has ridden on a bus, but that otherwise claimant was doing well and he encouraged him to continue to work. Apparently, the doctor was under the impression that claimant was performing some work at the time.

Claimant testified that he continues to experience back problems but that he did return to iron work in October 1984, including "busting rods." He described a persistent tightness in his back and that his back hurts on occasion. He said that he favors his back in his work and is fearful of reinjury. He stated that after working hard, it is painful for him to straighten his back. Claimant admitted in cross-examination that he works all of the hours that he can and is able to carry 40 to 50 pounds "or more" at the present time.

Claimant's appearance and demeanor at the hearing indicated that he was testifying in a truthful manner

APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of 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 therein.

Apart from claimant's inability to pinpoint the exact time of the fall and that the general foreman was not aware of any injury until months after the injury date, claimant's testimony is uncontroverted and verified by histories provided by two physicians. With reference to the injury date, claimant's inability to identify the exact date of injury is believeable given his description of a gradual rather than a sudden onset of leg pain. After his layoff from Holman, claimant was unemployed until he first sought medical treatment. The doctor reports which mention the latter part of December as the injury are too vague to impeach claimant's testimony. Claimant indicated that he could be off as much as 30 days in the injury date. Also, the fact that the general foreman was not aware of any injury until the insurance carrier started to receive claimant's doctor bills is likewise insufficient to impeach claimant's credible testimony. It was not claimant's responsibility to report the injury directly to the general foreman and claimant's testimony that he reported the fall to his immediate supervisors was uncontroverted. Therefore, the greater weight of evidence presented establishes that claimant suffered a fall and a work injury either in December 1983 or January 1984 which arose out of and in the course of his employment with Holman.

II. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of disability. 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

Claimant seeks permanent disability for the condition of his back subsequent to the chymopapin injection surgery. As no physician has opined that claimant has a permanent impairment of his back, such impairment, if any, must be gleaned from claimant's testimony or the descriptions of claimant's condition given by physicians. First, the only medical record which describes claimant's condition after surgery as it relates to his work is the note of Dr. Hawkins on May 14, 1983. In that note, Dr. Hawkins states that claimant was able to return to work at that time and that claimant's back should not cause him difficulty. The view of a treating doctor and orthopedic specialist must be given great weight. The doctor's reference to welding work in this note is unexplained in the record. Given the evidence in this case, the most plausible explanation for this reference is that the doctor simply misdescribed claimant's work. The most important aspect of this office note is that claimant was allowed to return to work without restrictions and it cannot be assumed that a release to welding work is a release to lighter duty than iron work. Therefore, claimant has not shown by the medical evidence that he has suffered any permanent impairment to his back.

Claimant testified that he is back to work doing the same duties as he was doing at the time of the work injury with no physician imposed restrictions. He admitted that he can lift over 50 pounds in his work. He only expresses a fear of re-injury and some pain after doing hard work. This alone does not show a causal connection between the work injury and any permanent disability as a result of his current back condition.

It should be noted however, that even if a slight permanent impairment of the back had been shown, claimant has not demonstrated an industrial disability or a loss of earning capacity as a result of the work injury. Such a showing is required for disabilities arising from a back condition. Claimant has returned to work in the same job he was performing at the time of the injury and he has not shown that he has suffered any permanent loss of earnings as a result of such impairment. A showing of permanent impairment does not automatically entitle a claimant to permanent disability benefits if no loss of earning capacity is demonstrated. Physical impairment is only one of the factors used to evaluate an industrial disability. See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant's testimony and the medical evidence presented has established by a preponderance of the evidence a causal connection between the work injury and temporary disability. The extent of the entitlement to weekly benefits for such disability is discussed below.

III. Temporary total disability benefits are available from the first day of disability until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first. Iowa Code section 85.33(1).

The first problem in this case is identifying the first day claimant was unable to work as a result of the work injury as claimant was laid off from defendant employer for reasons unrelated to disability. Claimant described a gradual increase in his leg symptoms following the work injury and admitted in cross-examination that he looked for work after being laid off. The preponderance of the evidence indicates that the most appropriate commencement date for temporary total disability benefits would be at the time he first sought treatment from Dr. Searlock on March 23, 1984. At that time, the doctor's records reflected that claimant had severe pain and there were definite clinical findings of spinal problems from test results such as the positive straight leg raising test. Only a few days after this initial visit, claimant was hospitalized for pain management and further diagnostic testing. The treatment of claimant's symptoms remained quite intensive until the time of his discharge from the hospital following chymopapin surgery on April 29, 1984. After recovery from the surgery, claimant was released for work by Dr. Hawkins as stated above on May 14, 1984. Dr. Hawkins' statements that claimant's back should not present any further difficulty to claimant indicates that claimant had reached maximum healing at that time. Therefore, claimant's period of temporary total disability extends from March 23, 1984 through May 14, 1984.

IV. The parties stipulated that the medical bills submitted by claimant in exhibit A were fair and reasonable charges for the services rendered and were causally connected to the claimed back condition. The evidence clearly establishes the causal connection of the bills contained in this exhibit to the work injury except for two statements in pages 7 and 8 of exhibit A, which appear to be delinquent notices for nonpayment of charges from Cedar Rapids Radiologists, P.C. These statements do not describe the nature or the time of the services rendered. Therefore, benefits could not be awarded for these bills but benefits shall be awarded for the balance of the bills comprising exhibit A.

FINDINGS OF FACT

1. Claimant is a credible witness.

2. Claimant was in the employ of defendant Holman at all times material herein.

3. Claimant's job in December 1983 and January 1984 consisted of iron work and specifically working with iron mesh and carrying concrete reenforcement rods from a central storage area to where they were needed.

4. In December 1983 or January 1984, while performing his work as an iron worker, claimant injured his low back from a fall at work by herniating a disc at the L5-S1 level of his spine.

5. As a result of the work injury, claimant underwent a surgical procedure termed a chymopapin injection to correct the herniated disc condition.

6. Prior to the work injury herein, claimant injured his upper extremity and upper back but not his low back.

7. As a result of his work injury, claimant was temporary unable to work due to his symptoms and treatment of his condition.

8. At the present time, claimant is not restricted by his physicians from any particular type of work activity.

9. Claimant is able to return to his normal activity and has done so.

10. Claimant has not suffered a significant permanent loss in actual earnings from employment due to his work injury.

11. Claimant is 29 years of age and has earned his GED.

12. As a result of his work injury, claimant has not suffered a loss of earning capacity.

13. As a result of his work injury, claimant was absent from work and medically unable to perform the type of work he was performing at the time of the work injury from March 23, 1984 through May 14, 1984.

14. Pursuant to the parties' stipulation, claimant's rate of compensation is $298.30 per week.

15. Claimant has incurred the medical expenses listed in the order portion of this decision for treatment of his back condition as a result of his fall at work in December 1983 or January 1984.

16. The amount of the bills submitted in exhibit A are reasonable charges for the medical services rendered.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that in either December 1983 or January 1984 he suffered an injury arising out of and in the course of employment.

II. Claimant has established by a preponderance of the evidence that this injury is only a cause of temporary disability.

III. Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits for 7 4/7 weeks.

IV. Claimant has established by a preponderance of the evidence entitlement to the medical benefits as ordered paid below.

ORDER

Accordingly, the following is ordered:

1. Defendants shall pay to claimant temporary total disability benefits from March 23, 1984 through May 14, 1984 at the rate of two hundred ninety-eight and 30/100 dollars ($298.30) per week.

2. Defendants shall pay claimant the following medical expenses:

Linn County Orthopedic (Leland G. Hawkins, M.D.)	$1,628.00
St. Lukes Hospital	959.60
Donald L. McCoy, M.D.	350.00
Cedar Rapids Radiologists, P.C.	183.00
Kenneth Serlock, M.D.	130.00

3. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

4. Defendants shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

5. Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

6. Defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 27 day of September, 1985.

Larry P. Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

15

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MILTON CLARK,	:	
	:	File No. 756217
Claimant,	:	
	:	RULING
vs.	:	
	:	ON
FRIT INDUSTRIES, INC.,	:	
	:	MOTION
Employer,	:	
	:	FOR
and	:	
	:	SUMMARY
SOUTH CAROLINA INSURANCE CO.,	:	
	:	JUDGMENT
Insurance Carrier,	:	
Defendants.	:	

FILED
SEP 27 1985
IOWA INDUSTRIAL COMMISSIONER

This matter comes on before the undersigned on the motion of the employer and insurance carrier for summary judgment. Defendants contend that there is no genuine issue of material fact as to whether claimant's claim is barred by the statute of limitations established in Iowa Code section 85.26. Claimant has filed a resistance. Oral arguments were heard by telephone conference call on August 2, 1985.

Rule 237(c), R.C.P. provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Critical to this ruling are the pleadings. Claimant alleges an injury date of October 28, 1983. He filed his petition on May 7, 1985 and is thus, clearly within the two year statute of limitations.

Defendants appear to contend that claimant's actual injury date was the spring of 1982. This may or may not be the case, but it makes no differene anyway. If claimant did not receive an injury in October 1983, he will not be able to carry his burden of proof. At this point, however, there has been no issue raised about whether or not he received an injury on October 28, 1983 since defendants have yet to answer claimant's petition. Summary judgment for the defendants would seem most inappropriate when it is the defendants who are in default. They have neither denied claimant's allegations nor affirmative pled the statute of limitations.

If anyone is entitled to judgment in this matter, it is claimant who is entitled to a judgment on default pursuant to Rule 232(b), R.C.P. Claimant has not, however, asked for a default and none will be entered until he does so.

WHEREFORE, defendants' motion for summary judgment is hereby denied.

Signed and filed this 27th day of September, 1985.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

76

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD CLASEN,	:	
Claimant,	:	File No. 733048
vs.	:	
A Y McDONALD MFG CO.,	:	R E V I E W
Employer,	:	R E O P E N I N G
and	:	
FIREMANS FUND INSURANCE,	:	D E C I S I O N
Insurance Carrier, Defendants.	:	

FILED
AUG 30 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Richard Clasen, against his employer, A. Y. McDonald Manufacturing, and its insurance carrier, Fireman's Fund, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained May 10, 1983.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Dubuque on May 3, 1983. 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 13, 1983.

The record in this case consists of the testimony of claimant, of claimant's exhibits 1, 2, and 3, and of defendants' exhibit A.

ISSUES

The issues for resolution are:

1) Whether a causal relationship exists between claimant's injury and claimant's disability;

2) Whether claimant is entitled to benefits and the nature and extent of any such entitlement; and

3) Whether claimant is entitled to reimbursement for a medical evaluation pursuant to section 85.39.

The latter issue is entertained pursuant to a prehearing motion of claimant. Notes from the prehearing of this matter of April 11, 1985 show this is a proper issue for resolution which apparently was inadvertently omitted from the issues listed on the prehearing order.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's rate of weekly compensation is $264.22 and that he returned to work on July 25, 1983. A Form 2 filed January 1, 1984 indicates claimant was paid benefits through July 24, 1983. The parties also agreed that claimant's injury arose out of and in the course of his employment.

Claimant, Richard E. Clasen, testified in his own behalf. Claimant was a setup man for A. Y. McDonald Mfg. who supplied other workers materials from the tool room. Claimant stated that this work requires that he be on his feet all day. Claimant was injured when a skid weighing approximately a ton fell off a forklift and pinned his ankle under it. Claimant was in a full cast from his May 10 injury date until mid July 1983. Claimant returned to light duty at the end of July. He worked at his regular duties until his leg became tired and then left work. L. C. Faber, M.D., was claimant's treating physician and saw him on a weekly and then a bi-weekly basis until his cast was removed. He also evaluated claimant in October 1983 and March 1985. Claimant saw Julian G. Nemmers, M.D., and Dale Wilson, M.D., once each for evaluation. Claimant indicated that he has returned to his same job at full duty, but that he has ankle soreness and stiffness at times. Claimant indicated that he has a tingling in the back of his ankle at all times and his ankle tires, lacks mobility, and swells.

Claimant's exhibit 1 is a medical report of Dr. Nemmers. Claimant's exhibit 2 is medical records of The Finley Hospital relative to claimant. Claimant's exhibit 3 is a report of F. Dale Wilson, M.D., of March 29, 1985. Defendants' exhibit A is various reports of Dr. L. C. Faber, Dr. Julian G. Nemmers, and The Finley Hospital. Medical records of Dr. L. C. Faber indicate that claimant was brought to The Finley Hospital emergency room where x-rays revealed a bimalleolar fracture of the right ankle. Claimant was placed in a short leg cast and admitted for overnight observation.

An October 19, 1983 report of Dr. Faber indicates that claimant was seen by the doctor on October 4, 1983 and then had full range of dorsal and plantar flexion, eversion and inversion, as well as "through the entire range of his ankle." Claimant did not have instability, but complained of pain and swelling in the ankle at the end of the day though no pain on walking, but had pain when driving from Dubuque to Des Moines and back. The doctor indicates that an x-ray of April 4, 1984 showed claimant's ankle fracture to be quite well healed with no acute changes in minimal degenerative arthritic changes. The doctor indicated that under the AMA Guides, he would evaluate claimant's impairment as five percent on the basis of pain. The doctor does not specify whether this impairment is to the extremity or to the body as a whole. In a March 20, 1985 report, the doctor indicates that he saw claimant on March 13, 1985 and that claimant then complained that his ankle hurts worse during the winter months with aching and burning and no balance when he first steps in the morning. He reports that claimant expressed the belief that this is getting worse and that he has aches and pains every day in the morning when he gets up and his ankle is stiff with pain and tingling in the back and bony part of the ankle. The doctor indicates that on evaluation, however, there was no evidence of swelling about the ankle or tenderness to palpation. Dorsal flexion was normal and equal to the left side as was plantar flexion; eversion and inversion are equal to the left side. X-rays were retaken which showed a healed fracture with no evidence of alteration in the mortice of the joint and no evidence of arthritis, articular erosions, subchondral cysts or any other abnormality. The doctor indicated that claimant's complaints are subjective in nature and hard to substantiate on the basis of physical findings and there has been no change in his evaluation of five percent which he states is the maximum degree of disability and is based on subjective complaints alone.

A December 29, 1983 report of Julian G. Nemmers, M.D., indicates that he examined claimant on December 20, 1983 and that he believes claimant's fracture is in good position and alignment and that his disability should stay as stated by Dr. Faber. The doctor believes that if claimant is to develop any arthritic changes in the ankle they would begin within three years, but that there was no evidence of arthritis developing at the time of examination. In his record of the examination of December 20, 1983, the doctor explains that in cases where osteoarthritis in the ankle develops following fracture, initial x-rays generally reveal a narrowing of the lateral superior joint line indicative of subluxation of the talus in the mortice. The doctor states that this x-ray finding did not exist in claimant's case and has never existed at any time and that, therefore, claimant's prognosis as to his ankle is good.

A March 29, 1985 report of Dr. Wilson states that claimant has residual swelling in the right ankle at the malleolus with no evidence of atrophy; that claimant has 70 degrees motion of the right ankle at rest; that on forced flexion of the right ankle against resistance, he has pain in his Achilles tendon; and that percussion and tapping over the Achilles tendon produce pain. The doctor opines that claimant has some Achilles tendonitis which accounts for his difficulty in climbing a ladder and pain on walking, and that claimant's May 10, 1983 injury was the cause of his symptoms, pathology and disability. He recommends that claimant avoids climbing ladders, minimize stair climbing and proceed cautiously on rough, uneven ground. The doctor evaluates claimant's impairment as ten percent of the right lower extremity based on loss of flexion and lateral motion, ankle pain, and weakness for climbing stairs and ladders and walking on rough ground.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether claimant's disability results from his injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 10, 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).

Little dispute appears to exist in this regard. Claimant fractured his ankle in the course of his work. Drs. Faber, Nemmers and Wilson agree that claimant has disability as a result of his ankle fracture. The fighting issue appears to be the nature and extent of claimant's 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).

Section 85.34(2) governs benefits payable for permanent partial disabilities and contains a table of scheduled member disabilities. An injury to the ankle is an injury to the foot. See Elam v. Midland Mfg. 2 Industrial Com'r Rep. 141 (Appeal Dec. 1981). Section 85.34(o) provides for weekly compensation during 150 weeks for total loss of or loss of use of a foot. Compensation for a less than total impairment to a scheduled member is proportionate to the scheduled maximum compensation for the member. Disagreement here concerns the extent of claimant's scheduled member disability.

Dr. Faber states that figure is five percent based on the AMA Guides. (The doctor did expressly state five percent of the lower extremity rather than five percent of the body as a whole. However, the Guides evaluate ankle impairment as lower extremity impairment. Where express reference is made to the Guides, it can be inferred the impairment rating is to the member or whole man as the Guides direct.) Dr. Nemmers agrees. Dr. Wilson indicates claimant has a ten percent lower extremity impairment. Dr. Faber was claimant's treating physician and has evaluated him on two occasions. Dr. Nemmers and Dr. Wilson each saw claimant once. Dr. Faber's opinion as to disability is accepted as claimant's treating physician he can reasonably be expected to have greater familiarity with claimant's overall condition and because the doctor's rating is more in keeping with claimant's objective condition. Claimant, at best, has only very limited loss of motion in the ankle; he apparently is not likely to develop osteoarthritis as a result of his ankle fracture; his chief complaints are of pain and discomfort. Dr. Faber indicates a basis for these cannot be substantiated by physical findings. Dr. Faber adequately considered these complaints in assessing claimant's impairment in any event. Hence, no reasonable basis is found for disregarding the impairment rating of claimant's treating physician and claimant is found to have a five percent impairment of the right lower extremity. The AMA Guides table 35 converts that figure to seven percent of a foot for which claimant is entitled to 10.5 weeks of permanent partial disability benefits.

Claimant requests reimbursement for costs of an independent medical evaluation under section 85.39. The section permits claimant one such evaluation upon application to the commissioner where the employee believes the rating of an employer retained physician is too low. While claimant in his application did not expressly allege that the impairment ratings of Drs. Faber and Nemmers were too low, copies of medical reports containing the ratings of each physician were attached to the application. Certainly, claimant's contentions as to the extent of his disability at hearing demonstrate his disagreement with those doctors' ratings. Claimant has not otherwise been reimbursed for an independent medical evaluation. He is entitled reimbursement of costs of Dr. Wilson's evaluation.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained a bimalleolar fracture of his right ankle which arose out of and in the course of his employment with A. Y. McDonald Mfg. Co. on May 10, 1983.

An injury to the ankle is an injury to the foot.

Dr. L. C. Faber regularly treated claimant for his injury until mid-July 1983 and has twice evaluated claimant.

Claimant saw Dr. Julian G. Nemmers and Dr. F. Dale Wilson for evaluation only.

Dr. Faber and Dr. Nemmers assign claimant a five percent (5%) impairment of his lower extremity.

Dr. Wilson assigns claimant a ten percent (10%) impairment of the lower extremity.

Claimant has only very limited loss of motion of his ankle; he is unlikely to develop osteoarthritis of the ankle; his chief complaints are of pain and discomfort and are largely not substantiated with physical findings.

Claimant has a permanent partial impairment of five percent (5%) of the right lower extremity which equals a seven percent (7%) permanent partial impairment of that foot.

Dr. Wilson's evaluation of claimant was an independent medical evaluation for which claimant made proper application.

Claimant had not received any other such evaluation.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his May 10, 1983 injury is causally related to his disability.

Claimant is entitled to permanent partial disability benefits resulting from his injury of seven percent (7%) of the right foot.

Claimant is entitled to payment of costs of his medical evaluation by F. Dale Wilson, M.D.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for ten point five (10.5) weeks at a rate of two hundred sixty-four and 22/100 dollars ($264.22).

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

Defendants pay costs of this proceeding.

Defendants file a final report when this award is paid.

Signed and filed this 30th day of August, 1985.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RALPH RUSSELL COOPER,	:	
Claimant,	:	
vs.	:	File No. 478854
MORSE CHAIN DIVISION OF BORG WARNER CORP.,	:	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
AETNA CASUALTY & SURETY COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	SEP 27 1985

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Morse Chain Division of Borg Warner Corporation, employer, and Aetna Casualty and Surety Company, insurance carrier, against Ralph Russell Cooper, claimant. The employer and insurance carrier seek to have a determination made of the termination of claimant's healing period under the provisions of the arbitration decision filed September 28, 1979 which awarded claimant a running award of healing period compensation. The hearing which produced the original award was conducted March 6, 1979.

The case was heard at Burlington, Iowa on April 19, 1985 and was considered fully submitted on June 7, 1985.

The record in this proceeding consists of the testimony of Ralph R. Cooper, claimant's exhibits 1 through 35, and defendants' exhibits A and B.

ISSUES

The issues presented by the parties at the time of hearing are a determination of the end of claimant's healing period; a determination of the nature and extent of any permanent disability which was caused by the original injury occurring on April 7, 1977, and on September 16, 1977; and a determination of claimant's entitlement to benefits for medical expenses under the provisions of section 85.27. It was stipulated by the parties that claimant's rate of compensation is $129.68 per week and that claimant's permanent disability should be evaluated and compensated as disability of a scheduled member.

SUMMARY OF EVIDENCE

Ralph Russell Cooper testified that he is 63 years of age. He stated that he has read the decision which was issued in this case in 1979 and that the description of the injury contained in that decision is correct. Claimant stated that he has undergone two surgeries under the care of Lucius C. Hollister, Jr., M.D. He stated that Dr. Hollister referred him to Billy James Williamson, M.D., who in turn referred him to Jerry L. Jochims, M.D.

Claimant testified that when he was first examined by Dr. Jochims in 1979, the examination caused his knee to swell and turn black and blue. Claimant testified that when he was again sent to Dr. Jochims in 1980, the doctor complained about not being paid for the prior examination. A dispute arose. Claimant testified that he would not allow Dr. Jochims to examine him and stated that the doctor threatened to make an unfavorable report.

Claimant testified that he was examined by Steven R. Jarrett, M.D., without any problems arising. Claimant testified that Dr. Hollister is now deceased.

In 1984 claimant sought an evaluation at the University of Iowa Hospitals in Iowa City. He stated that a probe was performed to examine the knee and that a surgical procedure which was performed improved the condition of his knee. He stated that the physicians at Iowa City recommended therapy, but that he has not had sufficient funds to undergo any therapy.

Claimant testified that he has had no earnings since 1979 and has had difficulty getting his medical bills paid.

Claimant testified that he had no physical limitations prior to 1977. He had a heart attack in 1978 for which he takes nitroglycerin and inderol. He denied suffering any injury to his knee subsequent to 1979 and stated that his only current medical disabilities arise from the injury to his knee and from his heart attack.

Claimant's exhibits 1, 2, 3, and 4 deal with scheduling an examination with Dr. Jochims. Exhibits 4 and 5 deal with the unpaid bill in the amount of $94.00, which arose from the 1979 examination performed by Dr. Jochims.

Exhibit 14 is a report from Dr. Jarrett, dated July 28, 1980. Dr. Jarrett indicates that he examined claimant and found him to have a restricted range of motion in his right knee. Dr. Jarrett evaluated claimant as having a 25 percent permanent impairment of the right lower extremity, but did not address the issue of claimant's healing period.

Exhibit 33 is a number of bills for care provided for claimant as shown on the face of the bills. The bills show total charges from the University of Iowa Hospitals in the amount of $838.70 and from John P. Albright, M.D., in the amount of $740.00. The charges are for services rendered in August and September, 1984.

Claimant's exhibit 34 is a report from Dr. Albright, dated October 16, 1984 which included attached clinical notes and an operation record. The clinical notes state:

> Chronic right knee pain following two injuries. The etiology of his pain remains obscure with minimal objective findings documented on diagnostic arthroscopy. He feels that a course of physical therapy may be of benifit [sic] to him at this point and we are sending him to his physical therapist in Keokuk for a 10 to 14 day course of phonophoresis with 5% hydrocortisone cream.

The operation record shows that a diagnostic arthroscopy of claimant's right knee was performed. It does not, however, indicate that any surgical treatment was performed other than the examination.

Defendants' exhibit A is the deposition of Dr. Jochims taken April 16, 1985. It includes deposition exhibits 1 and 2. Deposition exhibit 1 indicates that Dr. Jochims examined claimant on April 30, 1979. At that time Dr. Jochims found the claimant to have a 28 percent impairment of the right lower extremity. Dr. Jochims was of the impression that claimant's complaints were out of proportion to the medical findings.

Deposition exhibit 1 also contains progress notes from the examination attempted on February 29, 1980. Dr. Jochims makes the conclusion that claimant was grossly malingering.

At page 10 of the deposition, Dr. Jochims states that when he examined claimant on April 30, 1979 he felt that claimant had already completed his healing period. At page 21 of the deposition, Dr. Jochims stated that he felt that the 1979 examination was valid, but that the 1980 evaluation was of questionable value due to claimant's lack of cooperation.

APPLICABLE LAW AND ANALYSIS

The arbitration decision filed September 28, 1979 provided in pertinent part as follows:

> THEREFORE, defendants are hereby ordered to pay the claimant healing period benefits: . . . until claimant returns to work or recuperates as defined in Industrial Commissioner Rule 500-8.3.
>
> . . . Defendants shall pay healing period benefits until either an agreement between the parties is reached . . . or until defendants, with a prima facie showing that healing period benefits shall cease, shall file a request for immediate hearing for a determination of the cessation of the healing period.

Defendants filed the request for hearing on March 24, 1981. The arbitration decision is construed to mean that defendants were required to keep paying until such a request was filed with this agency. It does not, however, direct a result contrary to Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982) as the same relates to crediting overpaid healing period compensation toward an award for permanent partial disability.

Under Code section 85.34(1) and Rule 500-8.3, claimant's healing period ended at the time when it was medically indicated that no further improvement from the injury was anticipated. The only direct evidence in the record on that point comes from Dr. Jochims. He testified in his deposition that when he examined claimant on April 30, 1979 he felt that claimant had already reached the point of maximum recovery. He also made an evaluation of permanent disability which further indicates that the healing period had ended. Thomas v. William Knudson & Son Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). Accordingly, it is found and concluded that claimant's healing period ended April 30, 1979. It should be noted that the September 28, 1979 decision was based upon a March 6, 1979 hearing.

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

The stipulation by the parties that the disability is limited to that of a scheduled member is clearly supported by the evidence and the stipulation is accepted as correct. Dr. Jarrett placed the disability of claimant's right leg in the range of 25 to 32 percent. Dr. Jarrett reduced his rating to 25 percent, based upon an assumption that claimant's natural state was such that he had a less than normal range of motion. Dr. Jochims imposed a 28 percent impairment rating for the right leg. The difference between the ratings is small. The rating from Dr. Jochims is in the middle of the range indicated by Dr. Jarrett. It is therefore found that claimant has a 28 percent permanent partial impairment of his right leg and that he has a 28 percent loss of the use of his right leg as a result of the injuries of 1977 which were established by the arbitration decision.

The only remaining issue in the case is claimant's medical expenses with the University of Iowa Hospitals and Dr. Albright. As shown in the arbitration decision, Dr. Hollister and Burton Stone, M.D., both recommended an arthroscopic examination. Dr. Hollister was clearly an authorized treating physician. Defendants did not, however, follow that recommendation. An employer has an affirmative and continuing duty to supply medical treatment which is prompt and adequate. If the employer fails to do so, the claimant may make suitable independent arrangements at the employer's expense. The employer need not actually have refused medical services; it is enough that he has neglected to provide them. Richards v. Department of General Services, (Appeal Decision March 28, 1985). 2 Larson's Workmen's Compensation Law, §61.12(a) and §61.12(e).

Claimant testified to having problems with getting the bills for his care paid, even bills with physicians to whom the employer's representatives had directed him. He testified to an inability to obtain recommended care and treatment due to lack of financial resources. The record of the case corroborates the difficulty which claimant had in obtaining payment for the medical services which he had received long prior to the time he sought the examination at Iowa City. It is found and concluded that where the employer failed to provide the arthroscopic examination recommended by the authorized treating physician, Dr. Hollister, and by Dr. Stone, without a contrary recommendation appearing in the record from any other physician, and where the employer did not specifically designate a place for claimant to receive treatment for his knee, claimant was justified in seeking the arthroscopic examination at Iowa City. Defendants are therefore responsible for the costs incurred in relation to that examination, including $838.70 with the University of Iowa Hospitals and Clinics, and $740.00 with John P. Albright, M.D.

The file maintained by this agency on this case does not show a record of what payments have been made by defendants to or on behalf of claimant. Any overpayment of healing period compensation may be credited toward the permanent partial disability award, but any remaining overpayment may not be applied toward satisfaction of the section 85.27 liability. Section 85.34(4) provides no credit toward the section 85.27 liability. Applying such credit would be inconsistent with the general intent of the workers' compensation laws as construed in Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981), Cedar Rapids Community School v. Cady, 278 N.W.2d 298, 299 (Iowa 1979), Comingore v. Shenandoah Artificial Ice, Etc., Co., 208 Iowa 430, 226 N.W. 124 (1929), 2 Larson's Workmen's Compensation Law, §57.47, Anderson v. Woodward State Hospital-School, (Rehearing Decision February 15, 1985).

FINDINGS OF FACT

1. Following the injuries of April 7, 1977 and September 16, 1977 claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of the injuries from April 1, 1979 until April 30, 1979 when claimant reached the point that it was medically indicated that further significant improvement from the injury was not anticipated.

2. Claimant suffered a 28 percent loss of the use of his right leg as a result of the 1977 injuries.

3. Claimant obtained medical care for the injury from Dr. John Albright for which he incurred charges in the amount of $740.00, and from the University of Iowa Hospitals and Clinics for which he incurred charges in the amount of $838.70. The care was reasonable and necessary for the injury and the amount charged for the services rendered was fair and reasonable.

4. The employer, by failing to provide an arthroscopic examination of claimant's knee as recommended by its authorized treating physician, failed to provide prompt reasonable care for the injury.

CONCLUSIONS OF LAW

Defendants are liable for payment of healing period compensation to claimant at the rate of $129.68 per week, commencing April 1, 1979 and running through April 30, 1979, a span of four and one-sevenths weeks.

Defendants are responsible for payment to claimant of 61.6 weeks of compensation for permanent partial disability, representing a 28 percent loss of use of his right leg, payable commencing May 1, 1979.

Defendants failed to provide prompt adequate care for the injury when they failed to follow the uncontradicted recommendations made by the authorized treating physician. Claimant was then entitled to obtain the recommended care, at the employer's expense, from a source of his own choosing.

Defendants are responsible for payment of claimant's medical bills in the amount of $838.70 with the University of Iowa Hospitals and Clinics, and in the amount of $740.00 with Dr. John Albright.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant four and one-sevenths (4 1/7) weeks of compensation for healing period at the rate of one hundred twenty-nine and 68/100 dollars ($129.68) per week commencing April 1, 1979.

IT IS FURTHER ORDERED that defendants pay claimant sixty-one and six-tenths (61 6/10) weeks of compensation for permanent partial disability at the rate of one hundred twenty-nine and 68/100 dollars ($129.68) per week commencing May 1, 1979.

IT IS FURTHER ORDERED that all past due amounts of weekly compensation be paid to claimant in a lump sum together with interest pursuant to section 85.30 of the Code. Any overpayment of healing period compensation may be credited toward the defendants' liability for permanent partial disability, but not toward defendants' liability for section 85.27 benefits.

IT IS FURTHER ORDERED that pursuant to section 85.27, defendants pay claimant's medical expenses with the University of Iowa Hospitals and Clinics in the amount of eight hundred thirty-eight and 70/100 dollars ($838.70), and with Dr. John Albright in the amount of seven hundred forty dollars ($740.00).

IT IS FURTHER ORDERED that defendants pay the costs of this action.

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 27th day of September, 1985.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE DAISY, Claimant, vs. FRIT INDUSTRIES, INC., Employer, and SOUTH CAROLINA INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 756218 R U L I N G O N M O T I O N F O R S U M M A R Y J U D G M E N T

FILED
SEP 27 1985
IOWA INDUSTRIAL COMMISSIONER

This matter comes on before the undersigned on the motion of the employer and insurance carrier for summary judgment. Defendants contend that there is no genuine issue of material fact as to whether claimant's claim is barred by the statute of limitations established in Iowa Code section 85.26. Claimant has filed a resistance. Oral arguments were heard by telephone conference call on August 2, 1985.

Rule 237(c), R.C.P. provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Critical to this ruling are the pleadings. Claimant alleges an injury date of October 28, 1983. He filed his petition on May 7, 1985 and is thus, clearly within the two year statute of limitations.

Defendants appear to contend that claimant's actual injury date was the spring of 1982. This may or may not be the case, but it makes no differene anyway. If claimant did not receive an injury in October 1983, he will not be able to carry his burden of proof. At this point, however, there has been no issue raised about whether or not he received an injury on October 28, 1983 since defendants have yet to answer claimant's petition. Summary judgment for the defendants would seem most inappropriate when it is the defendants who are in default. They have neither denied claimant's allegations nor affirmative pled the statute of limitations.

If anyone is entitled to judgment in this matter, it is claimant who is entitled to a judgment on default pursuant to Rule 232(b), R.C.P. Claimant has not, however, asked for a default and none will be entered until he does so.

WHEREFORE, defendants' motion for summary judgment is hereby denied.

Signed and filed this 27th day of September, 1985.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH DE MOSS, Claimant, vs. JOHN MORRELL & COMPANY, Employer, Self-Insured, Defendant.	File No. 708288 A P P E A L D E C I S I O N FILED SEP 19 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 28, 1985 this deputy industrial commissioner has been appointed under the provisions of Iowa Code 86.3 to issue the final agency decision in this matter.

Claimant appeals from an arbitration decision filed April 3, 1985 in which he was awarded healing period benefits and permanent partial disability.

The record on appeal consists of a transcript of the hearing; claimant's exhibits A through I and defendant's exhibits 1 through 8. All evidence was considered in reaching this final agency decision.

The decision on appeal will be the same as that reached by the hearing deputy.

ISSUES ON APPEAL

The sole issue on appeal as stated by claimant is: "Did the deputy industrial commissioner err in concluding that claimant, Kenneth De Moss, was only entitled to permanent partial disability benefits as a result of his June 2, 1982, injury of fifteen percent (15%)?"

REVIEW OF THE EVIDENCE

Forty-three year old married claimant, who has a twelfth grade education and a semester in a vocational rehabilitation program, testified to work as a service station attendant, city worker, assembler, machine operator, truck driver-delivery person, parts finder and route salesman. In 1967 he began work for defendant as a roustabout. He then moved to the fab room, to bagging meat, to boxing and sealing meat, to trimming loins and tenders, to boning tops, to trim out and finally to lug and load.

Claimant recalled the circumstances surrounding his injury as follows: He was pushing four or five beef from the grading chain into the holding cooler. He slipped on ice that had formed on the floor and landed on his back and hip. He reported to the foreman and then the company nurse. He saw D. E. Wolters, M.D., who gave him medication. He also saw J. L. Powers, M.D., who had x-rays taken, placed him on light duty and then referred him to David L. Hoversten, M.D. He took vacation from June 21 to June 25 to ease his condition. On June 25 the plant was shut down.

Dr. Hoversten gave him cortisone injections and other medication. In April of 1983 he had surgery. After that he had a fluid build-up. He went to the Mayo Clinic for a second opinion and surgery was performed there. A third surgery followed in January of 1984.

Claimant reported he was told on March 26, 1984 he could perform light duty. His first week back he did janitor work for four to five hours each night. The second week he broke open his incision as he was going down stairs. He was allowed to work through April 6 or 7. He was then off until early May when he returned part-time for a few days. His light duty activities consisted of sweeping and scrubbing floors, emptying garbage and hanging coats. He had difficulty bending and trouble climbing stairs. He took pain pills, an anti-inflammatory and Ascriptin. Claimant indicated he told his employer of the problems he was having. He denied that he had grown to dislike his work.

Infection redeveloped and he returned to Mayo for additional surgery in July.

Claimant admitted a slip and fall in the parking lot in March of 1982, but he claimed that he was able to work thereafter. He fell once after his surgery by Dr. Hoversten. Claimant stated that he is being paid temporary total disability benefits. He is still an employee of defendant and he is required to call in each Monday to say he will not be at work.

Claimant, who wears support stockings, complained of constant pain in his lower back, hip and leg which is worsened in damp weather and with activities. He listed his daily medications as two or three Darvocet, Ascriptin and one Feldene. He claimed that the drugs decrease his stability and make him "dull and kind of oozy." He last saw a doctor for treatment in September of 1984.

Claimant has been going to college and studying sales and marketing. When he finishes a four to six weeks course in August of 1985, he would like to work in sales on a commission basis so that he could regulate his own hours. He had not talked with anyone about a job.

Claimant denied making his hip pop out through trick motion, that his limping would go away when his litigation was resolved, that his problems were attributable to self-inflicted wounds, or that he had been released by Dr. Hoversten or Robert S. Hranac, M.D.

Anna De Moss, claimant's spouse of nearly twenty-three years, listed things claimant can no longer do as follows: heavy lifting, fishing, bowling, golfing, lawn work, gardening, running and riding long distances in the car. She said that her husband moves slowly, sleeps poorly and uses a cane because he does not know when his hip will go out.

Fifty-five year old Richard Berger, claimant's pastor, testified that claimant's condition has deteriorated and that he must rely on his cane to get around.

Dennis L. Howrey, personnel and labor relations director for defendant, recalled receiving information from claimant's doctor in March of 1984 that he would be able to return to work. A light duty job was provided. When claimant felt he was incapable of doing the work and asked to see another physician, he was allowed to see Jerry Dawson, M.D. On August 31, 1984 Dr. Hranac indicated that claimant could return to work on a limited basis. The company had a job paying $8.35, but claimant had not tried it.

In addition to janitorial work, claimant had been given the task of removing one scale ticket from multiple copies. Claimant's supervisors were instructed that claimant was to have assistance with lifting. Claimant was concerned about getting an infection and Howrey felt that he did not wish to come back to work. He was aware that Dr. Hoversten had indicated claimant should work in an area where the temperature did not go below fifty-five or sixty degrees and was not to do excessive walking or stair climbing or to do heavy or repetitive lifting. Office type work was suggested. Howrey felt claimant could do the janitorial work he had done before perhaps by taking more breaks or doing the work of a stock room clerk with responsibilities for inventorying and issuing supplies. He admitted the latter job had not been offered to claimant. He estimated fifteen to seventeen jobs on the kill floor alone which would fit within claimant's restrictions. Howrey remembered claimant's calling in once to complain of back pain and he knew that claimant was fearful of reinjury to his hip.

Don Johnson, who has a master's degree in both divinity and rehabilitative psychology, who works for the state of Iowa rehabilitation department and also teaches and counsels in college, who had interviewed and tested claimant in June and July of 1984 and who had reviewed the depositions of Drs. Harnac, Hoversten and Bryan, testified regarding results of claimant's testing. Claimant's IQ measured at the low end of normal. He reconciled claimant's high grades in college with the fact that claimant was participating in a terminal program meaning one in which instructors endeavored to reward effort by the students. Claimant's work in three areas was developmental and remedial in nature. The witness was pleased claimant was doing well in college because some of his testing indicated he would not do so.

Claimant's Minnesota Multiphasic Personality Inventory demonstrated a tendency to focus on his medical dilemma. Hysteroid and hypochrondriasis were both pronounced. Depression also was elevated, but it was thought to be situational in nature. Claimant was characterized as "a very strong neurotic person." The psychologist believed that claimant could be helped by a pain clinic where he would have to handle the psychological components of his pain.

Johnson thought claimant was best suited for manual labor, but that his injuries now would preclude much of that work. As positive vocational abilities he listed working with his hands, exercising mechanical reasoning, carrying on a conversation and enjoying people. As liabilities he named claimant's present psychological condition, his age, his carriage and his demeanor.

David L. Hoversten, M.D., orthopedic surgeon, saw claimant on July 9, 1982 and took a history of falls in March and June of 1982. On examination claimant had full range of motion in his back, but there was tenderness over the hip. There was no evidence of nerve root compression. X-rays showed mild narrowing at L5-S1. Claimant was believed to have tendonitis which was treated with injections and medication. Claimant was not returned to work.

In April claimant was found to have some worsening of pain over his right hip and difficulty getting around. He was admitted to the hospital. A CT scan was normal. A myelogram showed a small bulging in the central area of L5-S1. Surgery on April 13 removed the right hip bursa. Post surgery a large effusion developed. Claimant was treated with medications and injections.

On September 1, 1983 claimant called to report a fall on steps which resulted in increased soreness and a bruise. A week later claimant appeared to have an infectious process within his hip.

Claimant was last seen on August 28, 1984 at which time he had marked weakness and soreness in the right hip with no present evidence of infection. There was minimal swelling of the foot and snapping of the iliotibial band across the greater trochanter of the hip.

Dr. Hoversten assessed claimant's impairment at sixty to seventy percent of a right leg which through the AMA Guides converted to twenty-five to twenty-eight percent of the whole person. The doctor did not think claimant could return to the work he was doing at the time of injury. He felt claimant should be in a controlled environment where the temperature was not below fifty-five or sixty degrees, should not do excessive walking or stair climbing and should not do repetitive heavy lifting. He thought claimant could work in an office type environment with a comfortable chair and freedom to move around. Part-time work progressing to full-time work was believed desirable.

He agreed with Dr. Bryan that claimant's hip should not produce the kind of pain claimant was evidencing, that claimant might improve with resolution of his litigation and that seeing the medical reports and records that had accumulated from August of 1983 until August of 1984 would have been helpful to him in forming his opinion.

Dr. Hoversten believed there was a possibility of infection recurring, of trouble with scarring, or of snapping progressing.

Richard S. Bryan, M.D., board certified orthopedic surgeon, saw claimant on September 9, 1983 and took a history of a fall, injections and surgery. On that same date an incision, drainage and debridement of the right greater trochanteric bursa was undertaken. Thereafter claimant developed thrombophlebitis which required use of anticoagulants.

Claimant returned on January 4, 1984 with complaints of constant pain in his right low back area and drainage from the bursa. Surgery was undertaken on January 9, 1984 to put in a suction irrigation system. Although he thought claimant was exaggerating his back pain, the doctor checked the back and felt claimant had a degenerative disc with no neurological problem. He said that claimant's limp would increase his low back discomfort of a muscular type as opposed to a herniated disc.

Claimant was given a return to light duty date of March 19, 1984. He was not to work in a cold, damp environment or to do heavy lifting or carrying until he increased his strength in his hip and back. The doctor viewed walking as a good exercise and climbing stairs as all right. Claimant was given a weight restriction of thirty-five pounds lifting and twenty-five pounds carrying.

Claimant returned on April 17 and reported developing renewed drainage after he returned to work. He was continued on antibiotics. Antibiotics were restarted in July and the wound was opened again. There was no involvement of the hip joint. Cultures grew staphylococcus. At that time claimant had acquired a snapping sound in his hip which Dr. Bryan did not attribute to any pathology. The surgeon anticipated an eight week healing period after claimant left the hospital with the major portion of that time directed to building up the musculature in his low back.

Claimant's back pain was attributed to both the narrowed interspaces and to claimant's poor muscles which he had not been exercising to build up. The doctor stated claimant's back would respond better to exercise than to rest. Claimant was given a five percent impairment to his lower back and five percent to his lower extremity which were combined to ten percent of the body as a whole. Dr. Bryan was unable to document claimant's pain by examination of the tissues or by watching him move.

The doctor felt that claimant should have been able to do light janitor work and that he was not doing everything he could to get back to work. He did not think that claimant's limp would be permanent. Dr. Bryan anticipated that claimant's becoming active would make him feel better.

Robert S. Hranac, M.D., who saw claimant after he returned from Mayo Clinic to follow his treatment, testified on May 29, 1984 that he thought claimant could go back to work on a limited basis and he had set up a job to build up claimant's strength. That limited basis would be for a few hours only. He thought that claimant needed to exercise his hip and walk to strengthen his muscles to allow the healing process to occur. He anticipated that claimant would have some pain and discomfort.

Dr. Hranac was aware that claimant felt his wound had opened as he was climbing stairs, but he did not know of any stitches coming out.

The doctor thought claimant might be helped by treatment at a pain clinic or by physical rehabilitation. He cautioned that claimant would need to watch for swelling, fever or drainage. He thought it was essential for claimant to walk and to reestablish his gait.

Dr. Hranac acknowledged that claimant has used a cane and that he walks with a limp and marked list of his body which causes difficulty with his lower back. He was unable to say whether the degeneration process seen in claimant's back was a result of claimant's injury. The physician believed claimant could do lifting of five to fifteen pounds and walking, sweeping and general cleaning at a rate of two to three hours per day at first. Climbing stairs was left to claimant's discretion. It was assumed that if claimant was unable to do the work he would report back. The doctor declared claimant's injury permanent and he agreed claimant needed a vocational change. Dr. Hranac believed that claimant has pain. He stated that side effects of Darvocet might lessen alertness, decrease reflexes and possibly cause drowsiness.

In a letter dated August 31, 1984 Dr. Hranac expressed the opinion that claimant could work three to four hours a day. A report to claimant's life insurance company dated December 21, 1984 declares claimant totally disabled and unable to resume work.

Jerry D. Dawson, M.D., saw claimant and reported his findings in a letter dated May 24, 1984. Claimant told the doctor of persistent back and right-sided hip pain and weakness. He complained of depressive symptoms which require him to take antidepressants. Claimant said that his right hip had been popping out as he was walking at work. Dr. Dawson wrote that claimant should not work and found him at risk from falling on stairs or wet or greasey floors and unable to sit for prolonged periods. He suggested claimant be seen by an orthopedic surgeon for the popping in the hip.

William Follows, M.D., orthopedic surgeon, expressed his opinion in a letter dated June 11, 1984 that claimant should not work and he anticipated a revision of the scar and a reconstruction of the abductor mechanism. He anticipated claimant's being able to return to work, but he thought there might be some permanent disability. Motion in claimant's hip was good and the opening in his wound looked superficial.

APPLICABLE LAW AND ANALYSIS

The sole issue on appeal is whether or not the hearing deputy erred in awarding only fifteen percent permanent partial industrial disability. This deputy commissioner concludes she did not.

When a 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 described the process of assessing industrial disability 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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

The hearing deputy thoroughly discussed the industrial disability factors beginning with functional impairment by noting that claimant's two ratings were "widely disparate." She gave greater weight to Dr. Bryan's opinion both because of his greater experience with claimant and his greater experience generally, and that weighing of the evidence was proper. Additionally, Dr. Hoversten was not aware of the treatment provided to claimant at Mayo Clinic and he acknowledged that information about claimant's care subsequent to his would have been useful to him in forming his own opinion.

Dr. Hoversten performed claimant's first surgery and then he did not see him for almost a year at which time he rated claimant's impairment at sixty to seventy percent of the right leg or twenty-eight percent of the body. Dr. Bryan assigned five percent impairment to the lower back and five percent to the lower extremity for ten percent of the body as a whole. Claimant's back problem was found to be unrelated to his injury of June 2, 1982 and there has been no appeal of that finding. Claimant does have impairment to his hip and the recurrent and serious nature of a staphylococcial infection cannot be overlooked. However, overall his permanent functional impairment of his body as a whole is small and is amplified by his focus on his medical problems which is reinforced by his spouse who attaches symptomatology to his injury for which there is no medical basis. Claimant's doctors are unable to document medical grounds for his pain. Functional impairment is only one consideration in a determination of industrial disability.

Claimant was released for light duty on March 26, 1984. Dr. Hranac arranged a work-hardening schedule to enable claimant to ease back to full-time duty. During his second week, his incision opened; and he was off work until either the end of April or early May when he left work again. Defendant is to be complimented on its efforts to get claimant back to work and on the attempt it made to coordinate its efforts with claimant's supervising physican. Those endeavors might have been more successful had there been better communication regarding those aspects of his work which he thought inappropriate.

The record evidences some lack of cooperation on claimant's part in assisting with his rehabilitation. His doctors have expressed the opinion that he could return to full-time duty if he would rehabilitate himself by walking and exercising. Again testing conducted by Johnson demonstrated claimant's tendency to focus on his medical problems. Johnson characterized him as "a very strong neurotic person."

On the other hand Johnson pointed to some positive aspects of claimant's situation; i.e., his abilities to deal with and to enjoy people, to engage in mechanical reasoning and to do work with his hands.

Claimant has been engaged in a rehabilitation program. When he finishes that program, he plans to seek work as a commissioned salesperson who regulates his own hours. Claimant is doing well in his program, but certain aspects of his course are developmental or remedial. He is in a situation in which he is rewarded for his achievements. Testing indicates claimant would not do well in a formal education program.

Claimant is in his middle years with nearly half his worklife ahead. He has not been terminated by defendant. Howrey testified to a number of jobs within a meat packing plant which he felt would be compatible with claimant's limitations. Claimant had a good hourly rate in the packing plant. The hearing deputy anticipated claimant's eventually being able to raise his income to a comparable level in sales.

The award of fifteen percent industrial disability was proper.

As there has been no appeal of any other issue in this case, the findings and conclusions herein regarding those issues will be the same as those of the hearing deputy.

The healing period dates cannot be determined precisely from the evidence presented. Healing period will be ordered for the time claimant was not working from June 2, 1982 through July 24, 1984.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-three years of age.

That claimant has a twelfth grade education and a semester in a vocational rehabilitation program.

That claimant has work experience as a service station attendant, city worker, assembler, machine operator, truck driver-delivery person, parts finder, and route salesperson.

That claimant began work for defendant in 1967 and has performed various jobs within the plant.

That claimant was injured on June 2, 1982 when he slipped and fell on ice at his work place.

That claimant slipped and fell in the parking lot in March of 1982, but he was able to resume his work thereafter.

That in April of 1983 claimant had surgery to remove the bursa from his right hip and subsequently developed a staphylo-coccial infection.

That on September 9, 1983 claimant had an incision, drainage and debridement of the right greater trochanteric bursa and thereafter suffered from thrombophlebitis.

That claimant underwent a third surgery on January 9, 1984.

That claimant was released for light duty on March 26, 1984.

That in July of 1984 claimant developed an abscess which was opened, evacuated and drained.

That claimant last saw a doctor for treatment in September of 1984.

That claimant wears support stockings and takes Darvocet, Ascriptin and Feldene.

That any problems with claimant's back are unrelated to his injury of June 2, 1982.

That claimant is restricted from work in lower temperatures, excessive stair climbing and repetitive heavy lifting.

That claimant's employment with defendant has not been terminated.

That there are a number of jobs within a packing plant which claimant could do with his restrictions.

That claimant needs to exert more physical effort to rehabilitate himself.

That claimant is motivated to succeed in sales.

That claimant was unable to work because of his injury for periods from June 2, 1982 through July 24, 1984.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence a causal relationship between his present disability and his injury of June 2, 1982.

That claimant has established entitlement to seventy-five (75) weeks of permanent partial industrial disability benefits as a result of his June 2, 1982 injury.

That claimant has established entitlement to healing period benefits for his time off work between the dates of June 2, 1982 and July 24, 1984.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay claimant seventy-five (75) weeks of permanent partial industrial disability at a rate of two hundred thirty-nine and 63/100 dollars ($239.63).

That defendant pay claimant healing period benefits for his time off work between the dates of June 2, 1982 and July 24, 1984 at a rate of two hundred thirty-nine and 63/100 dollars ($239.63).

That defendant pay the accrued amounts 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 activity reports as requested by this agency.

Signed and filed this 19 day of September, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MILTON DICKENSON,	:	
Claimant,	:	File No. 661038
vs.	:	R E V I E W -
JOHN DEERE PRODUCT ENGINEERING-WATERLOO,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
SEP 25 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

On August 2, 1985, the parties filed a stipulated record in this case. On September 3, 1985, claimant filed his brief and on September 4, 1985, defendant filed its brief.

On November 15, 1984, an appeal decision was filed herein which awarded, among other things, 200 weeks of permanent partial disability benefits. Claimant sought judicial review of this final agency decision in Iowa District Court and the original hearing exhibits are on file in the Black Hawk County Courthouse. Defendant employer did not seek judicial review and, therefore, a compensable injury has been established as a matter of law. On September 18, 1985, copies of the hearing exhibits were filed with the agency having been mailed by claimant's counsel to the agency on September 16, 1985. These exhibits have been reviewed.

ISSUE

The issue is whether the Iowa General Assembly authorized the agency, pursuant to Iowa Code section 85.27, to award benefits under some circumstances for the expense of a claimant in moving permanently from an Iowa residence to another jurisdiction, such as New Mexico, once a compensable injury has been established.

APPLICABLE LAW

Iowa Code section 85.27 reads in part:

> Professional and hospital services release of information--absolved from liability--charges--prosthetic devices. The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. (Emphasis supplied)

Black's Law Dictionary (Revised Fourth Edition, 1968) defines "rehabilitation" as follows:

> REHABILITATION. Investing or clothing again with some right, authority, or dignity; restoring to a former capacity; reinstating; qualifying again. In re Coleman, D.C.Ky., 21 F.Supp. 923, 924, 925. (Emphasis supplied)

The Iowa Court of Appeals stated in Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa 1984):

> In keeping with the humanitarian objectives of the worker's [sic] compensation statute, we apply it broadly and liberally. The legislation is primarily for the benefit of the worker and the worker's dependants [sic]. Its beneficial purpose is not to be defeated by reading something into it which is not there, or by a strained and narrow construction. (Citations omitted) (Emphasis supplied)

The Iowa Supreme Court stated in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980): "The primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents insofar as statutory requirements permit". (Citations omitted) (Emphasis supplied)

ANALYSIS

Defendant states in its brief as follows: "[T]he Commissioner cannot order the Employer to pay the costs of this permanent move by Mr. Dickenson and his entire family." Defendant does not argue in its brief that the move to New Mexico is not reasonable given claimant's medical condition and, in any event, such an argument would not be persuasive. See exhibits 1 and 2 attached to the stipulated record. The amount of the expenses is also determined to be reasonable. The question is, therefore, whether it is permissible under any circumstances for this agency to order the reimbursement of moving expenses for an out-of-state permanent move by an Iowa claimant. Both parties cite Larson, Law of Workers' Compensation, section 61.13(b) and the cases discussed in this section. This deputy has reviewed the case law cited by Larson.

It is concluded that the Iowa General Assembly vested authority or jurisdiction in this agency to award moving expenses under the circumstances of this case. Claimant herein moved to New Mexico because of his lung condition and the move constituted "reasonable...physical rehabilitation" as the move helped restore his lungs to their former capacity. The legislature did not use the term "physical therapy." Also, the legislature did not use the term "vocational rehabilitation." Exhibit 2 of the stipulated record is a letter dated August 29, 1984 from Michael L. Deters, M.D., to Robert D. Fulton and reads in part: "Milton Dickenson has contacted me to let me know that he was out in New Mexico and he felt markedly improved while he was out there....I do feel that he probably will do much better in that climate and will have markedly reduced symptoms from his underlying lung disease." In October of 1984, claimant moved to New Mexico. See exhibit 3 of the stipulated record. Living in New Mexico is the physical rehabilitation that is at issue here. However, given claimant's lung conditon, the result in this case would be different of course if claimant had elected to move to, for instance, North Dakota. The legislature contemplated that this agency would order reimbursement in cases such as this one because the denial of moving expenses in cases such as this one would result in claimants staying in Iowa incurring considerable medical bills at the expense of employers or their carriers. In construing statutes, the courts avoid strained, impractical or absurd results. Iowa National Industrial Loan Co. v. Iowa State Dept. of Revenue, 224 N.W.2d 437, 440 (Iowa 1974); see Iowa Code section 4.4(3) (1985) (courts are to presume that "a just and reasonable result is intended."); see also Iowa sections 4.2, 4.6(1) and (5) (1985).

ORDER

IT IS THEREFORE ORDERED:

That defendant pay claimant the disputed two thousand two hundred and 30/100 dollars ($2,200.30) and pay this amount in a lump sum.

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

That defendant file a claim activity report if such a report is requested by the agency.

Signed and filed this 25th day of September, 1985.

T. J. McSweeney
T. J. MC SWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN DIMITRACOPOULOS, Claimant, vs. THE UNIVERSITY OF NORTHERN IOWA, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 698684 D E C I S I O N O N R E H E A R I N G

FILED
SEP 27 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a decision on rehearing of attorney Steven D. Lombardi's application for approval of attorney fees and lien. Evidence on rehearing was taken before the undersigned on June 17, 1985 at the courthouse in Waterloo, Blackhawk County, Iowa.

The record consists of the statements of attorney Lombardi and the claimant; exhibits A, B, C, and F; and official notice of the file.

ISSUE

The only issue for determination is the reasonableness of attorney fees for services rendered to claimant.

REVIEW OF THE RECORD

A full understanding of the issue herein requires review of this entire file as well as the evidence presented by the parties at the time of hearing.

The file shows that claimant received an injury on January 28, 1982. Compensation payments to claimant were commenced on February 19, 1982 and a memorandum of agreement was filed April 9, 1982. Payments continued to claimant until July 25, 1982 when payments were terminated pursuant to notice.

On August 3, 1982 claimant contacted Craig H. Mosier at the law firm of Mosier, Thomas, Beatty, Dutton and Braun. He, at that time, entered into a written fee agreement providing that claimant's attorneys would receive 33 1/3 percent of the net recovery made on behalf of claimant. Claimant stated at hearing that he understood the English language and the fee agreement. He contended, however, that certain assurances made to him were not fulfilled.

At hearing attorney Lombardi stated that he and his law firm had considerable time involvement with the claimant. He advised that he spent a lot of time explaining claimant's rights to him and attempting to gather medical evidence. Attorney Lombardi contended that claimant was anxious to settle his claim; that he met strong resistance from the defendants; and that claimant's doctors were uncooperative. Counsel said he had some particular problems with some sort of medical report from Egypt.

Claimant denied he had ever sought or received a medical report form Egypt. He stated that he had been assured he would receive a lump sum settlement and was disappointed when this was not accomplished. Claimant stated that he paid one-third of his benefits to counsel until August 1984. At that time he requested an itemized statement of expenses, but was advised by counsel that none could be provided because his file had been destroyed. Claimant said he received an itemized statement after he was told his file was destroyed. Claimant was not satisfied with the itemized statement and so informed counsel. An adjustment was made to the statement, but claimant remained unsatisfied. At hearing claimant contended that the itemized statement contains charges for expenses incurred in his other matter and charges for long distance calls that were in fact made in Waterloo.

Included in the documents filed by the parties with this agency is counsel's itemized statement of time in this case. According to that statement the attorneys' actual times are as follows:

Attorney Lombardi	58.30 hrs.
Attorney Mosier	13.60 hrs.
Attorney Staack	18.50 hrs.
Paralegal	23.50 hrs.
Investigator	11.30 hrs.

95

The statement provides that the appropriate hourly fee for these services would equal $6,877.50. Expenses of $361.82 were claimed.

The file reflects that an agreement for settlement was entered into between claimant and defendants in September 1983 and an order approving the same was filed September 12, 1983. The settlement agreement provided that claimant's healing perioo was from January 29, 1982 through July 25, 1982 and that claimant's permanent partial disability was 37 percent of the body as a whole. Accrued benefits were paid in a lump sum. The parties agreed that claimant was at that time charged expenses of $424.62 which was deducted from checks received totalling $9,895.71. Counsel's one-third of the net recovery was $3,157.03, receipt of which he acknowledged.

On November 30, 1983 an order for partial commutation was granted in the amount of $6,517.93. The purpose of this commutation as stated in the application was to pay claimant's attorney fees. It was disclosed at hearing, however, that claimant and his counsel split the commuted funds on a one-third to two -thirds basis as per the fee agreement. No satisfactory explanation was offered as to why this agency was misinformed as to the intended use and disposition of those funds. In any event, counsel received $2,172.42 toward his fees. At hearing claimant produced ten cancelled checks payable to counsel in the amount of $197.41 each. See exhibit A. These checks were written between December 29, 1983 and August 8, 1984. Thus, the evidence establishes that to date counsel has received a total of $7,303.55, plus expenses in the amount of $424.62. By counsel's own admission expenses do not exceed $361.82.

In the ruling of February 25, 1985 it was found that claimant's award (less the discount for the commutation) was $26,211.25. A fee of 25 percent was allowed in the amount of $6,426.36 plus $361.82 in expenses.

At hearing claimant introduced an affidavit of Jay P. Roberts, an attorney from Waterloo which states that one-third fee is the usual and customary fee in workers' compensation cases in Waterloo.

APPLICABLE LAW AND ANALYSIS

An attorney has the burden of establishing by a preponderance of the evidence that the fee charge is reasonable and should be approved. This burden arises from the ethical requirements of the legal profession. The attorney is required under the Iowa Code of Professional Responsibility for Lawyers (herinafter referred to as ICPRFL) to only charge reasonable fees. See EC (ethical consideration) 2 - 19 and DR (disciplinary rule) 2 - 106, ICPRFL.

This agency's authority to review fee arrangements arises by statute. Iowa Code section 86.39 states as follows:

> 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....

Resolution of a fee dispute has two facets. The first consideration is whether or not the fee agreement has been followed and the second consideration involves the reasonableness of that agreement. In this case, we are dealing with a contingency fee arrangement in which the fee is based upon a percentage of the recovery, if any. Such fees have long been accepted in civil proceedings before the courts and administrative agencies. See EC 2 - 22, ICPRFL. However, despite the ethical acceptance of such fee agreements and regardless of the embodiment of the fee agreement in a written form as suggested in EC 2 - 21, ICPRFL, such agreements are not binding upon a tribunal reviewing the appropriateness of the resulting fee. Kirkpatrick v. Patterson, 172 N.W.2d 259, 261 (Iowa 1969). In Kirkpatrick, the Iowa Supreme Court stated that a one-third contingency fee contract may be reasonable but any determination of reasonableness must be based upon facts and circumstances of a particular case. The court listed the appropriate factors which have a bearing on the reasonableness fee. These factors are substantially the same as those contained in DR 2 - 106 of ICPRFL. These factors are described as follows:

> 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.... Id., at 261.

Although the various evaluating factors are different for each case, this agency in the past has approved one-third contingency fee arrangements when appropriate. Francis v. Ryder Truck Rental, IV Iowa Industrial Commissioner Report ___ (Appeal Decision, September 30, 1983).

The first question is whether the fee agreement has been followed. In this case it was until August 1984 when claimant ceased making payments. Under the terms of the agreement, counsel is still owed a portion of his fees.

The second issue is the reasonableness of the fees. On this issue counsel has failed to carry his burden and establish that a one-third fee should be approved. First, the undersigned seriously questions the necessity of 125 hours of legal research, investigation, and consultation set forth in the itemized statement. More importantly, however, the method of assigning a value to the time involved is so unreasonable as to defy any serious consideration. It was disclosed at hearing that attorney Lombardi barely had one year of law practice at the time he became involved in claimant's case. Yet attorney Lombardi assesses an hourly rate of $70 per hour while the rates of the two partners, Mosier and Staack, are assessed at $65 and $50 respectively. While this is certainly a unique billing practice, it defies any attempt to apply a rational basis to it. Even if it is assumed that 125 hours were necessary, it would be far more appropriate for attorney Lombardi's time to be valued at $50 per hour, attorney Mosier's at $70, and attorney Staack's at $65. Applying a reasonable basis for calculating hourly fees, counsels' time, including paralegals and investigators equals only $6,057.00. Further, the undersigned has not been able to add up the total hours set forth in the statement based upon the itemization. Even counsel's itemized statement does not equal 125 hours.

In addition, the comments and discussion contained in the original ruling remain appropriate.

The original ruling concerning expenses will remain unchanged.

FINDINGS OF FACT

WHEREFORE, the following facts are found:

1. On August 3, 1982 claimant entered into a written fee agreement with his attorneys.

2. The fee agreement provided a one-third contingency for attorney services.

3. At the time the fee agreement was entered into the defendants had admitted liability.

4. The legal issues involved in this case were not unique or unusual.

5. No depositions were taken.

6. The case was settled prior to trial.

7. Counsel's method of calculating the value of his time in this matter is unreasonable.

8. The factual questions involved in this case were not unique or unusual.

9. There was no great degree of risk that no recovery would be made in this case.

10. The results obtained in this case were average.

11. Claimant's gross recovery in this matter was $26,211.25.

12. Litigation expenses in this matter were $361.82.

CONCLUSIONS OF LAW

Attorney Lombardi has proven by a preponderance of the evidence that a reasonable fee for his services in this matter is six thousand four hundred sixty-two and 36/100 dollars ($6,462.36), plus three hundred sixty-one and 82/100 dollars ($361.82) in expenses.

ORDER

IT IS THEREFORE ORDERED that counsel's fees be approved in the amount of six thousand four hundred sixty-two and 36/100 dollars ($6,462.36) plus three hundred sixty-one and 82/100 dollars ($361.82) in expenses.

IT IS FURTHER ORDERED that counsel's request for a lien for payment of those fees is denied.

IT IS FURTHER ORDERED that the costs of this action are taxed to attorney Lombardi.

Signed and filed this 27th day of September, 1985.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES EARL DOUD, Claimant, vs. REED CONSTRUCTION COMPANY, Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 639598 A P P E A L D E C I S I O N

FILED
SEP 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision wherein they were ordered to pay claimant interest at the rate of 10 percent per annum upon each weekly payment of compensation for permanent partial disability which was not paid at the time the same became due under the provisions of section 85.34(2), Code of Iowa. The interest was found to accrue commencing May 20, 1981, the day after the end of the healing period and shall run until the date when claimant's entitlement to compensation for permanent partial disability was actually paid. The record facts in this case was stipulated to by the parties.

ISSUE

The issue to be determined is the amount of interest, if any, claimant is entitled as a result of the permanent partial disability in the Agreement for Settlement filed on June 6, 1984 and approved by the industrial commissioner on June 6, 1984.

REVIEW OF THE EVIDENCE

The stipulated record briefs and exhibits have been reviewed. The evidence was well summarized by the deputy and is adopted with enlarged and specific portions set out for magnification.

Exhibit 9, a letter to claimant's counsel from the insurance carrier dated August 16, 1983, states:

> You will note that he has rated Mr. Doud at five percent to the left arm. The AMA Guide to Evaluation converts five percent to the arm to three percent to the body. This would amount to 15 weeks at $158.47, or $2,377.05. All of this is accrued, and if you are in agreement we will immediately issue our check payable to you and to Mr. Doud.

Exhibit 10, a letter to claimant's counsel from the insurance carrier dated December 30, 1983, states: "Not having heard from you in response to our letter of August 16, 1983, we are enclosing a check for $2,377.05 payable to you and your client for his permanent disability, as rated by Doctor Berg."

The following is a summary by Dr. Berg of follow-up examinations:

> 11-7-80 Seen having shoulder discomfort and pain about his shoulder but has good functional motion, flexion to 110 deg. and abduction to a little over 90 deg. I recommended, however, because of his lack of external rotation that he go for P.T. for ROM exercises to his shoulder. The pt. agreed to this and is to start next week. Pt. to return in about one month.
>
> 12-8-80 Pt. is post op rotator cuff repair, still having difficulty with pain and motion and is tense at work. He was advised to return here in two months and not to work a regular job until seen.
>
> 2-9-81 Pt. is improving and has full motion of his shoulder but pain and noted fatigue in using his arm. I feel as far as returning to work, he could return March 9 with limit [sic] activity such as truck driving with no lifting. A Letter to Wausau Ins. Companies.
>
> 4-9-81 Post op rotator cuff repair, has full functional motion now but does not have power for doing any heavy work or should not do heavy work in the future with his arm. He may to [sic] light work, no return appt. here.

7-24-81 Pt. is post op rotator cuff repair, is back working doing light work presently still having pain in his shoulder but has flexion of his shoulder to 160 deg., he has abduction of his shoulder to 130 deg. However, he has a painful arc through this motion but he has obtained his abduction. I recommended that he should not do heavy work and should not do heavy work with his arm in abduction position. He states he is sweeping and doing odd jobs for his company and is able to [sic] this as long as he does not abduct or flex his arm above his head. I recommended that he continue doing this and I also recommended that he try a trial of Motrin on a regular basis to see if this would relieve some of his discomfort. He is to return here prn.

3-22-82 Continues to have some discomfort in his shoulder but has full abduction and flexion is limited to about 110 deg. He notes pain with motion of his arm and placed on Naproysn today and is to continue to work out with 1½ lb. weight. He is released from further follow up.

12-13-82 Follow up exam. Continues to have some pain and discomfort in his left shoulder. Lacks abduction beyond 100 deg. Forward flexion has pain. Crepitation about the shoulder and x-rays reveal deg. arthritis of the AC joint and some about the glenohumeral joint. Pt. is told to continue with motion exercises and placed on Feldene 20 mg. daily. To return here as needed.

APPLICABLE LAW AND ANALYSIS

Section 85.30 of the Code of Iowa states:

> Compensation payments shall be made each week beginning on the eleventh day after the injury, and each week thereafter during the period for which compensaion 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.

In Kostohryz v. Lake Center Industries/Deco Products Company, III Iowa Industrial Commissioner Report 161 (1982) after analyzing Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957), this agency stated:

> This case is a review-reopening. A memorandum of agreement was received by this office on October 23, 1980. Claimant's petition in arbitration [sic] was filed January 19, 1981. As this is a proceeding in review-reopening, following the dictates of Bousfield, 249 Iowa 64, 86 N.W.2d 109, interest can be assessed from the time claimant applied or from the time a determination of the permanency was made ....Since Bousfield was not overruled, it stands for the proposition that interest may not always begin on a certain date; interest should commence in a review-reopening action on that date which defendant knew claimant was entitled to permanent partial disability or had clear notice that claimant was making a claim for permanent partial disability.

Kostohrzy, at 163)

In Sloan v. Great Plains Bag Corp., III Iowa Industrial Commissioner Report 237 (1982), the commissioner stated after analyzing Bousfield supra and Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979):

> In contrast to the case sub judice, Farmers Elevator Co., Kingsley, 286 N.W.2d 174, involved a situation where the employer from the beginning denied the compensability of the claim. In the present case on appeal, the defendants accepted the claim as compensable and paid compensation for healing period and permanent partial disability to the extent of functional impairment estimated by a physician.
>
> ....
>
> The cases of Farmers Elevator Co., Kingsley, where the employer does not admit the compensable nature of a claim, and Wilson Food Corp., calling for prompt compensation, may support a finding that section 85.30 interest should accrue when the employer becomes aware of a claimant's claim for such compensation. However, this case does not fall within the Farmers Elevator Co., Kingsley or Wilson Food Corp., senario. Here the defendants admitted some degree of permanent disability and paid benefits accordingly, thus, the case falls squarely within the parameters of Bousfield, 249 Iowa 64, 86 N.W.2d 109.

Therefore, on the basis of Bousfield, where the employee makes permanent partial disability payments before the proposed determination and such payments were made in good faith, based upon a reasonable measure, the statutory interest on any increase in degree of permanent partial disability accrues on the date the amount is determined by the proposed award. It is determined, the defendants in the case sub judice have satisfied this criteria.

Sloan, at 237, 238.

In Sloan the commissioner awarded statutory interest from the date of the deputy's proposed review-reopening decision.

Of note in this case is the basis of claimant's healing period cessation. From the evidence in the record, focusing on Dr. Berg, it appears that the claimant's healing period ended because he returned to work. It is not at all clear that the claimant had reached maximum medical recuperation, or that he had reached a plateau where no improvement was expected so as to render a permanent partial impairment rating. In this case the stipulated evidence equivocates as to whether the claimant would sustain a permanent impairment.

The present case must be contrasted with the following hypothetical situation: An employee's healing period begins on January 1, 1980 and ends on February 1, 1980. Assume insurance carrier has been paying healing period timely. The basis of the cessation are several medical reports that indicate on February 1, 1980 claimant has reached maximum medical recuperation and that no improvement is anticipated. Those same medical reports indicate that claimant has suffered a 20 percent impairment to the body as a whole causally connected to his employment. The employer refused to pay any permanent partial disability payments.

In this case we have a man whose healing period ended due to a return to work; medical evidence which equivocates as to permanency; after a substantial period of time an impairment rating; (inference possible that up to that point claimant might not have suffered permanency); defendants' tendered amount to claimant reflective of rating; not hearing from claimant, defendants send check to claimant (apparently with "no strings attached"); claimant returns check uncashed; claimant seeks out own doctor for permanency rating; and defendants and claimant engage in settlement discussions consumating in settlement agreement.

Two factors enter our discussion, permanency and reasonableness or good faith. Where there is clearly established permanency, unreasonableness or bad faith on the part of the employer will be more easily proved and recognized than in a case, such as this one, where permanency, medically, is in question and where by the facts, it is apparent that defendants were acting reasonably and in good faith. The evidence in this case does not indicate that there was unreasonableness or bad faith. Therefore, based on the foregoing, interest will be due beginning on May 18, 1985 the date the amount of permanent disability was agreed to by the parties.

FINDINGS OF FACT

The facts alleged by the parties in their stipulation are accepted as true and correct. In addition it is found that claimant's healing period cessation was due to a return to work.

CONCLUSION OF LAW

Claimant is entitled to interest on his award with accrual on May 18, 1984.

WHEREFORE, the decision of the deputy is modified.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant interest at the rate of ten percent (10%) per annum upon each weekly payment of compensation for permanent partial disability. The interest shall accrue commencing May 18, 1984 and shall run until the date when claimant's entitlement to compensation for permanent partial disability was actually paid.

That costs of this proceeding are assessed to the defendants.

That defendants shall file a final report within 20 days from the date of this decision.

Signed and filed this 30 day of September, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ABRAHAM ELBAHAR,	:	
Claimant,	:	File No. 644923
vs.	:	
RABBI JOSEPH ROSEN INSTITUTE,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	FILED
HARTFORD INSURANCE COMPANY,	:	AUG 8 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration and for medical benefits brought by the claimant, Abraham Elbahar, against his employer, Rabbi Joseph Rosen Institute, and its insurance carrier, The Hartford Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained August 12, 1980.

This matter came on for hearing before the undersigned deputy industrial commissioner at the industrial commissioner's office in Des Moines on October 30, 1984. The record was considered fully submitted on that date. Briefs filed by both parties were reviewed in the disposition of this matter.

The record in this case consists of the testimony of claimant, of claimant's wife, Florence Elbahar, of Jacob Savitsky; of claimant's exhibits 1 through 14; of defendants' exhibits B, D, I and H; and of joint exhibits 1 through 15.

The issues for resolution are:

1) Whether a causal relationship exists between claimant's alleged injury and claimant's disability; and

2) Whether claimant is entitled to benefits and the nature and extent of any such entitlement.

3) Claimant's rate of weekly compensation.

4) Payment of certain medical costs under section 85.27.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's medical bills were fair and reasonable if found to be causally related to his injury and authorized by the employer.

Claimant, Abraham or Albert Elbahar, testified on his own behalf. Claimant, who was born in Morocco, does not speak English. Jeffrey S. Winter, executive director of the Bureau For Jewish Living, was duly sworn and appointed translator for claimant. Claimant, a jewish ritual inspector, was injured on August 12, 1980 when he was gored through his skull and right eye by a slaughtered beef while attempting to label a second beef as nonkosher. Claimant reported that he studied in religious seminaries in Morocco and became a ritual slaughterer after completing his education. He migrated to Israel from Morocco in 1955 and remained there until migrating to the United States in 1979. Claimant stated that he worked from 1952 to 1980 without illness or injury but for a period when he served in the Israeli army where he served through three wars without incident. Claimant reported that he had never seen a psychologist nor psychiatrist before his August 1980 injury and had not missed work because of depression or mental disease before that injury, but has now not worked since his injury. Claimant had worked as a ritual slaughterer in Israel, Savat, Spain, France, Ireland, as well as at other locations in the United States before beginning work at Spencer Foods plant where his injury occurred.

Claimant stated that he spoke with the younger Rabbi Savitsky regarding his employment with Rabbi Joseph Rosen Institute and that a written employment contract drawn by the Rabbis Savitsky awarded him a wage of $600 per week which amount did not include an expense allowance. Claimant stated that he was the sole support for himself and his family, which consisted of his dependent father, mother, and son, who reside in Israel, when injured. Claimant indicated that the separation agreement terminating his first marriage gave him custody of his son and that his son lives with his parents to whom claimant sends money for his support. Claimant reported that he was able to obtain kosher food at the Spencer Foods plant. Claimant maintained that he did not secure a second residence in Minneapolis; nor did he travel from Spencer to Minneapolis to attend synagogue on the Sabbath. Claimant explained that Sabbath begins at sundown and that an orthodox Jew wishes to be at the location where he will spend the entire Sabbath from an hour to an hour and a half before Sabbath begins. Claimant stated that sundown began in Spencer as early as 4:00 p.m. and that he often worked until 3:00 p.m. or 3:30 p.m. He reported that he would have only one-half hour before Sabbath to prepare food for the Sabbath since he was forbidden to cook on the Sabbath and, therefore, it was "untrue" that he received $900 per month of his remuneration to travel to attend synagogue on the Sabbath in Minneapolis.

Claimant indicated that he received a raise of $50 per week approximately three or four months before his injury. He indicated that he also began receiving his wage in two separate checks of $450 and $200 prior to his injury. Claimant explained that he had been receiving one check and that then "the bank" requested a report as to how much he was earning. Claimant stated he relayed his conversation with "the bank" to Rabbi Savitski and subsequently began receiving two checks.

Claimant stated that he has had three surgeries following his injury and continues to have pain in his legs, hands, and head. He reported that the head pain is unremitting and that he hasn't the strength to stand, can't sleep, has no appetite, and "just takes pills." Claimant stated that liquid from his brain drains into his eye and has created a haze in his good eye. Claimant displayed an extremely severe whole body dermatitis and stated that this had not existed prior to his injury. Claimant reported that the employer referred him to Dr. Andre who then referred him to Dr. Joseph Ransohoff and that the insurer then instructed him that Dr. Ransohoff would be in charge of his care in New York City. Claimant reported that Dr. Ransohoff and Dr. Jelks referred him to Dr. Danz who continues to provide care, but that claimant is unaware of whether the insurer continues to pay for such care. Claimant reported that Dr. Danz treats his eye condition and has made many adjustments in order to get his prosthetic eye to fit correctly. Claimant then reported that he does no driving in New York and leaves his house only to see doctors. Claimant reported that his wife orders taxis and car services for his doctor appointments. Claimant indicated that the car and taxi service receipts in evidence refer only to trips to the doctor and that he has no other way to travel to his doctor visits since he cannot travel by subway and cannot walk. Claimant reported that Dr. Ransohoff hospitalized him at Bellevue Hospital in New York for headache and numbness in his leg and arm. Claimant stated that while in Des Moines for psychological evaluation he was taken to the hospital after experiencing headaches, dizziness and nervousness.

Claimant reported that he and his wife have traveled to Israel since his injury. He reported that they obtained a direct flight from New York to Israel and that his wife accompanied him in a taxi to the airport in New York while another family met them in Israel and drove them to the house where they would be staying.

On cross-examination, claimant stated that under his contract, he was to be paid for the full year but for when he traveled to Israel. Claimant agreed that the contract specified that should he travel to Israel, that would be at his own expense, but did not specify that travel to Minneapolis would be at his own expense. Claimant reported he did not know if other workers went to Sioux City or Denver, but stated they had no time to travel. Claimant indicated that the institute sent replacement workers for only the major religious holidays.

Claimant agreed that he had been a good student and continued to learn and teach following the end of his formal education. Claimant agreed that he had been a cantor and a scribe; had trained persons for barmitzvah; had taught Bible study and ritual slaughtering; had led a congregation of approximately 400 persons; had been a counselor; and had performed marriages. Claimant admitted that no physician has instructed him not to do these activities for physical reasons. Claimant reported that he continues to take medication and produced a number of prescribed drugs from a shopping tote which his wife had brought with her. Claimant produced Elavil, Tylenol with Codeine 100 mg., Nitrostat, Valium, and salves and creams used for his dermatitis. Claimant indicated he had taken 190 Elavil tablets within the two months preceding hearing, and that he had prescriptions to purchase more tablets. Claimant indicated that Dr. Van Gilder had prescribed the Nitrostat when claimant was last in Des Moines, but claimant could not remember exactly when this was. Claimant reported that he no longer takes Valium.

Claimant agreed that since his injury he has returned to Israel on three separate occasions. Claimant explained that he went to Israel in 1981 because his father was very ill; in 1982 because his mother was ill; and in 1983 because his son had been injured in Lebanon. He reported that he would not travel to Israel in 1984 unless he had similar reasons to do so, and that he has no plans to reimmigrate to Israel. Claimant agreed that he traveled alone for an examination by Dr. Van Gilder in Iowa City. Claimant reported that his wife took him to the airport; that he was wheelchaired to his plane in Chicago; and then flew to Cedar Rapids where a "bus" took him directly to the hospital in Iowa City.

Claimant denied that the psoriasis he experiences preexisted his injury stating that hospital records so saying are in error. Claimant explained that he would have been forbidden to place his hands in food had he had severe psoriasis and denied that the United States Department of Agriculture inspectors had ever forbidden him to handle meat because of a psoratic condition. Claimant denied that the sense of touch only is significant for a bodek or ritual inspector explaining that sight is also necessary because one needs to both feel adhesions and be able to see them to remove them.

Claimant's wife, Florence F. Elbahar, testified in his behalf. She and claimant were married March 2, 1981. The witness testified that she was born in Morocco but migrated to the United States in 1946 and became a United States citizen in 1948. She reported that she is a beautician and has taught in cosmetology schools until several months after her marriage to claimant. Mrs. Elbahar testified that her husband has not worked since their marriage and that he would be unable to because he suffers so much. She outlined claimant's day and reported that he does little but sit and pray, has lost his appetite, is depressed, and cannot sleep. She reported that claimant complains about head, chest, eye, leg, foot, and arm pain as well as leg and arm numbness and often speaks of his prior strength and good vision. She relayed that claimant wants to see the doctor all the time because he has hopes the doctors will help him. She accompanys him to the doctor and administers his drugs. She reported that car services are used for doctor visits because the cab will not pick the couple up at their house. The witness expressed her belief that Dr. Andre referred claimant to Dr. Ransohoff who subsequently referred claimant to his other physicians.

On cross-examination, Mrs. Elbahar denied that Dr. Ransohoff has ever said that he did not wish to see claimant. She agreed that she had accompanied claimant to the New York University Medical Center on March 30, 1982 and assisted in translating his history and complaints to the doctors. She reported she met claimant in December 1980, but did not assist in his care until after their marriage.

Jacob M. Savitsky testified in defendants' behalf. Rabbi Savitsky identified himself as the director of the Rabbi Joseph Rosen Institute. The witness stated that the institute has an agreement with Land O' Lakes' Spencer plant to provide ritual slaughterers for the plant's beef kill operation. The witness indicated that he has studied ritual slaughtering both formally and by completing a practicum. He reported that one may be a ritual slaughterer without being a Rabbi and that the hierarchy of ritual slaughterers include the shoheit or cutter, the botek or internal inspector, and the Mashagiach who identifies the product as kosher.

The Rabbi identified defendants' exhibit I as a paper signed by the Chief Rabbi of Israel, that claimant presented him when he applied for employment at the Spencer plant which paper certifies claimant as a ritual slaughterer, inspector, and cantor. On voir dire, the witness admitted that the bottom portion of Exhibit I was not part of the original document when he hired claimant. The witness stated that he sent to Israel for the bottom portion when he came to doubt the authenticity of claimant's certification. The witness agreed he did not see the stamping in Israel and agreed that the bottom portion also has a blue stamp. The witness agreed that claimant's exhibit 4, which is the original of the photostat portion of defendants' exhibit I also has a blue stamp. Following this voir dire examination, claimant's counsel objected to the admissibility of the bottom portion of defendants' exhibit I on the grounds of lack of foundation, hearsay, and lack of evidence of authenticity. Claimant's objection is overruled pursuant to section 17A.14(1), Iowa Rule of Evidence 804(b)(5), and Iowa Rule of Evidence 901(A). The witness then identified the bottom portion of defendants' exhibit I as a statement of the son of the Chief Rabbi of Israel which reports that the top portion of defendants' exhibit I is falsified and that Chief Rabbi had never heard of claimant. The witness agreed that he did not recognize the handwriting on the document, but then identified the seal as that of the Chief Rabbi and reported that he has seen the seal a number of times on other documents.

The witness reported he is not certified as a ritual slaughterer, but that he is familiar with the law of ritual slaughtering. He opined that a person with only one eye could work as a ritual slaughterer, lead a congregation, counsel, and conduct marriages.

The witness then stated that if claimant's check stubs indicate that he had received two checks, one for \$450 per week and one for \$200 per week, this would be correct. The witness reported that approximately half of the Spencer kosher slaughtering workers receive two checks, and that the employee decided whether he wished two checks and received tax advantages from obtaining two checks. The witness indicated that ritual slaughterers were required to attend services since orthodox Jews must pray in the synagogue. He reported that a rotation system was developed in order that each slaughterer could attend services occasionally.

On cross-examination, the witness agreed that he had reported claimant had only one dependent on the first report of injury without further knowledge regarding such. The witness indicated that salaries at the Spencer plant were always higher than at other plants in which the institute provided ritual slaughterers because of the hardships of traveling to and from Spencer. The witness agreed that he could not recall any ritual slaughterers having only one eye and stated he could not judge whether anyone would use a ritual circumciser to circumcise an eight day old son. The witness agreed that the seals on claimant's exhibit 4 and defendants' exhibit I are identical. The witness then translated the bottom portion of defendants' exhibit I as follows:

> "My Father, my Master, my teacher Ovadia Yossef, this is to let know in public that this letter of recommendation of Rabbi Elbahar, whom is falsified, and one should be careful from this falsifier because my Father, My Master, does not know him at all and he never in his life"--"never signed this letter."

The witness then stated that he has met David Yossef, the Chief Rabbi of Israel and identified David Yossef was the individual in sunglasses by whose side claimant is standing in claimant's exhibits 5 and 6. The witness agreed he would recognize Yossef's signature and agreed that claimant's exhibit 4 appears to bear David Yossef's signature. The witness reported that claimant's exhibit 7 is an affirmation that David Yossef had signed the top portion of claimant's exhibit 4. The witness indicated, however, that he was troubled because the stamp did not appear with David Yossef's signature. He reported that he had never before seen David Yossef's signature without the actual stamped seal and merely with a photocopy. The witness then agreed that other documents produced also did not carry the seal but reported that all attestations of character from the office of the Chief Rabbi always carry the seal of the office. Objections to claimant's exhibits 4 through 8 are overruled pursuant to section 17A.14(1) and Iowa Rule of Evidence 901(A).

The witness reported he had no knowledge of anyone approaching claimant when first hospitalized and asking him to release the institute of all responsibility for his injury. The witness also reported he did not know why claimant's deposed coworkers denied receiving separate expense checks. The witness then agreed that the first report of injury filed in this matter reports claimant's salary as $400 per week. The witness agreed that he knew claimant was receiving $650 per week in remuneration, but stated he knew that $250 of such was assigned to expenses even though he did not know the breakdown of those expenses.

Claimant's exhibit 1 is the deposition of Rabbi Abraham Elbahar taken March 18, 1982 with David Nizri interpreting. In the deposition, claimant indicated that he was born June 6, 1936, speaks Hebrew, French and Arabic, and was educated in the Yeshiva, or religious school. Claimant explained that a certificate of authority is necessary before one will be recognized as a ritual slaughterer and that he had such a qualification before beginning work in Spencer. Claimant claimed he is also certified as a ritual circumciser, a ritual scribe, and as a congregational Rabbi and cantor. Claimant stated that his contract with the institute was signed July 23, 1979 for a two year period with a net wage of $650 per week and no probationary period. Claimant reported that he began receiving his weekly payments in two separate checks in July 1980. Claimant indicated that Rabbi Savitsky appointed him Chief Rabbi at the Spencer plant and, in that capacity, he supervised and inspected all slaughtering and all tools and the knives for slaughtering. He indicated that, in his new position, he also washed kosher meat and tagged non-kosher animals. Later, he stated the Mashgiach's responsibility was tagging non-kosher animals.

Claimant indicated that he is now unable to be a ritual circumciser since his hands shake and he has "some kind of fear in [his] heart" because of the responsibility. He indicated that he could not be a ritual scribe since he lacks sight in one eye and his hands shake and the writing is not kosher if even one letter is slightly connected to another. The Rabbi stated that he could not perform as a ritual slaughter since he could not check the knives properly because he cannot see well and because his hands tremble. He indicated that he also fears loss of sight in his remaining eye and stated that, under Jewish law, one is not allowed to slaughter with only one eye. Claimant stated that he had often been called to the injury site to inspect carcasses to see if they had been slaughtered in the Kosher manner. Claimant stated that one time after checking an animal he had "acne in my hand" and was sent to the doctor who released him back to work.

Claimant's bag of medications was inspected. Found in the bag were extra strength Tylenol, Anacin, Somonex, Motrin, Zomax, Valium, Fiorinal, Tetracycline and Tylenol with Codeine. Claimant agreed that, at the time of his deposition, he was still taking medications prescribed in Iowa in 1980. Claimant reported that Dr. Andre could speak French with him and that Dr. Weiss spoke Hebrew, and Dr. Ransohoff could speak some Hebrew and that they were able to communicate with his wife's help.

Claimant's exhibit 2 is the deposition of Arthur M. Meisel, M.D., taken January 18, 1984. The doctor indicated that he is a specialist in neurology and psychiatry and is board certified by the American Board of Neurology, Psychiatry and Psychology. The doctor explained that he spoke with claimant in a mixture of Yiddish, English and Hebrew, and that he could understand Yiddish and English, but required claimant's wife's assistance in translating the Hebrew. He opined that this combination of language skills was sufficient for meaningful, understandable, conversation with claimant. The doctor reported that claimant had feelings of helplessness and was unable to function when examined on September 23, 1983. The doctor stated claimant complained of weight loss and insomnia and appeared frantic that is, agitated, depressed, tearful, panicky, and only marginally oriented in that he knew his name and address, but did not know the day of the week or the name of the president. The doctor diagnosed claimant's primary disorder as a major depression with a compulsive personality and contributing physical difficulties related to brain damage, enucleation of the right eye, damage to the left eye, and post-stress reactions. The doctor rated claimant's degree of stress as maximum of 7 on a scale ranging from 1 to 7, and his functional capacity as minimal or a 6 on a 1 to 7 scale. The doctor opined claimant was physically disabled from returning to his former employment and stated that he was unable to give an accurate opinion as to the correct mode of treatment for claimant without further information regarding potential brain damage from claimant's injury. The doctor then opined that claimant would be unable to minister to a congregation, counsel, circumcise, or perform other standard religious functions or perform as a ritual slaughterer in the foreseeable future. The doctor stated that claimant had had a decrease in his auditory memory as evidenced by his decrease in English language skills since his injury. The doctor explained that language skills are the function of the temporal lobe memory. The doctor also stated that claimant's perceptual processes were highly unreliable and that his cognative skills were moderately to severely impaired and his judgment poor. The doctor opined that claimant's major depression, which he characterized as a psychotic condition, as well as the other findings, were a direct result of claimant's August 1980 injury. The doctor expressed his belief that behavioral management would not be a medically acceptable mode of treatment for psychotic depression explaining that major depressive disorders require treatment through medication under careful psychiatric supervision. He further asserted that psychoanalytic therapy would be inappropriate treatment for either psychotic depression or for brain damage such as claimant may have.

On cross-examination, the doctor admitted that he saw claimant only once for approximately one and one-half hours and agreed that he did not have complete information regarding claimant's physical condition. He opined that claimant could not travel alone and admitted he had been unaware that claimant had flown from New York City to Iowa City in early October 1983 and that this travel had involved a layover in Chicago and non-air transportation from Cedar Rapids to Iowa City. The doctor asserted that that fact would not change his opinion as to whether claimant could travel alone since he was unaware of the circumstances of claimant's trip or of the degree of assistance claimant had had. The doctor related that he had not performed any objective psychological testing of claimant and that he was not aware of claimant's preinjury psychological condition but for the fact that claimant was able to function within his usual routine before his injury. The doctor stated that claimant is currently receiving antidepressant medications but has not improved.

Deposition exhibit 1 is a September 26, 1983 report of the doctor. In the report, the doctor notes that communication with claimant was not easily established and rapport was only fair. The doctor indicates that claimant's prognosis is very guarded for recovery of personal, social and vocational capacity and that claimant requires physical care and both mental and physical rehabilitation. The doctor opines that claimant is unlikely to be restored to normal social, personal, and vocational functioning within the foreseeable future.

Claimant's exhibit 3 is the deposition of David L. Friedgood, D.O., taken October 29, 1984. Deposition exhibit 1 is the curriculum vitae of Dr. Friedgood. The doctor is a neurologist. The doctor reported that he had met claimant once socially in the hospital when claimant was undergoing treatment with Dr. Andre and that he had examined claimant on August 22, 1984 in Des Moines Mercy Hospital emergency room. He reported that claimant was in the emergency room following attempted psychological testing and that he presented with a large number of complaints, especially of chest pain, which were determined to result from severe anxiety. The doctor reported that, on examination, claimant appeared to be in severe pain, was crying, sweaty, and almost incoherent. He indicated that treatment consisted of talking with claimant and explaining that he was physically all right and that his problems would settle down. The doctor explained that claimant was very concerned regarding the psychological testing he was undergoing and he, therefore, advised that the only way to calm claimant's anxiety would be to terminate such testing. The doctor further opined that given claimant's then current state of mind accurate psychological test results would be impossible. The doctor reported that claimant had a raised annular-type rash all over his body and that the lesions were escoriated and scratched. The doctor explained that while he is not an expert in dermatology, he had reviewed claimant's medical history and believed claimant has a neurodermatitis brought about by severe anxiety which is possibly an exacerbation of underlying psoriasis. The doctor opined that claimant is not currently employable as a result of his disability. The doctor characterized that disability as in part physical from the loss of his right eye and chronic pain, but primarily psychological from severe depression and anxiety. The doctor further opined that claimant's medical and psychological problems were a direct result of claimant's injury.

On cross-examination, the doctor reiterated that he has only seen claimant twice and agreed that he could not opine as to causes other than claimant's injury for his physical and psychological state. The doctor also admitted that he told Dr. Hines on August 22, 1984 that claimant was physiologically capable of continuing testing, but that given claimant's [emotional] state such was unlikely to be productive.

Claimant's exhibit 9 is certain items of correspondence regarding claimant's medical expenses. Defendants objected to the exhibit on the grounds of materiality. The exhibit is admitted pursuant to section 17A.14(1) for whatever probative value it may have. Materials in the exhibit were reviewed in the disposition of this matter.

Claimant's exhibit 10 is certain medical records relative to claimant's condition. Defendants joined in the offering of the exhibit. The exhibit was reviewed in the disposition of this matter. Claimant's exhibit 11 is further medical records and notes relative to claimant. Defendants joined in the offering of this exhibit. An Iowa Methodist Medical Center discharge summary of November 28, 1981 of M. Andre, M.D., contains a final diagnosis of evidence of recurrent right frontal orbital cerebral spinal fluid leakage awaiting definitive therapy. The balance of the materials in the exhibit were reviewed in the final disposition of this matter.

Claimant's exhibit 12 is further medical records and notes relative to claimant's treatment. A report of Ilhan Conklu, M.D., of Des Moines Psychiatric Clinic, P.C., dated February 14, 1983 states that the reporter found no signs of psychotic behavior on examination of claimant, but that claimant appeared nervous and tearful and mentioned being forgetful. The reporter notes that tentative diagnosis of post-traumatic stress disorder, chronic, with anxiety and depression; possible organic brain syndrome, mixed with questionable amnesia, anxiety and depression.

A January 11, 1981 report of psychological services of George Abdallah, M.A., Ed.S., indicates that both the psychological interview with claimant and the Minnesota Multiphasic Personality Inventory results reveal that claimant has a high anxiety level and some depressive tendency. The profile obtained from the MMPI suggests a severe depression accompanying moments of irritation and agitation. The reporter notes that, in addition, claimant seems to withdraw from personal interaction and has somatic delusions and is developing a delusion of persecution and is becoming highly upset and impatient with himself and others. The reporter states claimant is reaching a low level of tolerance, is feeling helpless and defenseless, and that this appears to represent a collapse of a previously stable defensive system. He notes that claimant is feeling alienated and isolated in society and has lost assertiveness and is developing aggressive and hostile tendencies.

A January 18, 1982 report of Arthur F. Battista, M.D., P.C., of the New York University Medical Center, states that on examination, claimant had a slight rash-like skin lesion over the posterior lower thoracic, upper lumbar area and that claimant twice stated he had psoriasis. The reporter notes that claimant's history and findings are compatible with a facial neuralgic and shoulder pain syndrome on a neuritic basis.

An October 27, 1982 report of John C. Van Gilder, M.D., a professor of neurosurgery at the University of Iowa, notes that, on physical examination, claimant has hyperesthesia over the innervated forehead on the right side of the supraorbital nerve, but no evidence of hypalgesia on the 2nd and 3rd division and no evidence of tenderness, and that examination of the left eye demonstrates the fundi to be unremarkable with vision full to finger confrontation, but that otherwise the examiner can find no evidence of focal neurological deficit. ENT examination demonstrated no evidence of rhinorrhea.

An October 29, 1980 letter of Richard L. Anderson, M.D., of the University of Iowa Hospitals and Clinics, indicates that claimant was then ready to return to work although he should work in an environment that would not endanger his remaining eye. The report is by way of a letter to Mr. Leon Wildes, of Wildes & Weinberg Law Offices, New York, New York, and is apparently relative to claimant's status as regards his immigration visa.

A November 6, 1980 letter of John C. Van Gilder, M.D., indicates that when seen on October 10, 1980, claimant was complaining of a moderate amount of pain in the partially anesthetic area, but that his incisions had healed well and that his prognosis was good.

A December 4, 1980 letter of John T. Harvey, M.D., outlines claimant's treatment and progress to date and opines that claimant is ready to go back to work although he should work in an environment which would not endanger his remaining eye.

Claimant's exhibit 13 is an August 17, 1984 medical report of John C. Van Gilder, M.D. Defendants join in the offering of this exhibit. The reporter notes that since last evaluated in October 1983, claimant has persisted with headaches in the right frontal area and has had intermittent chest pain, anterior in location and relieved by nitroglycerin, as well as a long-standing psoriasis which has been in exacerbation with symptoms of itching. The reporter notes that on physical examination, claimant is bright, alert and oriented in all spheres although crying intermittently; that the craniotomy scar is well-healed; the fundus of the left eye is unremarkable; visual field is full in the left eye to finger confrontation; and hearing is intact bilaterally and lower cranial nerves are intact. Musculoskeletal examination revealed reflexes at +1 and symmetrical with no evidence of paresis, rapid alternating motion; dexterity is normal. Sensory examination reveals that pinprick, light touch, vibration and position are intact with the exception of first division trigeminal nerve hypalgesia. Cerebellar testing is normal. The doctor opines that there have been no changes in claimant's neurological status from a previous examination on October 17, 1983, but indicates that a major component of depression exists in claimant's condition.

Claimant's exhibit 14 is the defendants' answers to interrogatories propounded by claimant filed November 6, 1980. The answers were reviewed in the disposition of this matter.

Defendants' exhibit B is medical records of claimant's treatment from his admission to University of Iowa Hospitals in Iowa City in August 1980 through October 1983. Claimant joined in this exhibit. A number of the included records were also part of claimant's exhibits. A report of Dr. Andre of November 18, 1981 notes that claimant has developed psoriasis over the past six months and has been seen by a dermatologist who had a clinical impression of neurodermatitis. In an October 17, 1983 medical report, Dr. Van Gilder opines as follows:

> It is my opinion his residual neurological deficit from this injury is loss of the right eye, persistence and permanent dysesthesias in the right forehead which are secondary to the injury from laceration of the supra-orbital nerve from the injury. In addition, he has had a right and left trans-ethmoidal exploration for cerebrospinal fluid rhinorrhea that has not been documented at University of Iowa, but in New York. I think this is a consequence of his injury in 1980. The depression manifested by the patient in my opinion is the result of the multiple surgeries subsequent to his injury and relates to same as well as the persistent headache over the right frontal area. I could find no evidence of paralysis of the left side. It would be my opinion the above will remain permanent in reference to disability.

In a December 7, 1982 report, Dr. Van Gilder opines that claimant's permanent disability based on his last examination of October 26, 1982 is 24 percent from loss of the right eye and 10 percent secondary to hypalgesia and dysesthesias in the first division of the trigeminal nerve over the right forehead resulting in a combined disability of 32 percent using the AMA combined disability table. The doctor reports he does not anticipate additional neurological deficit to occur subsequent to this injury. A January 15, 1981 report of Dr. Van Gilder states that claimant was seen in the neurosurgery outpatient clinic on January 13, 1981 and has been doing well, his only complaint being intermittent headache in the right supraorbital area. The reporter notes that claimant has nonspecific paracervical discomfort with no radicular components nor suggestion of myelopathy. The reporter notes that on physical examination, claimant's right frontal craniotomy is well healed; hypalgesia exists over the right forehead distal to the innervation of the right supraorbital nerve; and claimant has full range of motion of the neck, motor strength of 5-5, and all muscle groups and reflexes are +2 and symmetrical with no evidence of sensory deficit. A report of Dr. Van Gilder of November 11, 1980 indicates that claimant was seen in the neurosurgery clinic on November 10, 1980 and on examination had a well-healed right frontal craniotomy scar with hypalgesia in the right forehead. The reporter notes that claimant had full, painless neck range of motion and motor strength testing of 100 percent in all groups with deep tendon reflexes as follows: biceps jerks 1/1, triceps jerks 1/1, knee jerks 2/2, and ankle jerks 1/1. Babinski sign was not present and there was no sensory deficit. A report of Dr. Van Gilder of November 6, 1980 states that claimant's prognosis is good and that the doctor would anticipate claimant could return to work in January 1981. A September 16, 1980 report of Dr. Van Gilder notes that claimant's postoperative course following exoneration of his right eye was unremarkable and that the wound healed without difficulty with no evidence of CFS rhinorrhea nor of focal neurological deficit, but for blindness in the right eye secondary to exoneration of same. A report of Dr. Van Gilder of October 16, 1980 notes that claimant denies any history to suggest CSF rhinorrhea and has had no fever nor has he had seizures.

Defendants' exhibit D is a "To Whom It May Concern" letter of Rabbi Jacob N. Savitsky, dated July 14, 1980 which acknowledges that Albert Elbahar is employed by Rabbi Jacob Savitsky at Spencer Foods as a ritual slaughterer and receives a weekly salary of $450. Defendants' exhibit H is a January 18, 1982 letter of Arthur Battista, M.D.

Joint exhibit 1 is the deposition of Dr. Samuel A. Weiss taken March 19, 1982. The doctor identified himself as a psychologist who does psychoanalytic psychotherapy and who has worked extensively with disabled persons. On examination by Mr. Harrison, the doctor indicated that he speaks a classical Hebrew and was able to communicate with claimant whom he saw on February 24, 1982 for a one and three-quarter hour interview. The doctor stated that, when interviewed, claimant revealed a tremendous amount of anxiety and was mourning the loss of his right eye as well as experiencing guilt over having left Israel for economic reasons. He explained that claimant also was experiencing trauma from coping with the absence of his preinjury view of himself as a very competent religious functionary. The doctor relayed that he explained to claimant the relationship between pain and anxiety and the role of personality in the pain experience, and that claimant seemed somewhat amendable to possible psychotherapeutic intervention. The doctor noted that claimant has scored at the average level on the Bender Gestalt intelligence test which Dr. Wolff had administered. The doctor observed that prior to his injury, claimant must have functioned at a bright to superior level because, as a Jewish religious functionary, he would have had to master a great deal of literature and jurisprudence if he were to carry out his duties as a Rabbi, scribe, and ritual slaughterer. The doctor noted that his experience with amputees had shown a substantial correlation between pain experience and diminishment of memory function.

On examination by Mr. Zoss, the doctor explained that while claimant would have likely experienced some minor guilt of leaving Israel even without his injury, that trauma and claimant's total devastation following such has led claimant to feel the accident was a punishment for leaving the Holy Land. The doctor agreed that psychoanalytic or other psychological counseling could be helpful to claimant if claimant were motivated to take such seriously. The doctor stated that his discussions with claimant did not indicate claimant had had problems with depression, anxiety, or pain induced anxiety prior to his injury.

Joint exhibit 2 is the deposition of Barry M. Zide, taken March 19, 1982. The doctor identified himself as a board certified plastic and reconstructive surgeon with special training in the reconstruction of severe cranial deformitities. He noted that he received a dental degree prior to entering medical school. The doctor stated that he first saw claimant on January 7, 1982 for an evaluation of his orbital deformity and again saw claimant on January 28, 1982 on a consultation because of his neuritis. The doctor stated that following the first visit he noted the following impressions: 1) Pain in the back of the neck; 2) an orbital volume problem; 3) connection between the brain and orbit leading to a CSF fistula into the orbit; and 4) severe depression. The doctor indicated that on examining claimant on that visit, he saw no CSF leakage from the nose or eye, but knew from former scan results that a connection existed between the brain and the cone of the orbit, and that spinal fluid was collecting in the cone of the orbit. The doctor explained that this was not dangerous if the fluid was not leaking to the outside, meaning through the nose since a passageway to the outside would also allow bacteria to enter the cranial area. The doctor disclosed that he told claimant that surgical repair of the leak was not necessary, but that surgery to improve the fit and appearance of his prosthesis was possible. The doctor agreed that he had told claimant this surgery was life-threatening in the sense that it was major surgery. The doctor stated that a radio isotope scan to further determine if claimant had a CSF leakage through his nose was scheduled, but had not been performed at the time of deposition. The doctor opined that if claimant is having neck pain and is as depressed as he appeared when examined, he is nonfunctional, but that if claimant's pain is psychological in origin it could be controlled psychologically. The doctor opined that claimant's loss of his right eye should not prevent him from working. On examination by Mr. Zoss, the doctor interpreted the test result report, which is Zide exhibit 1, as a finding of a cerebrospinal fluid leak into the right orbit and then into the nose. The doctor stated that this finding was not confirmed on either of his visits with claimant and further stated that if such a leak exists, a risk of meningitis also exists.

Joint exhibit 3 is the deposition of Dr. Bar Berthold Wolff taken March 19, 1982. The doctor stated that he is a psychologist who is also a clinical pharmacologist. The doctor holds a Ph.D in psychology and is an elected fellow of the American Psychological Society as well as a research professor of psychology at the post-graduate school of medicine, New York University. He is the director of the Comprehensive Pain Center of New York Medical Center and is chief of the Pain Study Group of the New York University, medical and dental centers, and attending psychologist at University Hospital and at Bellevue Hospital. The doctor indicated that he saw claimant as a private patient upon Dr. Zide's referral on February 5, 1982. The doctor did an intake evaluation, a pain induction test and psychological testing of claimant, all in February 1982. In the course of the deposition, the doctor explained that he speaks neither Hebrew nor Arabic, but does speak French poorly. He indicated that claimant's wife usually served as the interpreter though he felt claimant could understand English better than was generally thought. On examination by Mr. Harrison, the doctor stated that he diagnosed claimant's condition as an anxiety reaction and indicated claimant's test responses were similar to those of persons in whom pain was secondary to a psychological or emotional basis, that is, the psychological or emotional problems more influence the person's reaction to pain than does their physical state. The doctor further stated that this condition was neither that of acute intractable pain nor of chronic pain syndrome, but was a physical pain secondary to a psychological pain, that is, physical pain with a basis in an organic event which is worsened by claimant's psychological state of anxiety. The doctor explained that his statement that claimant's emotional lability was mixed meant that claimant has mood swings from feeling alright to feeling depressed, but that these are within a normal range. The doctor stated that claimant's Bender Gestalt testing does not indicate that claimant has no brain damage but only that any brain damage claimant suffers is not sufficient to produce abnormal results on that test. He further relayed that claimant's results on the Wechsler Memory Scale are not indicative of whether claimant has had a reduction in memory function. The doctor relayed that he had referred claimant to Dr. Zide for psychotherapy to reduce his anxiety. He opined that analgesic drugs would not be the most appropriate medication for claimant since these deal only with the sensory pain problem and not with the emotional component. The doctor expressed his belief that claimant's prognosis is "good" provided claimant can accept the fact that part of his pain results from his anxiety and accepts treatment with psychotherapy and antianxiety drugs. The doctor explained that were this true, claimant's sensory pain could then be dealt with through analgesic medication. The doctor opined that were the ethnic and cultural barriers to acceptance of the psychological treatment resolved, claimant would likely benefit from psychotherapeutic treatment within six months.

On examination by Mr. Hamilton, the doctor reported that he had found no problem other than claimant's injury which had aggravated claimant's anxiety reaction.

On examination by Mr. Zoss, the doctor agreed that claimant probably continues to have underlying organic pain and stated that claimant is not malingering. He opined that claimant is totally disabled from functioning as a Rabbi and stated that claimant perceives a tremendous psychological threat in the fact that he as a Rabbi could possibly have something psychologicaly wrong. The doctor indicated that claimant's psychological disability is his most serious problem and interferes with every aspect of his behavior. The doctor opined that if claimant for ethnic or psychological reasons cannot respond to or accept psychological treatment, claimant's condition will worsen.

On examination by Mr. Silber, the doctor stated that claimant's combination of anxiety and depression explains his erratic sleep patterns, that is, the fact that he has periods of both too little and of excessive sleep. The doctor agreed that the tests performed gave only a minimal appraisal of claimant's condition.

Joint exhibit 4 is the deposition of Dr. Glenn W. Jelks taken March 19, 1982. The doctor identified himself as a board certified plastic and reconstructive surgeon with a subspeciality in ophthalmic plastic surgery. The doctor indicated that he graduated from medical school in 1973 and completed his surgical internship, surgical, orthopedic, and ophthalmic residencies from 1973 through 1978. The doctor reported that he first saw claimant December 2, 1981 upon a referral of Dr. Ransohoff. On examination by Mr. Harrison, the doctor stated that the results of testing ordered by Dr. Andre gave conclusive evidence of a CFS leak from the cranial fossa into the orbit, but that physical examination did not reveal that condition, and, therefore, the doctor did not recommend surgical correction of the fistula. On examination by Mr. Hamilton, the doctor opined that the only apparent cause for claimant's cervical limitation of motion were paraspinal spasms since there were no meningeal signs apparent. On examination by Mr. Zoss, the doctor agreed that though a fistula leak could not be clinically demonstrated, it was possible claimant has a low flow fistula communicaton with drainage absorbed by the accommodating vascular tissues. The doctor defined a CFS leak as leakage of the fluid which normally surrounds the brain and which is normally confined by the dura into areas where it should not gather. He explained that an individual may live throughout a normal lifetime with such a leak, but that it requires careful monitoring because the leak carries the risk of inflammation of the meningeal fossa. The doctor indicated that claimant must weigh the risks of surgical repair with approximately 75 percent chance of a successful outcome versus the risk of meningitis from nonrepair of the condition. The doctor opined that the latter risk is quite low because claimant's leak, if any, is not blatant. The doctor opined that he is unable to relate claimant's cervical problems to his neurological problems, but stated that there is no evidence claimant's cervical problems are not the result of his injury and that they are a possible result of the injury. He then stated, however, that two years post-injury, one would expect more hard evidence of significant cervical spine or cervical vertebrae injury than is apparent in claimant. On examination by Mr. Silber and further examination by Mr. Harrison, the doctor explained that claimant's CFS leak is not a gross leak and that it is possible that it has or could diminish overtime and actually close off. He reported that for this reason, repeat cisternograms are advisable. The doctor opined that he did not feel surgical intervention would help resolve claimant's complaints.

Joint exhibit 5 is the deposition of Michael R. Fanning, plant superintendent at Spencer Foods, taken October 18, 1982. On examination by Mr. Zoss, the witness stated that as supervisor he worked with claimant and had daily contact with him. The witness described claimant's job as searching at the gut viscera table. The witness reported that the designation, chief Rabbi, was used by a number of kosher employees at the plant.

Joint exhibit 6 is the deposition of Shlomol Ben David taken February 16, 1983. The witness reported that he has worked in the Spencer plant as a cutter or schector for approximately three years. The witness refused to answer questions concerning the kosher workers' payment method or whether kosher workers were paid for expenses, but stated: "General rule is varied individuals and that's it, I think that's the bottom line, everybody gets paid in his own way, I guess, I cannot help you in this." The witness did state that he lived in Spencer at all times; traveled to see his family throughout the world; and traveled to synagogues in various places.

Joint exhibit 7 is the deposition of Morris Berman taken February 16, 1983. The witness indicated that he had lived in Baltimore before coming to work at Spencer and maintains an apartment in Baltimore as well as a home in Spencer. He reported that his wife lives with him in Spencer, but that he goes back to Baltimore on three or four occasions during the year. The witness stated that kosher food is not available in Spencer and that he must travel to Minneapolis or Sioux City for this. The witness stated that he is paid one check per week except when he works overtime, in which case he receives two checks. He refused to divulge the amount he is paid, but indicated some institute employees are paid more and some less. The witness stated that he did not think he received expense money or payment for travel to Baltimore. The witness indicated that there is no head or supervising Rabbi at the Spencer plant.

Joint exhibit 8 is the deposition of Leo J. Lang, manager of the Spencer Beef Division, Land O' Lakes, in Spencer, Iowa, taken October 18, 1982. The witness indicated that Spencer Beef Division was formerly known as Spencer Foods, Inc. The witness indicated that Spencer Foods pays the institute a flat fee to supply Rabbis and that he and Mike Fanning are the institute's liasons with the plant. The witness reported that the plant tried as much as possible to accommodate kosher workers who wish to attend synagogue by letting them leave early on Fridays in order to reach Minneapolis before sundown. He further indicated that most workers stay in town and do not attempt to attend synagogue on weekends, but do generally leave for the Holy Days in the fall. The witness reported that most of the plant's kosher workers have their primary homes somewhere other than Spencer, but if married, their spouse may also be with them in Spencer though workers do not have their children with them since there is no synagogue school.

The witness indicated that a "head Rabbi" who gives other kosher workers breaks but has no supervisory duties was employed beginning in the summer of 1982 and that the plant had no "head Rabbi" before such time. The witness agreed that claimant could have given breaks in the past, but he did not remember claimant doing such. The witness recalled that claimant kept saying he was the head Rabbi and that the witness asked Jaboc Savitsky if this were true and was told it was not true. The witness was unaware of claimant's duties or position ever changing while claimant worked at the Spencer Foods plant. The witness indicated that the plant's kosher workers generally got their kosher meat through the plant.

On examination by Mr. Harrison, the witness recalled a problem with the kosher workers leaving too much meat on the head of the animal, but did not have knowledge or recall Jacob Savitsky asking claimant to instruct other kosher workers as to how to correctly cut the animal in order to decrease the amount of meat left on the head. The witness stated that claimant's main job was that of searcher at the visceral table but that he could have done other jobs.

Joint exhibit 9 is the deposition of Simon Peres taken October 18, 1982. Mr. Peres stated that he was a mashgiach and that his job was to be a kosher inspector or to tag the tongues of kosher animals and match the heads with the carcasses. He reported that he is paid less than a cutter but otherwise refused to discuss either the method of payment or any breakdown of his remuneration by the institute. He agreed that religious services are not held in Spencer and workers must travel to Minneapolis to attend synagogue. He stated that Minneapolis is approximately three and one-half hours by car from Spencer and that he had another worker replace him on Fridays approximately twice each month to travel there for services. The witness indicated that, in the replacement rotation, a cutter would replace a cutter, a mashgiach would replace a mashgiach and so forth. He indicated that, when employed, claimant was the only searcher in the plant but for a break giver brought in from time to time. The witness indicated that he purchased kosher beef from the Spencer plant and purchased kosher chicken in Minneapolis. The witness reported that the plant had not had a head Rabbi before the present one was hired.

Joint exhibit 10 is the deposition of Chaim Joselit taken February 16, 1983. On examination by claimant's counsel, the witness stated that he had began work at the Spencer plant seven months before his deposition. He described himself as a mashgiach. The witness reported that he maintains a home in Denver to which he returns every other week and has a hotel room in Spencer. He indicated that he was paid every week and was paid "exactly for my work" and nothing else; and that maybe Rabbi Savitsky "knows better" if paid for expenses. The witness refused to answer all other questions regarding method of payment.

Joint exhibit 11 is the deposition of Rabbi Mordecai Savitsky and Rabbi Jacob Savitsky taken August 31, 1982. Mr. Zoss initially attempted to examine Rabbi Mordecai, the elder Rabbi Savitsky. However, because Rabbi Mordecai's understanding of the English language was limited, that examination terminated and Mr. Zoss examined Rabbi Jacob. Rabbi Jacob indicated that he trained as a Rabbi but not as a Mohel, or circumciser; a ritual scribe; or a ritual slaughterer. The Rabbi characterized those professions as minor non-rabbinical professions. The Rabbi stated that a Rabbi performs marriages, divorces, leads a congregation, and supervises slaughtering. Rabbi Jacob indicated that with his father, he formed the Rabbi Joseph Rosen Institute for the purpose of training Rabbis to be ritual slaughterers. He indicated it is not generally true that ordained Rabbis function as ritual slaughterers and stated claimant was not papered as an ordained Rabbi. The Rabbi characterized the institute as a chartered, non-profit company with salaried employees. He stated that Spencer Foods is the only plant with a contract to use institute slaughterers, even though the institute trains slaughterers in a small plant in Alco, Maine. He indicated that he alone directed the kosher workers at Spencer Foods and that plant personnel had no jurisdiction to direct them. He reported that Alco plant workers were paid one-half the salary of workers in other plants even though the work does not differ in the Alco plant, in Kosher Quality, and in the institute's plants but for the hardship of maintaining two homes for workers in plants other than Alco. The Rabbi reported that the institute's ritual slaughterers were required to attend weekly synagogue and pray. It was later established that only for the High Holy Days in the fall were replacements sent to the plants in order that workers could attend synagogue. The Rabbi indicated that part of the salary is expenses, but the salary is not broken down since that is left to the discretion of the individual employee for tax purposes.

The witness reported that his first contact with claimant was in June 1979 when claimant telephoned from a Denver plant asking about work. He stated that a written proposal was then submitted to claimant regarding work at Kosher Quality, Inc.'s Laverne, Minnesota plant. The witness assumed claimant was degreed as a ritual slaughterer since he was working in a major Denver plant, but stated that he asked for claimant's degrees as well. The witness reported that while the claimant gave adequate credentials, he later found the credentials to be forged, but would not reveal who first indicated claimant's credentials were forged. The witness agreed that only an ordained Rabbi could lead a Jewish congregation. He indicated that he has never observed claimant function as a ritual slaughterer, but has observed him function as a Bodek, or internal inspector. The witness reported that claimant signed a contract with the institute in July 1979 in the witness' presence. The witness agreed that the contract itself does not refer to a separate amount for expenses, but stated that this was "an understood thing." He indicated that claimant received a cost of living increase in his wages in early 1980 and that this increased his overall payment from $600 per week to $650 per week. The witness stated that in late March 1980, claimant was assigned the task of watching the Spencer Foods kosher slaughtering crew perform its work. He stated that claimant was stripped of these duties in May 1980 because the other workers "felt he was picking on them all the time."

The witness stated that he learned of claimant's injury through a telephone conversation with Mike Fanning and that he then asked Leo Lang for an accident report which he subsequently received. The witness identified deposition exhibit 5 as a first report of injury he filed in this matter. He indicated that claimant's employment was noted as beginning in January 1980 because claimant was considered "a probationary employee" until such time. The witness agreed that the contract did not specify that claimant would be a probationary employee from July 1979 to January 1980. The witness explained that claimant was reported as having only one exemption because he knew claimant was single and was unaware claimant had children. The witness explained that claimant's salary was reported as $400 since this was the figure that the institute's accounting office indicated claimant had received as non-expense checks. The witness again agreed that claimant's contract salary was $650.

The witness opined that a one-eyed individual could be a Bodek, a Mashgiach, or Mohel, as well as a ritual scribe under Jewish law since in each instance, the professions are open to orthodox practicing Jews with the designated qualifying degrees.

Under examination by Mr. Harrison, the witness identified deposition exhibit 14 as a wage letter sent to the internal revenue service at claimant's request. He indicated that the letter indicates claimant's wage as $450 and explained that $200 of claimant's remuneration was designated expenses. On re-examination by Mr. Zoss, it was established that Rabbi Mordecai was convicted for federal income tax evasion. Depositions exhibit 1 through 14 were reviewed in the disposition of this matter.

Joint exhibit 12 is the deposition of John C. Van Gilder, M.D., taken December 6, 1983. The doctor identified himself as a board certified neurosurgeon who is professor and chairman of the department of neurosurgery at the University of Iowa School of Medicine. On examination by Mr. Harrison, the witness stated that he first saw claimant on August 14, 1980 following removal of claimant's right eye. He stated that at that time claimant had spinal fluid in the incision area. The witness described this as a fistula or communication between the intracranial contents and the outside and stated there was evidence of spinal fluid draining into the orbit at the site of the entrance wound. The witness indicated that he performed a right frontal craniotomy on August 26, 1980 in which the brain underneath the right frontal area was explored, necrotic brain tissue removed and bone debridled from the brain. He indicated that surgery demonstrated evidence of hemmorhage into the brain, but stated that claimant's postoperative period was uneventful with no evidence of local or focal neurological deficit and that his incision healed well with no evidence of residual fistula between the brain and orbit. The doctor indicated that he saw claimant on September 9 and October 16, 1980 and that on both occasions claimant was doing well with his only complaint being of abnormal sensation in the right forehead above the removed eye. The doctor stated that he again saw claimant November 10, 1980 and that claimant had the same complaints and also complained of neck pain. The doctor reported that he subsequently reviewed prior x-rays of claimant's cervical spine and that these showed no evidence of pathological abnormality. The doctor stated that the November examination did not change his opinion that claimant could return to work in January 1981 without limitations as regards to work he could perform. The doctor reported that he again examined claimant on January 13, 1981 and that claimant reported the same symptomology. The doctor subsequently opined that paresthesia such as that claimant experienced above his removed eye normally persists from 12 to 24 months and occasionally becomes permanent. The doctor reported that he again examined claimant October 27, 1982 and found no change in his neurological examination. He stated that he then prescribed Elavil to treat claimant's chronic pain in those areas where he had lost sensation and as a substitute for those medications claimant was then using. The doctor reported that he rendered his opinion as to claimant's impairment in a letter of December 7, 1982 and that such opinion as to claimant's permanent partial impairment was within reasonable medical certainty as of that time.

The doctor reported that he last examined claimant October 4, 1983. He reported that claimant had then had further exploratory surgery for a CFS leak and complained of pain in his left forehead above the site of the last surgery as well as of chest pain, skin rash, and disturbed sensation in the left upper and lower extremities. On examination, the doctor found some questionable diminished dexterity in claimant's left fingers. The doctor opined claimant's psoriasis did not result from his injury and stated that the opthalmologist who examined claimant found that his prosthesis fit well and that such was not the cause of his right-sided headache pain. The doctor reported that claimant had normal EKG's and EEG's and that a computerized topographic scan of his brain did not show mass affect, infection, or other abnormalities. The doctor reported that these findings were such that he could not objectively substantiate claimant's subjective symptoms of intermittent altered sensation in the left arm and leg. The doctor opined claimant needs no further neurological examination and that his findings in October 1983 did not alter his October 1982 permanent partial impairment rating.

On examination by Mr. Zoss, the doctor stated that the major risk of a fistula is that bacteria will enter the brain with the resulting meningitis. The doctor explained that no testing for a CFS leak had been done but for a visual examination of the eye socket for drainage. The doctor opined that unless a cisternogram was unequivocally positive, the test was relatively weak evidence of a communication between the brain and orbit in a particular patient unless shored up by findings of a demonstrated leakage and patient complaints of leakage. The doctor reported that he was not familiar with a New York University Hospital's cisternogram which was positive for a left-sided CFS leak. He agreed that a neurologist consulting with a nuclear medicine specialist could reasonably conclude that claimant had a communication between his brain and orbit when the cisternogram was positive and claimant complained of fluid in his socket and these findings were further supported by a CT scan demonstrating fluid in the frontal sinuses. The doctor agreed that he had received no information regarding claimant's CT scan or complaints of claimant regarding fluids in the right eye socket in January 1983. He agreed that while he had found no evidence of a CFS leak on any examination from claimant, a leak could have developed and been present at some other time. The doctor agreed that headache can be a symptom of CFS leak but explained that the headaches generally are of two types, one which usually resolves when the patient lies down and a second which is diffuse and frequently associated with neck stiffness and possible temperature elevations. The doctor opined that the first type was different from the headaches of which claimant complained, but agreed that claimant had had complaints of neck pain. The doctor indicated that his permanent partial impairment rating did not consider psychological or psychiatric factors or any physical disfigurement. The doctor agreed that he had observed depressive symptoms in claimant in the last examination, but stated that he prescribed Elavil for the pain syndrome and not for depression. The doctor agreed that neurologically claimant will have a right forehead headache for the rest of his life. On examination by Mr. Hamilton, the doctor agreed that even if a CFS leak were found, that finding would not change the opinions he has previously rendered.

Joint exhibit 13 is the deposition of Mark Persky, M.D., taken April 21, 1983. The doctor identified himself as an assistant professor of otolaryngology at the New York University Medical Center. He reported that he has performed two surgical procedures relative to CSF leak on claimant and stated that as far as can be determined that leak has now been repaired. On examination by Mr. Harrison, the doctor opined that the location of claimant's headaches and their persistence following repair of the CSF leaks would indicate that the headaches are not secondary to the leak. The doctor opined that the CSF leak and its sequalae should not prevent claimant from returning to gainful employment or produce restrictions on claimant's activities. He indicated that he had not given claimant any permanent partial impairment rating. On examination by Mr. Zoss, the doctor stated that there had been objective evidence of persistent CSF leak after Dr. Van Gilder's initial craniotomy on claimant and that both subsequent surgeries which this witness performed were direct results of claimant's injury. The doctor's curriculum vitae as well as deposition exhibit 1 were reviewed in the disposition of this matter.

Joint exhibit 14 is the deposition of Joseph Ransohoff, M.D., taken April 1, 1983. The doctor identified himself as professor and chairman of the department of neurosurgery at New York University Medical Center. On examination by Mr. Harrison, the witness stated that Drs. Andre and Van Gilder had referred claimant to him and that he had last examined claimant on February 14, 1983. The witness opined that claimant needed no further neurological treatment since claimant was not neurologically incapacitated. The witness stated that he agrees generally with the permanent partial impairment rating given by Dr. Van Gilder and agreed that he had not restricted claimant's activities. The doctor explained that by multiple somatic complaints related to pain all over his body for which no organic basis can be demonstrated, he meant that claimant complained of aches and pains in his entire body, was depressed, and was incapable of functioning. The doctor explained that most complaints were related to areas of the body other than the injured areas and were not physically related to the injury. The doctor acknowledged he was not a psychiatrist, but opined that from his contact with claimant over two years he believed claimant was probably permanently disabled as a result of a post-traumatic psychosis or neurosis even though no organic pathological condition accounted for claimant's complaints. He stated that he continues to hold the opinion expressed in his report of December 15, 1982 that claimant is totally and permanently incapacitated as a result of his serious injury and his psychiatric response to the trauma resulting in his severe secondary depression. The doctor indicated that he had not referred claimant to Dr. Forcheimer or to Dr. Danz, but stated that Dr. Forcheimer had referred claimant to Dr. Danz and that he, himself, agreed with that recommendation. On examination by Mr. Hamilton, the witness indicated that further physical studies of claimant's complaints were not indicated since such studies likely would heighten claimant's psychological problem.

On examination by Mr. Zoss, the doctor agreed that claimant probably had had a CSF leak in one spot or another since his injury or shortly thereafter until his surgery several weeks before deposition. The doctor agreed that psychologically claimant's somatic complaints originated with his injury.

On further examination by Mr. Hamilton, the doctor stated that he suspected claimant had lacked emotional stability before his work incident and that this had precipitated his (psychological) response to the injury. The doctor's curriculum vitae as well as medical reports of the doctor were included as deposition exhibits. In deposition 2, a medical report of December 13, 1982, the doctor opines that claimant's cervical complaints are probably related to osteoarthritis. The balance of the reports were reviewed in the disposition of this matter.

Joint exhibit 15 is the deposition of Todd Hines, Ph.D., and John W. Ehrfurth, Ph.D., taken September 26, 1984. Both Drs. Hines and Ehrfurth are clinical psychologists. Dr. Ehrfurth has a specialty in clinical neuropsychology which he described as a discipline devoted to the study of behavioral and intellectual deficits following damage or injury to the brain. Dr. Hines defined clinical psychology as the diagnosis and treatment of dysfunctional behavior; that is, behaviors which interrupt typical, normal functioning of an individual. Dr. Hines stated that a large part of his practice is devoted to working with physicians in various specialites on the psychological aspects of illness, disease, trauma and injury. Dr. Ehrfurth stated that most of his practice involves the assessment of brain damage patients, most of whom have suffered either strokes or closed or penetrating head injuries.

On examination by Mr. Harrison, Dr. Hines stated that he evaluated claimant on August 20, 21, and 22, 1984 for a total of nine hours and Dr. Ehrfurth stated that he evaluated claimant on August 20 and 21, 1984 for a total of four hours and that his psychometrist completed testing on August 22. The doctors explained that they attempted a testing plan with claimant under which both psychological and personality functioning could be assessed. Dr. Ehrfurth was to perform the neuropsychological testing and Dr. Hines was to assess the personality measures. An interpreter was used throughout the testing procedures and both doctors stated they were satisfied they could communicate sufficiently with claimant despite the language barrier.

Dr. Ehrfurth stated that he had considerable difficulty getting claimant to comply with requests made in testing since claimant often interrupted with physical complaints and his wife's presence proved distracting. Dr. Hines indicated that it was difficult to get information from claimant and that claimant ultimately terminated the evaluation process by totally refusing to cooperate. Dr. Hines then described an incident in his office on August 22, 1984 in which claimant stated that his physical complaints made continuing the interview impossible and in which events ensued such that Dr. Hines took claimant by car to the Mercy Hospital emergency room. Dr. Hines opined that, at that time, claimant was manifesting symptoms of a psychological personality disorder.

Dr. Ehrfurth stated claimant had been able to partially complete the Wechsler Adult Intelligence Scale and the Wechslers Memory Scale and that the results received would indicate that claimant's performance has deteriorated significantly since his last examination in 1982. The doctor reported that this would not be expected had claimant's neurological condition remained stable and had the testing performance truly reflected intellectual problems related to organic brain damage. The doctor further related that claimant's noncompliance with the administered tests made specification of the types of intellectual loss claimant had suffered impossible, but stated it could be assumed that claimant had suffered some level of intellectual loss secondary to his injury. The doctor noted the damage to the right brain hemisphere generally results in deficits in nonverbal and spacial reasoning abilities, but not in deficits in verbal reasoning and verbal memory functions. He reported that claimant showed generalized, diffuse decline in intellectual abilities with performance on virtually all measures of neuropsychological functioning within borderline defective to defective range. He reported that there were no indications of a lateralized dysfunction as would be expected with a lateralized injury and that, therefore, it was likely that psychological and emotional factors play a heavy role in claimant's intellectual performance on the testing.

Dr. Ehrfurth stated that he agreed with the diagnosis of histrionic personality disorder with noteworthy features of dependency described in the September 12, 1984 report of himself and Dr. Hines. He stated that such accurately reflected claimant's psychological status and explained the cardinal features of the disorder are a tendency to be very dramatic in the expression of one's difficulties, to be somewhat demanding and dependent within an interpersonal context; to become preoccupied with somatic physical and psychological difficulties, and to overreact to emotional stimuli to the extent that even minor frustrations or minor emotional conflicts provoke exaggerated reactions. Dr. Hines agreed with the histrionic personality disorder diagnosis and reported that the diagnosis was derived from the description of the disorder contained in Diagnostic and Statistical Manual of Mental Disorders at pages 313, 314 and 315. He identified deposition exhibit A as an accurate copy of those pages of the manual. The doctor explained that a personality disorder relates to a lifelong set of characteristics within an individual personality. He then described claimant's emotions as very labile, intense, and self-focused. He characterized claimant as demanding, self-abusive, having tantrums and generally displaying exaggerated reactions and behaviors.

Dr. Hines later commented that the inconsistencies in claimant's tests performance both since 1982 and within days and minutes of each other on like exams suggested that a psychogenic process or anxiety or the histrionic personality disorder was affecting claimant's performance or that claimant was consciously manipulating performance, since there was no reason to believe that claimant's neurological functioning was variable as a result of his injury. Dr. Ehrfurth agreed that inconsistencies such as those claimant manifested were rarely seen in patients who did not have some psychogenic contribution to their test performance. Dr. Hines elaborated by explaining that while he believed there was an element of manipulation in claimant's performance, claimant's anxiety and depression also contributed to his low performance and that these resulted from claimant's genuine belief system that he is unable to perform. The doctor further explained that claimant conveyed the belief that he was helpless and could do nothing but stay at home and pray. Dr. Hines opined that he would not expect a person holding that belief to be able to travel by air, change planes, go through customs, and that if, in fact, claimant had done such things, such would be a manifestation of the inconsistencies in claimant's behavior. Dr. Ehrfurth agreed with this conclusion. Dr. Hines later opined that claimant was psychologically able to function in the world and perform some rabbinical duties, but that claimant was unable to do so because he believes he is unable to do so. Dr. Ehrfurth agreed that claimant does not feel capable of performing rabbinical duties.

Dr. Hines recommended that a single physician be employed to direct claimant's medical condition and review and limit his medications. He further recommended that claimant undergo psychotherapy which because of claimant's tendency towards dependence should be with a behaviorally-oriented, directive therapist. The doctor described the process as consisting of directing claimant's activities and moving him beyond his feelings while directing his behavior by indicating to him what needs to be done in order to cope with whatever physical limitations he may have, and essentially demanding, within the context of the therapeutic relationship, that claimant perform or become functional in the world. The doctor opined that such therapy could cause significant improvement in claimant's condition, but that it would be very difficult for claimant to accept therapy because claimant has "essentially decided he is a dead man," that is, that his condition is helpless and hopeless. The doctor reiterated, however, that if claimant were caused to attend therapeutic sessions on a regular basis because of his dependency needs, therapy would be helpful to him. The doctor opined that the greatest problem with therapy would be dealing with claimant's wife who "facilitates and supports and encourages and suggests" to claimant that he is totally impaired and that his condition is hopeless. The doctor called claimant's wife a very strong factor in establishing and maintaining both the intensity and breadth of claimant's sense of disability. Dr. Ehrfurth agreed with Dr. Hines' recommendation for behaviorally oriented therapy, but stated he believed claimant would resist that suggestion. He also agreed that claimant's wife's reaction to claimant tends to encourage and reinforce his overreactivity to emotional stimuli. Dr. Ehrfurth opined that only when claimant's litigative process is resolved, will claimant be able to focus on a therapeutic relationship and make desirable behavioral changes. Dr. Hines agreed that it would be very important and highly therapeutic that litigation be resolved since claimant's legal situation gives claimant a reason to maintain symptoms at an intense level. Both doctors agreed that claimant's wife, the litigative process, and claimant's symptoms produced an element of secondary gain, with Dr. Ehrfurth stating:

> Yes. I think in terms of the response of his wife, there is clear secondary gain. I would add that the degree of control that the Rabbi is able to exert over his environment by means of these

symptoms, he is able to elicit attention, support, nurturance, in some ways to control the actions of others and to restrict the level of demands that are made upon him by means of his symptoms, not speaking at all to his motivation. But I think the control of his environment is one of the principal elements of secondary gain that we are looking at.

Dr. Hines believed claimant would not benefit from psychoanalytically oriented therapy and that such would be "wholly the wrong course" since the emphasis in psychoanalysis would be on feelings and not behaviors and the therapy is generally utilized in a nondirective manner. Dr. Hines stated that, after evaluating claimant in person, his conclusions remained essentially those that he had expressed in his earlier letter of May 10, 1983. Dr. Ehrfurth opined that claimant would resist one individual controlling his medication.

On examination by Mr. Zoss, Dr. Ehrfurth explained that claimant's tendency to seek attention and maintain control over his environment by expression of intense emotionality would predict resistance to a carefully managed and focused regime. He explained that claimant would likely make numerous and repeated calls to one physician if one physician were assigned to manage his medical treatment. The doctor later explained that physical pain could be a factor in the reliability of test results and that he had considered this with regard to claimant, but concluded that claimant's reaction to his injury was very intense and dysfunctional beyond what would normally be expected.

The doctor opined that an individual with a histrionic personality disorder may be able to function in that he could hold a job and relate to a family and opined that claimant is not now functional and that a traumatic incident could result in a person who had been functional despite having a histrionic personality disorder becoming dysfunctional. The doctor explained that claimant's personality style involves a tendency to overreact to experiences and, therefore, claimant's disabling condition results from his dysfunctional reaction to an event rather than from the specific event itself. Dr. Hines explained that he took claimant to the hospital on August 22, 1984 because he was concerned that a physical cause for claimant's anxiety attack might exist. The doctor stated that he would not state whether a physical cause for claimant slapping his head might exist since this was outside his expertise, but that he had concluded from his own data that claimant's histrionic component was psychologically produced rather than physiologically produced. The doctor agreed that he had not investigated to determine whether claimant's histrionic symptoms might have been normal within his birth culture and stated that all tests administered had been developed either in Europe or the United States. The doctor explained that while some histrionic traits might be cultural in origin, a personality disorder leading to dysfunctional behavior is not and claimant's histrionic symptoms are dysfunctional. The doctor opined that a continuous headache could affect an individual's psychological reaction to stimuli, tests, and to repeated questions and agreed it was possible that an individual with excrutiating headaches would have trouble continuing to answer questions. The doctor indicated he was aware that claimant had been reported as suffering head pain. The doctor agreed that he formed his initial views regarding claimant from records alone without personally examining claimant, but denied that he had had a preconception as to the result to be obtained when he evaluated claimant personally.

Dr. Hines opined that any difficulty in accepting therapy would be more a psychological than a cultural phenomenon. The doctor further opined that when the fact that psychotherapy was not the cultural norm in claimant's birthland and the fact that claimant is married to a woman who is counterproductive for purposes of therapy and the fact of the particular nature of claimant's disorder were considered together, the probability of therapeutic success would be limited and therapy would be very difficult. The doctor opined that claimant's psychological and medical condition could benefit from some healing with therapy were claimant susceptible to therapy and assuming that therapy would have some effect. The doctor reported that it was "fair to say" that some type of psychological treatment might have assisted claimant in healing from his injury onward. The doctor opined that claimant is presently dysfunctional from employment because of his psychological condition and opined with a reasonable degree of psychological certainty that if claimant were placed in the prescribed course of psychological treatment, claimant would be employable. In the same regard, Dr. Ehrfurth stated that the degree of improvement which claimant could achieve would be a function of his readiness for treatment and that he himself had reservations concerning such readiness and, therefore, could not state that if readiness for treatment were not considered, a reasonable probability exists that claimant can be returned to employment. The doctor explained that readiness for therapy involves both conscious motivation and volitional factors as well as less conscious personality attributes and cultural influences. He recommended that any behavioral therapy program instituted for claimant should include his wife since she is "such an important part of the family system." Dr. Ehrfurth

116

agreed with Dr. Wolff's conclusion that a pain clinic would not assist claimant unless claimant's psychological problems were first alleviated. He stated that Dr. Wolff likely meant that claimant's compliance with the pain management program would likely not be obtained until claimant's anxiety levels were lessened.

Dr. Hines stated that he had not concluded claimant was suffering a major psychotic depression since claimant's depression and anxiety were variable and, therefore, were more likely part of the pattern of a histronic personality disorder. Dr. Hines stated that he disagreed with Dr. Misol's conclusion that behavioral management therapy would be inappropriate treatment for a psychosis. The doctor stated that a psychosis could explain the variability in test results if it were a schizophrenic psychosis and not an affective disorder psychosis. Dr. Ehrfurth stated that his diagnostic impression of claimant was not one of psychosis.

On re-examination by Mr. Harrison, Dr. Hines stated claimant's nonfunctionality resulted from his belief system. Dr. Ehrfurth stated that modifying claimant's belief system could restore much of his functional capacities. Dr. Ehrfurth reiterated his belief that claimant's prognosis is guarded because of his lack of apparent readiness for treatment. Dr. Hines opined that under the therapeutic plan discussed and presuming claimant would participate in that plan, claimant could achieve significant improvement. Dr. Ehrfurth stated he was not surprised that claimant continued to see other physicians while Dr. Ranshoff was directing his total medical program. Dr. Hines opined that one would expect an individual's experience of pain and report of pain to worsen if secondary gain factors supported the pain and the pain experience. Dr. Ehrfurth stated that the relationship between claimant and his wife was dysfunctional in that she definitely reinforces his complaints and symptoms.

On re-examination by Mr. Zoss, Dr. Ehrfurth defined a belief system as a system of cognitions which an individual generates based upon his experience, and which take the form of attitudes and tend to guide and determine behavior.

Deposition exhibit A is the three page description of histrionic personality disorder identified in the deposition. Deposition exhibit B is a report of Drs. Hines and Ehrfurth of September 12, 1984 which states, in part:

> There is clear and strong evidence of an Histrionic Personality Disorder with noteworthy features of dependency. The nature of the relationship with his wife and her style of interaction with him tends to reinforce, facilitate, support and encourage his experience of impairment and to retard the fullness of his recovery. He appears to believe and to present himself as more impaired, by degree, than objective findings would dictate. There is some conscious component to his resistance to evaluation and to his slowed recovery efforts. There are many contradictory facets to the variable quality of his response patterns which are difficult to explain on the basis of his injury. We conclude, because of the very nature of his historical trauma, that there is a high probability of some organic brain damage but we cannot unequivocally substantiate this hypothesis based open [sic] our data.

Deposition exhibit C is a report of Dr. Hines of May 10, 1983. The exhibit was reviewed in the disposition of this matter.

By stipulation filed November 9, 1984 the parties agreed that a total of $2,917.40 in unpaid medical expenses remains. The parties further stipulated that the charges evidenced in the stipulation are fair and reasonable for the services rendered, but defendants reserve the objection that no showing the charges resulted from an injury arising out of and in the course of claimant's employment on August 12, 1980 was made. The unpaid medical expenses consist of costs for medical examination, for prescriptions, for radiology services, for optical services, and for travel.

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 August 12, 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).

Doctor's expertise and board certification may accord his testimony greater weight. See Reiland v. Palco, Inc., 32 Biennial Report of the Industrial Commissioner 56 (Rev. Dec'n 1975); Dickey v. Continental Baking Co., 34 Biennial Report of the Industrial Commissioner 89 (1979).

An expert's testimony is not necessarily binding on the commissioner or the court when based upon an incomplete history. It is then to be weighted together with the other facts and circumstances, the ultimate conclusion being for the finder of fact. Musselman, 154 N.W.2d 128, 133.

To be a preexisting condition, an actual health impairment must exist, even if dormant. Blacksmith v. All American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

A cause is a proximate if it is a substantial factor in bringing about the result. Id. at 354.

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).

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

An employer takes an employee subject to any active or dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler, 252 Iowa 613, 620, 106 N.W.2d 591, and cases cited.

"As in other connections, a preexisting weakness in the form of a neurotic tendency does not lessen the compensability of an injury which precipitates a disabling neurosis...." Larson, Law of Workmen's (sic) Compensation, 42.22, p. 7-612 (1982).

The parties apparently do not dispute that claimant suffers permanent physical disability as regards his injury and the subsequent enucleation of his right eye. Each apparently concedes that, beyond the eye loss itself, claimant's injury related physical problems include a permanent right-sided headache and altered sensation in the area surrounding his injury site. The parties do dispute whether claimant's CSF leakage and his continued complaints of pain and altered sensation in his left extremities result from his injury as well as to whether claimant's dermatitis results from his injury. As regards the leakage, the greater weight of medical evidence suggests both that the condition exists, although it is perhaps not as severe as claimant suggests and that it results from claimant's work injury. As regards claimant's cervical complaints, Dr. Ranshoff has opined that claimant's cervical condition probably results from nonwork related osteoarthritis. Given the absence of objective findings of a significant neurological condition even after prolonged treatment and evaluation of claimant, the doctor's opinion is reasonable. For Dr. Jelks, who believed claimant's complaints might well result from his work injury, has opined that had claimant suffered serious cervical injury as a result of his work trauma, more severe manifestations of such likely would have appeared within a reasonable interval following his injury. Likewise, as regards claimant's extremity complaints, other medical and psychological practitioners have noted that claimant has numerous somatic complaints related to areas far beyond the site of his actual injury. Claimant's lower extremity complaints are most probably of that nature and may well be yet another symptom of his overall psychological condition, a matter which will be discussed below.

As regards claimant's dermatitis, Dr. Friedgood, who acknowledges that he is not a dermatologist, has opined that claimant's condition is a neurodermatitis brought on by anxiety which is possibly exacerbating an underlying psoriosis and results from claimant's emotional trauma following his work injury. A note of Dr. Andre suggests unidentified dermatologists have opined claimant's dermatitis is a neurodermatitis and results from his injury. Actual reports of these physicians are not in evidence, however. Dr. Van Gilder, a board certified neurosurgeon and professor of medicine and claimant's treating physician at the University of Iowa, has opined that claimant's psoriasis does not result from his injury. Other evidence also suggests that claimant on occasion had skin rash prior to his injury. This apparently did not unduly interfere with claimant's carrying out his duties as an internal inspector of beef, however. Hence, one must conclude that factors following claimant's work incident have produced his extreme psoriatic condition. It does not follow, however, that Dr. Friedgood's opinion that claimant has a work-related neurodermatis must be accepted. Other factors including claimant's random use of multiple medications might well play a role in the persistence and severity of claimant's condition. Thus, while it can be argued that claimant's skin condition and behaviors of claimant which promote that condition are a consequence of his physical injury, the evidence supporting that view is equivocal at this point. Hence, a finding that the dermatitis is work-related will not be made.

The parties also dispute whether claimant's psychological state results from his work injury. Specifically, defendants contend that claimant had emotional difficulties diagnosed as a histrionic personality disorder prior to August 12, 1980 and that that preexisting condition is principally aggravated by claimant's relationship with his wife whom he married March 7, 1981 and, therefore, defendants should not be held responsible for claimant's psychological difficulties as they are not disabilities related to his work injury. Defendants' argument fails on several counts, however. First, it is well established that where an injury aggravates or lights up a preexisting condition, claimant's resulting disability is compensable. A different rule does not apply merely because claimant's physical injury lit up a preexisting psychological condition. That is the case here. Both expert and lay testimony suggest claimant had emotional and behaviorial difficulties before his injury and that these difficulties impacted on his interpersonal relationships. Nevertheless, claimant had functioned sufficiently to maintain employment and provide for himself and his family until his injury. He does not function that adequately now. Numerous mental health practitioners as well as claimant's primary treating physicians in both Iowa and New York have attributed claimant's current dysfunctional psychological behavior to his injury or to his perception of the consequences of that injury. Indeed, on January 11, 1981, only five months following claimant's work injury and prior to claimant's marriage, George Abdallah, Ed.S., a psychologist, conducted a clinical interview with claimant and administered the Minnesota Multiphasic Personality Inventory to him. He reported that the MMPI revealed a high anxiety level and some depressive tendencies and that the MMPI profile suggested a severe depression with accompanying moments of irritation and agitation. He further concluded, apparently as a result of his personal interview with claimant, that:

> In addition, Abraham seems to withdraw from personal interaction and somatic delusions. He is developing the delusion of persecution and is becoming highly upset and impatient with himself and others. He is reaching a low level of tolerance, of feeling helpless and defenseless. This seems to represent a collapse of a previously stable defensive system. Abraham, as he explained, 'I was healthy and strong; now I am weak and confined.'

Mr. Abdallah's statement and conclusions clearly indicate that claimant's work injury had an almost immediate psychological impact and was likely the most significant factor contributing to claimant's current, disabling psychological state.

As noted, Mr. Abdallah's statements predate claimant's marriage to his wife. Indeed, claimant apparently had only known his wife approximately one month when Mr. Abdallah made his observations. Thus, Mrs. Elbahar could hardly have been a then signficicant factor in producing claimant's psychological condition. Claimant's marriage certainly was made at a time when claimant was under great physical and emotional stress. It is almost a truism that major life decisions such as the choice of one's life partner are best not made at such times. Nevertheless, it cannot be said on this record that claimant's marital situation, of itself, caused his psychological difficulties. The causative factors appear to lie in claimant's preinjury psychological needs and in his inability to perceive mentally healthy means of meeting these needs in the aftermath of his injury. Thus, while the level of psychological dysfunction claimant manifests may well be enhanced by other factors, the severe dysfunction itself is directly related to his work injury. It does appear, however, that Mrs. Elbahar is the most significant figure in claimant's life. That fact and its effect on claimant's overall recovery efforts will be further discussed below.

Defendants further contend that were claimant significantly psychologically disabled he would experience greater difficulty in traveling in this country and abroad. While this contention has some weight in considering the nature and extent of claimant's psychological disability, it does not per se counter the fact of that disability. Defendants' own experts note that claimant's degree of depression and anxiety are variable and that claimant's behaviors, albeit not always consciously so, are often manipulative and designed to promote concern and caretaking from others. It is not at all inconceivable that an individual manifesting those kinds and degrees of psychological difficulty could, on occasion, muster the emotional wherewithal to travel with some assistance where travel suited his own ends.

We next consider the nature and extent of claimant's disability. Our initial concern is with whether claimant's healing period has run its course. Section 85.34(1) requires payment of healing period benefits from the injury date until the employee returns to work, or is medically capable of returning to substantially similar work or until it is medically indicated that significant improvement from the injury is not anticipated, whichever first occurs. Defendants contend that claimant's entitlement to healing period benefits should be limited to January 13, 1980 with two additional ten week periods for each period of hospitalization and recovery for repair of claimant's CFS leak. Defendants' position is untenable for several reasons. It wholly ignores the causal relationship between claimant's current psychological problems and his work injury. Further, it was apparent at hearing that claimant was still having problems achieving compliance with an appropriate medical regime. As Dr. Hines states, one need not be an expert in pharmacology to recognize that claimant's indiscriminate ingestion of myriad medications most certainly continues to adversely affect both his physical and mental well-being. This behavior appears part of claimant's overall psychological problem. Dr. Hines has suggested that one physician be appointed to direct claimant's care and monitor his drug program. A like program apparently was attempted when defendants placed claimant under Dr. Ransohoff's care in New York City. Claimant apparently sought nondirected care from other physicians. Dr. Ehrfurth has opined that claimant likely would continue to resist a directed treatment program. Nevertheless, a program of directed care should be attempted. For, a directed program represents claimant's best hope of obtaining and sustaining maximum physical recovery from his injury.

Claimant's degree of psychological recovery also remains in dispute. As noted above, claimant's psychological problems have been variously diagnosed as psychotic depression for which medical intervention is appropriate, as depression and anxiety for which (nondirective) psychotherapy is appropriate and histrionic personality disorder with noteworthy features of dependency for which directive, behaviorially oriented therapy is appropriate. Various individuals have opined that claimant, for either cultural or psychological reasons, would have difficulty accepting therapy or related mental health treatment. This certainly is a possibility given claimant's cultural background and his preinjury perception of himself as a religious leader who gave rather than received psychic and spiritual healing. However, no attempt has been made to test this hypothesis. While claimant has undergone numerous psychological examinations and evaluations, no sustained treatment program has ever been initiated. It is impossible to conclude claimant has reached a maximum state of psychological healing under that circumstance. Hence, any directed treatment program must include provision for mental health care for claimant. The type and mode of treatment whether therapeutic counseling, drug therapy, or both should be chosen by an appropriate mental professional or professionals selected by claimant's designated directing physician. While the following cannot be ordered and may not be possible, it is suggested that claimant's mental health services would best be provided within the context of those services expressly available to clergy of his own faith. Claimant appears a gentleman with a strong need to reconcile this perhaps most profound tragedy of his unique and singular life to his own spiritual belief system. Treatment within his own religious faith system might well assist him in this reconciliation and may provide him a strong impetus to fuller psychic healing.

It also appears that Dr. Ehrfurth is correct in characterizing claimant's wife as an important part of the family system. Under those circumstances, family oriented therapy with her assistance and cooperation might well be appropriate.

Claimant may, indeed, resist a directed program of physical and psychological care and may attempt to seek nonauthorized treatment. Defendants, of course, will only be liable for those medical costs incurred for treatment which claimant's designated physician has directed. Defendants also are liable to claimant for benefits only for so long as claimant remains in compliance with his designated treatment program. Also, claimant's psychological condition does not appear so disabling that he is wholly unable to accept responsibility for his behavior and understand the financial consequences of initiating and accepting nondesignated treatment. Furthermore, claimant's wife who was present throughout hearing appears both intellectually and psychologically capable of understanding the consequences of noncompliance with the treatment program the designated physician authorizes. She most certainly can and should be called upon to assist claimant in maintaining compliance with the designated program.

Normally, defendants are free to choose and control care given the injured worker. However, in this case, two factors mitigate against allowing defendants' carte blanc license in choosing a designated physician. Appropriate psychological care has not been timely rendered claimant. Also, in all probability, claimant is more likely to comply with a medical program over which he feels some limited control. Hence, defendants are given sixty days from the signing and filing of this decision to submit to claimant the names and credentials of three candidates whom they believe are appropriate to direct claimant's total health care. Claimant will then have 30 days in which to select the directive physician from among those whom defendants have chosen. If claimant does not select from among the physicians within such time, full control of the selection of the directive physician will revert to defendants. In all events, a directive physician shall be selected and appropriate physical and mental health care for claimant shall be initiated within 120 days of the signing and filing of this decision. Claimant shall receive healing period benefits until such time as the designated directive physician releases him from care or it is otherwise substantiated that claimant has achieved maximum physical and psychological healing from his injury.

The undersigned realizes that the foregoing finding that claimant's healing period continue does not put the litigative process behind claimant, a condition which many specialists have opined might enhance claimant's well-being. Nevertheless under the statute a finding of permanency is not possible when the evidence establishes that the injured worker has not achieved maximum healing. It is her hope that in time these words of Rabbi E. A. Grollman, albeit written in another context, will have meaning for claimant:

> In Hebrew there is a word T'shuva. It means "to return," and implies the opportunity of a renewal attempt, a fresh start, an ever new beginning. Past [events] need not doom a person forever. The willingness to build the temple of tomorrow's dreams on the grave of yesterday's bitterness is the greatest evidence of the unquenchable spirit that fires the soul of man.

Claimant's rate remains in dispute. Section 85.36 provides that the basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings are the gross earnings of an employee exclusive of irregular bonuses, retroactive pay, overtime, penalty pay or expense allowances or reimbursements. Spendable earnings must also be determined in ascertaining the compensation rate. Spendable earnings are the amount remaining after payroll taxes are deducted from gross weekly earnings. Payroll taxes are determined by the maximum number of exemptions for actual dependency to which claimant was entitled when injured.

Claimant was paid on a weekly basis. Therefore, section 85.36(1) governs the matter. Factual disputes remain as to the number of exemptions for dependency to which claimant is entitled and as to the amount of claimant's weekly gross wage. Claimant contends that he was the sole support of his seventeen year old son and his parents when injured. Defendants have paid claimant, who was single when injured, as if he were entitled to one exemption only. Claimant had obtained custody of his child in his divorce proceedings. The child was living with claimant's parents and claimant testified he sent money to Israel for both the child's and his parents' support. Claimant's testimony in this regard was credible and no one has chosen to dispute it. Therefore, it will be inferred that both claimant's son and his parents were actually dependent upon him on the injury date and that claimant would have been entitled to exemptions for them on his tax returns.

Claimant's weekly wage remains in dispute. Both parties agree claimant was paid $650 per month when injured. Claimant contends that the amount represented wages only. Defendants contend variously that $200 or $250 of that amount was an expense allowance. Claimant maintains that his position is supported by the fact that his written contract with the institute does not provide that his remuneration includes an amount for expenses. Defendants maintain that expenses were included in the amount because claimant was required to regularly travel from Spencer to attend synagogue and to obtain kosher food. Rabbi Jacob Savitski characterized Spencer as a hardship post and testified that higher wages were therefore paid its workers. All parties and witnesses had an almost mystical reticence concerning money matters. Claimant's contention that his salary did not include an expense allowance is accepted as more in keeping with the objective facts presented, however. Claimant's employment contract does not provide for an expense allowance. Claimant's employer's representatives are astute businessmen as well as religious leaders. They drafted the employment contract which claimant entered. Normally, a contract is construed against its drafters. One must believe that had they intended part of claimant's remuneration to be an expense allowance and not wages, they would have so specified. This, they did not do. Furthermore, even if claimant's remuneration were higher than that which might have been paid a like worker in a less remote plant, the hardships of employment including the remoteness of the work site, the nonavailability of required food or other life necessities, and isolation from one's family or faith community are legitimate considerations in determining wages which might very well result in a higher salary as an incentive to workers who otherwise would be unwilling to accept employment in such locales. It would be wholly unjustified to consider that higher wages as including an expense allowance unless express provision for that had been made. Hence, claimant's gross weekly wage when injured is found to have been $650. He was entitled to four exemptions. His injury occurred August 12, 1980. Claimant's weekly rate is $339.08.

We must decide payment of claimant's disputed medical costs. Section 85.27 permits claimant payment of authorized medical expenses which are causally related to his compensable injury. Defendants contend that the expenses in issue either are not related to the injury or were unauthorized or both. Stipulation to remaining medical costs have been reviewed. Claimant testified that he had to use taxi and car services to travel from his home for his medical appointments. No evidence disputing this was presented. Hence, payment of those costs is in order as is payment of claimant's airfare costs. Costs of claimant's CT scan and his radiology costs are allowed. While evidence in this regard is limited, these appear to represent costs for diagnostic testing for conditions related to claimant's injury. Claimant's prescription costs and his optical costs are also allowed; for, insofar as can be ascertained, these also appeared to be related to conditions resulting from his injury. Claimant's credit bureau cost is disallowed; it is impossible to ascertain to what it relates. The parties are encouraged to discuss this cost further and payment should be rendered if it is ascertained that this cost does relate to claimant's treatment for his injury. Payment for treatment by Drs. Shupart and Kupersmith is disallowed as neither doctor was apparently authorized and neither condition as yet has been found to be related to claimant's work injury. It is noted that should it later be established that claimant's psoriasis results from his work injury, authorized treatment of that condition must be tendered and compensated.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant received an injury arising out of and in the course of his employment on August 12, 1980 when he was gored by a beef cow while working as a Botek for the Rabbi Joseph Rosen Institute at Spencer Foods in Spencer, Iowa.

Claimant's right eye was enucleated as a result of his injury.

Claimant has a fistula or communication between his brain and the outside as a result of his injury. This fistula results in CFS leakage and the risk of meningitis. Claimant has had three surgeries to correct this condition.

Claimant has severe, whole body dermatitis which either developed or was substantially exacerbated following his injury. It is not determined that this condition relates to claimant's work injury, however.

Claimant has a variety of whole body complaints including lower left extremity and left upper extremity and cervical complaints.

The lower extremity complaints are somatic in nature. Claimant's cervical complaints and upper extremity complaints result from nonwork-related osteoarthritis.

Claimant has experienced psychological difficulties following his injury. These are variously diagnosed as depression and histrionic personality disorder.

Claimant had some emotional and interpersonal difficulties prior to his injury but was industrially functional in that he could secure a livelihood for himself and his dependents.

Claimant is not now industrially functional largely as a result of his psychological condition.

While claimant's past emotional difficulties and his current interpersonal relationships also affect his psychological state, claimant's current dysfunctional psychological condition is a proximate result of his work-related injury.

Various treatment modes have been suggested for claimant's psychological condition. No treatment has been undertaken, however.

Claimant takes a variety of different medications randomly.

Claimant's wife, whom he married following his injury, is an important part of his family system.

Claimant would benefit from having his medical treatment, including his psychological treatment, under the direction of one physician.

Claimant's psychological condition is not such that claimant cannot understand the consequences of noncompliance with a directed medical program. Claimant's wife is also capable of assisting claimant in maintaining compliance with a directed medical program.

Claimant has not reached maximum medical improvement and remains in his healing period.

Claimant was single when injured and entitled to four exemptions as he was the sole support of his son and his parents. Claimant's employment contract did not specify that a portion of claimant's wage was an expense allowance.

Claimant worked in a hardship post for which greater remuneration could be expected.

Claimant's remuneration did not include an expense allowance.

Claimant's gross weekly wage was six hundred fifty dollars ($650.00).

Treatment by Drs. Shupach and Kupersmith was not authorized.

It is uncertain whether claimant's credit bureau cost relates to medical expenses resulting from his work-related injury.

Claimant's prescription, taxi and car fare, and air fare are costs related to his work injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his August 12, 1980 injury is the cause of his current disability but for his osteoarthritic conditons and his whole body dermatitis.

Claimant is entitled to a running award of healing period benefits from his injury date until such time that he is released from medical care or it is otherwise substantiated that claimant has reached maximum medical improvement.

Claimant is entitled to further medical treatment under the direction of a designated physician as provided in the order below. Medical treatment shall include treatment for claimant's psychological condition as deemed appropriate by the designated directive physician by a mental health professional or professionals of the directive physician's choosing. Noncompliance with the treatment plan of the directive physician may result in termination of benefits to claimant.

Claimant is entitled to payment of the stipulated medical expenses but for those of Drs. Shupach and Kupersmith and of the Iowa City Credit Bureau.

Claimant's rate of weekly compensation is three hundred thirty-nine and 08/100 dollars ($339.08).

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant healing period benefits from his injury date until such time as claimant's directive physician releases him from medical care or it is otherwise substantiated that claimant has reached maximum medical healing. Such benefits shall be at the rate of three hundred thirty-nine and 08/100 dollars per week. Defendents are to receive credit for those benefits already paid.

Defendants pay accrued amounts in a lump sum.

Defendants within sixty (60) days of the signing and filing of this decision submit to claimant the names and credentials of three candidates whom they believe are best qualified to direct claimant's total health care. Claimant shall select the directive physician from that group within thirty (30) days of the sixty (60) days. If claimant does not so select within thirty (30) days, defendants shall select a physician. Defendants shall initiate appropriate physical and mental health care for claimant within one hundred twenty (120) days of the signing and filing of this decision. Claimant's noncompliance with designated medical care may result in termination of his benefits.

Defendants pay claimant stipulated medical costs but for those of Drs. Shupech and Kupersmith and the Iowa City Credit Bureau.

Defendants pay interest pursuant to section 85.30.

Defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Defendants file claim activity reports as requested by the agency.

Signed and filed this 8th day of August, 1985.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
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Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN EXLINE, Claimant, vs. MASSEY-FERGUSON, INC., and DICO COMPANY, Employer, and SENTRY INSURANCE and WAUSAU INSURANCE COMPANIES, Insurance Carriers, Defendants.	File Nos. 732635/704104 A P P E A L D E C I S I O N **FILED** SEP 16 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 26, 1985 this 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 an arbitration and review-reopening decision in which he was denied additional benefits.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 4; Dico's exhibits A through C and Massey-Ferguson's exhibits AA through II. All evidence was considered in reaching this final agency decision.

The decision herein will reach the same result as that reached by the hearing deputy.

ISSUES ON APPEAL

The issues on appeal as stated by claimant are these:

> Whether the deputy erred as a matter of law by considering evidence that the hearing loss the claimant had as of July 28, 1981, might not have been caused by the noise at Massey-Ferguson, and based upon that evidence concluding that it was not.
>
> Even without the admissions, the claimant's evidence should prevail and the claimant should be awarded additional benefits.

REVIEW OF THE EVIDENCE

Fifty-three year old married claimant, a high school graduate with machinist training and some courses in engineering twenty or thirty years ago, testified to work experience as a machinist, production manager, plant superintendent and manufacturing engineer. He also operated his own business making nozzles. He was exposed to machinery noise in these employments, but he had no hearing problems.

In September of 1973 he went to work for Massey-Ferguson where he continued to work doing designing, welding and assembling until the plant closed on September 25, 1981. He labored in fabrication, steel bay, machining and the tool room. Over forty machines functioned in fabrication which was in claimant's opinion the noisiest area followed by machining, steel bay and tooling in that order.

Claimant described the noise in the plant as "pretty bad" and "like standing next to a jet engine." He estimated his time in the plant at from two to four hours, but he occasionally spent the entire week working in the plant on a machine. Noise made communicating difficult. Although he obtained earplugs from the nurse, he did not find it practical to wear them because he was unable to communicate with the person whose problem he was attempting to solve.

Claimant recalled that he first noticed a problem understanding when people spoke to him in 1978. He was seen by Neil Ver Hoef, audiologist, and Robert T. Brown, M.D. In September of 1981 or 1982 he began wearing two hearing aids provided by Sentry Insurance which he continues to wear all the time. He said that the settings on those aids remain unchanged.

On October 15, 1981 claimant went to work for Dico as a manufacturing engineer. He worked until April 15, 1982 when he quit his job because he was asked to work on Saturdays without pay. Punch presses of various sizes were used by the company as well as some other machinery. He estimated that he would spend two or three hours a day working in the area of machinery. He felt noise was louder at Dico than it had been at Massey as the processes were closer together and the ceilings were lower. Again there was difficulty communicating and specifically trouble talking with the plant manager, Don Brown, who had a hearing problem himself. Claimant estimated the noise levels at around a 124 decibels.

Claimant reported that after he left Dico he worked for a machine company doing quotations and calling customers. He also did some consulting work and designing on his own. He claimed he has applied for work with almost every manufacturing company in Des Moines and some outside of Iowa.

Robert W. Lumsdon, an employee of Massey since 1966 with prior experience as a method engineer in a plant with machine shops and a pressroom and as an aircraft hydraulic supervisor, denied that noise levels at Massey were similiar to the sound of a jet. One of his duties was as traveling safety director for the corporation and he had attended a school for hearing protection. He was repsonsible for the hearing conservation program within the plant. Lumsdon said the office area in which claimant was housed was separated from the factory by a concrete block wall. Noise levels were sixty-five or seventy DBA. As he recalled, heavy shears were not brought in until the Akron plant was closed in 1977. He agreed that claimant had supervisory responsibility for two tool designers, nine tool makers, a tool room foreman and two machine shop crib attendants.

This witness testified that he, in cooperation with Neil Ver Hoef had purchased equipment and had taken noise measurements all over the plant. Measurements were taken at the employee's ear level and perpendicular to the noise generator. Lumsdon asserted that noise levels were never over ninety decibels in an eight hour day.

The plant was conscious of noise levels because they were cited for an OSHA violation due to noise in the pressroom. Resampling showed no problem. Thereafter persons in the pressroom or fabrication area were required to wear hearing protection. Hearing protection was made available to any one who wished to wear it and it was chosen by welders, machinists and assemblers.

Regarding claimant's exposure, he said that claimant would have been in the press area but that the machines in that location might be idle. He said that fabrication would occupy fifteen to twenty percent of the plant, that the tool room would be a very small area and that each of two steel bays would encompass less than 1500 square feet of the total plant area of 565,000 feet.

Neil Ver Hoef, who has a master's degree and varied experience, testified that he began work with Massey on an ongoing basis in 1974 and that there was the potential for injurious noise exposure to persons working over eight hours and there was no fail-safe level for impact noise. There were also some rare operations which produced louder noise.

After 1974 attempts were made to overcome sound by engineering to decrease the number of employees exposed to the noise and to offer hearing protection.

Ver Hoef said that because claimant was not a regular employee operating machinery, he was not exposed to excessive continuous or impact noise.

The audiologist first performed hearing tests on claimant in January of 1978. A difference between the air conduction and bone conduction series was indicative to him of a medically treatable condition. Ver Hoef did not think claimant's condition is work-related. He said that it would be uncommon to see a rapid change in the lower speech frequencies secondary to excessive noise. Claimant's hearing pattern took on a configuration of presbycusis rather than that of noise exposure. He claimed that claimant's low frequency speech range had been materially affected over a short period, and classic notching at 4,000 Hertz was missing. There was another failure to follow the pattern because the hearing loss did not stop when claimant was removed from the work environment.

Ver Hoef agreed from December 1981 to April of 1982 there was no significant change in claimant's hearing loss. He admitted there was no test for October of 1981. He also agreed that there are those who think noise levels of less than ninety decibels may cause occupational hearing loss and that impact noise could as well.

The witness was unable to say what significance the audiograms from claimant's relatives might have because not all siblings were tested.

He said that the standard for most frequencies is a plus or minus three decibels and the step unit of noise five decibels. Ver Hoef wrote that consideration should be given to the fact that noise study reports were done by student engineers and were subject to error. He explained the difference between the A scale and the C scale.

Donald Edwin Brown, plant manager for Dico, testified that claimant was direct supervisor of the tool and die shop. Claimant's office was a wooden structure close to the assembly area. Claimant would spend as much as three hours per day outside his office. Brown acknowledged that styrofoam sheets are hung around the presses in an effort to keep down the noise.

Robert DeGeest, assistant personnel manager who took noise readings in the Dico plant, testified that noise levels from the tool and die shop were under seventy-five decibels. Testing in the pressroom recorded readings from eighty-three to ninety-five decibels. DeGeest denied ever observing values in the 120 to 124 range. It was his opinion that ear plugs provided a fifteen decibel reduction in noise levels. No testing was made of impact noises.

A hearing test performed on claimant by Robert G. Smits, M.D., on February 21, 1975 contains this remark: "Was in factory noise until 10 yrs. ago -- now only intermittently."

Robert T. Brown, M.D., board certified otolaryngologist, had reviewed a history given by claimant himself, claimant's testimony relating to his exposure to noise and the deposition of Dr. Updegraff. He had not been provided with noise levels at either Massey or Dico.

Dr. Brown recalled that when he began testing claimant there was no significant hearing loss in the speech frequencies, but there was a high frequency hearing loss. At the time of his examination on February 10, 1984 claimant had a moderate sensorineural loss of forty-five on the right and thirty and six-tenths percent on the left for a binaural loss of thirty-seven and two-tenths percent. Claimant's ability to understand speech was eighty-four percent on the right and ninety-six percent on the left.

Dr. Brown said that had claimant been exposed only to the noise levels shown on exhibit 7, those levels should not have been injurious to his hearing. He stated that excessive noise could cause the hearing loss damage seen in claimant. Dr. Brown said that other sources of sensorineual hearing loss might be a head injury or infection. He thought that if claimant had been removed from a noisy environment in 1978, his condition should not have progressed.

Hearing amplification was considered as early as June of 1981 and the doctor believed the majority of claimant's hearing loss had occurred by that time.

He had reviewed Dr. Updegraff's deposition and testified it was difficult to separate out what portion of a hearing loss is due to heredity and what is noise induced; however, he did not think claimant's graphs showed a hereditary pattern. Four of claimant's relatives were tested. The results gave no indication that claimant's hearing problems were familial. Difficulty traceable to heredity, according to the doctor, would produce a cookie-bite pattern with an extenuated mid-frequency loss.

Robert Rice Updegraff, M.D., board certified otolaryngologist, who had reviewed Dr. Brown's and claimant's depositions and various audiometric studies, examined claimant on August 8, 1983 and August 18, 1983. Claimant gave a history of increased difficulty hearing since 1978, but with some trouble beginning in 1974. He complained of occasional tinnitus. A history was taken of claimant's employment and nonemployment activities and his noise exposure in work.

An audiometric study showed a bilateral sensorineural hearing impairment which was moderate in degree. Claimant's speech reception threshhold was forty-five decibels on the right and forty on the left. His speech discrimination was eighty-eight percent on the right and eighty-four percent on the left.

Looking at claimant's 1974 audiogram, the expert noted a notch at 3,000 and 4,000 cycles which he said was characteristic of noise-induced hearing loss. By 1975 the notch had changed to a gradual and claimant was complaining of tinnitus in his right ear. In 1978 tests showed a gradual loss in the lower frequencies which would be typical of a sensorineural hearing impairment. Subsequent tests showed a similar gradual decline which was suggestive of a progressive familial hereditary sensorineural hearing impairment. He said that a person can have a hereditary hearing problem even though neither his parents nor his siblings have one. Other possible explanations for the progression were a cochlear otosclerosis or cochlear otospongiosis.

The expert said that hearing does not usually get worse after a person has been removed from a noisy environment unless there were mitigating circumstances. Neither would there be improvement.

Regarding the role of heredity in claimant's hearing loss, Dr. Updegraff testified:

> It would be my thought and my opinion that the sensorineural familial part has been a major part of his problem, keeping in mind that you are around noise and if there are noise exposures, that that can aggravate a problem such as sensorineural hearing impairment on a familial basis.

Carrying on from that, and perhaps being narrative, perhaps jumping ahead of the questions, it would seem to me that Mr. Exline has had a sensorineural hearing impairment that we have been able, I believe, to show by his audiometric documentation. I believe he has a noise exposure which also is documented in various and by varying levels which are in the other records; but let us assume both probable facts, that he does seem to have a sensorneural [sic] hearing impairment familial, that he has been around noise. Let us also go on to assume, from my point of view as a clinician taking the history, that he has been since 1978 wearing earplugs and ear protectors. He has been aware of earplugs and ear protectors. He's a professional and well aware of the need for protection and has been so advised over his period of years of work. So if he has worn ear protectors and earplugs, one type or another, with the attenuation that is expected from such, then if he has worn them consistently, you would expect that his hearing protection would have been good.

However, a certain amount of that is conjecture. And it is true that OSHA and under the 90 db rule of OSHA, that 90 percent of employees will be protected very adequately. Ten percent might not be. And there is--and we know that some are more susceptible than others to noise and the so-called philosophy of tender ears. So if Mr. Exline has been around noise, and he has been around noise, I would wish to give some credit to his noise exposure.

If I were to make a reasonable, as best possible, clinical judgment of the totality of all that we have said here, it would seem to me that probably approximately two-thirds, in some sort of a clinical reasonableness, would be his familial sensorineural hereditary problem and one-third would be perhaps to his noise exposure.

And in keeping with that one-third noise exposure, it would seem to me that a percentage of that or a part of that picture would be--or would not have come about if he had and did wear his earplugs and ear protectors.

So if I were to go on further and to make some sort of, again, very clinical appraisal of that, I would go on to suggest the thought that perhaps 50 percent of his noise exposure time to have been his responsibility.

So then in conclusion as I have tried with a fair number of hours of thought and investigation and in looking at all of his audiograms and all of his records, it would seem to me that his fundamental problem is sensorineural hearing impairment with some noise-induced aggravation with approximately the figures that I've outlined.

Q. So that I understand you and the record is clear, of the one-third which you indicate is noise induced, your're indicating to us that at least half of that is Mr. Exline's responsibility, and the remaining half is noise exposure?

A. That would be my clinical, as best possible fairness, look at it. It's not possible for me to say that that is absolute, but that is the best way that I would be able to put it, and I think that that is about as fair a look at it as I can come up with as I've looked at all of it.

Q. And I take it a portion of that would also be attributable to noise which the claimant may have experienced even prior to going to Massey-Ferguson?

A. Yes, that would be true because he had a notching in 1974, and that is documented. So that is a consideration. (Updegraff deposition, pp. 25-28)

Later he was asked:

Q. Does a person with a familial type sensorineural hearing problem such as the type you've described this man had in 1974, does he become more prone or have a greater propensity for noise-induced damage thereafter than the average person with no hearing problems?

A. Answer in two ways: One, it was in 1975, I believe, that the first audiogram showed the sensorineural familial tendency. '74 did look like a noise-induced notch.

Then, secondly, the answer to your question would be, in my opinion, yes. (Updegraff dep., pp. 40-41)

The doctor agreed that half claimant's hearing loss occurred during the time he was employed by Massey and the other half after he was employed at Dico.

On December 18, 1983 Dr. Updegraff wrote:

I believe Mr. Exline has had a gradual change of his hearing over a period of years, most likely noise induced, and although his family history is negative for trouble hearing and his laboratory findings are negative for any specific sensori-neural hearing impairment one must always consider possibilities of a hearing impairment, familial in type, to some degree with considerable superimposed sensitivity to noise and noise induced changes over the working life time of Mr. Exline, his work environment, age, and family possibilities all working together to present his audiometric findings of the present time.

....

I believe it is not possible to specifically say Mr. Exline sustained any great degree of further loss of hearing while working at Dico, except for perhaps some change during that time at 500 cycles only and I believe the essense [sic] of his hearing impairment is primarily that of a gradual continued progressive hearing impairment over a period of years for reasons outlined as above, and I believe the major portion of Mr. Exline's hearing difficulties started from 1974 progressively to the present time. (Updegraff dep., Exhibit 2)

APPLICABLE LAW AND ANALYSIS

This matter consists of two claims for noise-induced hearing loss. The first involves a review-reopening against Massey-Ferguson, Inc., and Sentry Insurance, the second is an arbitration against Dico Co., and Wausau Insurance Companies.

The first issue raised by claimant on appeal is "whether the [hearing] deputy erred as a matter of law by considering evidence that the hearing loss the claimant had on July 28, 1981 might not have been caused by the noise at Massey-Ferguson, and based upon that evidence concluding that it was not." Claimant goes on to point out that Massey made admissions in its answer and specifically:

2. For answer to paragraph 4 thereof, they state that the claimant sustained an injury on July 28, 1981, and the insurance carrier on behalf of the employer paid 2.18 weeks compensation for 1.25% of permanent loss of hearing in both ears, $788.81.

***

4. For further answer, the employer and insurance carrier state that the claimant has been fully compensated for loss of hearing.

Whatever argument claimant has to make regarding admissions in pleadings is unnecessary because Massey on August 16, 1982 filed a memorandum of agreement. That filing, according to the Iowa Supreme Court, "settles the first element of liability, that an employer-employee relationship existed at the time of injury...[and] also settles...that injury arose out of and in the course of employment." The degree of disability remains. Freeman v. Luppes Transport Co., Inc., 277 N.W.2d 143, 149-50 (Iowa 1975).

The hearing deputy included law which is usually cited in matters of arbitration when she was discussing Massey's case. It seems that those citations were placed at that point of the decision as a matter of convenience. Citations were not repeated in the Dico portion. The hearing deputy sets out the first issue in the review-reopening as "whether a causal relationship exists between claimant's alleged injury and his current disability." She went on to make findings of fact which are suggestive of an evaluation of whether claimant's hearing loss arose out of and in the course of his employment and concluded that "[c]laimant has failed to establish an occupational hearing loss under 85B." Although she reached that conclusion, her analysis could be used to answer the question she initially posed in the negative.

As can be seen from the citation to Freeman, supra, Massey's filing of the memorandum establishes an injury, but in no way establishes whether or not any disability is related to that injury. Claimant next argues for additional benefits.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 28, 1981 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

The hearing deputy's analysis of the medical evidence is accurate and that evidence leads to the conclusion that claimant has not established by a preponderance of the evidence any entitlement to weekly benefits under chapter 85B. Claimant's burden is a preponderance of the evidence which 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. 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). 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).

Lay testimony suggests that while claimant was exposed to machine noise at Massey his exposure was much less than he would have experienced as a machine operator in that he spent a considerable amount of time in his office. When he was actually in the plant, he tried to use ear protection.

Expert testimony comes from board certified otolaryngologists, Brown and Updegraff and from audiologist, Ver Hoef. The latter expert had an opportunity to set up the hearing conservation program at Massey, to actually be at the plant, to know claimant on a continuing basis and to experience first hand the noise levels there. Ver Hoef's first testing of claimant in 1978 suggested to him that claimant had a medically treatable condition. He viewed the rapid change in claimant's lower frequencies as uncommon. Overall he did not feel claimant's condition was work-related and he looked to both the configuration of the loss and the fact that the hearing loss did not stop once claimant was removed from the work environment.

Dr. Updegraff, who had reviewed depositions and testing and who saw claimant twice, noted the pattern of claimant's loss which began with a characteristic notch, changed to a gradual and took on a pattern suggestive of a progressive familial hereditary sensorineural hearing impairment. He agreed with Ver Hoef that hearing does not usually continue to deteriorate after one is removed from a noisy environment. Dr. Updegraff acknowledged that claimant would have a greater propensity for noise-induced hearing loss, but he believed only one-third of claimant's hearing loss could be attributed to noise exposure some of which might have occurred before 1974 based on the notching seen at that time. That thought is supported by the examination of Dr. Smits in 1975. Dr. Smits wrote: "Was in factory noise until 10 yrs. ago -- now only intermittently."

Dr. Brown's testimony is probably the most favorable to claimant in that he said excessive noise could cause the damage seen in claimant. He disagreed with Ver Hoef's and Dr. Updegraff's interpretation of claimant's hearing loss pattern; but he did agree that once a person with a noise-induced hearing loss is removed from a noisy environment, the hearing loss should not progress.

There is some evidence to support claimant's claim, but on balance it is slight. Claimant's noise exposure to some degree contributed to his hearing loss. Although his work-related injury does not need to be the sole cause of his disability, it does need to be a substantial factor. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). The noise exposure at Massey was not a substantial factor in claimant's hearing loss.

In light of the above conclusion; i.e., that claimant's present disability is not related to his injury, no benefits pursuant to Iowa Code section 85.27 will be awarded.

As defendant Dico points out, claimant's brief deals almost exclusively with his review-reopening claim against Massey. The hearing deputy concluded that claimant had failed to establish an occupational hearing loss under chapter 85B arising out of and in the course of his employment at Dico.

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

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

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

More specifically to recover benefits under chapter 85B, claimant must show that he has been exposed to an excessive noise level as determined by section 85B.5 and that noise exposure caused a binaural hearing loss.

Claimant worked at Dico for only six months. He estimated that a quarter of his work day would be spent in the plant. He did wear hearing protection. The highest noise level documented at Dico was ninety-seven dBA which as defendants' brief notes would allow a three hour daily exposure without earplugs.

The discussion of the medical evidence set out above is equally applicable to claimant's claim against Dico. He has failed to show both that he was exposed to excessive noise levels and also that any hearing loss he may suffer is causally related to his noise exposure at Dico.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is fifty-three years of age.

That claimant has work experience as a machinist, production manager, plant superintendent and manufacturing engineer.

That claimant was not a machine operator in his work either at Massey or at Dico.

That claimant worked for Massey from September of 1973 until September 25, 1981.

That claimant's work for Massey exposed him to machine noise, but he also worked in an office separated from the factory by a concrete wall.

That claimant wore hearing protection both at Massey and Dico except when it made communicating difficult.

That claimant began using hearing amplification in the early 1980's.

That claimant worked for Dico from October 15, 1981 to April 15, 1982.

That claimant was exposed to machine noise at Dico, but that noise was not excessive.

That claimant's hearing loss has progressed even though he is no longer in an noisy environment.

That the gradual decline in claimant's hearing is consistent with a familial or hereditary hearing loss.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence any entitlement to weekly benefits as a result of a hearing loss arising out of and in the course of his employment with Massey-Ferguson.

That claimant has failed to establish by a preponderance of the evidence any occupational hearing loss arising out of and in the course of his employment with Dico.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That costs of the proceedings are taxed equally against defendants Massey-Ferguson and Sentry and defendants Dico Company and Wausau Insurance Companies.

Signed and filed this 16 day of September 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN EXLINE, Claimant, vs. MASSEY-FERGUSON, INC., and DICO COMPANY, Employers, and SENTRY INSURANCE and WAUSAU INSURANCE COMPANIES, Insurance Carriers, Defendants.	:	File Nos. 732635 704104 A D D E N D U M T O A P P E A L D E C I S I O N FILED SEPTEMBER 16, 1985

FILED
SEP 24 1985
IOWA INDUSTRIAL COMMISSIONER

It has come to the attention of this deputy commissioner that a portion of the appeal decision filed September 16, 1985 could be interpreted as conflicting with a declaratory ruling filed May 2, 1985 in Morrison v. Muscatine County, File no. 702385. That portion of the appeal decision is paragraph seven on page 12 which might be interpreted as restricting recovery to a strict compliance with 85B.5.

The declaratory ruling states:

> The statute [85B.5] is not so restrictive. The tables do not act as the minimum time and intensity necessary to create an excessive noise level. If those times and intensities are met, however, it is presumed the noise level is excessive. Noise levels less than those in the tables may produce an occupational hearing loss. Sound which is determined to have produced a permanent sensorineural loss of hearing arising out of and in the course of employment is an excessive noise level. It becomes a matter of proof of causation with qualified evidence to establish the requisite criteria.

Paragraph seven on page 12 is not essential to the decision and will be stricken. The decision in all other regards remains as filed.

Signed and filed this 24 day of September, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALLEN FENTON,	:	
Claimant,	:	FILE NO. 764421
vs.	:	A R B I T R A T I O N
ARMOUR-DIAL, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
JUL 24 1985
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in arbitration brought by Allen Fenton, against Armour-Dial, Inc., a self-insured employer. Claimant alleges that he sustained a compensable injury to his left arm in December 1983. The hearing commenced at Burlington, Iowa at 8:00 a.m. on April 16, 1985 and the case was fully submitted upon conclusion of the hearing. The record in this proceeding consists of the testimony of Allen Fenton and claimant's exhibit 1.

ISSUES

The issues presented by the parties at the time of hearing are whether claimant sustained an injury which arose out of and in the course of his employment; whether the alleged injury has a causal relationship with any disability or medical care which claimant has received; a determination of claimant's entitlement to compensation for temporary total disability, healing period or permanent partial disability; and, determination of claimant's entitlement to section 85.27 benefits. Defendant raised a lack of notice under section 85.23 as a defense. It was stipulated that claimant's rate of compensation should be computed based upon his gross earnings of the preceding 13 weeks which were a total of $5,240.

SUMMARY OF EVIDENCE

Claimant testified that on December 23 or 24, 1983 he was working as a mixer operator for Armour-Dial. He was opening a spice bag and in doing so moved his arm back into a metal water pipe. He stated that he hit the pipe hard, and experienced pain similar to hitting his "crazy bone." He stated that he reported the incident to his foreman, George Bloom, but continued to work. Claimant stated that he worked the following day and was then laid off until May. Claimant testified that in May he returned to a job lifting weiners and worked approximately two weeks. He stated that he missed three days due to the condition of his elbow and was then laid off again. Claimant testified that in June he returned to work for a different company.

Fenton testified that while he was off work he had problems with his elbow. He stated that it was hard to raise his arm above his head or to bend the elbow. He stated that he quit using his left hand to a large extent. He related having problems performing activities such as turning doorknobs or holding a glass. He stated that he received medical care. He stated that when he returned to work in June the arm bothered him but that he was able to do his work. He stated that now the arm is 95 percent better. He denied having any prior problems with his left arm or experiencing any other injury to the arm.

On cross-examination claimant stated that when he first hit the elbow he did not think he had done anything serious but that he did experience pain at the time that it happened and that the pain worsened. He stated that his report of the injury to his foreman could have been within two days from the time the injury occurred.

Claimant testified that he was a little league coach in the spring of 1984.

Claimant testified that he worked for his new employer for five or six weeks starting in June or July, returned to Armour for a week and then gave notice of his resignation.

On cross-examination claimant denied any possibility that he could have returned to work for Armour in January or February for approximately a month, but then he stated that he could have been recalled in February and then laid off again. He stated that when he was recalled to work he was still complaining of his elbow and took off three or four days from work due to the elbow.

Claimant's exhibit 1 is a report from Jerry L. Jochims, M.D., dated September 4, 1984 which includes the notes from an examination performed August 27, 1984. The notes state that claimant probably did sustain a blow to the elbow and in doing so may have contused the left ulnar nerve or developed swelling around the nerve. The notes reflect that the results of the examination did not show any substantial abnormality, but that there was a suggestion of some abnormality in the dermatone pattern of the ulnar nerve. Dr. Jochims indicated that he was ordering nerve conduction studies to determine the function of the ulnar nerve. He stated that if the studies were negative there was no permanent partial impairment, but that if the studies showed evidence of impaired nerve conduction, then there would be a two percent permanent partial impairment of the left upper extremity based on intermittent sensory deficit. The report states that following the nerve conduction studies an addendum would be made. No such addendum appears in the record.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on December 23, 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 to striking his elbow. Dr. Jochims thought it was probable that claimant had suffered a blow to his elbow. It is therefore found that claimant did injure his elbow in the manner in which he described at hearing. The date of injury is not easily ascertained. The employer's records were not entered into evidence. Based on claimant's testimony and the testimony to the effect that he worked the day following the injury, the date of injury is affixed at December 23, 1983.

Claimant testified that he informed his foreman of the injury. No conflicting testimony appears in the record. It is therefore found that claimant did give the employer notice of injury within 90 days from the date it occurred. The defense of section 85.23 of the Code must fail.

Claimant did not introduce any evidence of the medical expenses he had incurred and no ruling can be made with regard thereto.

Claimant seeks weekly compensation benefits. The fact that claimant was injured does not necessarily result in any compensation for temporary or permanent disability. Many injuries can occur which do not prevent the worker from being engaged in gainful employment. In this case claimant continued to work after the injury. He returned to work when he was recalled. He testified that he missed some work due to his elbow but the record does not show any indication from medical personnel that he was incapable of engaging in employment substantially similar to that in which he was engaged at the time of injury. In view of such, claimant's claim for weekly compensation for a period of recovery, be it temporary total disability or healing period, must fail.

The report of Dr. Jochims indicates a possibility of some degree of permanent impairment. It related that studies were to be conducted. The report does not, however, contain the results of those studies. In short, it would be extremely speculative, based upon the record in this case, to determine whether or not any permanent disability had resulted or the degree thereof. Since claimant has the burden of establishing his entitlement to compensation benefits, any claim for permanent partial disability must also fail.

FINDINGS OF FACT

1. On December 23, 1983 claimant was employed by Armour-Dial, Inc., in the state of Iowa working as a mixer operator.

2. By opening a bag of spices claimant struck his left elbow against a metal water pipe and injured the elbow.

3. Claimant has failed to prove that he was at anytime medically incapable of performing work in employment substantially similar to that in which he was engaged at the time of injury.

4. Claimant has failed to prove that the injury was a substantial factor in bringing about any disability in claimant's left arm or elbow.

5. Claimant received medical care for the injury but failed to prove the amount of the charges made for those services.

CONCLUSIONS OF LAW

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

On December 23, 1983 claimant sustained an injury to his left arm and elbow which arose out of and in the course of his employment with Armour-Dial, Inc.

Claimant has failed to carry the burden of proving that the injury produced any temporary disability, healing period, permanent partial disability or the amount of expense that he incurred in obtaining treatment for the elbow and arm.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding.

IT IS FURTHER ORDERED that defendant pay the cost of this action pursuant to Industrial Commissioner Rule 500-4.33 and that defendant file a final report within twenty (20) days from the date of this decision.

Signed and filed this 24th day of July, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TRAVIS FIELDS, Claimant, vs. COMBUSTION ENGINEERING CO., Employer, and AETNA CASUALTY & SURETY, Insurance Carrier, Defendants.	:	File No. 667823 A P P E A L
TRAVIS FIELDS, Claimant, vs. ABELL-HOWE CO., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	D E C I S I O N File No. 649854

FILED
AUG 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASES

Claimant appeals from findings and conclusions in each entitled matter. Co-defendant, Combustion Engineering Co., cross-appeals with respect to the proposed arbitration decision #667823, which found that claimant sustained a permanent partial disability of 15 percent of the body as a whole. With respect to file number 649854 the claimant was found to have sustained a 50 percent loss to his left thumb. The record on appeal consists of the hearing transcript; claimant's exhibits 1 and 2; defendants' exhibits A through K; and briefs filed by both parties on appeal.

ISSUES

667823

By the claimant: The court erred in not granting a larger amount of permanent partial disability and should have awarded more than 15 percent of the body as a whole.

By the defendants: Did the deputy industrial commissioner properly include the testimony of Terry Ross, D.C., at the time of hearing.

649854

By the claimant: The deputy erred in not awarding additional impairments to the loss of said thumb beyond 50 percent.

REVIEW OF THE EVIDENCE

Claimant's compensation rate was stipulated at the hearing to be $299.01 for file 667823 and $278.17 for file 649854. At the time of the hearing the claimant was 51 years old with two years of college education. He had worked in factories as an inspector and maintenance man. For the last ten years he has been a millwright. He was laid off January 1, 1984.

Claimant began working for defendant Combustion Engineering Company (hereinafter CEC) in August 1980. On August 8, 1980 a ladder was knocked out from under claimant and he fell 20 feet across an open door-way. He struck the "opening" with his waist. The claimant went to a first aid station and returned to work within one-half hour. He continued to work that day and the rest of the week. Claimant testified that at the end of the week his whole body was sore and he experienced numbness in his arms and hands. Claimant saw a Dr. Conger in Gorham, Missouri, who gave the claimant salve for his leg and Empirin for pain. The claimant continued working for CEC until August 26, 1980.

Since this accident claimant testified his problems are; trouble riding in a car, sleeping, mowing lawn, numbness in arms and shoulder, pain in neck, constant pain in middle of back, numbness in legs, particularly the right, lack of hand strength, continually dropping things, difficulty climbing, trouble turning head, lifting, pain in fingers, and "can't sit for more than a half an hour without pain." Claimant stated that he had not experienced any of these problems prior to working for CEC.

Since September 1981 claimant has worked for Abell-Howe, General Electric, and Westinghouse. From September 1981 until the time of the hearing, claimant had been off work one and a half years.

While working for defendant Abell-Howe (file #649854) on September 26, 1980 claimant got his left thumb caught in a grinder. This tore off the portion of his left thumb including the second joint. Claimant was released to work on September 19, 1981 by John Beckert, D.O. He was paid temporary total benefits running from September 27, 1980 to April 13, 1981.

Claimant cannot now handle a tool with his left hand. He stated that he had experienced numbness in his hands prior to the accident with defendant, Abell-Howe.

Other doctors that the claimant saw after his accident at CEC included; Kenneth Eugene Kirschner, D.C., for six months beginning May 1981; Jerry L. Jochins, M.D., on referral from Dr. Beckert for tests on arms, hands, and x-rays of back; and Terry Lee Ross, D.C., for one year for hands and back problems.

On cross-examination claimant stated that in prior employments he has operated all types of industrial machines and could still work in shipping and receiving as well as inventory control. He stated that presently millwright jobs are scarce. The claimant had been called for a job as a millwright but it conflicted with the hearing. He testified that he worked for three companies as a millwright since 1982; General Electric (1982 for 8-10 weeks), Westinghouse (September or October of 1983), and Phillips (February or March of 1984).

Claimant recounted that the doctors told him not to work anymore but that he had nothing in writing. The claimant admitted that he has received no written restrictions or weight limitations. Dr. Beckert told the claimant in September of 1981 that he had done all he could for him.

Claimant was involved in an automobile accident on December 9, 1982. He was hospitalized with a broken breast bone and a sore neck. The claimant was shortly discharged with a sponge collar which he wore for three or four days. At that time the claimant saw Dr. Ross. Claimant saw Warren N. Verdeck, M.D., whom he termed a company doctor, in February or March of 1983. He did not tell Dr. Verdeck of his accident, claiming that Dr. Verdeck knew all of this. However, he did answer all questions put to him by Dr. Verdeck.

Dr. Ross was called to testify for the claimant. He stated that he saw the claimant in December of 1983. He took a history which included the claimant's two industrial accidents. Dr. Ross reported that the claimant had the following complaints: Severe headaches, tenderness, soreness in the spine, difficulty in grasping objects, and trouble lifting. On examination, Dr. Ross found that the claimant had suffered severe trauma and damage to the soft tissues of his thoracic spine. Dr. Ross had x-rays taken of the claimant at Scotland County Hospital in Memphis, Missouri. Dr. Ross had also available to him x-rays taken at Scotland County Hospital in 1981, and x-rays taken by the Cedar Rapids Orthopaedic Group taken in 1983. Dr. Ross concluded that the claimant is suffering from a chronic condition of severe degenerative osteoarthritis of his thoracic and cervical spine due to trauma. He attributed it to trauma because the claimant's history does not reveal any trauma prior to the fall. The x-rays of 1981 and 1983, Dr. Ross opined, indicated that the claimant's advancing spinal problems will prevent the claimant from working in his field.

Dr. Ross believed the claimant to be permanently partially impaired to the degree of 50 percent to the body as a whole. Regarding his impairment rating, Dr. Ross stated: "That was not a scientific evaluation. It's from the impairment figure of the whole man; which when you're impaired in one or two joints, then you're looking about 50 percent impairment." Dr. Ross did not use the AMA Guidelines in reaching his impairment rating.

On cross-examination Dr. Ross admitted that he looked at no other doctor's reports--he didn't feel it important. He performed no EMG. Further Dr. Ross had not looked at x-rays related to the car accident--again which he felt unimportant. Dr. Ross stated the claimant's thoracic spine was not involved in his auto accident. In September 1983 claimant had a normal range of motion in his neck.

Claimant's exhibit 1 is a collection of medical reports from Koert R. Smith, M.D. A Scotland County Hospital x-ray report dated April 29, 1981 states:

> COCCYX: Coocyx [sic] was seen well in the lateral position view, however in the AP, it is slightly under pentrated [sic] making it difficult for evaluation. There is anterior angulation of the distal portion of the coccyx. This could be secondary to old injury. There is no evidence of recent fractures noted.

IMPRESSION:
1. Anterior deviation of the distal coccyx.

LUMBAR SPINE: There is evidence of a grade II, spondylolithesis of L-5 on S-1. Advanced degenerative arthritis is noted by eburnation with marginal lipping and disc space thinning. This is probable secondary to the spondylitis. The remaining bony elements are intact and in good positon [sic].

IMPRESSION:
1. Spondylolithesis grade II, L-5 and S-1.
2. Spondylitis.

THORACIC SPINE: In the AP projection the thoracic spine is straight. In the lateral projection the thoracic curve is well maintained. The intervertebral disc spaces are intact. There is no evidence of fracture of the thoracic spine.

IMPRESSION:
1. There is no evidence of fracture of the thoracic spine.

CERVICAL SPINE: In the AP projection the cervical spine is straight. The odontoid process is intact. There is no evidence of cervical rib. In the lateral projection the cervical curve is well maintained. There is no evidence of angulation or fracture of the cervical spine.

IMPRESSION:
1. There is no radiographic evidence of fracture or angulation of the cervical spine.

Claimant's exhibit 2 is a report by Dr. Ross dated February 23, 1984. It states that he saw the claimant on December 16, 1982 in connection with an auto accident. Dr. Ross opines that the automobile accident of December 9, 1982 was not the primary cause of the claimant's back and neck problems. He concluded that the cause was claimant's fall while working for CEC.

Defendants' exhibit A is a history and physical report of claimant by J. Dockum, M.D., dated September 26, 1980. It states that claimant's thumb was being amputated at the IP joint. Defendants' exhibit C is a report from Dr. Smith dated March 23, 1981. It states claimant is suffering from bilateral carpal tunnel syndrome. He feels that his (the claimant's) upper extremity and neck symptoms are related to the carpal tunnel syndrome. Defendants' exhibit F indicates that the claimant's left thumb amputation was in the middle of the IP joint. Defendants' exhibits J and K are letter reports to defendants' counsel from Dr. Verdeck.

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).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Industrial Commissioner's Rule 500-2.4 provides:

> The Guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under section 85.34(2) "a"-"r" of the Code. The extent of loss or percentage of permanent impairment may be determined by use of this guide and payment of weekly compensation for permanent partial scheduled injuries made accordingly. Payment so made shall be recognized by the industrial commissioner as a prima facie showing of compliance by the employer or insurance carrier with the foregoing sections of the Iowa Workers' Compensation Act. Nothing in this rule shall be construed to prevent the presentations of other medical opinion or guides for the purpose of establishing that the degree of permanent impairment to which the claimant would be entitled would be more or less than the entitlement indicated in the AMA guide.

This rule is intended to implement section 85.34(2) of the Code.

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual compensable loss of use. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983). The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

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."

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.

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

The first issue to be addressed is the question of the admissibility of Dr. Ross's testimony. Chapter 17A.14 of the Iowa Administrative Procedure Act states in part: "Witnesses at the hearing, or persons whose testimony has been submitted in written form if available, shall be subject to cross-examination by any party as necessary for a full and true disclosure of the facts." The reports by Dr. Ross were filed March 1, 1984 with this office. The proof of service stamp indicates the defendants' attorneys were mailed copies on February 27, 1984. The hearing was May 8, 1984. The defendants did not find out that Dr. Ross would testify until about eight days before the hearing. If Dr. Ross' testimony would have resulted in fundamental unfairness to the defendants then the testimony in question would be stricken. Such would be the case if the defendants were not given an opportunity to cross-examine the witness. But in the instant case the defendants could have cross-examined Dr. Ross as long as they wanted with his report in their hands. The deputy did not err in accepting the testimony by Dr. Ross.

The next issue is degree of industrial disability. Several points are worth noting. The claimant has worked as a millwright subsequent to his injury. He would have worked the day of the hearing as a millwright but for the hearing. The claimant has no written restrictions. The claimant has two years of college with experience with many industrial machines and inventory systems. The claimant stated that millwright jobs are scarce now. But the claimant is not to be compensated for the scarcity of millwright jobs.

A further point needs illumination. Physical impairment does not equate to industrial disability. It is possible to have a higher permanent partial impairment rating than permanent partial disability rating. The reasons for this have been reviewed above. The deputy did not err in ascribing to the claimant a 15 percent permanent partial disability.

Finally the issue remains as to the claimant's scheduled injury to his thumb. The numbness of claimant's thumb was present prior to his injury and the fact finder observed, "Further, my personal observation is that claimant sustained a thumb injury distal to the crease in the thumb surface." The medical evidence fully supports this and no error can be found.

FINDINGS OF FACT

1. Claimant was employed by Combustion Engineering on August 8, 1980.

2. Claimant hurt his back while working on August 8, 1980.

3. Claimant sustained permanent partial disability as a result of the August 8, 1980 injury to the extent of 15 percent of the body as a whole.

4. Claimant had an amputation of a portion of the left thumb at Abell-Howe Company on September 26, 1980.

5. Claimant sustained a 50 percent loss to the left thumb.

6. Claimant was paid for a 50 percent loss of the thumb.

CONCLUSIONS OF LAW

Claimant was employed by Combustion Engineering on August 8, 1980.

Claimant sustained an injury arising out of and in the course of employment on August 8, 1980.

Defendants, Combustion Engineering Company and Aetna, will be ordered to pay unto claimant 75 weeks of permanent partial disability compensation at the stipulated rate of $299.01 per week.

Claimant was employed by defendant Abell-Howe Company on September 26, 1980.

Claimant sustained an injury arising out of and in the course of employment on September 26, 1980.

Claimant, because he has been paid his due, will recover nothing further because of the September 26, 1980 injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants, Combustion Engineering and Aetna Insurance Company, pay unto claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of two hundred ninety-nine and 01/100 dollars ($299.01) per week (File 667823).

That claimant take nothing further from defendants Abell-Howe Company and Liberty Mutual Insurance Company (File 649854).

That costs are to be divided equally by defendants.

That defendants, Combustion Engineering Company and Aetna Insurance Company, are to file a final report upon payment of this award.

That 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 30 day of August, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD FLYNN,	:	File No. 758418
Claimant,	:	A P P E A L
vs.	:	D E C I S I O N
OSCAR MAYER FOODS CORPORATION,	:	FILED
Employer, Self-Insured, Defendant.	:	AUG 7 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 28, 1985 this 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 in arbitration filed March 21, 1985 in which he was awarded temporary total disability and medical expenses and in which defendant was allowed a credit pursuant to Iowa Code section 85.38(2).

The record on appeal consists of a transcript of the hearing; joint exhibits A through Y; A1, B1, C1, G1 and H1 and claimant's exhibits 9 and 10. All evidence was considered in reaching this final agency decision.

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

ISSUES

The issues on appeal as stated by claimant are:

I. Should respondent be allowed an offset for sick leave?

II. In view of unanimous medical opinion that the incident at work caused or aggravated a pre-existing condition, with permanent work restrictions placed upon Claimant, was the Deputy Commissioner at liberty to ignore the evidence and award temporary benefits only?

REVIEW OF THE EVIDENCE

Thirty-seven year old claimant began work for defendant on August 25, 1967. He recalled the circumstances of his injury on February 16, 1984 as follows: He was earning $10.69 per hour. He was lifting a batch tub of springs weighing over 200 pounds. He had a sharp pain in his back. He worked about forty minutes. At break time he went to first aid and told Nurse Monica Murphy that he had hurt his back. He was given a pain pill and told to return for a heat treatment. He saw his supervisor, Mike Cain, and told him he had hurt his back and asked to go home.

He called J. B. Klindt, D.C. The following day he did not go to work. He was told to see the company doctor, a Dr. Bishop, who prescribed muscle relaxants and who released him for limited duty; but he went home.

He was seen in the emergency room on the weekend and then by Ahmad Chamany, M.D. He went back to work on a Tuesday and worked the remainder of the week; and the following Monday he left early to see J. A. deBlois, D.O., who did a CT scan.

He also was examined by John T. Johnson, D.O., Myron Stachniw, M.D., and Thomas Lehmann, M.D.

Claimant stated that he returned to work on May 21, 1984 with restrictions against excessive bending or lifting. He was placed on the continuous long baloney operation and then he was put on the same work he was doing when he injured his back. He complained that too much twisting and bending were required. On October 19, 1984 he began having sharp pains in his back. He left work and he has not been released nor has he returned to work. He agreed that he had been given light duty because of his back when he went to work in May and that he has not talked to any one with defendant regarding light duty work since October of 1984.

Claimant acknowledged that he had received workers' compensation before and that he had received sick leave benefits for his back injury. Claimant thought that sick pay benefits were deducted from his ultimate benefits at retirement.

Claimant admitted that he had been told to lose weight and that he had back problems before.

Vernon Keller, safety security manager for defendant for fifteen years, testified that payments for sick leave are not deducted from pension benefits. He said that if a person is entitled to workers' compensation benefits, but would get a larger amount through sick leave, he would be paid the difference. There is no employee contribution to sick leave.

Monica Murphy, industrial head nurse for defendant since 1981 with charge of three nurses, reviewed claimant's record prior to testifying. Records showed claimant first complained of back pain in 1976 when he was off from November 13 to December 26. On August 26, 1977 he was off with back pain. In November of the same year he fell at home and injured his back. He missed work from June 6, 1978 to June 12, 1978 with a neck and back problem. The following month he had a back condition for approximately a week. From November to December of the next year he missed a week's work. In early 1981 he was off with a back condition. He was absent with back trouble from June 27, 1983 to July 18, 1983.

On December 5, 1983 claimant called in with an upset stomach. He returned on December 12, 1983. The record failed to record back complaints at that time.

Murphy acknowledged that she could not say whether claimant was off work for a back strain or disc problem and that she had not seen claimant do any heavy work.

Claimant was placed on bedrest by J. B. Klindt, D.C., on April 4, 1973 due to a lumbosacral strain. In November of 1977 claimant was treated for an acute cervical and low back strain following an accident. A similar diagnosis was made by J. A. deBlois, D.O., in July of 1978 and again in November of 1978.

Low back strain was the diagnosis of Dr. deBlois in early 1981. Dennis S. Hagemann, D.C., recorded an acute lumbosacral strain in June of 1983. The following month Dr. deBlois changed the diagnosis to myofascial dysfunction of the mid-back. Late in 1983 claimant had a severe thoracic myofascitis followed by a lumbosacral strain.

On February 18, 1984 claimant was seen in the emergency room with back pain after he, on February 16, 1984, injured his low back while lifting a 200 pound object. Claimant's pain was described as intermittent with spasms in his left lower back which radiated down his left leg. There was no neurological deficit and claimant was given Robaxin. He was allowed to return to light duty on February 20, 1984 by Ahmad Chamany, M.D.

On February 28, 1984 claimant had a CT scan of the lumbar spine which was interpreted by C. P. Tillman, M.D., as showing a probable disc herniation at L5-S1 on the left. Mild degenerative changes were identified at the L4-5 level.

X-rays taken March 15, 1984 showed hypertrophic spur formation between T8 and 9 especially on the right. There was borderline narrowing at L5 and a spina bifida at S1. A few days later, R. J. Chesser, M.D., did electromyography which gave no evidence of a radiculopathy or a peripheral degenerating process. Nerve conduction produced a slightly prolonged sural latency suggesting early neuropathy.

John T. Johnson, D.O., family practitioner, first saw claimant on March 15, 1984 at which time he was complaining of back pain. Claimant related a history of lower back and leg pain developing in February as he was lifting at work, but he was unsure whether or not claimant gave that history when he was first seen or whether the history was copied from other doctors. Claimant was referred to the orthopedic and neurology departments at the University, to Dr. Stachniw and to Dr. Chesser who did electromyography. Claimant was returned to work on May 21, 1984.

Dr. Johnson placed claimant under a twenty-five pound weight restriction with no excessive bending or stooping and he attached those restrictions to the mid-February lifting incident. He agreed that claimant's weight would be a factor in his back trouble. He was unable to determine how much of claimant's problem is related to the February incident referred in his October 18 report and how much was due to degenerative disc disease.

Claimant was last seen by Dr. Johnson on November 2, 1984 after he stopped working on October 23, 1984 following a flare-up with his back. Claimant had pain in his lumbar spine and difficulty walking. He was given analgesics.

On August 20, 1984 claimant was seen in Iowa City where he gave a history of six or seven years of chronic low back pain and spasm in the lumbosacral area with an acute injury while lifting in February which caused left-sided radicular symptoms down the lateral aspect of the left leg and into the foot. Claimant had tenderness to palpation in the lumbosacral spine which was worse on the left. X-rays showed some retrodisplacement of L5-S1. No surgical intervention was recommended, and it was suggested claimant continue with exercise, weight loss and anti-inflammatories. It was thought that claimant had segmental instability of L5 on S1.

Myron Stachniw, M.D., saw claimant in late November of 1984. He took a history of back spasms coming on as claimant was lifting something in February. Pain progressively increased and went into the left leg where numbness also developed. Claimant had a full range of motion and his neurological was normal although he reported a decrease in sensation on the inner aspect of the left leg.

Dr. Stachniw expressed the opinion that claimant has chronic degenerative disc disease which was "maybe" exacerbated by his work injury. He was unable to say when the disc herniation occurred. Claimant was advised to lose weight and to undertake an exercise program. He was believed capable of light or sedentary work.

APPLICABLE LAW AND ANALYSIS

The first issue raised by claimant on appeal is whether defendant should "be allowed an offset for sick leave." He argues that Iowa Code section 85.38 requires two elements for application of the "offset;" i.e., that "[t]he employer must actually make payments to the employee" and that "[t]he funds must be contributed to wholly or partially by the employer." He finally states that the real issue is whether or not the 85.38 question could be raised.

Iowa Code section 85.38(2) provides:

> In the event the disabled employee shall receive any benefits, including medical, surgical or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, chapter 85A or chapter 85B, then such amounts so paid to said employee from any such group plan shall be credited to or against any compensation payments, including medical, surgical or hospital, made or to be made under this chapter, chapter 85A or chapter 85B. Such amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount so deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A or an occupational hearing loss under chapter 85B. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against them by reason of having received such payments only to the extent of such credit.

There was no order by the hearing deputy regarding section 85.38(2). His order was merely advisory with credit to be given "if applicable." The discussion in his introduction also is enlightening. He wrote:

> Apparently claimant and defendant are operating under a misconception that a ruling not to hear and determine the entitlement to and extent of any 85.38 credit some how prohibits defendant from taking such a credit. This is not the case. Absent a decision on the issue by this agency, defendant, Oscar Mayer may take whatever credit it feels appropriate under Iowa Code section 85.38. If claimant feels that the taking of such credit by defendant is improper, he may petition this agency for relief at that time.

No findings of fact were made and no conclusions of law were reached on the matter of Iowa Code section 85.38(2). Claimant cannot now make credit an issue on appeal when he fought to keep it out of issue at the time of hearing and the hearing deputy concluded claimant was correct in his contention.

The second issue raised by claimant is whether the hearing deputy was correct in awarding temporary total disability benefits only. Claimant points out that Dr. Johnson stated in his report that claimant be under a twenty-five pound weight restriction with no excessive bending or stooping. Defendant counters with an extensive review of the evidence.

Documentation and testimony submitted show that claimant had a lumbosacral strain in 1973, a low back strain in November of 1977, low back strains in July and November of 1978, a low back strain in early 1981 and an acute lumbosacral strain in June of 1983 followed by a myofascial dysfunction of the mid-back. In the December immediately prior to claimant's injury, he had first severe thoracic myofascitis followed by a lumbosacral strain. None of those incidents resulted in the imposition of any restrictions noted in the illness or accident reports.

Shortly after the February 1984 incident, claimant was released for light duty. His physician did not anticipate claimant's having further treatment or any permanent deficit.

Claimant worked for a short period and then went off work. Dr. Johnson first examined claimant about a month after the lifting incident. His report of October 18, 1984 does say that limitations are secondary "to the mid-February lifting incident on the job." That statement in isolation certainly seems favorable to claimant's position on permanency. Other statements are not so favorable; for example:

> Q. Are you able to segregate what percentage of his problem is due to degenerative disk disease and his -- you know, his general back condition and how much is related to that February incident that's mentioned in your October 18th report?
>
> A. Gee, I don't think I'm --
>
> Q. You can't separate that?
>
> A. I don't think I can. I think it could have -- (Johnson deposition, p. 14)

Later he was asked:

> Q. A man with a -- either a degenerative disk condition or a degenerative disk and a bulging disk with an incident that was caused or aggravated by lifting, say, a 200-pound weight, should this man be on permanent restrictions?
>
> A. Yes, definitely, even if he gets operations. They got new studies out from the -- from Harvard University or University of Massachusetts Medical School that just came out in the medical magazine that says be careful of quick-fixit back operations or injections, this type of thing. So even if he got an operation or got injected with the new things that they are using, he should still be on restrictions. (Johnson dep., p. 17)

Dr. Johnson had not treated claimant before. He took no history at the time of claimant's initial visit, but rather he resorted to a second-hand history from Drs. Chandler and Lehmann which was taken in August of 1984. There is no showing he was aware of claimant's extensive prior back history other than in a general way again from the notes of Drs. Chandler and Lehmann of a six to seven year history. Neither did the doctor record what claimant's work actually was.

Dr. Stachniw who saw claimant one time diagnosed a chronic degenerative disc disease with only "maybe" an exacerbation. He did not assign an impairment rating nor did he place claimant under any restriction. At the time of his examination claimant was not able to do heavy work, but he was thought capable of light or sedentary work.

The doctors at the University of Iowa saw claimant after he returned to work and they were aware of his being on light duty with lifting of twenty pounds. No statement of causal relation is contained in the report.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 16, 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).

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).

An award of benefits cannot stand on a showing of a mere possibility of causal connection between the injury and the claimant's employment. An award can be sustained if the causal connection is not only possible, but fairly probable. Nellis v. Quealy, 237 Iowa 507, 21 N.W.2d 584 (1946). Questions of causal connection are essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. 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 Mussleman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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.

Claimant's burden is a preponderance of the evidence and that burden he has not carried. As there was no appeal of any other issue in this matter by the parties, the findings of fact and conclusions of law reached by the deputy will be affirmed.

FINDINGS OF FACT

That claimant is thirty-seven years of age.

That on February 16, 1984 claimant had back pain as he lifted a tub while he was at work.

That defendant had actual knowledge that claimant suffered a work-related injury on February 16, 1984.

That claimant had a lumbosacral strain in 1973, a low back strain in November of 1977, low back strains in July and November of 1978, a low back strain in early 1981, an acute lumbosacral strain in June of 1983 followed by a myofascial dysfunction of the mid-back and in late 1983 claimant had a severe thoracic myofascitis followed by a lumbosacral strain.

That claimant has a spina bifida at S1.

That claimant is overweight.

That claimant was released to return to light duty on February 20, 1984.

That claimant was back at work on February 21 and went off again on February 29, 1984.

That claimant returned to work on May 21, 1984 with a restriction against lifting in excess of twenty-five pounds and against excessive stooping or bending.

That claimant incurred medical expenses at Franciscan Medical Center and at the University Hospitals and Clinics in Iowa City which are related to his injury of February 16, 1984.

CONCLUSIONS OF LAW

That claimant has established by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment on February 16, 1984.

That defendant has not established the affirmative defense of notice.

That claimant has established by a preponderance of the evidence that his injury of February 16, 1984 was a cause of temporary total disability entitling him to temporary total disability benefits from February 17, 1984 to February 22, 1984 and from February 29, 1984 to May 21, 1984.

That claimant has established by a preponderance of the evidence entitlement to payment of medical expenses as ordered below.

ORDER

That defendant pay unto claimant temporary total disability benefits from February 17, 1984 to February 22, 1984 and from February 29, 1984 to May 21, 1984 at a rate of two hundred ninety-seven and 74/100 dollars per week ($297.74).

That defendant pay claimant interest pursuant to Iowa Code section 85.30.

That defendant pay the following medical expenses:

Rock Island Radiology Associates, Ltd.	$72.00
University Hospitals and Clinics	70.00

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 1 day of August, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUTH E. FOSTER, Claimant, vs. PAMECO ENTERPRISES, INC., Employer, and STATE FARM FIRE AND CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 645377 A P P E A L D E C I S I O N

FILED
AUG 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision filed December 5, 1984 wherein it was found that the claimant failed to prove by a preponderance of the evidence that she was entitled to further payments for the October 18, 1980 injury. It was also found that the medical care offered by the defendants was reasonable. The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 6; defendants' exhibits A through Q; and briefs filed by both parties. A memorandum of agreement was filed May 8, 1981. A final report was filed November 17, 1982.

ISSUE

The issue as stated by the claimant is: "The Deputy Industrial Commissioner erred in failing to award claimant further payments for the October 18, 1980 injury and ordering further medical payments for claimant."

REVIEW OF THE EVIDENCE

At the hearing the parties stipulated that claimant's rate of compensation would be $98.98. The claimant demanded six months additional healing period. At the time of the hearing the claimant was a married 31 year old woman. In June of 1980 the claimant was employed by Pameco Enterprises, Inc., (hereinafter Pameco) as she had been for all but a brief period during the last four years. Her duties included sorting, bagging, and inserting mail. To do this she was required to lift and stand. In June 1980 the claimant injured her back when she bent down to pick up a tray of mail. She was under a doctor's care and felt fully recovered in two weeks time. While working for Pameco on October 18, 1980 she again injured her back in largely the same fashion as she had in June 1980. She stated that the tray she was lifting was heavy but she had lifted heavier. The incident occurred on a Saturday but the claimant worked through Wednesday of the following week. The claimant recounted that she was in continual discomfort with sharp pains in her back.

Finally the pain was so bad that the claimant went to R. Cook, M.D., on October 23, 1980. Dr. Cook prescribed bed rest, a week off work, muscle relaxers, and pain medication. The claimant never returned to work except for February 1981 when she returned and was told there was no light duty work available. She was under the care of Dr. Cook until January 1981.

The claimant saw G. Charles Roland, M.D., December 5, 1980 at the direction of the defendant insurance company. Dr. Roland told the claimant to avoid lifting and standing at a work station for a long shift. He prescribed exercises which the claimant still does. The claimant discontinued seeing Dr. Roland on February 4, 1983 at which time she was told that she had developed arthritis of the spine. The claimant stated that she told both Dr. Cook and Dr. Roland of her severe headaches.

The claimant saw Robert J. Connair, D.O., on the recommendation of her attorney on February 16, 1981. Her treatment by Dr. Connair has been continuous since that date. At times she has experienced relief under Dr. Connair. She also has had headaches lasting up to two and three weeks. She stated that she had no back pain prior to October of 1980.

The claimant saw Peter D. Wirtz, M.D., on November 2, 1983 at which time she was told that her condition had gotten no better but no worse. The claimant stated on direct examination that she feels worse now than she did in October 1980. She listed headaches, back pains, and leg pain as her predominate symptoms.

She admitted on cross-examination that even though six different doctors have said she could return to work she insists that she is unable to work even part-time. Specifically, she was aware that Dr. Cook and Dr. Roland indicated that she could go back to work in February of 1981.

The claimant indicated that she has been receiving generally the same treatments by Dr. Connair and only once in a while do these treatments give her any relief from her pain. She stated that she has never been x-rayed by Dr. Connair. Moreover she admitted on cross-examination Dr. Connair can tell the claimant where she hurts without her telling him.

Presently, weather permitting, the claimant walks two blocks a day. Other activities include prescribed exercises, reading, television viewing, and taking her relatives to the doctor. She used to bowl and play softball until the October 1980 accident. The claimant has been seeing a Dr. Northwall regarding certain emotional problems apparently not originating with her injury. She admitted on cross-examination that she probably told Jane Langren that she was hesitant to work because of her emotional condition. She did not recall telling Ada or Emery Jackson she hurt her back in a boating accident.

The claimant testified that she has applied to about 50 potential employers attempting to find employment. The types of jobs for which she has applied include receptionist, waitress, and hostess. She stated that she cannot work as a receptionist because of the need for a special chair. The claimant participated in a "vo-rehab" course taking a course in math and filing. However, she was prevented from participating in another program requiring a doctor's release which she could not get.

The claimant stated that presently she experiences pain at the base of her skull when she sits, cramps in her neck when she sits, constant back pain, leg pain, and headaches.

Dr. Connair, who specializes in rehabilitative and osteopathic manipulative medicine, testified on behalf of the claimant. He began treating the claimant in February of 1981 and has treated her on a weekly basis since. He took a history of claimant which included the claimant's two alleged injuries lifting trays. His diagnosis was that the claimant had a structural imbalance and that this was consistent with the claimant's history. Dr. Connair treated her with manipulation which he explained was a therapy designed to realign the body into its normal positions.

Dr. Connair stated that he never formed an opinion as to whether the claimant could return to work. He said the type of work she could do would be limited compared to what she was used to. Dr. Connair testified that the claimant's condition was not likely to improve but he did believe that the claimant will need treatment in the future for her condition associated with the injury of October 1980. He said that in March of 1981 he put claimant on as needed treatment basis. His charges, he testified, were fair and reasonable. Dr. Connair expressed his opinion on whether the claimant could return to work:

> Q. As of this time do you have an opinion as to whether or not Ruth Foster could return to some type of employment?
>
> A. Yes. It would have to be something in a very sedentary line, if anything. I don't know what her capabilities are as far as the amount of sitting she can do at one time or the amount of standing and pushing and pulling and those things.
>
> (Transcript, page 75)

On cross-examination he admitted that it was very possible that he told Kathryn Bennett that the claimant could perform light duty work in February of 1982.

Emery Jackson, owner of Pameco, testified that the claimant was a very good employee. However, he did not believe that the claimant could have been lifting more than about 20 pounds.

Kathryn Bennett, a vocational consultant for North Central Rehabilitation Services, testified for defendants. Bennett first saw the claimant on October 26, 1981. Bennett stated that she met with Dr. Connair and that the doctor told her that he thought the claimant could work in selective employments consisting of light duty. Bennett provided information to the claimant for job opportunities involving clerking, hostessing, and other light duty work. Bennett testified that her assistant called the prospective employers and found that the claimant checked up on some and not others. Bennett felt that all the job opportunities she located for the claimant were within claimant's restrictions. She questioned the claimant's motivation and felt that there was employment available to the claimant if she had made the effort. The witness last saw the claimant on March 29, 1982.

On further direct the claimant stated that her exhibits 3, 4, and 5 represented the referrals that Bennett gave her and she subsequently followed up on. The claimant also said that she kept looking after Bennett quit referring.

Claimant's exhibit 1 is a collection of reports by Dr. Connair. A letter from Dr. Connair dated August 27, 1982 to Steve Wolver states that the treatment the claimant is receiving is due to an accident on October 18, 1982. A letter dated June 18, 1982 to claimant's attorney states that although the claimant has been to the office on a very regular basis, her condition has remained the same and continued care is required if she is to progress. Also included is a list of charges totaling $675 which included charges for osteopathic rehabilitation including corrective manipulation and soft tissue manipulation to the cervical, thoracic and lumbar spine, and corrective chest and rib manipulation. This treatment was performed approximately 76 times beginning in February 1981 and continuing up to the time of the hearing. A copy of statements indicates that the last payment to Dr. Connair from defendant insurance company was October 14, 1982. Claimant's exhibit 2, an open account statement, shows as of November 30, 1983 a balance of $1,475. Claimant's exhibits 3, 4, and 5 have been identified and discussed above.

Defendants' exhibit A is a letter from Robert Hayne, M.D., a neurologist, to Steve Wolver dated September 8, 1981 and states that after examination it was his impression that claimant has a mechanical type back pain which is probably stable at its present level of symptomatology. He does not recommend any further treatment.

Defendants' exhibit B is a collection of reports from Dr. Cook. Included is a radiographic report dated November 6, 1980 which reports that except for a 5° scoliosis of thoraco-upper lumbar spine, there are no fractures or other acute bony abnormalities. Dr. Cook's assessment from October 23, 1980 to February 4, 1981 was back sprain. Defendants' exhibit C is a letter to North Central Adjustment Company dated February 4, 1981 from Dr. Roland. He states that the claimant could handle a light duty type work. He also reports that the claimant is at the end of her treatment and her symptoms maybe more on a permanent basis. He feels the claimant is developing degenerative arthritis in the thoracic spine region. In a letter of December 5, 1980, Dr. Wirtz states that claimant has mechanical back pain. Defendants' exhibit D is a report from Lon R. Brewer, D.O., to Disability Determination Services dated June 9, 1983. It states the claimant's x-rays are normal and lists postural mechanical backache as the diagnosis.

Defendants' exhibit E is a letter to the defendant insurance company dated November 2, 1983 by Dr. Wirtz. He states in part:

> This patient has an original injury to her back on 10/18/80. The injury was a minor strain that did not cause any fracture or dislocation noted on x-rays taken at that time. This would be diagnosed as a musculoskeletal strain to the dorsal spine musculature. Such an injury clears itself over a 6-12 week period of time. This patient has a preexisting idiopathic scoliosis in the dorsal and lumbar spine which is not contributory to her symptoms. Her present symptoms center around musculoskeletal strain and various arthralgias that have no direct relation to an injury such as the one that occurred on 10/18/80. She is requiring supportive treatment for these problems which are only palliative and not curative.

Defendants' exhibit G is a psychiatric report dated August 25, 1982. It states as a problem, "[n]o motivation to remain functional e.g., working, socializing,..." Defendants' exhibit H are psychiatric clinical notes on the claimant, outlining her problems including the fact that her husband is in prison.

Defendants' exhibit I is a Lutheran Hospital discharge summary dated July 27, 1975. The chief symptom on admission was, "[l]ower midline abdoninal pain,..." The final diagnosis was, "[m]ild S-type scoliosis of the lumbosacral spine." Defendants' exhibit J is a collection of progress notes of unknown (illegible) origin. An entry dated July 24, 1976 states, "headaches of 9 days duration." Entries dated August 30, 1977; September 1, 1977; January 1978; and August 23, 1979 state "back pain."

An entry dated October 2, 1979 reports the claimant having difficulty functioning at work. An entry of June 22, 1980 states claimant may have possible acute back strain or possible malingering.

Defendants' exhibit K is a collection of clinical notes by Jane Langren, clinical psychologist, kept on the claimant. All of the entries deal with the claimant's anger and depression towards her husband's incarceration.

Defendants' exhibit L is workers' compensation payment record. The record indicates that temporary total disability payments commenced on December 2, 1980 and ended on March 30, 1982, 70 weeks total at a rate of $98.98. The cumulative amount of temporary total and permanent partial disability paid to claimant was $7,423.50. Permanent partial disability payments began January 3, 1982. The last date of a medical payment was November 16, 1983. The cumulative medical paid was $2,694.26. Defendants' exhibit M is an eligibility report by a Mr. Stokesberry. It states that claimant brought in a note from Dr. Connair which stated that claimant is not ready for work at this time. Stokesberry reports: "Counselor has not noticed client reacting to back pain at anytime we have been together." Defendants' exhibit N is a surgical report dated January 8, 1976 on an unrelated matter.

Defendants' exhibit O is a collection of reports and letters from North Central Rehabilitation Service. A letter from Bennett to defendant insurance company dated Janiary 14, 1982 states: "It is NCRS's impression the injured worker is uninterested in obtaining appropriate employment in any area." A letter from Bennett to Dr. Connair dated February 12, 1982 states in part: "Also, you indicated that she could possibly return to work if it were a selective placement and the injured worker could cope with it....Ms. Foster has reported to me that she is incapable of performing multiple routine tasks and that she has been informed, by you, that she is unable to seek employment." In a progress report to defendant insurance company from Bennett dated February 12, 1982 she reports in part: "Dr. Connair indicated he believed the injured worker was capable of returning to selective employment in a position for which she was capable of coping and providing that treatment continued."

Defendants' exhibit P is a letter from Dr. Connair. It states in part:

> Please be advised that this patient is not released, that her prognosis is indefinite at this time and continued care is necessary. She is not ready for work (employment) at this time.
>
> Limitations include a ten pound weight limit, she may sit, stand or walk intermediately. She should not be doing work which requires repetitious movement of her arms and hands such as pushing, pulling, and grasping. She may on occassion [sic] bend, squat, climb, balance or stoop. She should not kneel, crawl or reach. She can not do heavy lifting, stretching, twisting or be on her feet for long periods of time.

Defendants' exhibit Q is a brochure of the type she was lifting when she allegedly injured her back.

APPLICABLE LAW AND ANALYSIS

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

An appeal decision by this agency held:

> That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature

> often continues beyond that point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition.

Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982).

The claimant has not carried her burden of proof. The 76 identical treatments by Dr. Connair do not justify extending the healing period for six months. It is clear that these treatments after a period of time were mere maintenance at most and not designed to improve claimant's condition. Further, all doctors involved, even Dr. Connair to an extent, released claimant to at least light duty work. This is enough to terminate healing period benefits and defeat claimant's assertion of permanent total benefits. Further, claimant has many emotional factors based upon tragic circumstances unrelated to her employment which may bear upon her motivation to work.

FINDINGS OF FACT

1. Claimant was employed by Pameco on October 18, 1980.

2. Claimant sustained a back injury at her place of employment on October 18, 1980.

3. Defendants filed a memorandum of agreement regarding an October 18, 1980 injury.

4. Claimant was paid healing period and permanent partial disability compensation in the amount of $7,423.50.

5. Defendants paid medical benefits in the amount of $2,264.26.

6. Medical care offered by defendants was reasonable.

7. Claimant has failed to prove by a preponderance of the evidence that she is entitled to further payments for the October 18, 1980 injury.

CONCLUSIONS OF LAW

Claimant sustained an injury arising out of and in the course of her employment with Pameco on October 18, 1980.

The claimant should take nothing further from these proceedings.

WHEREFORE, the proposed agency decision is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

That the costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 30 day of August, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANTHONY GULINO,	:	
Claimant,	:	
vs.	:	File No. 667446
HERITAGE CABLEVISION,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	FILED
THE HARTFORD,	:	JUL 24 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed February 15, 1985 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 review-reopening decision filed February 20, 1984 in which he was awarded seven and one-half weeks of permanent partial disability benefits and medical expenses.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 and 2; and defendants' exhibits A through C. All evidence was considered in reaching this final agency decision.

The decision herein will be the same as that of the hearing deputy.

ISSUE ON APPEAL

The issue on appeal as stated by claimant is: "Did the deputy commissioner err in failing to find a causal connection between claimant's fall and his back complaints?"

STATEMENT OF THE CASE

Thirty-four year old divorced claimant, a high school graduate, has been employed by defendant employer since April 1, 1980. His first assignment was as an auditor to catch persons who were illegally using cable service. He was promoted to installation. He is presently a converter bench technician with the duty of getting converter boxes repaired and ready to go back into service.

Claimant described his situation on March 26, 1981: He was an installer. He had been sent to clear the cables from a forty foot high house containing about eight to ten apartments. He took some cable off the house. He decided the house was too high so he climbed a pole. The cable was stretched between two poles. He disconnected the cable from the top of the pole. He moved his thirty-five foot aluminum ladder to a space in between the two poles and climbed up to take off the hook and cable. He cut the cable going to the house. He was flung from the ladder. He fell approximately thirty-five feet. He landed on his right heel and then fell backwards to his buttocks on dirt or concrete. He had tremendous pain in his right heel and leg and hands. He contacted his dispatcher for help. He was taken to the hospital where he was x-rayed. He asked to see Marvin H. Dubansky, M.D., who had treated him as a child. He was hurting all over, but he had strained his left wrist and ankle. His right leg hurt. It was elevated and ice was applied. Dr. Dubansky came and told him that his right heel was "smashed" and that three bones in his ankle were broken.

His foot eventually was placed in a cast and he was given crutches. During his recuperation he noted trouble with his leg.

He went back to light duty. He was to keep his leg elevated and he was not to climb. At first he cleaned converters. Then he moved to a sitting job in dispatch where, after about a week, he noticed that his lower back began to hurt with pain running down his right leg. He claimed that he had complained about his back to someone at work and had taken aspirin. He also noted eye strain from looking at the computer terminal. After seven weeks, he was moved to sales.

His job in sales was to sell cable service by antenna to persons in the country. He drove from house to house. He had trouble with his lower back, leg, ankle and heel. Later he walked to sell cable service in town. His back and leg were troublesome.

Claimant denied telling Dr. Dubansky that his leg and back pain had come on as he was wrestling with a thirteen year old. He said that he saw Dr. Dubansky on October 30, 1981 after he got out of a car and had pain and swelling in his left side.

After this October episode, he received therapy and then he was admitted for traction. Following his discharge, he continued to have therapy. He was dismissed by Dr. Dubansky, but he continued to have throbbing back pain. On the suggestion of his roommate, he sought treatment from a chiropractor, John D. Calisesi, D.C., in Fort Dodge. Dr. Calisesi referred him to Ronald C. Evans, D.C., who kept him off work treating him with vitamins and therapy.

Claimant recalled being pressured by the assistant manager in sales to have surgery. He visited the head of personnel who sent him to the company doctor, Donna Drees, M.D., who sent him to James L. Blessman, M.D. Dr. Blessman placed him in the pain clinic program.

When claimant returned to work, he took a position as a bench technician. He was told by his supervisor, Larry Schuler, that if he complained of his back he would be fired.

Claimant denied having prior back problems, but he acknowledged an incident with his back when he lifted a box. He also denied any lower back trouble after an automobile accident. He did not remember falling and landing on his lower back on a handle of the forklift.

Claimant's present complaints are trouble sleeping and difficulty sitting for long periods. He occasionally takes a muscle relaxant or pain pill. Claimant claimed that he has lower back pain across his back and at times he has stinging pain down his right leg and that this type of pain first started after Joshua Kimelman, M.D., removed his cast. He thought Dr. Kimelman and Dr. Dubansky's notes were incorrect and that he had told Dr. Dubansky of low back pain with throbbing or stinging pain into his right leg during an office visit on June 11, 1981. He no longer engages in bike riding, baseball, football or karate.

Claimant admitted he had not spoken with anyone at the company prior to seeking treatment from Drs. Calisesi or Evans.

Michael J. Woodward, an employee of defendant employer who has worked in the warehouse and in converter repair and who is currently converter repair supervisor and claimant's present supervisor, testified that lifting of thirty to fifty pounds is done when converters are boxed to move to the warehouse. The usual work can be done either sitting or standing. There is a fifteen minute break in the morning and in the afternoon.

The witness described claimant as a good and conscientous worker. He told of one instance in which claimant was unable to assist with a quarterly audit because his back was hurting. He believed claimant's current wage would be $6.05 per hour.

Records from Adair County Memorial Hospital show claimant was admitted on April 18, 1974 after a high speed automobile accident. His complaints at that time were of pain in his left shoulder, back and right knee. More specifially, claimant complained of pain in the mid and upper thoracic region. He had multiple contusions and abrasions.

A clinical note which is not dated indicates claimant injured his lower back. Straight leg raising was positive at seventy to eighty degrees. His back was tender to palpation and extension in the paralumbar area. X-rays taken May 26, 1977 showed alignment of the lumbosacral spine to be good with no evidence of recent injury or bony pathology. Stuart Olson, M.D., in a letter dated October 31, 1982 reported that his records showed a diagnosis following the x-ray of May 26, 1977 of a resolving lumbar myofascial strain.

On February 22, 1978 claimant fell landing on his lower sacral area on the handle of a hand forklift. There was no evidence of radicular pain.

In December of 1978 claimant had a contused left foot.

On March 26, 1981 claimant was hospitalized after a fall from a thirty-five foot pole. He complained of pain in both ankles and denied any other pain. There was mild swelling on the medial side of the right ankle. His left heel was tender on the plantar side to deep pressure. His back was nontender to heavy palpation. A compression fracture of the right os calcis was found. Claimant was seen by Marvin H. Dubansky, M.D., board certified orthopedic surgeon, who recorded no back complaints. Claimant was discharged on April 2, 1981 to elevate his foot and to use crutches. He was released to return to work with no climbing on May 4, 1981. Claimant saw Joshua C. Kimelman, D.O., on June 11, 1981 at which time he was released to full active duty, but he was allowed to continue therapy for three weeks.

On July 8, 1981 claimant was seen by Dr. Dubansky in the emergency room where he complained of pain across the low back and down the right leg with back pain commencing the month before, the day after he lifted a thirteen year old child and wrestled with him, and leg pain two weeks before. Claimant had a marked lumbar lordosis. There was pain in the right low back with right lateral bending. There was slight tenderness in the lumbosacral spine, right buttock and thigh. X-rays showed a little sclerosis around the facet joints of L5, S1 with no evidence of injury, boney abnormality or degenerative change.

By August 3, 1981 claimant's back was doing well and straight leg raising was normal. An eighth inch heel wedge was tried. On September 22, 1981 claimant's impairment was rated at five percent of the foot.

When Dr. Dubansky saw claimant on October 30, 1981, he told of developing severe pain in his back and down his left thigh to mid thigh and on the right thigh to the calf. He was tilted to the right. Straight leg raising was to eighty degrees. X-rays were negative. Claimant was given a muscle relaxant, Nalfon, and advised to use heat and to do exercise. Physical therapy also was ordered.

On follow-up visits, claimant continued to have pain down the right leg to the ankle, but not the foot. Straight leg raising was to sixty degrees on the right and to eighty on the left. Claimant was tender in the lumbosacral area, right buttock and thigh. On November 20, 1981 claimant was admitted to the hospital. He was discharged to continue physical therapy.

On March 11, 1982 claimant was advised to return on an as needed basis.

Dr. Dubanksy had no history of an auto accident in 1974, an injury in February 1977, a lumbar myofascial strain in May of 1977 or a fall landing on his lower back in February of 1978. Neither did he know of claimant's treatment, if any, thereafter.

The doctor was asked:

> Q. Doctor, given the fact that Mr. Gulino did not complain of back pain to you until months after his fall from the ladder and given the fact that Mr. Gulino told you his low back pain started after lifting and wrestling with a 13-year-old child, do you have an opinion within a reasonable degree of medical certainty whether or not Mr. Gulino's low back pain was caused by his fall from the ladder on March 26th, 1981?
>
> A. Yes.
>
> Q. What is you opinion?
>
> A. It's a little bit difficult to relate the two. I would usually expect if the back were related to the fall that he would have started complaining at least within a week or ten days, but to go three months before he had a complaint, it's a little difficult to relate it and it would only be a vague possibility and not a probability.
>
> Q. Doctor, in your opinion within a reasonable degree of medical certainty was Mr. Gulino's back pain caused by the fall from the ladder?
>
> A. I doubt it.
>
> Q. Doctor, now that you have Mr. Gulino's complete medical history does this opinion regarding the lack of causation between the back pain the fall from the ladder supersede any other statements you might have made regarding some possibility of a relationship?
>
> A. Would you read that question back please?
>
> (The requested portion of the record was read.)
>
> A. Well, one could never say that something didn't cause something, but in view of his past history of recurrent back injuries and the lack of any complaints for three months or so and giving a history of having lifted somebody and wrestled around, I would say that in all probability that the fall did not have anything to do with his back pain when I saw him July of 1981. (Dubansky dep., p. 13 ll. 14-25, p. 14 ll. 1-25 and p. 15 ll. 1-2)

Later he responded to a question:

A. I don't know. If I knew the exact cause of all backaches, it would be fantastic. All I can say is that at the time I saw him I thought it was a postural, mechanical backache with a strain. There was no evidence of fracture, no evidence of ruptured disc. There were some changes about his facet joints, which are something that you see on a long-range basis which may be degenerative or reactive, but to say any one particular thing caused any backache when somebody has recurrent difficulties, on that basis the finding is in my opinion impossible.

....

Q. Would it be fair to characterize your clinical notes as reflecting the fact that you still could not pin down the causal relationship but felt that it was within the realm of possibility?

A. Yes.

Q. Is that still how you feel today about that, Doctor?

A. Yes. (Dubansky dep., p. 24 ll. 6-16, p. 26 ll. 2-9)

Dr. Dubansky specifically said that claimant did not require hypos at the time of his initial hospitalization.

John D. Calisesi, D.C., saw claimant on April 24, 1982. Lumbar motion was restricted and pain was elicited. Palpation produced pain at L3-4, L4-5 and L5-S1. There was paravertebral muscle spasm at L4-5 and L5-S1. Dr. Calisesi was of the opinion that claimant had a "[c]hronic lumbar facet syndrome involving the posterior intervertebral joints of L4-5 and L5-S1 causing irritation to the rami dorsalis nerve of the posterior primary nerve root."

Ronald C. Evans, D.C., saw claimant on April 28, 1982. He took a history of claimant's falling from a ladder and fracturing the heel of his right foot and spraining his left ankle and wrist. Low back pain localized on the left. Claimant reported that in November of 1981 he had muscle swelling on the left. Dr. Evans believed claimant had been under the care of Dr. Calisesi in the latter part of 1981 and the early part of 1982.

On examination there were no pathological reflexes and no sensory deficits. Claimant had paravertebral spasm at L4, L5 and S1 on the right with pain localizing at L5. Bechterew's and Kemp's tests were positive on the right. Minor's sign was present. Stress films showed slight instability at L4-L5 suggestive of disc involvement without radiculopathy.

Dr. Evans was of the opinion that as a result of claimant's accident he had "lumbosacral sprain syndrome with lumbosacral facet impaction and vertebrogenic sciatic to the right leg" and "a right ankle sprain compounded by right calcaneus compression fracture." It was the doctor's opinion that "[t]his long-axis impaction injury to the leg and lumbar spine [sic] [was] further aggravated by subsequent lifting and twisting activities with severe exacerbation." Claimant was treated conservatively for slightly more than a month.

Donna Drees, M.D., saw claimant on June 24, 1982. She worked out a physical therapy program with exercise. In a letter dated July 21, 1982 the doctor wrote that she thought claimant had disability and a personality disorder which was aggravated by his frustration with his disability. She suggested the possibility of a pain center referral which in fact occurred on August 9, 1982.

David B. McClain, D.O., saw claimant on July 12, 1982. Claimant's extensors were decreased on the right as was his achilles reflex. A herniated lumbar disc at L4-5 on the right was suspected. The doctor recommended claimant be admitted to the hospital for bilateral electromyography and a lumbar myelogram. Dr. McClain rated claimant's impairment as fifteen percent "as a result of the trauma sustained March 26, 1981."

While claimant was hospitalized in August of 1982 for chronic pain, he was seen by Todd Hines, Ph.D., who found him to demonstrate reactive depression and a core of latent anger.

Claimant reported previous psychotherapeutic treatment which he attributed to seven months of unemployment. Claimant was found to lack vocational direction. Dr. Hines thought there was a strong possibility of a psychogenic component to claimant's presenting symptoms. Testing by Dr. Hines reflected an hysterical personality pattern for which he recommended treatment.

Electrodiagnostic studies were normal for the right lower limb and paraspinals in the lumbosacral area.

A note from James L. Blessman, M.D., dated August 13, 1982 states: "At this point, I am in complete agreement with the patient, that the fall which he described to me, in which he injured his foot & fractured his calcaneus, is the same injury that precipitated his problems with his low back."

In a letter dated August 30, 1982 Dr. Blessman summarzied claimant's treatment. On discharge from the program, he was to continue vitamins and nutritional supplements, his exercises and stress management. A TENS and a YMCA membership were recommended. Claimant was advised to return to work on September 13, 1982 with a weight limitation of fifty pounds and restriction on repetitive bending and stooping.

APPLICABLE LAW AND ANALYSIS

There is no question herein but that claimant fell on March 26, 1981 and injured his right ankle. Claimant argues on appeal that the hearing deputy erred in failing to causally connect his back complaints to that fall.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 26, 1981 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (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 argues for the applicability of DeShaw v. Engery Manufacturing Co., 196 N.W.2d 777 (Iowa 1971) in which the Iowa Supreme Court set out this rule at page 780:

> When a workman sustains an injury, later sustains another injury, and subsequently seeks to reopen an award predicated on the first injury, he must prove one of two things: (a) that the disability for which he seeks additional compensation was proximately caused by the first injury, or (b) that the second injury (an ensuing disability) was proximately caused by the first injury.

Claimant had a history of back complaints prior to March 26, 1981 including incidents in 1974, 1977 and 1978. Claimant's own testimony was that after he fell he hurt all over and that he first noticed pain in his back of a more specific nature when he moved to work as a dispatcher.

Records from claimant's emergency hospitalization on March 26, 1981 showed that claimant's complaints were of his extremities rather than of his back. There was no tenderness in his back. Claimant apparently returned to work in May and did not see a physician for back pain until July 8, 1981. At that time he gave a history of an intervening incident -- lifting a child, wrestling and feeling pain. Dr. Dubansky's initial impression was postural mechanical backache with possible strain.

This does not appear to be a case in which gait problems because of an extremity injury produced back complaints. In these circumstances the pain came on during the period in which claimant was doing a sedentary job and was first in the back and only later shot to the legs suggesting that if back problems are related to the March 26, 1981 injury, they evolved from that event rather than through the os calcis fracture.

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). 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).

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). 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).

Evidence from Dr. Dubansky, who was not aware of claimant's prior back complaints, never reaches beyond a possibility which is not enough to carry claimant's burden. The doctor stated: "I told him this relationship I could not determine because there was no definite fracture in his back but it could be that there might be some relationship. I cannot say definitely because of the period of time." "The relationship of his back to his original difficulty in March of 1981 when he fell at work is problematical, but it is well within the realm of possibilities that it could be related." "...I would say that in all probability that the fall did not have anything to do with his back pain when I saw him in July of 1981." "The relationship to his present condition and the fall that he had in March, there may be some possibility of relationship as many of the people that have a fractured os calcis may develop some back pain but I cannot be absolutely certain there is a definite relationship." After noting that claimant did not sustain a fracture to his back, Dr. Dubansky wrote: "It was quite a while after the fracture and fall that he complained of pain in his back and he did give a history of a 'pulled back' three or four years before, but there is some possibility there is a relationship."

The problem with the rest of claimant's medical evidence is the accuracy of the history. We know, of course, the testimony of a medical expert may be rejected when the opinion is based on an incomplete and inaccurate history. Musselman, 261 Iowa 352, 154 N.W.2d 128. The weight to be given to the expert opinion is for the finder of fact. Bodish 257 Iowa 516, 133 N.W.2d 867.

Dr. Calisesi took a history of the fall resulting in fracture to claimant's right heel, a sprained left wrist and left ankle and a hurt lower back with severe low back pain with radiation coming on six weeks later. He saw claimant on two consecutive days and made reference to a work-related injury which he called a chronic lumbar facet syndrome. He did not know of the wrestling incident.

Dr. Evans based his opinion on claimant's having hurt his lower back at the time of his injury and claimant's having been cared for by Dr. Calisesi in late 1981 and in 1982. Dr. Calisesi's bill shows claimant was seen on April 24 and 25, 1982. Dr. Evans causally related claimant's back condition to his accident. He did not know of the wrestling incident.

Dr. McClain's reports do not indicate exactly what history he relied on other than that he knew of claimant's fall, initial treatment, hospitalization and physiotherapy. He gave claimant an impairment rating which he attributed to the March 26, 1981 fall. He did not know of the wrestling incident.

Dr. Drees had the most accurate history, but as close as she comes to causal relationship is to write that claimant's "history and x-ray findings are compatible with osteoarthritis of the foot and back secondary to trauma and recurrent muscle spasm in the back without evidence of any disc involvement." She did not know of the wrestling incident.

Dr. Blessman said that it is claimant's fall which precipitated his low back problem, but he seems to have assumed claimant fell from a ladder and injured his back all at the same time rather than making any sort of independent evaluation of causation himself. He did not know of the wrestling incident.

Viewing the record as a whole can only lead to the conclusion reached by the hearing deputy. The greater weight of the evidence and particularly that of the treating physician, Dr. Dubansky, does not support a finding that claimant's back problems developed at the time his ankle was injured.

There has been no appeal of any other issue and the hearing deputy's findings and conclusions on those issues will be adopted.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-four years of age.

That claimant is a high school graduate.

That claimant has worked for defendant employer in various capacities since April 1, 1980.

That on March 26, 1981 claimant fell at a job site and suffered a fracture of the right os calcis.

That claimant was released to return to work on May 4, 1981.

That claimant was involved in a high speed auto accident in 1974 after which he had complaints of mid and upper thoracic pain.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS I. HALL,	:	
Claimant,	:	FILE NO. 732603
vs.	:	R E V I E W -
LEHIGH PORTLAND CEMENT COMPANY,	:	R E O P E N I N G
Employer,	:	FILED
and	:	JUL 19 1985
THE TRAVELERS INSURANCE COMPANY	:	IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Dennis L. Hall, claimant, against Lehigh Portland Cement Company, employer, (hereinafter referred to as Lehigh) and Travelers Insurance Company, insurance carrier, defendants, for the recovery of further benefits as a result of an injury on March 25, 1983.

Claimant bases his claim upon a change of employment condition, not physical condition, causing additional loss of earning capacity. On April 30, 1985, a hearing was held on claimant's petition and the case was considered fully submitted at the close of this hearing.

The record consists of the oral testimony of claimant, Alvin Sprau, Herbert Rose, Charles Weaver, Russel Bowers and Ronald Guthrie; claimant's exhibits 1 and 2; and, defendants' exhibits A and B.

ISSUES

The issues presented by the parties at the time of the pre-hearing and hearing are as follows:

I. Whether there is a causal relationship between the work injury and the claimed disability;

II. The extent of additional permanent disability benefits to which claimant may be entitled; and,

III. The extent of additional healing period benefits to which claimant maybe entitled.

REVIEW OF THE EVIDENCE

The following is a brief review of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

At the time of the hearing the parties stipulated that in the event of an award of benefits from these proceedings, claimant's rate of compensation shall be $263.86 per week. The parties also stipulated to various times claimant was off work beginning on October 8, 1984.

An arbitration decision in this case was filed in April 1984. No appeal was taken from that decision. Pursuant to this decision, claimant was awarded a 15 percent industrial disability or 75 weeks of permanent partial disability benefits and additional weekly benefits for a healing period as a result of a work injury to claimant's back and neck on March 25, 1983. In this decision, claimant's employment at the time of the hearing was considered in determining the extent of claimant's industrial disability or loss of earning capacity. Approximately two months prior to the arbitration hearing, claimant had been placed by defendant into a light duty job in the laboratory as a mix control operator. Claimant's wages as a result of this placement were higher than the wages he was receiving at the time of his work injury. The arbitration decision recites as follows:

> ...Claimant is indeed fortunate to have found work ideally suited to him. Not only does the work provide for his physical limitation, it also pays considerably more than that he was doing at the time of injury. Had claimant [not] been able to return to work with defendant employer or should he no longer be employed by defendant employer his industrial disability might be considerably higher. (The bracketed word, not, was added due to an obvious typographical error in the text of the original decision).

Claimant testified that although he has not suffered a change in his physical condition since this arbitration decision in April 1984, his employment situation has significantly changed. After the decision was filed, a contract between the union representing Lehigh employees and Lehigh expired and Lehigh's employees went on strike. Despite the continued lack of a contract, Lehigh employees returned from this strike under what is called "an implementation of Lehigh's last proposal during contract negotiations." Subsequent to the return of their employees, Lehigh's management reorganized all of the jobs at the cement plant. According to Ronald Guthrie, the employee relations supervisor, this reorganization was company wide and was not limited to the plant in which claimant was working. Guthrie added that the purpose of the reorganization was to achieve efficiency by eliminating unnecessary jobs. This reorganization included a combination of most labor jobs into one classification of "service" job. All service job personnel are now placed into a pool from which specific job assignments are given each day based upon the work needs for the day. Employees, then, bid for these assignments which are given according to seniority.

The reorganization included the laboratory where claimant was working. Claimant's job and the job of another occupationally injured employee, Shirley Willis, who was also in a permanent, light duty status, were abolished on October 8, 1984. Claimant, however, did not lose his entire employment with Lehigh. Although claimant has enough seniority to keep a part-time position as a relief man, he currently works only when full-time mixing operators take vacations or sick leave. Guthrie said that claimant is next in line for a full-time position should any of the older, full-time employees in the lab retire. Guthrie testified that claimant is expected to work 30 weeks this year as a result of currently scheduled vacations. He may work more than 30 weeks, if additional sick leave is taken. Guthrie added that 30 weeks of work would qualify claimant for the same two weeks of vacation pay and fringe benefits as if he were full time. Claimant emphasized during the hearing that except for Willis, no other person at the plant was laid off or had their hours reduced as a result of the "reorganization." This aspect is confirmed by witness, Guthrie.

Claimant was not able to bump anyone else in the plant despite his higher seniority because the reorganization in the labor pool did away with many traditional, light duty maintenance and janitorial jobs. Guthrie explained that claimant could not bump into this pool because an employee in the pool must be physically qualified to perform all the duties which may be assigned to the labor pool. Some of the assignments within the labor pool would exceed claimant's physician imposed work restrictions. Claimant demonstrated at the hearing that two employees, less senior than he, are currently performing full-time light duty work for Lehigh. However, Guthrie pointed out that these employees were in a special program to accommodate for temporary, light duty status arising from work injuries. Claimant would not qualify for this program as his work restrictions are permanent.

Guthrie further stated that even though claimant had a reduction of work, his actual pay for 30 weeks of work, including all available premium and over time pay in the job, would amount to earnings of $15,068.70 for 1985. When you combine this with the vacation pay of $1,554.00 and available unemployment benefits, claimant's income for 1985 will still be $19,862.70. Guthrie said that if claimant were to work full time in the labor pool in 1985 his income would be $22,962.80. Guthrie admitted that if claimant were to work full time in the lab for 1985 his income would be over $26,000.

Claimant's appearance and demeanor at the hearing as well as Guthrie's appearance and demeanor at the hearing indicated that they were both testifying in a candid and truthful manor.

APPLICABLE LAW AND ANALYSIS

I. In a review-reopening proceeding claimant has the burden of establishing by a preponderance of the evidence that he suffered a change of condition as a proximate result of his original injury, subsequent to the date of the award or agreement for compensation under review, which entitles him to additional compensation. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969). Such a change of condition is not limited to a physical change. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change of condition under Iowa Code section 85.26(2) and 86.14(2). See 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).

Claimant herein seeks additional benefits for a loss of earnings occasioned by a reorganization at Lehigh. First, defendants' own witness, Guthrie, testified that claimant has indeed lost earnings because of this reorganization. Second, this loss of earnings is proximately caused by the original work injury. Although, on its face, the reorganization is suspect as the only two employees on permanent light duty status at Lehigh were adversedly affected, claimant has not established by a preponderance of the evidence that the reorganization was motivated by claimant's injuries. However, claimant has shown that the resulting loss of earnings was due to the original injury. Claimant's work restrictions imposed by physicians after the work injury prevents him from bumping lower seniority employees in the labor pool. As pointed out in the arbitration decision in this case, any change in claimant's employment status would affect his industrial disability or loss of earning capacity. A loss of actual earnings from employment subsequent to a work injury is one of the factors to be considered in assessing a person's industrial disability or loss of earning capacity resulting from a work injury. See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985). Therefore, claimant has shown by a preponderance of the evidence a causal relationship between the original work injury and added permanent disability or loss of earning capacity.

II. The next issue concerns the extent of the additional industrial disability. According to claimant's testimony, the only change of condition since the arbitration decision has been in his employment status. Therefore, the findings in the arbitration decision remain unchanged as to the other factors of industrial disability. The analysis in this decision shall only assess the extent of additional disability occasioned by this change of employment status. Guthrie, testified that claimant is only expected to lose approximately $2,800 in income from the change to part-time status because of the higher rate of pay in the lab; the premium and over time pay in the lab due to multiple, daily and weekend shifts; the availability of unemployment compensation for the times off work; and, claimant's entitlement to vacation pay. Guthrie admitted that claimant could have earned over $26,000 if he were to remain full time in the lab this year. This would amount to approximately a $7,000 loss of income from his status prior to October 8, 1984. The loss is even greater when one considers the premium and overtime pay that is available in the laboratory. However, Guthrie pointed out that claimant's fringe benefits would remain unchanged and claimant is next in line for a full-time position should one develop. Therefore, on the whole record, claimant has suffered a significant increased industrial disability in the amount of 10 percent.

III. Claimant has not demonstrated entitlement to additional healing period benefits. Such benefits are designed to reimburse an employee for lost earnings due to absences from work during a reasonable healing period following a work injury. Absences from work after attaining maximum healing without additional medical treatment which is expected to improve claimant's condition are not compensable periods of healing under Iowa Code section 85.34(1). The arbitration decision contains the finding that claimant had a permanent functional impairment of the spine at that time and claimant testified that his physical condition has been stable since the arbitration decision. Therefore, claimant achieved maximum healing from his work injuries before the arbitration hearing in March 1984 and he is not entitled to further healing period benefits.

FINDINGS OF FACT

1. Claimant and Ronald Guthrie were credible witnesses.

2. Claimant's rate of compensation is $263.86 per week.

3. On October 8, 1984 as a result of a reorganization of personnel by Lehigh management, claimant's employment as a mix control operator was changed from a full-time position to a

part-time position but with no change in the hourly pay rate of $12.56 per hour.

4. Claimant is currently scheduled to work only 30 weeks per year as a replacement for vacationing or sick full-time persons in the Lehigh lab.

5. Claimant is not able to bump full time persons with less seniority in the Lehigh labor pool because of the work restrictions imposed upon claimant by his physicians as a result of the work injury of March 25, 1983.

6. The current wage rate in the Lehigh labor pool is $10.91 per hour.

7. Due to shift deferential and overtime pay in the lab; the higher hourly pay in the lab; the availability of unemployment compensation benefits and vacation pay; claimant will lose approximately $2,800 per year in income as a result of his change of employment status as compared to full-time employment in the labor pool.

8. Claimant's loss of earnings as a result of employment status as compared to full-time laboratory persons at Lehigh is considerably in excess of $7,000 per year.

9. Claimant has not lost medical insurance, pension rights or other fringe benefits.

10. Claimant is next in line for a full-time position if a vacancy occurs in the laboratory and persons in the laboratory are eligible for and considering retirement at this time.

11. As an additional result of his work injury of March 25, 1983 and his change in employment status since the original arbitration award, claimant has suffered an additional loss of earning capacity in the amount of 10 percent.

12. Claimant reached maximum healing from the injury of March 25, 1983 before April 1984.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that on October 8, 1984 subsequent to the original award of benefits in this case, he suffered an increase in his loss of earning capacity which is proximately caused by the original work injury of March 25, 1983.

II. Claimant has established by a preponderance of the evidence, entitlement to additional permanent partial disability benefits in the amount of 50 weeks at the rate of $263.86 per week.

III. Claimant has not established by a preponderance of the evidence entitlement to additional healing period benefits.

ORDER

Accordingly, the following is ordered:

1. Defendants shall pay an additional fifty (50) weeks of permanent partial disability benefits at the rate of two hundred sixty-three and 86/100 dollars ($263.86) per week beginning on the first week following the last weekly payment of the original award of benefits as awarded in the decision filed in April 1984.

2. Defendants to pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

3. Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

4. Defendants shall file activity report upon payment of this award as requested by the agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 19th day of July, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LUANN P. HARP,	:	
Claimant,	:	File No. 718009
vs.	:	A P P E A L
SECOND INJURY FUND OF IOWA,	:	D E C I S I O N
Defendant.	:	

FILED

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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant, Second Injury Fund of Iowa, appeals from a proposed decision on second injury fund benefits wherein it was found that the claimant satisfied the requirements of Iowa Code section 85.64. It was further found that the claimant had sustained a 40 percent industrial disability, 50 percent of which was attributable to the second injury. The defendant was ordered to pay the claimant 87 1/2 weeks of benefits at a rate of $214.20. The record on appeal consists of the hearing transcript; claimant's exhibit A; and various briefs filed by the parties.

ISSUE

Whether the deputy erred in finding claimant was entitled to receive second injury fund benefits.

REVIEW OF THE EVIDENCE

At the time of the hearing the claimant was a divorced 30 year old high school educated mother of two. She was training to become an L.P.N. Prior to working at Farmland Foods (hereinafter Farmland) the claimant worked as a bar maid, a nurses' aide, and a cashier.

In 1978 the claimant began working for Farmland. The claimant's duties were primarily on the cut floor where she, among other tasks, scrubbed hogs. The claimant testified that as a part of her work she was required to repetitiously lift. At times the claimant was required to lift 300 pound boxes. The claimant was paid $10.46 per hour.

Prior to the first incident of February 1980, the claimant suffered from tendinitis of her left wrist for which she received no workers' compensation benefits. She was placed on light duty work. In February of 1980 the claimant fell in front of a cooler where some water had gathered. The claimant stated that she landed on her right elbow. As a result of this fall, the claimant attempted to get Farmland to send her to a doctor. When Farmland refused, the claimant began "taping her hands" to help alleviate the pain. The claimant was not relieved of her duties in any way. In mid-April 1980 the claimant was sent to D. W. Crabb, M.D., a company doctor. The claimant stated that she was fitted with a brace that ran from her right hand to her elbow. She was subsequently put on light duty for two weeks. On May 5, 1980 the claimant was diagnosed as suffering from carpal tunnel. The claimant was off work until the end of August 1980. During this period the claimant was paid workers' compensation benefits.

The claimant was released to go back to work in late August of 1980 but testified that she still had problems with her right elbow and "extremity." The claimant reported having pain when gripping objects. The claimant was told by a doctor that she may have nerve damage. R. L. Bendixen, M.D., suggested that an EMG be done. The claimant then saw William R. Hamsa, M.D., who authorized the claimant to work light duty for two weeks. An EMG was performed. Dr. Hamsa recommended surgery to reposition the right ulnar nerve. This surgery was performed by Dr. Hamsa in September of 1980 at Clarkson Hospital in Omaha. As a result of the surgery the claimant was off work six to eight weeks for which she received workers' compensation benefits. Subsequently the claimant returned to work, having no further problems until October of 1982.

In October of 1982 the claimant testified that she began experiencing in her left hand the sensations that she had experienced in her right hand. The claimant began using wrist wraps to help relieve the pain but with no result. At this time the claimant was involved in trimming tails which she described as heavy work which utilized extensive use of her left hand. The claimant was then off work for one month at Dr. Hamsa's order during which time the claimant received workers' compensation payments. After returing to work, the claimant was restricted to light duty for a month. At that time there was no light duty work at Farmland and the claimant testified that she was cut off from workers' compensation benefits between December 5th and 12th of 1982. Farmland refused claimant permission to see another doctor. However, Farmland's insurer, Aetna Insurance

Company, did authorize the claimant to see another doctor in "early 1983." Ronald K. Miller, M.D., whom the claimant saw, put the claimant in a cast for four to six weeks after which the claimant was referred to John F. Connolly, M.D., an orthopedic surgeon. X-rays and an EMG were performed on the claimant's left arm and hand. The possibility of a left ulnar nerve repositioning was discussed with the claimant. The claimant then saw a Dr. Campbell in Iowa City who diagnosed the claimant as having a trapped left ulnar nerve. The claimant stated that during this period she suffered pain between her left elbow and hand. The claimant then saw Maurice P. Margules, M.D., who operated on the claimant sometime between June 26 and June 31, 1983. The claimant described her present problems as mainly the carpal tunnel in her left hand. The claimant expressed that she suffers pain in both extremities if she engages in repetitious or strenuous work.

The claimant testified that she will complete her training for an L.P.N. in August of 1984. She stated that she would then pursue training for an R.N. The claimant said it would be 1986 before she can work as an R.N. at a wage of approximately $7.50 per hour. On cross-examination the claimant admitted having landed on both elbows in 1980 but suffering pain only in her right.

Claimant's exhibit A is a collection of medical reports and memoranda regarding the claimant. An admitting report by Dr. Margules dated June 12, 1983 listed as admitting impression: "Intractable neuropathy of the LEFT ulnar nerve due to trauma." In a letter dated March 3, 1983 from Dr. Bendixen to claimant's attorney, the claimant is given a 20 percent impairment with 15 percent in the left upper extremity, and 5 percent in the upper right extremity.

Contained in exhibit A is a group of reports from Dr. Hamsa. On June 10, 1980 Dr. Hamsa summarized the result of the February 1980 slip and fall as follows:

> PRESENT ILLNESS: In March of 1980 thispatient [sic] fell during her employment and sustained a blow to the medial aspect of her right elbow. She had ecchymosis in this area with swelling. Shortly thereafter she began having numbness and tingling in half of the long finger, the ring and the fifth finger of the right hand. This persisted and increased in intensity with an additional symptom of loss of function as far as power is concerned. Patient was seen by Dr. Crabb and diagnosed as having a carpal tunnel syndrome. Surgical release of the carpal tunnel was carried out one month ago. The surgical woundhas [sic] healed without difficulty and the patient now has a little better grip or pinch between thumb and the index. She has persisted in having the paresthesias described in the present illness.
>
> The patient has been unable to return to work since her accident. She is right handed. She has no other musculoskeletal complaints.

In a note dated October 13, 1982, Dr. Hamsa, for the first time, refers to complaints in the left hand. The report lists as impression: "Ulnar Neuropathy secondary to traumatic use from her employment." The note further reads:

> Returns for followup with complaints of paresthesias in left hand similar to what she had in the right upper extremity. Had ulnar neuropathy in the right upper extremity requiring anterior transfer of the ulnar nerve in SEP 1981. Since that time has been asymptomatic as far as her right upper extremity is concerned. Symptoms in left upper extremity began about a month ago. She has been doing a new type job that requires repetitive use of the arm and with this she has had pain in the elbow with paresthesias in the 4th and 5th fingers. She has continued her employment despite her symptoms.

An entry dated December 1, 1982 states in reference to her left extremity: "I think if she goes back to the same job her symptoms are going to come back."

On December 12, 1982 Ronald K. Miller, M.D., made this entry concerning claimant:

> This young lady is apparently developing ulnar nerve symptoms on the left elbow. Will be scheduled for NCV's on her left ulnar nerve and will be seen once these studies have been completed. Sounds as though she is probably going to need decompression and/or transposition.

A report by Dr. Bendixen dated March 9, 1983 states in part: "Not exactly certain why she is having all this difficulty...." In a letter dated March 5, 1984 from Dr. Connolly to attorney for Farmland, Dr. Connolly ascribes to the claimant "a permanent impairment of function of 5% in both arms." In a report dated June 13, 1983 by Dr. Margules it states in part:

GENERAL STATEMENT: This is a twenty-nine year old female who is employed as a lineworker at Farmland Foods, Denison, Iowa, and has been admitted with the chief complaint that stems from an injury the patient received in March, 1980.

ADMITTING IMPRESSION: Intractable neuropathy of the LEFT ulnar nerve due to trauma.

The patient had previously been admitted to hospital from 5/26/83 until 5/30/83 with complaint of pain involving both elbows and both shoulders. Patient had sustained an injury while at work at Farmland Foods. She had undergone decompression of the RIGHT median nerve and transposition of the RIGHT ulnar nerve in 1980 as a result of the injury.

....

ADMITTING IMPRESSION: LEFT ulnar nerve neuropathy due to trauma sustained while at work for Farmland Foods in Denison, Iowa.
Patient postop status decompression of RIGHT median nerve and RIGHT ulnar nerve transposition in 1980 as the result of the same injury.

In a letter from Dr. Margules to claimant's attorney dated November 29, 1983, it states: "[I]t is our opinion that the patient has a partial permanent physical disability which is rated at 10 to 15% of the body as a whole."

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.64 (1981) states:

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

Functional impairment 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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

It is apparent from the review of evidence that the claimant does fall under 85.64 coverage. Contrary to the appellant's position, the preponderance of the evidence demonstrates that the claimant did sustain two separate injuries. To state that because the claimant fell on both elbows in 1980 and conclude therefore that any future physical impairment is a result of the 1980 fall is tenuous. Dr. Margules' report of June 13, 1983 appears to substantiate that position.

Expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The deputy considered the evidence in detail. The claimant testified that she did not have any problems with her left extremity until October of 1982. This lay testimony taken together with Dr. Hamsa's reports and Dr. Miller's report buttress the deputy's finding that two separate injuries did occur.

Next the appellant argues that the deputy erred in his finding as to the degree of industrial disability attributable to the second injury. The appellant states in its brief that "the record demonstrates that claimant's prior impairment to her right arm did not act as a hindrance to her ability to obtain or retain effective employment." The record is not unequivocal to the appellant's proposition. The claimant's testimony indicated that she was still having problems with both extremities and that she is limited in pursuing certain activities. The deputy's apportionment stands.

The record also supports the finding of 40 percent industrial disability. At the time of the hearing the claimant was 30, divorced, with two children. Her education consisted of high school with additional nurses training. If the claimant finds work as a registered nurse at a rate of $7.50 per hour that rate alone would be more than 30 percent lower than what she was making with Farmland. The claimant had not even started R.N. training at the time of the hearing. Assuming that: 1) Claimant pursues R.N. training; and 2) she can find work given her limitations the pay disparity is still present. In summary, the claimant's employment future at the time of the hearing was not as bright as the appellant would have us believe. The deputy's finding as to industrial disability will not be disturbed.

FINDINGS OF FACT

1. Claimant, at the time of the hearing, was 30 years old.

2. Claimant is a divorced mother of two.

3. Claimant possesses a high school diploma and was, at the time of the hearing, pursuing education leading to becoming an L.P.N.

4. The claimant expressed an intention to pursue becoming

an R.N.

5. Claimant's experience prior to working for Farmland consisted of the unskilled type in the food and beverage service industry.

6. While at Farmland claimant made in excess of $10.00 per hour.

7. If claimant worked as an R.N. she might make $7.50 per hour.

8. Claimant was involved in heavy repetitious work.

9. That in 1980 claimant experienced a fall at the Farmland plant and as a result of said fall sustained a permanent partial disability of five percent of the upper right extremity.

10. Claimant, in the fall of 1982, as a result of her employment with Farmland, suffered a permanent partial disability of her upper left extremity in the nature of 10 percent of said extremity.

11. The injuries enunciated in findings 9 and 10 were separate and distinct as to causation.

12. Claimant has had operations on both upper extremities.

13. Claimant still suffers pain and discomfort regularly in both extremities.

14. As a result of the separate injuries the claimant had to discontinue her work with Farmland.

15. As a result of the permanent partial disability in each extremity claimant has sustained a 15 percent functional disability to the body as a whole.

16. Claimant's industrial disability is 40 percent, 50 percent of which is attributable to the second injury.

17. The combined compensable value of claimant's injury is 87 1/2 weeks.

CONCLUSIONS OF LAW

The claimant is entitled to benefits from the second injury fund pursuant to section 85.64 of the Iowa Code.

The second injury fund is liable for benefits to the claimant for 87 1/2 weeks at a rate of $214.20 per week.

THEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That beginning on April 1, 1984 the Second Injury Fund will pay unto claimant eighty-seven and one-half (87 1/2) weeks of benefits until paid at a rate of two hundred fourteen and 20/100 dollars ($214.20) and that such benefits as have accrued be paid in a lump sum together with statutory interest from the date due.

That the Second Injury Fund pay costs of this proceeding pursuant to Industrial Commissioner Rule 500-4.33.

That the Second Injury Fund file a final report upon payment of this award.

Signed and filed this 18 day of July, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

REFUJIO HERNANDEZ, Claimant,	FILE NO. 764529
vs.	A R B I T R A T I O N
THE IOWA PACKING COMPANY, Employer,	D E C I S I O N
and	FILED
LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	SEP 25 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Refujio Hernandez, claimant, against The Iowa Packing Company, employer (hereinafter referred to as IPC), and Liberty Mutual Insurance Company, insurance carrier, defendants, for benefits as a result of an injury on May 8, 1984 to his wrist and forearm. On July 9, 1985, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of the hearing.

ISSUES

The parties have submitted the following issues for determination in these proceedings:

I. Whether there is a causal relationship between the work injury and permanent disability;

II. The extent of weekly benefits for permanent disability to which claimant is entitled; and,

III. Claimant's entitlement to medical benefits under Iowa Code section 85.27 or specifically, entitlement to reimbursement for travel expenses from Minneapolis, Minnesota to Des Moines, Iowa on December 12, 1984 for alleged treatment by Sinesio Misol, M.D.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The parties have submitted a pre-hearing report of certain matters pertaining to this case which has been approved and accepted as a part of the record in this case. The hearing record consists of the oral testimony of claimant; claimant's exhibits 1-10; and defendants' exhibits A and B. As claimant's testimony was in Spanish due to his lack of full understanding of the English language, use of an interpreter was allowed at the hearing and pursuant to Chapter 622A of the Iowa Code, the non-english portion of the proceeding was tape recorded.

The parties have stipulated to the following matters:

1. The claimant received an injury on May 8, 1984 which arose out of and in the course of his employment with IPC.

2. The claimant is entitled to temporary total disability or healing period benefits for his temporary disability caused by the work injury from May 9, 1984 through June 10, 1984 and from July 19, 1984 through September 16, 1984, and in the event that permanent disability benefits are awarded herein, the commencement date for those benefits shall be September 17, 1984.

3. The type of permanent disability, if defendants are held liable for such disability, is a scheduled member disability to either the left hand or the left upper extremity.

4. Claimant's rate of weekly compensation in the event of an award of benefits from these proceedings shall be $203.73 per week.

Claimant's testimony and the medical records submitted into evidence indicate that claimant had no prior arm, hand or finger problems before the work injury upon which he now bases his claim. Claimant who is 23 years of age testified that he began working for IPC in May 1984. Claimant's duties consisted of manual labor in a meat packing plant. The facts surrounding the work injury are not in dispute. Claimant testified that he cut the underside of his left wrist and forearm with a knife he was using to perform his assigned tasks on May 8, 1984. The laceration was four to five inches long.

Following the injury, claimant was intially treated by Frederick Nuss, M.D., at Iowa Lutheran Hospital in Des Moines, Iowa. This treatment consisted of cleaning the wound and repair of the skin laceration. Claimant returned to work on June 11, 1984 but according to claimant, he continued to experience a loss of sensation in his left forearm and restricted movement of his little finger and ring finger in his left hand. Claimant then sought additional treatment from James Blessman, M.D., for these problems. Dr. Blessman referred claimant to Sinesio Misol, M.D., a board certified orthopedic surgeon. Dr. Misol discovered that claimant had also lacerated the tendons to the affected fingers and after exploratory surgery on June 20, 1984, he repaired these lacerations. Subsequent to the surgery, claimant regained the use of his little and ring fingers in his left hand but continued to complain of loss of strength and numbness in his arm. Dr. Misol gave claimant an impairment rating of 15 percent to the left upper extremity and stated that he did not know when claimant's strength would improve.

Claimant has been examined by another board certified orthopedist, Scott B. Neff, D.O., in February 1985. Basing his opinion on a normal EMG test of the ulnar and median nerves and his manual testing of claimant's grip strength, Dr. Neff opines that claimant has no permanent disability arising from the work injury. Due to inconsistent measurements, the doctor was skeptical of his dynometer test results which indicated a 35 kilogram difference in grip strength between the right and left hands. Dr. Neff added that if there was a loss of grip strength, such strength would return upon performing strengthening excercises.

Despite the views of Dr. Neff, Dr. Misol maintains his view that claimant does not have a normal arm and specifically pointed to his views that his rating is not based solely on a range of motion test. Dr. Misol lists four factors upon which he basis his impairment opinion. A scar to the wrist and forearm area; decreased sensation in the area of the sensory branch of the ulnar nerve in the left hand; abnormal flexion of the PIP joint (one of the finger joints) in that full flexion is achieved in an abnormal manner; and loss of grip strength. In his test on November 2, 1984, claimant's grip strength was 105 pounds for the right hand but only 30 pounds for the left hand and claimant's pinch strength was 30 pounds on the right and only seven pounds on the left.

Claimant testified that he currently continues to experience loss of feeling in his left hand, especially during cold weather. He also continues to suffer a loss of strength. Claimant stated that activity which requires pulling causes him the most problems. Claimant said that he left the employment of IPC because his hand condition prevented him from performing his duties. He also added that he has worked in other meat packing firms in Texas and Minnesota since leaving IPC. Claimant is currently unemployed.

APPLICABLE LAW AND ANALYSIS

I & II. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of permanent disability. 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

By stipulation of the parties, the issue of permanency is limited to whether there is a permanent scheduled member disability to either the hand or arm.

Permanent partial disabilities are classified as either scheduled or unscheduled. 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); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Graves, 331 N.W.2d 116 (Iowa 1983): Barton V. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Industrial Commissioner's Rule 500-2.4 provides:

> The Guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under section 85.34(2) "a"-"r" of the Code. The extent of loss or percentage of permanent impairment may be determined by use of this guide and payment of weekly compensation for permanent partial scheduled injuries made accordingly. Payment so made shall be recognized by the industrial commissioner as a prima facie showing of compliance by the employer or insurance carrier with the foregoing sections of the Iowa Workers' Compensation Act. Nothing in this rule shall be construed to prevent the presentations of other medical opinion or guides for the purpose of establishing that the degree of permanent impairment to which the claimant would be entitled would be more or less than the entitlement indicated in the AMA guide.
>
> This rule is intended to implement section 85.34(2) of the Code.

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. Graves, 331 N.W.2d 116 (Iowa 1983). The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

First, claimant has established by the greater weight of evidence entitlement to permanent disability benefits for the work injury. Although Dr. Neff is certainly a well qualified physician, Dr. Misol's opinions must be given the greater weight. Dr. Misol was the treating physician and is most familiar with claimant's condition. Dr. Neff appears to base his opinion that claimant has no permanent disability upon inconsistent grip strength findings whereas Dr. Misol is basing his opinions upon many hours of clinical examination of claimant. Although Dr. Misol does not use the word "permanent" in his rating and stated that he did not know if claimant would regain his grip strength, the manner in which he responded to Dr. Neff's opinions by pointing out the permanent scarring, loss of sensation, abnormal operation of the PIP joint in addition to loss of grip strength obviously indicates that Dr. Misol is referring to permanent rather than temporary impairment.

Second, claimant has only established a permanent scheduled member disability to the hand. Although the injury was to the forearm and wrist and Dr. Misol has given an impairment rating to the arm, the impairments described by Dr. Misol only related to use of the hand. The scarring has not been shown to cause disability. Dr. Misol's records only indicate a decreased sensation in the ulnar nerve area of the left hand, not the arm. The abnormal operation of the PIP joint involves only the fingers and tendons of the left hand. Loss of grip strength only involves the use of the hand.

Third, claimant has shown by the greater weight of evidence entitlement to a 20 percent permanent partial disability of the left hand. There is a significant loss of grip strength and loss of feeling in the hand. There is a significant abnormal operation of the PIP joint. Finally, taking into consideration Dr. Misol's opinions and given this agency's expertise and experience, a 20 percent functional disability of the left hand is appropriate in this case. See Iowa Code section 17A.14(5). Therefore, claimant is entitled to 38 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(l).

III. It is unclear what the dispute may be concerning the travel expenses of claimant for the trip on December 12, 1984 to see Dr. Misol while claimant was residing in Minneapolis, Minnesota. First, there does not appear to be an authorization issue. As defendants did not admit to a work injury until the day of the hearing, defendants did not have the right to choose the care under Iowa Code section 85.27. See Kindhart v. Fort Des Moines Hotel, (Appeal Decision filed March 27, 1985). However, assuming defendants did have such a right, the evidence presented demonstrates that Dr. Misol had been the authorized physician since July 1984. Certainly, defendants are not suggesting that they have the right to authorize each and every appointment with Dr. Misol without notifying claimant of such a policy. Finally, the trip is found to be reasonably necessary for treatment of claimant's condition. Although the distance was 500 miles for the round trip, claimant had returned for a follow-up exam with a treating physician. A patient's discussions with a treating physician concerning his condition under treatment and examinations felt necessary by the physician upon complaints of continued problems at work are obviously within the scope of coverage for medical services under Iowa Code section 85.27. Also, this travel only occurred once while claimant was temporary residing in Minnesota. A change in treating physicians at that time would not have been reasonable and probably would have resulted in more costs to defendants than the mileage expenses for 500 miles. Therefore, claimant shall be reimbursed at the rate of $.24 per mile for his travel expenses of this trip pursuant to Industrial Commissioner Rule 500-8.1.

FINDINGS OF FACT

1. On May 8, 1984, while performing his work as a meat cutter for IPC, claimant cut his left wrist and forearm with a knife which required medical attention to repair the skin lacerations.

2. After the work injury, claimant underwent a surgical operation to repair tendons lacerated at the time of the work incident.

3. The work injury not only involved tendons and skin lacerations but also involved the sensory branch of the ulnar nerves in the left hand.

4. Prior to the work injury herein, claimant had no impairment or disability of the left hand or arm.

5. As a result of his work injury on May 8, 1984, claimant has a permanent scar on the dorsal area of his left wrist and forearm; a significant permanent loss of sensation of the ulnar nerve area in his left hand; a significant permanent abnormal functioning of the PIP joints in the fingers of his left hand; and a significant loss of grip in his left hand.

6. As a result of his work injury herein, claimant has sustained a 20 percent loss of the use of his left hand.

7. Pursuant to the stipulation of the parties, as a result of his work injuries, claimant was not able to work as a result of treatment for his work injury from May 9, 1984 through June 10, 1984 and from July 19, 1984 through September 16, 1984.

8. Pursuant to the parties stipulation, claimant's rate of compensation is $203.73 per week.

9. On December 12, 1984, claimant traveled 500 miles for the purpose of necessary treatment of his work injury from his treating physician.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that the injury of May 8, 1984 is a cause of permanent disability.

II. Claimant has established by a preponderance of the evidence entitlement to permanent partial disability benefits for 38 weeks and healing period benefits for 13 2/7 weeks.

-II. Claimant has established by a preponderance of the evidence entitlement to medical benefits consisting of mileage expenses for 500 miles at the rate of $.24 per mile.

ORDER

Accordingly, the following is ordered:

1. Defendants shall pay to claimant thirty-eight (38) weeks of permanent partial disability benefits at the rate of two hundred three and 73/100 dollars ($203.73) per week from September 17, 1984.

2. Defendants shall pay to claimant healing period benefits from May 9, 1984 through June 10, 1984 and from July 19, 1984 through September 16, 1984, totaling thirteen and three-sevenths (13 2/7) weeks at the rate of two hundred three and 73/100 dollars ($203.73) per week.

3. Defendants shall pay claimant the sum of one hundred twenty and no/100 dollars ($120.00) for medical mileage expense.

4. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

5. Defendants shall receive credit for previous payments of benefits under a non-occupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2).

6. Defendants shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

7. Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

8. Defendants shall file activity reports upon payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 25 day of September, 1985.

Larry P. Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY E. HERRICK, Claimant,	:	File Nos. 661570/735417
vs.	:	APPEAL
AMERICAN FREIGHT SYSTEM, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	

FILED
AUG 23 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a proposed agency arbitration decision wherein it was concluded that the claimant was entitled to permanent partial disability of 21 percent resulting from an injury on January 30, 1981 arising out of and in the course of his employment with defendant, American Freight System, Inc. (hereinafter American). The record in this case consists of the hearing transcript; claimant's exhibits 1 and 2; joint exhibit A; defendant's exhibit 2; and briefs of both parties.

ISSUES

Whether the deputy erred as a matter of law in not considering claimant's experience as an over-the-road truck driver in determining his industrial disability or loss of earning capacity.

Whether the deputy erred as a matter of law in failing to consider the condition of dermatitis in determining loss of earning capacity.

REVIEW OF THE EVIDENCE

At the hearing the parties stipulated that the claimant's rate of compensation would be $265.32. At the time of the hearing the claimant, Jerry Herrick, was married with one dependent child. He stopped going to school in 1959 with 10 1/2 years completed. The claimant began working for American in 1966. He stated that before working for American he had no neck or back problems. Prior to that time he worked in a lumberyard and running delivery for Coco-Cola, 7-UP, and Industrial Towel. He testified that these jobs required physical work.

The claimant was assigned to work the dock when he first began with American in 1966. This involved loading and unloading, which required him to lift 50 pounds and up. This he did for three years. He bid to an over-the-road job which he has done for 15 years. This job also, at times, required loading and unloading. In 1979 the claimant injured the "tendon" in his right arm. He reported this to the dispatcher. He stated he recuperated fully. On January 31, 1981, the date of injury, the claimant was working in the yard. This, he testified, was because he had gotten more speeding tickets than he should and he came to work in town to avoid those tickets on his drivers license. The claimant was injured when a dolly he was cranking slipped and threw him into the trailer. After the accident the claimant drove in the city doing delivery work. At times he is required to handle freight that weighs in excess of 50 pounds.

The claimant sought treatment the day of the injury from Herbert Rosen, D.O., whom he stated was the company doctor. Dr. Rosen gave the claimant a shot of morphine and sent him home. That night the claimant was admitted to Lutheran Hospital where he spent the next six days. After the claimant's discharge, Dr. Rosen continued to follow the claimant until April 1981 when the claimant was referred to Robert A. Hayne, M.D. Up to this time the claimant had not returned to work. In April 1981 Dr. Hayne conducted an EMG. The claimant stated that in a month he returned for the EMG evaluation and a myelogram. A ruptured disk was discovered and the claimant underwent surgery two days later. The claimant testified that even after the operation he experiences neck and back of neck pain.

The claimant returned to work in December of 1981. He was working city delivery. He experienced severe headaches which were not relieved with medication. He worked for one month, took vacation for a month, then returned to work for one month in March 1982. He then went back to Dr. Rosen who sent the claimant to University Hospitals in Iowa City in July 1982. The claimant had been off work approximately since some time in March. Iowa City recommended neck strengthening, which relieved claimant's neck fatigue somewhat, and a TENS unit which was of no help.

In May of 1983 the claimant saw Dr. From complaining of headaches and pain in his neck area. Dr. From suggested the claimant try the pain center. Claimant admitted to the pain center, headed by Dr. Blessman, in August 1983 for three weeks. In addition, the claimant underwent nautilus exercises for six weeks. The claimant experienced no relief from the pain center. After the nautilus training the claimant was released to work by Dr. Hayne with the restrictions that the claimant not work the dock nor drive over-the-road. The claimant took the city delivery job which he still has. However, the claimant complains of pain in his neck, shoulder, and right arm. The claimant states that his neck is not as mobile as before. He also states that now he has to lift with his legs.

The claimant does not recall exactly when his dermatitis problem set in. It occurs in his hands and feet. He saw Robert R. Schulze, M.D., for the problem who told the claimant that stress is a causative factor involved in his condition. The claimant states that he is stressed in that he is concerned about his job. He still has those concerns.

The claimant testified that over-the-road drivers for American can earn as much as $50,000 per year. The claimant now earns about $24,000. Presently the claimant is suffering from pains in his neck, across his shoulders, and his right arm. His headaches are pretty much gone.

On cross-examination the claimant admitted falling on ice in January of 1973 bruising his right arm. He denied that in 1977 his right arm went out. He stated that he could get help unloading heavy loads if need be. Claimant testified that he began to experience his skin problems early in 1984. Further the claimant said he has started golfing again and is also fishing.

Sharon Herrick, the claimant's wife testified as to the claimant's concerns about his job as follows:

Q. Does he express concerns to you about his ability to continue working at All American?

A. Yes.

Q. What are those concerns?

A. Only that he's afraid he can't take it that much longer, if this continues, this pain, constant pain. What else would he do since he's been in this industry so many years, what other training. He has none, he has no training at all, so he's concerned about what we would do.

(Transcript, page 66)

Claimant's exhibit 1 is a collection of medical bills that have been paid by the claimant. Claimant's exhibit 2 is a deposition of Paul From, M.D. From deposition exhibit E states that Dr. From is board certified in internal medicine. It states as a specialty -- internal medicine. Dr. From examined the claimant on May 24, 1983. His office collegue, David C. Temple, M.D., saw claimant on May 7, 1984. The claimant saw Dr. Temple about a rash on his hand and feet. The claimant gave a history of having this condition eight or nine months previously. Dr. Temple diagnosed the claimant as having dyshidrotic eczema. Dr. From testified that the claimant saw Dr. Schulze who he knows to be board certified in dermatology.

Dr. From found a psychological component to the claimant's problems and that it is secondary to the claimant's injuries from his accident. Dr. From testified as follows:

A. I thought that he had had this injury of January 29, 1981, that he had injury to his neck area, that he had had a cervical interbody fusion because of that injury and that subsequently he was having pain in his neck and arm as well as intractable headache and a reactive depression because of the pain syndrome he was having.

Q. Did you feel those were all probably secondary to the accident?

A. I did, yes, sir.

Q. With respect to the intractable headaches, did you feel that was psychologically induced or physically induced?

A. That is a very difficult thing to say. He had surgery for his condition. He was still having pain. The pain syndrome itself could lead to depression. It could be that the depression was not because of pain but because of original injury and subsequent surgery and impairment he was having, but I think the chronology was injury, disability from that, surgery, subsequent pain and depression mixed in together.

(From Deposition, pp. 14-16)

Testifying as to whether claimant's pain was phychological or organic in nature, Dr. From stated:

> The fact that the pain subsided after an experience with the pain clinic, a comprehensive pain clinic, and because also some of the experience he had in that pain clinic was designed to treat depressive reaction, I would think that most of that headache that he was having was neurologically or psychologically induced or in [sic] origin because it did pretty well go away without anything definitive having been done to his neck.

(From Dep., pp. 17-18)

As to claimant's dermatological problems, Dr. From stated that it is psychologically induced or due to nerves or stress. He testified that this can go on indefinitely, stating that he did not believe the claimant could last long at his job.

Without the psychological component, Dr. From believed that the claimant was able to perform sedentary work. However, with the skin problem the claimant would have trouble picking up objects and walking at times. Dr. From stated: "I think that he is going to find it very difficult to sustain himself without recurring problems for any period of time in most any job."

On voir dire examination Dr. From admitted that he doesn't practice dermatology nor did he see claimant's condition. Further, he stated that stress could come from work, marriage, or financial affairs. On redirect, however, Dr. From stated that no history was taken that he felt was either a cause or a contributing factor. Regarding the light carpentry, shoveling fresh ground, and laying sod that he said claimant could be capable of doing, he explained that the claimant could do these things only in short bursts.

On further cross-examination Dr. From admitted that he did not know what degree flexion was accomplished, but that he thought all modalities of rotation were impaired in claimant's neck or the claimant would not have gotten to the point he did in his impairment rating. Dr. From stated that because of claimant's neck one is going to have between 25 and 40 percent limitation of motion in the neck altogether.

From deposition exhibit A is a compilation of medical records and reports largely repetitive of joint exhibit A and will be discussed below. From deposition exhibit B is a letter from Dr. From to claimant's counsel dated May 25, 1983. Dr. From states that whatever job the claimant does find it will have to be sedentary. The letter also states that claimant does exhibit considerable loss of motion of the neck. Based upon claimant's neck surgery, limitation of motion and pain plus reactive depression, he believes claimant has sustained a 20 to 25 percent permanent partial impairment of the body as a whole.

From deposition exhibit D is a letter and accompanying material from Dr. Schulze to Dr. From dated May 22, 1984. Dr. Schulze states he examined claimant on February 7, 1984 and that claimant had Dyshidrosis of the palms which had been present for four months previously. In accompanying literature from Dr. Schulze it states:

> Question: What is the primary cause?
>
> Answer: "Nerves" are the only switch that makes these glands overactive on the hands and feet.
>
> Question: Why don't I feel nervous?
>
> Answer: The "nerves" that aggravate this disorder are the same ones that regulate the heart rate, blood pressure, bowels, etc.; hence, the patient may not seem "nervous".

From deposition exhibit E is a curriculum vitae.

Defendant's exhibit B is claimant's employment application with American. It states that the claimant has graduated from Atlantic High School, Atlantic, Iowa.

Joint exhibit A is a collection of various medical records, reports, and test results. Page 4 is a surgeons final report in regard to claimant's injury of his right elbow dated June 27, 1979. The diagnosis is contusion and sprain-medial aspect right elbow. It states that the patient returned to work and regular occupational duties June 11, 1979. The x-ray report in conjunction with this incident shows no evidence of fracture or of any other bony abnormalities of either the right humerus, elbow, or forearm.

Page 20 is an unsigned letter from Dr. Hayne to whom it may concern dated July 17, 1981. It states that it is his feeling that the claimant should return to work as of August 17, 1981. Page 27-31 consists of the office resume and discharge summary of the claimant. In the cover letter dated June 15, 1981 Dr. Hayne states he has not seen the claimant since his discharge from the hospital. A May 11, 1981 entry states that a myelogram showed a defect between the fifth and sixth cervical segments. On May 14, 1981 claimant underwent cervical fusion. Dr. Hayne's final diagnosis was a "[h]erniated cervical disk, fifth cervical interspace on the right side."

Pages 32 through 45 are various medical data relating to claimant's hospitalization at Iowa Lutheran in January/February of 1981. A radiographic report by G. B. Purnell, M.D., dated January 31, 1981 states in reference to the cervical spine "[t]he bone and joint structures appear essentially within normal limits with good alignment indicated." Office records of Dr. Hayne indicate that claimant called Dr. Hayne on June 3, 1981 with complaints of pain in hip.

A radiology report of May 14, 1981 by J. Hall, M.D., states that, "[a] single portable Polaroid film taken in the OR for localization purposes demonstrate a metal needle at the interspace between C 6 and C 7." In a letter to American from Dr. Hayne dated April 20, 1982, Dr. Hayne states that at this time he cannot state when claimant will be able to return to his occupation.

Page 65 is a clinical note of July 8, 1982 from University Hospitals orthopedic's department. It states in part:

> Physical exam: Jerry has full forward flexion of the neck and good extension. He has lateral rotation of about 50° bilaterally. He has lateral bending of 40° bilaterally. There is no paraspinous spasms. There is paraspinous tenderness around the C5-6 level. His strength is 5+ in all major muscle groups. Sensation is intact to light tough [sic] and pin prick. His reflexes are normal and symmetric.
>
> X-rays taken today reveal a well incorporated graph of the C5-6 level and altered flexion extension mechanics secondary to the graph.
>
> Impression: We believe that this is mechanic neck pain secondary to the altered mechanics of the C5-6 fusion causing fatigue and pain and spasms of the paraspinous muscles.

Page 67-68 is a letter from James L. Blessman, M.D., to claimant's counsel dated April 22, 1983 which states in part that the claimant has some minor vegetative symptoms of depression which he feels is secondary to claimant's chronic pain syndrome. In a discharge summary from the Pain Center dated August 31, 1983, Dr. Blessman states, "I do feel that he is likely to be able to return to his previous job full time without any restrictions at all at a date 6 weeks from the time of discharge from the Pain Center."

Page 79 is a letter to claimant's counsel from Dr. Rosen dated September 29, 1983. It reads in part:

> Because I have not seen Mr. Herrick for a considerable length of time, but with review of what has been occurring, I can give you my impression. I do feel that he is totally incapacitated from returning to his former type of work; such as driving a truck, loading and unloading objects greater than twenty pounds, bending and lifting objects off the floor, reaching overhead to place boxes, etc., and even pull down overhead doors.

A report by Dr. Hayne addressed to claimant's attorney dated October 16, 1984 states in relevant portion:

> I saw Jerry Herrick for examination on September 26, 1984. The last time he was seen by me for examination was in October of 1983.
>
> ....
>
> The neurological examination showed the gross strength and coordination of the upper and lower extremities to be normal. There was no evidence of muscular atrophy. The deep reflexes were 1+ throughout. The examination was essentially within normal limits.
>
> Repeat cervical spine x-rays were made on September 26th and this showed the interbody fusion between 5th and 6th cervical interspaces to be in good position and the union appeared solid. A high resolution CT scan of the cervical spine was made and this showed postoperative changes at the C5-6 level but there was no evidence of recurrent or new disc protrusion.

In view of her persistence of symptoms, I feel that it would be advisable for him to continue his work with the short city delivery. He should curtail lifting weights over forty to fifty pounds. He should avoid situations that require hyperflexion, hyperextension and extreme rotation of the neck.

There is a causal relationship between the onset of his symptoms that required surgery and the accident in February, 1981 at which time he began having pain in the right upper extremity after he had turned a crank on a "dollie". In view of his persistent pain, his permanent disability is in the vicinity of 12% of body total.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 31, 1981 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

The 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.

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 impairment 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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant first brings to issue the question of whether the deputy erred in not considering claimant's experience as an over-the-road driver in determining his industrial disability or loss of earning capacity. At the time of claimant's injury he was working in the yard. As the claimant explained, "I had been running the road previously. I had been running Fargo, North Dakota, and I had gotten more speeding tickets than you should, and I came into town to avoid those on my driver's license." The meaning of this statement is illusive and subject to varying interpretations. It is possible that the claimant had lost his license. It is also possible that he was up for revocation or suspension. It is equally likely that he was taking this as a preventative measure. What we know is that claimant had been working in the yard previous to his accident and that he was working the yard the day of the accident. If the accident had not occurred he would have worked the yard. But the length of time he worked in the yard is speculative. It is possible that he would have returned to trucking. But it is also possible he would not have. These possibilities do not create a preponderance. Claimant failed in his burden of proof regarding loss of earning capacity. Claimant's testimony regarding earnings of over-the-road drivers is highly speculative, undocumented, and unsubstantiated.

The claimant next brings to issue whether the deputy erred in not considering claimant's dermatitis. A preponderance is required to show that the dermatitis condition arose out of and in the course of employment, or that it was a result of psychological stress generated by a compensable injury. This the claimant has not done. It is taken that claimant's condition is caused by stress, but Dr. From admitted that stress can be brought about in different ways, e.g. family problems, financial or otherwise. Furthermore, Dr. From did not witness claimant's condition and is not a dermatologist and most importantly Dr. From is not a psychologist or psychiatrist. This Dr. From admits freely. The causal connection has not been established.

There was no appeal regarding file number 735417.

FINDINGS OF FACT

1. Claimant received an injury arising out of and in the course of his employment January 30, 1981 while cranking a dolly to hook a semi-tractor to a trailer.

2. Claimant's injury resulted in a ruptured cervical disc and claimant underwent a surgical fusion.

3. Claimant continues to experience pain in his right arm and shoulder and headaches. These are residual effects of his cervical injury.

4. Claimant underwent treatment at the Mercy Hospital Pain Evaluation Center for relief of chronic pain syndrome. Claimant subsequently underwent six weeks of outpatient nautilus training to strengthen his neck area.

5. These treatments were necessitated by his January 30, 1981 injury.

6. Claimant was medically capable of returning to work and returned to work October 20, 1983.

7. Claimant has developed a rash on his skin which has been diagnosed as dyshidrotic eczema. "Nerves" and stress are a factor in the development of this condition.

8. The origin of the claimant's dermatitis causing stress is not clear.

9. Claimant has a functional impairment of 12 percent of the body as a whole.

10. Claimant has completed ten and one-half years of school.

11. Claimant is 42 years old.

12. Claimant has returned to work as a city driver.

13. Claimant is restricted from over-the-road driving; from lifting more than 40 to 50 pounds; from hyperextension, hyperflexion and extreme motion of the neck.

14. Claimant was not working as an over-the-road driver when injured, having elected to come off the road because of excessive speeding violations.

15. It is not established claimant would have returned to over-the-road driving absent the injury.

16. Claimant's earnings as an over-the-road driver had he not been injured are speculative.

17. Evidence establishing that claimant was exposed to excessive noise at work was not presented.

18. Claimant hunts and uses wood saws for recreation.

CONCLUSIONS OF LAW

Claimant established that claimant's right arm and shoulder pain, his neck pain, his headaches and related restrictions are causally related to his January 30, 1981 work injury. Claimant has not established that his dermatitis is related to that work injury.

Claimant is entitled to healing period benefits from his injury date to October 20, 1983 for those days on which he was absent from work on account of his injury. Defendant is entitled to a credit for healing period benefits already paid.

Claimant is entitled to permanent partial disability resulting from his January 30, 1981 injury of 21 percent.

Claimant has not established an occupational hearing loss arising out of and in the course of his employment.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE it is ordered:

File 661570

That defendant pay claimant permanent partial disability benefits for one hundred five (105) weeks at a rate of two hundred sixty-five and 32/100 dollars ($265.32) per week.

That defendant pay claimant healing period benefits from his injury date to October 20, 1983 at a rate of two hundred sixty-five and 32/100 dollars ($265.32) per week for that time in which claimant was off work because of his injury.

That defendant is credited with healing period benefits already paid.

That defendant pay accrued amounts in a lump sum.

That defedant pay interest pursuant to section 85.30.

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

That defendant is to file a final report upon payment of this award.

File 735417

That claimant take nothing from these proceedings.

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

Signed and filed this 23 day of August, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LLOYD HOSKINS,	:	
Claimant,	:	
vs.	:	
QUAKER OATS,	:	File No. 708553
Employer,	:	A P P E A L
and	:	D E C I S I O N
IDEAL MUTUAL INSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	JUL 18 1985
		IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals an arbitration filed June 25, 1984 wherein claimant was awarded healing period benefits from July 15, 1982 through June 27, 1983 and was found to have a 20 percent permanent partial disability for industrial purposes. The record on appeal consists of claimant's exhibits 1 through 3; interrogatory #8; defendants' exhibits A through G; briefs of the parties; and the hearing transcript.

ISSUES

The issues as stated by the claimant are:

1. Did the deputy err in failing to enter a running award?

2. Did the deputy err in finding the Claimant to have industrial disability of only twenty percent?

3. Did the deputy err in failing to assess a penalty against the employer pursuant to Section 86.13?

REVIEW OF THE EVIDENCE

At the hearing the claimant's rate of compensation was stipulated to be $285.38. The medical expenses were stipulated to be fair. Benefits from January 28, 1983 to March 6, 1983 were stipulated to have not been paid until April 13, 1983. It was also stipulated that no workers' compensation benefits have been paid since March 6, 1983.

The claimant testified he was 38 years old, married, with one child at home at the time of the hearing. He completed formal education through the eighth grade, but received his G.E.D. through the air force. Claimant was discharged from the air force in 1966 after having served as an aircraft mechanic. After completing two courses in electronics the claimant worked for Altorfer Machinery.

In 1966 the claimant began working for Quaker Oats. The claimant was required to undergo a pre-employment physical examination which was performed by W. R. Basler, M.D. Claimant's first assignment with Quaker Oats was as a machine tender. This he did for two to four years whereafter he was a syrup tender and then a fork truck driver. Claimant also was a temporary supervisor. These jobs involved lifting and carrying.

The claimant began working in the maintenance department in July 1970 where he began as a painter apprentice and moved up until he became a journeyman electrician. This the claimant had been doing for approximately four years. The claimant testified that the job of journeyman electrician required lifting, carrying, pulling, crawling and climbing. On April 30, 1982 the claimant testified that he had an accident at work. His testimony follows:

A. I was working on a double lift-type scaffold, portable. I was coming down from the platform and one of the steps fell out. It's all steel, and one of the welds, it just - the steps just fell out on one end.

Q. All right. What happened to you when the step broke?

A. Well, I went down a little fast. I straddled the steps and landed on one leg.

Q. What did that feel like?

A. It gave shooting pains down the leg.

This fall occurred either at 9:00 a.m. or right before lunch. In any event the claimant finished his shift. (Transcript, pages 12-16, 42)

The claimant was examined by Dr. Basler, the company doctor, then referred to Leland G. Hawkins, M.D., a specialist in orthopedic surgery. Although the claimant had pain to an extent that some days he could not stand up straight, the claimant continued to work the next few months so he could see a big job done. Dr. Hawkins took claimant off the job and he was hospitalized at St. Lukes where myelograms, CAT scans, and x-rays were performed on him. A laminectomy was also performed on the claimant. Following surgery the claimant was released to work four hours a day. When claimant returned to work, his back got worse to the point that he had to discontinue working after March 23, 1983. The claimant is still being treated by Dr. Hawkins. The claimant stated that he cannot walk, stand, drive, lift, or bend.

In 1976 Dr. Hawkins performed a laminectomy on claimant as a result of a fall when a ladder broke in 1974. The claimant was subsequently assigned a 12 percent impairment rating to the back. Prior to working for Quaker Oats, the claimant stated he did not have any back problems.

On cross-examination the claimant explained that between 1974 and 1982 he has been treated primarily by Dr. Hawkins. During the period 1974 through 1982 the claimant has worn a back brace; been in the hospital; undergone traction; and taken various pain medications and muscle relaxants. He admitted that Dr. Hawkins has told him that he should stay off cement floors. The claimant also recounted that Dr. Hawkins told him that he was suffering from a degenerative disk condition. In 1974, the claimant worked approximately 2 1/2 months before consulting an orthopedic surgeon about his back.

Testifying about his fall in 1982, the claimant stated that the instant after the fall he experienced a "shooting," "needlelike pain" in his legs and through his feet. He had this pain off and on believing that it would go away.

Claimant's exhibits 1 through 3 are itemizations of transportation, medical, and various other costs incurred.

Defendants' exhibit A is a supplemental claim activity report. It stated that $9,376.73 in weekly benefits were paid and $5,786.16 in medical expenses paid. The date of last payment is listed as March 22, 1983. Defendants' exhibit B is a letter from defendants' insurance carrier to defendants' counsel.

Defendants' exhibit C is a deposition taken on October 25, 1983 of Dr. Hawkins. Dr. Hawkins first saw the claimant on October 2, 1974 in relation to claimant's fall off a ladder on July 23, 1974. Dr. Hawkins diagnosed the claimant as suffering from a contusion of the sciatic nerve on the left side and a lumbar sprain. Exercises and back brace were prescribed.

On December 9, 1974 the claimant was told that he had a degenerative disk problem. Dr. Hawkins stated that the presence of a degenerative disk can be disabling by itself. The following is a synopsis of relevant dates up to the fall in 1982:

February 7, 1975	Possible ruptured disk--could be caused by degenerative condition
March 4, 1976	Myelogram shows ruptured disk
March 23, 1976	Laminectomy removed L4-5 disk on left side.
June 1, 1976	Return to work
1976-1977	Dr. Hawkins continued to see claimant. Claimant continuing to have back and leg pain attributable to degenerative disk
1978	Numbness attributable to degenerative disk
March 2, 1981	Claimant admitted to hospital due to back pain. No neurological deficit
March 9, 1981	Discharged.

Second Fall

On July 14, 1982 the claimant saw a Dr. Bickel complaining of sudden onset of low back pain he experienced 10 weeks prior. No neurological problems were noticed. Claimant's straight leg raising was positive and he was taken off work. On July 30, 1982 claimant saw Dr. Hawkins and told him of his fall. Dr. Hawkins testified that claimant's condition at that time appeared markedly different from claimant's previously observed condition. Previously claimant's straight leg raising had been negative. Dr. Hawkins attributed this to a degenerative change in claimant's back which can occur without a specific trauma. On August 6, 1982 the claimant was admitted for pain which resulted from sneezing. A herniated disk was suspected at the L4-5 level with a fragment extending into the canal. The claimant was discharged with a prescription for Tylenol 3. Dr. Hawkins' clinical notes are briefly summarized:

August 20, 1982:	Claimant seen hazards explained about surgery
October 1982:	Doctor and claimant hesitant about surgery
October 18, 1982:	Claimant not able to return to work; myelogram; herniated disk or scar tissue
October 29, 1982:	Dr. Hawkins attempts to get claimant to try work

Dr. Hawkins admitted the claimant to the hospital on November 8, 1982 stating that the claimant's symptoms apparently progressed. On November 8, 1982 exploratory surgery was performed on the claimant and revealed no evidence of ruptured nor herniated disk at L4-S1 nor extruding disk material. Dr. Hawkins explained that some disk material was removed at the L4-5 level. Dr. Hawkins attributed the claimant's condition to scar tissue secondary to claimant's 1976 surgery. Claimant's post explorative progress is summarized below:

December 1, 1982	Leg pain, "pretty well gotten rid of back pain"
January 17, 1983	Reflexes normal. No back pain
February 21, 1983	High back pain
March 23, 1983	Pain in back and down into leg. Whole leg hurts.

On April 12, 1983 the claimant was admitted for a myelogram which showed a bulging at the L3-4 level. Dr. Hawkins attributed this to claimant's degenerative condition not related to trauma or injury. Dr. Hawkins stated that he did not believe this was causing claimant's problems. On May 23 the claimant complained of leg pain. Claimant achieved negative straight leg raising in a test on June 27, 1983.

On August 19, 1983 claimant experienced sudden pain after chaining his dog. Dr. Hawkins stated that claimant exhibited symptoms of instability at L4-5 disk which x-rays confirmed. Again Dr. Hawkins attributed this to claimant's degenerative condition. The claimant was to have a CAT scan on October 4, 1983.

Dr. Hawkins ascribed to the claimant at the deposition a permanent disability of 15 percent to the body as a whole. This rating includes the claimant's previous 12 percent impairment of the low back.

On cross-examination Dr. Hawkins stated that the claimant had stabilized his condition in reference to the first fall in May of 1981. Dr. Hawkins testified regarding what the claimant could do:

> A. Well, he is suited for a lot of different jobs. I think that standing and walking aren't a bother to him, as long as he is not carrying things around. Certainly some type of a sitting job where he can move around and he doesn't have to climb on ladders. He is an electrician. Electricians are required to bend and stoop and do a lot of work like that, it might be hard for him to do the kind of electrical work that I think of as an electrician doing.
>
> Q. Have you imposed or anticipated imposing a weight restriction?
>
> A. No....
>
> (Hawkins Deposition, pp. 59-60)

Dr. Hawkins testified to the claimant's limitations as follows:

> Q. Given Mr. Hoskins present condition, do you feel that there are any limitations that should be imposed on the kind of activities he is capable of engaging in?
>
> A. Yes. I have felt that for the whole ten years that I have known this man, that he should be doing activity that doesn't require carrying a heavy box of tools over his shoulder, for example, bending or twisting type of activity. I think he should be -- it's just a perfect setup to go on for the next ten years or twenty years with this same setup unless we can get him to a job that requires less stress on his back.
>
> (Tr., pp. 55-56)

Defendants' exhibit D is a compilation of medical expenses paid by the group carrier. Defendants' exhibit E is a record of claimant's time off.

Defendants' exhibit F is a collection of medical records. Five pertinent entries are listed below:

21 Apr 83: Recheck. I think he is getting along a little better if he is careful with his activities. His pain is decreased somewhat and he did not ask for any medication today. He continues with his traction. I have told him I want to see him in about a month. I told him during this time I want to increase his endurance by walking. He will try that.

23 May 83: Recheck. Continues to have difficulty with pain in the left lower extremith and he gets some weakness at that time. He does state that his sensation is improving in the extremity and he is continuing to walk but walking doesn't always relieve him because he does get quite a bit of pain when he sits.

27 June 83: Recheck. This patient has negative straight leg raising. His reflexes seem symmetrical to me today. He has paresthesias in the lower extremities. I cannot demonstrate any weakness. The patient continues to complain of back pain. I don't feel that in the past month that he has made much progress. I did not take anymore x-rays today but will follow him and see him in a months time and we will get x-rays at that time.

19 Aug 83: Lloyd comes to the office today, and

Lloyd has a recent episode of pain that was quite severe. He was apparently bending over to work with his dog and just had sudden onset of back pain and he has been really in bed since that time. Today on physical examination the patient's reflexes are symmetrical in the lower extremities. He has paravertebral back spasms that are palpable. He has no other abnormalities in sensory or motor function that I can detect. X-rays were repeated today and it looks as though on his spotview of the L4-5 S1 area that he has a good deal of instability at the L4-5 area. The previously operated site is easily identified.
Diagnosis: INSTABILITY L4-5.
Disposition: We will see Lloyd back in about 4 weeks to see how he is doing.

19 Sept 83: Lloyd is still complaining of numbness radiating down his left leg. I am going to repeat his CAT scan in several weeks and I advised him to continue with his program that he has in the past. Continue with exercises.

APPLICABLE LAW AND ANALYSIS

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 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. (emphasis added)

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 Tire & Rubber Co., v. Kubli, Iowa App., 312 N.W.2d 60, 65 (Iowa 1981). Stated another way, it is only at the point at which a disability can be determined that the disability award can be made. Until such time, healing benefits are awarded the injured worker. Thomas v. William Knudson & Sons, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984).

Claimant first raises issue as to a running award. Claimant is not entitled to a running award. In his brief claimant argues that because Dr. Hawkins had not released claimant to work that this is evidence that claimant had not reached maximum rehabilitation and therefore should receive a running award. But it is apparent from Dr. Hawkins testimony that claimant would not be released to work for some time, and that claimant should not ever work at his previous job.

An appeal decision by this agency held:

> That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond that point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition.

Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982).

Claimant's healing period terminated when Dr. Hawkins rated him as having a 15 percent permanent body as a whole impairment on October 25, 1983. This rating indicates that Dr. Hawkins did not expect claimant to improve and as such meets the criteria of section 85.34(1) and Thomas, 349 N.W.2d 124, 126. The finding of a termination of healing period necessarily precludes the discussion of a running award. The claimant worked between March 7, 1983 and March 23, 1983 and will not receive healing period benefits for this period. The proposed agency decision is modified accordingly.

Claimant argues that a penalty should be assessed defendants for terminating his benefits. As the deputy pointed out in the opinion, the medical testimony in this case is confusing to say the least, and such confusion is based primarily upon claimant's complex preexisting condition. However, the claimant has also failed to show that termination was without reason, probable cause, or excuse. Claimant's complex preexisting medical condition coupled with a lack of supporting evidence is fatal to claimant's position.

Functional impairment 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).

Iowa Code section 86.13 provides in relevant part:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

The proposed decision as to industrial disability is affirmed for the following reasons. The claimant is an electrician with considerable experience. The claimant has furthered his electrical training on his own. His testimony indicates that when he was healthy (without pain) he was a dependable, motivated worker, and systematically planned his career. While Dr. Hawkins felt that the claimant had certain physical limitations, he also felt claimant could stand, walk and even sit if he would move around. The claimant can also lift although he should not lift heavy objects. Claimant is not at such an age where retraining or pursuing another job is impossible.

FINDINGS OF FACT

1. Claimant was 38 years old at the time of hearing.

2. Claimant has a GED.

3. Claimant was hired by defendant employer in 1966.

4. In 1974 claimant was diagnosed as having a contusion of the sciatic nerve on the left side and a lumbar sprain.

5. In early 1975 claimant was diagnosed as having a mild degenerative disk disease and possible ruptured disk.

6. On March 23, 1976 a laminectomy was performed on claimant.

7. On May 15, 1981 claimant was given a permanent partial disability rating of 12 percent to the lower back.

8. On April 30, 1982 claimant sustained a work-related injury.

9. Claimant had exploratory surgery on November 8, 1982.

10. Claimant returned to work on March 7, 1983.

11. Claimant's last date of work was March 23, 1983.

12. Claimant was given a fifteen percent permanent partial impairment rating to the body as a whole on October 25, 1983.

13. Claimant has sustained an industrial disability of 20 percent.

CONCLUSIONS OF LAW

Claimant is entitled to permanent partial disability benefits based upon a finding of an industrial disability of 20 percent.

The healing period terminated on October 25, 1983.

Claimant has not sustained the burden of proof of establishing an application of Iowa Code section 86.13 benefits.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That the defendants pay unto claimant from July 15, 1982 through October 25, 1983, except for the period March 7, 1983 through March 23, 1983, healing period benefits at a rate of two hundred eighty-five and 38/100 dollars ($285.38) per week.

That defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability compensation at a rate of two hundred eighty-five and 38/100 dollars ($285.38) per week commencing on October 26, 1983.

That interest shall accrue on the award pursuant to section 85.30.

That the defendants pay the following medical expenses:

Linn County Orthopedists	$ 15.00
Hess Pharmacy	8.49
Mileage (540 Miles at $.24/mile)	129.60

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 18 day of July, 1985.

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS J. HUDSPETH, Claimant, vs. GEORGE A. HORMEL, INC., Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 759981 A P P E A L D E C I S I O N FILED AUG 16 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 26, 1985 this 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 an arbitration decision filed April 26, 1985 in which it was found he had failed to establish an injury to his back arising out of and in the course of his employment on March 12, 1984.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 17 and defendants' exhibits A through K. All evidence was considered in reaching this final agency decision.

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

ISSUES

No specific issue is raised by claimant's appeal brief.

REVIEW OF THE EVIDENCE

Thirty-eight year old married claimant, a high school graduate who served in the air force and who has a two year college degree, testified to work experience on the paint line for an appliance manufacturer and then as a truck driver. On July 8, 1974 he began work for defendant employer.

Claimant described his work in the winter of 1983 and 1984 as follows: He was in the sanitation department which did cleanup after other workers were gone. He moved garbage bags to a pallet and moved the pallet to the compacter with a forklift. The bags weighed between 300 and 400 pounds.

Regarding the circumstances of his injury on March 12, 1984 claimant said: His first job when he came in was to empty garbage bags. He was lifting a bag into the compacter. His hands were going up to the top of his head. He was trying to hold the bag with one hand and get the other hand underneath it so he could push it into the compacter. He felt his shoulder and back give and he began having sharp stabbing pain in his lower back and shoulder. He dropped the bag and reported what had happened to his foreman who allowed him to go home.

He used a heating pad that night. The next day he went to the hospital where he saw Cheryl Busbaum, a medical assistant, who gave him muscle relaxants and told him to take a week off. He received physical therapy.

He returned to his usual work. He was not placed on light duty. His shoulder stopped hurting, but his lower back remained the same. Although he did not request a change in his work, he said that he told his foreman lifting was hard on his back. Claimant now uses a back brace.

He was referred to D. E. Fisher, M.D., whose treatment he did not find helpful. He sought care from Horst G. Blume, M.D., who did a CT scan and a myelogram and recommended surgery if pain should go into his leg. Claimant did not wish to have an operation. Medication was prescribed. Claimant admitted no one from the insurance company had given him permission to see Dr. Blume whom he first learned about through a friend and who was recommended by his attorney when he asked about him.

Claimant agreed that he had been seen by Dr. Clegg in March of 1982 for spinal adjustments, but he did not remember complaining about his back on April 18, 1983. However, he characterized his back trouble before March 12, 1984 as muscle tension rather than a problem. He believed it was middle back trouble which he had in August 1983. In spite of Kenton Moss, M.D., recording chronic low back strain, he denied having low back pain before March 12, 1984.

Claimant asserted that he did complain of low back pain on March 13, 1984. He acknowledged seeing Dr. Moss in July for back pain that came on as he was helping move a boat trailer.

Linda Hudspeth, claimant's spouse of nearly eleven years, testified that since March 12, 1984 she and her son have taken over the lawn mowing, snow shoveling and putting the boat in the water. Claimant no longer hunts or plays golf. She said depression which she attributed to claimant's medication led to a brief separation for the couple.

Bill Lenz, night foreman at the time of claimant's injury, filled out a first report of injury which made no reference to an injury to anything other than the shoulder. Although Lenz was unable to recall specifically what had been said, he agreed it would be his duty to write down what claimant reported.

The foreman stated that claimant's current job is as a general worker who each week picks the work of someone else who is absent from the plant.

Company records show claimant filed an application for insurance benefits for a nonwork-related condition described as lower back pain on May 18, 1983. A similar form dated by claimant November 17, 1983 lists the diagnosis of chronic low back strain and indicates treatment with physical therapy. A short term disability form completed by Dr. Blume indicates claimant's condition arose out of his employment. A subsequent form completed by Dr. Moss suggests that the treatment he provided in July of 1984 was related to claimant's moving a boat trailer.

William L. Clegg, D.C., reported seeing claimant on March 24, 1982 for upper dorsal discomfort. In April of 1983 claimant was seen with a complaint of low back pain without sciatica or numbness. The initial impression was lumbar vertebral subluxation associated with a possible lumbosacral strain.

Kenton Moss, M.D., saw claimant on June 20, 1983. Claimant told of low back discomfort for the past several months. He had good range of motion with some discomfort. On August 24, 1983 claimant had good range of motion with minimal tenderness. Two months later claimant continued to complain of lower back discomfort with left lateral bending lateral rotation and forward flexion. Physical therapy was ordered.

Claimant was seen on January 9, 1984 again with lower back discomfort. He had mild tenderness in the right paralumbar muscles with discomfort on forward flexion. He was referred to Dr. Fisher.

D. E. Fisher, M.D., saw claimant on January 19, 1984 at which time he took a history of claimant's having progressive back pain for two years without specific injury or radiating pain. The examination was normal except that flexion at forty-five degrees produced marked paravertebral tightness and the x-rays were negative. Claimant was diagnosed as having probable lumbar disc degeneration with secondary muscle spasm. Claimant was given Parafon Forte and started on lumbar exercises. On March 1, 1984 Dr. Fisher indicated that most of claimant's pain occurred when he lifted garbage bags. Records from Kossuth County Hospital physical therapy department carry a diagnosis of neck-upper back strain. A note of March 13, 1984 states that claimant experienced pain while he was lifting at work with the pain in the area of the left scapula.

On March 13, 1984 claimant reported to Dr. Moss a sharp pulling sensation on the left side of his neck as he lifted a garbage bag. Specific note was made of claimant's having been seen for back discomfort which was not bothering him at the time. Claimant was holding his head stiffly and he had difficulty moving it. He was tender over the left trapezius and the paraspinous muscles on the left side of the cervical spine.

In April of 1984 claimant told Dr. Fischer he had been taken off work for a week because of job-related stress to his back. Claimant was fitted with a corset and told to remain off work because of a moderately severe strain. In May claimant was informed that he had no permanent impairment.

On July 23, 1984 claimant told Dr. Moss about low back pain after helping a friend move a boat trailer. Pain at that time extended down the leg to below the knee. There was marked muscle spasm in the right paralumbar muscles.

On October 29, 1984 Dr. Fisher recorded almost constant low back pain into the right buttocks and occasional pain to the coccyx. The doctor wrote that claimant might, in fact, have a herniated disc. He expressed the opinion that claimant's injury was work-related.

Horst G. Blume, M.D., saw claimant on June 6, 1984 and took a history of claimant's injuring his back in an accident on January 12, 1984 as he lifted a garbage bag.

Claimant was hospitalized on July 9, 1984 with complaints of back pain radiating to the right buttocks and posterior thigh. A myelogram showed a protruded disc at L4/5 which was confirmed by a CT scan. Claimant was given a prescription for Feldene and Tylenol 4. He was believed able to return to work, but he was to reduce lifting if it could be avoided.

On August 28, 1984 Dr. Blume wrote that there was no indication for surgery. He related claimant's condition to his injury at work and rated his impairment at five percent of the body as a whole.

APPLICABLE LAW AND ANALYSIS

Claimant raises no specific issue on appeal, but the thrust of his argument can be garnered from a prayer in his brief which requests "permanent functional disability and a permanent industrial disability" resulting from his injury on March 12, 1984. More particularly, claimant argues that his injury of March 12, 1984 resulted in injury to his back.

Claimant claimed that at the time of his injury he had pain in both his lower back and his shoulder. Foreman Lentz who was determined by the hearing deputy to be a credible witness, reported injury to the shoulder only.

The evidence shows claimant was treated for low back complaints described as chronic in nature in May, June, August and November of 1983 and in January of 1984. On the latter date, claimant gave a history of back pain for two years. He was diagnosed as having a probable degenerative disc by an orthopedist.

A note made the day after claimant's lifting incident records pain in the left scapula. Claimant also reported a sharp pulling sensation of the left side of his neck. He did not have back complaints. A diagnosis of neck strain was made.

On July 23, 1984 claimant had low back pain which extended down the right leg. He filed a disability form claiming a ruptured disc related to his employment. Dr. Moss in his portion of the form disagreed.

Dr. Fisher who believed claimant had made back complaints when he was taken off work in March decided in October of 1984 that claimant's condition was work-related. Precisely what work Dr. Fisher believed had caused claimant's injury is unclear, but seemingly he was referring to claimant's work generally as opposed to the specific incident of March 12, 1984.

Dr. Blume causally relates claimant's low back complaints to his injury at work, but he does so on the basis of claimant's injuring his back in an accident on January 12, 1984. Claimant did indeed see both Dr. Moss and Dr. Fisher in January of 1984, but his claim herein is for an injury in March. Interestingly a disability form completed in July of 1984 contains indication by claimant that his chronic back strain is not work-related. Dr. Blume on the other hand states there is a work relationship.

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 (1955). The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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 initial and overriding problem with claimant's case is his lack of credibility. The hearing deputy who heard the testimony and observed claimant's demeanor made a specific finding that claimant was not a credible witness and noted that he was hostile and uncooperative and that he "often floundered in a morass of conflicting fabrications." In support of her comments, she made specific reference to the record. Defendants' brief documents claimant's failure to acknowledge prior back trouble. Although two physicians make a causal connection between an injury and claimant's work, we are concerned in this case with the injury of March 12, 1984. Because of the inaccuracies in the histories given by claimant, the statements of causal connection are of no value.

The decision of the hearing deputy will be affirmed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-eight years old.

That claimant is a high school graduate with a two year college degree.

That claimant has work experience on the paint line for an appliance manufacturer and as a truck driver as well as for defendant employer.

That on March 12, 1984 claimant injured his shoulder as he was lifting a garbage bag into a trash compactor on his work site.

That on March 12, 1984 claimant did not injure his back as he was lifting a garbage bag into a trash compactor at his work site.

That claimant reported the March 12, 1984 incident to his foreman.

That claimant had treatment for low back conditions in May, June, August and November of 1983 and in January of 1984.

That claimant was diagnosed as having a probable degenerative disc in January of 1984.

That claimant was off work from March 13, 1984 to March 20, 1984.

That claimant was paid benefits from March 13, 1984 through March 19, 1984.

That claimant had no permanent impairment to his back as of May 1984.

That claimant had an episode of back pain in July of 1984 after he helped a friend move a boat trailer.

That claimant no longer has any complaints of his shoulder.

That claimant was treated with physical therapy in late 1983.

That claimant was not a credible witness.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence an injury to his shoulder on March 12, 1984 which arose out of and in the course of his employment.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That each party pay costs of producing its own evidence.

Signed and filed this 16 day of August, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARTHA J. HUIZENGA (LOHBERG), Claimant, vs. ALLIED STRUCTURAL STEEL, Employer, and COMMERCIAL UNION INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 700316 A P P E A L D E C I S I O N FILED JUL 26 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed April 4, 1985 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 an arbitration decision filed November 30, 1984 in which she was denied benefits.

The record on appeal consists of the transcript of the hearing; claimant's 1 through 15 and defendants' exhibits A and B. All evidence was considered in reaching this final agency decision.

The decision in this matter will slightly modify that of the hearing deputy.

ISSUES ON APPEAL

The issues on appeal as stated by claimant are:

> 1. The hearing officer erred in finding that the medical care offered by the employer and insurance carrier was reasonbly [sic] suited to treat Claimant's injury.
>
> 2. The hearing officer erred in finding that Claimant was not entitled to temporary total disability benefits. Claimant is at least entitled to such benefits for the period when she was hospitalized by Dr. Herzberger, even if his care is found to be unauthorized. Sufficient evidence establishes a causal connection between the condition being treated by Dr. Herzberger, and the work related injury, and the record indicates that Claimant was hospitalized and therefore unavailable for work.
>
> 3. The hearing officer erred in finding that Claimant was not entitled to §85.27 medical benefits. Regardless of the resolution of issue No. 1 above, Claimant is entitled to reimbursement of expenses for medication prescribed by the Employer's physicians, as set forth in Claimant's Exhibit #6.

STATEMENT OF THE CASE

Thirty-six year old married claimant, who was single at the time of her alleged injury, testified to the circumstances surrounding that injury on February 14, 1981 as follows: She had been working for defendant employer for a week as a jig fitter earning $5.91 per hour. Her job was to put steel beams into place to be welded. She followed blueprints and placed two L-shaped bars into a jig and marked where they were to be welded with steel chalk. As she was carrying two five feet pieces weighing eighty pounds which were to be welded and fitted into the jig, she tripped over some electrical cords and fell forward on the cement. Her right fingers were under the angle iron she was carrying and she fell on top of the bar on her left leg. Her first and second fingers were lacerated.

While she was waiting for help, she fainted. Her hands were bandaged and she was taken to the hospital. On her way to the hospital, her right shoulder and arm ached. She had a bruise on her right leg. At the hospital her fingers were stitched and her hands were x-rayed.

She returned to work on Monday and was given lighter duty carrying smaller bars weighing five pounds. She was able to do her job, but her right hand, arm and shoulder hurt.

Cramping and aching continued and she began to have spasms. She was assigned to work welding because she was unable to handle carrying steel bars. The ache in her shoulder was in a spot about the size of a quarter between her shoulder blades and spine. She took daily ultrasound treatments.

She found welding an easier job except for crawling in and out of the jig and pulling the welding cords which was hard on her shoulder. She report the latter activity causing spasms to shoot through her body with pain in her shoulders.

On April 2, 1981 she saw Dr. Ives who took her off work and sent her for physical therapy. She thought the company got Dr. Ives to allow her to come back to work as long as she did no work involving her right arm or hand. She was sent to welding.

When the quality of her welds did not measure up, she was put to sorting nuts and bolts -- work requiring use of her right arm and shoulder. She said that doing this task resulted in the same amount of pain she had with others, but she did not tell anyone she was unable to do this job.

She sought medical treatment because she was upset and "offended" by not being allowed time to heal. Claimant acknowledged having been nervous before and having been treated with medication and counselling. On this occasion she was told that the trouble was either with her children or her boyfriend. She was again told to return to work, but she did not do so. Neither did she return to the doctor she had been seeing because of her treatment on this latter occasion.

She asked about seeing a chiropractor and she was told by Dorothy Tribbett to try medical treatment first. She saw Dr. Droste, D.C., who performed adjustments which relieved the spasms, but the aching remained. After twenty-one visits, she went to a William C. Snyder, D.O., whom she told of spasms which by this time went to her head.

Dr. Snyder undertook osteopathic manipulation, ultimately prescribed medication, and eventually referred her to Eugene Herzberger, M.D., a neurosurgeon to whom she made the same complaints she had made from the beginning except that her spasms were worse. Dr. Herzberger hospitalized her for tests and prescribed medication and therapy which she was unable to tolerate. She returned to treatment with Dr. Snyder whom she said has been able to stablize her neck.

Claimant agreed that she had at no time after her experience with Dr. York asked defendant employer for a new physician or asked payment for medical services.

Claimant indicated that she does not think she can hold down any jobs because she did not know when she would be able to work as she would be unavailable because of spasm going to her head. The pain in her shoulder and arm has remained constant for about three years. Claimant stated that she has limited the use of her arm and shoulder by giving up carrying firewood, chopping wood and playing baseball among other things.

Claimant denied having any problem with the right arm and shoulder, spasms in the upper portion of her right back, headaches or neck pain before February 14, 1981. She recalled falling backward off a porch railing in 1980 and having stitches in her neck. She had stiffness which made turning her head difficult, but manipulations took care of the problem. Claimant said that cracking in her neck came on after about a year. She also said she had popping before the accident.

Ronald Huizenga, claimant's current spouse, testified to having paid the medical expenses offered at hearing.

Admitted into evidence was a letter from Joseph A. McPeek dated November 19, 1981 which refers to some unpaid medical expenses with Drs. Droste, Snyder, and Herzberger and informs claimant that those expenses will not be covered by the compensation carrier.

A report shows claimant was seen by Dr. Wulf following a fall and passing out. Her right upper thigh was contused. Lacerations of her second and third fingers on the right hand were repaired.

An undated typewritten form contains a handwritten notation which says, "right shoulder also hurts." Dr. Wulf released claimant for light duty on February 17, 1981. On February 25, 1981 stitches were removed.

About two and a half weeks after the injury she saw the doctor regarding pain in her upper scapula and rhomboid area on the right. Definite soreness and tenderness were recorded over the rhomboid muscle. A traumatic myositis secondary to sudden stretch or muscle hemorrhage was diagnosed. Claimant was treated with ultrasound, hot packs and Myoflex. At the end of the month, her complaints were continuing and she was scheduled to see a Dr. Ives.

On April 2, 1981 Dr. Ives examined claimant. She complained that pulling on the welding cable aggravated her condition. She was tender about the levator scapulae. There was full range of motion in the shoulder and neck. There was no neurological deficit in either upper extremity and no pain in the neck to palpation. The diagnosis remained strain of the rhomboid and levator scapulae muscles. The doctor's plan was for claimant to refrain from work for two weeks unless very light work was available. Deep heat was to be applied daily.

G. L. York, M.D., saw claimant on April 6, 1981 and wrote: "Martha is obviously very anxious, very upset today....It would seem rather apparent to me today that most of Martha's problems are emotional or psychosomatic in origin." As reasons for being upset, claimant told of being out of Robaxisol and of being assigned a light duty job with nuts and bolts. She had tenderness in the right rhomboid or subscapular muscle area. Although Dr. York felt claimant had myalgia and muscle spasm, he attributed most of her problems to a nervous state. Claimant was given Norgesic Forte and told to continue with heat and therapy on the right rhomboid area. She was given permission to return to regular duty.

William C. Snyder, D.O., saw claimant on June 29, 1981 for complaints of pain in the upper thoracic spine which radiated to her right forearm and hand. Dr. Snyder treated her with osteopathic manipulations on June 29, July 13, August 24, October 16 and December 4, 1981 and January 6, February 17, March 23 and March 29, 1982. He referred her to Eugene E. Herzberger, M.D.

Dr. Snyder believed claimant to have "a unique injury to the spine between the 6th cervical and 3rd thoracic." Claimant reporte a low grade constant discomfort which she tolerated until tension built up. Claimant did not keep a scheduled appointment in April. In May she sought a prescription for Seconal.

Dr. Snyder reported first caring for claimant in February of 1976 at which time she had a burning feeling radiating through her triceps which had been present for a month and shoulder and upper back discomfort with an onset three years before. In January of 1980 she injured her upper neck after falling backward from a porch.

Dr. Herzberger saw claimant on referral from Dr. Snyder. Claimant told him of a gradual development of recurring pain in the right shoulder and arm which sometimes radiated to the right chest. She complained of pain all the time and sometimes severe muscle spasms. Examination showed weakness in grip on the right. There were no sensory changes, muscle atrophies or muscle weakness. Claimant was hospitalized for testing.

X-rays of the cervical spine were normal. A myelogram was done which revealed no disc disease and no herniations. She had "fairly prominent ligamentous flavum bulges" posteriorly at C5-6 and C6-7. Nerve conduction studies and electromyography were normal. Proteins were increased in the spinal fluid which was suggestive of a nerve root irritation "which could have occurred during the patient's accident." Claimant was given therapy during the hospitalization which ran from October 29, 1981 through November 7, 1981.

Claimant was seen in follow-up on November 19, 1981 at which time she was advised to take Prolixia and Elavil and Zomax instead of Darvon. Claimant was not told to return to work.

In a letter dated December 14, 1981, Dr. Herzberger anticipated a favorable prognosis with the nerve root irritation eventually subsiding. He observed that it might take a number of months for that to occur.

Medical bills offered show defendant employer paid for treatment claimant underwent at Jane Lamb Memorial Hospital.

Claimant seeks payment of prescription expenses for E-mycin, Norgesic Forte, Mycostatin vaginal cream, Phenergan-C expectorant, Darvocet N100, Seconal 5, AVC suppositories, Elavil, Zomax and Prolixin.

APPLICABLE LAW AND ANALYSIS

Claimant's first complaint on appeal relates to 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....
>
> ....

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

In order to place this case in the proper perspective, some procedural history is necessary. Claimant filed her petition on May 19, 1982 alleging an injury of February 14, 1981. Defendants answer admitted that claimant lacerated three [sic] fingers on her right hand and that she was seen by Drs. Ives, O'Donnell, and York; but they denied the injury extended beyond the right hand and they asserted that no physicians other than the three above were authorized to provide treatment. No filings were made by defendants with the industrial commissioner until January 7, 1985 at which time a first report was received. A prehearing order A filed March 17, 1983 includes among those issues to be heard whether claimant's injury arose out of and in the course of her employment.

The hearing deputy's decision states: "Inasmuch as defendants have admitted claimant sustained an injury arising out of and in the course of employment it would be academic to discuss this matter." This deputy commissioner does not read the answer so broadly and she believes the admission goes only to the laceration of the fingers.

Claimant has the burden of establishing that the treatment she received is causally related to her injury. Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978). Pursuant to Iowa Code section 85.27 it is the employer who selects the care in the first instance; however, if the employer denies the compensability of an injury, it can assert neither that the care was unauthorized nor can it seek to guide the care. Holbert v. Townsend Engineering Co., 32 Biennial Report of the Industrial Commissioner 78, 80 (Review Decision 1975).

At issue herein is treatment claimant received from Drs. Droste, Snyder and Herzberger. Claimant argues that Dr. York ended her treatment. His note does not support that argument. He prescribed Norgesic Forte and instructed her to continue with heat and therapy. Claimant urges that as Dr. York's treatment was not reasonable or adequate to treat her injury, she was justified in making other arrangements particularly in light of her contention that any request to her employer would have been futile. In fact, other than some discussion of treatment by a chiropractor, claimant did not discuss the problems she was having with her medical treatment with her employer.

While this deputy industrial commissioner does not agree with claimant's assertion that she was not being provided with reasonable medical care or that defendants would not have provided additional care had they been asked, claimant might have received benefits because defendants have restricted their admission of liability solely to the fingers. Therefore, they could not control care for her shoulder.

Claimant's dilemma, however, is that she must show that her treatment was causally related to her injury. At the time of her fall, claimant lacerated her right second and third fingers and contused her right upper thigh. When she was seen on February 16, 1981 she complained of her right shoulder. Her condition was diagnosed as a traumatic myositis secondary to sudden stretch or muscle hemorrhage. For nearly the next two months she was treated conservatively through the time she was seen by Dr. York who offended her, returned her to regular duties and attributed most of her problems to an emotional state.

No evidence was presented from Dr. Droste. His bill shows that he was doing spinal adjustments for a period of two months. It was not until June 29, 1981 that claimant saw Dr. Snyder who diagnosed an acute cervical and thoraco-cervical strain. A bill from Tri-State Neurologic Associates carries a diagnosis of cervical syndrome.

Dr. Snyder's report states only that claimant herself related the pain which she had in her forearm and hand to her injury. He describes treatment to her cervical and thoracic areas rather than to the shoulder. He reports an increase in pain when claimant's tension builds. Additionally, Dr. Snyder records a history from 1976 of a "burning feeling radiating through triceps with onset four weeks ago, shoulder and upper back discomfort onset three years ago." The letter reference seemingly was to intolerable aching in the right arm as she was doing manual labor.

Evidence from Dr. Herzberger is somewhat more favorable, but it does not carry claimant's burden. He wrote in a discharge summary that claimant probably has nerve root irritation which possibly could have occurred during her accident. The reference to causation there is only a possibility. In his letter of December 14, 1981 he states that "the violent stretching described by the patient in her history could be the cause" of suggested nerve root irritation.

Claimant has not established that the treatment she received was necessitated by her injury of February 14, 1981. In light of that failure it is unnecessary to discuss claimant's second brief point.

Claimant's final brief point relates to the hearing deputy's failure to award expenses in exhibit 6. On April 6, 1981 Dr. York prescribed Norgesic Forte and only that cost will be allowed. Two prescriptions are in the name of claimant's husband. One is for an antibiotic and the second is for an expectorant. Of the remaining medications one is a sleeping pill, one is a vaginal cream, one is suppositories and the fourth is a pain medication. The sleeping pill and pain medication might have been prescribed for claimant's condition, but there is nothing in the record to show that they were. They were prescribed by Dr. O'Donnell. Claimant has the burden of establishing the charges are related to her injury and that burden she has not carried. Hoover v. Embassy Club, I Iowa Industrial Commissioner Report 151 (1981); Watson v. Hanes Motor Company, I Iowa Industrial Commissioner Report 356 (1980).

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

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

That on February 14, 1981 claimant fell at work lacerating her right second and third fingers and contusing her right upper thigh.

That claimant developed a traumatic myositis.

That after her injury claimant was placed on lighter work.

That defendants provided claimant with medical treatment from Drs. Wulf, O'Donnell, Ives and York.

That claimant sought treatment on her own from Drs. Droste, Snyder and Herzberger.

That claimant has a history of emotional problems.

That claimant had prior shoulder and upper back trouble for which she received treatment from Dr. Snyder.

That defendants have admitted liability for laceration of three [sic] fingers.

That defendants have not admitted responsibility for problems with claimant's shoulder, but they did pay for treatment of that area.

That claimant incurred a drug charge of seventeen and 95/100 dollars ($17.95) for Norgesic Forte prescribed by Dr. York.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant sustained an injury arising out of and in the course of her employment on February 14, 1981.

That claimant has failed to establish entitlement to weekly benefits resulting from her injury.

That other than a drug charge of seventeen and 95/100 dollars ($17.95) claimant has failed to establish entitlement to payment for other medical charges she has incurred.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay Wagner Clinic Pharmacy seventeen and 95/100 dollars ($17.95).

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

Signed and filed this 26 day of July, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY THERESA HUNGATE,	:	
Claimant,	:	
vs.	:	File No. 523727
LEAR-SIGLER, NOBLE DIVISION,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
LIBERTY MUTUAL INSURANCE CO.,	:	FILED
Insurance Carrier, Defendants.	:	AUG 30 1985
		IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant employer appeals from a review-reopening decision filed December 5, 1984 wherein claimant was awarded a running healing period award commencing on February 25, 1982 as a result of an injury sustained on January 15, 1979 arising out of and in the course of his employment with the defendant employer. The record on appeal consists of the hearing transcript; claimant's exhibit 1; defendants' exhibit A; two depositions of John P. Albright, M.D.; and briefs filed by both parties.

ISSUES

The issues on appeal as stated by the defendants are:

1. Whether the Deputy erred in finding that the Claimant had not reached her maximum medical improvement.

2. Whether the Deputy erred in finding that Claimant had carried her burden of proof of entitlement to benefits under §85.34(1).

3. Whether the Deputy erred in finding that the ongoing process of arthritis in a knee joint is sufficient to justify an award of healing period compensation as provided in §85.34(1) of The Code.

4. Whether the medical evidence supports the decision of the Deputy.

REVIEW OF THE EVIDENCE

At the hearing the parties stipulated that any healing period benefits due up to February 24, 1982 had been paid. It was further agreed that permanent partial disability would not be determined at the hearing. A memorandum of agreement had been filed by the parties.

The claimant stated that he was currently under the care of Dr. Albright for treatment of her right knee. She stated that from February 1982 to present about all she could do was housework. In September 1983 claimant underwent further surgery by Dr. Albright. She was fitted with a new brace in December 1983 and experiences no problems when she is wearing the brace.

On cross-examination claimant chronicled her previous surgeries. She had right knee surgery performed by R. H. Miller, M.D., on January 26, 1979. The claimant had right knee surgery performed by Dr. Albright in May 1981 and September 1983. In 1973 she had surgery to her right knee and in 1974 she had surgery to her left knee. She stated that she is presently not taking medication. The last time the claimant saw Dr. Albright was on February 20, 1984. The next previous visit was October 17, 1983.

Dr. Albright, Professor of Orthopaedic Surgery, and board certified in orthopaedic surgery, testified by way of deposition on two different occasions. In the first deposition taken on July 23, 1982 Dr. Albright related claimant's history as including a medical meniscectomy performed by Dr. Miller on January 26, 1979. On May 27, 1981 Dr. Albright performed a partial lateral meniscectomy. At the time of the deposition Dr. Albright had no opinion as to the permanency of claimant's injury.

On July 19, 1983 a second deposition of Dr. Albright was taken. He stated that the last three times he saw the claimant were March 3, 1983; December 2, 1982; and December 17, 1981.

In response to a query as to the reason for such a lengthy recuperation period, Dr. Albright stated:

A. Yes, I think that she has a problem now that she didn't have when she first had her surgeries. That was -- those were done to rid her of any defective part of torn cartilage of the cushion. Once that cushion is gone, then it's almost expected that people will get arthritis. And what we've been seeing with Mary has been the initial states of the development of arthritis, a rusty door hinge type of arthritis.

(Albright #2 Deposition, page 10)

As far as limitations, Dr. Albright stated:

A. Basically she's under no particular restriction other than that she's wearing a new brace to provide her stability to prevent her knee giving out. And the best wasy to describe the limits are on a "to tolerance" basis that she has been instructed to do as much as she can.

Q. So whether she could go horseback riding, play tennis or go to work as a fork lift driver would be pretty much up to her as to how much she could tolerate; is that a fair statement?

A. Yes.

Q. And would that be a fair statement as far back as December of 1981 with respect to your notes at that time?

A. From the time of the surgery up to December of 1981 or thereabouts, it was more of a restriction placed by me in that we're trying to allow her to resurface in the bone.

Q. Okay. And after that December of '81 visit and until you saw her again in December of '82, she would have been on a "to tolerance" basis as far as her activities were concerned?

A. That's correct.

(Albright #2 Dep., pp. 13-14)

Dr. Albright stated that what they were doing for her now was basically treating her for her symptoms. He stated that the claimant does have mild degenerative changes in her knee and that they were available if the claimant needed relief of the symptoms.

As to the permanency of the claimant's condition, Dr. Albright testified:

Q. Okay. Do you have an opinion as to whether or not she's going to have a permanent physical impairment as a result of this injury she had a January of 1979 and for which she's undergone two separate surgeries for?

A. Yes.

Q. And what's your opinion?

A. That she will be facing a permanent medical impairment as a result of the instability and the arthritis state.

Q. And have you had an opportunity to measure or perform an examination in which to measure the extent of that impairment, based on the AMA Guidelines?

A. No.

Q. Is there any reason why that could not be done now as opposed to six months from now?

A. Since she has remained relatively unchanged with regard to the picture that I see, there's no reason.

Q. Okay. So if we could get her back down here in the next month or so, you would be able to perform an examination and give us an opinion as to the extent of impairment she has?

A. Yes.

(Albright #2 Dep., pp. 15-16)

Claimant's exhibit 1 is a letter from Dr. Albright to claimant's counsel dated February 6, 1984. In reference to the September 1983 surgery, Dr. Albright states: "Indeed, the instability that Mary has been noted to have all along is related to the 'aggravation of the pre-existing [sic] condition' which she incurred from injury at work in 1979."

As part of defendants' exhibit A there is a report dated March 3, 1983. It states in part:

> She continues to have a pivot type feeling in her knee when not wearing a brace. But for the most part she has been wearing her Iowa Knee Brace which prevents her from doing this.
>
> IMPRESSION: Continue to have posterolateral instability of the right knee along with low grade synovitis.

A clinical note from September 1, 1983 states in part:

> Mary indicates she has had persistent giving way of the knee although this has decreased somewhat in the brace. She has had locking on several occasions including today in the clinic.
>
> IMPRESSION: The patient was seen and examined with Dr. Albright. We are concerned about Mary's knee as her instability appears to be progressing. The diagnosis for arthroscopy performed earlier indicated anterior cruciate was intact; however, we feel this was in error or that she has injured this at some point since that time. We feel that she has a meniscal tear that should either be excised or repaired. We feel that she should have anterior cruciate reconstruction to prevent the progressive instability and degenerative change. We feel she has anterolateral and posterolateral rotatory instabilities. We feel that in addition to the cruciate reconstruction, she should undergo possibly a Losee procedure and possibly a [sic] ODonohue [sic] posterolateral capsular advancement.

APPLICABLE LAW AND ANALYSIS

Section 85.34(1), Code of Iowa, provides:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

It has been previously held:

> That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond that point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition.

Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982). Dr. Albright stated as much when he testified, "since she has remained relatively unchanged with regard to the picture I see, there's no reason (permanent impairment could not be measured)." (Albright #2 Dep., pp. 15-16)

The Iowa Court of Appeals has recently stated: "It is only at the point at which a disability can be determined that the disability award can be made. Until such time, healing benefits are awarded the injured worker." Thomas v. Knudson, 349 N.W.2d 124, 126 (Iowa App. 1984).

There are several factors supporting a determination that claimant's treatment for a period of time was maintenance. The fact that the claimant was on a "to tolerance" restriction from December 1981 through December 1982. On July 19, 1983 Dr. Albright stated claimant is facing a permanent medical impairment as a result of the instability and arthritic state. On the same date Dr. Albright said he could give the claimant a permanency rating because claimant's condition has remained relatively unchanged. The doctor's general statement that claimant's condition had remained relatively unchanged, taken by itself, cannot be construed to mean that claimant reached maximum recuperation. However, Dr. Albright expressed the opinion on that same date that he could give the claimant an impairment rating. Taking Dr. Albright's statement together with the ability to give an impairment rating if the claimant were available would seem to indicate that the claimant had reached her maximum level of recuperation on July 19, 1983. See Stevens v. Ideal Ready Mix Co., Inc., (Appeal Decision filed April 30, 1985). Therefore, claimant's healing period runs from February 25, 1982 to July 19, 1983.

The analysis now turns to the nature of the September 1983 surgery. An award of interrupted healing period benefits can occur. See Curry v. Rowe Auto Body, IV Iowa Industrial Commissioner Report 87 (1984), and Meier v. Crane Siding and roofing Co., IV Iowa Industrial Commissioner Report 242 (1984).

Immediately preceeding the September 1983 surgery we are faced with a claimant who had reached a plateau where no further improvement was expected and maximum recuperation had occurred in July 1983 with a resultant permanent partial impairment of unknown degree. If the September surgery was merely maintenance with no period of recovery due to the surgery alone then no additional healing period benefits are due. If the surgery was calculated to improve the claimant's condition, to elevate her level of recuperation, then a further healing period award would be forthcoming. A third possibility exists--a surgical procedure which is required because of worsening of the claimant's condition whereby the aim of the surgery is to restore the status quo that existed prior to the need for this surgery. The status quo being the claimant's state of permanent disability prior to the September 1983 surgery. A surgery of this type would be a higher degree of maintenance but maintenance it remains. Such is the claimant's case. On September 1, 1983 claimant indicated to Dr. Albright that she had been experienceing a persistent "giving way" of the knee. It was Dr. Albright's impression:

> We feel that she has a meniscal tear that should either be excised or repaired. We feel that she should have anterior cruciate reconstruction to prevent the progressive instability and degenerative change. We feel she has anterolateral and posterolateral rotatory instabilities. We feel that in addition to the cruciate reconstruction, she should undergo possibly a Losee procedure and possibly a [sic] ODonohue [sic] posterolateral capsular advancement. (emphasis added)

If the surgery does not restore her to the status quo this will be reflected in the permanent impairment rating. The impairment rating should be acquired after the claimant has recovered as much as she will from the September 1983 surgery. The claimant will have a resulting healing period after the September 1983 surgery, however, the duration of that healing period remains unknown and there has been no evidence presented to allow determination. It is anticipated that this will not be a long drawn out process. As was indicated by claimant's exhibit 1 this surgery is related to the claimant's work injury. Therefore, the defendants will be liable for the costs of the surgery and attendant costs including transportation, physical therapy, and medication.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on January 15, 1979.

2. Claimant hurt her right knee at work on January 15, 1979.

3. Defendants filed a memorandum of agreement concerning a January 14, 1979 injury on June 4, 1979.

4. The rate of compensation is $133.14 per week.

5. The parties stipulated that the claimant was paid all healing period due her through February 24, 1982.

6. The injury to claimant's knee is permanent.

7. On July 19, 1983 claimant reached her maximum level of recuperation.

8. On July 19, 1983 Dr. Albright could give the claimant an impairment rating if the claimant were present.

9. Prior to July 19, 1983 claimant's condition had been unchanged.

10. Claimant is not capable of returning to employment substantially similar to the employment which she was engaged at the time of injury.

11. On July 19, 1983 claimant's healing period ceased.

12. Claimant underwent surgery in September of 1983.

13. Said surgery was necessitated by a deterioration of claimant's already impaired condition.

14. As such claimant's September 1983 surgery was maintenance in nature designed to preserve claimant's condition prior to the time her condition deteriorated.

15. The surgery of September 1983 is a result of a compensable injury.

16. Claimant's healing period ran from February 25, 1982 through July 19, 1983.

17. There will be a healing period corresponding to the September 1983 surgery of (at this time) unknown duration.

CONCLUSIONS OF LAW

Claimant sustained an injury arising out of and in the course of her employment on January 15, 1979, said injury being in the nature of an aggravation of a preexisting condition.

Defendants will be ordered to pay unto claimant healing period compensation commencing on February 25, 1982 and ending on July 19, 1983.

Claimant will be paid compensation at the rate of $133.14 per week.

Claimant's medical costs associated with the September 1983 surgery are to be paid by the defendants.

THEREFORE, the deputy's decision is modified and the matter is remanded for a determination of permanent partial disability in a manner consistent with this opinion.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant healing period compensation at the rate of one hundred thirty-three and 14/100 dollars ($133.14) per week commencing on February 25, 1982 and ending on July 19, 1983.

That if not already paid, defendants pay claimant's medical expenses relating to the September of 1983 surgery.

That any credit defendants have as a result of this decision will be applied to claimant's disability payments which will be determined at a later date.

That the costs of this proceeding are taxed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

That interest will accrue on this award from the date this decision is rendered pursuant to section 85.30, Code of Iowa.

That this matter is remanded back into the assignment for a determination of permanent partial disability and healing period benefits due as a result of the September 1983 surgery.

Signed and filed this 30 day of August, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY JACOBSON, Claimant, vs. DUBUQUE INSULATION, Employer, and ARGONAUT INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 716701 ARBITRATION DECISION

FILED
AUG 22 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Larry A. Jacobson, against his employer, Dubuque Insulation and Siding Co., and its insurance carrier, Argonaut Insurance Companies, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained September 23, 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Dubuque, Iowa, April 30, 1985. 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 October 28, 1982.

The record in this case consists of the testimony of claimant; of claimant's wife, Jeannette Jacobson; of Douglas Nelson; and of Jim Burch.

ISSUES

The issues for resolution are:

1) Whether claimant received an injury which arose out of and in the course of claimant's employment;

2) Whether a causal relationship exists between claimant's alleged injury and claimant's disability;

3) Whether claimant is entitled to benefits and the nature and extent of any such entitlement; and

4) Whether claimant is entitled to payment of certain medical costs.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's medical costs were fair and reasonable and stated that the issue as regards to healing period is confined to whether claimant should receive healing period benefits from August 7, 1983 through February 22, 1984. The parties also stipulated that claimant's rate of weekly compensation is $197.05.

Claimant, Larry Jacobson, testified in his own behalf. Claimant is 46 years old and a high school graduate. Claimant has also attended two semesters of college at the University of Wisconsin Platteville where he took industrial arts and general college courses. Claimant indicated that he only earned nine credit hours during that time since he failed his general courses. Claimant explained that he first worked for Dubuque Insulation and Siding Co. in 1969 and left in 1974 to run his own siding subcontracting business. When it failed, he returned to work for Dubuque Insulation and Siding Co. in 1976 and worked there until his injury date.

Claimant reported that on his injury date, his foreman requested that he lift derby gun rolls weighing approximately 90 pounds over a three and one-half foot retaining wall. Claimant indicated that he lifted at least six but less than twelve of these and that he was in pain when he left for lunch. Claimant reported that by the afternoon he felt terrible and left work. Claimant stated that even before this incident he generally felt constant pain, but "this time just had an ache" and "knew [he] had done more." Claimant self-treated at home during the weekend and returned to work the following week. He reported that he continued to have pain, especially when standing on a ladder and that the pain began to shoot down into his leg.

Claimant saw Edward Staver, D.C., on October 5, 1982 and has not since returned to work as an insulation sider. Claimant's chiropractic treatment was later transferred to Daniel S. Haines, D.C. Claimant received chiropractic back adjustments, used a home orthopod unit, and wore lifts in his shoes. He reported that his shooting leg pain was eliminated in approximately six weeks and that his degree of discomfort is lessened by position changes. He indicated that bending and stooping maneuvers continue to be a problem, however. Claimant characterized his current low back pain as a "good dull pain" which is like a "shiver."

Claimant reported that he counseled with Douglas Nelson regarding vocational rehabilitation. Mr. Nelson assisted him in receiving retraining with Dubuque Insulation and Siding Co. through the Job Training Partnership Act as a siding representative for the company. Claimant has worked as a representative for the company since completing a 26 week training program on August 25, 1984. Claimant reported that he earned between $14,000 and $16,000 in the years 1978 through 1981 while working as a sider for Dubuque Insulation and Siding Co. and received benefits such as health insurance and vacation and holiday pay. Claimant indicated that he receives no benefits as a sales representative, but conceded that all of Dubuque Insulation and Siding Co.'s benefit programs were eliminated after 1982. Claimant reported that he received a gross sales income of $13,200 in 1984 and had $1,700 of food and lodging expenses and $3,500 of transportation expenses resulting in an $8,000 net sales income. Claimant indicated that although he lives in Dubuque, he works primarily in Dodgeville, Wisconsin, which is approximately fifty miles from Dubuque. He reported that he has traveled approximately 18,000 miles with his own car since beginning sales work and that he receives a draw of $300 per week from which he nets $240 after removing his travel, lodging and meal expenses. Prior to his injury, his average weekly wage was approximately $306 per week. Claimant works approximately 60 to 70 hours per week in sales. Claimant indicated that he hopes to make between $14,000 and $15,000 gross as a salesperson this year. Claimant apparently must also pay his coworker, Maurice Hermanson, a one percent courtesy fee from that amount. Claimant agreed that he is now the leading sales representative for Dubuque Insulation and Siding Co.

Claimant indicated that he must stop and stretch after driving approximately half way from Dubuque to Dodgeville. He reported that he remains president of his bowling league, but rarely bowls and that he has changed from a ten pound to a sixteen pound ball since his injury.

Claimant agreed that he had had back problems prior to his injury date and that in January 1981 was off work three days after he fell on ice on his steps. He reported having back and leg pain then from overexertion.

Jeannette Jacobson, claimant's wife, corroborated his testimony as regards his injury and its physical effects.

Douglas Donar testified in claimant's behalf. The witness identified himself as claimant's work partner with Dubuque Insulation and Siding Co. from early 1978 through December 1980. He indicated that claimant had been a very productive siding worker and had then not appeared to have back problem.

Maurice Hermanson, claimant's sales coworker, testified that claimant has constant back problems which manifest themselves when he drives, stoops or bends, and make claimant tire easily. Claimant apparently stays at the witness' home in Dodgeville on Wednesday evenings.

Douglas Nelson, a vocational rehabilitation specialist with North Central Rehabilitation, testified in defendants' behalf. The witness reported that claimant's aptitude testing had indicated that he had a high aptitude for sales. The witness then contacted Dubuque Insulation and Siding Co. to explore the possibility of retraining claimant for a sales position with the company under the Job Partnership Retraining Act. He indicated that the company had been agreeable and that claimant had entered the job retraining program February 27, 1984 and completed it on August 5, 1984 when he became a full-time Dubuque Insulation and Siding Co. sales employee. The witness indicated that he had maintained contact with claimant and felt claimant was appropriately adjusting to his new occupation. The witness had received neither complaints from Dubuque Insulation and Siding Co. nor from the Partnership Act as regards claimant's performance. The witness characterized claimant as an extremely cooperative client who had pursued rehabilitation with great vigor and who had returned to an employment where he was able to earn an income equal to his preinjury income in a vocational area where he could continue to work much longer than he could have worked as a sider. The witness opined that claimant's income will increase with Dubuque Insulation and Siding Co. as he gains further knowledge and experience with the company.

On cross-examination, the witness agreed that most retail sales jobs are on an hourly or commission basis and that he is not familiar with the home improvement market within fifty miles of Dubuque.

Jim Burch, purchasing and personnel director for Dubuque Insulation and Siding Co., testified for defendants. The witness identified defendants' exhibit 3 as his projections of claimant's income in 1985. The witness stated that he is familiar with the earning records of Dubuque Insulation and Siding Co. sales representatives and that sales representatives generally earn commissions of 10 to 14 percent of the sale. He explained that a sales representative's commission income is decreased by two percent with every five percent discount which the sales representative gives a customer. A discount of more than 40 percent results in no commission. The witness indicated that newer representatives earn less commission because they have not mastered the art of competitive selling, that is, demonstrating their product is a superior product for which buyers should be willing to pay a greater cost. He indicated that January, February and March are not good insulation and siding sales months, but that he had projected claimant's income for those months at a ten percent commission. The witness then admitted that claimant was earning eight percent commissions in his first months after training, but that his commission percentage has increased as he has become more aware of how to figure items. The witness indicated that the medium income of Dubuque Insulation and Siding Co. sellers is about $18,000 and that representatives with greater experience should earn a greater income. The witness reported that his commission figures take into account telephone commissions and courtesy commission costs as well. He reported that commissions are only drawn when jobs are completed and costed, and that where work in process is cancelled, no commission is earned or reflected. The witness characterized claimant as a good employee of whom the company thinks well, and who has given the sales job "his best shot."

Claimant's exhibits 5a and 5b are correspondence between E. G. Staver, D.C., and the Argunaut Insurance Companies. In a letter to the company, the doctor opines that claimant's only permanency is spondylolisthesis. The doctor opines as of July 5, 1983 that claimant is ready to seek some form of employment which involves very minimal or no lifting, bending or kneeling.

Claimant's exhibits 7, 8, 9, and 11 relate to claimant's treatment by Daniel S. Haines, D.C. Exhibit 9 is a deposition of the doctor taken April 2, 1983. The doctor indicated that he has practiced chiropractic for approximately three and one-half years and that he first saw claimant on October 17, 1983 after claimant had treated from October 5, 1982 with Dr. Staver. The doctor indicated that claimant gave a history of a work history substantially similar to that claimant gave at hearing and also reported claimant's injury in 1980 when he slipped on the ice and landed on his buttocks. The doctor opined that claimant's work injury activated his previously asymptomatic spondylolisthesis at L4 and 5 and reported that treatment to restore normal mobility at L4 and 5 along with exercises to strengthen and stabilize the muscles surrounding that innerspace was implemented. The doctor indicated that the treatment relieved claimant's symptoms, but did not eliminate his underlying spondylolisthesis. The doctor released claimant to work on January 13, 1984 with restrictions on repeated lifting of over twenty pounds or repeated bending or twisting, but stated that claimant did not improve maximumly until February 22, 1984. The doctor assigned claimant a body as a whole impairment rating of 20 percent under the AMA Guides. He agreed that rating is only appropriate for a preexisting spondylolisthesis when the condition was aggravated with persistent muscle spasm, rigidity, and pain from trauma. The doctor did not know whether claimant had those symptoms when he last saw claimant, apparently on October 8, 1984. The doctor subsequently agreed that claimant had had muscle spasm, pain, and rigidity on all visits where these were measured, however.

Claimant's exhibits 3, 4 and 6 are the deposition and medical reports of Scott C. McCuskey, M.D. Claimant's exhibit 3 is the deposition of the doctor taken April 2, 1985. In his deposition, the doctor identified himself as a board certified orthopedic surgeon who graduated from medical school in 1971 and has practiced in Dubuque for approximately seven years. The doctor reported that he first saw claimant on February 10, 1983 on referral from Dr. Staver and that, on examination, claimant had tenderness across the low back and, on forward flexion, appeared to have a palpable defect at L4, 5. Claimant had reasonably good bending left and right, good strength in both ankle and toe dorsiflexes, was able to heel and toe walk well, had good straight leg raising and symmetric knee and ankle jerks. Claimant had no sensory deficit nor other objective evidence of permanent nerve damage. X-rays demonstrated a spondylolisthesis at L4, 5 with ten percent forward slippage. The doctor indicated that this slippage was essentially that found in films of July 1981 when Dr. Piasecki treated claimant for a back problem. The doctor recommended that claimant not lift weights of greater than sixty pounds and avoid repeated bending and stooping, but otherwise attempt to return to work. The doctor indicated that he next saw claimant on October 23, 1984 for the purpose of obtaining a history and physical in preparing a back evaluation. The doctor reported that claimant appeared to have more of a permanent problem and had not achieved any real improvement from his previous visit. The doctor stated that based on the restriction of motion found, x-ray changes demonstrating spondylolisthesis of the first degree, and claimant's current back symptoms, he assigned claimant a 20 percent whole man physical impairment rating under the manual of the American Academy of Orthopedic Surgeons or the second edition of the AMA Guides. The doctor stated that he did not have an opinion as to what part of the impairment rating was caused by claimant's work injury and that he could not assess what impairment claimant might have had when Dr. Piasecki saw him, apparently, on July 23, 1981. The doctor indicated that claimant did not have muscle spasm on either examination, but did have limitation of motion or less back flexibility when evaluated in 1984. The doctor reported that claimant's chiropractic treatment history indicates claimant has had muscle spasm. The doctor felt claimant's restrictions were permanent in October 1984, but agreed permanency normally would be reached approximately a year after injury even though he has not seen claimant from February 1983 to October 1984. The doctor further agreed that claimant's history did not indicate that claimant had improved by September 1983, however.

The doctor agreed that grade one spondylolisthesis may remain asymptomatic until made symptomatic by an injury which aggravates weaknesses in the soft tissue surrounding the spondylolisthesis. He opined that claimant's history of occasional back flareups but not continued pain before his accident of September 23, 1982 and his continued back pain from the accident onward indicate that injury resulted in claimant's current symptoms. The doctor recommended claimant not lift in excess of sixty pounds and not stand, stoop or bend repeatedly. The doctor reported that he did not agree with the radiologist's assessment contained in deposition exhibit 1. Deposition exhibit 1 is a report of S. Chi, M.D., Diagnostic Radiologist. The report states that the findings demonstrate a "delinited" [sic] progression of the grade one spondylolisthesis at L4, 5 and jagged appearance and motion at this level without significant sclerosis which suggests the process is more traumatic rather than congenital in origin.

In his October 23, 1984 report, the doctor states that on examination, claimant had tenderness across the lumbar area without any radiation down the leg; lateral bending to the left was 25 degrees and to the right 30 degrees; forward flexion 58 degrees, extension 22 degrees; rotation left and right was complete at 30 degrees; and claimant had full straight leg raising with +2 and symmetric knee and ankle jerks. He had good strength in both lower extremities and in the ankle and toe dorsiflexors. No sensory deficits were demonstrated. The doctor stated that as claimant has not had documented radiculopathy or radiculitis, he is unlikely to require a fusion although either pain relief or nerve protection may make fusion necessary.

Defendants' exhibit 1 is medical reports of Martin F. Roach, M.D. In a note of February 18, 1985, the doctor agrees with the diagnosis of grade one spondylolisthesis L4-5 and states there is no associated neurologic deficit or radiculopathy. He opines that claimant's condition is stable and that his sedentary job as a sales representative is satisfactory, but states that he would not recommend claimant lift more than 30 to 40 pounds. The doctor states that claimant's injury aggravated the spondylolisthesis and that maybe one or two percent of his "disability" relates to that incident while the rest relates to his spondylolisthesis. Attached to Dr. Roach's records is a medical report of A. J. Piasecki, M.D., of March 13, 1980. The report notes that claimant slipped, fell, and twisted his back while walking on a slight slope the day before. Also, that claimant had slipped in a similar manner approximately two weeks earlier and had some backache at that time, but that neither episode prevented his working. On examination, claimant could walk on his toes and heels well, could flex his back to bring his fingertips to his ankles, had slightly restricted back motions and could not touch his toes but reported he had not been able to do so for many years. Straight leg raising was 85 degrees bilaterally, tendon reflexes, muscle power and skin sensation in the lower extremities were normal. The diagnosis was back strain with associated spondylolisthesis, grade one, of L4-5. A note of Dr. Piasecki of July 23, 1981 states claimant was seen for low back pain and that his symptoms worsen when he does heavy work.

Claimant's exhibit 10 is claimant's sales account records from March 17, 1984 through April 13, 1985. As of December 29, 1984, claimant's 1984 sales to date were $48,580.09. His 1985 sales to date were $43,358.19 as of April 13, 1985.

Defendants' exhibit 3 is the projection of claimant's sales earnings in 1985. Claimant had sales earnings of $38,288 in the first quarter of 1985. Extended to an annual basis, these equal sales of $153,000. The reporter stated that figure should result in 1985 earnings of $15,300 with commission of ten percent. He states evening sales and quota bonuses claimant earned in the seven months considered would average $153 per month, bringing his annual [gross] income to $17,136.

Claimant's exhibit 1 is claimant's high school transcript. This indicates that claimant was a C and D student who occasionally earned B's in his industrial arts courses.

Defendants' exhibit 2 is the professional resume of Douglas L. Nelson indicating that he has a Master of Science in vocational rehabilitation and a Bachelor of Arts in psychology as well as twelve years of work experience in the rehabilitation field.

Claimant's exhibit 2 is statements of medical costs and for costs for medical reports and depositions sought by claimant. At hearing the parties stipulated that the cost of claimant's chiropractic care has been paid. Remaining unpaid medical costs are those of Dr. McCuskey of Medical Associates and of Diagnostic Radiology.

APPLICABLE LAW AND ANALYSIS

Our first concerns are whether claimant received an injury which arose out of and in th ecourse of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on September 23, 1982 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

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.

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 had a preexisting spondylolisthesis confirmed on x-rays taken when Dr. Piasecki treated him for back pain on July 23, 1981. Claimant, himself, stated he had persistent, dull back pain prior to his alleged work incident. Nevertheless, claimant worked as a manual laborer and needed only infrequent medical or chiropractic back care prior to September 23, 1982. He has needed substantial chiropractic care and has been unable to return to manual work since then. Those facts suggest that claimant's work exertion in lifting derby gun rolls so traumatized claimant's body as to result in a personal injury as contemplated by our law which arose out of and in the course of his employment. The related question of whether claimant's current disability relates to that injury or to his preexisting spondylolisthesis is next considered.

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

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.

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.

As noted above, claimant's preexisting problem was not altogether asymptomatic prior to September 23, 1982. Claimant had sought care for prior back problems. That care generally appears to have resulted from specific, reported incidents of minor trauma. Drs. Roach, McCuskey and Haines all opined that claimant's work incident activated or aggravated his preexisting condition thereby creating his current level of discomfort or disability. Dr. Roach opines that only a small percentage of claimant's current disability relates to his work incident and that the remainder relates to his previously largely latent spondylolisthesis, however. Nevertheless, claimant's preinjury pain had always resolved sufficiently that he could return to manual work and engage in other life activities without serious, persistent difficulties. Claimant and his lay witnesses testified his condition and his work and life activities changed substantially after his work injury. This suggests that injury seriously aggravated claimant's first degree spondylolisthesis. Therefore, Dr. McCuskey's view that claimant's current symptoms and the resulting disability relate to his work injury is given greater weight than Dr. Roach's view that claimant's disability largely results from the spondylolisthesis itself, especially in light of Dr. McCuskey's testimony that it is not uncommon for a spondylolisthesis to remain asymptomatic until made symtomatic through traumatic damage to surrounding tissue. Claimant has established the requisite causal relationship between his work injury and his disability.

Claimant's unpaid medical costs with Independent Diagnostic Radiologists, P.C., and for Dr. McCuskey's October 19, 1984 disability exam are medical costs related to claimant's compensable injury for which he is entitled to payment under section 85.27. Costs for reports supplied counsel are not compensable medical costs under the section but are proceeding costs.

Our last concern is claimant's benefit entitlement.

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

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 impairment 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.

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.

Claimant is a 46 years old high school graduate with minimal college training who has a 20 percent permanent partial impairment rating. Various physicians restrict him from lifting greater than 30 to 60 pounds as well as from twisting, bending, stooping and like maneuvers. Claimant cannot return to the siding and insulation work which he had performed for most of his adult life. Claimant has been more fortunate than many injured workers in that his employer has made commendable efforts to retrain and reemploy him in work he can perform with his physical restrictions and at which he potentially will earn a gross income somewhat commiserate with that which he earned as a company laborer. Claimant, himself, is highly motivated and has energetically pursued his new job as a sales representative for Dubuque Insulation and Siding Co. Testimony establishes, however, that while claimant is the company's current top sales representative, he experiences discomfort which curtails his level of sales activities. Despite this, claimant devotes 60 to 70 hours per week to his sales efforts. Further, claimant travels some 50 miles from his home and remains overnight to pursue his sales work. This is a personal inconvenience and nonreimbursed work expense for claimant. Claimant may well need to continue this business lifestyle if he is to develop and maintain his sales income. Industrial disability should reflect the real difference in effort, cost and convenience needed to secure a like income. In claimant's case that difference is balanced in part by defendants' willingness to retrain and reemploy claiamant and claimant's real level of additional income earning skills as a result of those efforts. When both are considered, claimant is found to have sustained an industrial disability of 20 percent. [It is noted that claimant's industrial disability parallels his functional impairment rating. That is a coincidental finding. Industrial disability may equal, exceed or be less than functional impairment in any given case. The proper approach is always to weigh all factors relevant to industrial disability. Claimant's industrial disability was ascertained through doing so.]

We next address the question of whether claimant is entitled to healing period benefits from August 7, 1983 through February 22, 1984. Section 85.34(1) provides:

> Healing Period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Claimant has not returned to the same or substantially similar work. Dr. Haines, his treating chiropractor, has opined claimant did not improve maximally until February 22, 1984. This is the only concrete evidence of termination of healing period contained in the records. Remarks of Dr. McCuskey as to when healing period would normally terminate are speculative and not related to the doctor's actual experience with claimant. Those remarks will not be given weight equal to that given claimant's treating chiropractor's opinion. Claimant is entitled to additional healing period benefits from August 7, 1983 through February 22, 1984.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained an injury to his back September 23, 1982 when he lifted derby gun rolls for his employer, Dubuque Insulation and Siding Co.

Claimant had a largely asymptomatic preexisting spondylolisthesis at L4, 5 and had sought occasional medical treatment for back pain.

Claimant had worked as a manual laborer and engaged in active life activities prior to his injury without serious difficulties.

Claimant has not returned to manual labor since his injury and is medically unable to do so.

Claimant has had to modify various life activities since his injury.

Claimant's spondylolisthesis has not been wholly asymptomatic since his injury.

Spondylolisthesis may remain aysmptomatic until trauma to surrounding soft tissue produces symptoms.

Claimant's injury activated or aggravated his previously asymptomatic condition.

Claimant reached maximum medical healing February 22, 1984.

Claimant's medical costs with Independent Diagnostic Radiologists, P.C., and for disability examinations by Dr. McCuskey relate to his compensable injury.

Claimant is 46 years old and a high school graduate with minimal college training.

Claimant has a permanent partial impairment rating of twenty percent (20%).

Claimant may not return to manual labor.

Claimant may not lift greater than thirty to sixty pounds.

Claimant has returned to work for the employer as a sales representative.

His employer cooperated in his rehabilitation for this job.

Claimant is highly motivated and has worked energetically at his sales position despite the physical discomfort, additional cost, and personal inconvenience it entails.

Claimant may eventually earn a gross income commiserate with his preinjury income.

Claimant has a loss of earning capacity of twenty percent (20%).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury of September 23, 1982 which arose out of and in the course of his employment.

Claimant has established a causal relationship between that injury and his disability.

Claimant is entitled to payment of medical costs of Independent Diagnostic Radiologist, Inc., and for disability examinations of Dr. McCluskey.

Claimant is entitled to permanent partial disability resulting from his injury of twenty percent (20%).

Claimant is entitled to additional healing period benefits from August 7, 1983 through February 22,1984.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for one hundred (100) weeks at the rate of one hundred ninety-seven and 05/100 dollars ($197.05).

Defendants pay claimant additional healing period benefits at the rate of one hundred ninety-seven and 05/100 dollars ($197.05) for the period of August 7, 1983 through February 22, 1984.

Defendants pay accrued amounts in a lump sum.

Defendants pay claimant the following medical costs:

Independent Diagnostic Radiologists, P.C.	$310.00
Dr. McCuskey	92.00

Defendants pay interest pursuant to section 85.30.

Defendants pay costs of this proceeding.

Defendants file claim activity reports as requested by the agency.

Signed and filed this 22nd day of August, 1985.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

The claimant did not return to Dr. Baker, but went through the phone book to find an orthopedist, settling upon John R. Walker, M.D., of Orthopaedic Specialists in Waterloo. The claimant made and kept an appointment for December 21, 1981 with Dr. Walker. Dr. Walker wanted the name of someone he could contact to verify that the claimant had indeed been injured on the job and to get permission from the defendants for him to see the claimant. On December 21, 1981 Dr. Walker took a history and examined the claimant. At the time he saw Dr. Walker he had neither seen an attorney nor had reason to retain one.

The claimant thought that he received maybe one payment of workers' compensation benefits. The claimant stated that the problem seeking benefits through the university was some kind of mix up through the personnel department. The claimant, at that time, was merely put on sick leave. Having 90 days of sick leave built up, the claimant was using that as his source of income.

Due to these problems he retained his parent's attorney, Mr. Redfern. Mr. Redfern transferred the case to his son. The claimant became dissatisfied with Mr. Redfern as his attorney and discontinued his services. The claimant came into contact with Mr. Walker, claimant's present counsel, after hearing about him from fellow workers.

The claimant did not see any physician other than Dr. Walker regarding his back and neck condition from the period December 14, 1981 to April 1, 1982. Neither Mr. Andrews nor anyone else at the university ever asked him to submit to an independent medical examination. Claimant's workers' compensation benefits were brought up to date for the period December 14, 1981 through February 25, 1982, at which time he began receiving bi-weekly payments until April 8, 1982.

On or around April 1, 1982 the claimant received a letter from Mr. Andrews indicating that his benefits would be terminated in 30 days. The claimant stated that the last workers' compensation check he received was on the 7th or 8th of April. The claimant received no explanation as to why his benefits were cut off sooner than indicated in the letter.

As to present medical complaints, the claimant has pain down his legs, trouble sleeping, and an inability to walk for extended periods of time. He avoids lifting and when he has to bend, bends with his knees. Sitting for more than 45 minutes to an hour causes the claimant's back to bother him.

At the time of the hearing claimant lived in the country. He stated that he was trying to sell his home because he is unable to care for the lawn and other things. The claimant was looking for an apartment where these things would be taken care of for him.

The claimant is currently enrolled in a health care administration course at Des Moines Area Community College. He has incurred all the costs of the program himself.

During the hearing there arose some question as to which of the medical bills had been paid by claimant and which bills had been paid by defendant employer. The deputy ruled:

> That will have to be done before we can award any benefits here, because under 85.27 Claimant may only be compensated for those amounts he actually paid out of his own pocket or actually liable for, so if we make a finding that 85.27 benefits are in order, I will order you gentlemen to stipulate as to those amounts that the Claimant ought to be compensated for as well as to those amounts that the University will be liable for that are yet unpaid.

(Tr., p. 40)

The claimant stated that subsequent to the injury of December 9, 1981 his diabetic condition has been "out of control." His blood sugar levels have varied greatly. The claimant stated that his blood sugars have been as low as 30 and 40 and as high as 400 to 500. The claimant testified that "a normal blood sugar is between 100 and between 80 and 100, 120." Prior to the accident his blood sugars ranged at an average "between 70 and/or 80 to 180."

On cross-examination the claimant testified that Dr. Baker authorized him to return to work on December 14, 1981. The claimant did return to work on the 14th. Claimant admitted that his understanding of the authorization given by Daryl Stoner on December 21, 1981 was that the authorization given was for examination, treatment, "and do whatever they had to."

The claimant admitted that the university has notified him of the possibility of a clerical/typist position available if he could pass a typing test. The claimant stated that typing might be troublesome for him in that as part of measuring his blood sugars level he is required to prick his fingers with a pin as many as four times a day.

The claimant believed that the beginning wage in health care administration was around $14,000. The high end in Iowa, the claimant said, "might be $20,000, maybe $25,000."

The claimant called Paul Hansen to testify on his behalf. Mr. Hansen is the president of AFSCME Local 2659. In his capacity as union president he has had opportunity to assist employees with various problems with the university. Mr. Hansen was aware of the policies and procedures with respect to injuries on the job. The witness testified that in the event that an employee is injured while on the job, that employee has a right to select a doctor.

Marian S. Jacobs, a vocational consultant, was called to testify regarding her report on claimant. Jacobs' report is discussed later in this review.

The defense elicited an offer of proof by calling claimant's counsel to testify. The offer of proof was necessary, according to defense counsel to show any bias or prejudice on the part of Dr. Walker, father of claimant's counsel.

Claimant's exhibit A is a collection of various medical reports and assorted correspondences. All claimant's exhibits hereinafter referred to are contained in claimant's exhibit A. Exhibit B is a medical report from Dr. Baker. In that report it is stated that the claimant can return to work on December 14, 1981. The x-ray diagnosis states: "no fracture, contusion, back sprain." Exhibit C is a medical report dated March 26, 1982 by Dr. Walker. As part of the doctor's objective findings it states: "Chronic sprain at L-1 and to some extent L-1 through L-4 and L-5. Sprain of cervical spine." Exhibit D-1 is a letter addressed to the defendants from Dr. Walker dated December 21, 1981. The letter includes an opinion which states:

> OPINION: The patient has a chronic sprain at L-1 and to some extent down the entire, low, lumbar spine from L-1 on down through L-4 and L-5. Secondly; he has a sprain of the cervical spine with headaches. Thirdly; he appears to have some sprain between the scapulae, namely at T-3 and T-4. I have ordered some Soma for this man to be taken q.i.d., which is a muscle relaxant and an anti-inflammatory drug. I also think that the patient should definitely get some traction and physical therapy for his back, particularly in the lumbar and cervical spine regions and the upper dorsal spine area. We will try to get some of these things done and we will also fit him with a lumbosacral corset and try to get some therapy started. We will see him in a few weeks.
>
> At this time the prognosis must be guarded.

Exhibit D-2 is a letter from Dr. Walker dated March 31, 1982 to claimant's counsel which reads in part: "Another complicating factor of course, is a diabetic problem, which in my opinion seems to have been aggravated by this whole situation,...Mr. Jensen will not be returning to any type of work...." Exhibit D-3 is a letter from Dr. Walker to Disability Determination Services dated August 31, 1982 stating that the claimant has a chronic sprain of the lumbar spine, a cervical spine sprain and a possible cervical disc with a severe sprain of the dorsal spine. Exhibit D-4 is a letter dated December 29, 1982 from Dr. Walker to claimant's counsel rating the claimant's permanent partial impairment "in the realm" of 28 percent to the body as a whole, excluding the diabetes. Exhibit D-6 again is a letter from Dr. Walker to claimant's counsel dated March 31, 1983. Dr. Walker, in this letter, states that the fact that the claimant is a "brittle diabetic" will be reflected in a higher award for the claimant. Exhibit D-7 is a doctor's release form dated June 27, 1983 and signed by Dr. Walker. There is no date supplied indicating when the claimant can return to work, nor is there a date supplied which would indicate when the claimant reached maximum recovery. Exhibit D-8 is a letter dated March 7, 1984 from Dr. Walker to claimant's counsel. It reads in part:

> Basically on June 27th, 1983 I indicated that he could stand for some two hours a day with some sitting in between and sitting three hours a day with a change of position every ten minutes allowed. He can lift and carry maybe 10 minutes, walking on grass twenty minutes a day, concrete forty minutes a day, stooping one hour a day. This was all waist level lifting and carrying and certainly not from the floor level. All-in-all the patient is not in any shape to handle a carpenter's job....All-in-all I cannot okay him to go back to his regular job.

Exhibit E is a discharge summary dated April 7, 1982 from St. Francis Hospital signed by Dr. Walker. It states in part: "He is discharged improved but far from well and completely disabled at this time."

Exhibit F dated September 10, 1982 is a letter from Philip E. Rohrbaugh, M.D., to Disability Determination Services. It states in part: "I believe it is unlikely that the patient will be able to tolerate activities such as bending, lifting, climbing, stooping in the future."

Exhibit G-1 is a clinical summary prepared by Robert C. Hardin, M.D., dated March 18, 1981. The summary discusses claimant's diabetes. Exhibit G-2 is a letter from Dr. Hardin to claimant's family physician, R. N. Bremner, M.D., discussing claimant's diabetes. The letter, dated June 11, 1981, states that the claimant has blood sugars in the 180 range with rare levels up to 240. It further states that claimant is doing quite well. Exhibit G-3 is a letter from Joseph D. Brown, M.D., to Dr. Bremner dated October 1, 1981 regarding claimant's diabetes. It reads in part: "He was advised to restart his insulin at 18 units of NPH q. AM, but he did not." Exhibit G-4 is a letter from Robert S. Bar, M.D., to Dr. Bremner regarding claimant's diabetes. The letter dated November 12, 1981 states in part, "[h]is sugars have been running in 180's post-prandially with an occasional 240 on chemstrip checks." Exhibit G-5, a letter to Dr. Walker dated April 20, 1982 from Ian M. Smith, M.D., states that the claimant's blood sugars were "mostly in the range of 180-240." Exhibit G-6, a clinical summary prepared by Dr. Hardin on July 23, 1982 states in part: "His p.m. blood glucose levels have usually been around 240....Eric's diabetes could be much better controlled if he would monitor his blood glucose with Chem Strips q.i.d. He should continue on his current dosage of Insulin and use Chem Strips q.i.d." Exhibit G-7 is a letter from Dr. Hardin to Dr. Bremner dated September 14, 1982. It states in part; "He [claimant] is currently on 30 units NPH and 3 units regular q.a.m. with blood sugars running between 70 to 240." Exhibit G-8 is again a letter from Dr. Hardin to Dr. Bremner dated March 9, 1983. The letter states that claimant checks his sugars infrequently. Exhibit G-9 dated March 11, 1983 is a letter from Dr. Hardin to Dr. Walker. It states in relevant part:

> As you will see, our attempts to achieve good self-monitoring and a stable insulin regimen have been largely unsuccessful. He tends to regulate his diabetes by how he feels rather than by objective evidence and he seems to prefer the simplest (i.e. the fewest shots) insulin regimen possible. Lately he has gone to two doses of insulin daily and, from what evidence we have, seems to be doing all right.

Exhibit H is a letter from Leslie E. Smith for Dr. Bremner dated July 15, 1983 to Marian S. Jacobs. The letter states in part:

> 2) It is difficult to accuratly [sic] answer the question regarding worsening of his diabetic condition from inactivity. As I mentioned, he has needed increasing amounts of insulin, but insulin levels alone are not accurate assessment of the state of one's diabetic condition. It would be accurate to say that his blood sugars have been more difficult to control during this period when he has been not working. I do not really know how to answer the emotion effects of his injury and its relationship to his diabetes.

Exhibit I is the same as defendants' exhibit 3 and will be addressed later in this review. Exhibit J-1 is the curriculum vitae of Marian S. Jacobs. It is noticed in exhibit J-1 that the vitae lists extensive honors and work experience that Jacobs possesses. Exhibit J-2 is Jacobs' disability report on the claimant. Relevant portions of that report are set out below:

> A. Pre-injury Earning Capacity:
> Mr. Jensen was earning $17,195.00 per year ($8.27 per hour) as a union journeyman carpenter at UNI. His total University compensation package amounted to $21,095.00 per year. If he were still working today at that job his pay rate would be approximately $8.93 per hour ($18,571.00 per year, excluding fringe benefits.)
>
> B. Post-injury Earning Capacity:
> 1. <u>Without retraining and within Dr. Walker's limitations</u>:
> Given Dr. Walker's limitations and without retraining and marketable skills, Mr. Jensen, in my opinion, can expect to earn a minimum of $3,484.00 per year (in a part-time, minimum wage job) and a maximum of approximately $9,880.00 per year (full-time job at $4.75 per hour). Thus, his projected post-injury earnings without retraining and within limits prescribed by Dr. Walker, would be significantly reduced (from 47% to 81%). Without job security, fringe benefits and advancement opportunities that accrue to Mr. Jensen as a journeyman carpenter, his post-injury earnings would be reduced by an additional 19%. (See pay scale and total University compensation, Page 4A in the Appendix.)

2. Without retraining and within Dr. Robb's prognosis:
(See Page Two of this report). If we assume that Mr. Jensen will eventually be able to return to his former job as journeyman carpenter, that therefore he is still in the process of "healing", and that his brittle diabetes can be controlled so that he is again physically capable of full-time employment then his post-injury earning capacity should, in time, equal his pre-injury earning capacity.

3. With retraining:
If Mr. Jensen successfully completes the DMACC course, he can expect to earn $12,000.00 to $14,000.00 per year, eventually increasing his earnings up to approximately $20,000.00 per year. However, unless he finds employment with a government/union entity, his fringe benefits may be substantially reduced.

....

E. Motivation:
Mr. Jensen has been realistic about his disability and its implications in terms of a return to his former trade. He is following a commendable rehabilitation program on his own by successfully completing suitable retraining in marketable skills at his own expense. His motivation to re-enter the work world is apparent, in my opinion.

F. Qualifications:
Mr. Jensen has demonstrated skills as a journeyman carpenter. This work requires heavy lifting and carrying, repetitive bending and stooping. If he is unable to return to the physically strenuous job duties of "journeyman carpenter" at UNI or with another employer, in my opinion, his earning capacity will be substantially reduced unless he is retrained in a highly marketable skills area.

G. Ability to Engage in Employment for which Fitted:
If we assume that Mr. Jensen, once his healing period is over, is able to return to work as journeyman carpenter, unless he returns to work with his former employer, he may experience difficulty in finding employment at comparable pay scales. He suffers from diabetes mellitus for which there is no cure. He has been unable to return to the work world since December, 1981, because of cervical and lumbosacral strain, resulting from his injury at work. He will be competing in the work world, with or without training, against a pool of healthy, qualified applicants for any jobs in the marketplace. If we assume that Mr. Jensen has severe physical limits as set forth by Dr. Walker, and, taking into consideration his physical overlay of diabetes mellitus, in my opinion, Mr. Jensen's ability to engage in employment for which he is fitted is severely curtailed. In essence, his skills as a carpenter cannot be transferred to work of comparable worth.
In my opinion, employment opportunities will be within entry-level jobs with sitting/standing/walking flexibility. Given all of the above factors, in my opinion, Mr. Jensen has a significant vocational disability.

Exhibit K is an itemization of expenses under rule 85.27 totalling $9,984.64. Exhibit L is a letter from defendants to claimant requesting additional medical records. Exhibit M is a memo to John D. Mixsell, Director Personnel Services, from Daryl Stoner, Director of Maintenance and operations. The memo dated March 2, 1982 is set out below:

Eric Jensen, Carpenter for Plant Services fell from a twelve foot ladder during scheduled working hours on December 9, 1981, and had gone to the University Health Center.

On December 21, 1981 the office staff of John R. Walker, MD, St Francis Professional Building, Waterloo, Iowa, contacted me asking permission to examine Mr. Jensen for injuries sustained in said fall. I gave permission as requested, and Mr. Jensen had an initial examination on December 21, 1981 by Dr. Walker.

Exhibit N is a letter from the office of the state comptroller to claimant dated February 17, 1982 indicating that claimant's current medical treatment is unauthorized. Exhibit O is a letter again from the office of the state comptroller dated April 1, 1982. Relevant portions of the letter are set out below:

The captioned file has come to my attention in the State Comptroller's Office pertaining to your work-related injury of 12/9/81.

A review of the file, reveals lack of medical data to substantiate your continuing disability.

This is to advise you that as of thirty (30) days from the date of this letter, your Workers' Compensation benefits will be terminated. If there is medical data that has not been presented, please direct to our attention immediately. If I may suggest, you are entitled to a hearing with the Iowa Industrial Commissioner's Office, should you disagree with my decision.

Exhibit P is a letter to John Mixsell dated April 13, 1982 containing a workers' compensation check for $2,042.88 to restore the claimant's sick leave. The letter also states:

> Also find enclosed two letters from Dr. Walker concerning Eric's injuries. You will note that these letters establish that the injuries arose in the course and scope of employment and relate the injuries to the accident which occurred at UNI. Furthermore, the letters will establish that Eric is authorized to remain off work and has been from the date that he first saw Dr. Walker. I am enclosing these letters so that you can complete your file and indicate to the State Comptroller's Office that this is a compensable injury and that disability payments should continue until a medical authorization establishes that Eric has reached maximum healing.

Exhibit Q is a letter dated May 18, 1982 from claimant's counsel to John Mixsell. In part the letter states, "I am also somewhat troubled by the statement in your letter, indicating that Mr. Richard Andrews advised your office that Worker's [sic] Compensation payments ended as of April 30, 1982." Exhibit R is a letter from Charles Wright, Director Board of Regents Employment Relations, to Thomas J. Miller, Attorney General of Iowa. The letter, dated August 4, 1982, states in part:

> It is my understanding that the State has discontinued payment because of disagreement among the doctors as to Mr. Jensen's ability to return to work.
>
> The university has been interested in the fact that Mr. Walker, who is Mr. Jensen's attorney in this matter, is the son of Dr. Walker, Mr. Jensen's doctor who indicates that he cannot return to work.

Defendants' sole exhibit is exhibit 3 which is a report by W. J. Robb, M.D., who examined claimant on November 29, 1983. Dr. Robb diagnosed the claimant as suffering from lumbosacral spine sprain and cervical sprain. Dr. Robb concluded that the claimant would be able to make a complete recovery as far as the cervical spine was concerned. Dr. Robb rated claimant's permanent impairment of function of the low back as five percent of the spine.

APPLICABLE LAW AND ANALYSIS

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

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.

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. Ziegler, 252 Iowa 613, 620, 106 N.W.2d 591, and cases cited.

Claimant's first issue concerns the possible aggravation of claimant's preexisting diabetic condition. The claimant testified that prior to his injury his diabetes was relatively stable, but subsequent to the injury, his blood sugars have fluctuated greatly. Dr. Walker reports in exhibit AD-2 that claimant's diabetes "seems to have been aggravated by this whole situation." Exhibits AG-3 and AG-9 allow the inference that perhaps the claimant is not as diligent as he should be in his self-monitoring and self-treatment. Exhibit AG-9 is specially indicitive of this. Exhibit H states that the claimant's blood sugars have been more difficult to control. However, the report declines to posit a causal link between emotional trauma and the claimant's diabetic condition. Causal connection is in the realm of expert opinion. However, the evidence presented establishes only possibility when the law requires probability. Hence, the claimant has failed his burden of proof. This determination therefore renders claimant's second issue regarding section 85.27 benefits for treatment of claimant's diabetes moot.

Claimant brings to issue the deputy's finding that the claimant sustained an industrial disability of 23 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."

Functional impairment 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.

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

The record indicates that the deputy correctly analyzed the evidence. The claimant, at the time of the accident, was 30 years old. As evidenced by his grades, he is certainly an intelligent young man. All indications are that Mr. Jensen is highly motivated. This is particularly evidenced by his efforts in retraining in the area of health care administration.

Dr. Walker's opinion as to functional impairment is given greater weight than that of Dr. Robb. The deputy may either accept, or reject, in whole or in part the opinions of experts.

In the present case, the deputy made an exhaustive review of the evidence, throughly and accurately considering all facts. The deputy's findings in regard to industrial disability will not be disturbed.

The claimant's fourth issue and the defendants' first issue address the issue of penalty as codified under section 86.13. The claimant wishes more and defendants argue that no penalty should be imposed. The review of the evidence supports the following regarding the penalties assessed by the deputy. The first cessation was essentially a "bureaucratic snafu." The claimant expressly stated that the lack of benefits was a result of a mix-up in personnel. Furthermore, during this period the claimant was on sick leave. He was not going without. Moreover, thanks to the aid of claimant's counsel, the oversight was corrected and the claimant's accumulated and subsequently depleted sick days were bought back. The claimant then received bi-weekly payments. The claimant therefore is not entitled to 86.13 benefits for this time frame.

The second cessation of benefits is another matter. The letter from Mr. Andrews of April 1, 1982 to claimant stating that in 30 days the claimant's payments will be halted, stated that if there is medical evidence to forward it immediately. Exhibit P is a letter to claimant's employer dated April 13, 1982 supplying the required medical information. However, by this time claimant's benefits had already been terminated in contradiction of Andrew's own letter and Iowa law. There was no reason advanced for early termination as was there no request for claimant to see a doctor supplied by the defendants until November 29, 1983. The cessation was unreasonable.

The Iowa Supreme Court stated in Auxier v. Woodward State Hospital School, 266 N.W.2d 139, 142-143 (Iowa 1978):

> 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,...

In the present case there was a clear deviation from the requirements laid down in Auxier. The termination of benefits on April 8, 1982, after a letter of April 1, 1982 indicating they would continue for 30 days, was not justified and should be subject to the maximum increase in benefits during that period for benefits unreasonably denied. However, additional benefits were not available as codified in section 86.13 until July 1, 1982. This agency has previously held that additional amounts pursuant to section 86.13 will not be attached to benefits payable prior to July 1, 1982. Bengford v. Denison Community School District, (Appeal Decision, filed May 3, 1985). Therefore, for the period from July 1, 1982 to March 21, 1983 the claimant's benefits will be increased fifteen percent. Furthermore, because the claimant's permanent partial disability benefits have been unreasonably withheld, the claimant is entitled to an additional 15 percent of his permanent partial disability benefits.

Defendants raise as an issue the deputy's decision to exclude testimony by claimant's attorney bearing upon the bias and interest of his father, Dr. Walker. Defendants cite in their post-hearing brief McCormick On Evidence, at page 78, wherein McCormick states, "The law recognizes the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self-interest of the witness in the outcome of the case." (emphasis added) The quote is appropriate but attorney Walker did not render the impairment rating. It was Doctor Walker who did. If counsel wished to elicit "the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties," then counsel for the defense should have called Dr. Walker as a witness. It was his potential bias they wanted to prove. The deputy therefore correctly excluded such testimony.

The defendants raise as a final issue on appeal whether the deputy erred in ordering the defendants to pay medical costs listed on page 21 of the review-reopening decision, asserting that the claimant at no time submitted proof that the costs were related to the injury. The deputy stated during the hearing that the parties would be ordered, if section 85.27 benefits were in order, to stipulate as to the amounts that the claimant ought to be compensated for as well as to those amounts that the university would be liable for that were as yet unpaid. The claimant is entitled to reimbursement, of his out of pocket medical expenses, if the claimant can show that the expenses were causally related to the December 9, 1981 injury. Therefore, the parties should so attempt to stipulate as to the amount. If the parties cannot so stipulate, this agency retains jurisdiction over the matter and the issue as to medical expenses will be remanded back to the deputy for consideration.

The claimant raises as a final issue the question of interest. The deputy ordered interest paid pursuant to section 85.30. The claimant, in his appeal brief, requests that in light of the past trouble claimant has had in securing benefits from the defendants that the commissioner set forth, in detail, the interest due claimant under section 85.30. This clerical function would best be done by the parties. The parties are directed to come to an understanding and stipulation regarding the interest ordered by the deputy. Although it is not understood how the parties cannot agree, if the parties cannot so stipulate the matter will be remanded to the deputy for consideration.

FINDINGS OF FACT

1. Claimant received an injury on December 9, 1981 arising out of and in the course of his employment with the defendants.

2. Examination by the University Health Center and Dr. Baker revealed no fractures, but did reveal contusions and back sprain.

3. Claimant was released to return to work by Dr. Baker on December 14, 1981.

4. Claimant returned to work on December 14, 1981 but could not continue after a twisting movement.

5. Claimant sought out treatment from Dr. Walker, an orthopedic surgeon.

6. The examination of the claimant and subsequent treatment was authorized by the defendants.

7. Dr. Walker found claimant could not work at his carpentry job and has of yet not released claimant to return to that type of work.

8. Defendants did not pay claimant's medical expenses nor benefits on the grounds that claimant's treatment was not authorized and his disability was not medically supported.

9. Claimant substituted accumulated sick pay and used that as a source of income.

10. Claimant's benefits were reinstated.

11. Claimant's sick pay was replenished.

12. The refusal to pay in Finding of Fact #8 was not unreasonable.

13. Claimant was notified on April 1, 1982 that absent any additional medical information, claimant's benefits would end in 30 days.

14. Claimant's benefits ceased without explanation on April 8, 1982.

15. Defendants did receive additional medical information.

16. Claimant did not receive timely notice of termination of benefits and said termination was unreasonable and without cause.

17. Claimant's head and neck pains have subsided, but claimant continues to experience low back pain.

18. Claimant was a diagnosed diabetic prior to December 9, 1981.

19. Since December 9, 1981 claimant has experienced wide fluctuations in blood sugar levels and trouble controlling his diabetes.

20. Claimant has not proven that there exists a causal connection between the injury of December 9, 1981 and trouble controlling his diabetes.

21. Due to restrictions placed upon him, claimant cannot continue in the carpentry field.

22. Claimant's inability to so continue will likely continue into the indefinite future.

23. Claimant's disability is causally connected to the injury of December 9, 1981.

24. Dr. Walker, claimant's treating physician, rated the claimant's permanent partial impairment to the body as a whole as 28 percent.

25. Dr. Robb's opinion was that claimant had a permanent partial impairment of five percent to the spine.

26. Claimant is enrolled in a health care administration program.

27. Health care administration graduates have enjoyed high employment success.

28. If employed in this field claimant's earnings may equal those paid to him at defendant employers.

29. Claimant is young, well motivated, but his diabetes may effect his employment.

30. Claimant has an industrial disability of 23 percent.

31. Claimant's healing period ended March 21, 1982.

32. Claimant's medical expenses not related to his diabetic condition, have as yet, not been proven to be causally related to the injury of December 9, 1981.

CONCLUSIONS OF LAW

Claimant has established that his injury of December 9, 1981 is the cause of the disability in which he now bases his claim.

Claimant has established that he did not receive timely notice of termination of his benefits under Auxier and is entitled to an additional thirty (30) days of benefits; defendants are entitled to a credit for those benefits paid claimant following the April 1, 1982 termination notice.

Claimant is entitled to further healing period benefits from April 9, 1982 to March 21, 1983.

Claimant has established a permanent partial disability resulting from his injury of December 9, 1981 of twenty-three percent (23%).

Claimant is entitled upon agreement and stipulation to payment of medical expenses submitted including medical mileage expenses, but for those expenses for treatment of his diabetic condition at the University of Iowa Hospitals and Clinics.

Claimant has established that defendants' termination of his benefits was unreasonable and is entitled to payment of an additional fifteen percent (15%) of benefits withheld from July 1, 1982 to March 21, 1983 and an additional fifteen percent (15%) of benefits for the period beginning March 22, 1983 for one hundred fifteen (115) weeks.

Pursuant to section 85.30, claimant, upon computation, agreement, and stipulation with the defendants, is entitled to interest.

Therefore the decision of the deputy is affirmed in part and modified in part.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant permanent partial disability benefits for one hundred fifteen (115) weeks at the rate of one hundred eighty-eight and 10/100 dollars ($188.10) with those payments to commence on March 22, 1983.

That defendants pay claimant an additional forty-nine and four-sevenths (49 4/7) weeks of healing period benefits at the rate of one hundred eighty-eight and 10/100 dollars ($188.10) with those payments to commence on April 9, 1982 and extend to March 21, 1983.

That defendants pay to claimant an additional fifteen percent (15%) of benefits withheld from July 1, 1982 to March 21, 1983 and to further pay an additional fifteen percent (15%) of permanent partial disability payments commencing on March 22, 1983 and running for one hundred fifteen (115) weeks.

That the parties attempt to agree and stipulate to the following:

1) The amount of medical expenses causally related to the injury of December 9, 1981 that the claimant is entitled to exclusive of any charges relating to his diabetic condition.

2) The interest that the claimant is entitled to pursuant to section 85.30, Code of Iowa.

That defendants pay interest pursuant to section 85.30.

That defendants pay the costs of this proceeding.

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

Signed and filed this 19 day of September, 1985.

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BRADLEY A. KATZENBERGER,	:	
Claimant,	:	
	:	FILE NO. 758408
vs.	:	
	:	ARBITRATION
BUSINESS REVENUE SERVICE, a/k/a BUSINESS REVENUE SERVICE of AMERICA,	:	DECISION
Employer, Defendant.	:	

FILED
AUG 1 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Bradley A. Katzenberger, claimant, against Business Revenue Service a/k/a Business Revenue Service of America, employer, hereinafter referred to as BRS (whether or not defendant is insured is unknown), defendant, for benefits as a result of an alleged injury on August 15, 1983 to claimant's low back. On July 12, 1985, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

Defendant, an Iowa corporation, did not appear at the hearing and defendant has not participated in these proceedings in any manner. For its failure to appear and defend subsequent to service of the original notice and petition, a default was entered against defendant by order of this agency on September 21, 1984. In addition, the record was closed to further activity or evidence by defendant on November 16, 1984 for defendant's failure to comply with orders of this agency during the course of these proceedings.

ISSUES

In light of the entry of the default, the following issues remain to be determined in these proceedings:

I. Whether there is a causal relationship between the work injury of August 15, 1983 and the claimed disability;

II. The extent of weekly disability benefits and the rate of weekly compensation to which claimant is entitled; and,

III. Claimant's entitlement to medical benefits under Iowa Code section 85.27.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision. The hearing record consists of the oral testimony of claimant and claimant's exhibits 1-3.

Claimant is 27 years old and at the time of the work injury was single and entitled to two exemptions on his income tax returns for himself and his minor child. Claimant is a high school graduate. Claimant's testimony and the medical reports submitted into evidence indicate that claimant had no back problems before the alleged work injury upon which he bases his claim.

Claimant testified that his past employment consists of over-the-road trucking; maintaining and repairing of autos, trucks and other vehicles; and, repossessing property from delinquent debtors on behalf of creditors. Except for the repossession work, claimant was required to use his back extensively in his past employment.

Claimant began working for BRS in January 1983 as a mechanic, truck driver and repossesser. Claimant said that he was paid a base wage plus commissions and that his average gross weekly wage was $250.00 per week. His day-to-day activities at work would vary with the needs of his employer. The maintenance and repair work involved changing tires, repairing brakes and doing motor work on all types of vehicles ranging from semi-tractor trailers to motorcycles.

Claimant testified that he injured his low back on August 15, 1983 while lifting during an attempt to change a tire on a front end loader, a type of tractor.

Claimant was treated for the back injury by Timothy D. Cochran, D.C., from August 26, 1983 through December 13, 1983 as set forth in claimant's exhibit 2. Subsequently, claimant received four additional treatments from Dr. Cochran at a cost of $16.00 for each visit. These treatments consisted of chiropractic examinations and manipulations with ultra-sound and heat therapy. Dr. Cochran diagnosed claimant as suffering from an acute lumbar strain with muscle spasms. The doctor's most recent report indicates that claimant's current condition is stable, but claimant continues to have intermittent lumbar spasms. The doctor opines that at the time of the work injury, claimant had only a temporary partial disability attributable to lumbar disc syndrome.

Claimant testified that after the work injury he was terminated by BRS for the reason he could no longer physically perform all of the work assigned to him because of his back injury. Following this termination, claimant was off work from October 1, 1983 until December 10, 1983, at which time he found a job repossessing property which did not require lifting. Claimant stated that during the period of unemployment in the latter part of 1983, he had persistent low back pain and was unable to work for that reason.

Claimant stated at the hearing that he continues to experience considerable low back problems and treatment by Dr. Cochran for this back condition, consisting of regular adjustments and prescribed leg exercises, is continuing. Claimant stated that he can no longer drive a truck or lift anything over 50 pounds without significant pain. Claimant said that his back condition limits his everyday work and leisure activities. Claimant is currently employed in an automotive repair shop performing body work and mechanic work on occasion.

Claimant's appearance and demeanor at the hearing indicated that he was testifying in a candid and truthful manner.

APPLICABLE LAW AND ANALYSIS

In this case, the claimant need not establish that he suffered an injury on August 15, 1983 which arose out of and in the course of employment as such fact is established by virtue of an entry of default against defendant. Sherwood v. Collins Radio Co., 33 Biennial Reports, Iowa Industrial Commissioner 66 (Appeal Dec. 1978). However, regardless of the default, claimant has established by the evidence presented at the hearing that he sustained such a work injury.

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of disability. 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

Claimant seeks permanent disability benefits from his back condition. Dr. Cochran opines that the original injury only caused temporary back disability. The problem with this opinion is that such a view is contrary to claimant's credible testimony that he had no back problems before the injury and that he now can no longer drive a truck or lift over 50 pounds without considerable pain as he had regularly done before the work injury. There are other problems with the medical opinion of Dr. Cochran. The doctor states in his last report of July 1985 that claimant continues to have intermittent lumbar muscle spasms. Such spasms did not exist before the work injury. Also, the doctor's use of the term "disability" rather than "impairment" in his evaluation report may indicate that the doctor is expressing a view as to the effect of the work injury on claimant's earning capacity. Such an opinion would be beyond the doctor's expertise. Finally, a reading of Dr. Cochran's reports suggest that the doctor may have felt that claimant had a preexisting disc syndrome which was aggravated by the work injury. The doctor's causation views, therefore, may be based upon his ignorance of the law of workers' compensation on injuries which "light up" a preexisting condition. Given the credible testimony of claimant that he had no prior back problems and claimant's continuing difficulties with his back despite a stabilized condition, claimant has shown by the greater weight of evidence that he has a permanent partial impairment of his low back.

Claimant also testified that his employer terminated him for the reason he could no longer perform his assigned duties due to his back injury. A loss of earnings caused by a job transfer for reasons related to the injury also can justify an award of permanent disability benefits. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Blacksmith, 290 N.W.2d 348 (Iowa 1980). Therefore, on the whole record, claimant has established by a preponderance of the evidence that the work injury to his low back is a cause of permanent disability to the body as a whole.

II. Claimant must next establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As claimant has shown a permanent impairment to the body as a whole, an industrial disability has been sustained. The degree of permanent disability arising from the work injury must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled members, disabilities under this provision are not measured solely by the extent of the loss or loss of use of a body member. Industrial disability is a loss of earning capacity resulting from the work injury. Diedeich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). The extent of an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Peterson v. Truck Haven Care, Inc., (Appeal Decision, Feb. 28, 1985).

Claimant's medical condition before the work injury was excellent and he had no functional impairments or ascertainable disabilities. Claimant was able to perform heavy lifting and strenuous work with little or no problem. Claimant's treating physician did not give claimant a permanent impairment rating but claimant's credible and uncontroverted testimony establishes that he no longer can lift over 50 pounds without considerable pain and reinjuring his back; that he can no longer drive a truck due to back pain; and, that he can no longer perform many sports and leisure activities that he once was able to do. Therefore, claimant has demonstrated a significant permanent partial impairment of the low back.

Claimant's medical condition prevents him from returning to his former work as an over-the-road trucker and any other work which requires him to perform regular heavy lifting. Claimant has a considerable amount of past working experience in the type of work he can no longer perform. Claimant was terminated from his employment with defendant employer for the reason he can no longer physically perform the duties that he was performing at the time of the work injury.

Apart from his lost earnings during his healing period which will be compensated by healing period benefits, claimant has not demonstrated that he suffered a loss in actual earnings as a result of his disability. Claimant did not mention his current earnings at the hearing. However, a showing that claimant had no loss of actual earnings does not preclude a finding of industrial disability. See Michael v. Harrison County, 34 Biennial Report, Iowa Industrial Commissioner 218, 220 (Appeal Dec. 1979).

Claimant is 27 years old and at the beginning of his working career. His loss of future earnings from employment due to his disability is not as severe as would be the case for an older individual. Claimant's age is favorable for retraining. See Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Report 426 (Appeal Dec. 1981).

Claimant appeared to be a well-motivated individual who continues to work in laboring occupations despite his persistent back problems.

Claimant's education and intelligence exhibited at the hearing indicates that he has average potential for vocational rehabilitation.

After examination of all the factors, claimant has suffered a 10 percent loss in his earning capacity from his work injury.

As claimant has established entitlement to permanent partial disability, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34(1) from the date of injury until he returns to work; until he is medically capable of returning to substantially similar work to the work he was performing at the time of the injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

The evidence shows that claimant was off work only from October 1, 1983 until December 10, 1983 following his termination from BRS. Claimant indicated that he was unable to work due to his back condition during this time and the records of Dr. Cochran indicate that claimant was receiving regular treatment until December of 1983. However, claimant is not entitled to healing period benefits after December 1983 as Dr. Cochran's records rather clearly indicate that claimant's condition stabilized after December 1983. Therefore, claimant has shown that he is entitled to healing period benefits from October 1, 1983 until December 10, 1983.

Due to the fact that claimant was partially paid on a commission basis, his rate of compensation should be based upon the average gross weekly wages over the 13 week period prior to the date of the work injury pursuant to Iowa Code section 85.36(6). Absent contrary evidence, claimant's testimony that his average gross weekly wage was $250.00 per week is sufficient to establish the rate under this code section. Given such a gross weekly rate of compensation, and claimant's entitlement to single status with two exemptions, claimant's rate of compensation pursuant to this agency's benefit schedule for an injury in August 1983 establishes a rate of compensation in the amount of $159.20 per week.

III. Claimant's credible testimony is uncontroverted as to the purpose for which he incurred the medical expenses from Dr. Cochran listed in exhibit 2 and the four additional visits to Dr. Cochran. Such testimony establishes the causal connection of this treatment to the work injury and that such charges are reasonable for the services rendered.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of defendant BRS at all times material herein.

3. Claimant's job on August 15, 1983 consisted of maintenance and repair work along with repossession of property from delinquent debtors.

4. On August 15, 1983 while performing his work, claimant injured his low back.

5. As a result of the work injury, claimant suffered severe low back pain and muscle spasms.

6. Prior to the work injury herein, claimant had no back problems or muscle spasms of the back, back impairments or ascertainable disabilities.

7. As a result of his work injury on August 15, 1983, claimant has developed a permanent low back condition which prevents him from truck driving, lifting over 50 pounds and performing a significant number of physical tasks that he was able to perform prior to the work injury.

8. As a result of his physical condition subsequent to the work injury, claimant is unable to return to his normal work activity or any other position which requires strenuous use of his low back.

9. Claimant's work history consists of regular gainful employment in occupations which require extensive use of his low back.

10. Claimant has not suffered a significant loss in actual earnings from employment due to his work injury other than the time off during his healing period.

11. Claimant is motivated to find suitable alternative

employment and has done so.

12. Claimant is 27 years of age, has a high school education and exhibited average intelligence at the hearing.

13. Claimant has average potential for successful vocational rehabilitation.

14. As a result of his work injuries, claimant has suffered a loss of earning capacity in the amount of 10 percent.

15. As a result of his work injuries, claimant was unable to work and was receiving treatment for his work injury from October 1, 1983 through December 9, 1983.

16. At the time of his work injury, claimant was single, entitled to two exemptions and received a gross weekly compensation from his employment of $250.00 per week.

17. Claimant's rate of compenstion is $159.20 per week.

18. Claimant's treatment from Timothy D. Cochran, D.C., received after the work injury as listed in exhibit 2 and the four additional visits since December 1983 are causally connnected to the work injury.

19. The fees charged by Dr. Cochran for treatment of the injury which has been ordered reimbursed herein are reasonable for the services rendered.

CONCLUSIONS OF LAW

(Although a default was entered, it can be concluded from the evidence presented that claimant has established by a preponderance of the evidence that he suffered an injury on August 15, 1983 which arose out of and in the course of his employment with BRS.)

I. Claimant has established by a preponderance of the evidence that the work injury of August 15, 1983 is a cause of permanent disability.

II. Claimant has established by a preponderance of the evidence entitlement to permanent, partial disability benefits for 50 weeks and healing period benefits for 10 weeks at the rate of $159.20 per week.

III. Claimant has established by a preponderance of the evidence entitlement to medical benefits in the amount of $507.60 as ordered below.

ORDER

Accordingly, the following is ordered:

1. Defendant shall pay to claimant fifty (50) weeks of permanent partial disability benefits at the rate of one hundred fifty-nine and 20/100 dollars ($159.20) per week from December 10, 1983.

2. Defendant shall pay to claimant healing period benefits from October 1, 1983 through December 9, 1983, a total of ten (10) weeks, at the rate of one hundred fifty-nine and 20/100 dollars ($159.20) per week.

3. Defendant shall pay claimant the sum of five hundred seven and 60/100 dollars ($507.60) as reimbursement for the medical expenses he incurred from Timothy D. Cochran, D.C., between August 26, 1983 and the present time.

4. Defendant shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

5. Defendant shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33 and specifically shall pay the sum of twenty-five and no/100 dollars ($25.00) to claimant for the cost of recording the hearing.

6. Defendant shall file an activity report upon payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 1st day of August, 1985.

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

Larry P Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CORDELIA MAE LARRISON,	:	
Claimant,	:	
vs.	:	File No. 722903
MERCY HOSPITAL MEDICAL CENTER,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
THE AETNA CASUALTY AND SURETY COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	SEP 17 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Cordelia Mae Larrison, claimant, against Mercy Hospital Medical Center, employer, and The Aetna Casualty and Surety Company, insurance carrier, for benefits as a result of an alleged injury on December 17, 1982. A hearing was held on July 22, 1985 in Des Moines and the case was submitted on that date.

The record consists of the testimony of claimant; claimant's exhibits 1 through 29; and defendants' exhibit A. Both parties filed briefs.

The parties stipulated that claimant's rate of compensation is $290.95 (the agency file shows that benefits paid prior to hearing were paid at a rate of $288.04); that temporary total disability benefits were paid from January 3, 1983 through May 22, 1983, that temporary partial disability benefits were paid from May 23, 1983 through August 17, 1983, and that temporary total disability benefits were paid from August 18, 1983 through December 18, 1983; that the conversion date is December 19, 1983; that claimant's injury of December 17, 1982 arose out of and in the course of her employment with Mercy Hospital Medical Center; that the medical bills incurred by claimant are fair and reasonable; and that claimant's hourly rate of pay at Mercy Hospital Medical Center was, or would have been, as follows: $10.40 per hour plus an additional $1.00 per hour for night shift work in 1982, $10.80 per hour plus an additional $1.00 per hour for night shift work in 1983, and $11.23 per hour plus an additional $1.00 per hour for night shift work in 1984.

ISSUES

The issues submitted at time of hearing were:

1) Whether there is a causal relationship between claimant's injury of December 17, 1982 and her claimed disability;

2) Nature and extent of disability; and

3) Whether defendants must reimburse claimant, pursuant to Iowa Code section 85.27, for a medical bill totaling $700.00 (exhibit 25 which is a bill from Wilden Clinic for the services of Gordon L. Elliott, D.O.) and for $45.36 in mileage to Wilden Clinic for treatment by Dr. Elliott (ex. 28, item 6).

SUMMARY OF EVIDENCE

Cordelia Mae Larrison, claimant, testified that she was born on May 20, 1948 and graduated from high school in 1966. She attended the University of Iowa, Grandview Junior College, Iowa Lutheran School of Nursing and Broadlawns School of Nursing, graduating from Broadlawns in 1971 with a "diploma degree in nursing." She had worked as a nursing assistant while attending Broadlawns School of Nursing.

After graduation from Broadlawns, she started work at Des Moines General Hospital as a staff nurse doing such things as record keeping, positioning patients and giving medications. The physical requirements at this job were demanding, and this is true of most nursing jobs except those involving solely supervising others. After about one year at Des Moines General, she accepted a job at Broadlawns working as a nurse in a surgical room and stayed at this job for about one year. She then returned to Des Moines General to work at an operating room/recovery room position and was employed in this capacity for about five years during which time she eventually became a supervisory nurse. In about 1977-78, she started work at the Veterans Administration Hospital in Des Moines as a staff nurse and eventually became "lead nurse" during an approximate five year tenure there.

In June of 1981, claimant started work at Mercy Hospital Medical Center (Mercy) as a staff nurse on the orthopedic ward. On December 17, 1982, she injured her back on the night shift (10:00 p.m. to 8:00 a.m.) when she was assisting an elderly female patient who was attempting to get out of bed after having hip surgery. The claimant experienced "sharp and intense pain in the right lower back" when trying to keep this patient in her bed. Claimant completed her shift due to a shortage of staff even though she had "considerable backache."

Claimant had several days off after December 17, 1982 (a Friday) and decided to see Dr. Elliott on December 20, 1982 (a Monday) after staying in bed on December 18 and 19, 1982. She attempted to work again on December 24, 1982, but had difficulty doing her job on that date and Dr. Elliott referred her to another physician, David Wilson, D.O. Regular physical therapy was recommended by both doctors.

Claimant then saw Dr. Lon Brewer who was the "employee health doctor" at Mercy. Dr. Brewer also recommended physical therapy which she actively engaged in for about three months. She initially saw William R. Boulden, M.D., on April 7, 1983 because of radiating leg pain and back pain. He diagnosed her as having facet syndrome. Dr. Boulden released her for part-time light duty work at Mercy effective May 23, 1983. She last saw him in October of 1983.

The morning of August 17, 1982, claimant aggravated her back problem at work when lifting a patient. She felt an "intense pain in the right lower back" at the time. She started using a TENS unit to control her pain and continued her physical therapy.

Claimant applied for two positions with Mercy in about October of 1983 prior to being released by Dr. Boulden. Specifically, she applied to be a nurse supervisor, and applied and interviewed to be a "Nurse IV." She also talked with Mercy personnel person Diane Dotson about another job, but did not apply because Ms. Dotson gave her the impression that she would not be given serious consideration. Mercy did not offer her any of the jobs just described. In December of 1983 she started work at Systems Development Corporation (SDC) as a claims analyst specialist starting at $8.17 per hour ($17,000 per year; her current salary is $18,937.50).

Claimant recently took a computer awareness course for nurses at the Des Moines Area Community College and a technical writing course at Drake University with most (up to 90%) of the expense being paid by SDC. She plans on taking more courses in order to get a degree in nursing.

Claimant testified that sitting at her current job aggravates her back condition. She has missed a number of days at her current job because of her back problems, but now comes to work even when she is in pain after being told of possible job loss. She has used all[her sick leave and vacation time at SDC. Currently, she does not engage in the following activities because of back pain and "a feeling of weakness and instability" regarding her back: vacuuming, mowing, golfing or yard work. She had back problems prior to December 17, 1982 as she sustained a compression fracture at L-4 in late 1979 or early 1980, while working at the Veterans Hospital, and missed several months of work. When she returned to work, she did so without restrictions or limitations.

Dr. Elliott treated her compression fracture. After December 17, 1982, she saw Dr. Elliott for osteopathic manipulative therapy (OMT) which has been very helpful in temporarily relieving her back pain. All of her visits to Dr. Elliott after December 17, 1982 are related to her back pain that started on that date. Dr. Boulden did not refer claimant to Dr. Elliott nor were her visits to Dr. Elliott authorized by defendants. She believes that defendants paid her medical bills until October 17, 1983 or December 19, 1983. She sees Dr. Elliott about twice a month currently and she had gone to him prior to starting work for Mercy in June of 1981. When she started work for Mercy she had no medical work restrictions.

Claimant testified that she "could handle" working as a nurse in a doctor's office, supervising other nurses or legal assistant for a law firm.

In a letter to claimant's attorney, dated November 26, 1984, Dr. Boulden stated: "In reference to the fact of her physical impairment, I feel the patient has an existing disability of her lumbar spine of 5%." See exhibit 1, page 2. In a letter dated December 4, 1984, he added that this five percent impairment was causally related to her injury of December 17, 1982. See exhibit 2. However, in a letter to Aetna, dated January 24, 1984, Dr. Boulden stated regarding claimant: "She has not sustained any permanent partial impairment," and also stated that she "has a pre-existing condition of her back called facet tropism." See exhibit 3.

In a note dated September 20, 1983, Dr. Boulden stated:

> Follow up of facet rhizotomy with Phenol blocks for facet syndrome and degeneration. She had a recurrence of her symptoms with more pain in the buttock, right down the posterior thigh and into the calf, with numbness again. This occurred after a lifting episode at work again. Clinically, she does not have any sciatica and has negative straight leg raising. So therefore, I feel that her symptoms are once again coming from the facet joints. Therefore, I have recommended a facet injection to see if this will not cool down her symptoms. We have also recommended that since conservative therapy in the past has not relieved any of her symptoms, that consideration for a different job at work might be in order where she would not have to be doing any type of lifting or be in a situation where lifting would be incurred. Therefore, I will re-evaluate her after the facet injection is completed at Mercy Hospital. (Ex. 4, p. 3)

In a letter to claimant's attorney, dated March 6, 1985, Martin S. Rosenfeld, D.O., stated:

> I do not feel that further treatment is warranted at this time. Any further treatment, I feel, would be in terms of a lumbar fusion and I doubt that the patient is [sic] need of this at the present time. I am unable to estimate when she did reach maximum medical improvement. I would feel that the patient does have a permanent partial impairment to the body as a whole of eight percent, and that this impairment is due to the initial injury of December 17th, 1982 and that the August 15th, 1983 aggravation was only an aggravation and not further injury. (Ex. 5, p. 2)

The records of Dr. Elliott (Ex. 9) show that claimant has seen him for back problems on numerous occasions and as early as January of 1980. The visits were oftentimes for OMT on her low back. Exhibit 10 is the records of David J. Wilson, D.O., and also reflects numerous OMT treatments commencing in 1980.

Exhibit 22 (medical records of Des Moines Bone & Joint, P.C.) is dated April 15, 1975, and reads in part: "Problems off and on for 5 yrs. Lifting heavy patients while in R.N. training. Rt. leg radiation pain posterior to knee. Numbness to & including foot. Coughing & sneezing do not effect. O.M.T. temporary relief. No medication."

Exhibit 24, page 6 is a report authored by James Laughlin, D.O., which states that claimant was admitted to the hospital on October 2, 1979 for a compression fracture at L-4 and then discharged on October 18, 1979. A lumbar myelogram taken on October 3, 1979 was normal according to this report. Dr. Laughlin concluded by stating that "[o]n discharge she was doing well and relatively asymptomatic."

Richard McCluhan testified (Exhibit 29) that he was hired by Aetna on or about November 1, 1983 to help claimant find a job. Mercy Hospital informed him that claimant was an "exemplary employee." Claimant found her job at Systems Development Corporation without his assistance. McCluhan agreed with Dr. Boulden that claimant should not go back to "floor nursing."

In a report to Aetna dated November 1, 1983, Richard McCluhan concluded as follows:

> Her attitude is quite good and she is willing to commute and go out of her way to locate employment. Obviously this attitude is a very beneficial given her present circumstances. I don't see any problem in shortly identifying a suitable position for Cordelia.

APPLICABLE LAW AND ANALYSIS

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

At the conclusion of the hearing held on July 22, 1985, defendants' attorney stated on the record that the primary issue in this case is nature and extent of disability rather than a causal connection issue. After reviewing all evidence of record, particularly the medical evidence, it is concluded that claimant has proven by a preponderance of the evidence that there is a causal connection between her injury of December 17, 1982 and her claimed disability.

Dr. Rosenfeld stated his opinion that claimant has a permanent partial impairment to the body as a whole of eight percent due to her injury of December 17, 1982 and the aggravation of this injury on August 15, 1983. Dr. Boulden in November of 1984 gave claimant a five percent impairment rating even though in January of 1984 he had stated that "she has not sustained any permanent partial impairment." Great weight is not given to Dr. Boulden's rating testimony as it is inconsistent.

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."

Claimant has documented that she sustained wage loss as a result of her work-related injury. This is a factor in determining industrial disability. Her attorney also urged the agency to increase her industrial disability due to the alleged refusal of Mercy to reemploy claimant because of her work-related injury and cited Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) and McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). A finding of fact will be made that Mercy decided not to reemploy claimant due in part to her work-related injury of December 17, 1982 and the aggravation of this injury at work on August 15, 1983.

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden, 288 N.W.2d 181 and Blacksmith, 290 N.W.2d 348, 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.

Another factor or concern in determining industrial disability in this case is claimant's chronic low back and minor compression fracture at L-4 prior to December 17, 1982. Claimant's medical history prior to December 17, 1982 is relevant in determining the extent to which Mercy and Aetna are responsible for claimant's industrial disability. It is noted in this regard that claimant was employed on a regular basis despite her chronic back problems and returned to nursing after sustaining the compression fracture at L-4.

Claimant is currently missing work on occasion because of her low back problems and has been informed by her employer (SDC) that she must minimize absences because of illness if she wishes to remain employed.

Taking all appropriate factors into account, it is concluded that claimant has sustained an industrial loss of twenty percent.

The remaining issue is whether defendants must reimburse claimant for visits to Wilden Clinic costing $700 and for mileage of $45.36 to get to the clinic. Defendants' authorization argument is rejected as they did not acknowledge that claimant's injury arose out of and in the course of her employment until time of hearing. See Kindhart v. Fort Des Moines Hotel, (Appeal Decision, March 27, 1985); Barnhart v. Mog Incorporated, I Iowa Industrial Commr. Reports 16, 17 (Appeal Decision 1981). The arguments that the medical expense at issue is not reasonably necessary and/or causally related is rejected as the greater weight of the evidence shows otherwise.

FINDINGS OF FACT

1. Claimant is thirty-seven (37) years old.

2. Claimant graduated from high school in 1966 and in 1971 received a nursing diploma from Broadlawns School of Nursing.

3. Claimant plans on pursuing a degree in nursing and has recently taken courses at Des Moines Area Community College and Drake University; her current employer paid for most of the expense (90%) of the courses.

4. From 1971 until the fall of 1983 claimant worked as a staff nurse, surgical nurse or supervising nurse at a number of hospitals.

5. In June of 1981, claimant started work at Mercy Hospital Medical Center as a staff nurse on the orthopedic ward and separated from this employer when she accepted a job in December of 1983 with Systems Development Corporation (SDC).

6. Claimant processes Title 19 (Medicaid) claims for SDC and is paid eighteen thousand nine hundred thirty-seven and 50/100 dollars ($18,937.50) annually after starting at an annual salary of seventeen thousand dollars ($17,000.00).

7. Claimant had chronic low back problems prior to December 17, 1982, but was able to work full-time as a nurse despite these problems.

8. Claimant sustained a minor compression fracture at L-4 in late 1979 or early 1980 while working as a nurse at the Veterans Hospital in Des Moines.

9. Claimant injured her back on December 17, 1982 at Mercy Hospital Medical Center when she was lifting a patient.

10. Claimant aggravated the injury of December 17, 1982 on August 15, 1983 when lifting a patient at Mercy Hospital.

11. Martin S. Rosenfeld, D.O., has given claimant a permanent partial impairment rating of eight percent (8%) of the body as a whole, and it is found that claimant has a functional impairment of eight percent (8%).

12. Claimant quit her employment at Mercy Hospital in the fall of 1983 after Mercy decided not to employ her in a position other than staff nurse and based their decision in part on her condition because of the work-related injury of December 17, 1982 and aggravation threreof on August 15, 1983.

13. Claimant's industrial disability is twenty percent (20%) as it relates to the body as a whole.

14. Claimant's stipulated weekly rate of compensation is two hundred ninety and 95/100 dollars ($290.95).

CONCLUSIONS OF LAW

1. Claimant's injury of December 17, 1982 is causally connected with her claimed disability.

2. Claimant is entitled to permanent partial disability benefits for one hundred (100) weeks at a weekly rate of two hundred ninety and 95/100 dollars ($290.95) for the period commencing on December 19, 1983.

3. Claimant is entitled to reimbursement in the amount of seven hundred forty-five and 36/100 dollars ($745.36) for visits to Wilden Clinic and the mileage to get there.

4. That since the parties stipulated to a rate of $290.95, but paid temporary total disability benefits at a rate of $288.04, that an additional $2.91 per week be paid for the following peiods: January 3, 1983 through May 22, 1983, and August 18, 1983 through December 18, 1983.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay unto claimant permanent partial disability benefits in the amount stated above and pay an additional two and 91/100 dollars ($2.91) per week for the weeks that temporary total disability benefits were paid.

That defendants pay seven hundred forty-five and 36/100 dollars ($745.36) in medical benefits.

That defendants pay accrued amounts in a lump sum, and pay interest pursuant to section 85.30, The Code.

That defendants be given credit for benefits already paid to claimant.

That defendants pay the costs of this action, pursuant to Industrial Commissioner rule 500-4.33 .

That defendants shall file claim activity reports, pursuant to Rule 500-3.1(2), as requested by the agency.

That this case be returned to docket for handling of the section 86.13 issue which has been bifurcated.

Signed and filed this 17th day of September, 1985.

T. J. McSweeney
T. J. MC SWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES J. LARSON, Claimant, vs. IOWA POWER & LIGHT Employer, Self-Insured, Defendant.	:	File No. 640317 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 7 1985
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Charles Joseph Larson, claimant, against Iowa Power and Light, self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out and in the course of his employment on June 18, 1980. It came on for hearing on June 4, 1985 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 July 2, 1980. On July 16, 1980 a memorandum of agreement was filed. A form 2 filed May 11, 1984 shows the payment of fifty-four weeks and four days of healing period benefits as well as thirty-three weeks of permanent partial disability benefits for fifteen percent of a lower extremity.

The record in this matter consists of the testimony of claimant and Mary Nelson; claimant's exhibit 1, reports from Donald W. Blair, M.D.; claimant's exhibit 2, reports from Stephen G. Taylor, M.D.; claimant's exhibit 3, records from Mayo Clinic; claimant's exhibit 4, records from defendant's medical department; claimant's exhibit 5, the deposition of Jerome G. Bashara, M.D.; claimant's exhibit 6, the labor management agreement and a listing of job positions; claimant's exhibit 7, a series of medical documents from Iowa Methodist Medical Center; defendant's exhibit C, letters from Dr. Taylor; defendant's exhibit E, a series of correspondence; defendant's exhibit F, wage rates and job descriptions; defendant's exhibit G, material related to claimant's running for public office; defendant's exhibit H, a flier for claimant's campaign; defendant's exhibit J, industrial commissioner's forms, defendant's exhibit L, payroll records and defendant's exhibits M and N, first reports of injury. Defendant submitted a brief.

Defendant's exhibit D was not considered as that report was received only a week prior to hearing. In excluding that report, defendant's exhibit E was evaluated and included in the record.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant injury and any disability he now may suffer and whether or not claimant is entitled to additional permanent partial disability benefits.

STATEMENT OF THE CASE

Thirty-four year old claimant, a high school graduate with average grades and participation in a wide variety of activities who has a semester of college in marketing, testified to completing an apprentice program for a journeyman lineman position. Included in the program were weekly four-hour night school classes with materials to be studied at home and testing to be completed. Theory, electrical math, building power lines, taking charge and organizing jobs were covered.

Claimant recalled the circumstances of his injury on June 18, 1980 as follows: He and two others were transferring service to eliminate a pole in an alley. He climbed a ladder and fastened onto a rung. The service was dropped from the pole and picked up by a car in the street. He was caught under the arm. He fell landing in the alley with a ladder and pipe on top of him.

A rescue unit was called and he was taken to the emergency room where he was seen by the company doctor. His complaints were of a headache, backache and pain in his right foot. X-rays were taken of his skull, back and right leg.

He was treated by David Blair, M.D., until Dr. Blair retired at which time claimant was referred to Stephen Taylor, M.D. He was having continuing problems with swelling and tenderness and he was not full weight bearing. After x-rays and cortisone injections, Dr. Taylor did a bone fusion.

Eventually claimant was sent to Mayo Clinic to see if additional surgery was needed. He was at Mayo on two occasions and he was seen in the gait lab. His treatment there included a prescription for rocker bottom soles and side shields for his shoes and cortisone injections. He visited Jerome Bashara, M.D., for evaluation.

Claimant reported his his most recent treatment of two or three months ago as injection of the subtalar joint by Dr. Taylor.

Claimant recalled returning to light duty in August or September of 1980 following his injury. Thereafter he was off work periodically for two or three days at a time due to swelling. He missed work from June to December in 1981 due to the fusion. Two years later he missed work again until May of 1984. Claimant's work at the time of his injury was as a line crew foreman. After his return to work, he had difficulty climbing due to the stress it placed on his right foot and back. More particularly he was bothered by his climbing hooks and safety belt.

In 1982 he worked alone as an electric serviceman with troubleshooting work on an 11 p.m. to 7 a.m. shift with weekend coverage as well. This work reduced his climbing with hooks although such work was necessary from time to time. On May 7, 1984 he commenced a second apprentice program of three years as a substation electrician. This work consists of maintenance in the substation. He again must attend Monday night classes. He has been troubled by the math needed in working with various formulae, but he anticipated being able to complete the program by working hard. He has not applied for work elsewhere. However, he did take a parttime job as a furniture salesperson and admitted he was good at selling.

Claimant asserted that his back above the belt line has troubled him since the time of his fall and he assumed it was because of his limping. He notes pain if he is standing or walking. He uses a TENS unit on both his back and foot, surgical hose and whirlpool. Because of the fusion, the motion of his foot is limited.

Claimant stated he was stressed by a dissolution and by a superintendent in the substation who did not want a person with a disability to work there.

Claimant acknowledged that prior to his injury from time to time he had pulled or strained a muscles in his back which he treated with muscle relaxants from the company doctor. After June 18, 1980 he pulled a muscle or strained his back getting off a truck and missed a few day's work.

In June of 1982 he twisted his knee while he was walking in snow, had surgery and missed work. He denied being troubled by his knee since that time or having a difference in gait attributable to this incident. He did not believe he saw Dr. Taylor for any trouble with his knee nor did he think he made knee complaints to the doctor.

Claimant indicated that of the thirteen persons in the substation department he carried the lowest seniority and he anticipated its taking a long time for him to become a foreman. His earnings as a foreman there would be the same as those of a line crew foreman. As an apprentice substation electrician he had not had as much overtime which he had on the line crew.

Claimant agreed that his restriction is against climbing with hooks and that he could do other climbing. The restriction led to his being told he could not do the electric serviceman job.

Claimant testified that he looked for work which would result in the least amount of loss of income. He believed meter reading would entail too much walking. He also gave consideration to underground cable splicer.

His personal activities also have decreased. He coaches a coed softball team and plays if there is a shortage of players. Claimant has twice been elected to the school board and he has served on a number of boards and committees. In 1980 he ran for the Iowa legislature. He also has been active with his union.

Mary Nelson, administrator of benefits and of labor relations for defendant employer testified to familiarity with job descriptions and wages, workers' compensation claims and records of claimant. She indicated claimant had reported back trouble on February 13, 1981 and May 23, 1982, but neither incident had resulted in lost time.

Nelson stated that claimant was paid benefits on the basis of a letter from Dr. Taylor. There had been no correspondence from Dr. Taylor providing a higher rating and none giving a functional impairment to the back. Claimant's sole restriction was against climbing with hooks. She acknowledged that Dr. Bashara has placed an impairment on claimant's back.

Nelson was unaware of the problem with a substation foreman not wanting claimant. She reported conferring with several others to determine what work claimant would be eligible for and she expressed the opinion that he is in the best position consistent with his interest. Work in power plants had not been explored as that was another section of the company. However, a transfer there was not foreclosed to to claimant.

Assuming claimant stayed with the company, he could retire at any time between ages fifty-five and sixty-five. Retirement prior to age sixty-two would result in a penalty. A large segment of employees retire at sixty-two. Staying until age sixty-five results in more benefits. Company records show claimant was seen by a doctor at Iowa Power in June of 1980 complaining of shoulder, neck and back pain. On March 4, 1982 he told of a low back strain four to five days before. In May of that year he reported back spasm after riding in a truck. Hospital records show claimant was seen in the emergency room for what was diagnosed as a probable muscle strain. In October of the same year Robaxin was prescribed for his stiff back.

Donald W. Blair, M.D., saw claimant on June 18, 1980 with complaints of his right foot following a fall from a ladder after which he landed on his feet and back. He complained of both his foot and his lower back. X-rays of the spine were negative. There was a fracture of the tarsal navicular of the right foot which was cast. Claimant was given crutches.

When claimant was seen approximately six weeks later union was incomplete. There was swelling in the foot and claimant limped.

On August 15, 1980 Dr. Blair found the back asymptomatic and and he did not anticipate functional impairment of either the back or foot.

Stephen G. Taylor, M.D., saw claimant on May 5, 1981 and took a history of a fall with a heavy piece of wood landing on the foot. There was tenderness in the mid foot joints and over the anterior aspect of the ankle joint. X-rays showed irregularity of the naviculocuneiform joint and a collapse of the navicular suggesting avascular necrosis. The doctor suspected post-traumatic arthritic changes and that a fusion would be needed. A cortisone injection was done and an orthotic was tried.

On June 24, 1981 a talonavicular fusion and naviculocuneiform fusion with iliac bone grafting were done. The post operative diagnosis was post-traumatic avascular necrosis, right tarsal navicular. No mention of back problems is made in the discharge history.

When claimant was seen in October, he was walking on the lateral border of his foot. On December 10, 1981 claimant was released to return to work the following Monday.

On January 25, 1982 claimant reported twisting and falling while skiing. An arthroscopy was done and claimant was started on exercises. A month thereafter claimant had full range of motion in his knee, but he continued to have chronic pain in his foot.

On August 20, 1982 Dr. Taylor rated claimant's impairment at fifteen percent of the lower extremity based on his limited motion and both the AMA and Orthopedic Guides.

Claimant was seen with ankle complaints in August of 1982 and then not again until July of 1983 at which time he was observed to be walking without a limp. The doctor suspected claimant was getting arthiritis in the subtalar joint. Injections were tried.

On November 28, 1983 claimant underwent an incision of the anterior process of the calcaneus with an extensor brevis muscle interposition and removal of a staple from the medial side of the foot.

As of January 1, 1984 claimant was walking without a limp. The following month Dr. Taylor decided to refer claimant to the Mayo Clinic.

He was seen at Mayo on February 21, 1984 where he gave a history of falling from pole and injuring his right foot when a heavy piece of wood landed on it. Claimant was noted to have a slight limp. Bernard F. Morrey, M.D., orthopedic surgeon, ordered a technitium bone scan which showed a diffuse uptake without specific localization. A gait study showed an exterior rotation with an altered force plate recording. Dr. Morrey suggested conservative treatment to include a sach heel and rocker bottom sole.

On his return, claimant told Dr. Taylor he would like to try changing his work to avoid climbers on wooden poles.

In May claimant went back to Mayo. Dr. Morrey indicated some dissatisfaction with the modification in claimant's shoes and boots. Claimant was injected over the calcaneal cuboid joint.

On May 1, 1984 Dr. Taylor recommended that claimant's use of climbing hooks be limited to 20 percent of his work day.

Jerome G. Bashara, M.D., board certified orthopedic surgeon, examined claimant on December 4, 1984 and found some mild tenderness in claimant's back. There was no movement between several joints of the mid and hind foot and some tenderness was present. X-rays from 1980 were compared with those from 1984. Anterior compression was observed at L5 which had not been present in 1980. Dr. Bashara concluded claimant had a mild compression fracture and assigned a five percent impairment rating related to the compression fracture of between zero and twenty-five percent based on the orthopedic guide. A twenty percent impairment was assigned to the lower extremity based on pain, swelling, decreased range of motion and both the Orthopedic and AMA Guides.

As to causation Dr. Bashara testified that "in an accident where one falls several feet and then lands on their back and heels and foot, it is just a very common combination of injury to have both a compression fracture of one of the lumbar vertebrae and an injury to the foot."

The accident referred to was a twenty foot fall in June of 1980 when a ladder slipped. Although the orthopedist thought claimant's foot would not prevent his climbing ladders or stairs, he viewed climbing a pole as difficult and dangerous. He placed no restrictions on claimant because of impairment to the back. Dr. Bashara pointed out these references to claimant's back: X-rays from June 18, 1980; the emergency room record of June 18, 1980; Dr. Blair's reports of June 24, 1980 and August 18, 1980; an emergency room record from May 23, 1982; prescription of a muscle relaxant on October 22, 1982; the company doctor's notes of May 14, 1982 and a back strain on March 2, 1982. He acknowledged there was no notation of back complaints in the records of Dr. Taylor.

Dr. Bashara knew both that claimant had a skiing incident in January of 1982 and that he had back complaints when he stepped off a truck in May of 1982. He believed injuries after the skiing accident were confined to the right knee and he did not think that incident contributed to claimant's back problems.

APPLICABLE LAW AND ANALYSIS

There is no question but that claimant had an injury arising out of and in the course of his employment on June 18, 1980. Defendant contends that the injury was confined to a scheduled member, the lower extremity; and claimant asserts that the injury has resulted in permanent impairment to his back thereby moving his injury to the body as a whole.

Claimant claimed that at the time of his injury he complained of a backache, that his back has troubled him since the time of his injury and that he attributed his difficulty to his limping. Dr. Blair's notes record complaints of both claimant's back and foot. X-rays of the spine at that time were negative. By August 15, 1980 Dr. Blair found claimant's back asymtomatic and he anticipated no functional impairment.

When claimant was first seen by Dr. Taylor, he made no complaints of his back and Dr. Taylor made no notation of the limp or of gait problems.

Claimant had a skiing accident in January of 1982 which rendered him unable to bear weight on his right leg. In August of 1982 claimant injured his ankle at the beach. Claimant was not seen from August of 1982 until July of 1983. At that time and again in January of 1984 claimant was observed by Dr. Taylor to be walking without a limp.

However, in February of 1984 while he was at Mayo Clinic claimant was noted to have a slight limp. He gave no history at that time of a back injury nor did he complain of his back. Alterations were made in claimant's shoes and boots to decrease stress on walking, but no reference was made to the back.

It was not until claimant saw Dr. Bashara in December of 1984 that a history of fairly constant low back pain accompanied by some stiffness and aching since 1980 was recorded. On examination there was mild tenderness at L5-S1 and on x-ray a very slight anterior compression at L5 was found with no significant change in height.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 18, 1980 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). 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 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. 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). 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).

Evidence from Dr. Bashara is the sole evidence supporting a finding that claimant's June injury resulted in impairment to his back and the doctor describes the objective evidence as "a very slight anterior compression of the body of L4 with no significant change in the height." Balanced against that evidence is Dr. Blair's declaration in August of 1980 that claimant's back was "bascially asymptomatic" with no permanent functional impairment anticipated; several additional traumatic events; a series of visits by claimant to Dr. Taylor during which no back complaints were recorded; and an evaluation at Mayo Clinic where claimant presumably would have used expertise there to deal with all his complaints and where in fact none relating to his back were noted. Claimant was being treated on a regular basis. He is an intelligent and articulate person with good communication skills with which to apprise his physicians of his condition. Dr. Bashara's examination was not undertaken until more than four years after the June 1980 injury. The gap is just too great. Claimant does not preponderate. Disability resulting from claimant's injury is confined to his lower extremity.

Claimant has been paid thirty-three weeks of benefits based on Dr. Taylor's rating and based on his limitation of motion and application of the AMA and Orthopedic Guides. Dr. Bashara rated claimant's impairment at twenty percent of the lower extremity; and he, too, used both guides.

On the one hand Dr. Taylor is the treating physician. He rated claimant's impairment in April of 1982. Subsequent to that rating, claimant has had additional surgery. The record does not disclose whether or not Dr. Taylor was asked for a rating after that surgery. Dr. Bashara used the guides relied upon by Dr. Taylor in evaluating claimant's condition in December of 1984. Greater weight in this decision is being given to the opinion of Dr. Bashara because his examination is the more recent. Claimant will be awarded an additional eleven weeks of benefits.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-four years of age.

That claimant is a high school graduate with some college and additional training as a lineman and substation electrician.

That claimant was injured on June 18, 1980 when he fell from a ladder.

That defendant has paid claimant healing period benefits and thirty-three weeks of permanent partial disability for fifteen percent of his right lower extremity.

That claimant returned to work in August or September of 1980.

That claimant missed work again from June to December of 1981 when he had a talonavicular fusion and naviculocuneiform fusion with iliac bone grafting.

That claimant had some back trouble prior to his injury.

That claimant carries a restriction against climbing with hooks more than twenty percent of the time.

That claimant reported back complaints in June of 1980, on February 13, 1981, March 4, 1982, May 23, 1982 and in October of 1982.

That claimant had a skiing injury to his right knee on January 25, 1982.

That claimant had a probable muscle strain to his back in May of 1982.

That claimant had additional surgery on his ankle in November of 1983.

That claimant has an exterior rotation of his foot with an altered force plate pattern.

That impairment resulting from claimant's injury of June 18, 1980 is confined to his lower extremity.

That claimant has an impairment of his right lower extremity of twenty percent.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence a causal relationship between his injury of June 18, 1980 and an impairment to his right lower extremity.

That claimant has failed to prove by a preponderance of the evidence a causal relationship between his injury of June 18, 1980 and any impairment to his back.

That claimant has established entitlement to additional permanent partial disability benefits based on a twenty (20) percent impairment of his right lower extremity.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant an additional eleven (11) weeks of permanent partial disability at a rate of two hundred fifty-two and 80/100 dollars ($252.80).

That defendant pay interest pursuant to Iowa Code section 85.30.

That defendant pay amounts due and owing in a lump sum.

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 1 day of August, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HELEN L. LAWSON, Claimant, vs. PARR MANUFACTURING CO., Employer, and SENTRY INSURANCE, Insurance Carrier, Defendants.	:	File Nos. 610827 720524 & 764427 A P P E A L D E C I S I O N

FILED
JUL 25 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant and defendants appeal a proposed arbitration decision wherein it was found that claimant sustained three separate injuries arising out of and in the course of her employment with defendant resulting in temporary total disability. The record on appeal consists of claimant's exhibits 1 through 12; the hearing transcript; and briefs filed by both parties.

ISSUES

The claimant's issue on appeal is whether the claimant is entitled to permanent partial disability benefits.

The defendants maintain on appeal that the claimant did not sustain a compensable injury on any of the three occasions: September 3, 1982; November 12, 1982; and February 9, 1983. Defendants state that if it is determined that claimant did sustain a compensable injury, the decision of the deputy stating that claimant did not suffer any permanent partial disability is correct.

ANALYSIS

The evidence was well summarized by the deputy in the review of the evidence and will not be repeated herein.

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

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

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of her employment September 3, 1982 while lifting boxes with a coworker at Parr Manufacturing.

2. Claimant sustained an injury which arose out of and in the course of her employment November 12, 1982 while lifting 90 pounds with a coworker at Parr Manufacturing.

3. Claimant sustained an injury which arose out of and in the course of her employment February 9, 1983 when she twisted while stooped and her back cracked.

4. Claimant's low back problems from September 3, 1982 through March 28, 1983 resulted from the September 3, 1982 lifting incident.

5. Claimant had low back complaints from at least November 1980. The September 1982 incident and its sequelae aggravated that preexisting condition.

6. Claimant was off work from November 15, 1982 to December 13, 1982 as a result of the November incident.

7. Claimant was off work from February 9, 1983 through February 14, 1983 and from February 21, 1983 through March 14, 1983 as a result of the February incident.

8. Claimant's mechanical low back problem was fully resolved March 28, 1983.

9. Claimant was released to work with a permanent 25 pound weight restriction.

10. Claimant is four feet, ten and one-half inches tall and her weight is not disproportionate to her height.

11. Claimant is 51 years old.

12. Claimant was hospitalized and received emergency room care and physician treatment as a result of her work incidents.

13. Claimant incurred 225 miles of medical mileage expenses as a result of her work incidents.

14. Claimant's employer paid a proportionate share of her health insurance premium.

15. Claimant's health insurer has paid portions of claimant's medical expenses.

CONCLUSIONS OF LAW

Claimant has established injuries of September 3, 1982, November 12, 1982, and February 9, 1983 which arose out of and in the course of her employment.

Claimant has established that her injuries were causally related to her disability.

Claimant is entitled to temporary total disability benefits from November 15, 1982 to December 13, 1982 as a result of her November 12, 1982 injury and from February 9, 1983 to February 14, 1983 and from February 21, 1983 to March 14, 1983 as a result of her February 9, 1983 injury.

Claimant has not established any permanent disability resulted from her work injuries of September 3, 1982, November 15, 1982, and February 9, 1983.

Claimant is entitled to payment of medical expenses as enumerated in the order below.

Claimant is entitled to payment of medical mileage expenses for 225 miles.

Defendants are entitled to a credit on medical expenses the health insurer paid proportionate to the health insurance premium share the employer paid.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant temporary total disability benefits at a rate of one hundred forty-four and 50/100 dollars ($144.50) from November 15, 1982 through December 13, 1982; from February 9, 1983 through February 14, 1983; and from February 21, 1983 through March 14, 1983.

That defendants pay accrued amounts in a lump sum.

That defendants pay claimant the following medical expenses:

Iowa Methodist Medical Center	$ 140.90
Iowa Lutheran Hospital	2,613.10
Dr. Foley	419.00
Orthopaedic Associates	90.00

That defendants pay medical mileage expenses of two hundred twenty-five (225) miles at the rate of twenty-four cents ($.24) per mile.

That defendants receive a credit for medical expenses paid by the health insurance proportionate to defendant employer's contribution to claimant's health insurance premium.

That defendants pay interest pursuant to section 85.30.

That defendants pay costs of this action.

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

Signed and filed this 25 day of July, 1985.

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY E. LEWIS, Claimant, vs. FOSTER-SMETANA, INC., Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 520933 A P P E A L D E C I S I O N FILED JUL 05 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed April 4, 1985 this deputy industrial commissioner has been appointed under the provisions of Iowa Code section 86.3 to issue a final agency decision in this matter.

Defendants appeal and claimant cross-appeals from a review-reopening decision in which defendants were ordered to pay the costs of examination at Mercy Medical Evaluation Center and claimant was denied additional healing period or permanent partial disability benefits as well as treatment in a pain center.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 11 and defendants' exhibit 12 and 13. All evidence was considered in reaching this final agency decision.

This decision modifies that of the hearing deputy.

ISSUES ON APPEAL

The issues on appeal as stated by defendants are these:

1. Whether or not claimant is entitled to have the Mercy Medical Evaluation Center medical cost paid for by the defendant under § 85.39 of the Iowa Code.

2. Whether or not the claimant is entitled to treatment at the Mercy Hospital Medical Center Pain Center or some other pain center at the expense of the defendants.

3. Whether or not claimant is entitled to additional healing period benefits after April 7, 1982.

4. Whether or not the defendant [sic] alledged failure to give a 30-day notice of termination of benefits is an issue in this portion of the appeal.

The issues as presented by claimant are these:

1. The claimant is entitled to treatment at Mercy Hospital Medical Center Pain Center, or some other pain center under the undisputed current record.

2. The claimant is still on healing period because he has permanent disability, has not at this time returned to work, there is no showing that he will not have significant improvement with treatment, and he is not medically capable of returning to employment substantially similar to that in which he was engaged at the time of injury.

3. Claimant is entitled to payment of the evaluation he had by Dr. From, as the Deputy ordered.

4. The defendants did not give the statutory thirty day notice as required by present Section 86.13 and the Auxier decision.

STATEMENT OF THE CASE

Forty-four year old married claimant, a former member of the National Guard with a GED, testified to helping on the family farm after he left school. He also did production and manufacturing jobs before entering the construction trade in 1973.

Claimant described his injury of September 21, 1978 as follows: It had been raining. He was asked to find a hose to hook up a pump so that an area could be drained. He was wearing five buckle overshoes. He had the hose over his shoulder. He was walking up an incline. He stepped in a hole he did not see. His leg snapped. He had pain and then swelling. He was taken to the hospital for x-rays. He was treated with ice, given crutches and sent home. His swelling did not go down. His business agent suggested he see a specialist.

He saw Frank Iwersen, M.D., who did surgery on his right knee which was followed by a pain block.

Dr. Iwerson referred him to R. Michael Gross, M.D., who arthroscoped his right knee and took out a bone spur. Thereafter, he was able to "slightly walk," but his pain remained. Later Dr. Gross injected his knee with Cortisone which again eased his pain for a brief time. Another surgery was followed by therapy and a Cortisone injection. Dr. Gross asked Timothy C. Fitzgibbons, M.D. to examine claimant and the two then did a further arthroscopy.

Claimant maintained that he continues to have pain and that he is unable to take the medication prescribed for pain and swelling because it results in an inability to drive or walk, loss of orientation, bleeding bowels and an upset stomach. He takes maximum strength analgesics at a rate of six to twelve per day. Claimant asserted that he had been told both by Dr. Gross and a physician in Des Moines that he might be helped by a pain center. Claimant said that the insurance carrier has refused to provide pain center treatment.

As to his work since his last surgery, claimant reported working July 6 to July 14, 1982; July 27, 1982 to September 10, 1982; from October 6, 1982 to October 16, 1982; November 1, 1982 to November 3, 1982; November 9, 1982 to December 21, 1982; June 6, 1983 to September 16, 1983 and October 6, 1983 to November 18, 1983. After this latter job and at the time of hearing in December of 1983, he had been on unemployment. Claimant indicated that he always sought work through the union hall. His business agent was aware of his health situation and did not send him on jobs he could not physically do or which would endanger either him or his fellow workers. He said that persons with good legs were working when he was not. Claimant refused to agree that the pain clinic was his own idea and asserted that both he and Dr. Gross thought it was a good idea.

On March 31, 1982 John Treantos, claim adjuster, refused authorization for claimant to be seen at Mayo Clinic. Claimant's former attorney subsequently was notified that while the carrier would not authorize treatment by someone other than Dr. Gross, consideration would be given to authorization for an section 85.39 examination.

On June 8, 1982 claimant's former attorney informed the carrier that Dr. Gross was referring claimant to a pain center. That letter also asks reinstatement of claimant's benefits in view of surgery at Mayo Clinic and contemplated treatment at a pain center.

Frank J. Iwersen, M.D., treated claimant with an arthrotomy and menisectomy of the right knee on November 14, 1978. He later used a sympathetic block. He released claimant to return to work on May 1, 1979 and restricted him from climbing ladders or doing lifting in excess of thirty pounds.

On May 22, 1979 Dr. Iwersen wrote that claimant was to be hospitalized for a lumbar sympathetic block and possibly a caudal block. When claimant was examined by Dr. Iwersen on September 5, 1979, he continued to have weakness and atrophy of the quadriceps on the right. The doctor suggested exercise to build the quadriceps.

Claimant next was seen on April 20, 1980 at which time he complained of pain and an inability to kneel. His pain was located in the lateral side of his leg half way between his ankle and knee. No definite or ligament instability was found. There was no swelling in the knee or fluid in the joint. Another arthroscopy was suggested which claimant refused because he was working.

Dr. Iwersen has provided claimant with impairment ratings ranging from ten to fifty percent of the right lower extremity with his most recent rating at twenty-five percent.

In August claimant had an arthroscope which revealed degenerative changes of the medial meniscus, mild degenerative changes in the lateral compartment and a retained posterior horn of the lateral meniscus which was removed.

In a letter dated October 7, 1980 R. Michael Gross, M.D., found nothing objective with which to correlate claimant's continued complaints of discomfort and buckling and he was unable to explain why the buckling occurred. Dr. Gross offered in a subsequent letter of May 7, 1981 that only a loose body, a flap tear of the meniscus, ligamentous instability or a dislocating kneecap would lead to buckling and that claimant had none of these.

Claimant was examined on May 7 at which time there was no fusion, but he complained of retropatellar discomfort and of discomfort over the medial and lateral femoral condyles. There was pain with varus movement of the knee which had full extension. Flexion beyond 130 degrees caused pain in the popliteal space. X-rays of the right hip were normal. X-rays of the right knee showed minimal degenerative changes. An additional arthroscope and video tape was suggested.

An arthroscopy and partial meniscectomy were done on May 11, 1981. A synovial plica was found and treated.

On November 10, 1981 Dr. Gross again complained of his inability to find a reason for a claimant's ongoing severe pain. He concluded that buckling was related to weakness which was a matter a rehabilitation. Claimant was returned to physical therapy and instructed to take pain pills before he participated. The doctor appeared to feel that claimant needed to push harder in his rehabilitation efforts.

On December 16, 1981 claimant was released to return to work with a restriction on working at heights and on his being on his feet for more than four hours a day. The plan was to gradually increase claimant's time on his feet to a full eight hours. Another work release is dated February 12, 1982. In a letter of March 30, 1982 Dr. Gross agreed that claimant could seek a second opinion at Mayo Clinic.

Claimant was seen at Mayo by Bernard F. Morrey, M.D., orthopedic surgeon, on May 7, 1982 he was unable to demonstrate an objective reason for claimant's symptoms. There was laxity which was attributed to the meniscectomy, but no real instability. Claimant was not offered treatment because his symptoms were so diffuse, but he seemingly talked the doctor into doing an arthroscopy which showed moderately extensive grade two changes with grade one to early grade two degenerative changes in the medial compartment. The rims of the meniscus were found to be stable.

In a subsequent letter Dr. Morrey rated claimant's impairment at fifteen percent and he noted the disparity between the objective findings and subjective complaints and suggested a functional component could be the reason for that difference.

In July Dr. Gross expressed this opinion about claimant's going to a pain clinic:

> With reference to your comment about the Pain Clinic, it is right that I did extend myself to Larry trying to arrange for him to go the Pain Clinic, but this was only because Larry requested this. Quite frankly, I am not optimistic that the Pain Clinic is not going to help Larry either.

Claimant was seen by James L. Blessman, M.D., on April 26, 1983 for a pain center evaluation. Claimant gave a history of an initial steroid injection followed by open surgery with three subsequent arthroscopies, two open surgeries, and a nerve block. Claimant's medication at the time of the evaluation was aspirin, but he had taken multiple medications before. Dr. Blessman assessed claimant's physical therapy as adequate.

On examination there was no swelling and claimant's range of motion was full. The knee seemed to be stable.

Claimant demonstrated pain behavior in that he was threatened that a physician might think his pain was all in his head. Dr. Blessman expected that he was mildly to moderately depressed although he found no vegetative sign of depression.

The pain specialist recommended a trial of an antidepressant and comprehensive pain management therapy including an active exercise component.

Scott B. Neff, D.O., orthopedist, reviewed claimant's records and found claimant's range of motion to be full. Dr. Neff believed claimant was not in need of any further surgical treatment and rated his impairment at fifteen percent. He also expressed the opinion that claimant could return to his normal occupation.

Todd F. Hines, Ph.D., saw claimant on April 27, 1983 and recorded his complaints of constant pain and sensitivity with buckling on an unpredictable basis, soreness in his right hip, turning of the right foot as he walked and numbness in the toes on the right. Claimant was interviewed and was given the revised Wechsler Adult Intelligence Scale, the Bender Gestalt and the Minnesota Multiphasic Personality Inventory. Dr. Hines did not find data reflecting psychological processes which could cause or exacerbate the presentation of symptoms or his pain experience. He found a modicum of depression and anger which was not of clinical significance. Anxiety was absent. There was no pattern of somatic conversion or hypochondriasis. Defense mechanisms and coping strategies reflected adequate breadth. No evidence of malingering or conscious manipulation was found. As a factor in claimant's slow recovery, Dr. Hines suggested "a personality pattern or style of emotional dependency which is characterized by a high need...for feedback and approval and an apprehension related to autonomous risk-taking."

Claimant was found to be at the lower end of normal range of cognitive skills. Claimant's reaction and response were slow, but he had good dexterity and coordination. Claimant was seen as perceiving situations concretely.

Dr. Hines concluded that claimant was a good candidate for a pain center and that claimant could complete a rehabilitation program which interested him.

Thomas W. Bower, L.P.T., examined claimant and found no effusion, no instability or drawering and no crepitus. A Cybex examination yielded inconsistent results. Bower rated claimant's impairment of the lower extremity at seven percent using the AMA Guides and twenty percent using the Orthopedic Guides. He viewed the latter rating as more fair.

Robert W. Jones, B.S., and G. Patrick Weigel, M.A., undertook a transfer of skills evaluation. Claimant told them that he was under a lifting restriction of twenty pounds and was not to climb ladders or to work at heights and was to work only four hours each day.

Claimant refused to supply a family history. He said both that he had graduated from high school and that he has a GED. He told of having a chauffer's license for a straight truck. Claimant reported work for ten years as a union laborer and work in farming and in a factory in assembly.

Testing showed claimant most interested in manual/skilled trades. Because of procedures on claimant's knee, it was suggested that claimant keep stooping, kneeling and crouching to a minimum. A computer assisted search showed there would be jobs claimant could do utilizing his previous job skills and remaining within his limitations.

APPLICABLE LAW AND ANALYSIS

Claimant seeks to raise in this proceeding the issue of notice required by Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978) and by Iowa Code section 86.13. Defendants question whether that issue can be raised in this appeal.

The industrial commissioner's file shows claimant sought to amend his petition at the time of hearing to add the issue of notice of termination and filed a written motion to amend to conform to proof. On January 6, 1984 the hearing deputy issued a ruling denying leave to amend. After seeking rehearing which was resisted by defendants, claimant appealed. The industrial commissioner's designee affirmed the deputy's ruling and declined to rule on whether any constitutional issue could be raised in a subsequent review-reopening. In light of that appeal decision, those issues will not be addressed herein. No judicial review was sought following that decision.

The first issue, therefore, to be considered is whether or not defendants should have been ordered as they were by the hearing deputy to pay for claimant's evaluation at Mercy Occupational Evaluation Center. Iowa Code section 85.39 provides in part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be to low, the employee shall, upon application to the Commissioner and upon delivery of the 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 are quite correct in noting that section 85.39 provides for only one examination of claimant at his employer's expense. Claimant was examined at Mayo and at Mercy. The hearing deputy's statement that "[n]o filings were made demonstrating defendants considered the Mayo examination an independent examination to which they consent" is not what the record shows. Instead of filing a Form 100 A provided by the industrial commissioner, claimant filed a Form 100 original notice and petition. Defendant's responded to claimant's request for examination by asserting that they "previously furnished claimant an examination and evaluation at Mayo Clinic under §85.39." Defendants next filed a request for admissions seeking to get claimant to acknowledge the truth and the correctness of two letters which were offered into evidence at the time of hearing. Claimant did not respond to that request.

The first of those letters was from the insurance carrier's claim supervisor to claimant's prior attorney indicating that only treatment by Dr. Gross was authorized, but that consideration would be given to authorizing an examination under section 85.39. Claimant's attorney then responded with a request for such an evaluation in a letter dated May 3, 1982.

The strict dictates of the code section; i.e., filing an application with the commissioner, were not followed by claimant when he went to Mayo. His failure to comply with procedure and defendants' accommodation by paying charges at Mayo should not result in their being ordered to provide additional examination at Mercy. That portion of the hearing deputy's order will be vacated.

The hearing deputy considered whether payment for the evaluation might be made under section 85.27 and concluded it could not. This deputy agrees but she reaches that conclusion because of the distinction between section 85.27 and 85.39; that is, the former is for treatment, the latter for evaluation. Clearly claimant went to Mercy for evaluation.

The next issue to be considered is whether claimant should be provided with treatment at a pain center. The hearing deputy concluded he should not. Dr. Gross acquiesed in trying to arrange for claimant to have pain clinic treatment, but seeking pain clinic care was an idea which orginated with claimant. Dr. Gross was "not optimistic that it could be helpful." Dr. Morrey did not suggest a pain clinic. Dr. Blessman recommended comprehensive pain management, antidepressants and an active exercise component. Dr. Hines found no patterns of somatic conversion or hypochondriasis and no evidence of malingering or conscious manipulation of symptoms. Claimant's personality style was thought to contribute to his slow recovery. Claimant was believed to be a good candidate for pain management.

This is a preplexing case. Claimant's pain has persisted for more than five years. When claimant's complaints have led to invasive procedures, those procedures, with the exception of that performed at Mayo, have resulted in some positive findings and repairs. The report of Dr. Hines does not indicate a psychlogical component to the condition of claimant's knee. That finding lends some legitimacy to claimant's complaint. Dr. Hines did find claimant a good candidate for pain management. Dr. Blessman is the only pain specialist to see claimant and he thinks claimant could benefit from pain clinic treatment. He has proposed direction for that treatment. On the basis of claimant's persistent complaints and of Dr. Blessman's expertise in dealing with chronic pain, defendants will be ordered to offer claimant treatment at a pain center of their choice and if he elects to undergo that care to pay him weekly benefits for the period of that treatment.

The final issue for determination is claimant's entitlement to further healing period or permanent partial disability benefits. Filings with the industrial commissioner show claimant has been paid for twenty-four percent of the leg which was injured on September 21, 1978 and for extensive healing periods from September 22, 1978 to September 4, 1979; August 14, 1980 to October 10, 1980; May 11, 1981 to April 8, 1982 and May 7, 1982 to July 1, 1982.

Claimant first had surgery--an arthrotomy and menisectomy of the right knee in November of 1978. Thereafter he had therapy in and a sympathetic nerve block. In May of 1981 a second procedure to repair a torn medial meniscus was undertaken. Claimant has returned to work from time to time.

Dr. Gross has been unable to find anything of an objective nature to explain claimant diffuse complaints. Dr. Morrey could find no objective reasons for claimant's continued pain and raised the possibility of a functional component. Dr. Blessman assessed claimant's medical and surgical evaluation and treatment as adequate. Dr. Neff found claimant in need of no additional treatment. Nor did therapist Bower.

Claimant argues that he remains in healing period "because he has permanent disability, has not at this time returned to work, there is no showing that he would not have significant improvement with treatment, and he is not medical capable of returning to employment totially similiar to that in which he was engaged at the time of injury." Claimant's argument covers all the contingencies of Iowa Code section 85.34 (1) which 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 similiar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

The record shows that claimant has returned to work and that he continues to work out of the union hall as he did prior to his injury. Claimant has been given work restrictions from time to time. However, Dr. Neff who saw him most recently gave him no restrictions. The experts providing reports agree that claimant has reached maximum recuperation. Claimant's healing period ends the first time he meets any of the tests set out in the statute. Claimant has been paid for those periods when he was unable to work because of his injury. He is not entitled to additional healing period at this time.

Neither is claimant entitled to additional permanent partial disability. He has been paid 25 percent of the leg and that payment is fair. As the hearing deputy noted there is no evidence to extend claimant's disability beyond the scheduled member.

FINDINGS OF FACT

WHEREFORE, it is found:

That claimant is forty-four years old.

That claimant has a GED.

That claimant began construction work in 1973.

That claimant injured his right knee on September 21, 1978 as he was working at his job site.

That claimant had surgery on his knee on November 14, 1978 and on May 11, 1981.

That claimant has had arthroscopies.

That claimant has had pain block injections in his knee.

That claimant worked from July 6 to July 14, 1982; July 27 to September 10, 1982; October 6 to October 16, 1982; November 1 to November 3, 1982; November 9 to November 21, 1982; June 6 to September 16, 1983 and October 6 to November 18, 1983.

That claimant also has drawn unemployment.

That claimant has developed degenerative changes.

That claimant was entitled to one examination to be paid for by his employer.

That claimant was evaluated at Mayo and also at Mercy.

That claimant was seen at Mercy for evaluation and not for treatment.

That claimant's examination at Mayo Clinic was an independent medical examination as contemplated by Iowa Code section 85.39.

That claimant was paid healing period benefits from September 22, 1978 to September 4, 1979; August 14 to October 10, 1980; May 11, 1981 to April 8, 1982 and May 7 to July 1, 1982.

That claimant has been paid permanent partial disability for 25 percent of the leg.

That treatment at a pain center is reasonable and necessary in claimant's care.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That claimant has failed to establish entitlement to payment for his evaluation at Mercy Medical Evaluation Center pursuant to Iowa Code section 85.39.

That claimant has established treatment at a pain clinic is reasonable and necessary to treat the injury he received on September 27, 1978.

That claimant has not established entitlement to further healing period or permanent partial disability benefits.

ORDER

THEREFORE, it is ordered:

That defendants offer to claimant treatment at a pain center of their choice.

That claimant either accept or reject defendants' offer of treatment in ninety (90) days.

That if claimant undergoes treatment at a pain center defendants pay weekly period benefits at a rate of two hundred and eight dollars and eighty-six cent ($208.86) for the period claimant is treated.

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

Signed and filed this 5 day of July, 1985.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH LUNDY,	:	
Claimant,	:	
vs.	:	File No. 710431
RADIO SHACK CORP.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
CNA INSURANCE COMPANIES,	:	
Insurance Carrier, Defendants.	:	

FILED
AUG 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision filed November 26, 1984 wherein it was found that the claimant sustained an industrial disability of 20 percent to the body as a whole as a result of sustaining an injury arising out of and in the course of his employment. The record on appeal consists of the hearing transcript; claimant's exhibits 1 and 2; defendants' exhibits 1 through 7; and the brief filed by the defendant appellant. The claimant appellee filed no brief in connection with this appeal.

ISSUES

The issues as stated by the defendants are:

I. The proposed review-reopening decision of the deputy industrial commissioner is unsupported by substantial evidence in the record made before the agency when viewed as a whole, so as to allow an award of 20% industrial disability as the result of the work related injury at issue.

II. Claimant failed to carry his burden of proof by a preponderance of the evidence that the injury of July 22, 1982, is causally related to the disability upon which he now bases his claim. A possibility is insufficient; a probability is necessary.

III. The claimant is not entitled to recover for the results of a preexisting injury or disease. If any injury is sustained in the course of claimant's employment which lights up or aggravates such condition, he may recover only to the extent of the aggravation.

IV. Where a claimant sustains an injury which is of a temporary nature only, any award for compensation shall be limited to that period of disability.

REVIEW OF THE EVIDENCE

At the hearing the parties stipulated that claimant's compensation rate in the event of an award would be $185.45. A final report was filed showing payments made between July 24, 1982 and June 17, 1983, 47 weeks. The claimant testified that he was 36 years old and married with two children. He completed the eighth grade and dropped out of school at age 13. His weight at that time was 250 pounds. The claimant received a G.E.D. when he was 26. At the time he dropped out the claimant went to work for his father as a bulldozer operator and pit supervisor for the family coal mine.

The claimant went to work for Boise-Cascade (hereinafter Boise) in 1969. He began with them in Sigourney, Iowa at Kingsbury Homes. Boise manufactured homes. Claimant's duties at that time required him to lift. He worked for Boise until September 1, 1979. For a substantial period of time Boise employed the claimant as a supervisor which required him to watch 50 men, write up records, and do the payroll.

The claimant had no back problems prior to 1972 but in 1972 while working for Boise the claimant "jerked the muscle" in his lower back. He was in the hospital for several weeks under the care of P. Jutabha, M.D. Claimant was off work for one to one and a half months. On returning to work the claimant had no problems. Then in either 1973 or 1974 while working for Boise the claimant "pulled a muscle" in his back which resulted in him being placed in traction for a couple of weeks. Again the claimant was off work for one to one and a half months. His weight during this period ranged from 250 to 280 pounds. In January of 1979 while working for Boise the claimant slipped on ice and "sprained" the muscles in his lower back immediately above his belt line. He was treated by Donald Burge, M.D., in Ottumwa. This injury resulted in the claimant losing between one to one and a half months.

After the claimant terminated his employment with Boise in 1979 he and another purchased and operated a bulldozer from January to March 1980. The claimant was a gas station attendant until August 1980 at which time he was made manager of defendants' Oskaloosa outlet. The claimant had started with defendants on April 23, 1980 as a salesman which required selling and stocking the shelves with stereo equipment. The claimant testified that he suffered an injury in April of 1981 when he was lifting a 120 watt receiver and tried to catch it as it fell back. He pulled the muscles in his lower back, the area that he had injured previously a number of times. He received no workers' compensation payments for this because, he testified, Larry Campbell the district manager told the claimant to turn it in on his insurance and that he would be paid his salary anyway. The claimant missed a couple of weeks work because of this incident. After the accident the claimant resumed his normal duties.

On July 19, 1982 at approximately 7:30 p.m., the claimant allegedly injured his back at the defendants' store. He testified as follows: "I was lifting a stereo up to put it on the top shelf in the back room and the darn thing flipped back out at me. And I reached out and grabbed it and sprained the muscles in the back."

The claimant's back, from the middle down, "just all tightened up." The claimant drove home and then had his wife take him to Mahaska County Hospital where Tony Kunz, M.D., was waiting for him. Claimant was put in traction immediately and remained in the hospital until August 10, 1982. During his hospitalization the claimant had complaints of pain in his middle and lower back and down his right leg. For these complaints the claimant was placed in traction and prescribed pain killers.

The claimant was referred to Donald D. Berg, M.D., of Ottumwa who saw the claimant one and one-half weeks after the accident. The defendant insurance company paid all medical bills including mileage in connection with the visits. Dr. Berg referred the claimant to Richard F. Neiman, M.D., a neurologist in Iowa City. Dr. Neiman performed a CT scan on the claimant. The claimant was also sent to Nebraska for a CT scan. The medical expenses for this trip were picked up by the defendant insurance company. The claimant was sent to Des Moines to be seen by Scott B. Neff, D.O., and Stuart R. Winston, M.D.

The claimant was released to work by Dr. Berg with a 25 pound weight limit. Claimant attempted to go back to work with the defendant but was offered only a part time job in Ottumwa which would have required the claimant to drive 70 miles round trip. The claimant stated that he applied for quite a few jobs. In August 1983 the claimant began working for Nobar Security Systems as a salesman for Nobar's southeast Iowa area. The claimant had to quit working for them in October 1983 because he could not carry the 50 pound bag of equipment.

The claimant, however, did spend from November 1983 to January 1984 repairing dilapidated FHA houses with his partner. The claimant stated that he painted, put up a wall in the basement, cut wood, and did some nailing, stating that he took it pretty easy. He did say that he and his partner were going to submit bids for other FHA houses.

The claimant stated that he has been advised by various doctors to lose weight. Having weighed 315 pounds at the time of the accident the claimant was down to 260-265 pounds at the time of the hearing. He testified regarding exercises he was prescribed to do as follows: "There isn't too much I can do without causing myself a lot of pain. You know, I done some of them. Dr. Berg told me some. Pulling my legs up and stuff, but my spine just won't take it." All medical, drug, and mileage bills have been paid by the defendants.

On cross-examination the claimant stated that Dr. Berg released the claimant back to work with a 25 pound weight restriction on June 14, 1983. The claimant told Job Service of Iowa that the weight limitation would gradually be lifted. On redirect the claimant stated that he is still having "shooting pains" down his right leg everyday. He has also had his back "lock-up" on him a couple of times. He also said that his accident occurred July 22, 1982.

G. Brian Paprocki, a self-employed vocational consultant, testified for the claimant. He stated that he has interviewed the claimant three times. Based upon his knowledge, experience, and doctor's reports as well as talking with the claimant, he assigned the claimant a 30 percent industrial disability.

The defendants called Mary Wilson, who is in charge of the defendants' personnel records. She stated that the decision to fire the claimant had been made prior to July 22, 1982 and that the claimant knew he was to be fired. Kathleen Benson testified regarding jobs she thought the claimant could handle but on cross-examination stated that she had neither seen nor spoke with the claimant.

Larry Campbell testified for the defendants. In July of 1982 he was a district manager in charge of the defendants' Iowa stores. Part of his duties involved the hiring and firing of employees. He stated that the store managers know exactly where they stand in terms of their future with the defendants. Mr. Campbell felt that the claimant knew he was to be fired.

Claimant's exhibit 1 is a collection of various medical reports. A CT report by J.J. Gleich, M.D., of Ottumwa dated May 11, 1983 states that a CT scan was done of the claimant's lumbar spine. The diagnosis was lumbosacral strain. The impression states in part "no definite evidence of herniated nucleus pulposus." A letter from Stuart R. Winston, M.D., a neurosurgeon, dated August 10, 1982 states that the claimant's neurological examination is normal. The EMG and nerve conduction tests suggested a mild S-1 irritation. A discharge summary of Dr. Kunz's dated August 6, 1982 states that claimant's lumbosacral spine "showed essentially no abnormality." It further stated: "There was felt to be some psychosomatic component to his illness due to the fact that he would require initially Demerol and Vistaril in large doses to control his pain but by the time of leaving, he was getting as much relief from 100 mg. of Vistaril IM."

A clinical note of Dr. Berg's on the date November 15, 1982 it states: "Has evidence of bulging disc at L5-S1 by the CAT scan." A letter from Dr. Berg to Dr. Kunz dated July 30, 1982 states in part: "My impression is the patient hss [sic] suffered lumbrosacral [sic] strain and he has underlying degenerative disc disease and exogenous obesity and some right sciatic pain." A letter from Richard F. Neiman, M.D., a neurologist, to Dr. Berg dated October 18, 1982 states in part:

> I enclose the EEG report and CT on Kenneth Lundy. I think he probably does indeed have a bulging L5-S1 disc. However, in view of his massive size, I think he is far from being a good surgical candidate. I think with a man this size, one might consider a gastric stapling procedure to reduce down his weight and then see how he does regarding the back. I have done this a number of times in the past with a good degree of success.

A CT scan of the lumbosacral spine performed by Dr. Neiman yielded the following results, dated October 8, 1982:

> IMPRESSION: 1) Examination of the L5-S1 level shows evidence of symmetrical central...disc, but no evidence of herniated disc nor is there evidence of encroachment of...nerve roots at this level. There is evidenceof [sic] mild lateral recess stenosis bilateral at L5-S1. No central canal stenosis is seen.
>
> 2) Examination of the L4-5 level shows again, a convex, but symmetrical...disc with no evidence of herniation. There is no evidence of nerve root encroachment good fatplanes being seen onthe [sic] lateral nerve roots. There is no evidence of...recess or central stenosis.
>
> 3) Examinaion of the L3-4 level shows less than ideal demonstration of the disc due to artifact. No gross abnormalities are seen however. No evidence of...recess or central stenosis.
>
> 4) Incidentally shown is some mild hypertrophy of the superior and inferior articular facets, both at L5-S1 and L4-5. (... indicates where right margin of exhibit is cut off)

Included in claimant's exhibit 1 is a letter report by Scott Neff, D.O., to defendant insurance company dated April 6, 1983. Dr. Neff writes:

> He has a bulging disc at L4-S1, without herniation, and without any sign of neurologic long tract involvement. He has facet degenerative disease, which is certainly common in patients of this size, who are of his approximate age. These facet degenerative changes occur with time, and are not related to his injury. I cannot find any evidence to support the "something is moving and slipping out of place in my back", that he feels higher in his back.

An x-ray of the L-5 spine on July 25, 1982 by A. T. Austin, M.D., states, "[t]here is no malalignment of the posterior aspects of the vertebral bodies and no appreciable change in the intervertebral spaces."

Claimant's exhibit 2 is the report and resume' of G. Brian Paprocki summarized earlier.

Defendants' exhibit 1 contains the following: Medical records of Family Medical Center, dated March 27, 1978 through September 2, 1978; medical report of Sutart R. Winston, M.D., dated November 12, 1982; medical records of Donald D. Berg, M.D., dated March 18, 1983 to July 22, 1983; and the medical report of Scott B. Neff, D.O., dated April 6, 1983. An entry dated

January 8, 1982 by Dr. Kunz states that the claimant is quite nervous considering difficulty with his job. On January 15, 1982 it is reported the claimant is still quite nervous. A discharge summary by Dr. Peterson dated April 30, 1981 diagnosed claimant as having severe low back pain.

An admission report by Dr. Kunz dated July 23, 1982 reveals the following:

> Present Illness: This 34 year old white male is admitted following having difficulties during the night. He states that yesterday at work he had reached up to take a box off of a shelf at work when another one started to fall, he twisted to catch it and had pain starting in his back. He had had similar troubles in the past prior to this requiring traction a couple of years ago and therapy with gradual improvement. At that time he had seen Dr. Berg and he was advised that he had had a pinched nerve but it shouldn't be operated on at the time. His back has been doing fairly well in the interim.

A letter from Dr. Berg to Dr. Kunz dated July 30, 1982 states in part: "My impression is the patient hss [sic] suffered lumbrosacral [sic] strain and he has underlying degenerative disc disease and exogenous obesity and some right sciatic pain." The CT scan of claimant by G. N. Siedband, M.D., dated August 30, 1982 encompased L3, 4, 5, and S1. It was Dr. Siedband's impression that the claimant demonstrated no disc herniation. A letter from Dr. Berg to claimant's attorney dated May 20, 1983 reads in part:

> [A]ll I can tell you is that he does not have a herniated disc and his lumbosacral strain should have healed by this time as far as his back is concerned. I think the prolongation of his symptoms is associated with his weight and the fact that he has degenerative arthritic changes in the facet joints.

Dr. Kunz in a letter to the defendant insurance company dated September 2, 1982 stated in part: "At the present time his diagnosis would be lumbosacral muscular strain with no evidence of surgical disc disease. His prognosis would be one of gradual improvement if not weighed by any psychogenic components but ultimately susceptible to reoccurrence as of most chronic back diseases."

Dr. Berg wrote the defendant insurance company on March 18, 1983 and told them that he last saw claimant on June 13, 1983 at which time Dr. Berg released the claimant to work with a 25 pound weight restriction for one month. After the one month period the claimant was released to lift more.

Defendants' exhibit 2 consists of the medical records of the Family Medical Center dated April 2, 1981 through August 2, 1983. An x-ray of the claimant's L-5 spine performed on April 25, 1981 by Dr. Austin, reports that, "the lateral view of the lower lumbar region there are what appear to be slight irregularities of the structure of S-3 and of the last sacral segment."

Defendants' exhibit 3 is the medical records of P. Jutabha, M.D., dated from March 14, 1978 to March 17, 1978. An x-ray report of March 14, 1978 reveals the following:

> IMPRESSION: See above concerning L-4, L-5 disc space with findings to suggest early disc disease. Comparing with previous studies, I see no change in the configuration of the lower dorsal spine as described above with changes of Scheuermann's disease nor do I see any significant change in disc spaces throughout the lumbar area.

Defendants' exhibit 4 is a collection of medical records of Keokuk County Hospital, dated May 15, 1972 and March 14, 1979. Defendants' exhibit 5 consists of the medical records of Donald Berg, M.D., much of it duplicative and reviewed above. Defendants' exhibit 6 is the evaulation report by Kathleen Benson. Defendants' exhibit 7 is Ms. Benson's resume'.

APPLICABLE LAW AND ANALYSIS

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

If the claimant has proven that he sustained an injury arising out of and in the course of his employment he must then prove by a preponderance of the evidence that the injury of July 22, 1982 is the cause of the disability on which he now basis his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (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 claimant has established that he did indeed sustain a work related injury. However, what is disputed by the defendants is whether there is any permanent disability on which to base a claim. Short of that, if there is a disability, is it causally connected to the claimant's work injury. The question of 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 problem arises, however, where the deputy concluded that the claimant had met his burden of proof by producing credible medical evidence in support of his claim for permanent partial disability to the body as a whole subsequently ascribing to the claimant a five percent permanent partial impairment while the record remained silent as to the extent of the permanent partial impairment if any. Larson has addressed this point and states:

> In compensation law, the administrative-law-evidence problem of expert opinion and official notice finds its principal application in the handling of medical facts. The usual question is the extent to which findings of the existence, causation or consequences of various injuries or diseases can rest upon something other than direct medical testimony--the claimant's own description of his condition, for example, or the commission's expert knowledge acquired not by formal medical education but by the practical schooling that comes with years of handling similar cases.
>
> To appraise the true degree of indispensability which should be accorded medical testimony, it is first necessary to dispel the misconception that valid awards can stand only if accompanied by a definite medical diagnosis. True, in many instances it may be impossible to form a judgment on the relation of the employment to the injury, or relation of the injury to the disability, without analyzing in medical terms what the injury or disease is. But this is not invariably so. In appropriate circumstances, awards may be made when medical evidence on these matters is inconclusive, indecisive, fragmentary, inconsistent, or even nonexistent.

3 Larson, The Law of Workmen's Compensation (1983), §§79.50, 79.51 Medical Evidence (emphasis added).

Citing Larson, supra, this agency has awarded compensation when medical evidence was lacking. In Lee v. American Roofing, II Industrial Commissioner's Report 235 (1981), this agency stated:

> While defendant is correct in pointing out that claimant has the burden of proof, the record establishes that claimant has met that burden; apparently without challenge. The fact that claimant has not introduced medical testimony to point out the obvious is of no consequence....
>
> The introduction of medical evidence may have strengthened claimant's case. But defendant did not overcome the obvious conclusions one would make from the evidence presented by the claimant. (emphasis added)

Id. at 236

In the case at bar the nonmedical evidence does not permit one to draw an obvious conclusion. Further, the medical evidence has one common characteristic and that is that there is no evidence presented to support a conclusion by a preponderance that the claimant has sustained an injury which resulted in a permanent partial disability. While this agency has vast experience in dealing with medical evidence and causation, the use of this accumulated experience in place of medical evidence should be limited to cases where the lay testimony and evidence is overwhelming and the accompanying medical evidence is inconclusive or even nonexistent.

The claimant in this case certainly did sustain an injury arising out of and in the course of his employment but the nature and duration of the injury was one of a temporary total nature not permanent partial. Claimant's treating physician, Dr. Berg, released the claimant to work on June 13, 1983. By July 13, 1983 the claimant would have had no weight restriction. On May 20, 1983 Dr. Berg stated that claimant's lumbosacral strain should have healed by that time and claimant's symptomatology was probably associated with his weight and degenerative arthritic condition.

The wealth of medical evidence reveals that the claimant suffered only from a lumbosacral strain. Although there was some disc bulging; EMG, nerve conduction, x-rays, and CT studies indicated normal readings with no herniation. Claimant himself has repaired a dilapidated house. He sawed, cut, and nailed, as well as help put up a wall. This certainly is not indicitive of a permanent disability. Claimant's actions support the conclusive medical evidence that there is no permanent disability. Other factors entering into claimant's symptomatology include obesity, and possible psychological factors.

Claimant has had right leg sciatic nerve problems in the past. 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. There is a lack of support in the evidence that the claimant sustained any material aggravation of this condition.

It is also apparent that the claimant was to be fired July 23, 1982. Whether he knew it or not is irrelevant.

In conclusion, the evidence is not the preponderant quality to sustain the deputy's conclusion that the claimant suffered a permanent partial disability as a result of his work-related injury. Therefore the deputy must be reversed.

FINDINGS OF FACT

1. On July 22, 1982 the claimant sustained an injury arising out of and in the course of his employment with the defendants.

2. The extent and duration of this injury was of a temporary total nature.

3. The claimant has not established that he suffers from a permanent partial impairment to the body as a whole.

4. Claimant has no disc herniation.

5. Prior to July 22, 182 the leg had experienced right leg sciatic nerve pain.

6. The injury of July 22, 1982 did not materially aggravate the sciatic nerve pain.

7. As a result of the injury of July 22, 1982 the claimant suffered a lumbosacral strain.

8. Claimant was released from Dr. Berg's care on June 13, 1983 with a work release.

9. Claimant is obese.

10. Claimant was to be terminated from his job July 23, 1982.

11. Claimant has been working repairing houses.

12. Claimant has worked on a farm handling 25 pound pigs.

13. Claimant has been paid workers' compensation benefits from July 24, 1982 to June 17, 1983.

14. All of claimant's injury related expenses have been paid.

CONCLUSION OF LAW

The claimant suffered a temporary total disability from July 24, 1982 to June 17, 1983 and has been paid for that period of time and shall take nothing further from these proceedings.

WHEREFORE, the proposed decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

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

Signed and filed this 30 day of August, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL G. MALDONADO, Claimant, vs. ARMSTRONG RUBBER COMPANY, Employer, and THE TRAVELERS, Insurance Carrier, Defendants.	:	File No. 758295 A P P E A L D E C I S I O N

FILED
SEP 23 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision wherein it was concluded that the claimant failed to carry his burden of proof by a preponderance of the evidence that his alleged injury arose out of and in the course of his employment. The record on appeal consists of the hearing transcript; claimant's exhibits 1 and 2; defendants' exhibits A and B; and briefs of both parties on appeal.

ISSUE

Whether the claimant sustained an injury arising out of and in the course of his employment.

ANALYSIS

The evidence was well summarized by the deputy in the statement of the case and will not be repeated herein.

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

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

FINDINGS OF FACT

1. Claimant first became aware he may have a hernia in mid-January 1984.

2. Claimant reported to a company nurse on February 2, 1984 that his right groin area had been bothering him for several weeks and that he thought he had a hernia.

3. Medical examination on February 9, 1984 disclosed a developing right inguinal hernia.

4. On March 12, 1984 the claimant, in relating a history to Dr. Bannister, stated that he had some groin tenderness and pain after lifting some heavy objects at work.

5. On March 14, 1984 claimant was admitted to Iowa Methodist Medical Center for a bilateral inguinal herniorrhaphy.

6. Claimant was off work from March 9, 1984 until he returned to work on May 7, 1984.

7. Medical evidence of causation is based on speculation, conjecture and surmise.

CONCLUSION OF LAW

The claimant has failed to carry his burden of proof by a preponderance of the evidence that his alleged injury arose out of and in the course of his employment.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That the costs of the arbitration proceeding are assessed against the defendants pursuant to Industrial Commissioner Rule 500-4.33.

That the costs of the appeal are assessed against the claimant.

Signed and filed this 23 day of September, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARLAN D. MARTIN,	:	
	:	
Claimant,	:	
	:	FILE NO. 754732
vs.	:	
	:	A R B I T R A T I O N
ARMOUR-DIAL, INC.,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED
JUL 31 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Harlan Martin, claimant, against Armour-Dial, Inc., self-insured employer, defendant. Claimant alleges that he injured his back on January 6, 1984 while disassembling a machine in the employer's place of business.

The case was heard at Burlington, Iowa on April 16, 1985 and was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of Harlan Martin, Martin Graber and Martha Lutenegger. Claimant's exhibits 1 through 7 and defendant's exhibits A through U were received into evidence.

ISSUES

The issues presented by the parties at the time of hearing are whether the claimant sustained an injury which arose out of and in the course of his employment; whether a causal relationship exists between the alleged injury and any disability or expenses of care which claimant has incurred; and, determination of claimant's entitlement to weekly compensation and section 85.27 benefits. The employer raised the issues of lack of authorization for medical care and requested a suspension of benefits for the alleged failure to attend a medical examination under the provisions of section 85.39 of The Code. It was stipulated by the parties that in the event of an award claimant's rate of compensation in $277.23 per week based upon gross earnings of $440.00 per week. It was further stipulated that the charges for medical services were fair and reasonable.

SUMMARY OF EVIDENCE

Harlan Martin testified that he is single and has custody of two of his children who reside with him.

Claimant testified that on January 6, 1984 he was taking apart a machine on the potted meat line in order to clean internal parts of the machine. He stated that he had taken out a valve and piston, was holding them in his hands and turned, at which point he felt a sharp, immobilizing pain in his back. He stated that he stopped, steadied himself and reported the incident to his foreman. Claimant testified that he was taken to the nurse's office and received medical treatment from Glen A. Gabrielson, M.D., who kept him off work until January 17, 1984.

Claimant testified that he was also seen by J. Kannenberg, M.D., following the time he returned to work and that he was referred to Donald MacKenzie, M.D., who examined him and recommended surgery. Claimant testified that he advised the company's nurse about the intented surgery and that she had indicated to him that the company might want a second opinion. He stated that he had more than one contact with the nurse concerning the proposed surgery and that on one ocassion the nurse told him that the company wanted an exam to be performed by Koert R. Smith, M.D., but that the time for examination had not been scheduled. Claimant stated that he was subsequently notified of the time of the appointment by a note which was placed on his time card the day before the surgery was scheduled to be performed.

Claimant testified that he discussed the matter with Dr. MacKenzie and decided to go ahead with the surgery as scheduled. He stated he is covered by a union contract and that exhibit 5 is part of the contract.

Claimant testified that following surgery he was off work and unable to engage in physical activities. He stated he was released to return to work on approximately July 4, 1984 and is now back at work performing his regular job.

Claimant testified that prior to the surgery he was in so much pain that he could not take it anymore. He stated that medication which had been prescribed put him to sleep if he sat down in the break area and that he felt that it was dangerous for him to try to work while taking the pain medication. He also felt that he was unable to do anything without the relief which the pain medication provided. He stated that the surgery relieved his pain, even pain which had preexisted the January 6, 1984 injury. He stated that he has reduced ability to bend when compared to that which he had prior to surgery.

Claimant testified that he received exhibit 7 by certified mail in June 1984. He stated that he did go into the plant on June 18 and requested a one week vacation. He stated that at that point in time he had not been released by Dr. MacKenzie. Claimant testified that on June 18, 1984 Dr. MacKenzie advised him that he was releasing him to light duty work in accordance with exhibit S. Claimant stated that on June 18 he did not feel that he was ready to go back to work. He stated that he had discussed light duty work with Dr. MacKenzie and that Dr. MacKenzie phoned Martin Graber. Claimant testified that Dr. MacKenzie felt that the work which Graber had characterized as light duty was too strenuous for claimant to perform at that time.

Claimant testified that workers' compensation had not paid any of his medical bills but that some had been paid in part by group insurance as shown in exhibits 1,2 and 4. He testified that he had not received any workers' compensation weekly benefits since the first few days when he missed work in January.

Claimant testified that he has a substantial history of recurring back problems. He related that he was given a permanent disability rating by Dr. Smith in 1981.

Claimant testified that he had been written up a number of times in 1983 for not training another worker and for leaving cans on a machine. He confirmed that he had a great deal of difficulty in getting along with the company in the past. Claimant testified that he received exhibit 6 by certified mail. He also stated that he received exhibit U. Claimant testified that the company had directed that all injuries, no matter how slight, be reported and that he did so. He stated that exhibit U threatened termination of his employment if he had more injuries. He stated that exhibits 6 and U are nearly identical but that exhibit 6 indicated that a review of his employability was to be conducted "in the future" whereas exhibit 6 indicated that it was actually being reviewed. Claimant stated that Harold Dory, a supervisor, had informed him that his working ability would be reexamined. Claimant felt that his job was on the line. He stated that he was closely supervised when he was at work. Claimant testified that there has never been a final determination made, to his knowledge, on the issue of whether or not the review had been completed or of the result of the review.

Claimant testified that when he initially saw Dr. MacKenzie he had related having ocassional backaches and strains. He stated that he had seen Dr. Smith years before but did not relate that there had been a disability rating because the matter was never brought up. He stated he did not limit his description of his prior back problems to simple backaches.

Claimant testified that he has been employed by Armour for 17 years and has worked at different plants. He stated that he completed the eleventh grade and then obtained a high school equivalency certificate. He attended Hawkeye Institute and a police academy but did not complete either. He stated that his work history consists primarily of physical labor. He stated that except for the problems with his back the only other physical injury which he has experienced is the partial loss of the fourth finger on his right hand. He confirmed that he is five feet eleven inches in height and weighs 260 pounds. He agreed that physicians had recommended that he lose weigh to aid the condition of his back.

Claimant testified that the Armour-Dial plant is located in the country and that it was necessary for him to travel to receive his medical care. He stated that he received a CT scan in Keokuk and that he had traveled to Burlington prior to his surgery. He stated that in he traveled 720 miles in obtaining medical treatment.

Martin Graber testified that he is the employee relations manager for Armour-Dial at Fort Madison. He stated that the company had not hired any hourly workers since 1979 but that if positions were available and all other things were equal he would probably hire a person who does not have any history of prior injuries.

Graber stated company policy is that the contract provision which is contained in exhibit 5 simply means that the right of the employee to choose the treating physician under the contract is the same as the right provided by the workers' compensation laws.

Martha Lutenegger testified that she is the plant nurse at Armour-Dial and had contact with claimant concerning his back surgery. She stated that she first obtained knowledge on Friday, March 30, that surgery was planned. She stated that prior reports had indicated that surgery was indicated and that she told claimant that she had been in touch with the home office and had been informed that a second opinion was desired. She testified that she advised claimant that a second opinion was needed but that one had not yet been scheduled. She identified exhibit L as her notes of her visit with claimant. Lutenegger testified that the appointment with Dr. Smith was scheduled and that claimant was given notice of the time by placing a note on his time card. She stated that on April 5 the company had contacted Dr. Kannenberg in order to have the surgery cancelled. She stated that the company decided to cancelled the surgery without consulting with a physician. She stated they felt that a second opinion was necessary in order to determine whether or not the surgery itself was really necessary and that a few days of delay would not hurt anything.

Lutenegger testified that she initially had thought that claimant's surgery was on April 9, rather than on April 6, because she looked at the wrong calendar and that the error was her mistake. She stated that scheduling of the appointment was done through Dr. Kannenberg. Lutenegger testified that the company continues to employ the services of Dr. MacKenzie as an orthopedic surgeon.

Claimant's exhibit 1 contains a report from Dr. Gabrielson which indicates that claimant was suspected of having a herniated disc at the L3-4 level with sciatica and recommended that he remain off work until January 12, 1984. Exhibit 1 also contains a statement from Fort Madison Community Hospital which shows total charges for services provided to claimant from April 6, through April 16, 1984 in the total amount of $3,410.90 of which $2,721.31 had been paid by insurance and $689.59 remained unpaid.

Exhibit 2 contains a number of medical bills for services provided to claimant. A number of bills refer to services which were performed prior to January 6, 1984. The last page contains charges for care and treatment of claimant's back performed on February 16, 1984 and April 30, 1984 in the amounts of $66 and $34 respectively.

Claimant's exhibit 4 in a bill from Dr. MacKenzie in the total amount of $2,155.00 of which $2,109.59 is shown as having been paid by insurance and $45.41 remains unpaid.

Claimant's exhibit 6 is a letter from the employer signed by Martin L. Graber dated January 19, 1984 which states that due to having been involved in a number of work related accidents his employability was being reviewed. The letter states that claimant would be advised of whatever determination was made when the review had been completed.

Claimant's exhibit 7 is a letter from Martin L. Graber dated June 18, 1984 wherein he advises claimant that Dr. MacKenzie has released him to light duty employment effective June 18, 1984 and that claimant was expected to report to work on June 18, 1984.

Claimant's exhibit 3 is the deposition of Dr. MacKenzie taken December 13, 1984. Dr. MacKenzie testified that following an examination which included a CT scan and myelogram that claimant was diagnosed as having a large bulging disc at the L4/5 interspace. He stated that in surgery he removed the disc. Dr. MacKenzie stated that claimant had been referred to him by Dr. Kannenberg. (Exhibit 3, pages 7 & 8)

Dr. MacKenzie testified that following the surgery claimant was on total disability until July 1 and that he was released to light duty on July 2. He stated that claimant was released for full duty on August 6. (Exhibit 3, page 10)

Dr. MacKenzie testified that claimant has a ten percent disability rating as a result of the surgical procedure which had been performed. He stated that at the time of surgery the disc appeared to be of an acute nature and that there was no question but that the disc was causally connected to the type of medical history which claimant had provided. (Exhibit 3, page 11) Dr. MacKenzie stated claimant's condition was due a degenerative back with an acute overlay due to a dramatic incident. (Exhibit 3, page 14). He stated that degeneration weakens the annulus fibrosis that contains an intervertebral disc and the weakening makes the disc more susceptible to injury. (Exhibit 3, page 21). Dr. MacKenzie was not aware that claimant had been previously seen by Dr. Smith and was likewise unaware that claimant had previously received a ten percent impairment rating from Dr. Smith. He stated that from his own evaluation of the case he saw nothing which would be inconsistent with another physician having imposed a ten percent impairment rating previously. (Exhibit 3, page 23).

Dr. MacKenzie testified that he became aware that the company had wanted a second opinion but that claimant felt that it was his own prerogative as to whether or not one would be performed. Concerning the second opinion, Dr. MacKenzie stated, "we always throw up our arms because it always comes up after we booked them, but I certainly don't stand in the way." (Exhibit 3, pages 28 & 29)

Dr. MacKenzie stated that claimant's surgery was reasonable and necessary. He stated that claimant's condition was urgent, but not an emergency, and that claimant could have tolerated an additional week or two in order to obtain a second opinion.

Defendant's exhibits A, B, C and D are copies of documents relating to prior workers' compensation cases which have been commenced by claimant. They reflect that a special case settlement was entered into under the provision of section 85.35.

Defendant's exhibit E appears to be progress notes from Koert R. Smith, M.D., and Jerry L. Jochims, M.D. covering the time span from August 31, 1976 through October 29, 1982. The exhibit indicates that claimant was diagnosed as having a herniated disc at the L4-5 level on August 31, 1976. It indicates that a similar diagnosis had been made approximately three years earlier by a physician in Mason City.

At a rather lengthy entry dated October 13, 1981 it is stated "Overall, I feel that based on the Manual for Orthopaedic Surgeons in Evaluating Permanent Physical Impairment,... he would rate at least a five percent permanent impairment due to neurogenic low back pain, disc injury with intermittent acute episodes. If one considers his disc space narrowing on the x-rays as demonstrable degenerative changes, then he would rate a ten percent impairment at this time." Dr. Smith went on to state, "A more difficult question is relating this to which, if any, of the industrial or nonindustrial injuries. I feel most appropriately, this could all be related to his first injury in December, 1972 with recurrent flares since. The other way to consider this would be that he had some injury and impairment at that time and each of his current episodes has added to that impairment. I feel the latter a less plausible explanation because after he recovers from each acute episode, he is able to return to his prior level of employment and activity."

In an entry dated April 26, 1982 Dr. Jochims states "...we did discuss the problem of his disability fully and I advised him there would really be no increase in his physical impairment rating because of this episode since any other contingencies on his back impairment would be based on the radiographic changes rather than clinical changes. No neurologic deficits being identified, I could identify no further parameters wherein his rating would increase."

Exhibit F is a report from Dr. Jochims dated May 13, 1982.

Defendant's exhibits G, H, I and J are reports dealing with claimant's injuries which ocurred in 1972.

Defendant's exhibit K is a deposition of Dr. Smith taken March 24, 1982. Dr. Smith, on pages 8 through 11, confirmed the impairment rating he had made in exhibit E and testified that any further increase in the impairment rating would require a permanent significant residual loss of motion or a significant neurologic deficit which had not previously existed.

Defendant's exhibits L, M, N, O, P and Q are records of communications dealing with the attempted second opinion examination by Dr. Smith. Exhibit L indicates that claimant reported the planned surgery on March 30 and that nurse, Lutenegger, advised him that an appointment with Dr. Smith would be scheduled. Exhibit M indicates that the note was placed on claimant's time card on the afternoon of April 4, 1984. Exhibit O indicates that claimant had called Harold Dory on Thursday evening and reported that he had been kept in the hospital following the test and that the surgery was to be performed the following morning. The exhibit indicates that claimant had been taken to surgery on the morning of April 6, 1984. Reference to a calendar for 1984 indicates that April 6 was a Friday.

Defendant's exhibit R is claimant's history of injuries which have occurred since January 6, 1976 with the Armour-Dial Company.

Defendant's exhibit S is office notes from Dr. MacKenzie. The notes indicate that a CT scan performed March 19, 1984 showed a disc problem at the L4-5 level. An entry dated March 27, 1984 shows claimant being scheduled for discectomy following a myelogram. An entry dated June 7, 1984 indicates that claimant was not then ready to return to work and that a return appointment was scheduled in two weeks. An entry of June 21, 1984 indicates that claimant did not appear for an appointment. An entry of June 25, 1984 indicates that claimant was then considered fit for work. Further notes indicate that claimant was released to return to full duty on August 6. Abbreviations used in the notes appear to indicate that claimant was totally disabled from April 6 to July 1 and that he could perform light duty work commening July 2 and running until August 6. The notes indicate that claimant returned to light duty work on June 18 and that a note was sent to Martin Graber on July 18.

Exhibit T is copies of forms 2A filed in this action.

Exhibit U is a letter dated June 13, 1983 indicating that claimant's employment status would be reviewed as a result of his work related accidents.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 6, 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). Claimant appeared at hearing and testified in person. He is found to be a credible witness on his own behalf although he exhibited some uncertainty regarding the precise dates of certain events. It is therefore found that he did sustain an injury which arose out of and in the course of his employment as he described.

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 injury was in the nature of aggravation of claimant's preexisting back problem and produced further injury to claimant's L4-5 lumbar disc. The claimant has the burden of proving by a preponderance of the evidence that the injury of January 6, 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). Dr. MacKenzie found the disc injury to be related to a traumatic incident. In view of the preexisting problem in claimant's back, trauma of the nature he described could produce the symptoms which were exhibited. Dr. Smith had indicated that claimant was susceptible to further injury due to the condition of his back. 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). It is therefore found and concluded that the trauma of January 6, 1984 which claimant described was a proximate cause of the injury to his lumbar disc and the treatment which he received therefore from Drs. Gabrielson, Kannenberg, MacKenzie and the services provided by Fort Madison Community Hospital.

Claimant was absent from work January 6, 1984 through January 11, 1984. According to his testimony it appears that he was paid healing period compensation for that time. Claimant next missed work commening April 6, 1984 and did not return to work until June 25, 1984 following a one week vacation which had commended on June 18. According to the record claimant had not been released to return to work on June 18, 1984 and was not then medically certified as capable of working. Claimant's healing period therefore runs from August 6, 1984 until June 25, 1984 when he actually returned to work, a span of 11 3/7 weeks.

Claimant has been evaluated by Dr. MacKenzie as having a ten percent permanent impairment. He had previously been evaluated by Dr. Smith as having a ten percent impairment. The rating imposed by Dr. MacKenzie is based upon the result of the surgery. The rating imposed by Dr. Smith was based upon the injury to the disc and degenerative changes in claimant's lumbar spine, including those which extended beyond the injured L4-5 lumbar disc. Although both physicians profess to use the same manual for rating the impairment, it is apparent that Dr. MacKenzie gave no additional impairment for the degenerative condition. If such were done it would appear that claimant's rating would now be 15 percent consisting of ten percent for the surgery and five percent for the degenerative condition. In view of the different factors considered in the ratings, the fact both physicians arrived at a ten percent impairment is not conclusive. In view of the differences in the methods and reasons behind their respective ratings, it is found that claimant has sustained an additional five percent permanent partial impairment of the body as a whole as a result of the injury to his back which occurred on January 6, 1984 and the surgery which was performed by Dr. MacKenzie to treat that injury.

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 impairment 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). Based upon exhibit E and other reports which are in evidence it appears that claimant is now approximately 37 years of age. His education is limited. His work experience is limited primarily to physical labor. He appears to be motivated and to be gainfully employed. The fact that claimant has retained his former position with his employer is a very great mitigating factor in assessing his loss of earning capacity. The fact, however, that the employer seems uncertain of whether or not it considers claimant to be permanently employable indicates that there may be a greater reduction of claimant's earning capacity than what would otherwise be expected under the existing circumstances. It is presumed, however, that the defendant employer acted in good faith with regard to claimant. It could not be reasonably anticipated that a review of claimant's employment status should take more than a few weeks and it has been over a year since exhibit 6 was mailed to claimant and more than six months since claimant returned to work following his surgery. It is found that the employer made a de facto determination that claimant was and is employable on a permanent basis. The assessment of industrial disability which is made hereafter in this decision is based upon claimant being permanently gainfully employed by Armour-Dial, Inc., at his current position with no reduction in his rate of earnings. If any change in that status should occur claimant would, of course, be in a position to seek an increase in his award through a review-reopening proceeding.

When claimant's disability is evaluated industrially, it is found that he sustained a five percent permanent partial disability of the body as a whole as a result of the January 6, 1984 injury.

The employer seeks to impose a suspension of compensation based upon the refusal of claimant to be examined by Dr. Smith. Section 85.39 limits the suspension of compensation to the period of the refusal. The obligation of an employee to submit to examination is limited by reasonableness. In this case claimant had a long history of a suspected herniated disc at the L4-5 level which had continued to cause problems during years of somewhat successful conservative treatment. The employer was aware of this history of claimant's back problems. Claimant had another acute episode. He followed the directions of the company and was referred by Dr. Kannenberg, the company's physician, to Dr. MacKenzie. This had the effect of making Dr. MacKenzie an authorized treating physician. Dr. MacKenzie advised claimant that surgery was indicated and claimant properly reported the same to nurse Lutenegger. A second opinion on the need for surgery is generally a reasonable request. It was not reasonable, however, to schedule that subsquent examination at a time which would interfere with the surgery which had previously been scheduled by Dr. MacKenzie. The evidence in this record indicates that the surgery was reasonable and necessary. There is no evidence from any physician which states that a second opinion was indicated or that Dr. MacKenzie's diagnosis was in any way questionable. Delaying the surgery in order to allow a second examination would probably not have produced any long term detriment to claimant but it would have required him to endure his discomfort for a longer period of time. It would have required rescheduling the surgery.

Under section 85.27 the employer is required to offer prompt treatment which is reasonably suited for the injury without undue inconvenience to the employee. The right of the employer to select the care means the right to decide who will treat the injury. It does not include the right to make professional medical judgments such as decisions regarding whether or not surgery should be performed or the type of treatment to be utilized. These are medical questions which should be determined by the authorized physicians. The right to choose medical care under section 85.27 and the right to have an injured employee examined under section 85.39 does not include the absolute right to interfere with a course of care and treatment which has been initiated by an authorized treating physician. Under the facts present in this case the employer's request for an examination which would delay the scheduled surgery was unreasonable and a suspension of claimant's right to compensation will not be ordered.

From a practical standpoint, claimant did not refuse to be examined by Dr. Smith. He simply refused to delay the surgical process. In accordance with exhibit P, it appears that on April 6, 1984 Dr. Kannenberg's secretary cancelled the appointment which had been scheduled with Dr. Smith for April 9. Subsequent to that time claimant was never again requested to see Dr. Smith. If a refusal to submit to examination did exist, that refusal commenced on April 4 or 5 and ended on April 6, the time when the examination was cancelled. Claimant was not receiving compensation during that time and his right to healing period has been previously found to commence on April 6, 1984, the same date as the end of any period of alleged refusal to submit to examination. On this additional ground, the employer's request for a suspension of benefits is denied.

In McSpadden v. Big Ben Coal Co., 288 N.W.2d. 181, 194 (Iowa

1980) the Iowa Supreme Court held that an employee did not have a right to an independent examination under section 85.39 unless the employer's liability for the injury had been established. In this case the employer denied liability in its answer. Whether or not claimant sustained any injury which arose out of and in the course of employment was identified as an issue at the time of hearing. In those cases where liability is denied by the employer and not otherwise established, the employer has no more right to require an examination than the employee has to receive one. In the absence of the right to require the examination the employee's refusal to submit to examination cannot be used to suspend the employee's right to compensation. In a case such as this, where liability is denied, the only right to compel an employee to attend an examination is the right provided by the rules of civil procedure. On this additional ground the suspension of benefits is denied.

Claimant was referred to Dr. MacKenzie by Dr. Kannenberg. This makes his care authorized within the meaning of section 85.27. The employer who denies the compensability of an injury cannot guide the medical treatment. Barnhart v. M.A.Q., Inc., I Iowa Industrial Commissioner's Report 16 (1981).

In those cases where the employer does have the right to select medical care it may, nevertheless, allow the employee to choose the treating physician. An employer could, through a collective bargaining agreement, allow employees to choose their own medical care. If such were done the employer would still, however, be responsible for the expenses of treatment. It appears that paragraph three of Appendix L of the collective bargain agreement, as shown in claimant's exhibit 5, is such a provision which allows the employee to choose the treating physician. There is no indication that claimant refused a request from Dr. Kannenberg, the company doctor, to make himself available for examination. There is no indication that claimant refused to allow the company doctor to examine any records. For each and all of the foregoing reasons it is clear that claimant's care by Dr. MacKenzie was not unauthorized. Defendant is therefore responsible for claimant's expenses with Fort Madison Community Hospital in the amounts of $3.410.90, $66.00 and $34.00. Defendant is also responsible claimant's expenses with Dr. MacKenzie in the amount of $2,155.00. The record in this case does not show any stipulation regarding credit under section 85.38(2). The record likewise does not show that the group insurance payments would not been payable if claimant had received workers' compensation. Habensperger v. Motorola Communications and Electronics, Inc., II Iowa Industrial Commissioner's Report 187, 189 (1981).

Claimant's testimony concerning traveling 720 miles in obtaining care for the injury is uncontroverted and is accepted as correct.

FINDINGS OF FACT

1. On January 6, 1984 claimant was a resident of the state of Iowa employed by Armour-Dial, Inc., in the state of Iowa.

2. Claimant was injured on January 6, 1984 while dismantling a machine.

3. At the time of injury claimant was employed by Armour-Dial, Inc., performing the normal duties of his employment.

4. Following the injury claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from January 6, 1984 until January 12, 1984 when he returned to work. Claimant was previously paid all compensation for which he was due during that span of 6 days.

5. Claimant was also medically incapable of performing work in employment substantially similar to that which he performed at the time of injury from April 6, 1984 until June 25, 1984 when he returned to work.

6. Claimant is a credible witness on his own behalf.

7. Claimant is 37 years of age, single and has two dependent children.

8. Claimant's rate of compensation is $277.23 per week.

9. Claimant received care for the injury from Dr. Donald MacKenzie in Fort Madison Community Hospital and in doing so incurred charges in the total amount of $5,665.90 of which $4,830.90 were paid by claimant' group insurance carrier.

10. Those services were reasonable and necessary care for the injury which claimant sustained. In accordance of stipulation of the parties the amount charged for those services was fair and reasonable.

11. The injury produced an additional five percent permanent physical impairment imposed upon claimant's preexisting impairment.

12. Claimant has a high school equivalency certificate. His work experience is limited to physical labor. He attended other vocational training but did not complete the courses.

13. Claimant appeared to be reasonably intelligent, emotionally stable and motivated to be gainfully employed.

14. Claimant has returned to work with his employer at his former job without any reduction in his rate of earnings.

15. Claimant is secure in his current position of employment.

16. Claimant had a very substantial history of prior back problems, including injury to his L4-5 lumbar disc. The injury which occurred on January 6, 1984 was a further injury to the previously weakened disc.

17. The trauma of claimant's turning while carrying parts of the machine was a substantial factor in bringing about the injury to claimant's disc, the absences from work, the medical care for treatment of the injury and the increase in claimant's disability.

18. Claimant traveled 720 miles in obtaining medical care for the injury.

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 January 6, 1984 arose out of and in the course of his employment with Armour-Dial, Inc.

3. The injury of January 6, 1984 is a proximate cause of claimant's abstences from work running from January 6, 1984 through January 11, 1984 and from April 6, 1984 through June 24, 1984.

4. The injury was also a proximate cause of the medical expenses in the total amount of $5,665.90 which claimant incurred with Fort Madison Community Hospital and Dr. Donald MacKenzie.

5. Claimant sustained permanent partial disability as a result of injury which is five percent of total disability when measured industrially.

6. The medical care which claimant received was not unauthorized and the employer is responsible for its cost in the total amount of $5,665.90.

7. The request for claimant to be examined by Dr. Smith was not reasonable and was not refused. A suspension of compensation under the provisions of section 85.39 is not warranted.

ORDER

IT IS THEREFORE ORDERED that the defendant pay claimant eleven and three-sevenths (11 3/7) weeks of compensation for healing period at the rate of two hundred seventy-seven and 23/100 dollars ($277.23) per week commencing April 6, 1984.

IT IS FURTHER ORDERED that the defendant pay claimant twenty-five (25) weeks of compensation for permanent partial disability at the rate of two hundred seventy-seven and 23/100 dollars ($277.23) per week commencing June 25, 1984. The entire amount thereof is past due and owing and shall be paid to claimant in a lump sum together with interest pursuant to section 85.30 from the date each payment came due.

IT IS FURTHER ORDERED that the defendant pay claimant the amount of five thousand six hundred sixty-five and 90/100 dollars ($5,665.90) for the medical expenses he incurred in this proceeding.

IT IS FURTHER ORDERED that the defendant pay claimant's travel expenses in the amount of one hundred seventy-two and 80/100 dollars ($172.80).

IT IS FURTHER ORDERED that the defendant pay the costs of this action pursuant to Industrial Commissioner's Rule 500-4.33.

IT IS FURTHER ORDERED that the defendant file a final report as required by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 31st day of July, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MAX J. MC ALISTER, Claimant,	
vs.	File No. 661276
JOHNSON BROTHERS CORPORATION, Employer,	A P P E A L D E C I S I O N
and	
EMPLOYERS INSURANCE OF WAUSAU, Insurance Carrier, Defendants.	FILED SEP 13 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 26, 1985 this 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 review-reopening decision filed March 28, 1985 in which they were ordered to pay permanent total disability.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 19 and defendants' exhibits A through F. All evidence was considered in reaching the final agency decision.

The decision herein will be the same as that of the hearing deputy.

ISSUES ON APPEAL

The appellants in this matter failed to file a brief but in their notice of appeal alleged that claimant failed to prove causal relationship between his psychological ill being and further that any psychological problem rendered him permanently totally disabled and that the deputy failed to discount prior functional impairment from a prior injury.

REVIEW OF THE EVIDENCE

Forty-nine year old married claimant, father of seven children, who left school in eighth grade and who subsequently has gotten a GED and training in welding, testified to work in construction as an operating engineer. In addition to running machinery, he did maintenance work which could require heavy lifting on the equipment he operated. He also did some climbing on machinery and ladders. Coordination was needed to use as many as sixteen hand controls and several pedals. For safety reasons mental alertness was required.

Claimant recalled missing two days' work in 1973 or 1974 when his hand was smashed. He injured his lower back in a fall in August of 1978 when he landed on his back and buttocks against a boat seat. The following day he had pain in both legs and he was unable to get out of bed. He had a series of chiropractic treatments and then injections. He was seen by an orthopedist who gave him "some real good drugs." He missed a month's worth of work and then returned to work taking pain medication. He worked until February of 1979 at which time his pain medication was stopped. He was unable to work without drugs. He was seen by Paul H. Beckman, M.D., and Byron Rovine, M.D., and treated with medication and therapy. He went back to work in June or July as a pump operator with a thirty day weight limitation. Claimant said that he worked when work was available at various jobs requiring pulling himself into equipment, bending and stooping.

Claimant remembered two incidents giving him back and leg pain with the first incident in August of 1980. For that episode he saw Dr. Beckman and was referred to Frank I. Russo, M.D., who treated him with therapy and a TENS unit which made it possible for him to return to work and to do his job. Thereafter he had "very minute pain" which did not prevent his engaging in family oriented activities including dancing, bowling, hunting, camping and fishing.

Claimant described the circumstances surrounding his injury of January 6, 1981 as follows: It was snowing. He got out of his rig, slipped, and grabbed a cable to catch himself. He hit the track with his back and buttocks and fell four feet to the ground landing hard on his feet and winding up on his knees. He had pain in his low back and down into his legs. He worked until noon. He then saw the company doctor who prescribed medication.

Eventually, in addition to pain medication he took anti-depressants. At the time of hearing he was taking Tylenol 4, Sinequan and Xanax and using a TENS and a back brace. He goes to the mental health center at least once a week. Claimant's current complaints are trouble standing for long periods, walking distances and difficulty concentrating, sitting in a car for more than an hour, bending or twisting. He is no longer able to participate in family activities because of his pain.

Claimant has sought rehabilitation through the state program. He has been able to do some woodworking for short periods during the day. Claimant testified to receiving $600 or $700 per month in social security benefits and $231 per month in union retirement benefits.

Claimant did not remember having any problems with his work at the time he saw F. Dale Wilson, M.D. He denied the accuracy of the statement that he was lifting nothing heavier than a lunch bucket or that he was having trouble with both legs or his right leg. He admitted to being cautious, but he did not recall conversations with Dr. Wilson about various limitations.

Dorthy Mae McAlister, claimant's spouse of thirty-two years, testified that after claimant's fall in 1978 he was able to resume family activities and to work regularly. She verified claimant's testimony regarding his inability to do things since his 1981 injury. She also described her husband's depression and his behavior towards his children and grandchildren.

McAlister indicated that claimant is the kind of man who would work with pain and who would "be a square shooter with the doctor."

Claimant was evaluated through the department of public instruction in November of 1982. He was able to obtain his GED. He demonstrated good comprehension of machine function and good dexterity. He had aptitude for engraving, but there was question about his ability to complete an eight hour day and to maintain sufficient speed. He had difficulty learning new concepts and it seemed unlikely he could work at bookkeeping or accounting. He did not demonstrate skill in selling. It was concluded that there was no job which claimant could do for a full day. A summary dated January 19, 1983 declared claimant unready for a competitive vocation due to both physical and emotional factors. The psychologist recommended claimant continue in psychotherapy.

Early medical records show claimant was treated by Manuel Mateus, D.C., an Ecuadorian chiropractor for an acute unilateral sacral subluxation on the right. Claimant's pain radiated to his right leg.

On September 29, 1978 J. Luis Pimental, an Ecuadorian orthopedic surgeon, reported that he was treating claimant for a possible herniated disc at L4. It was expected that claimant would need an additional six weeks of treatment.

Thomas H. Crouch, M.D., reported seeing claimant on October 2, 1978 after his boat injury. Claimant had a slow gait, marked spasm of his lumbosacral and thoracolumbar muscles, joint tenderness in the lumbosacral spine, marked restriction of motion, positive straight leg raising at fifty degrees and a positive Gaenslens. There was no evidence of sciatica or radiation. X-rays showed a possible compression fracture on the lateral aspect of the third lumbar section on the left. Claimant was told "to resume the use of his lumbosacral corset" and given a muscle relaxant and a pain killer. Physical therapy was prescribed.

Dr. Crouch did not anticipate permanent damage. He found claimant to be nervous, apprehensive and reluctant to move. Because of the possibility of a conversion and hysterical reaction, claimant was referred for a Minnesota Multiphasic Personality Inventory which showed only a mild degree of apprehension and over concern.

Byron W. Rovine, M.D., saw claimant in March 1979 and found his condition a direct result of his work injury. He hospitalized claimant for a myelogram which was normal and which left the neurosurgeon at a loss to explain claimant's prolonged symptomatology. Weight reduction and a conditioning program were suggested. Claimant at that time was having pain across his lower back into both buttocks and upper thighs posteriorly. His pain was aggravated by bending, coughing, sneezing or straining. Claimant had bilateral weakness on dorsiflexion of his great toes. There was minimal hypalgesia over the right great toe and some hypesthesia over both great toes and the dorsum of both feet. Lasegue's was positive for right hip and sciatic pain. Straight leg raising was blocked at forty-five to fifty degrees bilaterally. Claimant walked with a limp favoring his right leg.

In a letter dated May 11, 1979 Dr. Rovine attributed claimant's prolonged symptomatology to his confused and unorthodox treatment in Ecuador and he suggested the possibility of a traumatic neuropathy.

Claimant was released for return to light work with a thirty pound weight restriction as of June 18, 1979. Claimant showed a voluntary reluctance to move rather than an involuntary splinting or immobility. Straight leg raising was negative. Dr. Rovine predicted that claimant would be unable to work for very long and he suspected psychiatric management would be necessary.

Claimant was x-rayed on August 4, 1980 at the request of F. Dale Wilson, M.D. X-rays were interpreted as showing a minimal deformity at L3 possibly representing an old trauma. Claimant complained to Dr. Wilson of severe back pain particularly on the right which was aggravated by activity. His most painful spot was at L5-S1. Claimant had back pain which radiated down the back of the thighs; walked with a limp and favored his right leg; evidenced a loss of motion on flexion, extension and rotation; and had decreased sensation over the inner aspects of both legs and from the tibia down and over the dorsum of the foot. Straight leg raising was positive along both sides. Dr. Wilson diagnosed "[c]oncussion and hyper-extension strain of the lumbar spine with a stiff, painful, weak back" and "[d]isc compression, an injury L4-L5, L5-S1, with local pain on any back motion."

Dr. Wilson found claimant's twenty-five pound weight limitation which was to be gradually increased reasonable. Claimant was to limit sitting times to four hours and standing times to an hour. His prognosis was viewed as guarded. Claimant was given a thirty percent disability rating.

Paul H. Beckman, M.D., general surgeon, had records of first seeing claimant on March 19, 1979 although he made note of some medications on March 5, 1979. At the time of his first examination, claimant had tenderness to palpation in the lower thoracic and in the lumbar spines with weak dorsiflexsion and extension of the right great toe and questionably positive straight leg raising at forty degrees bilaterally. There was no reflex or sensory loss. The doctor's intent was to rule out a herniated disc. He also considered the possibility of rheumatoid arthritis. X-rays of the lumbar spine were normal, but x-rays from October of 1978 reportedly showed a possible compression fracture of the lateral aspect of the third lumbar section.

Claimant was seen on August 22, 1980 and again on September 6, 1980 at which time he was referred to Frank I. Russo, M.D.

A statement from Muscatine Health Center records claimant's jarring his body when he stepped out of a crane, slipped on snow and caught himself on a cable. Claimant's pain radiated to his legs. He had tenderness over the paraspinous muscles from T-12 to S1 with mild spasm. Steve Krogh, M.D., on January 9, 1981 diagnosed recurrent low back strain.

On January 23, 1981 Dr. Beckman found an acute lumbosacral strain. X-rays were negative. There was severe spasm in the lumbar paraspinous muscles. Claimant was treated with diathermy, a muscle relaxant and a pain killer.

Dr. Beckman said that he first considered the possibility of a functional overlay in claimant's condition when his myelogram was negative and then again shortly after he began treatment in 1981 when he was called by a physical therapist. The doctor acknowledged that the findings and observations he made in January of 1981 were similiar to those he made after the first examination.

In February of 1981 claimant was referred to Dr. Chang a psychiatrist. In April of 1981 claimant was released to return to work with no lifting over ten pounds and no prolonged bending or sitting.

Claimant was last seen on January 29, 1982. No examination was performed. There was no evidence of subjective decrease in claimant's complaints. The physician concluded that claimant was "totally and permanently disabled from his back, but not due to any direct result of an injury." It was thought that claimant's holding himself in a rigid state resulted in his suffering fibrosis of the paraspinous muscles to an incapacitating degree; i.e., the muscles had deteriorated to the point that they were replaced by nonelastic tissue. In a letter dated September 13, 1982 Dr. Beckman wrote that "although Mr. McAlister's back condition is related to both injuries, the majority of the disability would seem to stem from the second incident." Dr. Beckman was questioned about the possibility of deciding what portion of claimant's functional overlay was attributable to which accident and he responded that he thought it impossible to tell.

Frank I. Russo, M.D., saw claimant on October 1, 1980 at which time he told of the back injury. Claimant complained of chronic low back pain and aching in both extremities which was present all the time and exacerbated by activity. He told the doctor he continued to work because he could not live on workers' compensation.

Claimant was viewed as anxious and depressed. There was a flattening of the lumbar lordosis. Dr. Russo's assessment was "[c]hronic low back and lower extremity pain, probably secondary to an old musculoligamentous injury with very strong suggestion of a functional overlay." A TENS unit was tried and the possibility of psychological evaluation and relaxation training was suggested.

Claimant was seen on April 29, 1981. He was anxious and in moderate distress with a flattening of his usual lordosis. There was marked limitation of mobility, a great deal of guarding and diffuse tenderness to palpation. Dr. Russo's impression was of a "suggestion of a psychophysiological overlay on an underlying musculoligmentous injury." The doctor made reference to claimant's resistance to psychological evaluation or treatment with his previous injury.

Dr. Russo's notes show that as early as May 15, 1981 he believed claimant had a strong psychophysiological component to his symptoms. Electromyography was normal. The following month the doctor wrote that claimant's pain was real and that his psychological component and depression were significant.

In a letter dated September 4, 1981 Dr. Russo explained that claimant had two separate injuries -- one in 1980 and a reinjury or reexacerbation in January of 1981. The doctor characterized claimant's prognosis as "very guarded" and expressed the feeling that claimant would need ongoing psychological counseling and antidepressant medication.

R. Ronald Frogley, D.C., first examined claimant on March 9, 1981 at which time he found claimant to be in too much pain for an adequate evaluation. Neurological involvement was described as widespread. Dr. Frogley characterized claimant as "suffering from acute traumatic lumbosacral injury involving the neurodokons of the lumbosacral plexus particularly L4 through S1."

Thomas P. Dhanens, Ph.D., evaluated claimant on June 5, 1981 and gave him a series of pscyhological tests. The Minnesota Multiphasic Personality Inventory showed an elevated neurotic triad and an elevated pain assessment index. The depression scale was highest followed by hysteria. Dr. Dhanens thought anxiety and depression were exacerbating the back pain. An antidepressant was recommended and claimant was provided with a relaxation tape.

Claimant had weekly therapy sessions based on no treatable organic pathology. Dr. Dhanens suspected claimant was either fighting therapy or trying too hard. Claimant noted temporary improvement with an antidepressant and his pain decreased.

C. M. Updegraff, M.D., saw claimant on October 27, 1981 and found severe lumbalgia. Claimant was placed on exercise and given a TENS. His deep tendon reflexes were diminished bilaterally. There was weakness in both legs. Straight leg raising was positive at twenty degrees bilaterally. He had rigidity in his lower back. His gait was slow, rigid and strained.

When exercises and the TENS failed to produce significant improvement, biofeedback was initiated which also failed. Epidural injections giving short term relief were tried as well.

On February 12, 1982 Dr. Updegraff noted claimant was becoming depressed and he was started on Doxepin. Claimant returned on June 8, 1982 at which time Dr. Beckman was called to see if claimant could be referred to a psychiatrist.

Claimant was evaluated in an emergency intake interview on June 11, 1982 at which time he was depressed. He was placed in an adult day treatment program with focus directed to his feelings about his situation. In the month of July claimant was particularly troubled by conflicting statements from the doctors. Claimant focused on resolving the conflict of whether to allow himself to be disabled and to seek other employment or to continue to hope something would be found to help him function. Claimant was having some trouble dealing with the loss of his father four years before.

William M. Nissen, M.D., recorded a history of claimant's being injected by a doctor in South America and not being able to work since then. Claimant was treated at the community mental health center from June of 1982 through October of 1984. Dr. Nissen described claimant's pain as approximately the same as when he was first seen. Claimant's chronic pain syndrome and secondary depression were, according to the psychiatrist, a result of injuries he received in early 1981. Claimant's condition was stablized with any further treatment producing improvement seen as doubtful.

In a letter dated August 18, 1982 claimant was declared one hundred percent disabled. The assertion was repeated on October 9, 1984.

Richard H. Whittlesey, Ph.D., provided claimant with biofeedback treatment, but claimant was not able to progress to the level it was hoped he would obtain. As of February 1982 claimant was not progressing. He also was provided with psychotherapy which Dr. Whittlesey did not believe was profitable. Claimant was found to be rigid and unable to accept anything short of a full return to his original health and work.

Paul Anthony Hauck, Ph.D., clinical psychologist, initially evaluated claimant on May 21, 1982 at the request of claimant's attorney using both a subjective approach and an objective approach through psychological testing. Dr. Hauck's impression was that after claimant's first surgery he was able to return to work and to work steadily from June 1979 to January 1981 showing "none of the consequent results" that came on after the second accident. He believed claimant had to stay away from lifting and mechanical repair, but he did not know whether claimant continued to suffer from pain.

The psychologist recorded no history of claimant's having a difficult relationship with his father, with his sons or his sons-in-law or male friends. The diagnosis rendered was depressive disorder with anxiety and hysterical features. Psychotherapy was recommended.

Claimant was given the Minnesota Multiphasic Personality Inventory which showed he was truthful. Claimant's hysteria was the highest scale reflecting a tendency to take an emotional problem and convert it to a physical entity which might manifest itself in physical pain. Also elevated were the hypochrondriasis and depression scales.

Regarding the possibility of an obsession compulsion reaction, the psychologist stated:

> Well, depends upon -- depends upon, again, how he -- how he takes the whole event and what it has done to his life. If, for example, as I happen to believe, his being a capable and fully-employed worker was extremely important to his sense of well-being, and, in fact, he was regarded as someone who reached the pinnacle of his craft, and he was a respected man, and he was asked to go to foreign countries, and he had the admiration and he had a wonderful reputation.
>
> Now, if we think of that being the reason why he, at one time, apparently was able to function capably and then all of this is pulled out from under him like a rug, then how does he -- how is he supposed to react? Where does he get his strokes from? How does he -- how does he live day in and day out at home, unemployed, nobody giving him any recognition, not getting any satisfaction? He is practically bound. If he's not psychotic, he's practically bound, as any person would be, to think about what's happened to him and to dwell upon the enormous change that has taken place in his life and what all these things mean, so he becomes obsessive.
>
> Q. Can that become a self-fulfilling prophecy in the sense that the more you dwell on it, the more convinced you are that you are not going to recover?
>
> A. Yes. (Hauck deposition, pp. 24-25)

In a letter dated June 7, 1982 Dr. Hauck wrote: "It is very important to see this gentleman as being a mature person who has no history of evading responsibilities and difficult tasks. For him not to make further progress stems almost solely from his psychological reaction to his pain to the changes his accidents have brought into his life."

Dr. Hauck suggested debating with claimant or a cognitive-behavioral therapy as a means of treatment. He did not detect unhappiness on claimant's part with the treatment by his physicians, but he did detect disappointment in that the treatment did not provide a cure.

Dr. Hauck thought that a period of unemployment for claimant would provide an explanation for why the doctors began to report his showing signs of anxiety and depression, but he did not think that claimant's depression at the time of his examination would necessarily be related to the original injury. He thought that had it not been for claimant's second accident, he would have continued to work.

The psychologist believed that claimant had both hysterical and anxious features to his personality with which he was coping before his injury. Post injury he began to use coping techniques which were not so healthy. He said it would be possible claimant's father's death would have contributed to claimant's depression. 265

Dr. Hauck felt claimant could be psychologically crippled even though he did not have a physiologically disabling problem. He felt that claimant's psychological problem need not be permanent, but that it might be long standing. On June 7, 1982 he wrote: "Realistically speaking the man appears to be significantly disabled psychologically because of his accidents...." Dr. Hauck repeated his interview and testing of claimant in October of 1984. The Minnesota Multiphasic Personality Inventory showed he continued to be severely dispressed, pessimistic and downcast. The psychologist felt that claimant's testing compared to that in 1982 showed a worsening of his condition, but there was no manipulation or mallingering. He did not find claimant capable of employment.

Michael J. Taylor, M.D., evaluated claimant on March 8, 1983 and reviewed the depositions of Drs. Beckman and Hauck as well as various medical reports dating to 1978. Dr. Taylor found claimant to be suffering from a major depressive episode evidenced by sleep and appetite disturbance, difficulty concentrating, increased anxiety and irritability, feelings of worthlessness and hopelessness and suicidal ideation. The psychiatrist did not feel claimant was benefiting from medication he was taking and he found that claimant's depression at that time prevented his doing even routine, repetitive, unskilled work. However, he felt claimant's condition could be completely cured. Dr. Taylor wrote:

> The depression from which Mr. McAlister suffered in March of 1983 is a result of the physical discomfort and physical limitations caused by the injuries that he suffered. The time sequence would tend to indicate that the second injury, in January of 1981, was the straw that broke the proverbial camel's back and was the major precipitant for the current depressive episode. I find no indication that there was any mental disorder pre-existing the 1978 injury and I find minimal, if any, documentation for depression of the severity that we now see prior to the January, 1981, injury.

Patrick C. Campbell, M.D., psychiatrist, who had previously reviewed many of claimant's medical reports, but who performed no testing of his own, examined claimant on July 16, 1984. Dr. Campbell took a history and noted that claimant had the same set of symptoms in 1978 that he complained of in July. During his examination Dr. Campbell was told by claimant that he got better after being ill in 1978. The doctor confronted claimant with what was stated in the documents, that is, that there was a continuous problem. He also confronted him with the fact that the injury had resulted in a lawsuit.

As a result of his examination of claimant, the psychiatrist was unable to find any clinically recognizable psychological problems or disorders from which claimant was suffering including schizophrenia or an organic somatiform anxiety or an affective disorder. More specifically, at the time of his examination he did not find claimant to have signs of depression or to be depressed. However, in reviewing claimant's past, Dr. Campbell found evidence of depression in a report of Dr. Updegraff's treatment and that was in the form of suicidal ideations. He characterized depression as a remitting disorder which could disappear without residual evidence. While an episode of depression could be cured, the chances of recurrence would be higher than for someone who had never been ill.

Functional overlay recorded by Dr. Russo was described as: "a feeling component..., an emotional component and that can be -- most of the time it refers to a dramatization of the illness, emotional or functional part referring to the behavioral kind of pattern. That's usually what it refers to." (Campbell deposition, p. 9)

The physician believed claimant's behavior to be conscious and his complaints to be voluntarily produced for avoidance of work and for financial compensation. The doctor knew claimant was receiving $521 every two weeks from workers' compensation, $320 per month in social security and $230 in union pension. His dependents received $338 in social security. There was a disability clause on both claimant's life and health insurance. He stated that persons suffering from a wide variety of nervous disorders might not give up their symptoms after receiving a financial reward.

He thought that at the time of his examination there was no psychiatric or physical condition that would impair claimant's ability to work and that he could work as a crane operator although he acknowledged claimant would have difficulty finding other work.

Dr. Campbell stated that a V-Code condition could not be helped because it is not an illness.

APPLICABLE LAW AND ANALYSIS

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

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).

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 a serious injury in August of 1978 which resulted in his being treated into the following year. At that time he had pain radiating to his right leg. X-rays showed a possible compression fracture at L3. By the time claimant was treated by Dr. Crouch, there was no evidence of radiation or sciatica. Dr. Crouch did not anticipate claimant's having permanent damage. Claimant had a Minnesota Multiphasic Personality Inventory which revealed only a mild degree of apprehension and over-concern. Claimant was able to work until February by using pain medication. When his pain medication was stopped, he quit working and underwent treatment which enabled him to resume both work and home activities.

In August of 1980 he suffered a fall which resulted in an increase in his pain for a short period. In that same month Dr. Wilson performed his evaluation and gave claimant an impairment rating of thirty percent. Thereafter claimant continued to work until his accident on January 6, 1981.

Pain at the time of the January 6, 1981 incident radiated to both claimant's legs. Dr. Beckman who saw claimant in 1979 and again in 1981 ultimately concluded that claimant was totally and permanently disabled from his back and he provided an explanation for that disability by saying claimant had developed fibrosis. Dr. Russo thought claimant's pain was real and he believed claimant would need ongoing treatment. A Minnesota Multiphasic Personality Inventory in 1981 evidenced an elevated neurotic triad which had not been present at the time of claimant's injury in 1978. Dr. Updegraff also declared claimant one hundred percent disabled. Dr. Nissen causally connects claimant's chronic pain syndrome and secondary depression to injuries he received in 1981 and he thought improvement in claimant's condition unlikely. Dr. Hauck's testing results were consistent with a diagnosis of depression with anxiety and hysteria. Dr. Hauck related claimant's condition to his injuries and saw a progressive worsening. Dr. Taylor viewed claimant's 1981 injury as the straw that broke the camel's back.

Evidence from Dr. Campbell is the only evidence of record which is damaging to claimant's case. Dr. Wilson's report is suggestive of claimant's having greater problems than he acknowledged prior to January 1981, but those were of an orthopedic nature. Dr. Campbell determined that claimant's symptoms in 1978 were the same as those in July of 1984. There is some overlapping of symptoms; but as it can be seen from the discussion above, there are distinctions as well. Dr. Campbell is the sole practitioner who has failed to find a psychological problem. He reviewed some medical records, but he did no testing of his own.

The hearing deputy evaluated Dr. Campbell's opinion and observed claimant at the hearing. She wrote: "His [claimant] responses indicated his ability to think abstractly is diminished; his affect was flattened; and [he] couched many answers in a manner suggestive of perceived low-esteem and self-worth." Dr. Campbell's opinion is given lesser weight in this decision.

Clearly claimant had some psychological problems at the time of his 1978 injury; but he was resistant to psychological or psychiatric care at that time. He was able to function on an emotional level and to return to work. It was not until after his injury in January of 1981 that he finally accepted psychiatric help. Dr. Taylor wrote "that the second injury in January of 1981, was the straw that broke the proverbial camel's back and was the major precipitant for the current depressive episode." The preponderance of the evidence supports that statement and a finding that claimant's injury of January 6, 1981 is a cause of the disability on which he bases his claim.

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.
>
> Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant seemingly had exceptionally good health before his injury in 1978. After a period of treatment for that injury, claimant's health was restored at least to the point he was able to work. While the injury to claimant's back in 1981 may have increased the functional impairment in that area, it is claimant's mental condition resulting from his physical trauma that is the primary cause of his disability. He continues to visit the mental health center weekly. He takes medication including Tylenol 4 and uses a TENS and back brace. Defendants herein have undertaken extensive investigation of claimant's psychiatric condition. Evidence has not been presented to show such persistence for insight to claimant's orthopedic condition.

Claimant, at age forty-nine, is at a difficult age. He has been able to obtain a GED since his injury. His worklife thus far has been devoted to being an operating engineer. He is really too old for undertaking a long-term training program, but he has more than a quarter of his worklife remaining.

Claimant apparently was a very good operating engineer in that he was able to obtain assignments outside of this country. In addition to running the various machines, he also did maintenance work on the equipment. Claimant's work required good mobility and coordination and occasionally necessitated heavy lifting. Above all, for safety reasons and for others, mental alertness was of great importance. Claimant is unable to do his former work at this time. As the hearing deputy pointed out: "Claimant's inability to function as he did prior to his injury apparently reinforces his feelings of inadequacy and worthlessness and thereby feed [sic] his depression, anxiety and hysteria." "Claimant's perceived and actual pain and physical disablement preclude his working as a heavy equipment operator or an equally physically demanding job for which his limited education and training might otherwise suit him."

Claimant is unable to perform any other work. He went through an evaluation program. The conclusion of his evaluators was that he is incapable both physically and emotionally of engaging in competitive employment. He has done some toy making, but the purpose of that activity was to give him something to do with his time rather than to produce any income. Claimant is receiving retirement and social security disability payments and those could to some degree decrease his motivation to return to work. However, that seems unlikely in view of claimant's prior attitude toward his work. No information was submitted regarding claimant's earnings. His high rate would indicate his earnings prior to injury were substantial.

Fifty years ago the Iowa Supreme Court dealt with Diederich v. Tri City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935). Claimant Diederich had been a streetcar motorman for thirty years. His education was limited. He was not totally functionally impaired by a compression fracture but he did claim to have pain. The court observed that there was "no competent evidence to show that [claimant] could operate a street car sufficiently well to hold a position as a motorman; and there was no competent evidence that there was any other gainful employment which he would be able to enter and carry on successfully." Diederich at 591, 901. The court concluded at 594, 902:

> The loss which this claimant suffered due to the injury which he received while in the employ of the company is the inability to carry on the work he was doing prior to the time of the injury, or any work which he could perform. This man at fifty-nine years of age, after thirty years as a street car motorman, with little education, cannot find or hold a position that would not require some manual labor, and, of course, due to the condition of his back, he cannot perform such work. To say that he might become a stenographer or a lawyer or a clerk or a bookkeeper is to suppose the impossible, for a fifty-nine year old man, with no education, is not capable of securing or filling any such position. His disability may be only a twenty-five or thirty per cent disability compared with the one hundred per cent perfect man, but, from the standpoint of his ability to go back to work to earn a living for himself and his family, his disability is a total disability, for he is not able again to operate the street car and perform the work which the company demanded of him prior to the time of the accident.

If claimant in the matter sub judice had only his physical problem, he clearly would not be permanently and totally disabled. Claimant's physical injury has resulted in a psychiatric impairment which is very severe. The combination of the two results in permanent total disability.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-nine years of age.

That claimant has a GED and training in welding.

That claimant has work experience as an operating engineer who not only operated, but also maintained his equipment.

That claimant injured his back in August of 1978.

That treatment for claimant's injury in August of 1978 included manipulation, medication and therapy.

That claimant was able to return to work after the 1978 injury.

That claimant suffered increased pain when he tripped over a safety belt on a catwalk in August of 1980.

That claimant fell on his back and buttocks as he worked at his job site on January 6, 1981.

That claimant has been treated with a wide variety of modalities.

That claimant developed severe depression after his injury.

That claimant takes Tylenol 4, Sinequan and Xanax.

That claimant uses a TENS and a back brace.

That claimant goes to the mental health center weekly.

That claimant went through the state rehabilitation evaluation program.

That claimant has been able to some woodworking.

That claimant receives retirement and social security disability benefits.

That claimant has not returned to work since his injury of January 6, 1981.

That claimant is incapable both physically and emotionally of competitive work.

That claimant has a depressive disorder with features of anxiety and hysteria as a result of his January 6, 1981 injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence a causal relationship between his present disability and his injury of January 6, 1981.

That claimant has established entitlement to permanent total disability as a result of his injury of January 6, 1981.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant permanent total disability benefits during the period of his disability as provided in Iowa Code section 85.34(3) at a rate of three hundred twenty-five and 74/100 dollars ($325.74) per week.

That defendants pay accrued amounts 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 activity reports as requested by this agency.

Signed and filed this 13 day of September, 1985.

Judith Ann Higgs

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD McGHGHY,
Claimant,
vs.
LECKENBY COMPANY,
Employer,
and
ROYAL INSURANCE COMPANY,
Insurance Carrier,
and
THE SECOND INJURY FUND OF IOWA,
Defendants.

File No. 703576

APPEAL

DECISION

FILED
SEP 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant, Second Injury Fund of Iowa (hereinafter "the Fund") appeals from a review-reopening decision wherein it was ordered that the Fund pay unto claimant 50 weeks of compensation benefits. The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 12; defendants' exhibits A through D; and briefs filed by the parties on appeal. The claimant's stipulated rate was $342.66.

ISSUES

The Fund raises the following issues on appeal:

1. Whether a congenital birth defect is a qualifying injury as contemplated by the provision of §85.64.

2. Whether the Deputy erred in determining that Claimant's injury did not extend past the shoulder and into the neck and trunk, thus eliminating the Fund's liability to Claimant.

3. Whether the Deputy erred in finding that Claimant was 60% industrially disabled.

4. Whether the Deputy erred in his finding that only 10% of Claimant's industrial disability was as a result of the injury of August 10, 1981.

5. Whether the Deputy erred in his finding that Claimant's left arm birth defect resulted in a functional disability of only 80%.

6. Whether the Deputy erred in making his computation of Fund liability.

REVIEW OF THE EVIDENCE

The claimant testified that he is a high school educated married father of four. After high school he did complete two months of computer training. The claimant was born with what he termed club hand afflicting his left arm. That is where the claimant cannot straighten his left arm. Further he was born without a left thumb. The primary use of claimant's left arm is as a balance for he cannot lift with it. The claimant's work history consists of the following: Pattern tool builder, house builder, millwright, pipe fitter, self-employed entrepreneur in the home heating and air conditioning business, and as a boiler-maker. The claimant has consistently held employment after high school and testified that the only job he was turned down was a position with the Federal Bureau of Investigation. In 1970 the claimant injured his right wrist. This, according to the claimant, was not of a permanent nature. He also testified that he had neither neck nor shoulder problems prior to August 10, 1981.

On August 10, 1981 the claimant was working for the defendant employer, having been employed for approximately three weeks. The claimant was working 25 to 30 feet in the air on rain-slicked steel. He slipped, catching himself and the full force of his weight on his right arm. The claimant noticed pain in his arm then but continued working, attempting some strenuous work activity immediately after his fall, but noticing that his arm really hurt. Since the accident occurred toward quitting time, the claimant told the foreman and his union steward that he would wait until tomorrow and see how his arm is. During the night the claimant's arm became swollen and painful requiring the claimant to take "alot" of aspirins. The next day the claimant had to have a co-worker drive him to work. Succumbing to the pain claimant went immediately to the nurse who sent claimant to Randal E. Olson, M.D.

When the claimant saw Dr. Olson he presented him with complaints of a swollen right arm, generally the area between the right side of his elbow and wrist, and neck pain on the right side. Dr. Olson responded by prescribing hot and cold packs at home for claimant's arm. The claimant saw Dr. Olson four times over a period of a week to a week and a half to no avail. The claimant recalled that Dr. Olson did not treat his neck.

Dr. Olson referred claimant to William Catalona, M.D., whom the claimant saw about three weeks after the accident. The claimant had surgery within a week of seeing Dr. Catalona and within two weeks of the surgery his arm was placed in a cast. Several months after the accident a TENS unit was prescribed for the claimant. He testified that he used to use the unit every day. Now he only wears it if he does anything to aggravate his arm, any twisting or pulling. Dr. Catalona referred the claimant to the Mayo Clinic for one visit which the claimant termed as just an examination. The claimant was also seen at the Menninger Clinic in Kansas where "they ran all the shock tests and the needle tests all over again." At that time the claimant was having problems with his neck which they checked at the clinic. Dr. Catalona also set up an appointment for the claimant at University Hospitals in Iowa City. The claimant was seen there three times, his last visit being January 1983.

The claimant testified, "If [I do not] do anything it's there, but it just like a minor ache. But if I do anything, then they both swell up and I have problems with them." However, the claimant stated that he has improved somewhat. The claimant has not had formal medical treatment since January 1983. Claimant has been receiving regular payments for workers' compensation from the defendant insurance company. The claimant has not held nor looked for gainful employment since August 1981. Presently, the claimant cannot do any lifting, pulling, or twisting without his arms and neck hurting. The claimant has been prescribed medicine which he takes on an as-needed basis.

Testifying to his possible future employment the claimant stated, "I've come to the conclusion, in my own mind, that I'm not going to be able to do any physical work, so I've decided that I've got to buy some type of business where I can just manage it and hire help to do the work for me." The claimant thought he might only be able to work in minimum wage jobs, but the way it looks to him now he cannot even do that. The claimant stated that his condition has not improved since August 1982, but that it has improved a little since January 1983.

On cross-examination the claimant admitted that prior to his accident at defendant employer he did have low back trouble for which he sought out the treatment of a chiropractor. The claimant did think about going back to school for an engineering degree but found he could not afford it. He did admit however, that he did not check into any educational loan programs. After Dr. Catalona advised claimant to change jobs in November 1981 the claimant made no effort to find employment. In October or November of 1981 the claimant applied for social security benefits but was turned down because the social security office believed the claimant was employable.

On cross-examination by the Fund the claimant admitted that he has had some improvement in his right arm since January 1983 which was basically consistent with what the claimant was told at Mayo, in that his problem would resolve itself in two to three years. He also admitted to trying to play volleyball and occasional hunting with a shotgun, shouldering the shotgun to his right shoulder. The claimant stated that he cannot do anything now that he could prior to his accident.

Pamela McGhghy testified that prior to August 1981 the claimant had no problem with his right shoulder or his neck but as far as she knew, no medical treatment was prescribed for her husband's neck or shoulder.

Claimant's exhibit 1, a surgeon's report filled out by Dr. Catalona, states that he first saw claimant on September 3, 1981. He diagnosed the claimant as tennis elbow, medical and lateral epicondyle, and carpal tunnel syndrome. It estimates the claimant will be able to resume light work in two months. Claimant's exhibit 2 is the results of an EMG and nerve conduction test. The impression was "most consistent with a carpal tunnel syndrome over the wrist." Claimant's exhibit 3 is a letter to Disability Determination Services from Dr. Catalona, dated November 5, 1981. In the letter it states the claimant has had little or no relief from the decompression of the median nerve in his right hand. Dr. Catalona also reported that he advised the claimant to change his occupation. Claimant's exhibit 6, a letter from B.R. Nichols, M.D., to Leland Hawkins, M.D., dated December 10, 1981 which states, "I agreed with your evaluation that he was normal neurologically." Claimant's exhibit 8 is a letter from R.D. Beckenbaugh, M.D., of the Mayo clinic to Dr. Catalona dated February 17, 1982. It states in part:

> On clinical examination one notices a general tenderness about the entire flexor origin from the epicondyle distally for several inches but no specific localized area suggestive that he would respond to injection. His story is one of strain of his flexor origin. I think this will resolve

without significant prolonged impairment over a two to three year period. However, with regard to his questioning as to the advisability of returning to construction work in view of his left hand changes and the fact that he has a fairly significant scapholunate dissociation, probably old on wrist x-ray, I guess it is rather logical for him to seek lighter work activities over the long run. I discussed this with him. See no need for treatment and/or other specific items at this time.

Claimant's exhibit 9, a letter from John B. Runnels, M.D., a neurosurgeon associated with The Menninger Foundation, to the defendant insurance company dated April 12, 1982 states in part:

> Doctor Catalona last saw the patient on January 15, 1982, and felt that there was nothing further to offer the patient.
>
> ....
>
> At electromyogram and nerve conduction study will be performed, as requested, despite the patient's basic reluctance to "needles of any kind." I honestly expect the study to be of no value in assessing his basic pathology, however. I think this is a myofacial syndrome, related to a traction injury, andd unrelated to neurological function whatsoever....
>
> A copy of our electromyogram and nerve conduction report will be appended to this report when it is completed, but my disability determination percentage can certainly be rendered without it. I think it is a very practical matter that this young man is absolutely unable to perform the duties of his boilermaker profession, and this appears to be a chronic condition, unrelieved by any treatment mode to date. His Mayo Clinic evaluation speaks of resolution over a 2 to 3 year period, and I certainly have no better experiences to quote. If Doctor Beckenbaugh's interpretation of the right hand x-rays is correct and his diagnosis of a scapholunate dissociation, I certainly agree that the prognosis for his return to his former work is exceedingly poor. Neither do I have any recommendations for treatment in this situation.
>
> My calculation for loss of the use of one arm would regularly be 35% permanent partial disability,; in view of the fact that he already has impairment of his left arm from a congenital situation, this disability may well be functionally considerably greater.

Claimant's exhibit 10 is an EMG report from the Menninger Clinic dated April 12, 1982. The interpretation states: "EMG revealed no definite abnormalities. No evidence of right cervical radiculopathy or brachial plexopathy."

Claimant's exhibit 11 consists of copies of pertinent University of Iowa Hospitals and Clinic's medical records. A radiological consultation report dated August 11, 1982 states:

> AP and lateral of the right elbow: An osteophyte at the tip of the coronoid process is noted. There is also some calcification at the insertion of the wrist extensor tendons of the lateral epicondyle. The rest of the exam is normal.
>
> Impression: Findings as above.

Claimant's exhibit 12 is a letter from B. J. Campbell, M.D., of the University Hospitals and Clinics to defendant insurance company's counsel dated February 25, 1983 stating: "I think the previous rating of 35% of the right upper extremity is a reasonable rating and I feel that he should be retrained to do a job that does not require heavy lifting."

Defendants' exhibit D, a compilation of various medical reports, contains a clinical note by Dr. Conway and Dr. Campbell which reads: "All of the patient's problems seem to be subjective, primarily pain, rather than objective clinical findings." The note is dated January 14, 1983.

APPLICABLE LAW AND ANALYSIS

Section 85.64, Iowa Code (1981), provides in part:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the

latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

The Iowa Supreme Court held in Second Injury Fund v. Mich Coal Company, 274 N.W.2d 300, 304 (Iowa 1979):

> [T]hat in a second injury fund case under §85.64 when the commissioner finds as to claimant's present condition an industrial disability of the body as a whole, the commissioner must also make a factual finding as to the degree of disability to the body as a whole of the claimant caused by the second injury.

Expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903, 907 (Iowa 1974). Further, "the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances." Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128 (1967).

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 response to the Funds first issue, namely the role of the claimant's birth defect, the Iowa Supreme Court quoted with approval, Kacena, Workmen's Compensation in Tennessee: The Second Injury Fund, 6 Memphis State U.L.Rev. 715, 716-719 (1976). Kacena quoted in part in Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978).

> The source of this pre-existing disability is normally of no importance but it must be permanent and must tend to act as a hindrance to the individual's ability to obtain or retain effective employment. Such individuals are what society commonly refers to as 'the handicapped,' and the primary purpose of second injury fund statutes is to encourage the hiring of the handicapped.

The Fund argues that claimant's second injury extended to the body as a whole. While there is some testimony by the claimant that his right shoulder and right side of his neck are sore, there is not a preponderate amount of medical evidence to substantiate this. Further, the fact remains that claimant pursues various activities involving his right shoulder, mainly shouldering a shotgun to that allegedly injured right shoulder. The deputy held correctly on this point.

The third issue is whether the claimant actually has incurred a 60 percent industrial disability. The deputy found that prior to his second injury, the claimant worked at jobs requiring heavy lifting. This is true. It is also true that since his injury almost all the doctors are in agreement that claimant should find work that doesn't require lifting. While the claimant appears to be unmotivated toward this end, it is questionable with his current condition whether or not he could find work toward which he is suited. A little more motivation would go a long way for the claimant. In any event, the deputy correctly held that claimant suffered a 60 percent industrial disability.

The Fund brings to issue the apportionment of industrial disability, arguing that more than 10 percent is attributable to the second injury. By virtue of Second Injury Fund v. Mich Coal Company, 274 N.W.2d 300 (Iowa 1979), this agency must make such an apportionment. Breaking this issue down to the most elemental basis, we must look at the claimant's separate injuries and come to the determination; which injury is attributable to what percentage of the total industrial disability. Even the most cursory review demands the conclusion that the claimant's club hand contributes substantially to claimant's industrial disability. Again the deputy was correct.

What is the claimant's exact functional impairment of his left arm? The deputy was able to observe the claimant's arm in light of the testimony and drawing upon his knowledge and experience adjudged the claimant to have an 80 percent functional impairment. It is clear that claimant's left arm is not 100 percent functionally impaired as he uses it for balance. The deputy's findings will not be disturbed. There is no error found in the deputy's calculations.

FINDINGS OF FACT

1. As a reslt of his injury on August 10, 1981 claimant has a permanent impairment of 35 percent of the right upper extremity.

2. Claimant has a permanent functional impairment of 80 percent of his left upper extremity which has been present since birth.

3. The August 10, 1981 injury resulted in no impairment beyond the right upper extremity.

4. Claimant is 35 years old and is a high school graduate.

5. Claimant has two months of training on computers.

6. Claimant has held a number of different jobs, but all have required heavy lifting.

7. Since his injury physicians have instructed claimant to find work which does not require heavy lifting.

8. Claimant is intelligent and in the past has been a good worker.

9. Presently, claimant has a lack of motivation to seek employment.

10. Claimant reached maximum recovery on April 12, 1982.

CONCLUSIONS OF LAW

The sections regarding the Second Injury Fund do apply to claimant's situation.

Claimant presently has an industrial disability of 60 percent.

Claimant's birth defect to his left arm is equal to 200 weeks of compensation.

The amount of industrial disability related to his second injury is ten percent.

Claimant is entitled to healing period benefits up until April 12, 1982.

WHEREFORE, the proposed decision is adopted and affirmed.

ORDER

THEREFORE, it is ordered:

That defendant employer and insurance carrier are to pay unto claimant thirty-five and one-sevenths (35 1/7) weeks of healing period benefits at a rate of three hundred forty-two and 66/100 dollars ($342.66) per week and fifty (50) weeks of permanent partial disability benefits starting on April 12, 1982 and ending on March 28, 1983 at a rate of three hundred forty-two and 66/100 dollars ($342.66) per week.

*	60% body as a whole	= 300 weeks present industrial disability
	10% body as a whole	= 50 weeks attributable to second injury
	80% arm	= 200 weeks congenital defect

300 minus 50 minus 200 = 50 weeks

That the Second Injury Fund shall pay unto claimant weekly compensation benefits of *fifty (50) weeks commencing on March 29, 1983 and ending April 13, 1984 at a rate of three hundred forty-two and 66/100 dollars ($342.66) per week.

That defendant employer and insurance carrier are to be given credit for all amounts previously paid.

That defendant employer and insurance carrier are to pay amounts due and owing in lump sum.

That interest is to accrue in this award from the date of this decision.

That costs of this action shall be taxed equally to the Second Injury Fund of Iowa and the defendants.

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

Signed and filed this 30 day of September, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS MEYERS, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	File No. 758410 A P P E A L D E C I S I O N

FILED SEP 30 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from a proposed arbitration decision wherein it was found that claimant was exposed to excessive noise during his employment at defendant John Deere Dubuque Works of Deere & Company (hereinafter Deere). It was also found that claimant filed his action within two years of the excessive noise exposure and beyond six months since his last exposure thereto. The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 12; defendant's exhibits 1 through 7, 12 & 13; and briefs filed by the parties. Notice is taken of In Re Declaratory Ruling of John Deere Dubuque Works of Deere & Company, (filed February 17, 1983).

ISSUES

The issues as stated by the defendant are:

> I. Section 85B.8 provides the exclusive method of determining the date of occurrence of the injury for occupational hearing loss and claimant has failed to state his claim within the two year time limitation from the date of occurrence.
>
> II. Even if the "discovery rule" does apply, claimant has failed to meet his burden of proof that he filed his claim within two years of the date when he, or a reasonable person, should recognize the nature, seriousness and possible compensation character of his injury and disease.
>
> III. Even if the claim is timely filed, claimant has failed to meet his burden of proof that his injury arose out of and in the course of his employment.
>
> IV. Even if the claim is timely filed, claimant has failed to meet his burden of proof that there is causal connection between claimant's hearing loss and the disability claimed.
>
> V. Even if claimant has met his burden, the hearing commissioner applied the incorrect measure to determine the extent of claimant's hearing loss.

REVIEW OF THE EVIDENCE

The claimant, 41 years old, married, father of two, and with a high school education, testified that he began working for Deere on April 30, 1964. He had at one time been laid off but prior to that worked in tractor repair (K14), sections 147 and 141. These sections are located in the same area. After the layoff claimant was transferred to parts maker (N34) on June 1, 1982.

The claimant's work is basically on large crawlers while they are running. He usually does not roam more than 50 feet from that area. There is never the same noise level. In earlier years when the crawlers were tested they were on tracks. Today they are not. There are two test stands nearby. Parts and machines are tested there all day with an accompanying noise variation.

The claimant was told a week prior to the hearing that hearing protection was mandatory. He had a physical examination at Deere when he commenced employment but his hearing was not checked. However, he felt his hearing was at that time good. Claimant first found out of a hearing loss when Deere sent him to see John F. Gschwendtner, M.D., for an evaluation around March 1982. He testified to other hearing tests. One was performed around September 1981 at Deere's medical department using a machine. The claimant was not told the test results, only that he had to see a doctor. He saw Dr. Gschwendtner during his layoff. Claimant testified as follows:

> A. After I got laid off the last part of November, '81, I didn't know how long I would be off and I began to wonder just what was the problem or why they wanted me to see the doctor, so I went to my own one day. I went out to the medical department and I asked them.

Q. You went out to the medical department at the plant?

A. At John Deere, yes. And I asked them what was the deal on that last hearing test that I took, that I was supposed to see the company doctor and never did call me in. Did they forget about it or what. So at that they told me I would have to take another hearing test at the plant. I said, "Fine." So I took another hearing test at the plant and at that point I was sent downtown to Dr. Gschwendtner.

(Transcript, pages 12-13)

Dr. Gschwendtner told the claimant that he had a partial loss of hearing. The claimant was put in touch with Deere's doctor whom, the claimant stated, did not tell him much. Deere's doctor did tell him to wear hearing protection in excessive noise areas or to wear hearing protection to keep the hearing he's got. Although claimant presently has a hearing aid, which was paid by the group carrier, he went without one for a while because Dr. Gschwendtner told him he wouldn't like it. The events surrounding the hearing aid are as follows: Mr. Timmerman of the safety department sent the claimant to Deere Medical for a hearing test. The claimant testified that he could not hear some of the hearing tests and several parts of the test were repeated. Claimant was sent to Dr. Gschwendtner for an evaluation. He was told he had a hearing loss and that Mr. Havertape wanted to see him. Havertape, the Deere Safety Director, refused to pay for the hearing aid.

The claimant's noise exposure over the years has consisted of whatever firing was done of an M 1 rifle in the Marine Corp; squirrel or pheasant hunting he does about twice a year; lawn mowing; operating a chain saw for which he wears hearing protection; a family sawmill, at which he worked nights seldom when the saw was running; and with Deere. His greatest exposure was at Deere.

The claimant stated that he occassionally wore hearing protection while in departments 147 and 141 in March 1976. However, he had to take the hearing protection off to communicate with his partner. Hearing protection had to be requested from the supervisor. To his knowledge the claimant was not aware of any noise or hearing signs posted until he left the area. He is now in one of the comparatively quieter areas of the plant where he constantly wears hearing protection.

On cross-examination the claimant stated that department 147 changed to 141 on June 6, 1980 which he subsequently left in September 1981 to go to tractor repair (149). During his lay off claimant did not do much of anything. At the hearing test and audiogram in September 1981 claimant described his hearing as poor. After the audiogram he was told by a nurse that he was going to have to see a doctor. Around March of 1982 the claimant became concerned for his hearing and went to Medical Associates Clinic. An audiogram was done on claimant March 12, 1982. As a result the claimant was sent to see Dr. Gschwendtner who told the claimant that he had no infection and he should see an audiologist. In March of 1982 Dr. Gschwendtner told the claimant he had a partial loss of hearing. The claimant testified that Dr. Gschwendtner told him, "compensation laws are not made for the employee's, they're made for the employer's....So if you are thinking of compensation...you are not going to get it."

Claimant began asking about workers' compensation and his hearing after seeing a safety film on February 24, 1984. On February 3, 1984 Dr. McClenahan informed claimant of some hearing problems. The claimant filed his claim on March 7, 1984. The employer's first report of injury filed March 19, 1984 lists March 18, 1982 as claimant's injury date.

Donald A. Otto, who works for Deere and was involved in testing at departments 141 and 147 in early 1976 identified claimant's exhibit 10 as department 147 noise levels. The witness found the noise levels at 90-105 decibels (dba) which is over what is acceptable for an eight hour day. At times workers were exposed to peak 115 dba readings.

Robert B. Havertape, Deere's safety department manager testified that he supervises a number of people in respect to the safety activities, industrial hygiene, and also workers' compensation matters for Deere. Defendant's exhibits 1 through 6 were prepared by him or his staff.

John J. O'Neill, a supervisor with Deere in department 143 (large crawler assembly, formerly 147 to 141 to 143) testified the claimant came to 147 in March 1976. By March 1976 the crawler test area was in full swing testing 3.8 units per day. He testified that the claimant wore hearing protection off and on.

Patricia Gage, an industrial hygienist with Deere for five years testified that in September 1984 she fitted the claimant with a dosimeter which averaged for the day 80 dba with a range of 78-89 dba. She was told by one of the grinders that he was doing more grinding than usual. On rebuttal the claimant stated that the two regular grinders were gone and the person Ms. Gage talked to was filling in for one of them.

Claimant's exhibit 1 is a copy of claimant's file maintained by Medical Associates Clinic, P.C., of which Dr. Gschwendtner is an associate. A clinical note dated March 17, 1982 states the claimant has noticed a hearing loss the last 1 1/2 years. It also states: "Audio from I.D.--[reduced] hearing both ears in 2,000 H_3 range, 3000 -- 6000 H_3 no change." On March 17, 1982 claimant was advised by Dr. Gschwendtner to wear ear protection at all times when exposed to noise. An April 9, 1984 entrv states "Audio - no significant change x 2 years. Imp. -- high freq. sensori neural loss." A hearing evaluation was recommended.

A letter from Dr. Gschwendtner to Dr. McClenahan states:

> He worked at John Deere since the 1960's, but his first audiogram was performed in 1975. That audiogram showed a high frequency loss in the 3, 4, and 6000 Hertz range with normal hearing in the rest of the frequencies.
>
> ....
>
> A follow-up audiogram in 1981 showed a progression of his hearing loss and now in the range of the 2000 Hertz range in both ears. This audiogram was again repeated in March of 1982, and it confirms the persistent hearing loss in 2000 Hertz and above bilaterally.

A hearing test record of March 17, 1982 shows "% Loss left 18.75% - % Loss Right 5.63% - Binaural 7.8%." Another hearing test performed on April 9, 1984 rates a binaural loss of 12.1%. An undated Worksheet for Calculation of Percent Occupational Hearing Loss reports a 7.8% hearing loss and total binaural.

Claimant's exhibit 2 is a collection of medical reports from Deere medical. An entry dated September 4, 1981 states "Audio, To DRM for review." An entry dated March 10, 1982 indicated the claimant phoned the 9th of March regarding audio. On March 11, 1982 a repeat audio was done showing progressive hearing loss from 2-6 kHz.

Claimant's exhibit 5 is a collection of the various jobs the claimant performed at Deere. Claimant was in departments 147, 141, and 149 from March 15, 1976 until September 29, 1981. He was laid off November 29, 1981 until May 30, 1982. An audiogram by Deere performed on September 4, 1981 reveals a binaural loss between the 2-6 kHz range. An audiogram by Deere on November 7, 1975 shows a binaural loss at the 3-6 kHz range.

Claimant's exhibit 10 is a report from D A. Otto to W. E. Gabbard of Deere outlining department 147 noise to be 90 dba to 105 dba. Inside the cab of the crawler, the noise level was recorded as 107 dba. Another report, claimant's exhibit 11, from Otto to R. E. Wallace dated May 5, 1976 states: "Currently, the noise level has been lower, averaging 5 dba's. There have been six dosimeter checks made in the surrounding area. The results of these checks did not indicate an overexposure. However, since we do not currently know the duration of the test, an overexposure could be possible."

Claimant's exhibit 12, another report from Otto to Wallace, states there has been an average reduction of eight decibles.

Defendant's exhibit 1, an occupational hearing loss worksheet dated September 4, 1981, indicates a 16.9% hearing loss total, binaural. Exhibits 2 through 7 are occupational hearing loss worksheets. The percent total binaural hearing loss is indicated below:

March 10, 1982	15.6 %
March 12, 1982	15.3 %
March 17, 1982	6.88%
February 28, 1984	21.3 %
April 9, 1984	12.2 %

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85B.10 provides in part:

> The employer shall communicate to the employee, in writing, the results of an audiometric examination or physical examination of an employee which reflects an average hearing loss of the employee in one or both ears in excess of twenty-five decibels ANSI or ISO for the test frequencies of five hundred, one thousand, two thousand, and three thousand Hertz, as soon as practicable after the

examination. The communication shall include the name and address of the person conducting the audiometric examination or physical examination, the kind or type of test or examinations given, the results of each, the average decibel loss, in the four frequencies, in each ear, if any, and, if known to the employer, whether the loss is sensorineural hearing loss and, if the hearing loss resulted from another cause, the name of the cause.

Iowa Code section 85B.8 provides:

A claim for occupational hearing loss due to excessive noise levels may be filed six months after separation from the employment in which employee was exposed to excessive noise levels. The date of the injury shall be the date of occurrence of any one of the following events:

1. Transfer from excessive noise level employment by an employer.

2. Retirement.

3. Termination of the employer-employee relationship.

The date of injury for a layoff which continues for a period longer than one year shall be six months after the date of the layoff. However, the date of the injury for any loss of hearing incurred prior to January 1, 1981 shall not be earlier than the occurrence of any one of the above events.

Iowa Code section 85.26 provides in part:

1. No original proceedings for benefits under this chapter or chapter 85A, 85B or 86, shall be maintained in any contested case unless such proceedings shall be commenced within two years from the date of 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 payments 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.

Iowa Code section 85B.9 provides in part:

If more than one audiogram is taken following notice of an occupational hearing loss claim, the audiogram having the lowest threshold shall be used to calculate occupational hearing loss.

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).

Iowa Code section 85B.12 states:

A reduction of the compensation payable to an employee for occupational hearing loss shall not be made because the employee's ability to communicate may be improved by the use of a hearing aid. An employer who is liable for occupational hearing loss of an employee is required to provide the employee with a hearing aid unless it will not materially improve the employee's ability to communicate.

The statute of limitations is an affirmative defense which defendant must prove by a preponderance of the evidence. Baines v. Blenderman, 223 N.W.2d 199, 203 (Iowa 1974). This the defendant has established. But Iowa has adopted the discovery rule exception to the statute of limitations. The discovery rule delays the accural 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 (1967). The discovery rule delays the commencement of a limitation period, for bringing a cause of action or for giving notice, until the injured person has in fact discovered his injury or by exercise of reasonable diligence should have discovered it. Dillinger v. City of Sioux City, 368 N.W.2d 176, 179 (Iowa 1985), Orr v. Lewis Central School District, 298 N.W.2d 256, 261 (Iowa 1980).

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. Id. at 261. See also Orr v. Lewis Central School District, (Appeal Decision, filed September 20, 1985). What remains is the determination of when the claimant discovered his injury. For some unexplained reason claimant was not advised as to the results of his hearing test in September 1981 as required by section 85B.10. Had they done so the claimant would have earlier been aware of the nature of his hearing loss. It was not until the hearing test of March 17, 1982 claimant was provided with knowledge about his hearing loss which would allow him to infer that he had sustained a compensable injury. Therefore the claimant's petition and claim are timely. The notice requirement does not hinder the defendants as they had constructive notice or actual knowledge before even what they consider the injury date. See, Robinson v. Department of Transportation, 296 N.W.2d 809 (Iowa 1980).

The evidence is preponderating that claimant has established his claim for occupational hearing loss. The defendant is correct however in its final issue on appeal and claimant's hearing loss should be 12.2% instead of 15% as that was threshold on the lowest audiogram. The decision is modified accordingly.

FINDINGS OF FACT

1. Claimant was employed by Deere in March 1982.

2. Claimant was exposed to excessive noise during his employment at Deere.

3. Claimant sustained a 12.2 percent permanent partial hearing loss as a result of the injurious exposure at Deere.

4. Claimant filed the instant action beyond six months since his last exposure to excessive noise and within two years of the time when the claimant discovered in the exercise of reasonable diligence the nature, seriousness and probable compensable character of his hearing loss.

5. Defendant had knowledge of a possible claim prior to and within 90 days of March 1982.

6. The claimant's hearing loss was caused by the excessive noise exposure.

CONCLUSIONS OF LAW

Claimant was employed by defendant in March 1982.

Claimant filed the instant action within the proper time noted by the statute of limitations.

Defendant was given adequate notification of the claim.

Claimant is entitled to 21.35 weeks of permanent partial disability compensation at the rate of $302.89 per week.

THEREFORE, the decision of the deputy is affirmed in part and modified in part.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant twenty-one and thirty-five hundredths (21.35) weeks of permanent partial disability compensation at the rate of three hundred two and 89/100 dollars ($302.89) per week.

That the defendant supply the claimant with two working hearing aids adjusted for use.

That interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from the date said payments became due.

That costs of this action are taxed to defendant pursuant to Industrial Commissioner Rule 500-4.33.

That defendant is to file a final report upon payment of this award.

Signed and filed this 30 day of September, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT MORGAN, Claimant,	:	File No. 703009
vs.	:	APPEAL
ARMOUR-DIAL, INC., Employer, Self-Insured, Defendant.	:	DECISION

FILED
AUG 23 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant, Armour-Dial, Inc. (hereinafter Armour), appeals and claimant cross-appeals from a review-reopening decision wherein claimant was awarded permanent partial disability benefits as a result of a work-related injury he sustained on May 4, 1982.

The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 6; defendant's exhibits 1 through 4 and 6 through 11; and the briefs and filing of both parties on appeal.

ISSUE

Whether the deputy industrial commissioner erred in finding that claimant had sustained a 17 1/2 percent industrial disability.

REVIEW OF THE EVIDENCE

Claimant was 54 years old at the time of the hearing. He has worked at Armour's Fort Madison plant since July of 1979. Claimant is a high school graduate, married and has two children.

On May 4, 1982 claimant was involved in a work-related incident. On that day claimant was assigned to and running the Frank-A-Matic machine. Apparently the chain came off in the Smokehouse and meat fell to the floor. While attempting to pick up the meat, claimant injured his back. After claimant notified his employer of the injury he was sent to Harold L. Schrier, M.D.

In a letter dated October 11, 1982 Dr. Schrier stated that he had last seen claimant on August 2, 1982. His x-rays showed claimant to have curvature of the spine, degenerative arthritis and intervertebral disc disease. He placed the claimant on a 25 pound weight restriction, but cautioned that claimant's lumbar pain could reoccur even with the 25 pound limit.

Claimant was referred to James Kannenberg, M.D., on April 19, 1983. Dr. Kannenberg examined claimant and gave claimant a muscle relaxant as well as anti-inflammatory treatments.

Subsequently, claimant was referred to Donald Mackenzie, M.D. Dr. Mackenzie first saw claimant on August 10, 1983. At that time claimant told Dr. Mackenzie that his problems began on May 4, 1982 when he was injured at work. Initially, Dr. Mackenzie treated claimant with physical therapy, muscle relaxants, and anti-inflammatory medication. Later claimant received intermittent pelvic traction and began wearing a brace. Claimant had a myelogram performed on October 19, 1983 because he was experiencing symptoms even though his sciatic irritation tests had improved. Surgery was never performed on claimant.

In a letter dated February 13, 1984 Dr. Mackenzie revealed the following:

> Robert was seen in my office on the 7th of February and, in the past five months, has made considerable progress....At this point he has been back at work for 3 weeks and has been doing fairly well. He still has some occasional hip pain and occasional back discomfort but he is fairly well able to relate these to excessive activity....
>
> At this point he is released for full duty and, I think, it would be fair to say he probably has a 10% disability at this time, mainly on the basis of the pain he experiences but probably he does observe some inhibition in full activity. I expect this to continue to improve but would not expect to be able to make a final disability rating on him until the good weather arrives, an arbitrary date for this would be May 31st.
>
> (Claimant's Exhibit 1)

On September 12, 1984 Dr. Mackenzie gave claimant a five percent rating based upon the AMA Guidelines and a 10 percent rating using the American Academy of Orthopedic Surgeons Guides, however, Dr. Mackenzie was not aware that a revised second edition of the AMA Guidelines was published.

Koert R. Smith, M.D., performed an evaluation of claimant. In a letter dated July 31, 1984 Dr. Smith stated:

> Basically, I concur with the diagnosis and with the treatment at this point. Depending on symptoms that he may develop in the future, he may need nerve root exploration and decompression on the right side at L5-S1. Depending on his symptoms, when surgery is indicated, he might also need a fusion.
>
> (Defendant's Ex. 3)

A July 16, 1980 note from Aaron L. Katz, D.O., revealed that claimant was treated for his low back from February 13, 1975 through April 13, 1975. He was treated for a right hip injury from November 1, 1976 through December 9, 1976 and he was treated for a left wrist injury from August 1, 1977 through September 2, 1977.

Presently, claimant continues to experience back spasms. He performs light duty work. Claimant testified that he no longer can perform any physical activities which require running, bending, or lifting. He can't go fishing or camping. He hardly does any gardening or work on his cars since his injury. Claimant admits his sex life is affected by the back injury.

Claimant currently is a can and product inspector for Armour. Armour rates on brackets as far as a pay rate. Claimant is in a two bracket and makes 25 cents less than when he worked at the Frank-A-Matic. Claimant testified that he has been disqualified from the Frank-A-Matic job and the Smokehouse unloader position. In a letter dated May 6, 1983 from Armour, claimant was informed he was disqualified from the positions because he was medically precluded from lifting heavy weights and the two jobs in question required repetitious heavy lifting. Ken Montgomery, manager of industrial relations, confirmed this. Claimant took and failed a mechanical aptitude test which would have led to a maintenance apprenticeship program.

In 1980 claimant joined the Air National Guard which requires duty of one weekend a month and two weeks in the summer. Before starting, claimant was required to take a physical. The examination, which the claimant failed, included a lifting test. When claimant first began he serviced airplanes which required heavy lifting. At present his duty consists of supervising which requires him to be in the office 90 percent of the time.

Richard Leverington is an operating supervisor on the second shift at Armour. Leverington sees claimant several times each day during a given shift. He has never noticed claimant experiencing difficulty working. Leverington stated that claimant does have one of the easier and less intense jobs within the shift he supervises. Claimant has been found to be very conscientious.

Joel Roth is the production supervisor for the Vienna line. He has been claimant's immediate supervisor for approximately three and one-half months. Roth testified that claimant has been performing his job satisfactorily, has a proper attitude, and does not appear to have an inability to work. Roth did recall claimant complaining of his back hurting but not asking to be relieved.

Ken Montgomery testified that claimant ranks in the top 50 percent of the seniority rosters. For claimant to lose his job, Montgomery stated, there would have to be a major layoff.

James Lemon, maintenance mechanic with Armour testified that the Frank-A-Matic job is in bracket two, while CPI is in bracket seven. Lemon stated that each bracket increase represents a $.05 upgrade in a worker's hourly wage.

Ronald D. Sanders, a Master Sergeant in the Iowa Air National Guard, testified that claimant has been in his section for eight to ten years and is presently supervisor of the transient maintenance section. Sanders outlined claimant's responsibilities to include supervising men, servicing airplanes, and making sure that the paper work is taken care of. Claimant does bend or stoop to inspect and he has lifted up to ten pounds. Sanders characterized claimant as conscientious and dependable.

APPLICABLE LAW AND ANALYSIS

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant is a 54 year old high school graduate. At the time of his injury claimant was in the SJMA classification, a seven bracket job [the highest bracketted]. Since his injury, claimant has worked as a CPJ which is a two bracket job. The difference in brackets means claimant earns 25 cents less per hour now than he did prior to his injury. Claimant took a mechanical aptitude test in order to qualify for the maintenance apprenticeship program but he failed the test.

One weekend every month and two weeks during the summer claimant works at the Air National Guard as a supervisor. His superiors at Armour and the Air National Guard state claimant is conscientious and dependable.

Dr. Mackenzie gave claimant two functional impairment ratings. His first impairment rating of five percent was based on the AMA Guide. The more recent 10 percent functional impairment rating was based on the orthopedic guidelines. Claimant wears a brace at work every day and has a weight restriction of under 25 pounds.

Finally, while the record reveals testimony regarding the possibility of claimant being layed off, the deputy correctly noted that a decision would not be made based upon speculation. Should claimant's status change within three years from his last date of payment of compensation, he can reopen his case.

FINDINGS OF FACT

1. Claimant is 54 years old.

2. Claimant is a high school graduate.

3. Claimant began working for Armour in the Fort Madison plant in July of 1979.

4. Claimant has a history of low back complaints.

5. Claimant sustained a work-related back injury on May 4, 1982.

6. Claimant's current complaints are mainly back spasms.

7. Claimant wears a back brace at work.

8. Claimant was in the seven bracketted SJMA classification prior to his injury. This job required heavy lifting.

9. Claimant now is in the two bracketted CPI position which requires very little lifting.

10. Claimant is disqualified from performing the Frank-A-Matic and Smokehouse loader's jobs as a result of his 25 pound weight restriction.

11. Claimant is presently a supervisor in the Air National Guard one weekend every month and two weeks in the summer.

12. Claimant has failed to qualify for a maintenance apprenticeship program.

13. Claimant has a functional impairment.

14. Claimant is a conscientious, dependable, and motivated worker.

CONCLUSION OF LAW

The claimant has established by a preponderance of the evidence that he has sustained an industrial disability of 17 1/2 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant eighty-seven and one-half (87 1/2) weeks of permanent partial disability benefits at the rate of two hundred fifty-seven and 02/100 dollars ($257.02) per week.

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

That defendant shall pay interest pursuant to Iowa Code section 85.30.

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

Signed and filed this 23 day of August, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JIM MOUNT, Claimant,	:	File No. 735414
vs.	:	A P P E A L
JOHN DEERE COMPONENT WORKS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
AUG 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision filed October 29, 1984 wherein it was concluded that the defendants were estopped from asserting the statute of limitations as a bar to claimant's actions and that the claimant's current disability was causally related to his June 30, 1974 injury. The record on appeal consists of joint exhibits 1 through 12; the hearing transcript; and briefs filed by both parties.

ISSUES

The issues as stated by the defendants are:

A. Whether there was a nonunion of claimant's fracture prior to the June 1982, incident.

B. Whether the employer is estopped from raising the statute of limitations.

C. Whether the discovery rule is applicable under the facts presented during the hearing of this matter.

REVIEW OF THE EVIDENCE

A first report of injury was filed July 6, 1983 stating the date of injury as June 30, 1974. At the hearing the parties stipulated that the claimant's applicable rates of compensation would be $91.00 for benefits other than permanent partial disability and $84.00 for permanent partial disability benefits. The charges for outstanding medical bills were stipulated to be both fair and reasonable.

The claimant, a married male with three children, was lifting a 55 gallon barrel into a dumpster on June 30, 1974 at defendant John Deere Component Works' (hereinafter Deere) plant when he slipped, catching his left wrist between the dumpster and the barrel. The claimant went to Deere's medical department after the accident where he was put on light duty for the remainder of the shift. The next morning claimant saw John Walker, M.D., was x-rayed and told there was no fracture. He was put on light duty for several days. The claimant received no workers' compensation benefits. He was taken off light duty but still experienced problems and visited Deere medical often. "A couple weeks later" (July or August) the claimant returned to R. D. Acker, M.D., who took another x-ray of the claimant and discovered a fractured navicular bone in his left arm. The claimant was sent to a Dr. Wylie who placed him in a cast. The claimant stated that he did not miss work nor receive workers' compensation benefits. While on light duty the claimant's cast got wet and subsequently deteriorated requiring a new one to be put on by Deere medical. Two to three weeks later Dr. Walker removed the claimant's cast and restricted claimant to additional light duty. Again the claimant missed no work and received no workers' compensation benefits.

The claimant made several trips to Deere medical for pain in his wrist between September 11, 1974 and June 4, 1975. In June 1975 claimant saw Hester J. Hursh, M.D., for pain in his left arm. The claimant testified that he was told by Dr. Hursh that his fracture had healed. He stated that he was not told that there was necrosis of the bone. The claimant had been a navy corpsman and had some recollection of what necrosis was. Deere told the claimant that if he had any problems to return. He was not informed by anyone that the fracture had not healed.

Although the pain had been intermittent, it became worse in 1976 while the claimant was building a home. The claimant could not use his left arm to carry blocks. The next day claimant went to Deere medical where he was x-rayed and told that the fracture had healed. Dr. Hursh told him that he had arthritis in his wrist and that the pain was likely due to the arthritic condition. At that time no one told the claimant that there was a nonunion of the fracture, necrosis, or that he needed additional medical care at that time.

The claimant stated that the pain always had been intermittent but he experienced severe pain in June of 1982. Upon return from a fishing trip to Minnesota, claimant could not sleep and experienced throbbing pain. The claimant visited Sawat Phrutitum, M.D., on June 8, 1982 who x-rayed the claimant's left wrist and told him that his left wrist was still broken and that it never had healed. The claimant took himself off work at Dr. Phrutitum's direction. The claimant made an appointment to see Dr. Walker and a week or two later Dr. Walker diagnosed the claimant as having an unhealed fracture. Claimant sought workers' compensation from Deere. Claimant recalled that a Mr. Niedert told him that the incident happened too long ago and that he could have reinjured it. To the best of his knowledge this episode required the claimant to be off work from June 8, 1982 to July 16, 1982.

Claimant sought a second opinion from W. P. Cooney, M.D., of the Mayo Clinic. Dr. Cooney told the claimant that there was a nonunion. A tomogram was performed on the claimant, at which time Dr. Cooney apprised him of two possible courses of treatment: 1) having a prosthetic implant and removal of the bone; or 2) a bone graft. The claimant elected the bone graft which he underwent on September 27, 1982. The claimant was hospitalized for a week and was off work until December 13, 1982.

The claimant authenticated exhibit 2 as various expenses he has incurred with the exception of page 2. He told the deputy that there was a lapse of two weeks beginning on June 8, 1982 when he did not receive work indemnity benefits. Other than that the claimant received W.I. benefits the whole period at a rate substantially higher than the rate of workers' compensation. Since seeing Dr. Cooney, the claimant has been seen by doctors Charles R. Buck, M.D.; R. V. Corton, M.D.; and J. D. Kothari, M.D. On cross-examination the claimant admitted experiencing pain in his left wrist while driving a half-ton truck with camper home after his vacation in 1982.

Dr. Hursh testified for Deere. Dr. Hursh began working at Deere's Waterloo plant in February 1975. Dr. Hursh first saw the claimant in connection with his wrist problems on June 4, 1975 at which time she reviewed x-rays taken of claimant. Dr. Hursh identified exhibits 4 through 9 as follows: Exhibits 4 and 5, x-rays taken of claimant's left wrist by the Deere medical department on June 4, 1975; exhibit 6, x-rays of claimant's wrist taken on August 18, 1976; exhibit 7, x-rays taken on August 8, 1984; and exhibits 8 and 9, x-rays taken by Dr. Walker on June 11, 1982.

Dr. Hursh testified that exhibit 5 gives the appearance of a healed fracture of the scaphoid. The oblique view, Dr. Hursh stated, suggested that healing was going on in the bone. Exhibit 4 shows the left scaphoid stressed. Dr. Hursh testified:

> Q. What does that show then to you, the film?
>
> A. The film shows me two things. Number 1, there is no change of position from the main bone and the fracture -- fractured small part. And in the other view you can see that the position is maintained very well. There is no separation of the small part, which was previously fractured from the larger part of the bone. Also important is that there is no whiteness of the small bone fragment.
>
> Q. Well, tell the deputy the significance of that whiteness.
>
> A. Another name for whiteness is radiodensity, which is an indication that the bone fragment is dead or necrosed.
>
> Q. Now, I guess I didn't quite understand. Does that mean you see necrosis on that film or that there is not?
>
> A. I do not see necrosis on this film.
>
> (Transcript, page 73)

It was the opinion of Dr. Hursh that on June 4, 1975 there was not a nonunion of the fracture.

Dr. Hursh testified that exhibit 7 shows that there is not an avascular necrosis starting and there is healing of the fracture at this point. If there was necrosis beginning at this time there would be indications that would raise suspicions. It was Dr. Hursh's opinion at the hearing that there was a union in 1974 and 1975. Exhibit 6, Dr. Hursh maintained, showed no change in claimant's condition between 1975 and 1976. Dr. Hursh stated there was no nonunion in 1976. Dr. Hursh felt that exhibit's 8 and 9 compared to exhibits 4 and 5 showed a changed condition. Regarding this change in condition she testified:

Q. I prefer to ask the question this way, and this relates directly to the doctor's testimony concerning the union of that bone or the nonunion of that bone. You have testified that there was a union of that bone in 1975 or 6, the last time your note shows. And that there is a nonunion of that bone in 1982. Now, I believe that's what you have testified to, isn't it?

A. I don't think I used those words.

Q. All right. Use your words.

A. My words would be that there was a fracture in '74 which healed and was subsequently refractured some time before '82. Between '76 and '82 there was a refracture.

Q. Thank you. Evidenced by the nonunion shown in '82?

A. By the fracture shown in '82, yes.

Q. Now, I would like to ask you based on your experience, whether Mr. Mount's bone, as you see it healed in 1975, would be more easily damaged or refractured than if there had never been a fracture in the first place? Do you understand my question? I want to be sure you do.

A. Yes, I think the answer to that is yes.

(Tr., pp. 84-85)

On cross-examination Dr. Hursh described a tomogram as a planar-type of x-ray which delineates the internal structure of the bone. She stated that they have been available in Waterloo since she has been there. A tomogram would be indicated when there is a suspicion that the bone has not healed.

Dr. Hursh admitted that on June 4, 1975 she did not indicate to the claimant that he had or should have known that he had a fracture of his arm, a nonunion of his scaphoid. Dr. Hursh further admitted that she sent the x-rays of June 4, 1975 to C. J. Ludwig, M.D., a radiologist, and that Dr. Ludwig suggested to Deere a partial avascular necrosis. Dr. Hursh did not order a tomogram at this time. Dr. Hursh stated that a nonunion can interfere with the blood supply that results in the necrosis. In 1976 Dr. Hursh found irregularity of the cortex of the left navicular. She testified further:

Q. Doctor, if you had a person with a completely healed navicular or scaphoid, would you expect them to have continuing problems?

A. Yes.

Q. Just regularly?

A. Yes.

Q. And why is that?

A. Bones have a tendency to remodel after they are -- after they go through their initial healing period, they remodel. They realign their calcium and their fibers. They do that over a period of about three years. So if a patient has a limited range of motion, or a complaint of aching and difficulty with doing strong motions, I consider it a part of rehabilitation.

Q. For this three-year period?

A. Yes.

Q. How about for a ten-year period?

A. That's too long.

Q. So if a person has consistent problems over a ten-year period, it might indicate something else?

A. I would want them to be coming back for follow-up.

(Tr., pp. 100-101)

Joint exhibit 1 is the deposition of William P. Cooney, M.D., an orthopedic surgeon at the Mayo Clinic. Dr. Cooney first saw the claimant on September 2, 1982 at which time claimant exhibited symptoms of a person who had pain in his scaphoid bone. Dr. Cooney stated that the x-rays of 1974 suggested that claimant's fracture may be going to heal. However, Dr. Cooney believed that the x-rays of June 1975 indicated that the claimant still had a fracture and that the bones had slipped apart or otherwise had become displaced. He believed that in these x-rays of the scaphoid the fracture was difficult to see. Dr. Cooney believed that the x-rays taken at the Mayo Clinic demonstrated that the claimant continued to have a persistent nonunion or failure to unite the scaphoid bone with early signs of arthritis about the small bone of the wrist.

In July 1983 claimant's grip strength in his left hand measured approximately half as of his right. His left wrist motion is also one-half of normal. Dr. Cooney ascribed to the claimant a 25 percent permament partial impairment to the left upper extremity.

Dr. Cooney felt that the x-ray taken July 17, 1974 indicated a fracture. He also believed that the x-ray of June 1975 suggested an avascular necrosis. Regarding the x-rays taken on August 18, 1976 and June 4, 1975, Dr. Cooney testified: "On June 4th they said there is avascular necrosis and they don't mention a fracture. And in August of '76 they say there is a fracture and say it has not changed since June of '75. So someone changed their mind or read it differently." (Cooney Deposition, p. 17)

It was Dr. Cooney's opinion that the problem for which the claimant was being treated by him, the nonunion of the scaphoid, was related to the injury sustained in July of 1974. Dr. Cooney stated that his permanency rating is based upon two factors. One is the initial fracture of the bone. The most important factor was the failure of the bone to unite. This resulted in the mechanics of the wrist changing which has led to degenerative arthritis causing claimant's weak grip and limited motion.

On cross-examination Dr. Cooney stated that he was not aware that claimant had seen Dr. Walker or Dr. Jim Krause. Dr. Cooney also suspected that by August 18, 1976 the claimant would know he was still having problems with his wrist. Dr. Cooney explained that the scaphoid is part of the wrist not part of the forearm. His rating, Dr. Cooney explained, was for the upper extremity and if it was limited to the hand then it would be 28 to 30 percent of the hand. Dr. Cooney testified that no other part of the claimant's body was affected.

Exhibit 2 was explained above. Exhibit 3 is a compilation of various medical reports. A letter from Dr. Hursh to Dr. Charles Buck dated May 1, 1984 reads in part:

> The 1983 films certainly do show significant scaphoid changes, avascular necrosis with collapse in the proximal pole, and cystic changes in the distal pole.
>
> Left wrist films from the 1974, 1975, and 1976 show no collapse or radio density suggestive of avascular necrosis. I believe that the scaphoid non-union reported recently by Dr. W. P. Cooney, Mayo Clinic, was not evident until the subsequent films and tomograms became available.

A letter from Dr. Cooney dated May 29, 1983 contains in part:

> X-rays were reviewed dating back to July of 1974, June of 1975, and July of 1982. They all demonstrated a very small, almost inperceptable fracture of the left scaphoid. There was an x-ray in August of 1974 which suggested union, but those taken in June of 1975 showed the fracture fragment with slight displacement. In the interim period of time, x-rays demonstrate development of degenerative arthritis in the wrist with cystic changes within the carpal bones.
>
> It is our impression that the patient has a nonunion of the proximal pole of the left scaphoid with secondary mild degenerative changes and cystic changes within the scaphoid bone. We discussed with him the options of treatment which included removal of proximal pole of the scaphoid versus bone grafting procedures.

A letter dated August 18, 1983 by Dr. Cooney gives the claimant a 25 percent permanent partial impairment of his left upper extremity. Exhibits 4, 5, 6, 7, 8, 11, and 12 are x-rays and have been addressed above.

Exhibit 10 is a collection of medical reports by Dr. Walker. A letter to Deere's medical department dated September 6, 1974 stated:

> I feel this man would do well with a little physiotherapy. He seems to be fairly well healed now, but his wrist is weak. I am unable actually to see the fracture at this time and assume it is fairly well healed. He has been working setting up a computer. Maybe you could keep him on a lighter job for a while.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 30, 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 v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The defendant brings first to issue the question of nonunion of claimant's fracture prior to the June 1982 incident. The deputy found that a nonunion had in fact been present prior to 1982. This finding is consistent with the testimony of the claimant which indicated that he had experienced episodic pain over a period of time and the testimony of Dr. Cooney. Dr. Ludwig suggested that the x-rays taken on June 4, 1975 showed a partial avascular necrosis. Dr. Hursh stated that a nonunion can interfere with the blood supply and result in a necrosis. Dr. Cooney stated that although difficult to see, he did find a continuing nonunion in the x-rays of June 1975. Dr. Cooney opined that the claimant suffered from a persistent nonunion. The lay testimony of the claimant shows that he had intermittent trips to Deere medical for the pain. The deputy correctly found that the nonunion was present in 1974 and 1975. 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). This nonunion was a result of an injury arising out of and in the course of claimant's employment. The defendant is liable for any disability arising therefrom.

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

The deputy found the claimant to have suffered a permanent partial disability of 30 percent to the left hand. The medical evidence shows that the claimant has a significant loss of function of the left hand. The deputy's finding will not be disturbed on appeal.

The defendant next brings issue regarding equitable estoppel. A claimant may 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).

The record is replete with testimony to the effect that the scaphoid was difficult to see and in particular the nonunion of the fracture was difficult to notice. Although Dr. Ludwig reported to Dr. Hursh of the possibility of partial avascular necrosis, sound medical judgments may differ. Even though the factfinder does not accept Dr. Hursh's reading of the x-rays this does not mean that the defendant falsely represented a position to the claimant. The trier may accept or reject medical testimony in whole or in part. Where there is a meritorious issue as to medical causation and diagnosis the proof required to establish fraudulent representation may be difficult to ascertain and ~~prove~~ will be high. The proof adduced from this record is deficient to justify application of such a doctrine.

In July 1983 claimant's grip strength in his left hand measured approximately half as of his right. His left wrist motion is also one-half of normal. Dr. Cooney ascribed to the claimant a 25 percent permament partial impairment to the left upper extremity.

Dr. Cooney felt that the x-ray taken July 17, 1974 indicated a fracture. He also believed that the x-ray of June 1975 suggested an avascular necrosis. Regarding the x-rays taken on August 18, 1976 and June 4, 1975, Dr. Cooney testified: "On June 4th they said there is avascular necrosis and they don't mention a fracture. And in August of '76 they say there is a fracture and say it has not changed since June of '75. So someone changed their mind or read it differently." (Cooney Deposition, p. 17)

It was Dr. Cooney's opinion that the problem for which the claimant was being treated by him, the nonunion of the scaphoid, was related to the injury sustained in July of 1974. Dr. Cooney stated that his permanency rating is based upon two factors. One is the initial fracture of the bone. The most important factor was the failure of the bone to unite. This resulted in the mechanics of the wrist changing which has led to degenerative arthritis causing claimant's weak grip and limited motion.

On cross-examination Dr. Cooney stated that he was not aware that claimant had seen Dr. Walker or Dr. Jim Krause. Dr. Cooney also suspected that by August 18, 1976 the claimant would know he was still having problems with his wrist. Dr. Cooney explained that the scaphoid is part of the wrist not part of the forearm. His rating, Dr. Cooney explained, was for the upper extremity and if it was limited to the hand then it would be 28 to 30 percent of the hand. Dr. Cooney testified that no other part of the claimant's body was affected.

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> X-rays were reviewed dating back to July of 1974, June of 1975, and July of 1982. They all demonstrated a very small, almost inperceptable fracture of the left scaphoid. There was an x-ray in August of 1974 which suggested union, but those taken in June of 1975 showed the fracture fragment with slight displacement. In the interim period of time, x-rays demonstrate development of degenerative arthritis in the wrist with cystic changes within the carpal bones.
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A letter dated August 18, 1983 by Dr. Cooney gives the claimant a 25 percent permanent partial impairment of his left upper extremity. Exhibits 4, 5, 6, 7, 8, 11, and 12 are x-rays and have been addressed above.

Exhibit 10 is a collection of medical reports by Dr. Walker. A letter to Deere's medical department dated September 6, 1974 stated:

> I feel this man would do well with a little physiotherapy. He seems to be fairly well healed now, but his wrist is weak. I am unable actually to see the fracture at this time and assume it is fairly well healed. He has been working setting up a computer. Maybe you could keep him on a lighter job for a while.

10. Claimant did not realize the probable compensable nature of his 1974 injury until June 8, 1982 when he was told that his fracture of 1974 had never healed.

11. Claimant is a high school graduate and former navy corpsman.

12. Claimant's failure to discover the nature, seriousness and probable compensable character of his injury prior to 1982 was reasonable for a person of his intelligence and training who relied on the advice of his physicians.

13. Claimant underwent a bone graft to reunite his fracture.

14. Claimant continues to have significantly reduced grip strength and range of motion in his left wrist.

15. Claimant's injury is to the hand and results in a 30 percent permanent partial impairment of the hand.

16. Claimant's disabling impairment is causally related to his injury.

17. Claimant incurred medical mileage expenses of 3,240 miles at 24 cents per mile as a result of his injury.

18. Claimant incurred other medical expenses of $10.50; $62.00; $25.00; and $33.00.

19. Claimant was off work from June 8, 1982 to July 16, 1982 and from September 28, 1982 to December 13, 1982 as a result of his injury.

20. Claimant received work indemnity benefits as if his injury were noncompensable for all but the first ten days of this time.

CONCLUSIONS OF LAW

Claimant has established his July 1974 injury arose out of and in the course of his employment.

Claimant has established that his current disability is causally related to his July 1974 injury.

Claimant is entitled to permanent partial disability from his injury of 30 percent of the left hand.

Claimant is entitled to healing period benefits from June 8, 1982 to July 16, 1982 and from September 28, 1982 to December 13, 1982. Defendant is entitled to a credit under section 85.38(2) for weekly indemnity benefits paid claimant during such time.

Claimant is entitled to payment of medical mileage expenses of 3,240 miles.

Claimant is entitled to payment of medical expenses in the amount of $130.50 as specifically delineated in the order below.

THEREFORE, the deputy is affirmed in part and reversed in part.

ORDER

That defendant pay claimant permanent partial disability benefits for fifty-two and one-half (52 1/2) weeks at the rate of eighty-four dollars ($84.00) with those payments to commence December 13, 1982.

That defendant pay claimant healing period benefits of ninety-one dollars ($91.00) from June 8, 1982 to July 16, 1982 and from September 28, 1982 to December 13, 1982.

That defendant pay accrued amounts in a lump sum.

That defendant pay claimant mileage expenses totaling three thousand, two hundred forty (3,240) miles at the rate of twenty-four cents ($.24) per mile.

That defendant pay claimant the following medical expenses:

Orthopaedic Specialists	$62.00
Mayo Clinic	10.50
Jesup Clinic	58.00

That defendant pay interest pursuant to section 85.30.

That defendant pay the cost of this proceeding pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 30 day of August, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GLEN E. MULNIX,	:	
Claimant,	:	
vs.	:	
LOUIS RICH COMPANY,	:	File Nos. 726746/771099
Employer,	:	A P P E A L
and	:	D E C I S I O N
CONTINENTAL INSURANCE COMPANIES,	:	
Insurance Carrier, Defendants.	:	

FILED
SEP 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal an order refusing to set aside default judgment.

ISSUES

The issues on appeal as stated by defendants:

I. Service of the original notice and petition in this matter was not proper because the defendant-insurance carrier was not served as required by I.R.C.P. 49 and by section 17A.12, Code of Iowa.

II. Claimant did not resist the motion to set aside the default and the deputy industrial commissioner's ruling denying the motion, therefore, constituted abuse of discretion and should be reversed.

III. Ronald Erwin, vice president of the defendant-employer, stated in his affidavit that he has no personal recollection of being served with the original notice and petition, calling into question the validity of the return of service. Claimant presented no evidence in resistance to the motion to set aside the default to show that Mr. Erwin was served, so claimant, in effect, admitted Mr. Erwin was not served and the deputy industrial commissioner's determination that Mr. Erwin was served thus constituted an abuse of discretion.

IV. Assuming Ronald Erwin was served with the original notice and petition, the suit papers were lost in the corporate channels through either mistake, inadvertence, surprise, excusable neglect or unavoidable casualty, any of which constitutes a basis for setting aside the default.

V. Neither the defendant-employer nor the defendant-insurance carrier were served with the motion for default as required by I.R.C.P. 82, as applied pursuant to Industrial Commissioner Rule 500-4.35.

ANALYSIS

I

The first issue regarding service of the insurance carrier is inconsistent with the affidavit of Marty Jakosa which states: "That whenever workers' compensation petitions are served on anyone in the company, the company policy is that those papers are to be forwarded to the personnel deparment [sic], which will then process the papers and forward them to our insurance carrier for proper disposition." Section 87.10 of the Iowa Code, provides:

Every policy issued by an insurance corporation, association, or organization to insure the payment of compensation shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer, and the insurer shall be bound by every agreement, adjudication, award or judgment rendered against the insured.

Industrial Commissioner Rule 500-4.10 states: "Whenever any insurance carrier shall issue a policy with a clause in substance providing that jurisdiction of the employer is jurisdiction of the insurance carrier, the insurance carrier shall be deemed a party in any action against the insured."

II

In response to defendants' second issue, the claimant cannot be construed to not have resisted in that claimant can stand upon his previous pleadings in advancement of his motion of default. The affidavits serve to refute or excuse facts presented by claimant in his pleadings.

III

Defendants state in their third issue; "...claimant presented no evidence in resistance to the motion to set aside the default to show that Mr. Erwin was served, so claimant, in effect, admitted Mr. Erwin was not served...." The sherrif's deputy's return of service stating that Mr. Erwin had been served was, early on, a part of the record. That is the claimant's best evidence to support his contention that defendants, through Mr. Erwin, was served. The claimant cannot, under these facts, be construed to have admitted Mr. Erwin was served.

IV

Defendants correctly cite the Iowa law on this subject. However, they have not shown that their failure to defend was not due to their negligence, want of ordinary care or attention, or to their carelessness or inattention. Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977).

V

The deputy correctly analyzed this issue when he wrote:

> Rule of Civil Procedure 231 provides that a default must be entered on demand. In the courts, an order is necessary only if the defendant is under a legal disability or a prisoner. Those conditions are not pertinent in this case. There is no requirement that the party in actual default [although not yet entered] be given prior notice of the demand for default. This claim is not for a sum certain and it cannot, by computation, be made certain. In accordance with Iowa Rule of Civil Procedure 232(b) a hearing must be held to determine claimant's entitlement. Defendants are entitled to participate in that hearing.

THEREFORE, it is ordered that defendants motion is overruled and the deputy is affirmed.

Signed and filed this 30 day of September, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY NADERMANN,	:	
Claimant,	:	File No. 741799
vs.	:	APPEAL
FDL FOODS, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	

FILED
AUG 15 1985
IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 26, 1985 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.

Defendant appeals from an arbitration decision filed March 29, 1985 in which it was ordered to pay healing period benefits and 100 weeks of permanent partial disability benefits.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 11 minus the conclusion portion of claimant's exhibit 5 and defendant's exhibits 1 through 5. All evidence was considered in reaching this final agency decision.

The decision herein will reverse that of the hearing deputy.

The briefs submitted by the parties were thorough and of assistance in resolving this matter on appeal.

ISSUES

The issues on appeal as stated by defendant are:

I. The deputy commissioner abused his discretion in finding that claimant sustained an injury arising out of and in the course of employment.

II. The deputy commissioner abused his discretion in finding permanent partial disability of 20 percent of the body as a whole because said finding was not supported by the weight of the evidence.

REVIEW OF THE EVIDENCE

Thirty-eight year old claimant, a high school graduate who served with the air force and received special training in communications and who thereafter received a bachelor of arts degree in psychology, recalled beginning work for a packing company in August of 1970 and continuing that work until the plant closed. He also has work experience as a press operator and rural mail carrier. He was unemployed after the plant's closing until he went to work for defendant employer in February of 1983 in the smoked meats department.

Claimant described the circumstances surrounding his injury as follows: He had been switched to wash and hang. He was pulling trees on the rail and sending them by escalator to the smokehouse. On June 3, 1983 he got sensations and little shocks of pain in his left arm from his shoulder to his elbow. His hand was numb. Around four o'clock he had a conversation with Darlene Linden, a company nurse, to whom he voiced his complaints and who suggested that he see his family doctor. Later in the evening he spoke with her again and told her that he thought his problem was work-related and requested something for pain.

He did the same work the following day and he noticed his condition was becoming more pronounced and constant. He went to the first aid station and asked to see the doctor. He was told to return the next day. Later in that day he was terminatd after alchohol was found in his work locker.

After his termination he saw Scott McCuskey, M.D., who examined him, ordered a cervical collar, prescribed pain medication and referred him to Eugene Herzberger, M.D. He had a CT scan and a myelogram followed by a cervical fusion and repair of a double hernia. His last visit with Dr. Herzberger was November 16, 1983.

Although claimant has looked for work he has been unable to find a job. He was denied unemployment. Applications filed with employers since his termination list as his reason for leaving defendant "medical surgery problem" and "medical."

As to his present complaints, claimant listed cramps and stiffness in his neck, numbness in his hands, headaches with overexertion, loss of grip strength on the left and cramping in his shoulder.

Claimant compared his evaluation by Dr. Fischer with that of Dr. Herzberger. He claimed that Dr. Herzberger saw him for five minutes, talked with him and gave him advice. Dr. Fischer spent about a half hour with him and took measurements.

Claimant said that he had various work and nonwork injuries including an injury below his chin in 1976, to his shoulder in June of 1977 with some cervical traction, at the base of his neck in 1979 and a fall in October of 1981 which hurt his neck. He stated that no claim for compensation was filed for the 1977 injury. From September through October of 1979 he complained of headaches and tightness in his neck and back. In September of 1981 he complained of soreness and hot muscles in his mid neck and left shoulder region.

Darlene Linden, R.N., testified that she reported for work on June 3, 1983 at approximately six o'clock and did not speak with claimant earlier. She did talk with him on the phone at which time he was complaining about pain in the base of his neck which radiated down his left arm and which began three days before.

Diana Thomas, personnel director for defendant employer, testified to making notes during a meeting at which claimant was suspended.

Melvin Kiebel, manager of the payroll who handles workers' compensation, expressed the opinion that had claimant not been terminated for possession of alchohol he would have been able to continue working for the company.

Claimant's medical history questionnaire completed at the time he sought employment with FDL Foods indicates that he had a workers' compensation claim in 1977, that he had arthritis in his back and that the back injury he sustained resulted in water behind the shoulder muscles.

First aid records from claimant's former employer showed a pulled muscle in the left shoulder and soreness in the right cervical area in 1972; soreness in the neck in 1974; a swollen area on his left neck which apparently was a boil in 1976; left shoulder pain with cervical traction and diathermy and later physical therapy in 1977; soreness in his right shoulder and back in 1978; left temporal area, shoulder and back pain with neck spasms in 1979; weakness and soreness in the left elbow in 1980 and upper back pain and neck and left shoulder pain in 1981.

A Dr. Cairns saw claimant on May 11, 1978 for complaints of neck pain which came on the year before after he fell and struck his head and neck against a pallet and was rendered unconscious. Claimant's pain was in the left trapezius and parascapular area with some pain down the left arm. He had an occipital headache and tingling and numbness in the palm of his hand. Neck motion was excellent. X-rays showed no abnormalities in the cervical spine, but some degenerative changes in the thoracic spine. Claimant was treated with light cervical traction.

On October 3, 1981 claimant was seen in the emergency room complaining of neck and shoulder pain since September 28, 1981. He spoke of increased severity of pain and of weakness and tingling in his left arm. His condition was diagnosed as a musculoskeletal strain.

A neurological, orthopedic and physical examination performed by a doctor Gerald M. Besler on October 7, 1981 lists claimant's cervical ranges of motion as twenty-eight degrees flexion, twenty-five degrees extension, twenty degrees right-sided bending and fifteen degrees left-sided bending. Note was made that claimant has always been troubled by his grip. Claimant was taking Indocin. His condition was diagnosed as an acute cervical sprain-strain complex which was complicated by a left brachial neuralgia. Claimant subsequently observed that his headaches were better. He complained of soreness in his shoulder blades. On November 10, 1981 claimant complained of soreness in his neck after a little boy jumped on it. In December of the same year a car door was pushed shut on his upper back and he was knocked to the ground.

He was diagnosed as having an acute myofascitis of the mid-thoracic spine. In February of 1982 he reported soreness in his upper thoracic area. He continued treatment with Dr. Besler until late March of 1982.

After claimant began work for defendant employer in 1983 he first complained of a sore back in March. At 6:30 p.m. on June 3, 1983 claimant called the first aid department to complain of severe neck pain radiating down the left arm with no specific injury. He reported the pain beginning three days before.

Claimant was seen by a Dr. Scott McCuskey on June 7, 1983 with a complaint of numbness in his left hand which came on the Thursday before. He denied a history of trauma to his neck. Claimant had dullness to pinprick in what appeared to be a C7 distribution and loss of grip strength. Range of motion in the neck was decreased. Cervical x-rays showed a sharp spur at C6-7 on the left.

Eugene E. Herzberger, M.D., saw claimant on June 8, 1983. He was told of an injury in 1977 which resulted in pain in claimant's left shoulder and arm. Claimant reported his symptoms lessening with only occasional pain or numbness in the left upper extremity. All motions of the cervical spine were limited and there was weakness in grip on the left and reduction in the triceps reflex. Dr. Herzberger noted that:

> The narrowing seen on the cervical spine films at C6-7 had not occurred in the past 10 days. It has been present for years and in the absence of any other history of injury to the cervical spine, one must assume that it has been caused by the injury of 1977. It appears that due to this unaccustomed heavy activity in the last 10 days the patient has sustained a herniation of the very same disc on the left side.

Conservative treatment was tried at first. Then claimant was admitted to the hospital on July 26, 1983 for a myelogram which showed a left-sided herniated nucleus pulposus at C6-7 and an annular bulge at C5-6. On August 11, 1983 claimant had an anterior discectomy and arthrodesis at C5-6 and C6-7.

On December 13, 1984 Dr. Herzberger provided claimant with a disability rating of five percent of the body as a whole and indicated that claimant could even do "heavier work." However, he continued that because of claimant's light build, heavy work might not be a good idea due to increased chance of injury.

Barry Lake Fischer, M.D., saw claimant on March 28, 1984 and took a history of the development of left-sided cervical and arm pain with numbness and weakness in the left hand. He told of conservative treatments to the left shoulder and after an injury in 1977. Claimant's complaints at the time of the examination were pain, soreness and stiffness in his neck and left shoulder, difficulty turning his neck, and numbness in the fingers of his left hand.

On examination there was tenderness to palpation bilaterally over the cervical, rhomboid and trapezius areas. Cervical ranges of motion were flexion twenty-five degrees, extension ten degrees, lateral rotation fifty degrees in each direction and later bending twenty degrees bilaterally. There was a decrease in abduction of the left shoulder. Atrophy occurred in the muscles of the left upper arm. There was some sensory loss in a C7 distribution.

Dr. Fischer stated that the strain to claimant's cervical, rhomboid and trapezius areas was superimposed on a prior injury which necessitated surgical intervention.

APPLICABLE LAW AND ANALYSIS

The first issue raised by defendant is that the deputy commissioner abused his discretion in finding that claimant had a work-related injury.

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

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 hearing deputy specifically found that "claimant was a good worker and a credible witness." That is a significant finding in that the hearing deputy saw the witness and observed his demeanor. See Peak v. Pepsi-Cola, I Iowa Industrial Commissioner Report 230 (Appeal Decision 1980). However, the written record casts doubt on that finding. See Jackson v. R & R Welding Supply Co., I-1 Industrial Commissioner Decision 108 (Appeal Decision (1984).

Defendant argues that claimant has failed to sustain his burden on the threshhold issue of arising out of and in the course of employment because of inconsistencies in claimant's testimony and his lack of candor in giving his medical history. The inconsistencies will be considered first.

While preciseness in testimony would make the work of those trying and deciding cases much easier, precision is rarely found in real cases. Linden recorded claimant's telling her that he developed pain at the base of his neck and into his left arm three days before June 3. Defendant argues that would be May 31. Dr. McCluskey was told the pain began about June 2. The difference in the dates is not so wide as to destroy claimant's case. Pinpointing a specific date of injury is often difficult in cases of cumulative trauma.

More troubling is the divergence between claimant's testimony and that of Nurse Linden. Claimant said he talked to the nurse twice on June 3. The first conversation is the one which results in the controversy. Claimant reported speaking with Linden personally at some where around four o'clock. Linden denied being in the plant at that time. No documentary evidence was offered to show the time of Linden's arrival. No notation was made in the first aid records of claimant's being seen. The phone call at 6:30 is recorded.

Conflict also exists surrounding claimant's termination. Claimant indicated in subsequent applications for employment that he left defendant because of a "medical surgery problem" and because of "medical" reasons. Notes relating to the meeting at the time of termination indicate that claimant was terminated because of alcohol in his locker. He first said he brought alcohol to the plant because he had no car and he was going on a fishing trip. He said at the time of his deposition that he was using the alcohol to ease his shoulder pain. As claimant indicated, the liquor had been in his locker for a week or two. Presumably if it was for shoulder pain, he had been having pain for some time.

Claimant denied at the time of his deposition any injury to his neck other than that in June of 1977. Claimant's medical history herein was extensive. Although the history was dominated by a serious incident in 1977 to claimant's neck and shoulder which resulted in treatment with cervical traction in both 1977 and 1978, claimant had cervical complaints in 1972, 1974, 1979 and 1981. In his testimony at hearing he denied filing a workers' compensation claim. His application for employment at FDL Foods reflects a claim being made.

Claimant was treated on a number of occasions beginning in October of 1981 for an acute cervical sprain-strain complex which was complicated by left brachial neuralgia. Claimant gave two histories of incidents in October. On September 29, 1981 he reported to first aid with soreness and a hot muscle in his mid-neck and left shoulder after he was pushing a beef with his head. On October 3, 1981 claimant was seen at the emergency room where he gave a history of "injured neck on Monday -- was pushing beef, had sharp twinge neck, later that night was stiff in neck...↑ severity. Thinks L arm may be weaker slt tingling down L arm." On October 7, 1981 he reported neck and back problems after he fell at home on October 5, 1981. At hearing claimant referred to his trouble as producing a "knee problem or something." Medical documentation makes no reference to the knee.

The second thrust of defendant's argument is claimant's lack of candor in providing his medical history. Medical history is of extreme importance in workers' compensation matters.

Questions of causal connection are essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The testimony of the medical expert may be rejected when the opinion is based upon an incomplete and inaccurate history. Musselman, 261 Iowa 352, 154 N.W.2d 128. The weight to be given to expert opinion is for the finder of fact. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

When claimant gave his history to Dr. McCuskey on June 7, 1983 he denied any previous trauma to his neck. Claimant told Dr. Herzberger that he had changed to a new job about ten days before his June 8 visit. Dr. Herzberger was told of the 1977 injury and subsequent treatment by Dr. Cairns. He seemingly did not know of the treatment in October of 1981. Dr. Fischer took a history of the 1977 injury. He determined that claimant's injury necessitated surgical intervention.

None of claimant's physicians knew of his injuries in October 1981 or of his extensive treatment which continued well into 1982. Dr. Herzberger's statement regarding causation is not very understandable. He wrote:

> It is quite clear that the narrowing seen on the cervical spine films at C6 7 has not occurred in the past 10 days. It has been present for years and in the absence of any other history of injury to the cervical spine, one must assume it has been caused by the injury of 1977. It appears that due to this unaccustomed heavy activity in the last 10 days the patient has sustained a herniation of the very same disc on the left side.

Dr. Fischer on the basis of his one time examination makes a causal connection. It is interesting to note that claimant's ranges of cervical motion at the time of Dr. Fischer's examinations are almost the same as those recorded by Dr. Besler in 1981. The dynamometer reading on claimant's left side taken by Dr. Herzberger is the same as well. The argument presented in claimant's brief on this issue ignores the 1981 injury or injuries.

Defendant is correct. There are too many gaps in the record to allow claimant to preponderate. The hearing deputy's finding regarding claimant's credibility is not supported. It is not necessary for claimant's story and the doctors' histories to be perfect to allow him to prevail, but it does need to be less flawed than claimant's herein. Defendant's analysis makes a good point:

> Because there is no incident of injury or witnesses to corroborate Claimant's version of his injury and because all of the medical evidence in the case relies upon the history given by Claimant to his examining and/or treating physicians, the issue whether his injury arose out and in the course of his employment rest solely on Claimant's version of the facts. The evidence in this case, however, very clearly indicates that claimant is not a credible witness and that there exists substantial doubt as to the events relating to his alleged injury.

Claimant has failed to carry his burden of establishing an injury arising out of and in the course of his employment.

In light of the above conclusion, it is unnecessary to discuss the second issue presented by defendant or defendant's motion to strike a portion of claimant's brief.

FINDINGS OF FACT

That claimant is thirty-eight years of age.

That claimant served with the air force and received special training in communications.

That claimant is a high school and college graduate with a degree in psychology.

That claimant has had significant work experience in packing plants as well as experience as a press operator and rural mail carrier.

That claimant worked for a meat packing company until October of 1981 and then was unemployed until February of 1983.

That claimant had cervical complaints in 1972, 1974, 1979 and 1981.

That in 1977 claimant had an injury to his neck and left shoulder which resulted in treatment with diathermy and traction in both 1977 and 1978.

That claimant had no abnormalities in his cervical spine in May of 1978.

That claimant had incidents in October of 1981 which resulted in his receiving medical treatment until March of 1982.

That claimant worked for a meat packing company until October of 1981 and then was unemployed until February of 1983.

That in August of 1983 claimant had surgery on his neck.

CONCLUSIONS OF LAW

That claimant has failed to establish by a preponderance of the evidence an injury arising out of and in the course of his employment on June 3, 1983.

ORDER

That claimant take nothing from these proceedings.

That each party pay costs of producing its own evidence.

Signed and filed this 15 day of August, 1985.

Judith Ann Higgs

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GERALD F. PORTER,	:	
Claimant,	:	
vs.	:	File Nos. 741973 750408
CROUSE CARTAGE COMPANY,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
LIBERTY MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

FILED
SEP 23 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This decision concerns two arbitration proceedings brought by Gerald F. Porter, claimant, against Crouse Cartage Company, employer, and Liberty Mutual Insurance Company, insurance carrier. Claimant alleges that he injured his back on June 14, 1983 and on July 14, 1983. The case was heard at Fort Dodge, Iowa on May 21, 1985 and was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of Gerald Porter, Grace Porter, George Savery, and Arnold Smith. The exhibits which were received into evidence are claimant's exhibits 1 through 15, 18, 20 through 25, and 34, and defendants' exhibits A, B, and C.

ISSUES

The issues presented by the parties at the time of hearing with regard to both cases are whether claimant sustained an injury which arose out of and in the course of employment; whether a causal relationship exists between the alleged injury and any disability; determination of the nature and extent of any disability which claimant has experienced and his entitlement to benefits therefore; and determination of claimant's entitlement to benefits under section 85.27, including travel expenses and determination of the costs of the proceeding. It was stipulated by the parties that claimant's medical expenses were fair and reasonable, with the exception of any expenses from John R. Walker, M.D., and that claimant's rate of compensation for an injury of June 14, 1983 would be $305.08, and that for an injury of July 14, 1983 it would be $310.54.

SUMMARY OF EVIDENCE

Gerald Porter testified that he is 57 years of age, married, and has a foster child who lives in his home for which he receives approximately $300 per month from a public agency. Claimant stated that he dropped out of school in the eighth grade and has no further formal education. He has worked for Crouse Cartage Company since July 13, 1956 and his present duties include loading and unloading trucks. He has held that position for four or five years and had previously been employed as a truck driver for Crouse Cartage Company and other trucking companies.

Claimant testified that his present position requires lifting of as much as 200 pounds, but that equipment is available which limits the amount of lifting.

Claimant testified that on June 14, 1983 he was trying to get a roll of carpet down from on top of some freight when his back went out. He stated that he kept working while taking it easy and then sought care from John D. Calisesi, D.C. Claimant testified that the treatment made him feel better. He was scheduled for vacation starting June 20 and took off work the rest of the time until the vacation started. Claimant testified that the vacation was a trip to Hawaii which had been planned to last for three and one-half to four weeks, but he returned early and went back to work on July 11, 1983. Claimant stated that while on vacation he was resting and his back did not bother him very much.

Claimant testified that on July 14, 1983 he was lifting a heavy carton onto a two wheeler when his back went out again. He stated that he experienced pain in his back and down his left leg into the upper part of his calf. He stated that he had never previously experienced pain in his lower leg. He sought care from Charles Dago, M.D., who placed him on bed rest. Dr. Dago arranged a CT scan and then referred claimant to Thomas R. Lehmann, M.D., who performed surgery on October 11, 1983.

Claimant testified that Dr. Lehmann released him to return to work on March 12, 1984 and that he has been working steadily since that date except for the period of three or four weeks when he was off work due to an injury sustained in falling off a flatbed trailer.

Claimant testified that he now wears a back brace as recommended by Dr. Lehmann. He stated that lifting bothers his lower back and that he is sore at the end of the day. He stated that he feels fine if he does nothing and that his condition seems to be stable.

Claimant testified that he has had a history of back problems since 1965. He has used a back brace for approximately twelve years but stated that prior to 1983 there were some years when he was getting along quite well and did not wear the brace. He stated that he may have been wearing the brace on June 14, 1983 but was uncertain.

Claimant testified that he has experienced little change in his lifestyle and that he intends to try to keep working. He stated that since the surgery was performed he has experienced no pain in his lower leg. He takes medication for a nerve inflammation.

Claimant testified that he is now doing the same work at the same pay as he did prior to June 1983.

Grace Porter testified that she is claimant's spouse. She stated that when he returned from work on June 14, 1983 he made complaint concerning his back, was bent over, could hardly move, and was obviously in misery. She stated that on July 14, 1983 he was in worse pain. She stated that at that time he complained of pain in his leg and had never previously complained of pain radiating into his leg.

Mrs. Porter testified that since the injury, claimant has ceased doing carpenter and plumbing work about their home, that he is slow in getting out of a chair, and has lost the ability to turn over while in bed.

George Savery testified that he has been the Crouse Cartage Company Fort Dodge terminal manager since 1961 and has daily contact with claimant. Savery confirmed that since claimant's return to work in March 1984, he has been at the same job. He stated that claimant is an excellent employee and that he knew of no reason why claimant could not continue to work in his current position.

Savery testified that he first learned of claimant's back problems prior to 1983 and that claimant wore a corset at one time. Savery recalled June 14, 1983 as a time when claimant reported to him that his back was bothering and that he wanted to go to the doctor. He stated that claimant called in, took some days off, and was paid sick leave. Savery testified that the Teamsters Union has its own health and welfare fund and that he did not know if a claim had been processed for benefits under the Teamsters fund.

Savery testified that he first learned of the allegation of a July 14, 1983 injury from Arnold Smith.

Arnold Smith testified that he is the assistant terminal manager and that in the summer of 1983, claimant had requested to go on workers' compensation. Smith stated that he observes claimant at work on a daily basis and that claimant now performs his duties in the same way as he did prior to 1983.

Claimant's exhibit 1 is a three ring binder which contains exhibits 2 through 14. In exhibit 3, Dr. Lehmann expresses his opinion that claimant's condition, for which surgery was performed, was causally related to a work injury which had occurred approximately seven weeks prior to August 29, 1983. Dr. Lehmann characterized the injury as an aggravation of a preexisting condition and estimated that a ten percent permanent partial impairment would result.

Claimant's exhibit 5 is a report from Dr. Lehmann dated November 14, 1983 wherein he indicates that claimant has a good prognosis of a good recovery and that, at the time of the report, claimant was temporarily totally disabled.

Claimant's exhibit 6 is an EMG report which indicates a left L5 radiculopathy. Exhibit 7 is a radiologic consultation report which indicates L4-L5 disc herniation. Exhibit 8 is claimant's discharge summary which indicates that claimant had undergone a lumbar 4-5 discectomy and removal of an osteophyte from the first sacral body. Exhibit 9 is the operative report of the surgery.

Part of claimant's exhibit 11 contains a CT scan report from Trinity Regional Hospital dated August 18, 1983 which indicated that the L5-S1 neural foramen for the L5 nerve root on the left was compromised by an osteophyte and that claimant had a degenerated disc at the level of L5-S1.

Exhibit 12 is records showing claimant's hospitilization for back problems in 1965. Claimant's exhibit 14 contains a report from Dr. Calisesi which indicated that in his opinion, claimant's lifting of freight at Crouse Cartage Company caused the back injury for which he treated claimant on June 14, 1983.

Claimant's exhibit 15 is the deposition of Dr. Lehmann taken October 23, 1984. In the deposition, Dr. Lehmann generally confirms his report of December 14, 1983 which appears in the record as claimant's exhibit 3, particularly that claimant was injured through lifting at work approximately seven weeks prior to August 29, 1983 and that the injury was in the nature of an aggravation of a preexisting condition. Dr. Lehmann clarified his impairment rating by stating that claimant did have a preexisting impairment of some undetermined degree and that the 1983 injury increased that impairment by ten percent of the body as a whole. Dr. Lehmann indicated that claimant was released to return to work on March 12, 1984 without any formal restrictions but with advice that he should be cautious about how he used his back and to trust his own judgment in activities such as lifting. Dr. Lehmann was aware of the general nature of claimant's work and felt that claimant could perform that type of work without injuring himself further, but that claimant's discomfort would be related to his activity level.

Claimant's exhibit 18 is the deposition of Dr. Calisesi taken November 21, 1984. On page 24 of the deposition, Dr. Calisesi stated that in his opinion, the injury which claimant suffered in 1983 involved an injury to a disc and that it was more serious than the injury for which he had treated claimant in 1982.

Claimant's exhibit 20 is a partial statement of his medical bills and expenses, exclusive of those shown in exhibit 24. Exhibit 21 is claimant's claim for costs. Exhibit 22 is claimant's statement of the time he missed work due to his back condition. Exhibit 23 is claimant's mileage exhibit. Exhibit 24 consists of the actual bills for claimant's medical care as summarized in exhibit 20. Exhibit 34 is a health claim report made against the Teamsters Union Central States Health and Welfare Fund by claimant.

Defendants' exhibit A is a collection of medical records and reports concerning claimant, a collection of medical bills, and other documents related to claimant's health history.

APPLICABLE LAW AND ANALYSIS

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 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 appeared and testified at hearing. Savery and Smith characterized him as a good worker. He is a long-term employee of Crouse Cartage Company. Claimant's appearance and demeanor were observed and he is found to be a credible witness on his own behalf. Claimant's description of the events of June 14, 1983 and July 14, 1983 is found to be accurate. Accordingly, claimant has proven by a preponderance of the evidence that he did receive an injury on each date alleged.

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. Lehmann characterized claimant's injury as an aggravation of a preexisting condition which increased claimant's physical impairment by ten percent. His testimony stands uncontroverted and is adopted as correct. It is further corroborated by the testimony of Dr. Calisesi which characterized claimant's 1983 injury as more serious than the 1982 injury and as being more indicative of an injury to a disc than the 1982 injury.

From the evidence, it appears that claimant was experiencing an ongoing process of injury with major occurrences on June 14, 1983 and July 14, 1983. From the record made, there is no obvious means of determining whether or how much of the additional impairment found by Dr. Lehmann arose from either of the two injuries. In view of the fact that this was a continuing injury process, it is found that the injury of June 14, 1983 produced temporary total disability.

Claimant was injured on June 14, 1983. He did not return to work thereafter until July 11, 1983. Part of this time was a vacation which had been previously scheduled. As shown on exhibit 14, Dr. Calisesi recommended that claimant take it easy. He was aware that claimant was going on vacation and directed that he return if his pain had not improved. Although the evidence is not extremely clear, it appears that Dr. Calisesi intended that claimant should remain off work until the end of his vacation. Such is sufficient to warrant an award of temporary total disability, running from the date of injury until claimant returned to work. The record contains no indication that claimant was medically capable of returning to his employment prior to the time of July 11, 1983. This computes to a total of three and six-sevenths weeks.

Claimant did return to work after his vacation, worked three days, and was then injured again on the fourth day. According to claimant, the pain running into his lower leg was a new occurrence. Based upon his credibility, such is found to be the injury of most significant consequence and the last significant part of the injury producing process. Accordingly, claimant's surgery, the extended absence from work, and the permanent impairment is found to be related to the July 14, 1983 injury. It is recognized that claimant made complaints regarding his left leg to Dr. Calisesi in June, but the record does not show those complaints to have extended into his lower leg.

Dr. Calisesi relates the injury of June 14, 1983 to the condition for which he treated claimant. Dr. Lehmann relates the condition for which he treated claimant to a time approximately seven weeks prior to August 29, 1983. Such would result in a date in July, rather than a date in June, and supports the finding previously made which establishes the July injury as the most substantial factor for producing claimant's condition, medical care, and resulting 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 impairment 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).

Claimant has returned to work at his previous position and has not suffered any loss of earnings. It appears that his employer will permit him to continue in his current position. He is approaching normal retirement age. Dr. Lehmann indicates that claimant should be able to continue working in his present position. Claimant has had a disc removed. He has no experience in any occupation which does not involve substantial manual activity. His education is limited. He is at an age when reemployment under any circumstances would be difficult if his employment with Crouse Cartage Company were to terminate. Claimant's position does appear, however, to be relatively secure. When claimant's disability is evaluated industrially, it is found to be ten percent of total disability.

The reasonableness of the medical expenses which claimant seeks to have imposed upon the defendants has been stipulated. The care which was reflected by the records and reports in the record appears to have been reasonable and necessary for treatment of claimant's herniated disc. Defendants will therefore be held responsible for the medical expenses shown in exhibits 20, 24, and 25.

It appears that some of claimant's medical expenses may have been paid by the Teamsters health and welfare fund. The record does not, however, show such to have been a type of insurance for which the employer would be entitled to credit under section 85.38(2) of the Code since there is no showing in the record that the employer paid any part of the premium or that such would not have been payable in addition to any benefits which claimant could have received under the workers' compensation laws. Hebensperger v. Motorola Communications & Electronics, Inc., II Iowa Industrial Commissioner Report 187 (1981).

The possibility that claimant may not have actually paid the expenses from his own funds does not prohibit an award of expenses where there is no showing that the employer contributed to the cost of the Teamsters insurance coverage. Grings v. Great Plains Gas Co., 260 Iowa 1309, 1320, 152 N.W.2d 540, 546 (1967). Iowa Power & Light Co. v. The Board of Water Works Trustees of the City of Des Moines, 281 N.W.2d 827, 833 (Iowa Appellant 1979). Woodard v. City of Des Moines, 182 Iowa 1102, 165 N.W. 313 (1917). 4 Larson's Workmen's Compensation Law, §97.51(a).

Defendants may, of course, honor the lien in favor of the University of Iowa Hospitals and Clinics.

Based upon claimant's testimony and the affidavit contained within exhibit 23, the mileage which claimant incurred appears to be correctly computed in the total amount of $928.80. Travel time from Fort Dodge to Iowa City would be in the range of three and one-half to four hours. Under those circumstances, it would be reasonable for claimant to have travelled to Iowa City on the day before his medical appointments. Defendants will also be held responsible for the lodging expenses in the amount of $157.50, which amount is found to be quite reasonable.

Claimant's statement of costs, as shown in exhibit 21, shows amounts which are reasonable. There is no requirement that a medical report be received into evidence in order for it to be considered as part of the costs of the case. Therefore, the report from Dr. Walker, for which a charge of $60.00 was made, will be included in the costs which claimant may recover. The total recovery for costs is therefore $92.65.

Claimant's exhibit 22 sets forth the time he was absent from work. It has previously been determined that he is entitled to three and six-sevenths weeks of temporary total disability for the June injury. The remaining time of thirty and one-seventh weeks constitutes healing period for which claimant is entitled to compensation. Claimant's healing period is found to have ended, for purposes of commencement of compensation for permanent partial disability, on March 12, 1984 when he returned to work. Healing period can be interrupted by returns to work and, in this case, the dates of June 28 and 29, 1984 and January 15 and 16, 1985 are found to be additional healing period for which claimant is entitled to be compensated. Riesselman v. Carroll Health Center, III Iowa Industrial Commissioner Report 209 (1982).

Since claimant's disability has been found to be related to the July 14, 1983 injury, the rate of compensation is $310.54 per week as stipulated by the parties.

FINDINGS OF FACT

1. Claimant was injured while lifting on June 14, 1983.

2. Following the injury of June 14, 1983 claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of the injury from June 14, 1983 until July 11, 1983 when claimant returned to work.

3. The injury of June 14, 1983 produced no permanent disability.

4. Claimant was injured on July 14, 1983 while lifting at his employer's place of business.

5. Following the injury, claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from July 14, 1983 until March 12, 1984 except for the time from July 21 through August 5, 1983 when claimant did actually work.

6. Claimant also missed work in order to receive medical care on June 28 and 29, 1984 and on January 15 and 16, 1985.

7. Claimant is 57 years of age and married.

8. Claimant is a credible witness.

9. Following the injury of June 14, 1983 claimant received care from Dr. Calisesi for which he incurred expenses in the amount of $74.00.

10. Claimant received care for the injury of July 14, 1983 from Trinity Regional Hospital, University of Iowa Hospitals and Clinics, American Prosthetics, Walgreen Pharmacy, and Fort Dodge Medical Center for which charges were made as shown in exhibits 20 and 24.

11. All the medical care which claimant received for the two injuries was reasonable and necessary for the medical condition and the charges for such care were fair and reasonable in relation to the services rendered.

12. The injury of June 14, 1983 was an injury to claimant's lumbar disc at the L4-5 level, but was not shown to have produced permanent disability.

13. The injury of July 14, 1983 was a further injury to claimant's lumbar disc and produced a permanent disability of ten percent more than the level of disability which had preexisted.

14. Claimant has an eighth grade education.

15. Claimant's work experience is limited to manual labor. He has some training as a Linotype operator, but the training was obtained approximately twenty years ago and has not been refreshed.

16. Claimant appears to be of at least average intelligence, emotionally stable, and motivated to be gainfully employed.

17. In order to obtain medical care, claimant travelled a total of 3,870 miles. Claimant's medical care required that he remain away from home overnight for which he incurred lodging expenses in the amount of $157.50. Such expenses are found to be reasonable.

18. Claimant incurred costs in the prosecution of this action as shown in exhibit 21 in the total amount of $92.65.

19. Claimant is presently not under any formal activity restrictions but has been directed to exercise caution and good judgment in his activities. He has had the L4-5 lumbar disc surgically removed and has a good result from his surgery.

CONCLUSIONS OF LAW

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

The injuries which claimant sustained to his back on June 14, 1983 and July 14, 1983 were injuries in the nature of aggravations of a preexisting condition which arose out of and in the course of claimant's employment with Crouse Cartage Company.

As a result of the June 14, 1983 injury, claimant is entitled to compensation for temporary total disability from June 14, 1983 through July 10, 1983.

As a result of the injury of July 14, 1983 claimant is entitled to receive thirty and one-sevenths week of compensation for healing period with four days thereof payable commencing July 15, 1983, two days payable commencing June 28, 1984, two days payable commencing January 15, 1985, and the balance of twenty-nine weeks payable commencing August 5, 1983.

Claimant's disability, which is related to the July 14, 1983 injury, when evaluated industrially, is ten percent of total disability. He is entitled to receive fifty weeks of compensation payable commencing March 12, 1984.

Claimant's rate of compensation for the injury of June 14, 1983 is $305.08. The rate of compensation for the injury of July 14, 1983 is $310.54.

Defendants are responsible, based upon the July 14, 1983 injury, for claimant's medical expenses incurred with Trinity Regional Hospital, University of Iowa Hospitals and Clinics, American Prosthetics, Inc., Walgreen Pharmacy, and Fort Dodge Medical Center in the total amount of $10,050.93.

Claimant is entitled to receive from defendants transportation expenses in the total amount of $1,086.30, representing mileage and lodging.

Claimant is entitled to receive his costs in this proceeding in the amount of $92.65.

ORDER

IT IS THEREFORE ORDERED:

That based upon the injury of June 14, 1983 defendants pay claimant three and six-sevenths (3 6/7) weeks of compensation for temporary total disability at the rate of three hundred five and 08/100 dollars ($305.08) per week commencing June 14, 1983.

IT IS FURTHER ORDERED that defendants pay claimant seventy-four dollars ($74.00) representing the medical expenses he incurred with Dr. Calisesi as a result of the June 14, 1983 injury.

IT IS FURTHER ORDERED that based upon the July 14, 1983 injury, defendants pay claimant thirty and one-sevenths (30 1/7) weeks of compensation for healing period at the rate of three hundred ten and 54/100 dollars ($310.54) per week with four (4) days thereof payable commencing July 15, 1983 with two (2) days payable commencing June 28, 1984 with two (2) days payable commencing January 15, 1985 and with twenty-nine (29) weeks payable commencing August 5, 1983.

IT IS FURTHER ORDERED that based upon the injury of July 14, 1983 defendants pay claimant fifty (50) weeks of compensation for permanent partial disability at the rate of three hundred ten and 54/100 dollars ($310.54) per week commencing March 12, 1984.

IT IS FURTHER ORDERED that defendants pay claimant ten thousand fifty and 93/100 dollars ($10,050.93) representing the medical expenses incurred for treatment of the injury of July 14, 1983. Such total represents the following expenses:

University of Iowa Hospitals and Clinics	$ 9,086.64
Trinity Regional Hospital	396.30
American Prosthetics, Inc.	178.00
Walgreen Pharmacy	124.24
Fort Dodge Medical Center	265.75
TOTAL	$10,050.93

IT IS FURTHER ORDERED that defendants pay claimant his transportation expenses in the amount of one thousand eighty-six and 30/100 dollars ($1,086.30).

IT IS FURTHER ORDERED that defendants pay claimant's costs of this proceeding in the amount of ninety-two and 65/100 dollars ($92.65).

IT IS FURTHER ORDERED that all past due amounts of compensation for temporary total disability, healing period, and permanent partial disability be paid in a lump sum together with interest pursuant to section 85.30 of the Code.

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1

Signed and filed this 23rd day of September, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD L. RAYMOND, Claimant,	File No. 675932
KING TRANSFER, Employer,	A P P E A L
and	D E C I S I O N
GREAT WEST CASUALTY COMPANY, Insurance Carrier, Defendants.	FILED SEP 30 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 26, 1985 this 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 arbitration decision filed April 16, 1985 in which claimant was found to be an employee and in which he was awarded healing period, permanent partial disability and medical benefits.

The record on appeal consists of the transcript of the hearing; claimant's exhibit 1, defendants' exhibits A through F; commissioner's exhibits 1 and 2; the evidentiary depositions of Thomas Carlstrom, M.D., and Robert M. Roth, M.D., and the discovery depositions of Connie King, George B. King, Albert Raymond and the claimant. All evidence was considered in reaching this final decision.

The decision herein will reverse that of the hearing deputy.

ISSUES

The issues as stated by defendants are:

(1) Whether or not claimant established a prima facie case as to an employer-employee relationship between himself and defendants, and if so, whether or not defendants proved by a preponderance of the evidence that claimant was in fact an independent contractor;

(2) Whether or not a causal relationship exists between claimant's "cervical abnormality" and the injury of June 1, 1981 or if in fact claimant's cervical complaints are related to an independent intervening cause on September 26, 1981;

(3) Whether or not claimant's healing period is in fact 90 1/7 weeks; and

(4) Whether or not medical charges of Dr. Horst Blume were in fact fair and reasonable for the services rendered.

REVIEW OF THE EVIDENCE

Thirty-seven year old claimant who was married at the time of his injury, who is a high school graduate and who served four or five weeks with the navy before being discharged with spots on his liver, testified to work experience as a laborer, electrician, welder and semi driver. In 1976 he bought a truck from his father. Later he took over payments on the truck his father was buying and the two were leased to the same company.

In August of 1979 the two trip leased to defendant employer. Claimant said that prior to February 1980 there was no percentage taken from their paychecks. Claimant assumed that the company carried workers' compensation and he did not do so. He provided the liability insurance on the tractor and the license plates. His wife also drove the truck. King owned and maintained the trailers. Work could be done at the King shop with tools that were there. Claimant was notified of available loads by Connie King. King Transfer signs were taped to the doors of the truck. King had two or three other drivers who did not own tractors.

Because a trip lease caused too much paperwork, a permanent lease was negotiated in February of 1980. Claimant, his father and Connie King were present at the time the agreement was signed. Claimant recalled that he and his father objected to the provision regarding workers' compensation and that they were told something could be worked out later.

Claimant reported that after February 25, 1980 ten percent was withheld from his check to pay workers' compensation and base plates and that Connie King took out the ten percent and then an additional eight dollars a hundred to pay workers' compensation. Thereafter Kings directed claimant where to go, what to pick up, where to haul it and when to come back. All permits were in King's name.

Albert Raymond, claimant's father and an over-the-road trucker, testified to signing the same agreement as his son. He was unaware whether or not prior to that signing they had workers' compensation coverage. Raymond first said that after the signing payments for workers' compensation was taken out of his check. He then said it was to be paid by defendant employer, but taken from the ten percent for licenses. He claimed that he did not agree to the portion of the agreement relating to workers' compensation. He signed because Connie King was willing to take the workers' compensation out of the ten percent withheld. Raymond indicated that when he signed the contract he did not pay much attention to a clause which made him an independent contractor. Raymond viewed the permanent lease as offering an advantage over the trip lease in that he would get priority for loads.

As he recollected when the jack fell he tried to pull his son from under the truck, but he could not pull him as he was caught in the scissors. Claimant was cut across the jaw and neck and his teeth were broken. Within a week or two after claimant was home from the hospital he was complaining of bad headaches, of his neck and shoulders, and of numbness in his hands. Claimant told him that the shaking of the truck made his headaches worse.

In fulfilling the contract he drove his own truck with King's name on it. He did not wear a King's uniform or drive a King's truck. He bought his own fuel and oil. He did his own repairs or hired them done with parts he purchased or paid for himself. He usually picked the route unless George King told him the shortest way, but he was not obliged to take it. He had done work for others. No money was withheld for social security, health insurance, pension or state or federal income tax. The witness acknowledged that he deducted expenses for liability insurance and truck permit fees on his income tax.

Marilyn Raymond, claimant's former spouse, observed a cut on her husband's neck at the time of the bar altercation. She denied seeing any other injuries.

George B. King, owner and president of King Transfer, who claimed he was present when the Raymonds signed their contracts, testified that his intent in the agreement signed by Raymonds was to make them independent contractors. They were given weekly settlements of gross revenues less seventy-five percent with ten percent taken out for license and primary liability. There was no withholding for state or federal taxes, social security, health insurance or pensions. The Raymonds were assigned loads when loads became available. They had the right to refuse loads and could, with permission, haul for others. Raymonds were told what company to go to and what trailer to take. The shipper or consignee decided the time of arrival.

King indicated that the company does have employees who are paid on an hourly or weekly basis for driving company trucks; license fees, liability, workers' compensation and health insurance, truck repairs, oil, and gas are paid for by the company. There is no right to refuse a load or to haul for other carriers. The drivers' routes are predetermined.

He denied ever discussing workers' compensation with the Raymonds.

The witness did not recall claimant's ever complaining of neck or back problems. He said claimant's contract was terminated after his truck burned, but he was sent a letter telling him he could return to work if he replaced his truck.

Connie King, secretary and treasurer of the corporation, testified the same as George King regarding the manner in which the Raymonds were paid, the nature of their working relationship and the company's relationship with other employees. She asserted that she had asked the Raymonds to supply her with proof that they were carrying workers' compensation because the corporation's insurance carrier had requested the information. She denied that claimant had ever been provided with workers' compensation. She recalled being told by the Raymonds that they had seen an insurance agent who informed them they could not buy their own workers' compensation policy. King thought at the time of hearing that she and her husband had been present when claimant signed his contracts.

The license for claimant's truck showed him as the owner and King Transfer as the operator. She was unable to remember whether or not she had told claimant there was a run for him at midnight on June 1, 1981.

Phil Schroeder recalled seeing claimant in the fall of 1983 driving a truck and talking to claimant in January of 1984 about a truck with a clutch out in Ohio or somewhere that they wanted to have fixed. In February Albert Raymond asked for further repairs. Schroeder acknowledged doing quite a bit of work for King Transfer.

Claimant responded by saying that it was in February of 1982 that he was at Schroeder's place in a red truck, and that his father had another Ron, a Ron Wilder, working for him who might have called Schroeder and that his visit in the fall was to take a starter out in his pickup. Albert Raymond also said that he had another Ron working for him and that claimant had driven with that Ron.

Marilyn Schroeder testified that claimant had visited the Schroeders' residence in the fall of 1983 and that Ron Wilder had been working for the Schroeder's company since January 1, 1983.

A document dated February 25, 1980 signed by claimant and George King contains these provisions:

> The CONTRACTING OWNER agrees that use of the equipment described above shall be, during the term of this agreement, limited to CARRIER only, unless written permission is obtained from CARRIER authorizing such other use.
>
> 2. The parties intend and agree that this agreement shall create an independent contractor relationship between the parties and not a master-servant, employer-employee, or principal-agent relationship.... CONTRACTING OWNER shall have the right to store, maintain, and repair the equipment at a place selected by him and reject any load assignment.
>
> 3. The CARRIER agrees to pay the CONTRACTING OWNER 65 percent (65%) of the net revenue derived by the CARRIER from the full and proper performance of this Agreement by the CONTRACTING OWNER. Net revenue is defined as gross revenue less amounts paid to other persons in connection with transportation of property with the Equipment.
>
> ....
>
> E. The CARRIER shall be authorized under this Agreement to deduct from payments due the CONTRACTING OWNER those amounts which may have been previously withdrawn by the CONTRACTING OWNER, including but not limited to withdrawals for operational expenses, maintenance and repairs, fines or penalties, mileage, fuel or road taxes, or any other expense which, under the terms of Paragraph 5 below, is the obligation of the CONTRACTING OWNER. In addition, the CARRIER shall have a period of thirty (30) days after termination of this Agreement to verify the account of the CONTRACTING OWNER as to money owed the CONTRACTING OWNER and to make appropriate deductions before final settlement.
>
> ....
>
> 5. The CONTRACTING OWNER shall determine the method and manner of the performance of all transportation services undertaken by the CONTRACTING OWNER under the terms of this Agreement. The CONTRACTING OWNER has and shall retain all responsibility for:
>
> A. Hiring, setting the wages, hours and working conditions and adjusting the grievances of, supervising, training, disciplining and firing all drives [sic], driver's helpers and other workers necessary for the performance of the CONTRACTING OWNER'S obligation under the terms of this Agreement, which drivers, driver's helpers and other workers are and shall remain the employees of CONTRACTING OWNER:
>
> B. Selecting, purchasing, financing, and maintaining the Equipment:
>
> C. Selecting all routes:
>
> D. Paying all operating and maintenance expenses on the Equipment, including but not limited to all expenses of fuel, oil, lubrication, and repairs to the Equipment, fuel for refrigeration equipment, and road taxes, mileage taxes, fuel taxes and permits, fines for parking, moving or weight violations, tolls, licenses, permits or any other fees, levies or assessments based upon the operation of the vehicle, subject ineach [sic] case only to any regulatory requirements which may be placed on CARRIER by various governmental agencies, and on the CONTRACTING OWNER by Paragraph 4 of this Agreement.

6. The CONTRACTING OWNER has and shall retain sole responsibility for all Workmen's [sic] Compensation and withholding and employment taxes due to Federal, state or local governments on account of drivers, driver's helpers and other workers necessary for the performance of the CONTRACTING OWNER'S obligations under the terms of this Agreement.

A. Maintain in force at all times proper Workmen's [sic] Compensation insurance coverage covering all drivers, driver's helpers and laborers used by it in the performance of this Agreement. CONTRACTING OWNER agrees to provide CARRIER with a certificate of insurance evidencing CONTRACTING OWNER'S compliance with this provision.

B. File all Federal, state and local income, withholding, and employment tax forms and returns, which it may be required by law to file, on account of itself and all drivers, driver's helpers and laborers used by it in the performance of this Agreement at the time and place which may be specified in the applicable Federal, state and local laws, and to pay when due all taxes and contributions reported in such forms and returns;

C. Furnish CARRIER with such evidence of complainces with the foregoing as CARRIER shall reasonably require.

....

8. The CARRIER shall not be responsible for the wages and expenses of the CONTRACTING OWNER, its drivers, driver's helpers and laborers, nor social security, unemployment or other payroll taxes for the CONTRACTING OWNER, its drivers, driver's helpers, and laborers. The CARRIER shall not be responsible for Workmen's [sic] Compensation Insurance covering the CONTRACTING OWNER, its drivers, driver's helpers and laborers. Such matters are the sole and exclusive responsibility and liability of the CONTRACTING OWNER.

....

16. CONTRACTING OWNER may terminate this Agreement by sending to CARRIER a written notice of termination by Certified Mail, Return Receipt Requested, addressed to CARRIER at it Onawa, Iowa, domicile. CARRIER may terminate this Agreement by mailing to CONTRACTING OWNER at CONTRACTING OWNER'S address contained herein, a written notice of termination by Certified Mail, Return Receipt Requested.

....

22. This Agreement constitutes the entire Agreement and understanding between the parties and shall not be modified, altered, changed or amended in any respect unless in writing and signed by both parties. (Defendants' exhibit A)

A memo dated September 14, 1981 informs claimant his employment is being terminated because his truck burned.

Hospital records show an admission on June 1, 1981. X-rays revealed a fracture of the lower jaw bilaterally and some straightening of the cervical spine. Claimant was stablized for transfer.

When he was admitted in Sioux City, trauma to the upper trunk, face and mandible were recorded as well as a crushing injury to the upper trunk, right and left arms and sternum. A post-operative diagnosis of compound, comminuted fracture of the left body of the mandible and a fracture of the right condylar neck of the mandible was made. Claimant was described by Dr. Garred as totally disabled from June 1, 1981 to July 28, 1981.

Claimant's next hospital admission was on September 26, 1981.

John P. Zortman, D.C., first examined claimant on November 14, 1981 for complaints of frequent, severe headaches. Claimant's range of motion was reduced and he was treated with adjustments and ultrasound. Claimant was to limit himself to light work for short periods.

Robert M. Roth, M.D., who has practiced with William P. Garred, M.D., since July of 1981, reported claimant was seen in March of 1981 for a routine physical. On June 1, 1981 claimant was treated for a fractured mandible and concussion. Two weeks later he had developed acute cellulitis.

On September 26, 1981 claimant was seen in the emergency room. He was somewhat combative and disoriented. He had a bruise and laceration on the right occiput, a laceration on the bridge of his nose and a subconjunctival hemorrhage of the left eye. Examination of the neck was normal with no restriction of motion. X-rays showed a narrowing at C6-7. A history was taken of claimant's being assaulted by several people. During his hospitalization claimant complained of pain in the back of his neck. The doctor described claimant's injuries as minor.

Dr. Roth was unable to say based on the information available whether the condition shown on x-ray of claimant's neck resulted from the altercation. He thought it was possible that trauma to the upper neck, right and left arms and across the sternum could cause discomfort from C5 to C7. He stated, however, that there were no bruises, contusions or lacerations in the neck area and that when claimant was seen for follow-up he made no complaints.

Claimant was seen by Dr. Garred on May 15, 1982 at which time he told of headaches, pain in his neck and spasm into his shoulders.

Horst G. Blume, M.D., admitted claimant to the hospital on August 2, 1982 with complaints of pain in his mid-cervical spine with radiating pain into the greater occipital nerve territory primarily on the right. A myelogram was suggestive of a ruptured disc at C6/7 with posterior spur formation. There was suspcious disc pathology at C5/6 as well and a slight narrowing of L5/S1. A nerve block was done. The history given by claimant was of a numb feeling in his arms and hands since October of 1981, weakness in the arms and legs, general fatigue and neck pain radiating to the head. Claimant indicated headaches started two months before and numbness in his arms and hands began in May of 1982. Tenderness was present in the mid-cervical spine particularly at the occipital cervical junction. Examination of the lumbar spine elicited no abnormal findings.

Claimant was hospitalized again on September 24, 1982 and on September 26, 1982 had an excision and removal of a cervical disc at C5/6 and C6/7 with removal of posterior spur formation, an unroofing of the nerve roots, and an interbody fusion from C5 through C7 with wired bone dowels. After surgery claimant was not to work for twelve months.

Claimant was seen for nearly monthly follow-ups. In August of 1983 he reported his headaches had returned. Claimant was still wearing his soft cervical collar. Intense physical therapy was prescribed. Dr. Blume felt consolidation of the fusion had been delayed and that, therefore, claimant should not return to work. He thought claimant could participate in a reeducation program.

Dr. Blume performed a nerve block on claimant on November 4, 1983 at T4/5 and 6 on the left. The injection was repeated on December 16, 1983. On December 21, 1983 T6 through 9 were injected. On March 1, 1984 thirty-five radio frequency lesions were made at T7 through T11 which provided claimant with pain relief. No further nerve block procedures were planned after March 26, 1984.

Dr. Blume declared that for one year post neck surgery claimant would have been unable to work. Thereafter he should participate in a reeducation program for less strenuous activity. Claimant was considered able to drive a tractor-trailer but it was thought that sitting for prolonged periods would aggravate the pain in his spine and that help with loading and unloading would be necessary. A lifting limitation of thirty to forty pounds was assigned.

Dr. Blume defended his charges for two level disc surgery as reasonable.

Thomas Carlstrom, M.D., board-certified neurosurgeon, examined claimant on September 20, 1983 and reviewed his medical records. He took a history of claimant's being squeezed by a scissor jack and having a fractured jaw. Claimant thought he had numbness and tingling in his extremities which occurred before September of 1981. After the bar fight he had neck pain which was treated conservatively and then with surgery.

Claimant had full range of motion in his back and neck and a normal neurological examination. X-rays showed a good fusion. Calluses on claimant's hands suggested claimant had been doing heavy work.

Dr. Carlstrom found no reference in the medical records to neck pain prior to September 1981. He thought it more likely the altercation would cause neck pain than the incident with the jack. In reaching that opinion, Dr. Carlstrom considered the type of x-rays taken after claimant's injury, the mechanics of the injury, the lack of crushing or snapping of the head, claimant's failure to seek attention for a neck problem until February 1982, and Dr. Blume's report of claimant's symptoms beginning in October of 1981.

The neurosurgeon testified that for the past year he has been reviewing fees for a health insurance company to ascertain their reasonableness. He viewed Dr. Blume's fee of $4,000 with an assistant fee of $800 as unreasonable. He also thought hospital visits and some follow-up visits should have been included in the surgical fee. Dr. Carlstrom said his fee for the surgery and subsequent treatment would have been $1300 dollars.

The physician thought that three months post surgery would have been sufficient time for claimant to heal and that claimant was fully healed by the time of his examination. He felt that a fusion is as strong as it will get at six weeks. A five percent impairment rating based on the AMA Guides was assessed. No further treatment was thought to be necessary.

Dr. Carlstrom believed claimant could return to truck driving in which he included loading and unloading and minor mechanical repairs.

The neurosurgeon acknowledged that numbness and tingling in the hands before September 1981 might be significant in that a herniated cervical disc may cause such symptoms.

APPLICABLE LAW AND ANALYSIS

At the outset it must be noted that claimant cites a series of cases standing for the proposition that working persons are entitled to the liberal construction of the statute. Those citations relate to the law and not to the facts to which no liberal construction is applicable, and it is the facts which cause the difficulty in claimant's case. Claimant also cites cases relating to the standard of review. It is the standard of judicial review with which those citations deal rather than the standard for appeal to the agency which is found in Iowa Code section 17A.15.

The first issue raised by defendants is whether or not claimant has established a prima facie showing of being an employee. Iowa Code section 85.61(2) and section 85.61(3)(b) state:

> "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.
>
> 3. The following persons shall not be deemed "workers" or "employees":
>
> ....
>
> b. An independent contractor.

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 opinion stated in part:

> Factors to be considered in determining whether this relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. [citation omitted]

It is helpful in this matter to examine claimant's initial relationship with King Transfer and then to evaluate the relationship under the agreement claimant signed. Originally he operated on a trip lease basis. He testified that no percentage was taken from his paychecks, that he carried no workers' compensation, that he provided liability insurance and license plates, that he was notified of loads by King, that King provided the trailers, and that King Transfer signs were taped to the truck doors.

It is also useful to observe that King acknowledged having employees who operated equipment owned and maintained by King, who are paid on an hourly or weekly basis with no right to refuse profferred work and for whom license fees, insurance including workers' compensation, gas and fuel were provided. This distinction is an important one. See Hassebroch v. Weaver Construction Co., 246 Iowa 622, 633, 67 N.W.2d 549 (1955).

Because trip leasing resulted in too much paperwork, a permanent leasing arrangement was entered. Both claimant and his father signed agreements which contained a provision stating that it represented the entire agreement between the parties, that it was not to be modified unless the modifications were done in writing signed by both parties and that the agreement created was an independent contractor relationship "not a master-servant, employer-employee, or principal-agent relationship."

In Sanford v. Goodridge, 234 Iowa 1036, 1042, 13 N.W.2d 40, ___ (1944) the Iowa Supreme Court looked to substance and not to form to determine the relationship of the parties. The court has also pointed out that "the contract must be construed from 'its four corners' and not from an isolated paragraph. Courts must declare the intention of the parties from the language employed in the entire instrument, regardless of the classification of the parties determined by themselves, bearing in mind that it is not the nomenclature which the contract uses, but the provisions which it makes for control of the details of the work that determine the status of the parties." Schlotter v. Ledut, 255 Iowa 640, 645, 123 N.W.2d 434, ___ (1963).

In addition to the five factors set out above the court has added the overriding consideration of intention of the parties as to the relationship created. Henderson v. Jennie Edmundson Hospital, 178 N.W.2d 429, 431 (Iowa 1970). At hearing George King expressed the intent that claimant not be an employee and claimant, of course, asserted that he was an employee. Claimant filed his 1980 and 1981 returns as a self-employed person. In light of these attestations, the remainder of the contract and the conduct of the parties must be evaluated.

The parties entered the agreement as a manner of convenience to both. It was not a traditional hiring-right of selection situation. Claimant was paid sixty-five percent of the net revenue which was defined "as gross revenue less amounts paid to other persons in connection with transportation of property with the Equipment." George King indicated ten percent of the revenue from the load was withheld for licenses and liability insurance. There were none of the traditional withholdings such as federal or state income tax, social security, health insurance or pension. Assertions by claimant and his father that amounts were held back to pay workers' compensation on one occasion are not supported by other evidence and those allegations are contradicted by testimony from the Kings. Either party could terminated the agreement by written notice to the other. Control of details of the work will be skipped for the moment as that aspect deserves more discussion which will be carried out below. Benefit of claimant's work did not accrue exclusively to King. Claimant had the option of working when he wanted. When he did work, he profited by his own labor. Claimant, with permission, could work for others and he had done hauling for a farmer.

There are certain aspects of any job which are dictated by circumstances and which must be controlled to see that a contract is performed according to specifications. See Meredith Publishing Company v. Iowa Employment Security Commission, 232 Iowa 666, 673, 6 N.W.2d 6 (1942). In this case King acted as a clearing house for loads and notified claimant when work was available. Claimant retained the right to refuse to haul and as a matter of fact exercised that right on the date of his injury. Claimant drove his own truck which he maintained using fuel, oil and parts which he bought, and running on routes he selected. He was not required to purchase or to wear a company uniform and he did not do so. The agreement contained a provision giving claimant the right to "determine the method and manner of the performance of all transportation services undertaken."

Claimant cites several cases under the heading "Lease Arrangements Held to Show Claimant An Employee." Hassebroch v. Weaver Construction Co., 246 Iowa 622, 67 N.W.2d 549 (1955) is not a case which supports claimant's position. Weaver had trucks of its own which were operated by employees who were paid by the hour and from whom deductions were made for federal withholding tax, social security and unemployment. Hassebroch owned three trucks which he provided under an oral contract to Weaver. Hassebroch paid for gas and oil, carried liability insurance, was paid by the mile and could take routes he selected. He was able to hire others and to set the size of his loads. He could refuse work or do work for others. Hassebroch was found to be an independent contractor. Coleman v. Ringle Truck Lines, Inc., 249 Iowa 1133, 91 N.W.2d 566 (1958) also is contrary to claimant's position. Daggett v. Nebraska-Eastern Express, Inc., 252 Iowa 341, 107 N.W.2d 102 (1961) is perhaps most supportive of claimant's position but it is distinguishable from claimant's case. Nebraska-Eastern owned no trucks of its own and entered into trip lease agreements as opposed to a permanent agreement.

Although it is not believed that claimant has established a prima facie showing that he is an employee under these facts, his claim would fail in any event because defendants would preponderate on their affirmative defense.

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]

The test for meeting the burden of proof on this affirmative defense is found in 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, 246 Iowa 622, 628, 67 N.W.2d 549, 553.

Applying the factors set out in Mallinger results in the following analysis. Claimant was performing work, transfer of various goods, for a fixed price -- sixty-five percent of net revenue. This method of payment was different from that of others who worked for King. Truck driving may be of an independent nature as in claimant's case or a truck driver may be an employee as others who worked for defendant employer were. Claimant's independence is evidenced by his ownership of equipment, his right to refuse loads and his privilege of controlling details of his work. The argeement entered by the parties allowed claimant to hire; to set wages, hours and working conditions; to supervise, train and discipline, and to fire all workers as necessary for the performance of his obligations. Claimant was required to furnish equipment and to pay all operating and maintenance expenses on that equipment. As set out above, claimant could control the method and manner of performing his duties. Claimant was employed on a permanent basis and paid by the job. His work was a part of the regular business of King Transfer, but operating a truck was his own business as well.

As claimant cannot prevail on the threshhold issue of establishing an employer-employee relationship, he does not fall under the protection of the Iowa Workers' Compensation Act and no consideration of any other issue is necessary.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-seven years of age.

That claimant is a high school graduate.

That claimant has work experience as a laborer, electrician, welder and semi driver.

That claimant began working for King Transfer in 1979 under a trip lease arrangement.

That after February of 1980 claimant worked under a permanent lease.

That the written contract intended claimant to be an independent contractor.

That the permanent lease agreement was a matter of convenience to the parties.

That claimant was paid a percentage of net revenues from each load.

That ten percent of the revenue from a load was withheld for payment of liability insurance and licenses which was originally paid by King.

That no amounts were withheld for federal or state income tax, social security, health insurance, pension or workers' compensation.

That either party could terminate the agreement by written notice to the other.

That claimant, with written permission, could work for others and did hay hauling for a farmer.

That claimant drove his own truck which he maintained using fuel, oil and parts which he purchased over a route he selected.

That claimant had the right to employ assistants and the duty to supervise their work.

That claimant retained control over the method and manner of performing his services.

That King employed persons whom it considered employees and under an arrangement which was different from that made with claimant.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant is an independent contractor and not an employee.

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 30 day of September, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WALTER H. SAATHOFF, Claimant, vs. FARMLAND FOODS, INC., Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	:	File No. 630878 A P P E A L D E C I S I O N

FILED
JUL 23 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a proposed review-reopening decision wherein it was found that claimant's accident in March of 1980 did not result in impairment to claimant's body as a whole. The record on appeal consists of claimant's exhibits 1 through 8; defendants' exhibits A through U; the hearing transcript; and briefs filed by the parties.

ISSUES

Claimant states the issues as:

I. Did the Deputy err in deciding that the claimant's accident in March, 1980 did not result in impairment to claimant's body as a whole.

II. Did the Deputy err is [sic] deciding that claimant was not entitled to total permanent disability benefits.

ANALYSIS

The evidence was well summarized by the deputy in the statement of the case and will not be repeated herein.

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

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

FINDINGS OF FACT

1. Claimant is sixty years of age.

2. Claimant has a bachelor degree, master degree and hours toward a doctorate.

3. Claimant began work for defendant employer in 1960 as an agronomist.

4. Claimant later worked in a genetic improvement program.

5. Claimant was in an automobile accident in 1970 in which he had a posterior fracture dislocation of right acetabulum, a comminuted fracture to the distal staff of the radius and a fracture at the head and neck junction of the right humerus.

6. Claimant had an open reduction and Kirschner wire fixation of his left wrist in late 1970.

7. An open reduction of the right hip was attempted in December of 1970.

8. Claimant took Darvon compound 65 on a nearly weekly basis beginning in 1972 and continuing to the end of 1978 to help control his pain.

9. Claimant's medication was changed in 1979.

10. Claimant's drug use stopped in mid 1979.

11. In April of 1972 claimant's right leg measured an inch shorter than the left.

12. A total hip replacement was performed on January 7, 1974.

13. Claimant did not have recorded back complaints in 1974 and 1976.

14. Claimant's hip prosthesis was replaced in December of 1976.

15. A dislocation of claimant's shoulder was discovered.

16. In August of 1979 claimant had a Neer hemiarthroplasty of the right shoulder.

17. Claimant suffered a comminuted fracture of the right femoral and tibial plateau fracture of the left knee in an accident in March of 1980.

18. Claimant's femoral prosthesis was changed and a new long stemmed prosthesis was inserted after the accident of March of 1980.

19. As a result of surgery and claimant's fracture, he had a ten percent increased impairment in his right lower extremity.

20. Claimant is to avoid prolonged standing and weight bearing, to shun running and heavy lifting and to use a cane or crutch.

21. Causalgia, which claimant experiences, was present before the March 1980 injury.

22. Claimant retired from his job at the request of the company.

23. Claimant attempted to work as a vocational agricultural teacher in the fall of 1981, but he was unable to do so.

24. Claimant and his spouse raise livestock on a small acreage.

25. Claimant's riding, standing, sitting and walking are limited.

26. Claimant uses a cane and sometimes a crutch.

27. Claimant's accident of March of 1980 resulted in impairment to both lower extremities.

28. Claimant's accident in March of 1980 did not result in impairment to claimant's body as a whole.

CONCLUSIONS OF LAW

Claimant has established a causal relationship between his accident of March 21, 1980 and impairment of both lower extremities.

Claimant has established entitlement to 40 weeks of permanent partial disability benefits as a result of his accident of March 21, 1980.

WHEREFORE, the proposed agency decision is affirmed.

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 23 day of July, 1985.

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS SABEL,	:	File No. 758400
Claimant,	:	APPEAL
vs.	:	DECISION
OSCAR MAYER FOODS CORP.,	:	FILED AUG 13 1985
Employer, Self-Insured, Defendant.	:	IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 26, 1985 this 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 an arbitration decision filed February 18, 1985 in which he was found to have an injury arising out of and in the course of his employment on January 24, 1984, but which denied him benefits because he failed to establish permanent partial disability.

The record on appeal consists of the transcript of the hearing; claimant's exhibit 1 through 3 and defendant's exhibits A through C. All evidence was considered in reaching this final agency decision.

The decision herein will slightly modify the decision of the hearing deputy, but it will not change the result.

ISSUE

The issue on appeal as stated by claimant is: "Can the Deputy Commissioner find no permanent disability in the face of unanimous medical opinion to the contrary, when accident, notice and disability were found in Claimant's favor?"

REVIEW OF THE EVIDENCE

Thirty-five year old married claimant, father of two children who has a ninth grade education, testified to work experience as a manual laborer and about fifteen years' work with defendant. More specifically his work has been popping bubbles and peeling meat -- work requiring reaching and pulling with both arms.

Claimant recalled noticing aching from his shoulders down and pain and numbness in his hands from as much as a year and a half prior to January 24, 1984 at which time he noted a burning from the middle of his shoulders. Claimant indicated he ceased popping bubbles and peeling meat at that time, but he has not lost time from work. He told Chuck Schlichting of his trouble.

Claimant was given sonic heat treatments and muscle relaxants by John Johnson, D.O., who sent him to Anthony D'Angelo, Jr., D.O., who changed his medication and in turn sent him to R. J. Chesser, M.D. At the request of his attorney claimant was examined by Barry L. Fischer, M.D.

Claimant's current complaints consist of aching in his shoulders on long walks, with prolonged standing or on long drives. His hands cramp, stiffen and become cold when he does tedious work. He notes trouble with pushing and pulling. He claimed no improvement in his hands, arms or shoulders since January 24, 1984. Claimant said that he had been informed by Dr. D'Angelo that there was no sense in continuing his office visits and if he got to the point he needed surgery he should call the doctor. He last saw a doctor for his condition in March of 1984. He sometimes takes pills and had last done so about a month before hearing.

Claimant was not working at the time of hearing because he had refused recall at a wage of $8.25 per hour. His last work was performed on September 7, 1984. Claimant, who has collected unemployment, stated that he has looked for work and that he is planning to move to Arizona. He reported that he had been told by the doctor that his work was not good for him, but he had not been told to stay off work.

Vern Keller, safety-security manager for defendant for the past eight or nine years, testified that the company's basic wage rate had been reduced to $8.25 per hour with no change in benefit programs.

John T. Johnson, D.O., in a report dated May 15, 1984 stated that claimant has bilateral supraspinatus tendonitis and symptomatic bilateral carpal tunnel syndrome with definite median nerve root irritation. Electromyography was within normal limits. He believed claimant's conditions are permanent although there may be periods of exacerbation or remission of symptoms.

Dr. Johnson causally related claimant's symptoms to the reaching and pulling claimant has done.

Barry Lake Fischer, M.D., saw claimant on February 14, 1984 and took a history of claimant's doing reaching, pulling and using his hands for cutting with pain developing in both shoulders and hands. Examination showed full range of motion in the shoulders, tenderness to palpation and pressure over both ribs, decreased range of motion of the hands and positive bilateral Tinel's sign.

Dr. Fischer diagnosed repetitive trauma to the upper extremities which resulted in symptomatic bilateral carpal tunnel syndrome and an underlying median nerve root irritation which required electromyography to determine its exact nature and extent.

R. J. Chesser, M.D., performed electromyography on February 15, 1984 after taking a history of claimant's having intermittent hand pain for nine to ten months with increased pain in the shoulders and the cervical region. Symptoms were aggravated by repetitive use of the upper extremities. Findings were normal with nothing to indicate entrapment neuropathy at either the carpal tunnel or cubital canals. Cervical spine x-rays were interpreted by Charles R. Parton, D.O., as normal. Range of motion in the cervical spine was normal as was strength and pin prick in the upper extremities. Reflexes were symmetrical.

Anthony D'Angelo, Jr., D.O., saw claimant on March 1, 1984 and recorded complaints of pain across the shoulders with a burning sensation and numbness and tingling in the left hand. Claimant's symptoms had been present for a year and a half. On evaluation claimant had full motion in his cervical spine without pain to either shoulder or reproduction of numbness or tingling. There was some tenderness at the supraspinatus tendon bilaterally. Phelan's and Tinel's were positive on the left. Claimant was started on Tolectin.

When he was seen on March 15, 1984 he had relief of his symptoms from taking Tolectin intermittently. A supraspinatus tendonitis was found on the left. There was also one on the right which was less symptomatic.

APPLICABLE LAW AND ANALYSIS

The sole issue raised by claimant on appeal is his entitlement to permanent partial disability.

The hearing deputy found claimant has a bilateral supraspinatus tendonitis related to his work. Claimant argues that the hearing deputy failed to understand the relationship between median nerve compression and carpal tunnel syndrome and also that she failed in not awarding permanency.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 24, 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).

Dr. Johnson found claimant to have two permanent conditions which would result in periods of exacerbation and remission. These conditions are bilateral supraspinatus tendonitis and bilateral carpal tunnel. X-rays of claimant's cervical spine and Dr. Chesser's findings on electromyography and nerve conduction were both normal. Dr. Fischer was unable to assess any impairment for what he diagnosed as "symptomatic carpal tunnel syndrome of both upper extremities." Dr. D'Angelo diagnosed a bilateral supraspinatus tendonitis, but he made note of a positive Phelan's and Tinel's.

Questions of causal connection are essentially within the domain of expert testimony. Bradshaw, 251 Iowa 375, 101 N.W.2d 167. The testimony of the medical expert may be rejected when the opinion is based upon an incomplete and inaccurate history. Mussleman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The weight to be given to expert opinion is for the finder of fact. Bodish., 257 Iowa 516, 133 N.W.2d 867.

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).

The medical evidence in this case is sparse. Dr. Johnson is the lone practitioner who mentions permanency and he says only that the conditions are permanent with the qualification of "occasional periods of exacerbation and remission of symptoms." Claimant has permanent conditions, and unlike the hearing deputy this deputy is prepared to find that claimant has both bilateral carpal tunnel and bilateral supraspinatus tendonitis.

The problem with claimant's evidence is that there is no showing of permanent disability resulting from the permanent conditions. Burt v. Firestone Tire & Rubber Company, 34 Biennial Report of the Industrial Commissioner 62 (Appeal Decision 1978) (Dist. Ct. Appeal Settled). See also Nissen v. Gary P. Latus Construction Co., 34 Biennial Report of the Industrial Commissioner 240 (Appeal Decision 1980). Neither is there support for a permanent functional impairment. No functional impairment rating is a part of the record. Dr. Fischer notes loss of motion based on normal range of motion of 160 degrees with equal amounts assigned to flexion and extension. In this deputy's experience normal range of motion is 130 degrees with flexion of seventy degrees and extension of sixty degrees. See Iowa Code section 17A.14(5). Claimant has not established disabling pain. See Waller v. Chamberlain Manufacturing, II Iowa Industrial Commissioner Report 419 (1981). Claimant reported pain relief from taking Tolectin intermittently. Electromyography and nerve conduction were normal. Claimant has not been placed under any work restrictions.

Claimant has failed to establish any permanent disability relating to his conditions.

One additional argument by claimant deserves mention. Claimant urges that he should not be required to look for work in Iowa and he cites a portion of the hearing deputy's decision. This deputy would agree that claimant is not required to seek work in Iowa, but she does not believe that either the hearing deputy's discussion in her decision or her finding of fact imposes that requirement. In light of claimant's failure to establish any permanent disability, a discussion of claimant's motivation seems unnecessary.

FINDINGS OF FACT

That claimant is thirty-five years of age.

That claimant has a ninth grade education.

That claimant's work experience in addition to that for defendant has been as a manual laborer.

That claimant's work required reaching and pulling.

That claimant had an increase in symptomatology in his hands, arms, and shoulders on January 24, 1984.

That defendant had actual knowledge that claimant was alleging a work-related injury within ninety days from the time he first recognized the seriousness of his injury.

That claimant filed his petition on June 27, 1984.

That claimant's petition in arbitration was filed within two years of his injury.

That claimant has normal electromyography, nerve conduction studies and cervical spine films.

That claimant's work resulted in two conditions -- bilateral carpal tunnel and bilateral supraspinatus tendonitis.

That claimant may have periods of exacerbation of his condition.

That claimant has not missed work because of his injury.

CONCLUSIONS OF LAW

That defendant has not established that claimant's petition in arbitration was filed beyond the applicable statute of limitations.

That claimant has established an injury arising out of and in the course of his employment on January 24, 1984.

That defendant has not established that claimant did not give timely notice of his injury.

That claimant has not established entitlement to permanent partial disability benefits.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

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

Signed and filed this 13 day of August, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DELORES J. SCHRAGE,	:	
Claimant,	:	File No. 741614
vs.	:	A P P E A L
K MART CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED

SEP 19 1985

IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 26, 1985 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.

Defendant appeals from an arbitration decision in which it was ordered to pay medical expenses, healing period benefits and 125 weeks of permanent partial disability.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 15 and the depositions of John R. Huey, M.D., John R. Walker, M.D., and the claimant. All evidence was considered in reaching this final agency decision.

The decision herein will modify the decision reached by the hearing deputy.

ISSUES ON APPEAL

The issues on appeal as stated by defendant are:

I. The deputy erred in finding that there was sufficient competent evidence in the record to support a finding that claimant had received any injury arising out of and in the course of her employment at K Mart Corporation.

II. There is insufficient evidence in the record to support a finding of 25 percent industrial disability arising out of any injury received in Miss Schrage's employment with K Mart Corporation.

III. The deputy erred in failing to award credit to K Mart Corporation for benefits paid for non-work-related injuries in the total amount of $3,571.00 paid to her pursuant to the provisions of section 85.38 of the Code of Iowa (1985).

STATEMENT OF THE CASE

Twenty-six year old single claimant, a high school graduate with a year and a half of training in marketing management, testified to work experience as a waitress, salesclerk who did stocking, a press operator, a clerk-cashier and cook. She sometimes had more than one job and she usually was paid minimum wage. On January 20, 1983 she went to work for defendant as a manager trainee whose duty it was to learn book work, act as a buyer for the automotive and sporting goods departments, wait on customers and stock shelves. She lifted articles varying in weight, but weighing as much as 110 pounds. In addition to her pay of $1,025 per month for forty-eight hour weeks, she had health and disability insurance and a paid vacation.

Regarding her alleged injury, claimant testified: On May 7, 1983 she noticed a kink in her back as she was watching TV at home. The day before she had been checking in and pricing merchandise weighing anywhere from two to fifty pounds at the warehouse during a five hour period. The ache was constant and dull. She slept on the floor.

She walked to work the next day. She waited on customers and stocked shelves. She noticed her back pain was getting sharper and she had a sharp pain in her right leg. She talked to her manager and then went to the emergency room.

After several days of continuing to have pain, she saw an orthopedic surgeon, John R. Huey, M.D., who prescribed Flexeril and whom she saw weekly.

She remained off work until June 7, 1983 at which time she returned with a thirty to forty pound weight limit. Because defendant would not accept her with restrictions, she stayed off work until June 14, 1983 when she returned to her usual duty.

She had back pain which went down her leg and was brought on by such activities as lifting, going up and down steps, stocking shelves and handling large merchandise.

On June 23, 1983 she was taking down utility trailers. She stopped working when she had pain which prevented her moving. She again saw Dr. Huey who gave her Williams' exercises which she did "up to a certain point." She was back at her customary work on July 18, 1983. By that time, the pain in her right leg was gone.

Right leg and sharper back pain recurred on July 21, 1983 and she has not returned to work for defendant. Claimant said that defendant never tried to provide her with lighter work. Ultimately Dr. Huey restricted her from bending and twisting and from lifting more than twenty or thirty pounds. Beginning on August 10, 1983 she started work in a donut shop with varying hours for minimum wages. She had no difficulty working there. After a brief time she also began to work at a hotel as a cook with hours varying from ten to twenty-five per week. She then took another job with hours ranging from thirty to fifty.

Claimant indicated she has trouble with her back when she is on her feet too long, when she stands in one spot or when she lifts. She reported that she continues to have occasional pain in her right leg which is usually in the front of her leg and extends down to her toes. She says she has given up both bowling and dancing.

Claimant denied any back problems prior to her alleged injury.

Claimant stated that she last saw Dr. Huey on May 25, 1984. His examination which took five minutes consisted of measuring her legs and checking her reflexes. She compared her exam by Dr. Huey with those by Dr. Walker which took in excess of an hour each time and included x-rays. Dr. Walker presented the possibility of either a CT scan or a myelogram. Claimant asserted that she has not sought additional medical treatment because she has neither insurance nor the funds to do so.

Claimant admitted that prior to the incident with her back on May 7, 1983 she had felt tired when she finished work, but she had not had difficulty with her back.

Claimant agreed that when she was seen in the emergency room she could not attribute her back condition to any work activity. She also reported to her manager that her injury did not happen at work and her inability to recall anything unusual happening at work which would cause a back problem.

Claimant said that she received full pay for the first two months after her injury. Her pay was then cut in half until November, but she testified payments stopped altogether in September and she believed they were halted because she was working. She acknowledged receiving $3,571 in disability benefits for a nonwork related condition.

Claimant agreed that her back has remained basically the same since July 1983.

Henrietta Schrage, claimant's mother, testified that her daughter had no back problems or injuries before May 7, 1983. Since that time she has observed that her daughter has difficulty using stairs, riding in the car, vacuuming, or doing heavy lifting. She reported feeling a marble size lump on the right side of claimant's spine which seems to protrude.

A letter from George Keil, personnel manager for defendant, explains that claimant is expected to perform some "stock boy duties."

Copies of claimant's W2's show wages from Donutland of $1,628.95 in 1983 and from the Roosevelt Hotel of $1,597.40 in 1983.

On May 8, 1983 claimant was seen in the emergency room with low back pain which began the day before and was aggravated by movement. She gave no history of trauma to K. R. Kensey, M.D., who thought she had signs associated with disc disease. Tylenol 3 and Valium were prescribed.

John R. Huey, M.D., board certified orthopedic surgeon, first saw claimant on May 12, 1983 and took a history of low back pain radiating to both legs which started late on Saturday. Claimant claimed no previous episodes of back discomfort. Claimant was not aware of the reason for the pain, but she reported doing heavy lifting. On examination her movements were guarded and her reflexes hyperactive. Straight leg raising produced more pain on the right than the left. There was spasm in some back muscles particularly on the right. X-rays showed Schmorl's nodes, a small spina bifida of the first and maybe the second sacral segment. The diagnosis was lumbosacral strain. She was sent home for bedrest.

The following week claimant was still bothered by her right leg. Conservative treatment was continued. Claimant was released to return to work on June 14, 1983. Slightly more than a week thereafter she had acute lumbosacral pain. In early July claimant continued to have lots of spasm. She was started on Williams' exercises. At some point it was suggested that claimant try to return to work, but that she watch twisting, heavy lifting and quick turnings. On July 22, 1983 claimant continued to have cramps in her back. Dr. Huey suggested employment where she would not have to do lifting. He did not think she was a candidate for surgery because she had no neurological deficits. At the end of July, she again was advised to take a less strenuous job.

Claimant returned to work on August 9, 1983 at which time she carried permanent restrictions from lifting in excess of thirty pounds and on bending and reaching. She was not to do stooping or twisting.

Claimant was next seen on May 25, 1984 at which time she reported changing jobs. There was a difference in the circumference of claimant's legs which claimant attributed to her sunburn. There was tenderness in the erector spinae muscle mass at the lumbosacral level. Claimant had a slight lordosis. The doctor felt claimant had a five percent permanent partial disability of her low back in that she was still having tenderness and spasm and that she was unable to do heavy work. Claimant's loss of motion was from spasm and not from rigidity. She had no reflex changes or muscular weakness. The doctor thought claimant would be limited from bending, stooping or standing over prolonged periods and lifting over twenty-five or thirty pounds. A job giving her a combination of sitting and standing would be best. On June 4, 1984 he wrote, "I feel she has about a 5% permanent partial disability due to lumbosacral strain, chronic, of the low back with inability to carrying on heavy work."

Dr. Huey expressed the belief that claimant had reached maximum healing on July 26, 1983.

Regarding causation, the orthopedist traced claimant's problems to her work as she did not have back trouble before and then it came on over the weekend after she relaxed.

In a letter dated August 22, 1983 Dr. Huey expressed the opinion that "it is probable that the lifting iniated [sic] her back pain."

Dr. Huey acknowledged that persons with spina bifida should work brains rather than brawn.

John R. Walker, M.D., saw claimant on December 28, 1983 and developed a working diagnosis of a herniated disc at L4 involving the L5 nerve root with right-sided sciatica. His examination showed exquisite tenderness at L4, L5; an equivocal instability sign; positive Leseque's, Flip and sciatic tension tests; a seven-eighths inch atrophy of the right calf and limited motion. X-rays were normal except for the spina bifida. Dr. Walker suggested a CT scan and myelogram. He also diagnosed a sacroiliac pain.

He saw claimant again on June 11, 1984 at which time she had tenderness in the right sacroiliac. She had sciatica and positive Lasegue's, straight leg raising and pelvic tension tests. There was an inch and an eighth of atrophy of the right calf and a half inch atrophy of the right thigh.

Dr. Walker believed claimant needed treatment and listed her problem as a space occupying lesion which had slightly improved and a right sacroiliac sprain. The doctor wrote: "Until this patient is treated, her temporary partial impairment is going to remain high. I would certainly state that it will be in the region of 30 to 35% of the body as a whole."

Dr. Walker agreed that the spina bifida could produce symptoms with a sprain in the area producing back pain, but unlikely to produce leg pain. The doctor also said that a pure sprain of the sacroiliac joint could produce leg pain.

Regarding Williams' exercises, he said that they usually make a sacroiliac sprain worse.

As to causation, Dr. Walker agreed that the conditions found in claimant could be caused by "a myriad of activities" and might come on either gradually or suddenly, but that usually it could not be traced by the patient to an injury or trauma. He testified that claimant's weak ligamentous structure makes her more prone to the development of back problems than someone with a normal back. He responded "true" to the question "you had a history that she had done heavy lifting and bending in the history of her employment; and that would be a reasonable thing to conclude might be a cause of her problem in the absence of any other history?" He then said, "absolutely" in answer to a question about whether claimant's trouble could be attributed to recreational activity depending on the history provided. Finally he was asked: "If the patient related that the condition came on after some activity at home, then, in that event, you would attribute it to the activity at home rather than some work-related activity?" He answered "I probably would, yes."

Dr. Walker wrote that "there is a direct causal connection between the exertion and the lifting required by the employment and the injury that the patient received."

On January 3, 1984 claimant's counsel wrote to defendant's attorney seeking "some kind of treatment." The response from defendant was that Dr. Walker was not acceptable and suggested the attorneys attempt to agree on a competent orthopedic surgeon.

APPLICABLE LAW AND ANALYSIS

The parties in this matter filed extremely thorough and exceptionally helpful briefs which contain good analyses of all the evidence presented.

The first issue raised by defendant is whether or not claimant sustained an injury arising 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, 405, 68 N.W.2d 63 (1955).

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

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

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 who has a spina bifida, testified that she initially noticed a kink in her back as she was watching TV at home after spending five hours of the previous twelve hour work day checking in and pricing merchandise weighing as much as fifty pounds. The following day she had back pain and pain in the right leg. Both claimant and her mother indicated claimant had not had prior back trouble.

Dr. Huey testified that spina bifidas do cause backs to be weak. His testimony evidences his feeling that claimant had an aggravation. He viewed the lifting claimant did on Friday as consistent with the symptoms she exhibited on Saturday. In his letter of August 22, 1983 Dr. Huey makes a causal connection between the lifting claimant was doing and her back pain.

Dr. Walker is also of the opinion that the repeated lifting claimant did resulted in her condition.

Defendant argues well. It first contends that claimant's injury was not in the course of her employment because her pain did not come on while she was working. The onset of pain is the wrong event to evaluate. It is the activity which produced the pain which must be examined. The activity alleged by claimant was checking in and pricing merchandise over a five hour period and that duty was in the course of her employment.

Defendant, based on claimant's testimony at trial, states that claimant "specifically told the attending physician [at the emergency room] that she had not injured her back while working at K Mart Corporation." However, the record made comtemporaneously with claimant's visit says only "[n]o history of any significant damage or trauma." It is true that Dr. Huey did not record a specific event, but claimant did tell him she had been engaged in heavy lifting. It is also accurate that Dr. Walker said claimant's condition could be attributed to some activities she carried out at home. There is no evidence any where in the record of home activity resulting in symptoms. Claimant testified she did nothing in particular that day as it was raining.

The deputy's conclusion that claimant suffered an injury arising out and in the course of her employment is proper.

Defendant claims that the hearing deputy found an injury on both May 6 and May 8 in spite of the fact that claimant alleged no injury on May 8. That complaint is justified. Claimant's petition proffers an injury date of May 6, 1983 and that is the date which will be used in the conclusion in this decision.

The hearing deputy concluded that claimant's injury resulted in disability. Defendant has not appealed from that conclusion.

The second issue raised is whether or not there is evidence to support a finding of twenty-five percent industrial disability. The industrial commissioner has the described the process of evaluating industrial disability thusly:

> 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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.
>
> Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Defendant first cites the hearing deputy's statement that "none of the physicians place much weight on this condition [spina bifida] as contributing to claimant's current abnormality." That statement is not entirely accurate. It is true as defendant urges that Dr. Huey agreed that he would have recommended to claimant prior to her injury that she work with her brain and not her brawn and that she not be involved with heavy lifting, bending or twisting. Dr. Walker agreed that the structure of claimant's back was weaker because of the spina bifida. Defendant cites the following portion of Dr. Huey's deposition: "I don't think probably the spina bifida itself causes pain. It's just the weakness in the area that causes edema around the nerve roots as they come out, and that's where the pain comes from."

(p. 26) That portion must be read in conjunction with this one:

> Q. It would be above the, in that area or above. I'm interested in the point that when she first saw you she indicated that she first experienced pain on a Saturday. If she hadn't-- You know, the type of problem that, the pain that she was experiencing, would that occur immediately upon the trauma or could it come a day on so later after the--
>
> A. It generally comes on later after they've gone home and tend to relax, and then you get the swelling and spasm. Moving around keeps it pretty well pumped out, so to speak, and the muscles keep working and keep the edema down. And it gets irritated afterwards from the lactic acid buildup and so forth. (Huey dep., pp. 23-24)

Defendant also is correct in pointing out that Dr. Walker's rating is of temporary partial impairment, not permanent partial impairment as the hearing deputy appears to have assumed and that her impairment could be decreased with further treatment. Letters from counsel suggest there has been a problem agreeing to treatment for claimant. The hearing deputy ultimately found a functional impairment of fifteen percent and went on to award permanent partial disability. That finding of functional impairment is not supported.

Defendant suggest that the hearing deputy thought claimant had a herniated disc rather than a spina bifida. He does not say that, and he does say "Dr. Huey concludes that claimant's functional impairment is due to muscle spasms." Defendant makes good points regarding factors which negate claimant's having a herniated disc. They are that claimant's condition has stabilized; that claimant at some times has been working two jobs with long hours; that she has right leg pain with heavy lifting, bending, stooping or twisting; that claimant has symptoms consistent with a sacroiliac sprain rather than a herniated disc; that Williams' exercises reduce claimant's symptoms; and that claimant has no neurological deficit. It is has not been established at this time that claimant has any condition other than the lumbosacral strain which was rated by Dr. Huey at five percent. One must agree with defendant's statement that "[b]ased upon the evidence in the record, the only conclusion that may be supported is that claimant was suffering from an aggravation of her preexisting spina bifida condition." It will be found that claimant has a small permanent functional impairment resulting from her injury of May 6, 1983.

Although functional impairment is only one aspect of industrial disability, the fact that the hearing deputy made a specific finding in that regard suggests its importance to him. Because he misinterpreted Dr. Walker's assessment, a reevaluation is necessary.

Defendant argues that claimant has no limitation she should not have had prior to her injury; and, according to Dr. Huey, that is right. However, claimant does have industrial disability.

Claimant is a younger worker with a good education and excellent motivation as evidenced by her willingness to hold two jobs and to work long hours. Her motivation and her past willingness to pursue additional training suggest good potential for rehabilitation. She was seemingly in good health prior to her injury.

At the time of her injury claimant was a manager-trainee with a major corporation. Her earnings were above minimum wage and presumably she began a career path which would have provided her with many opportunities. Had claimant returned to that course her industrial disability would have been small indeed. She has been terminated by her employer and that termination contributes to a substantial industrial disability. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). See also Chewning v. Morris Chain Rubber Division, II Iowa Industrial Commissioner Report 88 (Appeal Decision 1982); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (Appeal Decision 1981). Defendant is a large corporation with many positions with varied physical requirements. There is no evidence of any attempt to return this claimant to work. The absence of any such efforts elevates claimant's industrial disability.

Based on the Iowa case law, the analysis herein and the findings of fact set out below, it is concluded that claimant has permanent partial industrial disability of twenty percent.

The final issue relates to whether or not defendant is entitled to a credit pursuant to Iowa Code section 85.38(2). That section provides:

In the event the disabled employee shall receive any benefits, including medical, surgical or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, chapter 85A or chapter 85B, then such amounts so paid to said employee from any such group plan shall be credited to or against any compensation payments, including medical, surgical or hospital, made or to be made under this chapter, chapter 85A or chapter 85B. Such amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount so deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A or an occupational hearing loss under chapter 85B. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against them by reason of having received such payments only to the extent of such credit.

Claimant was questioned about payments she had received from defendant and she responded "okay" to the question, "and the total amount that you received was $3,571.00, approximately?" Claimant urges that defendant has not established the benefits she received were paid under a plan that falls within section 85.38(2). There is no evidence of record as to precisely what the payments were that claimant received. However, the law is the law and by operation of the law defendant would be entitled to credit under Iowa Code section 85.38(2) if its plan qualified. The parties should cooperate in the resolution of this matter with defendant providing to claimant the material necessary to show their entitlement to credit.

As there has been no appeal of any other issues in this case, the hearing deputy's rulings on those questions will be affirmed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-six years of age.

That after graduation from high school, claimant had a year and a half of training in marketing management.

That claimant has work experience as a waitress, salesclerk, press operator, clerk-cashier and cook.

That claimant was working for defendant as a manager trainee with duties including book work, buying, waiting on customers and stocking.

That claimant's duties required lifting as much as 110 pounds.

That claimant was earning $1,025 per month at the time of injury.

That claimant experienced pain at home watching TV after she spent five hours of the previous twelve hour work day checking in and pricing merchandise.

That claimant had a preexisting spina bifida.

That claimant was released to return to work on June 8, 1983 with no lifting over forty pounds.

That claimant was released to return to work on June 14, 1983 with no restrictions.

That claimant went off work on June 24, 1983.

That claimant was released to return to work on July 18, 1983.

That claimant was returned to work on August 9, 1983 with a permanent restriction from lifting in excess of thirty pounds and on bending, reaching, stooping and twisting.

That claimant has a small functional impairment as a result of her May 6, 1983 injury.

That claimant has been able to obtain work at minimum wage or only slightly above and has a reduction in actual earnings.

That claimant's employment was terminated by defendant.

That defendant has made no attempt to find suitable work for claimant.

That claimant has a permanent partial industrial disability of twenty percent.

That claimant has incurred medical expenses.

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 May 6, 1983.

That claimant has established by a preponderance of the evidence a casual relationship between her injury of May 6, 1983 and the disability she now suffers.

That claimant has established entitlement to healing period benefits for the time she was off work during the period from May 8, 1983 through July 18, 1983.

That claimant has established entitlement to one hundred (100) weeks of permanent partial industrial disability.

That claimant has established entitlement to the payment of medical expenses.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay claimant healing period benefits beginning on May 8, 1983 through July 18, 1983 for the time she was off work at a rate of one hundred forty-six and 56/100 dollars ($146.56).

That defendant pay unto claimant one hundred (100) weeks of permanent partial industrial disability at a rate of one hundred forty-six and 56/100 dollars ($146.56) commencing on July 19, 1983.

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 the following medical expenses:

John R. Huey, M.D.	$262.00
John R. Walker, M.D.	125.00
Emergency Room Charges	36.00

That defendant pay costs pursuant to Industrial Commissioner Rule 500-4.33 including the expert witness fees of Drs. Walker and Huey.

That defendant file claim activity reports as requested by this agency.

Signed and filed this 19 day of September, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS J. SCHULTZ,	:	
Claimant,	:	File No. 716024
vs.	:	
QUAD CITY SPOTTING SERVICE, INC.,	:	R E V I E W - R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
U.S. FIDELITY & GUARANTY,	:	FILED AUG 20 1985 IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Thomas J. Schultz, against his employer, Quad City Spotting Service, Inc., and its insurance carrier, United States Fidelity and Guaranty, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained November 27, 1981.

This matter came on for hearing before the undersigned deputy industrial commissioner at Davenport, Iowa, April 12, 1985. 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 December 7, 1981.

The record in this case consists of the testimony of claimant, and of Usula Skiba; of claimant's exhibits A through L; and defendants' exhibits 1 and 2. All objections to exhibits are overruled.

ISSUES

The issues for resolution are:

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

2) Whether a causal relationship exists between claimant's alleged injury and claimant's disability; and

3) Whether claimant is entitled to benefits and the nature and extent of any such entitlement.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's rate of weekly compensation is $182.88. They also stipulated that claimant was off work from his injury date to February 1, 1982; then apparently worked to June 1982 with a six week layoff for nonmedical reasons and returned to work in July 1982 and worked through October or November 1982 after which he did not return to work.

Claimant testified in his own behalf. Claimant reported that he was employed by Quad City Spotting Service on November 27, 1981 and that his duties were to load and unload trucks and assemble and stack pallets. He indicated that this involved stooping and bending as well as lifting weights from 50 to 125 pounds. Claimant reported that he had an air hammer nail driven into his skull while constructing pallets for his employer. Claimant was transported to the hospital by ambulance where Eugene Collins, M.D., immediately performed surgery. Claimant spent two weeks in the hospital, one week of which was in the intensive care unit. While hospitalized he had constant dizzy spells and unbearable pain with profuse sweating. Claimant indicated that upon his release he slept 16 to 18 hours per day; had severe headaches; was highly irritable, withdrew from his family; and had both increased sweating and pain. Claimant also began to experience blackouts. Dr. Collins apparently released claimant to light duty work. Claimant reported that upon returning to work his symptoms increased and he was exhausted. He continued on medications and saw Dr. Collins three to five times per week with phone calls between visits, but worked until a six week company layoff in June 1982. Claimant has been driving a forklift on his initial work return, but he returned to pallet repair on a quota basis following the layoff. Claimant was unable to do this for a full day. Dr. Collins took him off work in October or November 1982.

Claimant reported having had four or five blackouts between November 1982 and July 1983, and having had both an auto and a bicycle accident while experiencing blackouts. In Spring 1983, claimant was admitted to Mercy Hospital for treatment of suicidal idealization, appetite loss, and sleep disorders. Claimant remained hospitalized for six weeks with Thomas Garside, M.D., as his treating physician. Claimant reported that his head pains persisted after his release and he continued to have blackouts and be unable to "handle crowds." Dr. Garside saw claimant four times per month and referred him to Jerry Lowe for therapy.

Claimant reported that his condition improved in the summer of 1984 even though he continued to have pain and dizziness. Claimant attempted to play baseball and weightlift, but was unable to do so. Claimant apparently now sees Dr. Garside quarterly for approximately four hours for medication check and health review. Claimant opined that while he does not feel his condition has stabilized, he feels it is somewhat improved. Claimant reported having seen Truce T. Ordona, M.D.. for twenty minutes. He denied telling Dr. Ordona either that he was not seeking employment because he was receiving workers' compensation benefits, or that he experiences sinus headaches. He indicated that he had told Dr. Ordona that he was not seeking employment because he had received no work release and that his headaches were like sinus headaches. Claimant denied telling Dr. Ordona that he was markedly improved, but stated that he had told Dr. Ordona he was feeling better because of his medications and that his temper outbursts and rages were improving.

Claimant reported that he had been working three jobs before his injury. These included pallet repair in the morning, his Quad Cities job in the afternoon, and bartending on weekends. He reported that he is not trained for other employment but for two years of army service as a heavy equipment operator.

Claimant reported that he has dietary restrictions which include an inability to drink beer as well as teeth deterioration on account of medication. Claimant takes five different prescribed medications daily. Claimant indicated he no longer drives a car and must be driven places where he he cannot go on his bicycle. Claimant has flashbacks when he works with an air hammer and fears seizures.

On cross-examination, claimant agreed that his sister has epileptic seizures and that his father has migraine headaches. He agreed that his pay rate on his postinjury work return was the same as that preinjury at both his Quad Cities and his pallet repair job. He also agreed that he had had no car insurance at the time of his auto accident and, therefore, had problems regarding his drivers license. Claimant expressed a wish to go to college to train as forester, but indicated he has taken no steps as yet to do so. Claimant agreed that jobs in that field are limited and that he was unaware of wages received.

Usula Skiba, claimant's foster mother and maternal aunt, next testified. She corroborated claimant's testimony regarding his physical condition and personality changes following his injury.

Claimant's exhibits A, B, and C, and defendants' exhibit 1 relate to claimant's treatment by Eugene Collins, M.D. A Mercy Hospital medical note for a November 27, 1981 admission indicates that claimant was brought to the emergency room where skull films and a CT scan confirmed a 3.5 inch nail had entered his right temporal region and extended posteriorly and inferiorly in the direction of the brain stem and the midline cerebella region on the right. Claimant was treated with a right temporal craniectomy and removal of nail from the right temporal region with debridement of depressed skull fracture and suture of dural laceration. On December 5, 1981, claimant was released on Dilantin, Chloramphenicol and Cloxacillin. A report of the doctor of December 27, 1982 indicates that claimant underwent an EEG in late August 1982 which was abnormal because of diffuse slowing in the right frontal temporal region consistent with both diffuse and local destructive seizures. The doctor later reports that claimant has remained neurologically intact but complained of personality changes, depressive episodes and headaches all of which are related to his head injury. Dr. Collins released claimant to return to work on February 1, 1982.

A University of Iowa Hospital and Clinics, Department of Neurology evaluation of claimant to Dr. Collins of January 20, 1983 indicates that psychometric testing of claimant revealed a verbal IQ of 84 and a performance IQ of 83 with moderate impairments and delayed recall of visual material and visuoperceptive discrimination, which together with claimant's behavioral changes, is consistent with right hemisphere dysfunction involving the temporal lobe structures. The reporters opine that claimant is 100 percent disabled from his prior work and that he has a permanent partial disability of at least 50 percent but should be able to return to light, nonhazardous work with appropriate retraining.

Claimant's only other training is as a heavy equipment operator. It is unlikely claimant can return to this field with his permanent organic problems.

Claimant is twenty-four (24) years old.

Claimant's motivation to seek work and set realistic career goals is limited.

Claimant has a moderately severe functional impairment.

Claimant has a sixty-five percent (65%) loss of earning capacity.

Claimant's condition was stable as of February 7, 1985.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury of November 27, 1981 which arose out of and in the course ouf his employment.

Claimant has established that that injury is causally related to his current disability.

Claimant is entitled to permanent partial disability from his injury of sixty-five percent (65%).

Claimant is entitled to healing period benefits from his injury date to February 7, 1985 for those dates on which he was actually off work on account of his injury.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability for three hundred twenty-five (325) weeks at a rate of one hundred eighty-two and 88/100 dollars ($182.88) with those payments to commence February 7, 1985. Defendants receive credit for those amounts already paid.

Defendants pay claimant healing period benefits from his injury date to February 7, 1985 for those days on which claimant was actually not working on account of his injury. Defendants receive credit for those amounts already paid.

Defendants pay any accrued amounts in a lum sum and pay interest pursuant to section 85.30.

Defendants pay costs of this proceeding.

Defendants file claim activity reports as requested by the agency.

Signed and filed this 20th day of August, 1985.

Helen Walleser

HELEN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES SCOTT, Claimant, vs. OSCAR MAYER FOODS CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 735633 A P P E A L D E C I S I O N

FILED
SEP 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision wherein it was held that the claimant had established an injury arising out of and in the course of his employment, which injury consisted of a temporary aggravation of a preexisting condition. It was concluded that the claimant did not establish a causal connection between his work-related aggravation and any permanent disability therefore claimant was entitled to only temporary total benefits.

The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 14; defendant's exhibits A through D; medical records in the commissioner's file admitted by motion; and briefs filed by the parties.

ISSUES

The issues as stated by the claimant are:

> Whether the defendant can obtain offset under 85.38(2), when no testimony was elicited from any party as to the source of the funds paid by way of sick leave to Claimant, after having pleaded the same, but having failed to raise 85.38 as an issue in the pre-trial conference, and not objecting to the pre-trial order.
>
> Whether Deputy Walleser could find, in spite of all the evidence, save that of Dr. Sunderbruch, that Claimant had suffered no permanent partial disability, when Dr. Sunderbruch never found anything wrong with Claimant and did not believe Claimant even had suffered temporary total disability, and that Deputy Walleser's findings are inconsistent.
>
> Whether the finding of Deputy Walleser that Claimant had only suffered a temporary total disability is contrary to the manifest weight of the evidence, where all evidence showed a job aggravation and permanent restricions that followed, with no evidence of any other aggravating cause or factor.

REVIEW OF THE EVIDENCE

At the hearing the parties stipulated to a compensation rate of $278.85 and the reasonableness of the medical expenses except those charges of Barry Fischer, M.D. The deputy stated the issues, one of which was whether the defendant was entitled to a credit under section 85.38(2), Code of Iowa. Defendant's counsel stated that the summary of issues by the deputy was a fair statement of the issues. The prehearing conference and order also indicates that section 85.38(2) was an issue for adjudication at the hearing.

At the time of the hearing the claimant was a 37 year old married male with two children. He began working for the defendant in October 1964. His last day of work was March 2, 1983. The claimant's last activity for the defendant involved taking boxes off of conveyor lines and placing them on pallets. The claimant would reach up and grab the boxes squeezing them together then turning sideways and placing them on a pallet. This required extensive lifting, twisting, bending, and overhead reaching. The boxes involved weighed between 2 1/2 and 24 pounds. The claimant estimated he performed this activity between 800 and 1,000 times per hour. The claimant testified he did this five days a week for a couple of years.

The claimant stated that he began noticing pain in his neck and numbness of his fingers. He claims to have told fellow workers of his condition. On March 2, 1983 the claimant called the defendant and stated that he would not be in to work because of the neck pain and numbness of his fingers. The claimant saw Micheal Schreck, M.D., who prescribed Motrin and sent claimant to Mercy Hospital for physical therapy. In addition, the claimant stated he was seen by Eugene Collins, M.D.; R. J. Chesser, M.D.; John T. Johnson, D.O.; and Barry Fischer, M.D., at his counsel's request. As of June 1984 the claimant stated he was not feeling any better. He has undergone no treatment other than physical therapy and Motrin. The claimant recalled that Dr. Collins suggested an operation, but with a 50-50 chance of success the claimant declined.

Our next concern is 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 November 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).

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).

A cause is proximate if it is a substantial factor in bringing about the result. It 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).

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. Collins has opined that claimant's depression personality changes, and headaches are related to his injury. The University of Iowa evaluators found claimant's changes in intellectual level and reasoning functions consistent with right hemisphere dysfunction. Dr. Garside diagnosed claimant's conditions as organic personality disorder and organic affective disorder both post or due to right temporal lobe injury. Defendants raise the spector of claimant's father's migraine headaches and his sister's epileptic seizures apparently to suggest that claimant's current problems have a source outside his work injury. No history was presented which even intimates claimant, himself, had either problem prior to his work injury, however. Hence, defendants' contention appears to have little factual merit. Furthermore, even had predisposition to either condition been evident, claimant had no symptoms of either before his injury. Hence, the injury would be viewed as the incident which light up any preexisting problem. Likewise, medical notes of Dr. Ordona suggest claimant had unresolved emotional conflicts related to his family situation and behaviorial problems prior to his injury. Other medical reports do not speak to either of these findings. Even if they did, however, it again appears claimant's behavior and emotional state were sufficiently stable as to permit him to function both industrially and socially. Claimant has had manifest difficulties functioning in both spheres since his injury. As noted, numerous other authorities attribute these to his organic condition and his psychological reaction to his injury. Thus, claimant's psychological state, like his organic problems, must be attributed to his work injury.

Our next concern is claimant's benefit entitlement. We shall first address the question of claimant's healing period under section 85.34(1). Claimant was unable to return to the same or substantially similar work. The question then is when maximum medical improvement was achieved. The University of Iowa evaluators initially assigned claimant a permanency rating on January 20, 1983. The Medical Evaluation Center indicated claimant had not terminated his healing period as of June 8, 1983. Claimant was subsequently rehospitalized for psychological problems found related to his injury on August 5, 1983. He later received therapy and medical followup. Dr. Garside stated his agreement with the Medical Evaluation Centers permanent partial disability assessment on March 29, 1984. He did not report claimant's condition stable until February 7, 1985, however. He then reported that claimant's mental state had improved from that of the previous year. February 7, 1985 is, therefore, is accepted as the date on which claimant achieved maximum medical improvement and claimant is entitled to healing period benefits to that date.

We last consider permanency.

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 impairment 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).

Claimant is 24 years old, has a high school education, and no special training or experience beyond manual labor and heavy equipment operation. A return to the latter field appears unrealistic given claimant's organic problems. Many experts have opined he can return to light duty manual labor with appropriate retraining. It appears claimant cannot return to his former job for both organic and psychic reasons and his former employer has not attempted to accommodate him by providing more appropriate work. Claimant is not now working and offered no evidence regarding attempts to seek other employment. This fact may indicate that claimant has little motivation to pursue career goals which are realistic for him, a fact to be weighted with others in assessing his industrial disability. Claimant has expressed an interest in retraining in both forestry and German. Other evidence suggests each goal may be intellectually unrealistic for claimant, however. Further, claimant is not actively pursuing either goal and lacks even basic information regarding vocational options in either field. These facts also suggest claimant is not realistically coping with his current level of industrial functioning. On the other hand, claimant does have serious handicaps which have disturbed his organic, intellectual, and emotional functioning as a result of his injury. These handicaps of themselves will make pursuit of even realistic career goals difficult for claimant and will limit his career options and earning capacity throughout his life. Claimant's organic and psychological disability, apparently meaning functional impairment, has been rated as between 0 and 50%. The zero rating appears unrealistic given claimant's remaining difficulties. Claimant has achieved a more stable level of psychological functioning than that when his impairment was originally assessed, however. The Medical Evaluation Center reporters opined psychological improvement would likely decrease his disability. Claimant is found to have a permanent functional impairment of approximately 30 to 40%. That, with other relevant factors discussed, indicates a substantial industrial disability which is found to be 65%.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant was injured November 27, 1981 when a 3.5 inch air hammer nail was embedded in his skull while he assembled pallets for his employer, Quad City Spotting Service.

The nail entered claimant's right temporal region and claimant underwent a craniectomy.

Claimant has experienced blackouts, seizures, headaches, personality changes, and decreased intellectual functioning following his injury.

Drs. Collins and Garside and the University of Iowa evaluators attribute these conditions to claimant's work injury.

Claimant cannot return to his former job or similar work, but retraining for light duty manual labor is recommended.

Claimant is a high school graduate.

Claimant's exhibits F through J relate to claimant's treatment under Thomas Garside, M.D. Mercy Hospital Records of an August 5, 1983 admission and a September 1, 1983 discharge indicate a final diagnosis of organic personality disorder, and organic affective syndrome both due to right temporal lobe injury. Claimant was discharged on Tegretol 400 mg., Ativan 2 mg., Haltol 2 mg., and Ritalin Sr 20 mg. An attached psychological evaluation of Wayne M. Sliwa, Ed.D., states that claimant obtained a full scale IQ of 79 on the Weschler Adult Intelligence Scale - Revised; a reading grade score of 9.0 with a standard score of 101 on the wide range achievement test for reading. The Luria-Nebraska Neuropsychological Battery revealed right hemispheric dysfunction located in the frontal lobe and the anterior temporal areas of the right hemisphere. The specific cognitive deficits include difficulties in dealing with new or unusual sensory input. The reporter opines that claimant will have difficulty in the analysis of unfamiliar stimuli; in sequential processing; in areas of conflicts and special problems; in functioning in nonverbal areas of speech; in the analysis and synthesis as well as in the understanding of nonverbal communication and in interpreting his own and other's emotional states and that claimant will show slowness in motor functioning. Claimant was also demonstrating difficulties in simple and complex arithmatic calculations. A report of Dr. Garside of February 7, 1985 indicates that claimant's condition was stable and that claimant is able to integrate new material and is not particularly explosive though he continues to be easily frustrated but less so than in the previous twelve to eighteen months. The doctor recommends that claimant continue on his medications and states claimant can attempt technical or vocational training. In a report of March 29, 1984, Dr. Garside states that some of the consequences of claimant's right temporal lobe injury include emotional lability, low frustration tolerance, and defects in social judgment which could lead to considerable difficulty in work where frustration or supervision conflicts might erupt. The doctor states that he and Dr. Sliwa agree with the Des Moines Rehabilitation Center's assessment that claimant has a 50 percent total person disability.

Claimant's exhibit D is a psychological evaluation of W. David McEchron, Ph.D. The evaluation is undated but apparently was conducted in conjunction with claimant's evaluation by Truce T. Ordona, M.D. The reporter concludes that claimant is currently functioning in the intellectual range of borderline retarded to dull normal which represents a significant deterioration due to his head injury. He states claimant manifests both deficits in global cognitive functioning and signs of prepsychotic functioning and needs monitoring for signs of organic affective disorder. The reporter opines that these types of problems tend to be fixed and not very amenable to intervention, but require external control, coupled with psychotherapy. He notes the outlook is guarded for further recovery and displays of anger and possible periods of psychotic functioning can be expected.

Claimant's exhibits E and L are reports of Truce T. Ordona, M.D., of May 9, 1984 and April 3, 1985, respectively. In the May 9, 1984 report, Dr. Ordona indicates that he had two interviews with claimant, first alone and then with his father and his aunt, Usla Skiba, with the total of both interviews being three hours. In the report, the doctor states that he does not dispute that claimant has a permanent disability of from 25 percent to 50 percent under the American Medical Association guidelines, but states claimant has secondary gain from his injury that will prevent his truly benefiting from rehabilitation. The doctor states that his interviews with claimant revealed that claimant " wishes to have a white collar job and have his medical expenses covered forever as long as they relate to the above mentioned injury." The doctor opines that claimant may have some residuals in his cerebrum related to the injury, but can work in a blue collar position if not exposed to the injury site of which he has a phobia-like fixation. In the April 3, 1985 report, Dr. Ordona evaluates claimant's current permanent disability under the AMA Guides as zero percent. He quotes claimant as explaining that he has not sought employment: "because, to tell you the truth, I cannot find one that will pay as much as workmans [sic] comp. which is $182.88. I expect a full commutation settlement." He reports that claimant's headaches, sleep disorder, appetite loss, rages or temper outbursts, depression, and discomfort with crowds have all improved or totally disappeared.

Claimant's exhibit K is the Medical Occupational Evaluation Center report on claimant for dates of examinations of June 6 through 8, 1983. In the psychologist's report, the reporter, Todd Hines, Ph.D., notes that claimant appears to have sustained some residual organic brain damage, but that the degree of impairment is not clear at the time of the report due to some equivocal and disparate behavior and psychological patterns. He notes that claimant has not reached psychological healing and that psychological turmoil likely remains a problem, a fact which makes accurate assessment of claimant's organic and permanent psychological impairment difficult. In the Transfer of Skills Report, the reporters, Robert W. Jones, B.S., and G. Patrick Weigel, M.A., indicate that claimant cannot return to his former employment, but should return to light, nonhazardous work with appropriate retraining. They note that claimant expressed an interest in receiving a college degree in German and becoming a translator. The synopsis of the overall report states that while claimant will likely improve with therapeutic counseling and experience in a pain center or both, the fact of an organic brain syndrome and some post-traumatic seizure syndrome creates a functional impairment of 40-50 percent which may decrease in the future to one-half that range.

Defendants' exhibit 2 is a report of an EEG of August 12, 1983 indicating that claimant had a normal EEG, awake and asleep.

APPLICABLE LAW AND ANALYSIS

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 November 27, 1981 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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 v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971), 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.

Little dispute exists as to this issue. A three and one-half inch air hammer nail entered claimant's skull while he was assembling pallets for his employer during normal working hours. No evidence of horseplay or other like activity was presented. As a pallet assembler, claimant could reasonably be expected to be working with or near air hammers. Thus, the cause or source of claimant's injury like its time, place and circumstances must be attributed to his employment.

The claimant stated that he was offered a job by the defendant lifting trays of meat. The claimant said he turned the job down because he was not released to do such work by his doctor. Claimant testified he has looked for work but has had no success.

Claimant was paid sick pay by the defendant but received no temporary total disability after his sick pay ran out. The claimant saw the defendant's company doctor, J. H. Sunderbruch, M.D., within 90 days after he stopped working. He testified that he told Dr. Sunderbruch what his symptoms were and what was causing them.

On cross-examination the claimant said that he had been seen by Dr. Fischer for only half an hour. The claimant last saw a physician (Dr. Fischer) in June of 1984. The claimant last saw a doctor that recommended treatment (Dr. Johnson) in May of 1984. He saw Dr. Johnson after his fellow employee's recommended him. Regarding the alleged offer of a job by defendant lifting meat trays, the claimant admitted he never talked to Dr. Johnson about the job.

Vernon Keller, the safety-security manager for the defendant was called to testify for the defense. One of Mr. Keller's principal activities was administration of workers' compensation claims. He stated that he did not offer to the claimant a job of lifting meat trays.

Claimant's exhibit 1 contains letters from Dr. Collins to Dr. Schreck dated April 11, 1983 and September 12, 1983; and a report dated May 18, 1983 addressing nerve conduction and EMG studies. The latter states as impression: Normal EMG findings; normal nerve conduction values; nothing to indicate entrapment neuropathy across cubital canal nor axillary portion of the ulnar nerve. It also states the claimant's strength in his extremities is normal for all major muscle groups. Claimant's exhibit 2 is a reproduction of the report dated May 18, 1983.

Claimant's exhibit 3 is a letter dated May 6, 1983 from Dr. Sunderbruch to the defendant's medical department. It states that x-rays definitely showed arthritis of the cervical and lumbar spine. It later states, "I feel that this patient will definitely aggravate his condition with heavy lifting and working in cold atmospheres." Claimant's exhibits 4 and 5 are defendant's form, "attending physician reports." Exhibit 5, dated June 16, 1983 and signed by Dr. Collins, states that the claimant has been continuously disabled from April 7, 1983 through June 13, 1983. It states that claimant is able to return to work.

Claimant's exhibit 6 is a letter to defendant from Dr. Sunderbruch (unsigned). The doctor states that he can find no objective findings in the claimant and finds no reason why the claimant cannot return to work. Claimant's exhibit 7 is defendant's attending physician's report stating claimant was disabled from April 7, 1983 through September 12, 1983 by Dr. Collins dated October 4, 1983. Claimant's exhibit 8 is a letter to defendant from Dr. Schreck dated October 12, 1983. Claimant's exhibit 9, a letter from Dr. Schreck dated February 6, 1984 to claimant's counsel. Dr. Schreck reports claimant refuses to have a myelogram. Aggravation of a preexisting ailment is possible. It continues that the claimant's condition should improve with rest, physical therapy, and anti-inflammatory medications.

Claimant's exhibit 10 is a letter from Dr. Fischer to claimant's counsel dated June 5, 1984. Dr. Fischer examined claimant on May 23, 1984. Dr. Fischer gives the following diagnosis:

> This patient sustained a repititious [sic] trauma from lifting, twisting and bending and reaching over head which tended to aggravate or accelerate a pre-existing condition of osteoarthritis. ...
>
> ...[T]here is a loss of range of motion of the cervical spine in flexion, extension, lateral rotation and lateral bending with a loss of range of motion of both arms at the shoulders.

Dr. Fischer ascribes to the claimant a 25 percent permanent partial impairment to the body as a whole. Dr. Fischer is board certified. In his deposition Dr. Fischer stated he saw claimant on March 28, 1984 and at that time he said claimant wouldn't get any better. It was his opinion that claimant's osteoarthritis was present before the alleged injury.

Claimant's exhibit 11 is a letter to claimant's attorney from John Johnson, D.O., dated June 19, 1984. Relevant portions are set out below:

> This patient has disc disease, C-6, C-7, with generalized thinning of all the cervical disc spaces, and osteoarthritis. In addition to the pain and tenderness over the cervical, rhomboid and trapezius muscles bilaterally, the patient has

decreased range of motion of the cervical spine, with flexion, extension, and lateral rotation averaging only about 66% of normal, and he has some loss of range of motion of both arms at the shoulders. He also has some sensory loss over the right ring and small finger. I consider particularly significant the intervertebral foraminal encroachment at C-6, C-7.

The patient has reported to me that over the course of many years of working at Oscar Mayer in Davenport, he did a lot of lifting, twisting, bending, and reaching overhead, which, in my opinion, is certainly the cause, or at the very least, an accelerating and aggravating factor in the patient's symptomology [sic]. The aggravation to the arthritic condition is certainly on a permanent basis.

An x-ray report by the Davenport Osteopathic Hospital dated February 24, 1984 states for impression of examination of cervical spine:

1) Generalized thinning of the cervical disc spaces.

2) Osteoarthritis.

3) Foraminal encroachment, particularly at the C6-C7 level, especially on the right side.

Impression for lumbar spine states:

1) Thinning of the lumbosacral disc space with associated hypertrophic marginal lipping with minimal posterior lipping.

2) Spondylolysis involving L5.

Claimant's exhibit 12 is a statement from Mercy Hospital in Davenport showing a balance due of $141.60. Claimant's exhibit 13 is defendant's form, Job Placement of the Impaired Employee, filled out by claimant's foreman and Dr. Johnson regarding placement. Claimant's exhibit 14 is the curriculum vitae of Dr. Fischer.

Defendant's exhibits A and B are determinations of sick pay benefits given claimant.

Defendant's exhibit C is the deposition of Dr. Sunderbruch. Dr. Sunderbruch is a family practitioner who does considerable industrial medicine and surgery. He does work for the defendant on an irregular basis. The doctor saw the claimant three times. The results of x-rays taken June 1, 1982 were as follows:

Therefore, his impression was: "One, normal right shoulder; two, arthritis of the cervical and lumbar spine with some encroachment upon intervertebral foramina opposite C6 and 7 on the right side; three, a spondylolysis of the pars of L5 with narrowing of the fifth lumbar interspace.

Dr. Sunderbruch stated that he could find no objective findings of a disability. He further stated that the claimant gave him no history that the alleged injury was work related.

Dr. Sunderbruch next saw the claimant on May 5, 1983. He found no evidence of any disability in either the ulnar or median nerve. The doctor's report of May 6, 1983 states claimant has arthritis in is cervical spine which the claimant must have had for quite some time. The doctor stated that the claimant told him that he had been working in his garden. Dr. Sunderbruch felt the claimant was capable of some type of work. Dr. Sunderbruch's medical opinion follows:

Q. Doctor, do you have an opinion based upon a reasonable degree of medical certainty as to whether this patient has any permanent partial disability related and resulting from his employment in any manner?

A. Yes. I think any disability that this man might have is all subjective, and I think it's due to the arthritis in his neck causing some neuropathy that is transitory, comes and goes, and I don't think should completely disable him nor be -- I think he could do many types of work, perhaps not work in subzero temperatures or in high humidity but the ordinary things that are caused -- would aggravate arthritic conditions, but the condition that this man has I don't think is due to his employment.

(Defendant's Exhibit C, pages 10-16)

On cross-examination the doctor admitted to being the defendant's doctor for 40 to 45 years. Defendant's exhibit D was considered above.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 2, 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).

In Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960), the Iowa Supreme Court stated: "It is, of course, well settled that when an employee is hired, the employer takes him subject to any active or dormant health impairments incurred prior to this employment. If his condition is more than slightly aggravated, this resultant condition is considered a personal injury within the Iowa law."

When an aggravation occurs in the performance of an employer's work and a causal connection is established, claimant may recover to the extent of the impairment. Id. at 620

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.

Industrial disability is a reduction of earning capacity, and not mere functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience and inability because of the injury to engage in employment for which claimant is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Martin v. Skelly Oil Co., 252 Iowa 128, 106 N.W.2d 85 (1960). See also Blacksmith v. All-American, Inc., 290 N.W.2d 348, and McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Claimant raises an issue of offset under section 85.38(2). The evidence weighs against the claimant. Section 85.38(2) is in the pre-trial order as an issue. The claimant testified that the sick pay was paid by the defendant. Even if section 85.38 was not a pre-trial issue, the claimant may be estopped from asserting the issue due to the fact that claimant's attorney stated that the deputy's reading of the issues [which included section 85.38(2)] was a fair statement of the issues.

Claimant's second issue is whether the deputy could find that the claimant suffered no permanent partial disability. It is clear from all the medical evidence, including Dr. Sunderbruch's letter, that the claimant did suffer an aggravation of his osteoarthritic condition. The question is whether it is permanent. The deputy in a thorough analysis did not find the claimant's condition to be permanent. Objective findings supporting the claimant's position are scarce. Dr. Sunderbruch, while not board certified in orthopedics, neurology, etc., has many years experience with industrial health. Claimant asserts self-interest and bias. The best way for the claimant to have proven such an accusation would be to have produced objective fingings at odds with Dr. Sunderbruch's opinion. This the claimant has not done. Dr. Fischer's testimony is considered. However, as the deputy stated, Dr. Sunderburch's findings, like those of Drs. Schreck, Collins, and Chessler, are far more consistent with claimant's reported symptoms and activity restrictions than are those of either Drs. Johnson or Fischer. Thus, Dr. Sunderburch's opinions are given greater weight and credibility. Dr. Schreck stated that the claimant's condition should improve with rest, anti-inflammatory drugs, and physical therapy. The claimant received all of these.

In summary the evidence does not weigh in claimant's favor. Claimant's EMG and nerve conduction studies did not suggest radioculopathy or peripheral denervating process. Regarding the claimant's current symptomology the deputy stated:

It is possible that these symptoms result from the work-related aggravation of claimant's preexisting osteoarthritis; it is equally possible that they relate to the underlying condition. Indeed, Dr. Schreck's opinion that claimant's aggravation likely should have resolved with treatment and the lack of objective findings to support any greater underlying pathology support the latter inference.

There is no error in the deputy's analysis. The deputy may accept expert evidence in whole or in part, or may reject it outright.

FINDINGS OF FACT

1. Claimant has preexisting osteoarthritis.

2. Claimant worked as a palletizer for defendant Oscar Mayer.

3. Claimant had to grab, twist, turn, lift, bend, and reach overhead in performing his duties.

4. Claimant had no specific work incident on March 2, 1983.

5. Claimant has had electromyelographic and nerve conduction velocity studies performed. These suggest neither radiculopathy nor peripheral denervating process.

6. Claimant temporarily aggravated his preexisting osteoarthritis through his work activities.

7. Claimant could have returned to work June 16, 1983.

8. Claimant first experienced loss of sensation in his right hand in April 1982.

9. Claimant has received sick leave benefits during the time he has been off work because of his condition.

10. Section 85.38(2) benefits were properly an issue before the deputy at the hearing.

CONCLUSIONS OF LAW

Claimant has established an injury arising out of and in the course of his employment, which injury consisted of a temporary aggravation of his preexisting osteoarthritis.

Claimant has not established a causal relationship between his work-related aggravation and any permanent disability.

Claimant has established he is entitled to temporary total disability benefits from March 3, 1983 to June 16, 1983.

Defendant has established it is entitled to a credit for sick leave benefits paid claimant.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant temporary total disability benefits at a rate of two hundred seventy-eight and 85/100 dollars ($278.85) per week from March 3, 1983 to June 16, 1983. Defendant is to receive credit for sick leave benefits paid claimant.

That defendant pay accrued amounts in lump sum.

That defendant pay interest pursuant to section 85.30, Code of Iowa.

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

That defendant file a final report upon payment of this award.

Signed and filed this 30 day of September, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIRGIL A. SCOTT,

Claimant,

vs.

AMF LAWN & GARDEN -- WESTERN INTERNATIONAL,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier, Defendants.

File No. 689011

A P P E A L

D E C I S I O N

FILED

JUL 31 1985

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a proposed agency decision in arbitration filed November 2, 1984. The proposed decision held that the claimant had an episode of back pain arising out of and in the course of his employment on January 6, 1982 which resulted in temporary total disability only. In a rehearing decision on the same matter filed December 12, 1984 the deputy expanded her findings to include, "[T]hat the claimant suffered no permanent disability as a result of his January 6, 1982 injury." The record on appeal consists of claimant's exhibits 1, 3, and 4, including Jones deposition exhibits 1 and 2; defendants' exhibits A through F; the hearing transcript; and briefs filed by the parties.

ISSUE

The issue on appeal is whether the employment injury of January 6, 1982 is a proximate cause of subsequent surgeries of either January of 1983 or April of 1984, or both, thereby entitling the claimant to associated medical and healing period benefits.

REVIEW OF THE EVIDENCE

The parties stipulated to the following: $259.14 as the applicable rate; that the claimant was off work between January 3, 1983 to June 30, 1983 and between April 3, 1984 to May 30, 1984, the date of the hearing.

The claimant, at the time of the hearing, was a 36 year old married male who began working for the defendant employer on September 18, 1972. In 1974 and 1976 the claimant was involved in motorcycle accidents with no resultant injuries to his back. In 1975 the claimant's back gave out at work. He testified that he received an injection of cortisone and returned the next day. In 1976 the claimant was off for about 20 days because of back problems. There was also a period in 1978 when the claimant was off due to back problems. In 1981 the claimant twisted his back and went to the plant nurse who told him it was just old age.

On January 6, 1982, while working in the boxing area, the claimant experienced a sharp pain in his lower back which shot down his leg. After his work break the claimant had trouble straightening up. For the next few days the claimant had trouble with his back. Work in the boxing area consists of packing riding mowers which are lowered by a hoist with occasional lifting required to position the unit in the crate. The claimant treated himself with ice packs. He also stated that he told people at the defendant employer's plant of his injury.

The claimant saw Albert L. Clemens, M.D., the company doctor, in connection with the incident. Dr. Clemens told the claimant to stay "off it" [back] for a couple of days and suggested a myelogram. The myelogram was not arranged by Dr. Clemens. The claimant sought out and saw Robert A. Hayne, M.D., on his own. He testified that this was because Ken Strosahl, the safety man at the plant, told claimant that the incident did not fall under workers' compensation. In February of 1982 the claimant saw Dr. Hayne who told the claimant he needed a myelogram, but as long as the claimant could live with it, he was fine. The claimant did not like Dr. Hayne and was apprehensive at the prospect of a myelogram so he declined the myelogram.

The claimant continued to work through 1982. Sometime between September 5 and September 18, 1982 the claimant was laid off. Between January 6, 1982 and the layoff the claimant stated he had pain in his right leg. During the layoff the claimant rested his back to see if it would recuperate. He said that this episode was much more severe than any previous back episode. The claimant's back did not improve during the layoff so he went to see Ronald Evans, D.C., a week to ten days before being called back.

The claimant returned to work in November of 1982. The claimant stated that returning to work aggravated his back complaints. Dr. Evans told the claimant that he had done all he could and referred claimant to Robert C. Jones, M.D.

The claimant saw Dr. Jones in November of 1982 who suggested a myelogram. This time the claimant assented. However, the myelogram was not done until January 3, 1983 due to the fact that claimant was apprehensive plus he wished to get the 30 working days in before Christmas. Surgery was performed on the claimant's low back during the same hospital stay. The claimant was released by Dr. Jones without restriction on June 30, 1983. At that time however, AMF was on layoff. During claimant's hospitalization and recuperation the claimant had been receiving weekly indemnity benefits in the form of sick pay. These benefits were to run out June 30, 1983. For the claimant to receive unemployment he had to have a work release without restriction. The claimant testified that he still had physical limitations.

The claimant returned to work August 1983. His duties at that time required him to lift 3 to 5 pounds, twist, and set a unit over his head. The claimant stated that he did "real good" for about two months, then about 1:00 p.m. every day he experienced pain down his leg. The foreman placed claimant in other jobs and the claimant would go back to his old job and try again. The claimant was taken off that job January of 1984 and put on another job he could handle better. The claimant went to see Dr. Jones again. He kept working at this time.

Up until early April of 1984 the claimant's leg pain traveled from his left to his right. The claimant had another myelogram done and tried to work the next day. He testified he experienced a lot of pain. The next day claimant had surgery. He has been off work since the surgery.

On cross-examination the claimant admitted that he has missed substantial periods of work over the years due to back problems. Some of these episodes did not come on by working. The claimant had other workers' compensation back related injuries on September 25, 1975 and January 3, 1976. When the claimant returned to work in 1983 he worked eight weeks with no back or leg pain.

Phyllus Scott, claimant's wife, testified that in January of 1982 her husband told her that he hurt his back. She noticed that when the claimant returned to work in November of 1982 his condition immediately worsened.

Jerry Johnson, a foreman with the defendant employer, testified that in January of 1982 he had supervised the claimant for three or four months. He had no recollection that the claimant told him of an injury in January of 1982. It was standard operating procedure for Mr. Johnson to send an injured worker to the nurse who would then send an injured job form back to him to fill out. No such report was filled out regarding the claimant. He had no recollection of complaints from claimant between January 14, 1982 and May 18, 1982 and that the claimant could perform his duties satisfactorily.

Ken Strosahl, defendant employer's safety and security supervisor, testified for the defendants. Strosahl stated that he spends 85 percent of his time trying to reduce injuries. He stated that the dispensary notes are maintained under his supervision. The dispensary notes contain anything to do with an injury, work related or not. He also maintained the personnel files. Strosahl testified that on September 6, 1973 the claimant first reported a back problem. On September 25, 1975 the claimant missed 19 days due to his back. In February of 1976 claimant missed 20 back related work days. The claimant visited the dispensary four times in 1975 with complaints of back pain. He visited the dispensary six times in 1976. Beginning on April 21, 1978 the claimant missed 27 days because of his back. Beginning on February 21, 1979 and December 5, 1979 the claimant missed 10 to 13 days of work respectively. On February 20, 1980, March 18, 1980 and April 29, 1980 the claimant went home early due to back pain.

Strosahl did not hear about claimant's January 1982 incident until he saw the claimant's letter of January 18, 1982. The witness testified that the claimant told him that he had pain from a prior accident at AMF. On January 19, 1982 the claimant returned to work under restriction by Dr. Clemens to not repetitiously lift, and no lifting over 10 pounds. Beginning August 29, 1983 the claimant worked until October 11, 1983 when he was again laid off. On April 10, 1984 the claimant took a leave of absence.

Gerald Gervais testified in rebuttal for claimant stating that he worked for defendant employer in January 1982 and noticed back pain in claimant.

Claimant's exhibit 1 is a deposition of Robert C. Jones, M.D., a neurologist. Dr. Jones testified that he first saw claimant on November 11, 1982. Dr. Jones performed surgery on claimant's low back in January of 1983. He also operated on claimant at the same level in April 13, 1984 for recurrent lumbar disk. In the April 13, 1984 operation, Dr. Jones found an extruded disk. Dr. Jones testified that in December of 1983 the claimant experienced back and leg pain that worsened and led to surgery in April of 1984. The doctor expressed the opinion that claimant's activities and injury in January of 1982 were significant factors in bringing about claimant's condition that required surgery in January of 1983 because he called Dr. Clemens after he saw the claimant on November 11, 1982 and Dr. Clemens verified that the claimant had been in his office for the same problem. Dr. Jones expressed the following opinion regarding the claimant's surgery of April 1984.

> Q. What part, if any, does that condition that existed then and that incident back in '82 play, sir, in the recent surgery that you performed?
>
> A. I think that the patient's major problem for requirement of the first surgery was from the January of '82 episode. I think as a result of his continuing to work at the same job over the period since that time resulted and caused a recurrence of a disk in his low back requiring another operation of the same level.
>
> Q. Do I take it then that the recent surgery is occasioned then as a result of combination of both the condition caused by the January '82 incident together with or superimposed upon the recent work activities leading up to and just prior to the recent surgery?
>
> A. Yes, since it was at the same level.
>
> Q. How long would you anticipate that Mr. Scott would be off work from this recent surgery, sir?
>
> A. Depending on what type of work they put him on, three to six months.
>
> (Claimant's Exhibit 1, pages 10-11)

Jones exhibit 1 is a collection of letters from Dr. Jones to Dr. Evans with the exception of a letter addressed to whom it may concern. In a letter dated November 24, 1982 after reciting the claimant's history which included the compensable injury at defendant employer for five or six years previously, the doctor states: "I felt that he had a lumbar disc syndrome which had its beginnings when he hurt his back in 1975 and has caused intermittent flare-ups since." A March 15, 1983 letter states in part:

> I admitted him into Mercy Hospital, performed a myelogram with amipaque showing a herniated disc at L4-5 on the right and took him to surgery and with the help of the operative microscope removed an extruded disc at this level....
>
> When last seen in the office on March 14, 1983 he was free of leg pain although he had a slight list to the left which is not uncommon in L4-5 disc problems.

After stating in a letter dated September 15, 1983 that the claimant had some pain at L4-5 but no leg pain, the doctor writes: "I felt he had a good result from the surgerv and if someone gave a physical impairment figure of 15%, I would not disagree with such a figure." In the "to whom it may concern" letter (presumeably the employer) dated March 15, 1984, Dr. Jones states that the claimant started again having problems with his back in the fall of 1983 and is having pain in his back and both legs. Dr. Jones states that claimant's original problem was work related from stapling boxes in January of 1982 and that his present problem is a continuation from that injury. Jones deposition exhibit 2 is a collection of hospital records in connection with the operation of January 7, 1983.

Claimant's exhibit 3 is a letter from claimant to defendant dated January 18, 1982. It states in part: "On Jan. 6, 1982 while boxing on line 2 I twisted wrong & experienced some back pain." The letter goes on to state that he was off work the 8th and 11th of January, 1982. He states that he reported the injury to the nurse on January 12.

Claimant's exhibit 4 is a collection of Mercy Hospital reports arising from the April 1984 surgery. The myelogram reported dated April 3, 1984 gives as impression: "1) Extradural defect at L-4 - L-5 on the right suggesting a disc herniation.... 2) Poorer filling of the S-1 root on the right." The CT scan done on April 3, 1984 states findings highly suspicious for recurrent disk herniation at L4-5 on the right. The surgical report of April 13, 1984 states that the claimant was given a "lumbar laminectomy lumbar 4 right."

Defendants' exhibit A is a deposition of Robert A. Hayne, M.D., accompanying exhibits. Dr. Hayne specializes in neurological surgery. Dr. Hayne saw the claimant on February 3, 1982. As part of the history, the claimant told Dr. Hayne that he strained his back four or five years ago. In January 1982 the claimant had back pain. Dr. Hayne reported that the results of his examination were essentially within normal limits and diagnosed the claimant as having a low back strain. After examining Dr. Evans' notes and the Mercy Hospital records Dr. Hayne stated that it was not likely from the history the claimant gave and his findings that the incident described by the claimant on February 3, 1982 was causally related to the herniated disk that Dr. Jones found. Dr. Hayne stated he would have anticipated more physical findings. However, on cross-examination Dr. Hayne said it was possible that the complaints the claimant was having on February 3, 1982 would be consistent with a disk that had not yet completely ruptured so as to cause severe complaints.

Defendants' exhibit B is the deposition with accompanying exhibits of Ronald Evans, D.C., who first saw the claimant December 7, 1979 in connection with low back pain the claimant was experiencing. Dr. Evans treated claimant for several days. His initial conclusion was that the claimant suffered from a disk syndrome. However, due to the quick resolution of the claimant's symptoms, Dr. Evans felt that instead the claimant had suffered from a severe lumbar strain.

The claimant was next seen by Dr. Evans on October 31, 1981. The claimant came in with the appearance of chronic lumbosacral strain syndrome with the right leg sciated. The claimant could not identify any specific act that brought on his low back discomfort.

On October 26, 1982 the claimant came in to see Dr. Evans with severe low back and right leg pain. The claimant presented a history of low back discomfort for the last four to five weeks. The claimant stated he twisted the wrong way at work. Dr. Evans diagnosed acute lumbar disk syndrome and commenced intensive conservative management consisting of ultrasound and electric muscle stimulation. Dr. Evans or his partner saw the claimant on a daily basis until November 6, 1982 when the claimant was referred to Dr. Jones for surgery. Dr. Evans testified that Dr. Jones' surgery at L4-5 was consistent with his diagnosis.

Dr. Evans distinguished the October 1982 visit from the October 1981 visit in that the former had clear cut neurological involvement while the later was more characteristic of muscle strain and that neurological findings were absent. Dr. Evans expressed the opinion that the symptoms seen in October 1982 were not related to the incident of January 1982. Dr. Evans stated that it was his experience that patients could only tolerate these symptoms for three to four weeks. He could not link the two events causally because a person cannot go that many months with that kind of symptom severity. Dr. Evans admitted that the work stresses between 1981 and October 1982 were a significant contributing cause of claimant's problems, however, he did not know from what stresses or or where they came from in the work. He stated that the chronic lumbosacral strain diagnosed on October 30, 1981 was the recurrence of the same mechanism of trauma that the claimant had in the past. Part of the deposition exhibit reads as follows: "Virgil Scott October 26, 1982. Acute lumbar disc syndrome 3-4 weeks duration Treatment: ultrasound, tetnazation petrissage, cox flecture manuvers [sic] patient replaced in his D-cart brace bed rest ice and seen in 1 day; work, 'Twisted the wrong way.'"

Defendants' exhibit C is a deposition of William Boulden, M.D., a specialist in orthopedic surgery. He testified that he first saw the claimant on May 4, 1978 with a history of having lifted metal at work and suffering low back pain. Dr. Boulden felt that the claimant had a musculoskeletal strain. By May 12, 1978 the claimant had improved and gone back to work without restriction. The doctor next saw the claimant on March 5, 1979 with a history of welding with resultant low back pain on both sides. That indicated to Dr. Boulden a musculoskeletal problem. On May 1, 1980 the claimant was again seen with symptoms synonomous with prior visits.

Dr. Boulden opined about the possible causal connection between the January 1982 incident and the 1983 surgery.

> Therefore, it's hard for me to believe that incident in January led to [sic] him to have surgery a year later in '83.
>
> So therefore, opinionwise I don't think that one particular incident caused him to have a ruptured disk. Now, I'm not saying that he hasn't had trauma to his back.
>
> In reviewing what has been happening with this patient, it's my feeling that he's had a disk that's probably been going bad for some period of time and that, you know, there's multiple episodes of back pain and that not one specific incident really set it off until sometime in -- you know, I think he went to see Doctor Jones I think in October if I can tell by his notes.

It went down the leg this time he said in May of 1982. Doctor Jones' notes said that, and I'm assuming at that point he's talking about right-legged pain. So whatever happened might have happened anywhere from January to May because I don't know where -- this is the first time he really starts talking about pain down into the leg. So therefore, it's hard for me to say that that one instance in January of 1982 caused him to have the surgery of January of '83.

(Defendants' Ex. C, p. 16)

On recross-examination the doctor responded.

Q. Do you think that the disk surgery was finally necessitated because of an accumulation and combination of the various work incidents that have been discussed here, Doctor?

A. Probably, yes.

(Def. Ex. C, p. 36)

Deposition exhibit 3 is a letter signed by Tom Bower, L.P.T. and Dr. Boulden. Dated April 21, 1978 the letter states claimant has pain radiating into both legs.

Defendants' exhibit D is a comprehensive compilation of medical records regarding the claimant. A Mercy Hospital record indicates that in his 1974 motorcycle accident the claimant fractured the anterior inferior iliac spine on the left.

Exhibit D contains a first report of injury giving September 25, 1975 as a date of back injury. Dr. Clemens originally treated the claimant but referred him to Dwight C. Wirtz, M.D. Dr. Clemens released claimant to work on October 24, 1975.

A first report of injury giving January 30, 1976 for date of the injury was filed by defendants. The injury is described as back pain. The claimant was seen by Dr. Wirtz and released to work on March 8, 1976.

Regarding claimant's 1976 motorcycle accident, Mercy Hospital records indicate that the claimant suffered a partial avulsion fracture left anterior superior iliac spine. The claimant was released to full duty on August 10, 1976.

A first report of injury listing April 21, 1978 as a date of injury was filed by defendants. The injury listed is back strain due to picking parts out of a basket. In an examination of May 4, 1978. Dr. Boulden diagnosed a musculoskeletal strain. A first report of injury listing February 21, 1979 as a date of injury was filed by defendants. The injury listed is "back strain due to picking up parts aggravated preexisting back condition." Dr. Boulden feels it is musculoskeletal strain. The claimant was released to full duty on March 19, 1979. A first report of injury giving December 5, 1979 as a date of the back strain injury was filed by defendants. It states it was caused by the claimant picking up trash thereby aggravating a preexisting back condition. In a letter to the defendant insurance company Tom Bower, L.P.T., opines a musculoskeletal problem.

Another first report of injury listed April 29, 1980 as a date of injury and states claimant aggravated a preexisting condition (back strain). Dr. Boulden states as impression on May 1, 1980, myofascial pain over sacroiliac joint.

The first report of injury regarding the alleged January 6, 1982 injury was filed January 19, 1982. It states the claimant had back pain. A note by Stroshal states claimant said that it was due to an injury the claimant had at AMF years ago. In this period of time exhibit D indicates that claimant was off January 7, 8 and 11 for reasons unrelated to his back. He missed part of January 13 due to his back but was paid for the full day. He was off January 14 and 15 and was released for work by Dr. Clemens on January 18, 1982.

Dr. Jones, in a letter to Dr. Evans, dated November 24, 1982 states he saw claimant on November 11, 1982. Dr. Jones felt that the claimant had a lumbar disk syndrome which had its beginning when the claimant hurt his back in 1975 and has caused intermittent flareups since. In a letter dated February 4, 1983 Stroshal writes to defendant insurance company stating that claimant's treatment by Dr. Jones was not authorized. Dr. Jones released claimant to work June 20, 1983 with no restrictions.

Defendants' exhibit E is a dispensary permit dated November 4 stating claimant is going to his own doctor about his back. Defendants' exhibit F is a letter from Dr. Wirtz dated February 19, 1976 to Fireman's Fund Insurance which states that the claimant had pain down his left leg.

APPLICABLE LAW AND ANALYSIS

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

It is clear from a reading of the evidence that up until January 6, 1982 the identifiable injury was back strain of a musculoskeletal nature. However sometime between January 6, 1982 and the January 1983 surgery the claimant experienced an incident which was at least a contributing cause of the needed surgery in January 1983. The claimant believes and asserts that the injury of January 6, 1982 for which the claimant received two days of temporary total benefits is the precipitating cause.

Dr. Jones stated that the incident of January 6, 1982 was a significant factor because he called Dr. Clemens after he saw the claimant and Dr. Clemens stated that the claimant had been in to see him for the same thing. This does not link the disk problems and the January 6, 1982 incident. It is a non-sequitar.

On February 3, 1982 Dr. Hayne saw the claimant. His examination yielded results that were within normal limits. He diagnosed strain of the low back. After reviewing Dr. Evans' notes and the hospital records of the January 7, 1983 surgery, Dr. Hayne stated that the incident claimant described to him, taken with his findings and the history, was not causally related to the herniated disk Dr. Jones found. On cross-examination Dr. Hayne stated that claimant's symptoms possibly were consistent with a disk that had not yet ruptured. It is not clear from the evidence that the claimant's disk had indeed ruptured. The cross-examination and direct examination reveals that Dr. Hayne believed that the January 6, 1982 incident was unrelated to the January 7, 1983 surgery and that the claimant ruptured his disk after the 6th of January, 1982. Dr. Hayne thought more pain and objective findings would be present for a causal connection.

Dr. Evans had begun seeing claimant in 1979. Prior to October 26, 1982 claimant only had suffered, by Dr. Evans' account, lumbar strain. But on October 26, 1982 the claimant had come in with low back and right leg pain that he had been suffering for the last four to five weeks, a period during which the claimant had been laid off. Within two weeks time Dr. Evans referred the claimant to Dr. Jones who diagnosed herniated disk at L4-5. Dr. Evans believed this was consistent with his diagnosis but felt that the symptoms of October of 1982 were not causally related to the incident of January 1982. Dr. Evans stated that it was his experience that patients could only tolerate these symptoms for three to four weeks. He could not link the two events causally because a person cannot go that many months with that kind of severity.

Dr. Boulden testified that from 1978 to 1980 he never found objective findings of a ruptured disk or internal disruption. All neurological findings were normal. He stated that the claimant's herniated disk could have arisen sometime between January and May but he could not really nail it down to a January 1982 incident.

Dr. Jones expressed the opinion that the April 1984 surgery was related to the January 7, 1983 surgery. Also of note are the two iliac spine fractures the claimant suffered in two nonwork-related incidents.

The deputy carefully reviewed and correctly analyzed the evidence. No error is found on appeal.

FINDINGS OF FACT

1. Claimant is 36 years of age.

2. Claimant started work for defendant employer in September of 1972.

3. Claimant had motorcycle accidents in 1974 and 1976 with a fracture of the anterior inferior iliac spine of the left in the first and a partial avulsion fracture of the left anterior superior iliac spine in the second.

4. Claimant first complained of a backache in 1973.

5. Claimant had yearly back incidents at work beginning in 1975 and continuing through 1982 with the exception of 1977.

6. Claimant was treated in October of 1981 for chronic lumbosacral strain syndrome with right leg sciatica.

7. On January 6, 1982 claimant had back pain as he worked packing riding lawnmowers.

8. Claimant missed work on January 14, 15, and 18, 1982.

9. On January 18, 1982 claimant was released to return to work.

10. Claimant returned to work on January 19, 1982.

11. Claimant was on layoff from May 18, 1982 until November 2, 1982.

12. After claimant returned to work he had Christmas vacation and in early January left work for medical treatment.

13. Claimant was admitted to the hospital in early January 1983 for a myelogram and lumbar laminectomy at L4.

14. Claimant had additional surgery in April of 1984.

15. The surgeries of January 1983 and April 1984 are related.

16. The injury of January 6, 1982 produced no permanent disability.

CONCLUSIONS OF LAW

Claimant had an episode of back pain arising out of and in the course of his employment on January 6, 1982 which resulted in temporary total disability only.

Claimant has established entitlement to two days of temporary total disability benefits.

Claimant has failed to establish a causal relationship between his injury of January 6, 1982 and any permanent disability that he now suffers.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant two-sevenths (2/7) weeks of temporary total disability benefits at a weekly rate of two hundred fifty-nine and 14/100 dollars ($259.14).

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

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

Signed and filed this 31 day of July, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JACK D. SHAW, Claimant, vs. CATERPILLAR TRACTOR COMPANY, Employer, Self-Insured, Defendant.	:	File No. 536712 A P P E A L D E C I S I O N

FILED
JUL 23 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from a proposed review-reopening decision wherein the claimant was awarded additional healing period benefits and an additional 15 percent permanent partial industrial disability. The record on appeal consists of the hearing transcript; claimant's exhibits 1 and 2 (with accompanying deposition exhibits); defendant's exhibits 1 and 2; the transcript, exhibits and record in the prior hearing in this matter; and briefs filed by the parties.

ISSUE

Whether or not the claimant established a causal relationship between claimant's original injury of April 12, 1979 and his subsequent need for surgery and the ensuing disability by that surgery.

REVIEW OF THE EVIDENCE

The proposed agency decision adequately reviews the evidence and that review will be adopted as set forth therein and not be reproduced here.

APPLICABLE LAW AND ANALYSIS

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 applicable law cited in the proposed decision below is also incorporated herein. The analysis of the evidence except as it relates to permanent partial disability is adopted. The analysis regarding permanent partial disability is replaced with the following. The evidence establishes that the two subsequent surgeries were related to claimant's original injury. Edward A. Dykstra, M.D., agreed that a patient who has had two-level disk surgery possesses a fairly high risk of recurrent injury and subsequent herniation. While trauma can cause a herniated disk, Dr. Dykstra stated that frequently it could be as little as a sneeze or a cough. This the claimant experienced and together with the medical evidence establishes that the two surgeries are related to his original injury.

A question arises as to whether the claimant suffered increased impairment. The evidence is vague on this and the deputy in the proposed decision made a finding that the claimant's functional impairment has been increased. In the preceding review-reopening decision in 1981 the deputy made the finding that claimant had a permanent partial impairment of 10-25 percent of the body as a whole. As of January 6, 1984 Dr. Dykstra rated the claimant as having a 12 percent impairment. The evidence does not establish an increase in impairment.

Even if an increased impairment were found the claimant has not established a further increase of his industrial disability. The claimant testified at the second review-reopening that he could perform at that time the type of job he was engaged in at the time of the original review-reopening hearing. His employments subsequent to the original proceeding were substantially similar to that. No increased industrial disability has been proven.

FINDINGS OF FACT

1. Claimant suffered an injury to his back in April of 1979 as he worked loading transmission housings for defendant.

2. Claimant was hospitalized and treated conservatively after a CT scan was inconclusive.

3. On May 18, 1979 a bilateral laminectomy at L4-5 and L5-S1 with an excision of a herniated nucleus pulposis was carried out.

4. A year post surgery claimant continued to complain of pain.

5. Claimant received psychotherapy.

6. Claimant had back and leg pain which never totally subsided.

7. Claimant had surgery in April of 1983 which entailed a laminectomy and diskectomy at L4-5.

8. Claimant had a second surgery in late 1983 to remove a disk fragment at L4-5 and to perform a fat graft.

9. Dr. Dykstra released claimant to return to work on January 6, 1984.

10. Claimant is currently forty-five years of age.

11. Claimant was in good health prior to his April injury.

12. Claimant had some treatment for back strain in 1960 and two hernia repairs.

13. Claimant has work experience as a drill press operator, drummer and electrician.

14. Claimant has a GED.

15. Claimant has had some further training in truck driving, cabinet making and in electrostatic spray painting.

16. At the time of the prior hearing claimant had lower back pain with prolonged sitting or standing making pain go down particularly his left leg.

17. At the time of the prior hearing claimant was working as a maintenance person with an hourly wage of $7.50 with no benefits.

18. Claimant's two surgeries in 1983 and their resultant disabilities were related to his 1979 employment injury.

19. The claimant has no increased impairment.

20. Claimant has not incurred further industrial disability.

CONCLUSIONS OF LAW

WHEREFORE, the decision of the deputy is affirmed in part and modified in part.

Claimant has established by a preponderance of the evidence a causal relationship between his injury of April 12, 1979 and the disability on which he now bases his claim.

Claimant has established entitlement to medical benefits pursuant to Iowa Code section 85.27.

Claimant has established entitlement to temporary total disability benefits from April 7, 1983 to June 3, 1983 and from September 20, 1983 to January 6, 1984.

Claimant has not established entitlement to additional permanent partial industrial disability.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant temporary total benefits at a rate of two hundred twenty-six and 91/100 dollars ($226.91) from April 7, 1983 to June 3, 1983 and from September 20, 1983 to January 5, 1984.

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 the following medical expenses:

Anesthesia Associates of Iowa City, P.C.	$ 330.00
Anthony Owen Colby, M.D.	436.00
Edward A. Dykstra, M.D.	3,660.00
Mercy Hospital	6,904.85

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 23 day of July, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEVIN R. SHOEMAKER,	:	
Claimant,	:	
vs.	:	File No. 653861
ADAMS DOOR COMPANY,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
BITUMINOUS INSURANCE COMPANIES,	:	FILED
Insurance Carrier, Defendants.	:	AUG 30 1985
		IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision filed November 19, 1984 wherein it was concluded that the claimant was not required to show a material change of circumstances since filing of a memorandum of agreement. It was also concluded that claimant had established that he suffered industrial disability equal to 35 percent of the body as a whole, causally related to his injury of November 14, 1982. The record on appeal consists of the hearing transcript; claimant's exhibit 1; and defendants' exhibits A through C. Neither party filed an appeal brief.

ISSUES

Defendants' notice of appeal contends there was a prior settlement of this matter from which claimant must show a change of condition in order to recover.

REVIEW OF THE EVIDENCE

It was stipulated by the parties that in the event of an award the claimant's rate of compensation would be $142.77. The claimant is a 26 year old high school graduate whose job experience prior to working for the defendant, Adams Door Company (hereinafter Adams), was concentrated in the manual or service unskilled industries. The claimant began working for Adams in September 1980 installing and repairing garage doors. The claimant's duties involved lifting weights between one and two hundred pounds. On November 14, 1980 the claimant was removing a spring when it suddenly unwound underneath the claimant's arm and shoulder. Stitches were used to repair the wound and the claimant stated that his scar goes into the chest muscle and then down into the side of his chest wall.

The claimant returned to work in about three weeks on light duty. His doctor restricted him from lifting heavy objects above his head. Claimant testified that in February 1981 he was fired while on light duty.

The claimant's next job was with McMillan Oil Company as a truck driver. He began working for McMillan in May 1981 but had to quit in September 1981 because of the lifting involved and its effects on his injury. The claimant returned to the firewood business that he ran prior to beginning work for Adams in September 1980. This was easier for him because he could do just a little work at a time. The claimant next worked in Florida for Central Florida Door Company as a garage door helper. He terminated his employment with Central because of pain in his shoulder and arm.

On May 28, 1982 the claimant was seen by Robert J. Chesser, M.D. This visit was primarily an examination of claimant's arm motions. This examination was set up by the defendant Bituminous Insurance Company (hereinafter Bituminous). Dr. Chesser did not apprise the claimant of any permanent restrictions. A short period after claimant's examination, claimant received money from Bituminous which he understood to be compensation for his arm.

The claimant stated that in June 1982 he was represented by attorney Patrick W. Driscoll. Claimant recalled that he did not talk to Driscoll about the terms "body as a whole" or "industrial disability." The claimant was unaware that if he had an injury to his body as a whole he could receive more money than he did for the functional impairment of his arm. The claimant said that although he received compensation for 25 percent of his arm, he felt that his injury was in his shoulder. He said that had he been told of industrial disability and the chance to recover more money he would not have settled for 25 percent of his arm. He was not aware of any permanent lifting restrictions prior to receiving the money from Bituminous. The claimant attempted work for five different employers, but due to the pain in his shoulder he could not continue working.

The claimant again saw Dr. Chesser for evaluation on August 3, 1984 at his present attorney's direction. Dr. Chesser told the claimant not to lift more than 15 pounds over his head and not to lift over 35 pounds to his shoulder. The claimant has unsuccessfully attempted to find employment within his restrictions. Presently the claimant stated that his right shoulder bothers him a lot. It hurts when he lifts and he experiences numbness and swelling. Claimant is right handed.

On cross-examination the claimant agreed that his shoulder is just like it was before the case was settled. He stated, "It's all the same and then when I do heavy work, I can hardly move it at all."

Patrick Driscoll testified that he was the attorney who represented the claimant regarding the injury he received while working for Adams. He stated that he did not talk to claimant about industrial disability as it relates to whole man disability. There were no settlement negotiations with Bituminous which centered around industrial disability or a body as a whole settlement. The settlement, according to Driscoll, was based upon right arm disability.

By May 1982 Driscoll knew that claimant had trouble lifting objects. He recommended that claimant take the 25 percent impairment of the arm settlement. Driscoll expressed that he believed the claimant received a fair deal regardless of industrial disability.

Virginia Bance testified that in June 1982 she was employed as a claims representative for Bituminous and that she handled the claimant's claim. She did not recall any discussion with Driscoll about whole man disability or industrial disability. She considered the claimant's injury to be an arm injury. There was no demand for an independent evaluation.

Patrick Doherty, rehabilitation counselor for the Franciscan Rehabilitation Center, testified that the claimant has been "accessed out of" many jobs in the local labor market because of the type of injury he has and resultant disability. As a result of his injuries, any job the claimant could do will result in lower pay. Without training the claimant could make between minimum wage and $5 per hour. Any sedentary jobs that he might do because of his physical limitations would require additional training because the claimant has only a high school education.

Claimant's exhibit 1 is a collection of various medical and rehabilitation reports. Of special note are two letters from Dr. Chesser dated May 28, 1982 and August 3, 1984 respectively. The first letter to Bituminous states that claimant has a 17 percent loss of motion to his right upper extremity. Due to the restricted range of motion and generalized weakness of the upper right extremity, Dr. Chesser ascribes to the claimant a 25 percent permanent partial impairment to the extremity. In the second letter to claimant's attorney Dr. Chesser gives the claimant a 10 percent whole man impairment. Both letters describe the injury as one to the right axilla. Defendants' exhibits A, B, and C represent letters from Driscoll to Bituminous wherein evaulation and settlement are discussed. A memorandum of agreement was received by this office on December 5, 1980. A final report filed June 21, 1982 shows claimant was paid for permanent partial disability for 25 percent of the arm constituting 62.5 weeks in the amount of $8,923.13. The same report indicates the claimant received eight weeks of healing period benefits.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 14, 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 Iowa Supreme Court in Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143, 149, 150 (Iowa 1975) stated:

> Thus the decisions make clear that unless a memorandum of agreement is set aside on such grounds as fraud or mistake, it settles the first element of liability, that an employer-employee relationship existed at the time of the injury....A memorandum of agreement also settles the second element of liability, that the injury arose out of and in the course of the employment.

The Iowa Supreme Court held in Tebbs v. Denmark L. & T. Corp., 230 Iowa 1173, 300 N.W. 328 (1941), that the memorandum of agreement "[leaves] the question with reference to extent of disability open for adjustment in accordance with the facts." See also Peterson v. Truck Haven Cafe, Inc., (Appeal Decision Filed February 28, 1985).

The thrust of appellants notice of appeal is that the claimant must prove a material change in condition to receive additional compensation since the memorandum of agreement. Freeman and Tebbs state quite clearly what a memorandum of agreement extablishes and what it does not.

The question presented to the Iowa Supreme Court in Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968), was whether a review-reopening is limited to increased incapacity alone, subsequent to a prior settlement or award, to the exclusion of mistake, lack of knowledge or misconception on the part of claimant relative to conditions existing at the time of preceding disposition or adjudication. Id. at 732.

Iowa Code 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." (emphasis added)

The court in Gosek stated: "But 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 as a basis for additional benefits (citations omitted)." 158 N.W.2d 731, 733. Gosek also cited with approval Messer v. Drees, 382 S.W.2d 209, 212-213 ( ) where it was stated: "Whether it be called a 'mistake' or a 'change in conditions' is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it." (citations omitted).

In summary the court in Gosek held:

> We now hold, cause for allowance of additional compensation exists on proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, sometimes referred to as a substantive omission due to mistake, at time of any prior settlement or award.

158 N.W.2d 731, 735.

It is clear that the claimant, by his own knowledge, had no idea of the choices available to him in connection with his injury. It is also quite clear that claimant's first attorney was not aware of the whole man and industrial disability implications of claimant's injury and accordingly did not apprise the claimant of these possibilities. The claimant did accept payment from Bituminous, and perhaps Bituminous thought that by doing so claimant could not bring another action absent a material change in his condition. Aside from the mistaken understanding of workers' compensation law, for the claimant to agree by implication not to bring further action would be contingent upon the claimant possessing the requisite knowledge to make an intelligent and voluntary decision. This he was not able to do for the above reasons. This is a substantive mistake and the claimant is entitled to have his industrial disability calculated utilizing permanent whole man impairment.

Although defendants, in their notice of appeal, indicated they were appealing from any and all adverse rulings in the review-reopening decision the only specific issue has been addressed. As no other issues are identified, the case will be affirmed in total.

FINDINGS OF FACT

1. On November 14, 1982 claimant suffered an injury to his right shoulder while at work.

2. Said injury caused damage to the anterior aspect of claimant's right axilla.

3. As a result of the injury, claimant suffered a 25 percent loss of the right upper extremity and can not lift more than 35 pounds to shoulder level and 15 pounds above his shoulder.

4. Claimant's injury was to his body as a whole.

5. Claimant is a 27 year old high school graduate with no specialized training.

6. Claimant is a poor academic performer and is of below average intelligence.

7. Claimant is well motivated.

8. Claimant has been paid all healing period benefits and 62 1/2 weeks of permanent partial disability.

9. Claimant has not shown a material change of circumstances since the filing of a memorandum of agreement was filed on June 21, 1982.

10. Claimant's rate of compensation if $142.77.

11. As a result of his injury, claimant has suffered an industrial disability of 35 percent of the body as a whole.

CONCLUSIONS OF LAW

Claimant is not required to show a material change of circumstances since the filing of the memorandum of agreement on June 21, 1982.

Claimant has proven by a preponderance of the evidence that he suffered an industrial disability equal to 35 percent of the body as a whole and that said industrial disability is causally related to his injury of November 14, 1982.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant one hundred seventy-five (175) weeks of compensation at the rate of one hundred forty-two and 77/100 dollars ($142.77) commencing March 20, 1981. Defendants shall take credit for sixty-two and one-half (62 1/2) weeks previously paid. All accrued sums shall be made in a lump sum.

That interest on all accrued payments shall commence from the date of this decision.

That the costs are taxed to the defendants.

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

Signed and filed this 30 day of August, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CALVIN D. SIROVY,	:	
Claimant,	:	
vs.	:	File No. 649864
U. S. GYPSUM COMPANY,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
CNA INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

FILED
AUG 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision where it was concluded that the claimant failed to prove that he was entitled to additional compensation as a result of an injury sustained on September 2, 1980. The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 3; defendants' exhibits A through C; and briefs filed by both parties. At the hearing the claimant's rate of compensation was stipulated to be $182.70.

ISSUE

Whether the deputy erred in denying additional industrial disability to the claimant.

REVIEW OF THE EVIDENCE

The claimant, an unemployed 30 year old married father of two, testified that he dropped out of high school about 1970 during the tenth grade. His grades were average to just below average. In 1971 he received a G.E.D. The claimant's work experience was varied, having worked as a farmhand, lumbar yard worker, cookie press operator, and a grain bin loader--each for a year or less. From 1972 to 1977 claimant was in the army as an artillery crew member and a maintenance worker primarily replacing points for the Huey Helicopter. The claimant found most of the duties he was involved in while in the army to be non-transferrable to civilian life.

After an honorable discharge claimant located in Danville, Iowa where he was employed for less than a year with Vega Heatilator assembling fireplaces. In 1978 claimant was employed by Aldi Foods as a warehouseman. During his employment with Aldi claimant experienced pain in his side for which x-rays were taken. The x-rays were negative and claimant testified that the pain resolved itself. Claimant was laid off after three months with Aldi. Thereafter claimant enrolled at Muscatine Community College in industrial maintenance. The claimant pursued this for eight months and quit.

In March 1979 claimant began employment with the defendant, U. S. Gypsum Company (hereinafter Gypsum), as a "C level" mechanic. This "C level" was explained by claimant to be the lowest paying of the three mechanics levels A, B, and C. Claimant's duties included maintaining the machinery, welding, and machining. Claimant termed his health prior to working for Gypsum as "excellent" with no chronic back problems. His duties with Gypsum frequently required lifting up to ten pounds and occasional lifting of 100 pounds. The tools he was required to carry weighed 45 to 50 pounds.

On September 2, 1980, while working at Gypsum, claimant sustained an injury when a ladder fell from underneath him landing on its side and he fell on the ladder on his back. He immediately experienced pain up and down his back and side. At the time of the injury claimant was an "A mechanic" making $7.42 per hour. His next move up would be to a supervisor.

Claimant saw a Dr. Patterson in Mediapolis. Dr. Patterson took x-rays and told him nothing was broken. Claimant could not recall if Dr. Patterson was a medical doctor, an osteopath, or a chiropractor.

The day following, claimant was put on lighter office work for a week after which felt that he had recovered enough and requested to be transferred back to his regular job. After a week of his normal duties he began experiencing pain in his hips which radiated down his legs. He was taken to the emergency room at Burlington Hospital where he saw Koert R. Smith, M.D., who told him that he had disk problems. Claimant's early conservative treatment from Dr. Smith consisted of bedrest and cortisone with no apparent lasting effect. A myelogram was performed and in November 1980 claimant underwent surgery to his lower back. He stated that it took him a year to recuperate and that his back got better even though he still experienced stiffness.

Claimant attempted to return to work three or four months later. However, Gypsum would not allow the claimant to return to work without a 100 percent release from his doctor. Claimant asked for and received a 100 percent release from Dr. Smith although, as claimant testified, he was not 100 percent. Claimant attempted to perform his former duties but his back hurt and he worked for about a month at which time he was taken off for more recuperation.

On November 16 and 17, 1981 claimant was evaluated in Des Moines and told that he should look for other lighter work. Claimant could not find work. He thought the problem was part economics and part his back. When he stayed away from heavy to moderate lifting claimant was fairly comfortable.

Between November 1981 and April 1982 claimant was registered with Job Service in Muscatine and sought lighter employment. The claimant put his light duty restrictions on employment applications he filled out. He received no offers of employment.

Claimant arrived at an agreement for settlement with Gypsum in April 1982. In April 1982 the claimant's back was stiff and he experienced a dull pain. The claimant testified that he had no pain radiating down his legs. At the time of settlement the claimant also had plans for self-employment, but these plans fell through right after the settlement. Claimant attempted to open a body shop but he found that he was not physically capable of performing the tasks required. He stated that he could have done it in April of 1982. The claimant has netted $6,000 from the body shop since April 1982. He agreed that he could sit and stand for four hours apiece per day if he was allowed to rest. Claimant testified that he is more limited now than he was in April 1982. His biggest problem now is that he has to be able to get up and move around.

The claimant admitted that on September 30, 1981 a doctor told him that he would not be able to return to his previous level of activity and that he was the only one who thought he could. Claimant knew before and after the settlement that he couldn't work for Gypsum. Claimant admitted that both before and after the settlement he was offered no work. He admitted further that Dr. Smith told him essentially the same things as the evaluators had in Des Moines. The claimant never really tested his back to see what he could do. He received his last settlement check in September 1983.

George Brian Paprocki, a self-employed vocational consultant, testified that he was asked by claimant's attorney to evaluate the claimant in terms of industrial disability. It was his opinion that claimant's industrial disability "at this point is upward of 50%." Paprocki based this opinion in part on the assumption that the claimant would have become a supervisor at Gypsum making $13.00 per hour. The witness admitted that he made no attempt to find out whether claimant would have really had an advancement or what his former job is paying today. Paprocki also stated that he was available in early 1982 to make an evaluation if so asked.

Claimant's exhibit 2 is an estimated functional capabilities form filled out by Dr. Smith on April 19, 1984. The form states that the claimant can never carry 51 to 100 pounds and never bend. It also states that the claimant can work full time now. Claimant's exhibit 3 is a copy of the Medical Occupational Evaluation Center's report of November 1981.

Defendants' exhibit A is a copy of the stipulation for agreement for settlement which was filed April 1982. The claimant stipulated that his permanent partial disability was equal to 25 percent of the body as a whole, his condition was not expected to deteriorate, and that he could no longer perform the job he had held at Gypsum. In the Statement of Claimant's Intent Concerning Partial Commutation Funds the claimant states, "In addition, Mr. Crowley and I have discussed the fact that I may have an opportunity to become self-employed in the field of mechanics." Included in defendants' exhibit A are various medical reports from claimant's evaluation of November 1981. On November 18, 1981 Peter D. Wirtz, M.D., rated the claimant as having a permanent partial impairment of five percent to the body as a whole. Paul From, M.D., indicated that claimant had a 10 to 15 percent functional impairment. On January 12, 1982 Dr. Smith rated claimant as having a "20 percent impairment with disectomy without neurologic deficit with persistent symptoms limiting activity."

Defendants' exhibit C is a letter from Dr. Smith dated October 18, 1983 which reads in part:

> Calvin D. Sirovy's permanent impairment rating continues to be 20% of whole man.
>
> Inherit [sic] and applied in the 20% impairment rating, is that Mr. Sirovy will have intermittent episodes of increased back and/or leg pain, and that his work activity will need to be significantly limited.

APPLICABLE LAW AND ANALYSIS

In a review-reopening proceeding 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 additional compensation. Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 219 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. An agreement for settlement has the same force and effect as a prior adjudication. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969).

It is to be remembered that, while functional disability is to be taken into consideration, the basis for allowance of compensation (except where specifically provided) is the question of industrial disability, or, in otherwords, the reduction of earning capacity. Oldham v. Scofield & Welch, 222 Iowa 764, 768, 266 N.W. 480, 482 (1936). 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 a change of condition. Bousefield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957).

The question is, then, did claimant by sufficient competent evidence show a change since the agreement for settlement 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? Henderson v. Iles, 250 Iowa 787, 794, 96 N.W.2d 321, ___ (1959).

The answer to each of the above must be no. There had been no preponderate showing that the claimant has had a further reduction of earning capacity. Before and after April 1982 the claimant received no offers of employment. The claimant's physical condition has largely remained the same and Dr. Smith is satisfied with the earlier 20 percent permanent partial rating that he had ascribed the claimant.

As to Paprocki's testimony it has often been cited that the determination of industrial disability is mixed question of law and fact and thus is in the province of the commissioner or his deputies. Further, the assumptions on which Paprocki partially based his opinion were questionable.

Finally, claimant argues that because he did not turn his self-employment possibility into a reality warrants increased disability. An increased award cannot be justified on the fact that the claimant could not turn a business venture into a success. The proposed decision is adopted.

FINDINGS OF FACT

1. On September 2, 1980 claimant received an injury arising out of and in the course of his employment as established by the agreement for settlement filed in April 1982.

2. Claimant agreed and stipulated in April 1982 that as a result of his injury he suffered a permanent partial disability for industrial purposes of 25 percent of the body as a whole.

3. Since the agreement for settlement was filed and approved by the industrial commissioner's office claimant's physical condition has not deteriorated.

4. Since the agreement for settlement was filed in April 1982 claimant's employment situation has remained the same.

5. Claimant's employment potential is the same now as it was in April 1982.

CONCLUSION OF LAW

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional compensation as a result of his injury of September 2, 1980.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

That claimant take nothing further from these proceedings.

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

Signed and filed this 30 day of August, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DON K. SMITH,	:	
	:	FILE NO. 705797
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
JOHN MORRELL & CO.,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED
AUG 23 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Don K. Smith, claimant, against John Morrell & Co., employer, self-insured, defendant, for the recovery of further benefits as a result of an injury on May 27, 1982. A memorandum of agreement for this injury was filed on September 13, 1982. Claimant is basing his claim for disability upon physical impairments to both of his hands and wrists. On May 16, 1985 a hearing on claimant's petition was held and the matter was considered fully submitted at the close of this hearing.

ISSUES

The issues presented by the parties at the time of the pre-hearing and hearing in this case are as follows:

I. Whether there is a causal relationship between the alleged injury and the claimed disability; and,

II. The extent of disability benefits to which claimant may be entitled.

Upon agreement by the defendant on the record at the hearing that it would pay various medical expenses related to claimant's treatment at the Mayo Clinic, claimant withdrew his claim for medical benefits under Iowa Code section 85.27.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The record consists of the oral testimony of claimant and joint exhibit 1. At the time of the hearing, the parties stipulated to the following matters:

1. Claimant's rate of weekly compensation in the event of an award of benefits from these proceedings shall be $301.98 per week;

2. Claimant was off work following the work injury from June 14, 1982 through November 7, 1982; and,

3. If claimant is entitled to permanent partial disability benefits, the stipulated conversion date from healing period to permanent partial disability benefits is November 8, 1982.

Claimant is in his early fifties and has a high school education. Claimant's work history consists primarily of meat packing jobs.

Claimant's testimony and the medical reports submitted into evidence at the hearing indicate that claimant has non-work related traumatic arthritis of the left elbow resulting from an injury in 1970. This condition causes limited range of motion of claimant's arm at the present time with some occasional pain. Furthermore, there is some evidence in the record of prior existing wrist arthritis but claimant stated that he did not have any wrist problems prior to his work injury upon which he now bases his claim for compensation benefits.

Claimant began working at defendant's hog kill plant in Esterville, Iowa in September 1978. Claimant's duties consisted of work in the boning room. From late 1978 until June 1979, claimant operated a table band saw. Claimant described the operation of this saw as very strenuous and required repeated heavy use of both hands and arms in the sawing of 1500 to 2000 pork loins per day which weighed an average of 15 to 18 pounds each.

The facts surrounding the work injury are not in dispute. Claimant testified that his wrist and hand problems began over a period of time with gradual development of pain and impairment in the right wrist at first and, later, in the left wrist as well. Claimant was initially treated for tendonitis by S. C. Carlson, D.O., with pain and anti-inflammatory medication including injections of cortisone in his wrists. Claimant was later referred to Robert Giebink, M.D., an orthopedic surgeon, who treated claimant conservatively. Claimant said at the hearing that Dr. Giebink did not feel that surgery was necessary. At the request of the defendant, claimant was examined by J. L. Powers, M.D., the company doctor, who later referred claimant to the Mayo Clinic at Rochester, Minnesota when in June and August 1982, James H. Dobins, M.D., an orthopedic surgeon, performed carpal tunnel surgery at separate times.

On November 8, 1982, claimant returned to work operating an elevator. He was then transferred to the curing department as a shank shaker, the job he is performing at the current time, which requires claimant to lift pails of ingredients and place the contents of the pail into a mixing tank, a process necessary to prepare boneless hams. Claimant emphasized at the hearing that he has not missed any work since his return to duty and his current job is lighter duty than the previous band saw operator job.

Although he has an admirable attendance record, claimant testified that he continues to have wrist problems at work and these problems worsened after the two surgeries. The surgery, however, did remove most of the numbness in his hands and fingers. His primary complaint concerns the condition of his right hand and wrist. His right thumb is still painful on movement; he has finger lock or triggering of his right index finger; and he experiences aching in the heel of his hand. Although less a problem, claimant also complains of continued pain in his left hand and wrist. Claimant generally describes a loss of grip in both hands after the surgery. Also, protruding "ganglions" or cyst type of lumps on both wrists have been growing in size since claimant started the band saw position in 1978.

Dr. Dobins gave a permanent partial impairment rating for claimant's median neuropathy only. This rating consists of three percent permanent partial impairment to the right hand and eight percent to the left hand. Claimant was not satisfied with this rating and received another evaluation on his own from Dr. Giebink. Dr. Giebink opines that as a result of the problems with the right index finger, loss of motion of the right wrist and weakness of the grip of the right hand and thumb along with residual numbness, claimant has a 10 percent permanent partial impairment of the right wrist. As a result of the left carpal tunnel syndrome, carpal tunnel releases, the ganglions and tendonitis involving the joints of the left wrist, Dr. Giebink opines that claimant has a 10 percent permanent partial impairment of the left wrist.

Claimant's appearance and demeanor at the hearing indicated that he was testifying in a candid and truthful manner.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of disability. 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

Claimant, in this case, seeks permanent disability arising from a hand and wrist condition in both extremities. The record reveals a gradual development of claimant's hand problems and no specific incident of injury but the injury date of May 27, 1982 used for the memorandum of agreement is at or about the time when the injury process became acute. The record also shows that the injury process was not limited in effect to claimant's right and left carpal tunnel and the resulting surgeries. There are continuing problems with the right index finger, residual numbness in the hands, ganglions on both wrists, aching in the ulnar nerve area of the right hand and loss of strength in both hands. Some of these conditions result in permanent impairment and some of them are only temporary aggravations caused by claimant's current work activity. Dr. Carlson causally connected claimant's initial symptoms to his work. Dr. Dobins and Dr. Giebink do not give specific causal connection opinions but their reports and claimant's credible and uncontroverted testimony reveals no intervening non-work injuries and directly link claimant's current hand problems and any resulting disabilities to claimant's work in May and June, 1982. Therefore, claimant has established by a preponderance of the evidence that his work injury is a cause of permanent disability.

II. Permanent partial disabilities are classified as either scheduled or unscheduled. 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); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

A determination of the extent of permanent disability in this case involves three considerations. First, the time of the development of the impairment must be ascertained. Second, the exact location of the impairment must be identified. Third, the degree of impairment must be measured.

The evidence shows that the injuries did not occur as a result of a single accident under Iowa Code section 85.34(2)(s). Although only one injury date was alleged in claimant's petition, as mentioned before, the evidence shows that this was an injury which developed over a period of time. Claimant testified that he first developed problems with his right hand and at a later time developed similar problems in his left hand. The injury process is certainly similar but did not occur at the same time or simultaneously.

The disability or "loss of use" to both hands may have occurred at the same time, but the disabilities to each hand was not "caused by a single accident" as required by the code. As the work "accident" implies a sudden, unexpected event or occurrence, see Black's Law Dictionary, 4th Ed., page 31, and the word "single" further restricts the phrase to a precise time period, it must be assumed that the legislature intended application of Iowa Code section 85.34(2)(s) to be limited in application to events which occur at precisely the same time or simultaneously. Possibly, the legislature's use of such terms is an attempt to avoid confusion with the application of second injury fund benefits under Iowa Code section 85.64. At any rate, given such language in the statute, a very restrictive application of the section must be made in this case.

Furthermore, claimant has not shown by the greater weight of evidence a functional loss beyond his hands. A wrist injury is an injury to the hand, not the upper extremity. Elam v. Midland Mfg., II Iowa Industrial Commissioner Report 141 (App. Dec. 1981). Although claimant did testify that his pain radiates into the forearm, this alone does not establish an arm disability. All of the medical evidence in this case suggests only an impairment of the functioning of the hands, either from loss of grip or movement. The only medical evidence of any involvement beyond the hand concerns the elbow and the loss of motion of the elbow stemming from an non-work related injury and resulting traumatic arthritis. Therefore, the extent of disability must be measured under Iowa Code section 85.34(2)(l) which limits disability benefits to a maximum of 190 weeks.

Two physicians have rated claimant's permanent partial impairments. However, Dr. Giebink's opinions are the most convincing because his clinical findings are the most recent and the most detailed in the record. Also, Dr. Giebink's findings are most consistent with claimant's current complaints. Claimant stated that most of his problems involve the right hand but Dr. Dobins gives the right hand the lowest rating. Therefore, claimant has established by a preponderance of the evidence entitlement to 10 percent permanent partial disability benefits for each hand or a total of 38 weeks of permanent partial disability.

As claimant has shown entitlement for permanent partial disability claimant is entitled to healing period benefits for the time he was off work as set forth in the parties' stipulation. Iowa Code section 85.34(1). The evidence clearly shows that claimant was unable during this period of time to perform his work and was under treatment for his work injury.

As claimant's potential claims for his second injury under Iowa Code sections 85.63 et seq were not raised in these proceedings, no findings binding upon the second injury fund can be made at this time.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of defendant between September 1978 and June 1982.

3. Between September 1978 and June 1982, while performing his work for defendant, claimant gradually, but not simultaneously, developed multiple tendonitis conditions in both wrists and hands from operation of a band saw.

4. Claimant's work in May and June, 1982 resulted in extreme pain and the loss of functioning of his hands at different times necessitating medical treatment which included carpal tunnel surgeries in June and August 1982.

5. Prior to September 1978, claimant injured his elbow which resulted in loss of motion to his left arm and this condition causes some occasional pain at present.

6. Claimant has a prior non-work related arthritic condition of his wrist but claimant did not have any physical impairments or disablity prior to 1979 from such a condition.

7. Before May 1982, claimant was able to physically perform his work as a band saw operator.

8. Claimant has 10 percent permanent impairment to both of his hands.

9. Claimant's permanent impairment to his hands is the result of his work in May and June 1982 but the injury to each hand did occur simultaneously.

10. As a result of his work injury, claimant was absent from work for treatment of his hand conditions from June 14, 1982 through November 7, 1982.

11. Claimant's rate of compensation is $301.98 as stipulated by the parties.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence the work injury to claimant's hands in May and June, 1982 is a cause of permanent disability but that the injury to each hand did not occur in the same accident.

II. Claimant has established by a preponderance of the evidence entitlement to permanent partial disability benefits for 38 weeks and healing period benefits for 21 weeks.

ORDER

Accordingly, the following is ordered:

1. Defendant shall pay to claimant thirty-eight (38) weeks of permanent partial disability benefits at the rate of three hundred one and 98/100 dollars ($301.98) per week from November 8, 1982.

2. Defendant shall pay to claimant healing period benefits from June 14, 1982 through November 7, 1982 at the rate of three hundred one and 98/100 dollars ($301.98).

3. Defendant shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

4. Defendant to pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

5. Defendant shall pay the cost of this action pursuant to Industrial Commissoner Rule 500-4.33.

6. Defendant to file activity report upon payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 23rd day of August, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT F. SNYDER,	
Claimant,	File No. 779891
vs.	DECISION
CONTINENTAL GRAIN COMPANY,	ON
Employer,	MOTION FOR
and	SUMMARY
AETNA CASUALTY & SURETY CO.,	JUDGMENT
Insurance Carrier, Defendants.	

FILED
SEP 13 1985
IOWA INDUSTRIAL COMMISSIONER

This is a decision on a motion for summary judgment which came on for hearing before the undersigned on April 8, 1985. The hearing was conducted by conference call and the parties limited their presentation to argument.

The issues presented by the parties is whether the state of Iowa has jurisdiction of this matter and if this agency does not have jurisdiction pursuant to section 85.71, can the agency decide the matter using the law of the state where the injury occurred.

FACTS PRESENTED

Claimant was injured while working in Illinois and primarily worked in the state of Illinois. Several of the physicians who treated claimant for for his injury are located in Iowa. The uncontroverted affidavit of William L. Davis also indicates that the contract of hire was entered into in the state of Illinois. The affidavits also indicate that claimant has been paid Illinois Workers' Compensation benefits.

ANALYSIS AND APPLICABLE LAW

This agency is a creature of statute. Unlike the courts, this agency only has the authority which is specifically granted to it by statute.

Section 86.8(1) and (5) states:

> Duties. It shall be the duty of the commissioner:
>
> 1. To establish and enforce all necessary rules not in conflict with the provisions of this chapter and chapters 85, 85A and 87 for carrying out the purposes thereof.
>
> ....
>
> 5. In general to do all things not inconsistent with law in carrying out said provisions according to their true intent and purpose.

Section 85.71 states:

> Employment outside of state. If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this chapter, provided that at the time of such injury:

In a letter dated January 17, 1984 Goettsch agreed to pay claimant's transportation expenses, $45 to Dr. Varner and $25 to Dr. Neiman and to provide claimant with a biofeedback unit of which defendants would retain ownership. Claimant was scheduled for an appointment with Dr. Taylor.

The next correspondence dated January 24, 1984 asks if defendants will provide a recliner for biofeedback. A letter from a few days later seeks reimbursement for bills from Drs. Taylor, Varner and Neiman and for mileage and informs defendants of appointments with Drs. Neiman, Gersh and Taylor.

On March 29, 1984 claimant was advised again that he was not authorized to be treated by Drs. Varner, Gersh or Neiman. Neither would mileage to Iowa City be reimbursed.

Hanssen immediately questioned revocation of the authorization noting that Dr. Taylor's report of October 24, 1983 recommended continued treatment by Drs. Varner and Neiman and shortly thereafter sought reimbursement of bills for Drs. Neiman and Gersh.

After some intervening letters, Hanssen wrote on May 30, 1984 to question whether Dr. Taylor's recommendation in regard to treatment was going to be followed. Goettsch answered by saying that Drs. Carlstrom and Taylor were the authorized physicians.

For a period of time thereafter claimant tried to get payment of his various expenses, and on October 31, 1984 he sought a hearing on the issue of medical and mileage expenses.

About a month later Hanssen advised that claimant was agreeable to not going back to Dr. Neiman. A January letter requests payment of a bill of $40 from Dr. Varner pointing out that claimant had not seen him since July 6, 1984.

A letter from Thomas A. Carlstrom, M.D., dated June 18, 1983 reports his seeing claimant on June 7, 1983 for complaints of a headache and neck pain with other associated symptoms. There were no neurological abnormalities. Dr. Carlstrom expressed the opinion that claimant has a chronic myofascial strain and that his healing period had ended. He proposed referral to a pain clinic and otherwise made no suggestions for further treatment.

Michael J. Taylor, M.D., who reviewed information from Dr. Varner and other medical records as well, evaluated claimant on October 11, 1983. Claimant complained of headache and of memory difficulties. He reported being treated by Drs. Neiman and Varner and taking Xanax and Darvocet. Claimant indicated that his ability to concentrate will vary depending on the severity of his pain, that he has increased irritability and that he has memory difficulties.

Dr. Taylor observed that claimant had a slightly decreased rate of speech, slightly decreased motor activity and mildly depressed mood. He agreed with Dr. Varner's assessment of an organic affective syndrome with the primary psychiatric difficulty claimant's memory disturbance. Dr. Taylor believed claimant to be incapable of "even routine, repetitive, unskilled work." He thought claimant was improving and he suggested continued treatments by Drs. Varner and Neiman with reconsideration by Dr. Gersh of his decision not to proceed further with biofeedback.

Dr. Taylor saw claimant again on April 9, 1984. He was unable to say whether claimant's difficulty in concentrating was related to depression or to brain damage. He believed the lack of concentration would interfere with any rehabilitation program claimant might undertake.

He found claimant to be benefiting from the biofeedback training he was getting from Dr. Gersh as he was able to obtain relief from his headaches fifty percent of the time. There was no one in Dr. Taylor's office who could provide claimant with that care. Claimant's medication was changed in an effort to treat his depression more aggressively.

APPLICABLE LAW AND ANALYSIS

The issue presented by claimant is whether or not he is entitled to payment of medical expenses pursuant to 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.
>
> ....

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

Claimant bēgan seeing Dr. Neiman in September of 1982. In June of 1983 he was seen by Dr. Carlstrom whose only suggestion was that claimant might be referred to a pain clinic. When claimant began seeing Dr. Varner is unclear. In October of 1983 he went to Dr. Taylor who recommended he continue treatment with Drs. Neiman and Varner.

Claimant seeks payment for a visit to Dr. Neiman on April 3, 1984 and visits to Drs. Neiman and Varner on July 6, 1984. Mileage expense is sought for the July 6, 1984 trip and meal costs are requested on both dates.

Correspondence between the parties was initiated in September of 1983 when defendants first attempted to withdraw authorization from Drs. Neiman, Varner and Berg and to authorize "[f]urther medical treatment...through or on behalf of Dr. Thomas Carlstrom." Claimant raised a valid point in response -- Dr. Carlstrom suggested a pain clinic but recommended no other treatment.

Defendants subsequently paid expenses incurred with Dr. Neiman in October and Dr. Varner in December as well as mileage expenses from December. In January Goettsch wrote that Dr. Taylor had agreed to provide claimant with treatment.

Very shortly before claimant went to Dr. Neiman in April defendants' attorney reminded claimant's counsel that Drs. Varner and Neiman were no longer authorized. Hanssen responded by questioning why Dr. Taylor's advice was not being followed. No answer to that question was provided.

Ultimately, claimant agreed to discontinue seeing Dr. Neiman and he commenced seeing Dr. Taylor on a monthly basis.

The Iowa Workers' Compensation Act is to be construed in favor of the working person. Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, 662 (1961). It is clear from the statute that the employer has the right to choose care, but choice of care carries with the elements of promptness, reasonableness and convenience. The statute also allows for the agency to settle disputes regarding treatment.

Defendants' reasons for changing physicians are difficulty in obtaining information from the doctors and the increased expense of travel from claimant's home in Knoxville to Iowa City versus travel to Des Moines. Neither of these is particularly weighty. Getting information from doctors is a chronic problem and defendants are to be commended for their interest in monitoring claimant's treatment. Drs. Neiman and Varner are well-known and respected physicians who undoubtedly are overworked. Defendants' second consideration is slightly more persuasive in that over a period of time a substantial amount of mileage expense would be saved if claimant were being treated in Des Moines. That consideration should have been raised early on and not after claimant had become accustomed to his physicians.

One would wish that claimant's feelings in this matter were more apparent. There is little question, however, regarding the opinions of the attorneys for the parties. There is likewise little doubt that it is defendants who have become dissatisfied with the care they originally authorized. They seemingly never explored the possibilities of sending claimant to a pain clinic and they were discontent with Dr. Taylor's suggestion that care continue where it was. Actions on the part of defendants made it questionable whether or not they were offering alternate care or seeking to terminate long-term care which claimant was receiving.

Defendants cite three agency decisions as precedent. Not cited is a case more closely analogous to this -- Smith v. Carnation Co., II Iowa Industrial Commissioner Report 366 (1981) -- in which defendants were ordered to continue care with the previously authorized physician.

As claimant has now capitulated to defendants' wishes, it is unnecessary to establish an authorized treating physician. With regard to the issue of the factual situation presented in this appeal, defendants will be ordered to pay the charges of Drs. Varner and Neiman and to pay mileage expenses. The hearing deputy properly noted that meals are not an expense covered by Iowa Code section 85.27. However, Industrial Commissioner Rule 500-8.1 relates to transportation expenses and does provide for meals incident to an examination. There is no testimony that meals for which claimant makes claim were incident to examination.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant was injured at his employment on July 1, 1982.

That claimant was treated by Drs. Neiman and Varner.

That claimant was sent by defendants to Drs. Carlstrom and Taylor.

That defendants withdrew authorization of Drs. Neiman, Berg and Varner and offered instead Drs. Carlstrom and Taylor.

That claimant incurred medical expenses with Drs. Neiman and Varner and mileage expenses after authorization was withdrawn.

That defendants failed to follow the advice of either of the physicians to whom they sought to switch authorization.

That defendants withdrawal of authorization was not reasonable under these circumstances.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established entitlement to payment of medical and mileage expenses pursuant to Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay the following medical expenses:

Vernon P. Varner, M.D.	$40.00
Richard F. Neiman, M.D.	50.00

That defendants pay mileage expenses totalling fifty-eight and 80/100 dollars ($58.80).

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

Signed and filed this 26 day of August, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

T. GERTRUDE STARR,	:	
Claimant,	:	File Nos. 645957 686300 706245
vs.	:	
DEAN PRINTING COMPANY, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	FILED
IOWA KEMPER INSURANCE COMPANY,	:	JUL 03 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed April 8, 1985 this deputy industrial commissioner has been appointed under of the provisions of Iowa Code section 86.3 to issue a final agency decision in this matter.

Defendants appeal from three decisions filed December 20, 1984 in which claimant was awarded 180 weeks of permanent partial industrial disability.

The record on appeal consists of a transcript of the hearing, claimant's exhibits A and B and defendant's exhibits 1 through 3. All evidence was considered in reaching this final agency decision.

The decision herein will modify that of the hearing deputy.

ISSUES ON APPEAL

The issue on appeal as stated by defendant is: "Is the Deputy's Finding that claimant suffered a 40 percent industrial disability as result of the injury 2/10/82 supported by the evidence?"

REVIEW OF THE EVIDENCE

Seventy-three years old claimant, a high school graduate who has worked for defendant employer for more than 25 years, testified to work experience in bindery type jobs and on an assembly in an ordinance plant. Prior to her injury, she did overtime. In addition to the bindery work which required bending, stooping and use of her wrist, she made out checks for bills and she ran the business when her boss was on vacation. She claimed that before her injury she also did all the work around her home including mowing and shoveling.

Claimant indicates that her accident on February 10, 1982 happened essentially as Valera Starr, her daughter-in-law testified. Her hips and legs were bruised. She was dizzy. She called the office of Rodney Carlson, M.D. and began home whirlpool therapy, heat and Tylenol 4. She worked until April 13. She was hospitalized for five weeks.

Claimant complained of a needle-like sensation in her left leg, difficulty in sitting because of her hip, trouble walking distances, and an inability to stoop. She does not lift. She declared that her "nerves are shot" and that she cannot sleep. Claimant claimed that she was troubled by her inability to pay her medical expenses and that her concern led to blood pressure problems for which she received shots.

Claimant acknowledged a fall in 1980. On another occasion she hurt her back while she was lifting. She subsequently had surgery by Robert Hayne, M.D. for which she said she stayed off work only two weeks. She did not recall testifying at the hearing before the industrial commissioner in July of 1975 regarding her time off work. Nor did she recollect subsequent complaints of back pain to Dr. Carlson.

Claimant did not think that she had the mobility or ability to be on her feet for a long enough period to do or to supervise bindery work. She denied being fired. Rather she said she left because of a dispute with her employer. She collected two or three weeks of unemployment and on May 26, 1982 first actually went to Dr. Carlson's office about her hip.

Claimant claimed that Dr. Hayne's examination took only five minutes and that he had not looked at x-rays.

Seventy-three years old George Richard Dean, who had been in the printing business for nearly 40 years, testified that claimant worked for him as a bindery girl doing bending, stooping and lifting. In more recent times claimant did some bookkeeping.

He recalled claimant's injuring her back when she fell over a skid, claimant's having surgery for a disc and claimant's having a third back incident. He remembered picking claimant up off the floor when she walked into a skid and then hit the folding machine and landed near the feeder. He believed claimant went to the hospital. He also knew of claimant's claiming a slight stroke.

He did not know claimant was in the hospital in May of 1982 until he heard about it from her son. He at that point called Dwayne Miller to let the insurance carrier know; claimant had been responsible for reporting injuries. Dean acknowledged conversations with Valera Starr in which claimant's condition was discussed and he thought those took place after she was hospitalized.

The witness said that he did not know claimant was hurt at the time she was terminated for her poor work performance over the prior six months to a year. Valera Starr let herself go. He was unsure of the termination date.

Shirley M. Law testified that Dr. Hayne's examination of claimant lasted less than four minutes.

Valera Starr, claimant's daughter-in-law, testified that before February of 1982 claimant did bending, stooping and lifting. Use of the wrist was required especially for gathering books. Starr described the alledged incident of February 10, 1982 as follows:

> We was working on some syndicate books and she was -- had turned to walk back to get a box to put -- well, she had turned really to pick up some sheets off of the folder and pick up a box, and she caught her foot on the corner of a chair and when she did it slung her over against the string tier. It flipped her. She hit the edge of the folder and she fell into some rollers that was angled along the side of the wall, and it flipped the string tier then down over partway on her before we could get it.

Present at the time was George Dean. Claimant did not work the following day. Claimant had trouble with her back, hip and leg which she tried to treat at home.

Since the injury claimant's activities around her home have decreased. Claimant was upset before her injury and she has been upset since that time.

Rodney I. Carlson, M.D., a member of the Academy of Family Practice, who has treated claimant since 1971 at which time claimant told of low back pain present for years. In 1972 Norgesic was prescribed for low back problems. Dr. Carlson recalled on December 7, 1973 taking a history of claimant's falling at work and hitting her back and left knee. Claimant at that time had generalized osteoporosis or thinning of the bone in her skeleton. She was hospitalized by D.C. Wirtz, M.D.,in April of 1974 and diagnosed as having osteoarthritis with spurring which was aggravated by the fall. Claimant was given a back brace. On October 9, 1974 claimant had a laminectomy. Her herinated disc was attributed to an aggravation by a fall. At some point thereafter Dr. Carlson observed claimant to be tense, anxious and concerned about the economic outcome of her case. She had leg and back pain. Dr. Carlson restricted prolonged standing and her lifting to five to 10 pounds.

Claimant was seen in June of 1975 for back pain radiating into the leg which was aggravated by coughing and sneezing. She was seen again in 1976 for pain in her hip and back and again in 1977 when she complained her back was worse. In 1979 she told of falling several times and of having mid and lower back pain with pain down to the right knee.

Claimant was hospitalized in August of 1980 after she had low back pain as she lifted the box. Pain also radiated down the right leg. Her diagnosis was acute strain.

Claimant called on February 19, 1982 after a fall at work. The doctor attributed claimant's pain to the aggravation due to the fall. A report dated May 27, 1982 recorded a chief complaint of pain radiating to the ankle which started on May 24, 1982. Claimant was hospitalized later that month. Final diagnoses included spinal stenosis which was attributed to claimant's arthritic condition and a deformity at L4/5 with radiculitis which the doctor said could be related to the laminectomy or to degeneration of a disc wall. A CT scan and body imaging were normal. A myleogram showed asymmetry at L4/5 which was consistent with a nerve root irritation causing leg and hip pain.

A letter from the doctor dated August 19, 1982 related claimant's problems to her fall in February of that year.

Dr. Carlson did not anticipate claimant's being able to return to work because of her age and because her problems had caught up with her. The doctor did not think claimant could handle either the mental or physical strain of the job.

The doctor thought that at the time of his deposition claimant had reached a point where she would not improve anymore and that claimant had not improved since her fall. Dr. Carlson did not relate claimant's osteoporosis, chronic obstructive pulmonary disease, labyrinthitis, diverticulosis, nasal or colon polyps, urinary problems, hypothyroidism, sclerosis, spurring, degenerative changes, hiatus hernia or hypertension to any work injury. The doctor acknowledged the claimant's difficulty maintaining her balance could be related to her arteriosclerosis.

The doctor observed that claimant gets anxious and upset and is very "hyper."

Dr. Carlson agreed that a fall in the bathroom could cause problems such as those of which claimant complained and he knew claimant fell on ice in January of 1982 and believed that such a fall could affect claimant's low back.

Robert Hayne, M.D., board certified neurosurgeon, first saw claimant on December 19, 1974 at which time she gave a history of a fall on December 3, 1973 resulting in a strain to her left knee with subsequent pain in her low back and into the back of her left thigh of increasing severity. The doctor concluded claimant had a protruded disc at L5 on the left. In March of 1975 claimant complained of pain down the back of her right lower extremity. She was hospitalized for physical therapy. By that time claimant's neurological findings were near normal and her neurological deficit was viewed as relatively small. She had no atrophy or loss of strength or coordination. Claimant was given a rating of eighteen percent. The doctor anticipated claimant's being able to return to work which did not place a strain on her low back. More specifically he did not think claimant could operate a stapling machine or perforator. He questioned her ability to gather and do folding. He expected claimant to have difficulty with constant twisting, turning, squatting, bending, lifting, standing and carrying bulky or awkward materials.

Dr. Hayne examined claimant on November 18, 1983 and reviewed a CT scan which he interpreted as showing evidence of bilateral facet hypertrophy and degenerative changes in the space between L4 and L5 as well as some foraminal narrowing. The neurological was within normal limits. Claimant's condition was found to be worse with an increased disability of four percent as a result of symptoms dating from February 1982. He wrote that "a considerable portion of this patient's symtomatology ... is attributable to degenerative changes secondary to the aging process."

Joseph Fellows, M.D., board certified orthopedic surgeon, first saw claimant March 8, 1975 in consultation with Dr. Hayne. Claimant's motion was restricted and raising her left leg produced a pain. The diagnosis was mechnical low back pain based on degenerative arthritis in the back with the possibility of residual radicular or nerve root irritation. A back brace was prescribed.

Dr. Fellows rated claimant's impairment at 15 percent "of the back related to the body as a whole." He anticipated claimant's being able to do light work with lifting 15 to 20 pounds and most forms of sedentary work although prolonged sitting could be bad.

Claimant was seen by Neal Kassell, M.D., neurosurgeon, who reported a history of a laminectomy following a 1972 injury and a fall in February 1982 when she "banged both hips" and shortly thereafter developed low back and simultaneous non-radiating left leg pain. She had intermittent numbness and tingling into her left thigh which was exacerbated by activity and relieved by rest.

Claimant favored her left leg. She had no paraspinous muscle tenderness or spasm. Her range of motion was full; and her muscle mass, tone and power were normal. The tingling sensation was diminished in the left leg and her deep tendon reflexes were hyperactive. X-rays were thought to show moderate osteoarthritis; the myelogram, extradural defects.

Dr. Kassell could not explain his findings.

Thomas W. Bowers, L.P.T., provided claimant with physical therapy in August.

William R. Boulden, M.D., in August of 1982 reported claimant's stating to him emphatically that she injured her back and left leg on February 10, 1982. He wrote that "in trying to state whether this accident really caused her problem or not I would have to tend to believe the patietn[sic] that the accident was a result of the accident in February." He did not feel claimant could return to work she had been doing, that she had reached recuperation nor that she would have any permanent partial impairment. His diagnosis was lumbosacral strain with trochanteric bursitis.

Dr. Boulden saw claimant on April 12, 1983 to provide her with an impairment rating. Her ranges of motion were left lateral bending 10 degrees, right lateral bending 10 degrees, extension five to 10 degrees, and forward flexion 80 degrees. Straight leg raising on the right brought on buttock discomfort; on the left, pain to the calf, thigh and hip. Her left ankle reflex was decreased as was sensation in the left leg.

Dr. Boulden's impression was degenerative disease with left leg pain. He rated claimant disability at 10 percent of the lumbar spine.

A 1975 review reopening-decision relating to claimant's injury of December 3, 1973 awarded her permanent partial industrial disability of 23 percent.

APPLICABLE LAW AND ANALYSIS

Initially it must be noted that this is claimant's second hearing before the industrial commissioner. The first was over an injury to her back on December 3, 1973 for which she was awarded permanent partial industrial disability of 23 percent. Pertinent considerations in the review-reopening decision were these: Claimant was assigned a rating of 18 percent of the body as a whole by Dr. Hayne who did not think claimant could continue to do work requiring constant twisting, turning, squatting, bending, lifting, sorting, or carrying bulky or awkward materials; but he thought claimant could do more sedentary work. Dr. Fellows who estimated claimant's impairment at 15 percent of the body as a whole found claimant's hip motion on the left was reduced and she had decreased sensation along the S1 nerve root on the left. He recommended physiotherapy and a back brace and that claimant not lift over 15 to 20 pounds.

Three files were consolidated for hearing in this current matter. File 645957 relates to a back injury of August 12, 1980 for which claimant was paid temporary total disability. The hearing deputy concluded claimant was not entitled to any additional benefits for that injury.

Nor was she found entitled to additional benefits in file 686300 which involved an injury to her right hand for which she was paid healing period and nine and half weeks of permanent partial disability for loss of use of the hand.

Neither file 645957 nor file 686300 is involved in this appeal as the sole issue herein relates to file 706245 involving a back injury of February 10, 1982 for which the hearing deputy awarded a 40 percent industrial disability. Defendants have appealed asserting that they are not liable for "claimant's pre-existing physical problems or by naturally occurring progression of such conditions, or problems caused by subsequent injuries;" that claimant's age and receipt of retirement benefits are a diminishing factor and that claimant's industrial disability in minimal.

When an aggravation occurs in the performance of an employer's work and a causal connection is established, claimant may recover to the extent of the impairment. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960).

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber, Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960). See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

The industrial commissioner has stated on many occasions:

> A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant has a long history of back complaints which seemingly began before Dr. Carlson started treating her in 1971. Claimant had both preexisting osteoporosis and osteoarthritis. In 1974 she had a laminectomy at L5 on the left and thereafter complained of back and leg pain. Dr. Carlson saw claimant for back pain in 1975, 1976 and 1977. In 1979 she told of falling several times and then having pain. In August of 1980 she was hospitalized with back pain radiating down the right leg.

Dr. Carlson was the first practitioner to see claimant for her February 1982 fall although claimant had been to Dr. Boulden for other treatment. Dr. Carlson did not anticipate claimant's being able to return to work both because of her age and because her problems had caught up with her. Dr. Hayne saw claimant after her first injury and again in 1983. He increased her functional impairment by four percent and related her symptomatology to degenerative changes secondary to injury. Dr. Kassell, a neurosurgeron, examined claimant and found some diminution in sensation in the left leg and hyperactive deep tendon reflexes. Dr. Boulden gave claimant a rating of 10 percent of the lumbar spine.

Claimant complained of the briefness of Dr. Hayne's exam. It is apparent from Dr. Hayne's report that claimant was less than cooperative with his examination. Overall, Dr. Hayne's assignment of an additional four percent body as a whole impairment attributable to her last work incident is not out of line with Dr. Boulden's 10 percent spine impairment which did not consider claimant's preexisting impairment from her prior back surgery. Dr. Carlson did not give a functional impairment rating, but rather declared claimant unlikely to withstand the strain of a job.

Claimant is a high school graduate with limited work experience. The major portion of her work life has been devoted to bindery work and more particularly to bindery work for defendant employer.

Claimant was able after her injury in 1973 to return to her work. She was seventy years of age at the time of this injury--well beyond normal retirement age. Her age obviously makes rehabilitation unfeasible and one could not fault claimant for the lack of motivation to return to work at this point in her life. Had claimant been forced to leave her job substantially because injury in 1982 rendered her unable to continue working, her industrial disability would be considerablely higher. She did not stop working after her fall. She did not even contact Dr. Carlson until more than a week after the fall. She saw Dr. Boulden in March of 1982 on more than one occasion and never complained of her back. Dr. Carlson's testimony indicates claimant age and problems caught up with her. Claimant's health conditions in addition to her back trouble are significant. Claimant testified she left her employment because of a dispute with her employer after which she collected unemployment. Dean testified she was terminated for poor work performance. Termination of claimant's employment was not related to her injury.

The hearing deputy's award of 40 percent is too high. Defendants argue that claimant should be paid only five percent. That would be too little as she does have some industrial disability. Based on the Iowa case law, the discussion herein and the findings of fact made below, claimant's industrial disability will be found to be 10 percent based on the injury of February 10, 1982.

FINDING OF FACTS

That claimant is seventy-three years of age.

That claimant is a high school graduate.

That claimant's work experience has been in bindery type work and assembly.

That claimant has worked for defendant employer for more than twenty-five years.

That bindery work requires lifting, bending and stooping.

That claimant has a long history of back complaints.

That claimant has had generalized osteoporosis and osteoarthritis since the 1970's.

That claimant has a number of conditions which are not related to any work injury including chronic obstructive pulmonary disease, labyrinthitis, diverticulosis, polyps, urinary problems, hypothyroidism and hypertension.

That claimant injured her back, neck and knee when she fell over a skid at work on December 3, 1973.

That in October of 1974 claimant had a laminectomy at L5 on the left.

That subsequent to the laminectomy claimant was restricted from prolonged standing and to lifting of five to 10 pounds.

That claimant was awarded industrial disability of 23 percent as result of her December 3, 1973 injury.

That claimant was able to return to and to perform her regular work.

That claimant was hospitalized in August of 1980 with low back complaint relating to a back injury of August 12, 1980 for which she was paid temporary total disability benefits.

That claimant received an injury to her right hand in July of 1981 for which she was paid healing period benefits and permanent partial disability.

That claimant fell at work on February 10, 1982.

That claimant continued to work until April 13, 1982.

That claimant left her employment either because of a dispute with her employer or because of poor work performance and collected unemployment.

That claimant's functional impairment to her body as a whole resulting from the injury of February 10, 1982 is minimal.

That claimant fell on ice in January of 1982.

That claimant has been paid healing period and permanent partial disability as result of her February 10, 1982 injury.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That claimant has failed to establish by a preponderance of the evidence entitlement to any additional benefits relating to her injury of July 12, 1980 or July 31, 1981.

That claimant has established by a preponderance of the evidence a causal relationship between her injury of February 10, 1982 and her current disability.

That claimant has established by a preponderance of the evidence entitlement to permanent partial industrial disability of 10 percent.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant 50 (fifty) weeks of permanent partial disability benefits at a rate of $145.60 (one hundred forty-five dollars and sixty cents) per week.

That defendants be given credit for amounts previously paid.

That defendants pay the amount of this award in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

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

That defendants file claim activity reports as requested by this agency.

Signed and filed this 3 day of July, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

T. GERTRUDE STARR,	:	
Claimant,	:	File Nos. 686300 645957 706245
vs.	:	
DEAN PRINTING COMPANY, INC.,	:	N U N C
Employer,	:	P R O
and	:	T U N C
IOWA KEMPER INSURANCE COMPANY,	:	O R D E R
Insurance Carrier, Defendants.	:	

FILED
JUL 17 1985
IOWA INDUSTRIAL COMMISSIONER

An appeal decision was filed in these matters on July 3, 1985. A clerical error occurred in that decision. The first conclusion of law on page 11 is amended to read: "That claimant has failed to establish by a preponderance of the evidence entilement to any additional benefits relating to her injury of August 12, 1980 or July 31, 1981."

That decision filed July 3, 1985 remains unchanged in all other regard.

Signed and filed this 17 day of July, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GENE STORJOHANN,	:	
Claimant,	:	File No. 754600
vs.	:	
PHILLIPS ENTERPRISES, LTD.,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	FILED
EMPLOYERS INSURANCE OF WAUSAU,	:	AUG 20 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration and for medical benefits brought by claimant, Gene Storjohann, against his employer, Phillips Enterprises, Ltd., and its insurance carrier, Employers Insurance of Wausau, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained November 30, 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Bicentennial Building in Davenport, Iowa on April 9, 1985. 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 January 12, 1984.

The record in this case consists of the testimony of claimant and of claimant's exhibits 1 through 31 and 33 and 34.

ISSUES

The issues for resolution are:

Whether claimant received an injury which arose out of and in the course of claimant's employment.

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

Whether claimant is entitled to benefits and the nature and extent of any such entitlement.

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

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's rate of weekly compensation was $379.03 per week; that claimant's contested medical bills are fair and reasonable if causally related to his injury and authorized. The parties also stipulated that items on exhibits 18 and 27 relate to claimant's shoulder problem and that defendants will voluntarily pay these. They also agreed that if claimant's back surgery is found to be causally related to his injury, then items evidenced by exhibits 19 through 26 and 28 through 31 as well as subsequent care are causally related to surgery.

Claimant testified in his own behalf. Claimant is 43 years old, has completed eleven and one-half years of school and also obtained a GED in the service. He is married and has two children who remain at home. Claimant has been an ironworker since 1967. Prior to becoming an ironworker, claimant worked as a mechanic, a steel fabricator, and as a general laborer. He testified these occupations all required bending and lifting of weights up to 100 pounds or more. Claimant reported ironworking involves heavy physical labor, climbing ladders, and lifting weights of more than fifty pounds. The ironworker also reads blueprints and plans job layout. Apparently, foremen who also assist in physical labor generally perform the latter tasks.

Claimant was injured November 30, 1982 when a track suspended above a 200 foot long wash booth broke and hit him across his head and shoulder. Claimant reported that he was told that the beam was resting on his leg while he was in immobilized in a crouched position. Claimant reported his back, shoulder, head, and neck hurt. Claimant worked light duty following his injury through December 1982. Claimant sought chiropractic treatment for his condition in January 1983. After several weeks of chiropractic treatment, claimant saw Eugene Collins, M.D., who referred him to John Sinning, M.D. Dr. Sinning apparently treated claimant's back with physical therapy in April and May 1983. He received no treatment for his shoulder condition at that time, but reported that his symptoms in the shoulder and leg as well as in the back did not abate.

In June 1983 claimant worked as an ironworker supervising foreman. He indicated this involved doing layout work with minimal physical activity as his coworkers did required lifting for him. Claimant reported his back and shoulder pain intensified and that he again saw Dr. Sinning for shoulder and back pain in January 1984. Claimant was uncertain whether he had sought authorization for this care, but indicated that at his employer's instruction he contacted the insurer and was told to do whatever was necessary. Dr. Sinning apparently ordered a CT scan, an EMG, and a myelogram, and referred claimant to Stanton Goldstein, M.D., a neurosurgeon. Dr. Goldstein apparently performed back surgery in February 1984 and subsequently redirected claimant to Dr. Sinning who then performed shoulder surgery in June 1984. Claimant reports that he is continuing in-home therapy to strengthen his shoulder.

Claimant reported receiving a wage of $16.20 per hour as an ironworker plus benefits equalling approximately $3.00 per hour. Claimant expressed his belief that he would now have difficulty performing many tasks required of an ironworker. He reported that he has a 25 pound lifting restriction and cannot bend, weld overhead, climb, or reach. He indicated that he worked as a layout worker intermittently in December and January 1985 and then through April 5, 1985, but he was then laid off as no work that he could do with his back and shoulder condition remained. Claimant described as atypical an ironworker doing layout work only and reported that but for the intervention of friends he would not have gotten that position. Claimant indicated that prior to his injury, he worked as a foreman approximately ten percent of the time and agreed that he preferred work as a foreman because the wage paid was greater. Claimant agreed that ironwork is inconsistent in that one may work more or less than forty hours per week, but reported that he often worked more than 160 hours per in 1982.

Claimant reported that he had never had back and shoulder problems which affected his work before his 1982 accident. He agreed that he had seen a chiropractor for back problems approximately six or seven years prior to his 1982 injury, but stated that he had received complete relief after three or four treatments, had no back problems in the intervening time and had continued to lift up to fifty pounds until his injury.

Claimant has sought assistance from state vocational rehabilitation. He attempted retraining in body shop repair work. Claimant reported that he had trouble lifting above chest level and bending his hand beyond the elbow while attempting this work as well as problems with sitting or standing for prolonged periods. Claimant believed that had he been able to work in auto body repair, he could eventually have earned up to $300 per week.

On cross-examination, claimant agreed that while a foreman is generally a working foreman who also works with a crew, on large projects, the foreman may interpret blueprints on an ongoing basis. Claimant also agreed that in 1982 work was slow in the local area even though available in other locales. Claimant agreed that Dr. Goldstein has given him a 25 pound lifting restriction as regards his back, but that Dr. Sinning has not given him lifting restrictions as regards his shoulder. Claimant agreed that while working in the body shop, he had rotary ground paint, but stated this was usually done at waist level. He also had occasionally welded and had once replaced a cord panel. Claimant reported that his back pain varies from minimal to severe even when he is not working. Claimant believed that he could physically handle the job of bench welding or other factory work, but did not believe he could easily work indoors.

Claimant reported that Dr. Sinning knew of his shoulder condition in May 1983, but told him to let the condition progress until his next appointment in January 1984. Claimant disagreed with a note of Dr. Sinning of May 12, 1983 reporting that his back and leg were feeling much better.

Claimant's exhibit 9 is an emergency department record of Mercy Hospital, Davenport, Iowa, dated November 30, 1982. The nurse's observation notes on that report described a history of the injury which is substantially that which claimant gave at hearing. The observations note that claimant was wearing a hard hat and that claimant has an abrasion on the right clavicle and the right upper chest, but that claimant denies back pain or neck pain. It also reports that claimant denies injury to (unintelligible) or the extremities.

Claimant's exhibits 1, 2, 3, 4, 5, 10, 11, 12, 13, 16, and 34, relate to claimant's treatment under the direction and control of Dr. Sinning. Exhibit 16 is the deposition of Dr. Sinning taken March 19, 1985. In his deposition, the doctor identified himself as a board certified orthopedic surgeon who has been in practice since 1956. The doctor indicated that claimant gave a history of injury substantially similar to that given at hearing. He reported that claimant stated that he had continued shoulder pain and that later claimant reported pain in his left hip and knee with numbness over the upper calf. On physical examination, claimant had full motion of his hips with no tenderness, full motion of his knees with some snapping; normal reflexes; and negative straight leg raising tests. Claimant had full motion of his foot and ankle with no tenderness in the arch of his foot. The reported area of numbness was too vague for any definite borders to be ascertained. Claimant had full motion and good strength in his left shoulder, but the outer end of the collar bone was much more prominant than on the opposite side.

The doctor next saw claimant May 12, 1983. The doctor reported claimant's hip and leg complaints were much improved and reported to Phillip Enterprises that claimant could be released as to his back and hip on May 16, 1983 with no specific restrictions or impairments. The doctor reported that x-rays of claimant's shoulder revealed that there was a loss of the normal joint of the acromioclavicular with arthritic changes, bony spurs and small cysts in the bone. The doctor characterized the cyst formations as a reaction to injury and reported the described conditions were of a degenerative nature, but opined it was impossible to tell whether the changes preceded claimant's accident.

The doctor next saw claimant on January 4, 1984. Claimant had increased right shoulder pain with a greater awareness of pain with repeated or prolonged overhead reaching. Claimant had continued complaints of low back pain radiating into the left buttock and the upper thigh and aggravated by heavy lifting. On examination, claimant had full range of motion in the back with normal straight leg raising and gait.

The doctor next saw claimant January 20, 1984. Claimant complained of ankle pain and foot numbness. Claimant had a positive straight leg raising test at 45 degrees with weakness in dorsiflexion of the left foot. The doctor characterized these findings as generally associated with acute intervertebral disc herniation and reported that a CT scan and nerve conduction studies were ordered. The CT scan revealed bulging and bony spurs in the upper portion of the fourth lumbar disc. On January 31, 1984, a myelogram and an enhanced CT scan were performed. The myelogram revealed a blockage between the third and fourth lumbar vertebral bodies and the enhanced scan showed stenosis or narrowing of the spinal canal at L3-4 and L4-5. Dr. Sinning reports that claimant was subsequently referred to Stanton Goldstein, M.D., who later performed back surgery.

Following his back surgery, claimant returned to Dr. Sinning regarding his shoulder problem. The doctor performed a partial acromionectomy, excised the coracoacromial ligament, excised the distal end of the right clavicle and explored the rotator cuff. The doctor opined that surgery was successful and reported that he released claimant for work on August 7, 1984 without restrictions even though claimant could not fully reach overhead.

The doctor performed an impairment evaluation of claimant on November 7, 1984. He reported that claimant's external rotation was 30 degrees and his overhead elevation and internal rotation were each limited by ten degrees. Dr. Sinning then released claimant from his care and assigned him an impairment rating of ten percent of his right upper extremity.

On further discussion of claimant's low back problems, the doctor reported that claimant's complaints were suggestive of nerve irritation, but claimant had no objective findings of disc abnormality in April or May 1983. The doctor later stated he did not believe claimant's November 1982 injury was the most likely cause or a cause of claimant's herniated disc, even though that accident may have played some part in the herniation. The doctor stated that claimant may have injured the nerves around the disc and the small joints of the back in the accident producing reflex sciatica rather than true sciatica which reflex sciatica had largely disappeared by May 1983. He reported that when claimant returned in January 1984 he still had reflex sciatica leg pain, but that in the subsequent three weeks claimant developed an acute disc herniation. The doctor indicated that while it was possible that the 1982 injury caused damage to claimant's already forty year old disc, something, even if only daily activity, happened in January 1984 that caused the disc to truly rupture. The doctor later opined that the conditions for which he treated claimant in March, April, and January were causally related to claimant's November 1982 accident and stated that periods of remission and exacerbation are common in back patients. In a December 6, 1984 letter, the doctor states that claimant's shoulder condition can reasonably be attributed to the accident of November 30, 1982.

Exhibits 6, 7 and 17 relate to claimant's treatment by Stanton L. Goldstein, M.D. Exhibit 17 is a deposition of Dr. Goldstein taken July 31, 1984. The doctor identified himself as a board certified neurological surgeon who has practiced for over thirty years. The doctor reported that claimant had given a history substantially similar to that given at hearing, but stated that the beam which struck claimant weighed between 800 and 1000 pounds; that claimant was wearing a hard hat at the time, and that claimant was apparently knocked unconscious. The doctor stated that in January 1984, claimant's primary complaint was of pain in the low back which radiated into his left low leg with numbness in both legs. Apparently, in January 1983, claimant complained of left leg pain only. The doctor opined that claimant's disc herniations were such as could produce pain in both lower extremities and that the shift in claimant's pain experience could result from a shift in the disc herniation or an increase in the degree of disc herniation. The doctor reported that claimant's CT scan revealed arthritis at L3-4 with a large spur protruding posteriorly as well as a bulging disc at L4-5. The doctor stated that the large spur could be causing pressure on claimant's nerve root and characterized the spurring as a hypertrophic growth or arthritic condition which ordinarily is slow growing and had probably been present for years. The doctor stated that a myelogram revealed a block below at the L4-5 innerspace and that surgery revealed a large disc herniation at L4-5 and smaller bulging discs at L3-4 and L5-6. The doctor reported a major portion of the L4-5 herniation was adherent to the nerve root, that is, it had produced scar tissue on the nerve root, which had to be disected away.

The doctor stated in regards to Dr. Sinning's May 16, 1983 work release of claimant, that it was not unusual that claimant was then asymptomatic since often persons with a disc rupture have episodes of pain followed by nearly symptom-free remissions after which pain returns. The doctor agreed that claimant apparently had no additional trauma or injury between May 1983 and his February 1984 surgery, but stated that continued heavy manual labor could introduce additional disc stress which might cause a reherniation without specific trauma. The doctor did not believe that continued work was inconsistent with already herniated discs.

A medical report of the doctor of February 14, 1984 indicates that the doctor performed a laminectomy of L3, 4, 5 and 6 on February 6, 1982 in which a very large extruded disc was removed from the L4-5 innerspace and small protruding discs were removed from the L3-4 and L5-6 innerspaces. In his deposition, the doctor reported that three months after surgery claimant had had an excellent result with nearly complete return of right foot strength albeit with some toe tingling and foot cramping. He then recommended claimant return to work as directed by Dr. Sinning and with a permanent restriction on heavy lifting. The doctor later opined that claimant should avoid prolonged standing, bending, and stair climbing and should not return to ironworking. The doctor assessed claimant's disability at 35 to 40 percent, but considered claimant's age, education and work history in doing so. The doctor opined that claimant had reached maximum medical improvement regarding his back as of the deposition date, July 31, 1984.

The doctor related claimant's disc herniation to the November 30, 1982 injury stating that claimant had no significant pain before that time and had had a very definite blow which could have caused pressure along the axis of the spine and, therefore, caused the disc to protrude and herniate. The doctor later stated that the incident could have set up a weakened disc mechanism with the actual disc herniation occurring much closer to the time of his own treatment and care of claimant. He further agreed that the accident could have weakened claimant's back and that the actual herniation could have occurred as a result of normal work or some other activity more proximate to the time of claimant's surgery. The doctor did not find the fact that x-rays in 1983 had not revealed narrow disc spaces significant in that narrowing of the disc innerspace does not necessarily occur with disc rupture. The doctor later described one of claimant's discs as of "degenerated" disc and opined that degeneration is usually caused by both trauma and wear and tear with age. In a medical report of March 26, 1984, the doctor states that claimant's work injury is "directly responsible" for claimant's condition requiring medical care and surgery.

Claimant's exhibit 8 is a note of John F. Collins, M.D., of March 16, 1983. In the note, the doctor states that claimant's complaint is of pain in the right shoulder and "leg hip area." Claimant's exhibit 18 through 31 are statements of medical costs for services rendered claimant. Claimant's exhibit 33 is a copy of claimant's local union work records for years 1978 through 1984. These were reviewed in the disposition of this matter and indicate claimant worked steadily before his injury.

APPLICABLE LAW AND ANALYSIS

Our first concerns are whether claimant received an injury which arose out of and in the course of his employment and whether his current disability is causally connected with any work injury.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 30, 1982 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

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

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

It is not seriously disputed that claimant was injured at work on November 30, 1982 and that claimant was injured at work on November 30, 1982 and that claimant's injury extended to his shoulder. The dispute centers on whether claimant's work injury also produced his disc problems.

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

A cause is proximate if it is a substantial factor in bringing about the result. It need only be one cause; it does not have to be the only cause. Blacksmith v. All American, Inc., 290 N.W.2d 348, 254 (Iowa 1980).

Dr. Sinning opines that claimant's leg pain before January 20, 1984 was reflex sciatica only and not indicative of a true disc rupture, but that something in January 1984 produced a true disc rupture. He does not believe claimant's work injury was a cause of his disc ruptures. Dr. Goldstein, on the other hand, believes claimant's work injury ultimately produced his disc condition even if the condition did not fully manifest itself and even if the disc did not fully rupture until as late as January 1984. While both doctors have considerble years of medical experience and are board certified in their respective fields of medical expertise and are equally competent to address this particular causation question, Dr. Goldstein's opinion is accepted. The doctor emphasized claimant's absence of significant pain before that injury and the mechanism of the injury itself in reaching his conclusion. He emphasized that the mechanism for the disc rupture had its onset in the injury even if the rupture and protrusions occurred later. That appears a reasonable conclusion given the severity of claimant's actual incident of injury, his considerable problems thereafter, and the absence of evidence of further trauma subsequent to the work injury. Thus, while something may have happened in January 1984 which contributed to claimant's disc problems, his November 1982 work injury also was a probable cause of that condition. Claimant's current disabilities flow from the residuals of his disc condition and his shoulder condition. These, of necessity then, are causally related to his injury.

Our next concern is claimant's benefit entitlement. We first consider the duration of his healing period under section 85.34(1). Claimant has not returned to the same or substantially similar work. Dr. Goldstein opined claimant had reached maximum medical improvement for his back July 31, 1984. Dr. Sinning released claimant for work on August 7, 1984 even though claimant could not yet reach overhead fully. He released claimant from his care and assigned an impairment rating November 7, 1984. Dr. Sinning had performed claimant's later surgery, that for his shoulder, June 1984. Thus, the date he released claimant from care as regards that condition is significant evidence of when claimant reached maximum recuperation. Claimant's healing period is found to run to November 7, 1984.

We next consider the question of permanent partial disability. Claimant is 43 years old; has completed eleven and one-half years of school and has a GED. His work experience is largely as an ironworker with some experience as a mechanic, steel fabricator and general laborer. Claimant is restricted from heavy lifting and has difficulty using his right arm for external rotation, internal rotation and overhead reaching. Dr. Sinning assigned a permanent partial impairment rating of ten percent of the right upper extremity. Claimant's injury is to his shoulder, however; it, therefore, is an injury to the body as a whole. Alm v. Borris Banich Cattle Co., 240 Iowa 174, 38 N.W.2d 161 (1949). Dr. Goldstein evaluated disability for the back as 35 to 40 percent, but considered factors other than functional impairment in so doing. Nevertheless, it appears claimant has a moderate to severe body as a whole impairment to his back which when combined with his shoulder problem represents a moderately severe body as a whole impairment. Claimant cannot return to work as an ironworker. He is well motivated and has worked as an ironworker foreman and otherwise with assistance from coworkers since his injury. Claimant is well spoken and appears to have good social and business judgment. He would do well to utilize these skills in seeking alternate employment. Indeed, claimant has attempted retraining in auto body repair work and body shop management. Factors beyond his control, apparently, prevented his completing this training. It appears like supervisory employment areas would be suitable for claimant, however. Claimant's supervisory and intellectual skills as well as his high motivation make his work future much less bleak than would be that of someone with like physical difficulties but lesser motivation and abilities. Nevertheless, the severity of claimant's physical handicaps and their actual impact on his earning capacity cannot be discounted. Claimant even with retraining will likely not receive an income approaching the $16.00 per hour he earned as an ironworker. When all factors are considered, claimant is found to have sustained an industrial disability of 40 percent.

Claimant seeks payment of medical costs. Under section 85.27, claimant is entitled to payment of reasonable medical costs resulting from a compensable injury. Claimant's back condition has been found to result from a compensable injury. Claimant is entitled to payment of costs evidenced in exhibits 19 through 26 and 28 through 31, as well as costs evidenced in exhibits 18 and 27.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant was injured November 30, 1982 when an 800 to 1000 pound track broke and struck him across the head and shoulder.

Claimant was pinned under the beam in a croached position for a time and was left stunned or temporarily unconscious.

Claimant had difficulties with his right arm and shoulder as well as with his back with radiation of pain and numbness in the left leg.

Dr. Sinning treated claimant for these conditions in April and May 1983 and early January 1984. Dr. Sinning released claimant for his back pain on May 16, 1983. On January 20, 1984, claimant complained to the doctor of back pain with radiation into both extremities.

An enhanced CT scan and a myelogram were performed.

Claimant had a large disc herniation at L4-5 and small bulging discs at L3-4 and L5-6 for which a laminectomy was performed on February 6, 1982.

Episodes of pain with periods of remission followed by further episodes of pain are common in back patients.

Claimant had not experienced significant back pain prior to his work injury.

The physical mechanism of claimaht's work incident was of a nature that could produce disc bulging and disc rupture.

Claimant's disc problems related to his work injury.

Claimant's shoulder and right arm problems related to his work injury.

Claimant has not returned to the same or substantially similar work.

Dr. Sinning assigned claimant an impairment evaluation November 7, 1984 and released claimant from his care on that date.

Claimant's shoulder surgery and followup treatment were his last received medical care.

Claimant reached maximum medical improvement November 7, 1984.

Claimant is forty-three (43) years old, has completed eleven and one-half (11 1/2) years of school, has a GED, is well motivated, and is intelligent.

Claimant has worked an an ironworker foreman and appears well suited for supervisory jobs.

Claimant has a moderately severe body as a whole functional impairment as a result of his work injury.

Claimant has attempted vocational rehabilitation but was unable to complete retraining as an auto body repairer and shop manager.

Claimant would earn considerably less in fields for which he is currently suited or for which he retrains than he earned as an ironworker or ironworker foreman.

Claimant has a loss of earning capacity of forty percent (40%).

Costs evidenced in exhibits 18 and 27 related to claimant's compensable shoulder condition.

Costs evidenced in exhibits 19 through 26 and 28 through 31 relate to claimant's compensable back injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury of November 30, 1982 which arose out of and in the course of his employment.

Claimant has established his current disability is causally related to that injury.

Claimant is entitled to healing period benefits from his injury date to November 7, 1984 for those times when he was actually off work on account of his injury.

Claimant is entitled to permanent partial disability of forty percent (40%).

Claimant is entitled to payment of medical costs evidenced in exhibits 18 through 31.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for two hundred (200) weeks at a rate of three hundred seventy-nine and 03/100 dollars ($379.03).

Defendants pay claimant healing period benefits from his injury date to November 7, 1984 for those times when he was actually not working on account of his injury. Defendants receive credit for benefits already paid.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

Defendants pay medical costs evidenced in exhibits 18 through 31.

Defendants pay costs of this proceeding.

Defendants file claim activity reports as required by the agency.

Signed and filed this 20th day of August, 1985.

Helen Wallesen

HELEN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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323 South Franklin Street, Suite 806
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VERNON R. SULLIVAN, Claimant, vs. FLOYD VALLEY PACKING Employer, and ARGONAUT INSURANCE INSURANCE COMPANY and NORTHWESTERN NATIONAL INSURANCE COMPANY, Insurance Carriers, Defendants.	File No. 724395 741620 738214 723660 A P P E A L D E C I S I O N FILED JUL 30 1985 IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed April 8, 1985 this deputy industrial commissioner has been appointed under provisions of Iowa Code section 86.3 to issue the final agency decision in this matter.

Defendant Argronaut Insurance Company appeals from the arbitration decision filed February 20, 1985 in which it was ordered to pay 100 weeks of permanent partial disability, healing period benefits and medical expenses.

The record on appeal consists of the transcript of the hearing, joint exhibits 1 through 3, claimant's exhibits 1 through 6, Argonaut Insurance Company's exhibits A and B and Northwestern National Insurance Company's exhibits AA and BB. All evidence was considered in reaching this final agency decision.

The decision herein modifies that of the hearing deputy.

ISSUES ON APPEAL

The issues on appeal as stated by defendants Floyd Valley and Argonaut are as follows:

> I. Claimant did not sustain an injury which arose out and in the course of his employment on 1-6-83 because he did not show any causal relationship between an alleged gradual injury and his alleged impairment and inability to work.
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> II. If a work injury is found, liability should be apportioned equally between the two insurers.
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> III. If compensability is found, claimant has little or no industrial disability.
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> IV. Claimant did not sustain an injury in the nature of a hernia on 5-28-83 which arose out and in the course of his employment.
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> V. The arbitration decision should have no significance.

REVIEW OF THE EVIDENCE

Claimant denied any problems with his back prior to commencing work for defendant employer in September of 1980 as a gutter -- work entailing making five or six cuts, removing the entrails and placing them in a moving tray. At other times he worked the loading dock or pushed hogs down a rail. In June or July he began having back trouble. In August of 1981 or perhaps before he told Nurse Penny and his foreman that his lower back was aching on the left side from doing his work, but the nurse wrote nothing down. He apparently had more difficulty communciating with the nurse; and after asking to see the doctor, he asked for papers so he could see a chiropractor. He saw R. I. Sprague, D.C., eight times in August.

In December of 1981 he fell in the parking lot and broke two ribs.

Early in 1982 he again saw Dr. Sprague. Claimant said that he saw Dr. McCarthy after he allegedly fell at home in July as he was carrying some lumber. He asserted that he only reported a fall at home so that the doctor would get paid.

Claimant asserted that his back problems grew worse and he told Mike Hanson his foreman he was hurting from gutting sows. He also complained to another foreman Ed Hanson.

In late 1982 his pain was much worse and he saw the company's doctor, Joseph Krigsten, M.D., who x-rayed him, gave him heat massage, prescribed medication and sent him back to work. He subsequently was referred to William Krigsten, M.D., who hospitalized him for tests.

On his release he was to return to work, but he was not to do heavy lifting. He was sent to gutting light pigs. He claimed that he continued to hurt in his lower back on the left with pain in his left leg and sometimes the right. He worked until February 18, 1983 when he was hospitalized by Alexander Kleider, M.D., to obtain a second opinion. After a myelogram and two weeks of home therapy, he went back to work on March 7, 1983 at light gutting. He developed a sharp pain which hurt all the time. He had pain on the right side which he assumed was coming from his back.

He denied that the company was telling him anything at this point and he went to see Dr. Sprague his chiropractor who kept him off work. Evenually he sought treatment at the Veterans Hospital and he was hospitalized for therapy. He returned to work on May 2, 1983 and worked until May 28. His legs and back were hurting. He was again treated by Dr. Sprague and then on June 30 went to Horst Blume, M.D., and to Cesar Rojas, M.D., who found a hernia.

He was hospitalized for tests and a nerve block was done which lead to postponing surgery for the hernia. He told Linda, the nurse at the plant, about the hernia.

Dr. Blume hospitalized and treated claimant until March 5, 1984. He also provided him with a TENS unit. Claimant was released to return to work with no lifting of over five or six pounds and no constant bending. He undertook work with a wizard knife and developed carpal tunnel problems for which he had surgery and was compensated. He believed his current work pay is twenty or twenty-five cents less per hour.

Claimant indicated that although his back feels better he continues to take Motrin and Tylenol 4 and to see a chiropractor for the constant aching pain on his left side.

Claimant denied receiving any letter saying why his compensation benefits were being stopped, but he agreed he had returned to work when payment stopped.

Scherry Jean Sullivan, claimant's spouse of 16 years denied that claimant had any problems with his back before going to work for defendant employer.

Randy Samson, union president, testified that he first learned of claimant's back problem in the mid summer or early fall of 1981. Claimant told him the gutting job was bothering his back and asked to be moved to a lighter job. Samson contacted the foreman and they discussed using a relief person. When no solution was found, the problem was taken to management. There was discussion with Fowler, the vice-president of the company about rotating employees in the gutting job. Plans were made for a time study and a check for a possible safety hazard.

Samson's next contact with claimant's problem came in 1982 when claimant became upset because his medical bills were not being paid. Again there was discussion of keeping claimant off the job. The witness also tried to determine through the nurse and Fowler why claimant was not getting workers' compensation.

James Curtis Bunch who had done gutting described it as a "bad job." He recalled that claimant complained of back problems several times and all the time beginning in the fall of 1981. The company's response when claimant's complained was to tell him to quit.

Dave Eugene Trobaugh, a relief person, testified to an incident in which he was not allowed by foreman, Ed Hanson to relieve claimant.

Leonard Ray Tanner who worked with claimant at another company testified that claimant had no back problems at that time.

Penny Hodge, B.S.N., a nurse with defendant employer for five years, testified to duties recording injuries at work and to handling group and workers' compensation benefits. She said that she has handled both industrial and non-industrial claims for claimant. In addition to herself there is currently another parttime person and two parttime persons for Friday and Saturday. Cards were kept on all complaints.

Nursing notes showed claimant had a laceration of the hand in August of 1981, but no back injury. Another laceration occurred in October. Hodge was not aware of a back injury in 1981 or of claimant's complaining in 1980 or 1981.

She denied being told of any on the job injury. In addition to the note she would make, the foreman would file a report. She denied telling claimant to change dates for insurance coverage. She did know of claimant's fall in the parking lot in which he hurt his ribs, but she did not have a report of back injury. Notes showed that on November 11, 1982 claimant had complained of pain in his right upper leg and groin which radiated down. Hodge testified that claimant's fall in the parking lot did not get on his card because it was reported too late.

Ed Hanson, kill floor foreman who has worked for defendant employer for 18 years, testified that there were other jobs claimant could do with his seniority other than work with the wizard knife. He believed pay would range from $8.20 to $8.90 per hour and that there would be perhaps ten night jobs on the kill floor. He acknowledged that gutting is a fairly hard job.

Nursing notes from November of 1980 through February 16, 1983 contain no notations of back pain.

Claimant's employer filed first reports of injuries occurring on October 7, 1980; October 14, 1981; December 22, 1981; April 14, 1982; May 29, 1982; November 1, 1982; November 10, 1982; February 14, 1983; and May 28, 1983. As a result of the December 22, 1981 injury which was a fall on ice, claimant had a fracture of the tenth left rib posterior to the axillary line. The injury of November 10, 1982 was diagnosed as a low back strain caused by work. Claimant's pain at that time was in his right groin, buttock and leg. He was referred to Dr. Krigsten.

An insurance form completed on August 5, 1981 indicates claimant fell down and hurt his back, complained of back and leg pain, and saw D.P. Cronin, D.C. On February 22, 1982 claimant filed a claim based on pain in his leg after he slipped on ice and hurt his low back. A mild sprain/strain of the lumbar spine was diagnosed and treated by Dr. Sprague. A form dated July 27, 1982 reports back and leg pain after claimant fell in his driveway as he was carrying lumber and treatment by Dr. Sprague who diagnosed a lumbar sprain and sacroiliac subluxation. The block indicating his condition was related to his employment was checked and then crossed out.

On May 27, 1983 claimant made a claim for total disability relating to an accident gutting hogs on November 11, 1982. Dr. Sprague's nurse signed a form on July 1, 1983 which diagnosed a sprain/strain of the lumbosacral-sacroiliac spine with associated myofascial fibrositis which came on as he was gutting hogs in November of 1982.

Office notes from R. I. Sprague, D.C., show claimant had back pain with right leg and groin pain on February 23, 1982. In July he had low back pain and right buttock pain which apparently came on when he was lifting lumber at home and slipped and fell, but on July 30 he told of hurting himself at work. He had buttock and some low back pain. On August 11, 1982 claimant complained of a constantly aching low back.

William M. Krigsten, M.D., hospitalized claimant on January 6, 1983 after seeing him in the out-patient department where he gave a history of injury to his back at work eighteen months before. X-rays taken November 12, 1982 were viewed as negative. Hospital records state lumbosacral and right gluteal pain for six months with pain anterior to the knee and also some on the left. Claimant complained of pain beginning gradually in the right groin, subsequent severe pain in the left groin and almost constant low back pain and pain in both gluteal areas for six months. Claimant had a normal examination except for a bilateral trochanteric tenderness. Claimant's physical exam specifically noted no hernia. A CT scan showed minimal anterior narrowing of L1. Electromyography was within normal limits. Particular note was made of the absence of electrodiagnostic evidence of lumbosacral radiculopathy. Claimant was injected with Xylocaine and Hydeltra TBA.

Claimant was advised to return to work on January 14, 1983. When he called to say he was unable to do some of the work, the doctor told him he would have to seek other employment. No evidence of permanent impairment was found.

Alexander Kleider, M.D., saw claimant on February 17, 1983 on referral from Joseph M. Krigsten, M.D. Claimant gave a seventeen to eighteen month history of discomfort with pain increasing in severity. Pain sometimes radiated through the buttocks into the proximal thigh and occasionally the groin. Although his examination was normal, further investigation was undertaken with both a CT scan and myelogram being normal.

On March 8, 1983 claimant reported low back pain which had been constant since August. On that date Dr. Sprague wrote that claimant had a chronic myofascial strain/sprain of the lower back which developed because of constant bending over and a difficult lifting position. His diagnosis subsequently was changed to lumbar sprain with resultant myofascial fibrositis. Later complaints were of pain on both the right and left. Claimant was sent to a new job in May, but he continued to be seen for pain.

On May 2, 1983 Dr. Sprague provided an impairment rating of two percent of the whole person based on the AMA Guides. Claimant's job description and the type and area of pain involvement were thought consistent with chronic pain. Claimant's painful areas were over the right sacroiliac and buttock and the lower lumbar area bilaterally especially at the lumbosacral junction. The area involved was innervated by the L3/L4 nerve roots. The double leg raise, Gaenslens and Thomas was positive.

On May 5, 1983 claimant was released to return to gutting, but he was not to gut sows. At the end of the month, Dr. Sprague recommended treatment at a pain center.

Horst G. Blume, M.D., began treating claimant conservatively on June 30, 1983. Claimant continued to complain of constant low back pain radiating to the left buttock and left upper thigh. On July 20, 1983 the claimant had a nerve block to the rami dorsalis of the posterior nerve roots of the intervertebral joints at L4/5 and L5/S1 bilaterally. During this period Paul W. Wolpert, M.D., saw claimant for pain in both groin which was worse on the right. Bilateral inguinal hernias were found. Surgery was postponed until complaints lessened

Two months later claimant spoke of constant paravertebral back pain in the left upper and mid lumbar spine with radicular pain into the left buttock and upper thigh. Claimant was hospitalized for an IVP to rule out a kidney problem. He had a nerve block to the facet joints at L1, L2, L3, and L4 on the left. Dr. Blume decided claimant had a centrally ruptured disc at L4/5 and irritation of the rami dorsalis of the posterior nerve root of the intervertebral joints at L1, L2, L3, L4 and S1. In a letter dated September 27, 1983, Dr. Blume declared claimant disabled from any gainful employment.

Dr. Blume causally related claimant's back complaints to heavy lifting. As of October 12, 1983 he was unable to tell if claimant would have permanancy.

Claimant was admitted to the hospital for a neurotomy to the rami dorsalis of the posterior nerve roots of the intervertebral joints of L1/2, L2/3, L3/4, L4/5, L5/S1, and S1/2 on the left and L3/4 through S1/2 on the right which was performed on December 21, 1983 and which did not help.

Discograms in February showed only slight degeneration at L5/S1 with no reproduction of claimant's pain.

Claimant's diagnoses in March were irritation of the rami dorsalis of the posterior nerve roots of the intervertebral joints in the lumbar spine and iliosacral joints; conjoined nerve roots L5/S1, left; and no evidence of ruptured disc L4/5 or L5/S1. Claimant was released to return to light work on March 5, 1984 with lifting limited to ten pounds without constant bending or stooping. A permanancy rating of eight percent was assigned.

Mark A. Kruse, D.C., board certified chiropractic orthopedist and roentgenologist, saw claimant on June 11, 1984 for examination and he diagnosed an acute, severe subluxation of the lumbar spine associated with sciatica, and lumbosacral sprain/strain complex. At that point claimant had been treated nineteen times and another five weeks were recommended at which time he anticipated that if there was no change in claimant's symptoms he would be at maximum medical improvement. He rated claimant's impairment at approximately twenty percent of the whole person, but he said that a physical examination would have to be performed to determined his actual degree of post-traumatic pathology.

APPLICABLE LAW AND ANALYSIS

This matter involves three files. The hearing deputy added a fourth -- file 723660 which relates to an injury of November 10, 1982 for which claimant was paid temporary total disability for the period from January 5, 1983 to January 16, 1983 (note that the record from the agency is slightly different from that in joint exhibit 3). File 724395 refers to an alleged back injury in October of 1981. File 738214 relates to an alleged injury of May 28, 1983 which apparently was hernias. File 741620 seemingly covers an alleged injury of January 6, 1983. Counsel for Argonaut expressed the opinion that the latter injury was in reality the injury covered by file 723660 and a stipulation was entered to that effect.

The hearing deputy found defendant employer and Northwestern responsible only for medical benefits for expenses incurred prior to September 1982 relating to an injury arising out of and in the course of claimant's employment in July and August of 1981. There was no time lost from work in July and only one day in August. In December claimant had an injury to his ribs on the right side. In February he had a mild sprain/strain of his lumbar spine.

Claimant reported falls on August 5, 1981, February 20, 1982 and July 27, 1982 which resulted in injury to his back and which he claimed were not related to his employment. Claimant's bill for medical treatment by Dr. Sprague in August was $236; in February, $68; and in July and August of 1982, $144.

Although Northwestern has not appealed, they will not be held responsible for the medical charges of Dr. Sprague and that portion of the hearing deputy's order will be vacated.

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 fulfilling those duties or engaged in something incidental thereto. McClure v. Union County, 188 N.W.2d 283, 287 (Iowa 1971).

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

Claimant also must establish that medical charges are related to his injury. Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978).

Claimant explained that he checked that his injury in July or August of 1982 was not related to his employment because he wanted to insure insurance coverage. That explanation while plausible is contrary to Dr. McCarthy's note of July 27, 1982, presumably written contemporaneously with the incident, which says "lifting lumber at home slipped fell." Three days later he reported injury at work. There is nothing in the record from Dr. Sprague to causally relate claimant's treatment to his employment. Claimant has not carried his burden of establishing a work-related injury.

Defendant employer and Argonaut have filed a thorough brief which forcefully advocates their position. Their first argument combines several issues -- that claimant did not sustain an injury arising out of and in the course of his employment and that he did not show a causal relationship between the gradual injury and either any impairment or inability to work. They point to claimant's numerous nonwork-related back traumas.

Claimant's own testimony was that in June or July 1981, after having commenced work for defendant employer in September of 1980, he began experiencing back pain. Claimant had a series of back complaints. He filed insurance forms for back and leg pain in August of 1981, February of 1982 and July of 1982. In November of 1982 he had the compensable injury referred to above. Nursing notes from shortly after claimant's hiring through February 16, 1983 recorded no back pain, although there was a notation of pain in the right upper leg which radiated down the leg. Claimant was diagnosed as having a low back strain caused by work and he was paid compensation by defendant insurance carrier Argonaut.

Claimant was hospitalized by Dr. William Krigsten in January of 1983. Dr. Krigsten specifically concluded that claimant's low back pain was not related to his work, decided that claimant had no impairment related to his employment and found no recent pathology on x-ray, no evidence of radiculopathy with electromyography and normal limits on a bone scan. Claimant reported an onset of pain eighteen months before.

Claimant gave the same history to Dr. Kleider who found both claimant's examination and a myelogram to be normal.

Forms completed by Dr. Sprague refer to a low back sprain which was caused by his employment with first treatment in March 1983 and indicate claimant had not had the same or similiar condition -- sprain/strain of the lumbosacral-sacroiliac spine when he himself previously had diagnosed a lumbar sprain and sacroiliac subluxation in July of 1982. Other forms report that claimant has had the condition and that it is traceable to November of 1982. When claimant was seen on March 8, he told of constant back pain since August. His problem was described as chronic. Dr. Sprague found no objective findings to substantiate a rateable problem. He said that "the job description by claimant and the type and area of pain involved is consistent with producing a chronic type pain." The doctor wrote: "It is my opinion that he has a chronic myofascial strain/sprain of the lower back, which has developed because of constant 'bent over' and difficult lifting position."

Evidence from Dr. Blume shows that he used a second-hand history from Dr. Rojas which was that of claimant's having low back pain for the past two years which claimant himself attributed to heavy work. Dr. Blume expressed the opinion that the condition found in claimant in September 1983 was related to incidents of heavy lifting. In March he reiterated his position and assigned an impairment rating of eight percent.

Dr. Kruse, too, relates claimant's own opinion that his pain began three years before.

Defendant insurance carrier Argonaut stipulated at the time of hearing that claimant's injury of November 10, 1982 and his alleged injury of January 6, 1983 are one and the same. Therefore, claimant did not have to establish an injury arising out of and in the course of his employment. It is obvious claimant was doing heavy, hard work; but it is equally clear claimant's lifting was not the sole source of trauma to his back. He had a series of falls which occurred prior to November 10, 1982, but he continued to work. The real problem in this case is whether or not claimant has any disability related to his injury of November 10, 1982.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 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). "A cause is proximate if it is a substantial factor in bringing about the result. It only needs to be one cause; it does not have to be the only cause." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

Dr. Krigsten specifically found the condition for which he hospitalized claimant in January of 1983 not to be related to his work. Dr. Sprague's opinion supports a causal connection and seemingly traces claimant's complaints for which he provided treatment to his November injury. Dr. Blume, who did not have an accurate history, causally connects claimant's impairment to incidents of heavy lifting.

This is a close case, but claimant does preponderate ever so slightly on the issue of causal connection between his work injury and subsequent disability. In reaching that conclusion, greater weight is being given to the opinion of Dr. Sprague who treated claimant both before and after his injury. In spite of the imperfections in neurosugreon Dr. Blume's history, his evaluation of claimant's current condition is supportive of claimant's claim.

The second issue raised by defendant employer and Argonaut is that liability should be apportioned between the insurance carriers' on the basis that "if claimant may be said to have sustained a work injury, it would be a single work injury over the coverage of two insurers." Appellants cite treatment of rights between insurers found in 4 Larson, The Law of Workmen's Compensation, 85.31.

Before one gets to that section, however, Larson suggests in §85.11 that the initial question should be whether the injury is a new one, an aggravation or a recurrence. The evidence in this case both medical and claimant's testimony suggests a new injury. Claimant had a series of back problems before November 10, 1982 which led to his seeking treatment. However, those were primarily falls and they were not incidents he attributed to his work. He missed no work. He testified that it was in October or November of 1982 when his trouble became severe. He continued to work until January. Testimony of other lay witnesses is suspect in view of the difficulty of establishing a time frame. Dr. Sprague traces claimant's incapacity to November of 1982. In light of the findings in this decision, none of the prior back problems were related to claimant's employment.

The section of Larson to which appellants refer relates to successive incidents which combine to produce a final disability and more specifically to situations in which there is an aggravation or acceleration of a preexisting condition or anamoly. The medical evidence herein while recording a number of incidents does not contain reference to any preexisting condition or disease other than some anterior wedging in the first lumbar segment.

The third issue raised by appellants is that "claimant has little or no industrial disability." Claimant was awarded twenty percent industrial disability which defendant employer and Argonaut argue is excessive particularly in light of their having returned claimant to work and considering the improvement in his condition since his evaluation by Dr. Blume. This deputy industrial commissioner agrees that twenty percent is too high and appellants' reasoning for why it is too high is correct.

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).
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> 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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.
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> Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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.
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> There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant is a young worker with a good education. The hearing deputy's remarks, i.e., that claimant's "loss of potential earnings from disablement at this time is more than for an older person" and that "claimant's relative youth is favorable for retraining" are well taken. Claimant has been returned to work and there was testimony of other work claimant could do for his employer. Claimant carries a weight limitation of ten pounds and he is restricted from constant bending or stooping. Claimant's work experience outside of packing plants does not give him alternative areas in which to seek employment. In the event he is no longer employed by defendant employer, his industrial disability would substantially increase.

Claimant did testify his condition has improved. He continues to take pain medication and to seek treatment. He has had no surgery. Dr. Sprague rated claimant's impairment at two percent. Dr. Blume gave an eight percent rating. Dr. Kruse assessed a twenty percent impairment. The latter rating is too high and is being disregarded.

Based on the Iowa case law, the discussion above and the findings of fact set out below it is determined that claimant has a permanent partial industrial disability of twelve and one-half percent.

Claimant also alleged hernias developed from his work activities and the hearing deputy so found. No hernia was discovered at the time of claimant's hospitalization in January of 1983, but claimant said his pain in the groin area came on in October or November of 1982. Dr. Wolpert confirmed bilateral inguinal hernias and recorded claimant's telling him of heavy lifting in the packing plant, but he did not connect the two. Claimant had a hernia repair in August of 1983. He was released to return to work on October 30, 1983.

Claimant's hernias were of the bilateral inguinal nature meaning that claimant's condition stemmed from preexisting weakness in his body. It might be argued that claimant's injury in November of 1982 was in reality the hernias which later were surgically treated. There is no medical evidence to causally connect the hernias to claimant's work. Defendants' request for removal of this "anathama" [sic] will be honored.

The final issue raised by appellants is the hearing deputy's failure to address the issues raised in the brief presented by them to him. The timing of the brief and decision are as defendant employer and Argonaut allege. It is also true that the hearing deputy did not specifically address the flawed history relied upon by Dr. Blume, but his decision shows the manner in which he evaluated the doctor's opinion in that he said, "the opinion of Dr. Blume tracing claimant's back problems to the repeated heavy lifting incident as a hog gutter is the most plausible opinion as to causation." As the finder of fact, the hearing deputy of course weighs the evidence as he sees fit.

This deputy industrial commissioner agrees that serious issues raised in briefs should be addressed to evidence understanding of the case, to avoid suspicion of arbitrariness, to contribute to legal precedence and to foster satisfaction with the decision rendered. Appellants might have been more comfortable with the hearing deputy's decision had he made particular reference to their arguments. However, overall, the decision more than complies with the dictates of the statute and case law. See Iowa Code section 17A.16(1); Ward v. Iowa Department of Transportation, 304 N.W.2d 236, 238 (Iowa 1981); Catalfo v. Firestone Tire and Rubber Co., 213 N.W.2d 506, 510 (Iowa 1973). There has been no appeal of any other issues decided by the hearing deputy and his findings and conclusions will be adopted on those issues except that charges relating to claimant's hernia will be deleted.

FINDINGS OF FACT

That claimant is thirty-eight years of age.

That claimant is a high school graduate with no further training.

That claimant has work experience as a cook and painter.

That claimant's tasks in packing plants have included boning, dropping cattle, washing cattle, gutting cattle and hogs and legging.

That as a result of contract negotiations claimant's wage has dropped from $11.64 when he started to $8.20 at the time of hearing.

That claimant's other health problems include a bout of malaria, a mild ulcer, alcoholism, an injured right ankle and cuts.

That claimant began work for defendant employer in September of 1980.

That on October 1, 1982 defendant employer's insurance coverage changed from Northwestern National Insurance Company to Argonaut Insurance Company.

That claimant had a compensable back strain on November 10, 1982 for which he was paid temporary total disability.

That on August 5, 1981 claimant fell down and had low back and leg pain.

That claimant fell on ice on December 22, 1981 and injured his ribs on the right side.

That claimant slipped on ice on February 22, 1982 and had low back and leg pain.

That claimant reported back and leg pain in July of 1982.

That claimant was paid temporary total disability from January 5, 1983 to January 16, 1983.

That prior to November 10, 1982 claimant had not been absent from his job for work-related back complaints.

That claimant has a functional impairment of between two and eight percent.

That claimant remains on medication and continues under chiropractic care.

That subsequent to his injury claimant had carpal tunnel surgery.

That claimant has a weight limitation of ten pounds and he is to avoid constant bending and stooping.

That there are a number of packing plant jobs which claimant could do within his limitations.

That claimant has been returned to work by defendant employer, but he has some reduction in actual earnings.

That claimant continued to work after an increase in pain in November of 1982 until his hospitalization in January of 1983.

That as a result of claimant's injury he was absent from work.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence a work-related injury to his back in July, August or October of 1981.

That claimant has failed to establish by a preponderance of the evidence bilateral inguinal hernias arose out of and in the course of his employment.

That claimant suffered an injury arising out of and in the course of his employment on November 10, 1982.

That claimant has established by a preponderance of the evidence a causal connection between his injury of November 10, 1982 and the disability he now suffers.

That claimant has established by a preponderance of the evidence entitlement to healing period benefits for fifty and three-sevenths (50 3/7) weeks.

That claimant has established by a preponderance of the evidence entitlement to permanent partial industrial disability of twelve and one-half (12 1/2) percent.

That claimant has not established that he failed to receive required notice of termination of benefits pursuant to Iowa Code section 86.13.

That claimant has established by a preponderance of the evidence entitlement to medical expenses relating to his injury of November 10, 1982.

ORDER

THEREFORE, IT IS ORDERED:

That defendant employer and Argonaut Insurance Company shall pay unto claimant sixty-two and one-half (62 1/2) weeks of permanent partial disability benefits at a rate of two hundred ninety-six and 63/100 dollars ($296.63) beginning on March 7, 1983.

That defendant employer and Argonaut Insurance Company shall pay claimant interest pursuant to Iowa Code section 85.30.

That defendant employer and Argonaut Insurance Company shall pay amounts due and owing in a lump sum.

That defendant employer and Argonaut Insurance Company shall pay unto claimant healing period benefits from February 18, 1983 through March 5, 1983; from March 10, 1983 through May 1, 1983 and from May 28, 1983 through March 6, 1984.

That defendant employer and Argonaut Insurance Company shall pay the medical expenses set out in joint exhibit 2 which were paid by Title 19 or which remain unpaid, but charges relating to treatment for claimant's hernias should not be paid.

That the defendant insurance carriers in this matter divide and pay costs equally pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file claim activity reports as requested by this agency.

Signed and filed this 30 day of July, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VERNON R. SULLIVAN, Claimant,	File Nos. 724395, 741620 738214, 723660
FLOYD VALLEY PACKING, Employer,	R E H E A R I N G
ARGONAUT INSURANCE COMPANIES and NORTHWESTERN NATIONAL INSURANCE COMPANY, Insurance Carriers, Defendants.	D E C I S I O N

FILED
AUG 16 1985
IOWA INDUSTRIAL COMMISSIONER

Now on this day the matter of defendants Floyd Valley Packing Company and Argonaut Insurance Companies' application for rehearing comes on for consideration. Those parties seek clarification of the appeal decision filed July 30, 1985.

They first state: "It does not appear that the appeal deputy intended to relieve the Northwestern National Insurance Company of the liability for the payment of Dr. Sprague." Page 8 of the appeal decision contains this paragraph: "Although Northwestern has not appealed, they will not be held responsible for the medical charges of Dr. Sprague and that portion of the hearing deputy's order will be vacated." Northwestern was not ordered to pay charges of Dr. Sprague.

Their second request is for a specific order regarding medical bills for which defendant employer and Argonaut are responsible. Expenses for the hernia have been deleted. The appeal decision filed July 30, 1985 will be supplemented with this paragraph:

That defendants Floyd Valley Packing and Argonaut Insurance Companies pay the following medical expenses:

St. Lukes Medical Center	$1,733.50
Dr. Blume	4,142.50
Dr. Sprague	302.25
Dr. Youngblade	98.00
Marian Health Center	6,265.11
Prescriptions	191.30
Mileage	272.00

Signed and filed this 16 day of August, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FREDERICK L. TAYLOR, Claimant, vs. GEO. A. HORMEL & CO., Employer, and LIBERTY MUTUAL INS. CO., Insurance Carrier, Defendants.	FILE NO. 424478 D E C I S I O N O N A T T O R N E Y F E E

FILED
AUG 22 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding brought by Frederick L. Taylor wherein he seeks a determination of the fees to be allowed to Robert L. Ulstad for services rendered in the above entitled proceeding against George A. Hormel & Company and the Liberty Mutual Insurance Company.

The case was heard at Fort Dodge, Iowa on May 24, 1985 and was fully submitted upon conclusion of the hearing. The record in this proceeding consists of the testimonies of Frederick L. Taylor, Herbert R. Bennett, Marsha Hickey and Robert Ulstad. Claimant's exhibits A and B and defendants' exhibits 2, 3, 4, 5, 12 and 15 were received into evidence. Official notice was taken of the agency file in this proceeding with special attention given to the petitions and decisions contained therein.

The only issue in the case is that of determining what fees should be allowed to Ulstad for the services which he provided to Taylor.

SUMMARY OF EVIDENCE

Frederick L. Taylor testified that he was dissatisfied with the services which Ulstad had provided in that Ulstad did not recover compensation for a period of approximately two years when Taylor was receiving paid sick leave in the gross amount of approximately $300 per week from which income tax in the amount of approximately $50 per week was deducted. Part of his dissatisfaction was due to the fact that workers' compensation benefits are not taxed. He was also dissatisfied due to a lack of recovery for any mileage or travel expenses.

Taylor testified that he began having Ulstad handle his workers' compensation case beginning in late 1975. He stated that in 1975 he received approximately $3,500 as compensation for a seven percent disability and that Ulstad received one-third of the recovery for his fees. Taylor stated that in approximately 1978 and 1979 Ulstad did further work on his case and the disability award was increased from seven percent to ten percent. Taylor stated that Ulstad received one-third of the additional $1,300 which was received. Taylor stated that they then started the proceeding which resulted in the current permanent total disability award. From Taylor's testimony it was unclear as to when he was first advised that Ulstad expected to charge one-third of the recovery as a fee. He stated that he disagrees with a law which allows an attorney to receive one-third of the recovery when the law sets the amount of the recovery. He felt that Ulstad had not done anything spectacular and that he could have handled his own case and have gotten the same results without the services of an attorney. Taylor agreed, however, that his own handling of the case would have been limited to the time that the case was in the agency and that he could not have handled the appeals in the courts by himself.

Taylor testified that he feels a fee equal to one-third of the recovery is outrageous but that prior to the current award there was not enough money involved to dispute the fees which Ulstad had charged and received.

Taylor testified that Ulstad had advised him that his normal fee was one-third of the recovery after the first ten percent award was received. He also stated, however, that he expected to be treated fairly and that no particular price for Ulstad's services was ever quoted. Taylor stated that exhibit A is the only written agreement dealing with the amount of attorney fees. Exhibit A is a written agreement between Taylor and Ulstad which sets Ulstad's fees at the total of $15,000. Exhibit A further provides that the fees will be paid by giving Ulstad 50 percent of a lump sum payment for past due amounts and one-third of future benefits until the total $15,000 fee had been paid.

Taylor testified that he did not sign the agreement when it was initially presented to him but that he eventually signed it as the only way that he could receive anything from the award. Taylor testified that he had not expected to pay any legal fees if the case had been lost and that he expected that the amount of legal fees would have some relationship to the result which Ulstad obtained. He further stated that he would not mind paying a fee which was equal to one-third of the total recovery if a lump sum payment of the entire award could have been arranged. Taylor stated that he was 47 years of age when the permanent total disability award was obtained. He agreed that attorney fees would exceed $40,000 if one-third of the recovery were paid for the duration of his life expectancy under the commissioner's tables.

Taylor testified that he had received $1,430 since July 1984 and that approximately $10,499 of the $15,000 fee which Ulstad had charged remains unpaid. He stated that he was not dissatisfied with the procedure under which the fee was being collected but was dissatisfied with the total amount of the fee.

Herbert R. Bennett testified that he has been a practicing attorney in the Fort Dodge, Iowa area since 1948 and is presently a senior member of the firm of Bennett, Wilke & Tarbox. He testified that he is a past president of the Iowa Academy of Trial Lawyers and was a member of the Workers' Compensation Advisory Committee in the 1960's. Bennett testified that he has done a great deal of workers' compensation legal work for both claimants and defendants and that he is familiar with the fees commonly charged for such services.

Bennett testified that one-third of the recovery is a minimum fee in a workers' compensation case and that in the event of an appeal the fee should increase to 40 percent of the recovery. He stated that such was a standard which has been followed since he has been engaged in the practice of law. He stated that the one-third fee would be received on whatever could be commuted and that thereafter the compensation checks would be shared by the attorney and the client.

Marsha Hickey testified that she was the primary secretary for Robert Ulstad from 1980 until early 1985. She stated that she was acquainted with Frederick L. Taylor through Ulstad's office and the workers' compensation claim.

Hickey testified that she typed exhibit A and that it was signed by Taylor and Ulstad on the date that she typed it.

Hickey testified that she would have typed the checks to run money through the trust account and that she gave claimant his share. She stated that the monthly checks were sent to the office and that Taylor gave her a check for the fees and that she turned the entire check over to him. Hickey testified that exhibit B was typed by her at Taylor's direction at a time when Ulstad was out of the office. She stated that the signature on the letter is a signature stamp. Hickey stated that exhibit B was never followed because Ulstad told her that the place of mailing the check should not be changed and that she then informed the insurance company to disregard the letter.

Hickey testified that Ulstad's law practice is heavily involved in workers' compensation and that one-third of the recovery is his normal fee.

Robert Ulstad testified that he has been a practicing attorney for 34 years and that since 1953 he has specialized in workers' compensation representing both claimant's and defendants. He testified that his normal fee is one-third of the recovery plus costs. He stated that he has not had any fee disputes except with claimant and that he now uses a written fee agreement.

Ulstad testified that he began talking with Taylor about his case in 1975. He stated that exhibit 4, which is an itemization of his services, does not include office visits or phone calls with Taylor. Ulstad testified that the fact that his normal fee was one-third of the recovery was commonly known throughout members of the Hormel employee's union.

Ulstad testified that under the life expectancy tables used by the industrial commissioner claimant had a life expectancy of 1,482 weeks at the time the permanent total disability award was entered. He stated that he attempted to obtain a partial commutation but was not successful in doing so. Ulstad stated that on the basis of the life expectancy tables a fee of one-third of the recovery would exceed $40,000 but that he agreed to reduce his fees and enter into an agreement with Taylor as shown in exhibit A. Ulstad testified that Taylor had paid the litigation expenses and costs directly as the same were incurred.

Ulstad indicated that he had also performed other legal work for claimant without charging any additional fees but was uncertain with regard to the accurracy of his records in that regard. Ulstad indicated further that the matter of fees was discussed on at least one occasion before the agreement, exhibit A, was finally signed. Defendants' exhibit 2 is a copy of checks dated June 29, 1984 from Liberty Mutual in the total amount of $6,140.99, a deposit ticket dated July 31, 1984 and checks from the Ulstad trust account dispersing the full amount to Ulstad and Taylor on July 31, 1984. Exhibit 3 is a copy of Ulstad's ledger showing the unpaid balance of the $15,000 fee to be $10,499 following the May 21, 1985 payment. Exhibit 5 is a collection of copies of the checks which have been received.

Defendants' exhibit 12 is copies of supeonas which Ulstad testified had been mailed to the witnesses identified on the documents. Exhibit 15 is a copy of a commutation of attorney fees from the time when claimant's disability was increased from seven percent to ten percent in 1979.

Review of the agency file reveals a file with a total thickness of approximately two inches. The file contains all the pertinent materials dealing with claimant's earlier permanent partial disability awards. It also contains the decision of the deputy industrial commissioner which awarded permanent total disability on April 5, 1983, the decision of the industrial commissioner which affirmed that decision on September 14, 1983, the ruling from the district court which upheld that award on May 9, 1984.

APPLICABLE LAW AND ANALYSIS

Under section 86.39 of the Code this agency has jurisdiction to fix the amount of attorney fees which may be recovered for representing a claimant in a workers' compensation proceeding. A reasonable fee is determined by considering the factors listed in the Iowa Code of professional responsibility, particularly in DR2-106(A)(B). For a contract to be enforceable it must be clear, concise and mutually understood. Carmichael v. Iowa State Highway Commission, 219 N.W.2d 658, 665 (Iowa 1974). A contract which is contrary to public policy may not be enforced. Rowen v. LeMars Mutual Insurance Company, 282 N.W.2d 639, 650 (Iowa 1979). Contingent fee contracts are generally enforceable. Wunschel Law Firm, P.C., v. Clabaugh, 291 N.W.2d 331, 333 (Iowa 1980). A contingency fee normally applies to future payments as well as past due amounts. Blazek v. North American Life and Casualty Company, 121 N.W.2d 339 (Minn. 1963). Fees ranging from 25 percent to 40 percent of the recovery have been found to be reasonable. Stoebe v. Kittey, 249 N.W.2d 667 (Iowa 1977), Blazek, Continental Casualty Company v. Knowlton, 232 N.W.2d 789, 794-795 (Minn. 1975).

It would appear from this case that Taylor should have known that Ulstad's normal charge was one-third of the recovery as a result of the two earlier proceedings wherein one-third of the recovery had been charged. It is found that at the time Taylor employed Ulstad to perform the work on the case which resulted in the permanent total disability award Taylor was aware that Ulstad would expect to charge a fee equal to one-third of the recovery. In view of such a binding contract for the same existed. In this case it is not, however, necessary to rely upon a contract, expressed or implied, to determine whether or not the fee of $15,000 should be allowed. It is clear that both Ulstad and Taylor agreed that this case was to be handled as a "contingency fee case" since even Taylor agreed that if there had been no recovery there was to have been no fee and that the amount of the fee would have some relationship to the amount of the recovery. The amount of the fee which Ulstad has charged, namely $15,000, is less than 11 percent of the total recovery when the weekly benefit amount is applied to claimant's life expectancy under the industrial commissioner's tables. This case went completely through the district court before it was finally resolved and counsel expended a very significant amount of time in handling it as shown by the contents of the file and exhibit 4. When the appropriate factors of DR2-106 are considered it is clear that a reasonable fee for handling this case would have been an amount much greater than $15,000. Counsel has very graciously reduced his fee by at least 50 percent in order to make an accommodation for Taylor. In return he has been forced to devote a substantial amount of time and expense to defending this action. If counsel were seeking a fee greater than $15,000 there is no question but that a fee of at least $30,000 would be awarded assuming that it was to be paid as the compensation payments were received.

It is noted that Taylor is dissatisfied with the lack of workers' compensation benefits for the two years during which he received sick pay and the lack of any recovery for transportation expenses. It would appear that the weekly compensation benefit would have been much less than the sick leave which he did in fact receive. From the record it cannot be determined whether or not Taylor provided Ulstad with a statement showing the amount of miles that he traveled in receiving medical care. Even if such were done, however, any conceivable amount of travel would not approach the amount by which Ulstad has already voluntarily reduced the amount of his fee.

FINDINGS OF FACT

1. Robert Ulstad represented Frederick Taylor in a workers' compensation action which resulted in an award of permanent total disability to Taylor after the case had progressed through the Iowa District Court.

2. Using the commissioner's life expectancy tables one-third of the total amount of Taylor's recovery is a sum in excess of $40,000.

3. At the time Taylor employed Ulstad to handle the case Taylor understood that Ulstad would expect to charge a fee equal to one-third of whatever amount was recovered.

4. Ulstad has reduced his fee to the fixed amount of $15,000, payable as the compensation is received.

5. When a fee in the amount of $15,000 is applied to the work which Ulstad performed in the case, such is found to be much less than the reasonable value of the services when viewed in accordance with the Iowa Code of Professional Responsibility.

6. Of the $15,000 there remains an unpaid balance of $10,499.

7. The schedule of payment of the fee as set forth in exhibit A is reasonable.

CONCLUSIONS OF LAW

Robert L. Ulstad should be allowed a fee in the amount of $15,000 for representation of Frederick Taylor in the proceeding which resulted in the award of permanent total disability, payable as set forth in exhibit A which was received into evidence.

ORDER

IT IS THEREFORE ORDERED that Robert Ulstad is authorized to collect a fee in the total amount of fifteen thousand and no/100 dollars ($15,000.00) for the legal services provided to Frederick L. Taylor in file number 424478 commencing with the review-reopening petition filed May 11, 1981.

IT IS FURTHER ORDERED that the remaining balance of ten thousand four hundred ninety-nine and no/100 dollars ($10,499.00) shall be paid by having the checks be mailed to Ulstad's office and with Ulstad to deduct one-third thereof and then pay the remaining two-thirds of each check to Frederick L. Taylor until such time as the entire fifteen thousand and no/100 dollars ($15,000.00) has been paid.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against Frederick L. Taylor.

Signed and filed this 22nd day of August, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CORA M. TUTTLE,

Claimant,

vs.

THE MICKOW CORPORATION,

Employer,

and

GREAT WEST CASUALTY,

Insurance Carrier,
Defendants.

File No. 627377

FILED

APPEAL

JUL 31 1985

DECISION

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

The claimant and defendants appeal from an arbitration decision filed October 15, 1984 wherein it was concluded that on June 11, 1981 the decedent, Charles Tuttle, was employed by the defendant employer, The Mickow Corporation (hereinafter Mickow), and was not an independent contractor. It was further concluded that the decedent sustained an injury arising out of and in the course of his employment on June 11, 1981. The claimant's rate of compensation was determined to be $207.54. The record on appeal consists of the transcript; claimant's exhibits 1 through 6, 14 through 19, and 21 through 30; and numerous briefs filed by the parties.

ISSUES

The defendants' issues are:

1. Did an employer-employee relationship exist on the date of Charles Tuttle's death;

2. Did Charles Tuttle's death arise out of and in the course of his employment, and if it did, the applicable rate.

The claimant's issues are:

1. Claimant is entitled to a rate of compensation of $384.00 per week.

2. An employer-employee relationship existed between claimant's decedent, Charles Tuttle, and The Mickow Corporation on the date of the decedent's death.

3. The death of claimant's decedent, Charles Tuttle, arose out of and in the course of his employment with The Mickow Corporation.

4. Claimant is due interest at ten percent per annum on her award beginning with the eleventh day following injury, and thereafter as payments accrued.

REVIEW OF THE EVIDENCE

The claimant, Cora M. Tuttle, wife of the deceased, testified regarding her and her late husband's relationship with Mickow. Charles Tuttle began hauling Mickow's loads in December of 1978. During this time decedent drove for John Dawson a/k/a Jay Mar Company who contracted with Mickow for the lease of tractor and/or tractor trailer combinations. Decedent was remunerated by Dawson.

In October 1980 decedent purchased his own truck and executed an independent contractor transportation agreement with Mickow on October 28, 1980. Charles Tuttle was the sole owner of the tractor. Cora became an authorized driver so she could travel with her husband and share in the driving. Prior to this time claimant could only travel with decedent once a month after completing a form supplied by Mickow. Although claimant was an authorized driver she received no income from either the decedent or Mickow. The decedent claimed all income from the truck as his while the claimant claimed nothing.

After purchasing his tractor the decedent first began hauling loads with Mickow's trailers. Then he used a trailer owned by Travis Johnson. The decedent did not pay Johnson directly for the use of his trailer, but instead Mickow deducted the agreed amount from decedent's check and Mickow paid Johnson. The claimant and decedent had decided to purchase a trailer of their own. On June 8, 1981 Cecil Whitehurst, from whom they were purchasing the trailer, left the trailer at Mickow's Norfolk, Nebraska terminal. It was there that decedent was to pick up the trailer. On June 8, 1981 decedent took a load from Norfolk to Willmar, Minnesota. After delivering the load at Willmar the decedent was going to travel to Des Moines to leave the Johnson trailer and make other arrangements for getting the new trailer. Claimant and decedent were purchasing the trailer so they could make more money.

On June 10, 1981 decedent was going to make the necessary arrangements at Mickow's Des Moines terminal to have the new trailer "signed up" so loads could be hauled with it. This the decedent did with Walter Annett. The claimant had business at the terminal also involving Mike Young, Mickow's Des Moines dispatcher. Part of the business pertained to payment for bounce miles. Payment for bounce miles, the claimant described, was money the defendants offered drivers who were empty to go to another location to pick up a load. The claimant testified that she and her husband had some coming.

Accompanying the decedent and claimant on June 10 was claimant's brother Grant Coonrod. While claimant and her husband were talking to Mike Young, Eli Zimmerman (the Norfolk dispatcher) allegedly called Des Moines and asked decedent if he wanted to take a load from Norfolk to Okalahoma. The claimant testified that her husband agreed. The decedent was not paid for his trip from Willmar to Des Moines, nor from Des Moines to Norfolk. The claimant said that she thought that her husband talked directly to Zimmerman at this time. The claimant said loads were usually assigned on a "First In First Out" basis where the driver had to be present to be able to take a load. However, loads had been assigned the decedent and others over the telephone. It was her husband's plan to drive to Norfolk to pick up their new trailer and the load. The decedent was injured and died as a result of a truck accident on Interstate 80, east of Avoca, Iowa at approximately 12:43 a.m. on June 11, 1981.

On cross-examination the claimant agreed that on their 1979 tax return they listed as the decedent's employer, Jay Mar Co. Also in 1979 the claimant and her husband completed a Schedule 2106, business expense form. On the 1980 return the claimant and decedent completed a Form C, profit or loss from business which listed as the proprietor(s); Charles and Cora Tuttle. Line 7 on claimant's and decedent's 1981 tax return reported 0.00 for wages, salaries, and tips. A Form C was also completed with the 1981 tax return. The claimant also stated that while the decedent was working for Jay Mar Co., Jar Mar withheld payroll and social security deductions. Jay Mar also paid all the fuel, repair, and maintenance charges.

While driving under Mickow, Charles received 75 percent of what Mickow was paid to deliver the load. No taxes or social security were withheld. Maintenance, fuel, and operating costs were borne by the decedent. The claimant testified that a driver did not have to take a load offered nor did a driver have to request time off to service trucks. When driving together, the claimant stated that it was her husband who decided who was going to drive when. Richard Watson testified on behalf of the claimant. He had driven for Mickow and stated that a driver could be dispatched by telephone.

Walter Annett was called by the claimant. Annett, the general manager of Mickow said his duties include the daily management of the company, dispatch duties included. Annett, filled out a first report of injury on June 15, 1981 not knowing that claimant was going to pursue a claim. A computation of weekly earnings was done June 15, 1981 figured on the "independent contractor's" 75 percent. In his opinion the 75 percent the driver received was for equipment rental only and that the owner provides the driver for free. Annett also testified that some loads are dispatched by phone. It was his belief that the decedent would wait for a load after getting his new trailer lined up.

Mickow requires that all potential drivers fill out an application for employment. The application is to guarantee that the potential drivers pass DOT as well as Mickow's own requirements. According to Annett, Mickow did not have any people who would just want a load once in a while. He stated that they [Mickow] would not put up with it. If the drivers did not work everyday "we get rid of them." The decedent would not be able to haul loads without utilizing Mickow's authorities or someone elses. Annett stated that it was Mickow's position that the claimant was neither an employee nor an independent contractor.

Annett testified that Mickow could not, for instance, fire a driver of Jay Mar's however, they could tell Jay Mar to get a new driver. Mickow never made payments to the state in the decedent's name for unemployment insurance. In 1980 and 1981, Mickow did not prepare W2 forms for the decedent.

Under the independent contractor agreement the decedent had to supply the tractor, chains, binders, and tires. The agreement also requires that truck must have "operated by Mickow Corp." on it. The equipment that the drivers need can be purchased from Mickow for a substantial discount. Annett testified that Mickow does not utilize "forced dispatch" where drivers are required to take the load offered. The driver can pick his own route, stop eat and sleep whenever he wants. The drivers are not required to call in as long as they are where they are supposed to be.

On redirect, the witness stated that Mickow's requirements are above and beyond DOT requirements. The company also has a regulation regarding passengers in the independent contractor vehicle. Trip leasing was allowed only through Mickow. If a driver violated this rule then he or she would be subject to termination. Trip leasing might be allowed if Mickow did not have a load available, but not if they had a load waiting.

Harrold Annett, president and part owner of Mickow testified that agreements with the drivers were not all the same. Grant Coonrod testified that the decedent told him on June 10, 1981 that he was going to pick up a load at Norfolk and take it to Oklahoma. Also called to testify was Marvin Tuttle.

Eli Zimmerman was called by the defense. Zimmerman, terminal manager at the Norfolk terminal for the last six years, performs the dispatching duties himself. Mickow's largest customer in the Norfolk area is Nucor Steel. Zimmerman testified that he spoke to the decedent by telephone on June 9, 1981. The decedent called and said that he was empty in Willmar, Minnesota, to put him out of service, and that he (the decedent) was going to Des Moines to take care of some business.

Testifying in reference to claimant's exhibit 16, Zimmerman stated that he was the only one who fills these forms out and that he does not receive loads that he does not list. As the decedent instructed, Zimmerman put an out of service notation next to the decedent's name on the list. Although a driver is out of service, his name continues to move up the list. When Zimmerman found out that Charles Tuttle had died he scratched his name off the list. Zimmerman did not find out about the Bixby, Oklahoma load until, at the latest, mid-morning of June 11, 1983.

On cross-examination Zimmerman admitted that if a driver out of service telephoned and took a load, he would scratch the name off like he did the decedent's on June 11. The number under consignee is the last three numbers of a loading order. He admitted that the number under CONSIGNEES (423) for June 11 was the number from Nucor Steel's June 8 load list and that Nucor Steel's load list for June 11 had as a number "498" which was not present on Mickow's June 11, 1981 sheet. Zimmerman attributed this to an error. On examination of Baer deposition exhibits 3 and 4, Zimmerman testified that the first one (423) was voided out. Zimmerman testified on redirect examination that if Tuttle were given a load by phone and his name scratched off then his name would appear in the driver column, which it does not.

Mike Young, Mickow's dispatcher in Des Moines for the last five years, stated the decedent was not on the dispatcher list either June 9, June 10, or June 11 of 1981. Young stated that the decedent was not given any bounce miles to go to Norfolk. The witness stated that although it was not usual practice, drivers could be dispatched from Des Moines to take a Norfolk load.

Claimant's exhibit 1 is a stipulation of evidence. It is stipulated that Charles Tuttle was injured in and died as a result of a truck accident on Interstate 80 east of Avoca, Iowa at approximately 12:42 a.m. June 11, 1981. Claimant's exhibit 2 is the independent contractor transportation agreement executed between Mickow and decedent on October 28, 1980. Excerpts are below:

> 2. That the CONTRACTOR represents and warrants the above described equipment is now in good repair and he will at all times maintain the same in good repair at his own expense.
>
> 3. That the CONTRACTOR will paint the leased vehicle with such distinctive insignia or other symbols and lettering as may be required by the COMPANY or by federal, state or local government or any agencies, bureaus, and departments thereof, the cost of said painting to be paid by the CONTRACTOR; and upon termination of this agreement, whether by cancellation or expiration of the term thereof, the CONTRACTOR shall forthwith remove all the COMPANY'S colors, insignia, and advertising from the leased vehicle and all other symbols identifying the CONTRACTOR with the COMPANY in any manner whatsoever, including all permit numbers, both state and federal.

Claimant's exhibit 4 is a copy of the appendix to decedent's lease where the purchased trailer was added. The date of the appendix is June 9, 1981. Claimant's exhibit 5 is a record of decedent's earnings starting March 12, 1981 and ending July 16, 1981. Claimant's exhibit 6 is decedent's record book of income and expense. Under the June 1981 entry, line 8 reads from Norfolk, Nebraska to Willmar, Minnesota. Line 9 is blank however, line 10 reads, "From" off duty to Des Moines. Claimant's exhibit 7 is a record of expenses. Claimant's exhibit 14 is a compilation of claimant's decedent's various state and federal income tax returns. Claimant's exhibit 15 is a workers' compensation claim earnings information. The weekly earnings equaled $548.33. Claimant's exhibit 16 is a record of the loads referred to by Zimmerman in his testimony. Claimant's exhibit 17 is a first report of injury. Claimant's exhibit 18 is a letter to the industrial commissioner's office from defendant insurance company dated June 30, 1981 denying compensability on the grounds that the injury and resultant fatality did not arise out of and in the course of the decedent's employment. Claimant's exhibit 19 is a copy of the daily log of Robert E. Box for June 11, 1981. Claimant's exhibit 21 is an independent contractor transportation agreement between Mickow and Travis Johnson. Claimant's exhibit 22 is a map of the northeastern portion of Oklahoma.

Claimant's exhibit 23 is the deposition of Walter Annett wherein he testified regarding workers' compensation insurance available to its "independent contractors:"

> Q. Does Mickow Corporation have available for any of the contractors or drivers for contractors under any circumstances Worker's [sic] Compensation insurance?
>
> A. Yes, we provide it on the independent contractor himself, not on drivers for owners.
>
> Q. You say you provide that to the independent contractor himself?
>
> A. The man that owns and drives his own truck.
>
> Q. Mr. Tuttle owned and drove his own truck. From what you said, it sounded to me like you were saying you had Worker's [sic] Compensation for such a person?
>
> A. When they're doing something that concerns the company, yes.
>
> (Transcript, pages 61-62)

It was Annett's position that at the time of decedent's accident the decedent was not performing a duty for the company.

Claimant's exhibit 24 is the deposition of Michael Young. Young testified that he did not recall talking to Zimmerman or the deceased about a load in Norfolk on June 10 or June 11. Not that it could not have taken place, but that with his high volume of phone calls it was hard for him (Young) to keep track of each call. Young also testified that he did not recall the deceased turning down a load.

Claimant's exhibit 25 is a deposition of Eli Zimmerman. It was Zimmerman's recollection that he talked to the decedent who called on June 9, 1981 from Willmar, Minnesota telling Zimmerman that he was empty, instructing him to put him out of service, and that he (decedent) would talk to him later in the week. Zimmerman stated unequivocally that he had no conversation with the decedent by phone telling him that he had a load in Norfolk available for him.

Claimant's exhibit 26 is another deposition of Zimmerman. In reference to the incorrect load number, Zimmerman admitted that he could have written the number down wrong or Nucor Steel contacted him and voided an order and then he (Zimmerman) could have mistaken the voided number with the one Nucor wrote up when the material was actually ready.

Claimant's exhibit 27 is a deposition of Lloyd Baer, traffic dispatcher of Nucor Steel located in Norfolk, Nebraska. Baer testified regarding the voided order Zimmerman testified to at the hearing.

> Q. When is the loading order prepared, when a customer calls you--
>
> A. The loading order is prepared immediately. As soon as the phone call terminates we write up the loading order and the bill of lading to correspond with the numbers that we are given.
>
> Q. So, at the time the loading order and the bill of lading are prepared, you assume that the material is ready to be sent?
>
> A. We know it's ready to be sent.
>
> Q. On the first loading order, in this case it was subsequently voided. Now, since the loading order was prepared, does that indicate to you that the material was ready?

A. At the time that particular loading order was written, I would assume that the material was--or was thought to be ready. However, between the time that we gave out that particular load order number and the time the driver arrived at our plant, either the material was gone or we'd discovered there was something wrong with it, or for one reason or the other we would not load that particular load.

Q. What happens when you decide not to load a load and the truck driver is there?

A. We have no choice. We just simply call the local agent of that particular truck line or whoever we normally contact and tell him that we have made an error. And that the very earliest possible date we will correct that error and call him when that load is ready for pick up.

(Baer Deposition, pp. 15-16)

Baer stated that he did not know who would be picking up a particular load.

Claimant's exhibit 28 is a deposition of Robert E. Box. Box worked for Mickow between September 1978 and July 31, 1981. Box met the decedent in 1979. Testifying to the events surrounding June 11, Box stated that he took the Bixby, Oklahoma run. The witness stated that Zimmerman told him that the reason the load was up there was because "that was the one Charley was supposed to have had." On cross-examination Box stated that he was never told that the Bixby load was assigned to the decedent.

Claimant's exhibit 29 is a collection of documents, exhibits, and arguments supporting claimant's motion for partial summary judgment.

Defendants' exhibits A through D, various tax returns of claimant and decedent, have been discussed in connection with the testimony of the claimant.

APPLICABLE LAW AND ANALYSIS

Iowa 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, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury.

Iowa Code section 85.61 states in part:

2. "Worker" or "employee" means a person who had 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.

....

3. The following persons shall not be deemed "workers" or "employees":

a. A person whose employment is purely casual 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 first issue to be addressed is the relationship and employment status, if any, between Charles Tuttle and Mickow.

It is elementary doctrine, and it would fill many pages to cite the support it has, that one is not an employee if he may choose his own method of working,--the mode and manner of doing the work....

An independent contractor within the generally accepted legal definition of the term is: a person who in the pursuit of an independent business, undertakes to do specific work for another person, using his own means and methods, without submitting himself to the control of such person in respect to all of its details. An independent contractor represents the will of its employer only as to the result of his work, and not as to the means by which it is accomplished.

Arne v. Western Silo Co., 214 Iowa 511, 516 (1932).

The commonly recognized tests of such a relationship are, although not necessarily concurrent, or each in itself controlling: (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer. If the workman is using the tools or equipment of the employer, it is understood and generally held that the one using them, especially if they are of substantial value, is a servant.

Mallinger v. Webster City Oil Co., 211 Iowa 847, 851 (1981).

"The test oftenest resorted to, in determining whether one is an employee or an independent contractor, is to ascertain whether the employee represents the master as to the result of the work, or only as to the means. If only as to the result, and himself selects the means, he must be regarded as an independent contractor.* * *(Citing cases.)"

Arne, 214 Iowa 515.

"The most important or principal element in defining an independent contractor in Iowa is that he is free to determine for himself the manner in which the specified result should be accomplished." Swain v. Monona County, 163 N.W.2d 918, 921 (Iowa 1969).

In this case the decedent and Mickow executed an agreement titled "independent contractor transportation agreement." Titles of instruments do not always conclude the nature of the agreement.

In the construction of a contract involving a contractor's relationship, the contract must be construed from "its four corners" and not from an isolated paragraph. Courts must declare the intention of the parties from the language employed in the entire instrument, regardless of the classification of the parties as determined by themselves, bearing in mind that it is not the nomenclature which the contract uses, but the provisions which it makes for control of the details of the work that determine the status of the parties. See In re Estate of Amond, 203 Iowa 306; Burns v. Eno, 213 Iowa 881; Storm v. Thompson, 185 Iowa 309; Badger Furniture Co. v. Industrial Comm., 227 N.W.288 (Wis.); Schneider's Law of Workmen's Compensation (2nd Ed. 1932), Vol. I, Sec. 37, p. 284 et seq.

Arne v. Western Silo Co., 214 Iowa 511, 517 (1932).

The executed instrument provided that the decedent had to identify Mickow on the truck either by painting the truck or a large sticker or printing of some type on tractor doors. The "contractor" was required to keep the vehicle in good working order at his own expense.

Control is often very indicitive of an employer-employee arrangement. The uncontradicted testimony of Mickow's own president indicated that if a person did not wish to drive for them everyday then they would get rid of them. Defendants argue the merits of unforced dispatch. However requiring a driver to drive on, at the very least, a more than regular basis or else face termination, is de facto, a forced dispatch. The power of termination is the ultimate form of control. Further, in an arrangement with an intermediary such as Jay Mar Co., if Jay Mar had a driver that Mickow did not like, they could effectively fire him or her through Jay Mar.

The defendants' view towards trip leasing is also inconsistent with the idea of an independent contractor. If the trucker took on a load that was not Mickow's when Mickow had a load available, Mickow's president testified quite unequivocally that the trucker would in all likelihood be terminated.

There was also testimony indicating that Mickow had higher standards than the DOT. Mickow also had stringent requirements as to passengers in driver's trucks. Again hardly indicitive of an independent contractor. In short, drivers were to work on a steady, regular basis for Mickow, with outside work being, at the bare minimum, being discouraged, with Mickow exercising substantial control over the means by which a driver operated his or her truck.

Regarding method of payment, Larson states:

> The majority of modern decisions awarding compensation give little weight to the fact that a trucker, cutter, or loader is compensated at so much per thousand feet of logs or lumber, per tie, per cord of pulpwood, per ton of stone, per yard of dirt or gravel, or per load mile; that a salesman is compensated solely by a percentage commission, <u>a truck driver by a percentage of gross revenue earned</u>, a cheesemaker by the cheese, a roofer or carpenter by the square or window or door;...

Larson, <u>The Law of Workmen's Compensation</u>, §44.33(b), (1982). (footnotes omitted, emphasis added)

Larson further states that there is a growing tendancy to classify owner-drivers of trucks as employees when they perform continuous service which is an integral part of the employer's business. <u>Id.</u> at §44.34 (1982).

Where the driver is expected to drive continuously for a company, with the company exercising various controls over the driver, including power of termination if the driver hauls for someone else, the driver is an employee for purposes of workers' compensation coverage. The method of payment is a slight consideration; for the fact remains that the driver was hauling goods for the company for pay. No amount of "smoke" will conceal the fact that decedent was an employee of Mickow. The instrument, taken together with various supporting testimony, indicates that Charles Tuttle was an employee of Mickow.

The second issue to be determined is whether the employee, Charles Tuttle, was in the course of his employment when he suffered his fatal accident. Both parties have introduced a large quantity of evidence bearing upon this issue.

Claimant has the burden of proving by a preponderance of the evidence that decedent received an injury on June 11, 1981 which arose out of and in the course of decedent's employment. <u>McDowell v. Town of Clarksville</u>, 241 N.W.2d 904 (Iowa 1976); <u>Musselman v. Central Telephone Co.</u>, 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The words "out of" refer to the cause or source of the injury. <u>Crowe v. DeSoto Consol. Sch. Dist.</u>, 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. <u>McClure v. Union et al. Counties</u>, 188 N.W.2d 283 (Iowa 1971); <u>Crowe</u>, 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." <u>Cedar Rapids Comm. Sch. Dist. v. Cady</u>, 278 N.W.2d 298 (Iowa 1979), <u>McClure</u>, 188 N.W.2d 283, <u>Musselman v. Central Telephone Co.</u>, 261 Iowa 352, 154 N.W.2d 128 (1967).

"The primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit." <u>Harned v. Farmland Foods, Inc.</u>, 331 N.W.2d 98 (Iowa 1983); <u>McSpadden v. Big Ben Coal Co.</u>, 288 N.W.2d 181, 188 (Iowa 1980); Accord, <u>Caterpillar Tractor Co. v. Shook</u>, 313 N.W.2d 503 (Iowa 1981).

The evidence presented supports the following sequence of events. The decedent, in service, delivered a load from Norfolk, Nebraska to Willmar, Minnesota. At Willmar the decedent called Mickow's terminal in Norfolk and asked to be put out of service. At that time decedent proceeded, as his own records indicate, out of service to Des Moines to take care of personal business. While in Des Moines the personal business was attended to. Claimant stopped at Mickow's Des Moines terminal to sign up trailer and discuss bounce miles. The claimant proposes that while the decedent was at the terminal signing up the trailer, he received either a communication or talked directly to the Norfolk dispatcher where the decedent agreed to take a load. Claimant cannot remember for sure if her husband talked to Zimmerman directly or not. Zimmerman says he did not and the documentary evidence supports this. The records indicate that the decedent went out of service in Willmar and never came back in. Ignoring the out of service, if the decedent's name was scratched out because he was given a load, then his name would be under a driver list. But it is not.

Claimant fails to establish that the decedent did in fact have a load waiting for him at Norfolk or that a load even existed at that time. Evidence that decedent talked to or communicated in some manner to Zimmerman is thin and not a preponderance. The defendants' evidence tends to demonstrate that; first, there is every good chance that the Bixby load did not exist (not on load list of June 9 or June 10); second, even if the Bixby load did exist the decedent would not have been assigned to it as he was out of service.

Employer benefit is a question to be discussed. It could be argued that if the decedent picked up his trailer it would help further his employer's benefit. Be that as it may, it must be remembered that claimant and her husband did not purchase the trailer for the benefit of the employer, but for their own benefit. The claimant stated it was purchased so they could make more money. Absent a load, and sufficient employer benefit, plus a substantial benefit to claimant and decedent, the decedent's trip to Norfolk was a personal one.

Assuming for the moment that decedent did have a load in Norfolk as well as his trailer, the dual purpose doctrine would preclude the decedent's recovery. For had the load been cancelled the decedent would have continued on to Norfolk to pick up his new trailer. The converse cannot be so asserted. It is very questionable, and highly speculative to say that if the decedent had not been able to pick up his new trailer he would have taken the load in Norfolk. Mitigating against this is the fact that there is a terminal in Des Moines. For the reasons set forth above the claimant is found not to have been in the course of his employment.

FINDINGS OF FACT

1. Decedent entered into an independent contractor agreement with Mickow.

2. Decedent and claimant hauled goods for Mickow.

3. In connection with the decedent hauling goods for Mickow, they [Mickow] exercised various forms and types of control over the decedent in performance of his work.

4. Decedent drove for Mickow regularly.

5. Decedent was effectively required to drive for Mickow regularly.

6. Decedent was effectively prevented from driving for any other but Mickow.

7. The decedent was an employee of Mickow.

8. The decedent delivered goods "in service" to Willmar, Minnesota.

9. Decedent went "out of service" in Willmar and subsequently traveled to Des Moines to tend to personal matters.

10. Decedent had purchased a trailer that was at Mickow's terminal in Norfolk.

11. Said trailer was not purchased from Mickow.

12. Decedent had to park the rented trailer he was utilizing at Mickow's terminal in Des Moines.

13. Late on the night of June 10, 1981 decedent began traveling to Norfolk, Nebraska to pick up a recently purchased trailer.

14. During this trip decedent remained out of service.

15. There was no assigned load for decedent awaiting him in Norfolk.

16. Decedent's trip to Norfolk was purely personal.

17. At 12:43 a.m. June 11, 1981, on Interstate 80 east of Avoca, decedent was involved in a fatal accident.

18. Decedent's death neither arose out of nor was in the course of his employment with Mickow.

CONCLUSIONS OF LAW

The decedent was, for purposes of workers' compensation, an employee of Mickow.

The decedent was not in the course of his employment when he suffered his fatal accident on June 11, 1981.

WHEREFORE, the decision of the deputy is affirmed in part and reversed in part.

ORDER

THEREFORE, it is ordered that the claimant take nothing from this proceeding.

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

Signed and filed this 31 day of July, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM S. UDELL,	:	
Claimant,	:	File No. 764416
vs.	:	
JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,	:	ARBITRATION DECISION
Employer, Self-Insured, Defendant.	:	FILED SEP 23 1985 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, William S. Udell, Sr., against his self-insured employer, John Deere Dubuque Works, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained in September 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Dubuque, Iowa, May 2, 1985. 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 29, 1984.

The record in this case consists of the testimony of claimant, of Gary L. Neivel, and of Patricia Gage; of claimant's exhibits 1 through 13; and defendant's exhibits A through S.

ISSUES

The issues for resolution are:

1) Whether claimant sustained an occupational hearing loss under Chapter 85B.

2) Whether claimant is entitled to occupational hearing loss benefits; and

3) Whether claimant's action is barred because filed beyond the applicable limitation period.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's rate of weekly compensation is $262.93. Claimant's action was filed May 22, 1984.

Claimant testified in his own behalf. Claimant indicated that he would be 63 on June 6, 1985 and was 60 when he retired in 1982. Claimant indicated that he did manual labor with the Civilian Conservation Corp and at Farley & Lecher Company in Dubuque prior to entering the military service in 1943. Claimant reported that he was injured in a World War II shell explosion on March 4, 1944. Claimant reported that the explosion flash caused a concussion and blinded him for some time afterwards. He was discharged with a ten percent military disability which he attributed to eye, ear and asthma problems related to his war injury. Claimant apparently worked briefly in construction following his discharge and military health recovery and then opened a barber shop where he continued to work until the early 1960's. Claimant began full-time work with John Deere in 1959. He reported that he had worked intermittently for the company from 1949 until that date, however. Claimant reported that in his early years at John Deere he worked on shakeout in the foundry where he ran grinders and precision bores as well as drills. Claimant later was an industrial forklift driver or material stock clerk. He agreed that as a forklift driver or stock clerk he "chased down" parts or worked in the office quite a bit. Claimant indicated that the company sought his retirement because it felt his continued work as forklift driver created dangers for himself and other workers given the state of his hearing and eyesight.

Claimant reported that his initial service disability pension was discontinued a number of years after his 1945 discharge when Veterans Administration physicians found he no longer had service-related disability. Claimant agreed, however, that his service disability was reinstated in 1983 with a finding of a 40 percent service-related hearing loss. Claimant reported that his Veterans Administration doctors were aware that he worked in a noisy environment. Claimant further agreed that he has been aware of a gradual worsening of his hearing in the ten years prior to his retirement. Claimant also indicated that he had worked as a union official for a period of time, but also did his regular work when not on union business. Claimant agreed that only one or two areas of the plant had been posted for hearing protection at his retirement date and that he had not routinely worked in those areas.

Gary Leonard Neivel testified. Mr. Neivel identified himself as a supervisor in John Deere department 125, that is, the attachment assembly department. He reported that claimant worked under him from 1974 through 1979 setting up scales. He reported that claimant's building and department were largely considered a storage area but that impact noise from trucks loading and unloading would occasionally exceed 90 dba. He reported that the dumping would occur from two to five days per work week and would go on for a period of one to two hours with actual dumping taking two to three minutes sporadically throughout the day.

Patricia Gage, John Deere Industrial Hygienist, testified. She indicated that she had assisted in the preparation of exhibit S, specifically in the noise exposure column contained on the exhibit. She reported that the exhibit was prepared from information kept in the ordinary course of John Deere's business and that it was true and correct to the best of her knowledge and belief. She indicated that class data is data available for the job classification whereas the department average is data used for the department as a whole where data on the class itself is not available. She reported that claimant became an industrial forklift operator in department 64 in August 1969. The witness agreed that the department average for chip and grind operations was 98 dba and that claimant had also worked in an area where the department average was 101 dba, but that he had done so only for 15 days in 1965.

Defendant's exhibit I is Veterans Administration medical records relative to claimant. A note of October 30, 1943 reports that in March 1944 in Germany an enemy shell exploded near claimant causing deafness and bleeding in both ears as well as blindness for about ten minutes. It indicates that claimant's hearing has been impaired since with occasional earaches. The reporter further notes that his impressions are of impaired hearing in the right ear with findings which seem difficult to understand in that a whispered voice can be heard at five feet yet high pitched forks are not heard. The spoken voice impairment gives the impression, therefore, of being exaggerated. A report signed May 28, 1958 indicates part of the diagnosis is "impaired hearing. Nerve type." A note of May 12, 1958 indicates that claimant feels he has had some impairment of hearing and that he does not hear well if there are several people speaking if there are noises going on. The report states that examination of ears show both drum membranes to be thickened, dull with cone of light poorly defined. The Weber test was negative. The Rinne test was A. U. 7 seconds negative. A note dated June 17, 1958 under remarks reports a supplementary special audiology exam as per circular 10-72, paragraph 3, with SC, apparently meaning service connected, disability 0 percent for defective hearing. A note of November 30, 1958 indicates that claimant's discrimination scores were not as good as might be expected from pure tone data of conductive type left ear impairment. A report dated August 22, 1983 indicates that claimant has a mild loss through 250-2000 Hertz which dropped precipitously to severe loss AS and moderate through 250-2000 Hertz dropping precipitously to severe loss AD.

Claimant's exhibit 10 and defendant's exhibit A relate to claimant's examination and evaluation by John F. Gschwendtner, M.D. A May 9, 1984 report indicates that claimant reported a service connected hearing disability and that his hearing has always been worse in the right ear. The doctor reports that an audiogram showed sensorineural loss bilaterally, more severe on the right than the left. The reporter opines that since claimant is no longer exposed to noise, his hearing should remain relatively stable, except for the normal process of aging.

Defendant's exhibit B and claimant's exhibit 11 relate to claimant's evaluation by James W. White, M.D. A note of the doctor of February 14, 1985 indicates that claimant's hearing test shows a severe deafness in the right ear and moderate deafness in the left ear with a moderate discrimination score. Claimant apparently had a hearing test at John Deere in 1971 and had a standard threshold shift from 1971 through 1975 in the left ear and no standard threshold shift in either ear since that time. The final impression noted is bilateral sensorineural hearing loss with a strong history of noise exposure and most probably related to noise exposure.

Claimant's exhibits 1 through 9 and defendant's exhibit C are records of claimant's physical examinations and treatment by the medical department at John Deere Dubuque Works. Three records of physical examinations for lift truck operators after January 23, 1978 indicate that claimant's hearing is unsatisfactory. An undated physical exam record also indicates claimant's hearing is unsatisfactory. A medical note of June 4, 1982 indicates that claimant's hearing loss apparently is service incurred. A note of April 5, 1984 indicates that claimant is concerned about possible noise induced hearing loss and has a 40 percent service connected disability for hearing.

Defendant's exhibits D through H are records of audiograms for claimant. Defendant's exhibits J through R are work sheets for calculations of percent occupational hearing loss. Exhibit J indicates a total binaural loss of 25.9 percent based on the results of audimetric exam at University Hospitals of October 17, 1958. Exhibit K indicates a total binaural loss of 19.06 percent based on results of an audiometric exam at the John Deere medical department of February 3, 1971. Exhibit L indicates a total binaural loss of 20.3 percent based on results of audiometric exam of the medical department of August 20, 1975. Exhibit M indicates a total binaural loss of 30.3 percent based on results of audiometric exam in the medical department of January 23, 1978. Exhibit N indicates a total binaural loss of 13.13 percent based on results of audiometric exam of the medical department of June 9, 1980. Exhibit O indicates a total binaural loss of 21.56 percent based on results of audiometric exam of the medical department of June 4, 1982. Exhibit P indicates a total binaural loss of 24.06 percent based on results of a Veterans Administration audiometric exam of August 22, 1983. Exhibit Q indicates a total binaural loss of 42.2 percent based on results of audiometric exam by Dr. Gschwendtner of April 16, 1984. Exhibit R indicates a total binaural loss of 45.8 percent based on exam by Dr. White's office of February 14, 1985. Claimant's exhibit 13 is an employee's hearing loss calculation for the audiogram of April 16, 1984 indicating a binaural total loss of 42.2 percent.

Claiman's exhibit 12 and defendant's exhibit S are work histories for claimant indicating noise level exposure on various jobs held at the Dubuque Works. The exhibits indicate that prior to his August 11, 1969 transfer to the job as industrial fork truck operator, claimant had substantial noise exposure at values between 96 and 86 dba; after becoming an industrial fork truck operator, claimant's reported noise exposures were at 65, 66, and 70 dba. Claimant last work day was August 21, 1984.

At close of hearing, defendant moved to dismiss on the grounds that claimant had failed to establish an occupational hearing loss or in the alernative that claimant's action was barred because filed beyond the applicable limitation period. The motion is denied.

APPLICABLE LAW AND ANALYSIS

We first consider whether claimant's action is barred because filed beyond the applicable statute of limitation.

The statute of limitations is an affirmative defense which defendant must prove by a preponderance of the evidence. Baines v. Blenderman, 223 N.W.2d 199, 203, (Iowa 1974).

Section 85B.8 provides that the date of injury in a occupational hearing loss claim is the date of occurrence of "any one" of either transfer from excessive noise level employment or retirement or termination of the employer-employee relationship. A declaratory ruling of this agency has interpreted the phrase "any one of the following events" in the section to mean the first to occur of these events. See In Re Declaratory Ruling of John Deere Dubuque Works of Deere & Company, III Iowa Industrial Com'r Report, 147. The section further provides that the date of injury for any loss of hearing incurred before January 1, 1981 shall not be earlier than the occurrence of any one of the above events.

Claimant alleges in his petition that his injury date was his retirement date, apparently September 1, 1982. The objective evidence does not support claimant's contention, however. Work histories for claimant indicate he has not consistently worked at noise levels exceeding 70 dba since becoming an industrial forklift operator on August 11, 1969. Prior to that date, he had had substantial noise exposure exceeding 86 dba. Thus, a 16 dba reduction in the intensity of claimant's work noise exposure occurred on and after August 11, 1969. The times and intensities table of 85B.5 is not an exclusive listing of excessive noise levels. Prolonged exposure to excessive noise levels may result over time where the intensity of exposure is less but the duration greater. However, the tables delineate times and intensities of exposure which by law are excessive noise levels. They also provide guidance in considering whether a less intense or less prolonged exposure could reasonably result in an excessive noise level exposure. In this case, both the actual reduction in weighted noise exposure and the fact that the reduced weighted noise exposure was at least 20 dba below the 90 dba for an eight hour duration listed in the table supports the findings that claimant was transferred from excessive noise level employment on August 11, 1969. Claimant's occurrence date, if any, is August 11, 1969, a date prior to the January 1, 1981 effective date of chapter 85B.

Claimant argues in his brief that the occurrence of any enumerated event should be sufficient to permit filing a claim for a loss allegedly occurring before January 1, 1981. Such is not the case, however. Section 4.5, Code of Iowa, provides that a statute is presumed to be prospective in its operation unless expressly made retrospective. The legislature did not expressly make chapter 85B retroactive. The Act as a whole must be construed in that light. Hence, the addition of the final sentence to section 85B.8 saves claims for occupational hearing loss incurred prior to January 1, 1981 if any of the enumerated events occurred at a time which would place the prospective claim within the applicable limitation period. Section 85B.14 makes section 85.26(1) and (3) applicable to chapter 85B. Therefore, a potential claim for occupational hearing loss benefits which could be filed on or after the January 1, 1981 effective date of the occupational hearing loss act without exceeding the limitation period of section 85.26(1) is a valid occupational hearing loss claim within the parameters of the Act. Section 85.26(1) permits commencement of an original contested case proceeding within two years of the occurrence of the injury. Claimant's date of occurrence of injury, if any, was August 11, 1969. Claimant commenced his claim on May 22, 1984. Clearly, the section 85.26(1) limitation period was exceeded. Under the foregoing analysis, claimant's potential claim is not among those within the parameters of the Act. Claimant's claim must fail.

Claimant also argues in his brief that the discovery rule should save his claim for occupational hearing loss benefits. We shall first address that argument on its face.

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 (Iowa 1980).

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, 261 (Iowa 1980).

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, 819 (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 reasonable 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 to 15-66 (1976)" as cited in Robinson at 812.

When claimant's argument is taken at its face, the discovery rule does not save his alleged claim. Claimant was well aware of noise induced hearing loss for he had suffered such a loss during his military service and had received a service disability for that loss. Claimant also knew he was exposed to noise in his work. Claimant is a gentleman of at least average intelligence. He, therefore, could reasonably be expected to both recognize that he had a hearing loss and to inquire as to the loss' work-relatedness and possible compensability within a short time of experiencing the loss. There is no evidence in the record demonstrating claimant did either. Hence, on its face the discovery rule could save claimant's claim.

Claimant's argument as to the discovery rule also fails for a more fundamental reason. Claimant would have the discovery rule create commendable claims for persons who suffered a hearing loss beyond the Act's effective date, but who did not discover that loss until the effective date. Persons suffering a loss before the effective date who discovered that loss before the effective date would have no claim, however. No rational basis can be found for that result. That result clearly treats differently persons similarly situated in contravention of the constitutional principle of equal protection of law. It is presumed that the legislature intended compliance with the state and U.S. constitutions when it enacted chapter 85B. See section 4.4(1), Code of Iowa. Hence, the discovery rule cannot be used to create an action where one would not otherwise exist under chapter 85B. Claimant's claim is barred because it cannot be filed on or after the January 1, 1981 effective date of the Occupational Hearing Loss Act without exceeding the limitaton period of section 85.26(1).

We need not address the issue of whether claimant has an occupational hearing loss. The evidence suggests, however, that claimant's noise induced hearing loss probably results from his military exposure and not from his work at the Dubuque Works.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant transferred from work at a noise exposure of 86 dba, a greater to a noise exposure of 70 dba or less on August 11, 1969.

Claimant remained at noise exposure of 70 dba or less through his last work day, August 31, 1982.

Claimant retired on or about September 1, 1982.

Claimant filed his petition May 22, 1984.

Claimant's August 11, 1969 transfer was a transfer from excessive noise level employment.

Claimant's date of occurrence of his injury, if any, was August 11, 1969.

Claimant's potential claim for occupational hearing loss benefits was not commenced within two years of the date of occurrence of his injury.

Claimant's potential claim could not be saved by filing on or after the January 1, 1981 effective date of the Occupational Hearing Loss Act without exceeding the limitation period of section 85.26(1).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant's action is barred because it cannot be filed on or after the January 1, 1981 effective date of the occupational hearing loss act without exceeding the limitation period of section 85.26(1).

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from these proceedings.

Defendant pay costs of these proceedings.

Signed and filed this 23rd day of September, 1985.

Helen J Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT J. VANDERMEULEN,	:	
Claimant,	:	File No. 758421
vs.	:	A R B I T R A T I O N
JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
SEP 13 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Robert J. Vandermuelen, against his self-insured employer, John Deere Dubuque Works, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained March 16, 1983.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Dubuque, Iowa, on May 1, 1985. 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 March 23, 1984.

The record in this case consists of the testimony of claimant, of Patricia Gage, of Dick Elliot; of claimant's exhibits 1 through 10; and of defendant's exhibits 14 through 24 and 11 and 27.

ISSUES

The issues for resolution are:

1) Whether claimant sustained an occupational hearing loss as defined in chapter 85B.

2) Whether claimant is entitled to occupational hearing loss benefits;

3) Whether claimant is entitled to payment of certain medical costs; and

4) Whether claimant's action is barred because filed beyond the applicable limitations period.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's rate of weekly compensation is $289.48. Claimant is a 41 year old high school graduate who has worked for John Deere for the last 21 years. Prior to working for John Deere, claimant worked for several years at two other Dubuque manufacturing plants as a machine operator. Claimant fishes, duck hunts, does auto mechanics, has owned motorcycles, attends horse races, and bowls. In the last three years claimant has also participated in auto demolition derbys. Claimant indicated he wears a hearing muffling helmet, but not ear protection while doing so. Claimant expressed the belief that noise levels at his own auto shop were about 1/20 of those at the John Deere mechanic shop and much less than at the John Deere foundry or screw machines. Claimant indicated that he currently works as a John Deere mechanic. He stated that he presets tools, that is, prepares a machine for steel fabrication. Claimant indicated that he has performed this job since July 9, 1979 and that it is much less noisy than his previous job. Claimant indicated that he also worked as an experimental mechanic for five and one-half years in a building separated from the rest of the John Deere plant. Claimant indicated that he worked on the tractor repair line for three months and that this was "very noisy" with hoists and air wrenches running constantly in that department. Claimant has also worked in the foundry and characterized this as the noisest job he held at John Deere. Iron is poured and pounded there.

Claimant reported that he worked on the screw machines intermittently after 1975 and this was his second greatest noise exposure. Claimant explained that a steel bar is fed into an automated machine which then forms the bar into a part. He reported that four to eight bars are generally formed at one time and that the noise varied with the stock style fed into the machine. Claimant reported that coolant pumps and the stock feeder also operated nearby. Claimant reported workers had to leave the machine area and go into the aisle to communicate and that the area was not posted for hearing protection until fall 1984 when hearing protection was required throughout the plant. Claimant indicated that he had operated a cutoff machine which he characterized as much less noisy than was the screw machine in 1976 through 1978. Claimant also stated he had been secretary to the union council for a period of time. He testified that while holding that position, he worked his regular job unless he had union business, in which case he would perform that business for one-half to two hours on a nondaily basis. Claimant last worked in the foundry in 1968 and last worked at the screw machine on September 14, 1976. Exhibits 9 and 24 indicate claimant transferred from the automatic cutoff machine April 2°, 1979 and from assembly changeover July 8, 1979.

Claimant had periodic physicals while employed and several audiograms. He reported having had an audiogram on April 25, 1975 but could not remember discussing that test with the examiner. Claimant stated he was first notified in writing of his hearing condition on March 16, 1983 per a notice of Dr. McClenahan, which is claimant's exhibit 2. Claimant indicated that Dr. McClenahan sent him to James W. White, M.D., and James E. Spoden, M.D., and that Mr. McClenahan told him that even though the doctor felt claimant's hearing loss was work related, claimant was beyond the time for filing a compensation claim. Claimant agreed that the percentage calculation of his hearing loss increased by 11 percent from March 16, 1983 to August 1984. Claimant also agreed that the percentage calculations would indicate that his hearing has improved from 1975 through 1983.

Claimant reported that his mother is alive at age 60 and has good hearing and that his father died in October 1984 but had never worn a hearing aid. Claimant denied he had ever suffered a bad concussion as a child as reported in John Deere's medical records.

Dick Elliot, claimant's supervisor in department 863 from February 1983 through January 1985, testified that hearing protection has been required in that area since October 1984.

Patricia Gage, Industrial Hygienist for the John Deere Dubuque Works, testified. She indicated that several of claimant's audiograms indicated that he had been exposed to high intensity noise within 0 to 20 minutes of the time of the audiogram and that such was not desirable since it could affect the validity of the audiogram itself. Ms. Gage indicated that she is working toward a Master's Degree in industrial technology, teaches safety and industrial hygiene at the University of Dubuque and is certified as a hearing protection specialist by the Council For Hearing Conservation. She indicated that she supervises hearing conservation throughout the plant and checks noise levels by the use of dosimeters and sound level meters. She indicated that exhibit 8 records a dosimeter sampling on claimant in 1978 with claimant's calculated exposure being 83 dba. She reported that exhibit 27 is a calculation sheet which identified exhibit 24 as a work history for claimant indicating noise exposure data. She reported that the exhibit indicates noise exposure by job classification or by department average where job classification exposure data is not available. Ms. Gage indicated that readings used to prepare the exhibit were made in the ordinary course of John Deere's business and that she prepared the data from John Deere's business records under her supervisor's control. The witness indicated that the question of whether employee was overexposed on exhibit 6 simply referred to whether the employee had worked in an environment where the weighted average exposure was above or below 90 dba.

Medical records of the John Deere Dubuque Tractor Works for claimant are in evidence as exhibits 5 and 23. A note of March 17, 1983 indicates that claimant's average hearing in the 500-3000 Hertz range, on the left is 36.25, and on the right 27.5. A note of March 30, 1983 indicates that claimant was informed on his average hearing and notes that his previous history is of a concussion as a child and that claimant is aware of decreased hearing with background noise, TV and people with high pitched or soft voices. It indicates claimant worked at A. Y. McDonald's on machines for one year before hiring with John Deere and has done some right-handed hunting and trap shooting in the past. A note of October 4, 1983 indicates that the statute of limitations has been exceeded, apparently in regard to a hearing loss. Claimant received an audiogram at the start of his shift on March 14, 1984 which revealed a slight decrease in hearing in the past year per a note of March 21, 1984. The March 21 note further states that claimant had significant exposures before 1968, but his recent exposures in departments 83 and 84 were at 77 and 73 dba. Further notes indicate that claimant has been advised to wear hearing protection, but has become disoriented because of sound deprivation and will need to remove his protection periodically.

Claimant's exhibit 4 is a medical record of James E. Spoden, M.D., of May 2, 1983 in which the doctor states that claimant's audiogram and evalution indicate his hearing problem is relatively mild and that claimant appears to be in a safe area of the plant.

Claimant's exhibit 3 and defendant's exhibit 11 are reports of James W. White, M.D., of April 4, 1984 and August 30, 1984, respectively. The April 4 report indicates that claimant was evaluated for his hearing loss and that he has some slight ringing in his ears, but is not complaining of dizziness. The doctor indicates that claimant has not had nonwork noise exposure of comment and does not give a history of head trauma, fibrile illnesses or family traits for hearing loss. The doctor states that claimant's ear, nose and throat examination was essentially within normal limits, but that his hearing test shows bilateral sensorineural hearing loss with a 4000 kc dip. The doctor states his impression is of a mild bilateral sensorineural hearing loss compatible with noise exposure.

Exhibits 8, 9, 10, and 24 relate to claimant's work history and his noise exposure in different plant departments. Exhibit 8 indicates that on March 28, 1978 claimant had a noise exposure of 83 dba, but does not localize that exposure within the plant. Claimant's bar graph of his noise exposure indicates that claimant has worked for substantial periods at noise levels ranging from 84 to 91 dba and worked briefly at a noise level of 94 dba. From June 21, 1971 through July 8, 1979 claimant worked in positions where the job classification noise exposure was 85 dba or greater. Claimant's most recent two exposures, those from July 1973 onward, have been at 75 dba and 73 dba. Defendant's record of claimant's work history is substantially consistent with that of claimant as regards times and intensities.

Claimant's exhibits 2 and 6 and defendant's exhibits 20, 21, and 22 relate to claimant's audiograms performed in 1975, 1983 and 1984 and to information conveyed to claimant regarding them. Defendant's exhibits 14, 15, 16, 17, 18, and 19 are work sheets for calculation of percent of occupational hearing loss for claimant's audiograms of April 25, 1975, March 16, 1983, May 2, 1983, March 14, 1984, April 4, 1984, and August 30, 1984, respectively. The percentage loss calculation for April 25, 1975 is 1.6 percent binaural. The percentage loss calculation for March 14, 1984 is 14.1 percent binaural. The percentage loss calculation for April 4, 1984 is 4.69 percent binaural. The percentage loss calculation for August 30, 1984 is 11.6 percent binaural. Claimant's exhibit 7 is a hearing loss calculation for the audiogram dated March 14, 1984 which indicates a percentage loss calculation of 14 percent binaural.

Claimant's exhibit 1 is a first report of injury filed in this case. Claimant's exhibit 27 is a copy of a John Deere Dubuque Works noise exposure data sheet.

At the end of testimony, defendant moved that claimant's claim be dismissed as a matter of law as the employee has failed to establish an occupational hearing loss under Chapter 85B or exposure to noise in excess of standards in section 85B.8. The employer further stated that even had claimant suffered hearing loss in earlier years, the employee's claim is barred by the statute of limitations since claimant had changed his occupational duties two years prior to commencement of his claim. Oral arguments concerning the appropriateness of defendant's motion were made at hearing and were considered in the disposition of this case as were briefs filed by both parties. The motion is denied.

APPLICABLE LAW AND ANALYSIS

Our first concern is claimant's injury date, if any.

Section 85B.8 provides that the date of injury in an occupational hearing loss claim is the date of occurrence of "any one" of either transfer from excessive noise level employment, retirement or termination of the employer-employee relationship. A declaratory ruling of this agency has interpreted the phrase "any one of the following events" in the section to mean the first to occur of these events. See In Re Declaratory Ruling of John Deere Dubuque Works of Deere & Company, III Iowa Industrial Com'r Report, 147. The section further provides that the date of injury for any loss of hearing incurred before January 1, 1981 shall not be earlier than the occurrence of any one of the above events.

Claimant and defendant apparently believe claimant's injury date is September 14, 1976 when he transferred from the automatic screw machine to the automatic cutoff machine. The objective evidence of exhibits 9, 10, and 24 refutes that belief, however.

Claimant remained employed in jobs which by job classification had weighted noise exposures of 85 dba or more from June 21, 1971 to July 9, 1979 when he began work as a mechanic. His weighted noise exposure by job class then decreased by at least 11 dba. That change in intensity of noise exposure at the levels demonstrated is sufficient to establish a transfer from excessive noise level employment on July 9, 1979. The addition of the final sentence to section 85B.8 saves claims for occupational hearing loss incurred prior to January 1, 1981 if any of the enumerated events occurred at a time which would place the prospective claim within the applicable limitation period. Section 85B.14 makes section 85.26(1) and (3) applicable to chapter 85B. Hence, a potential claim for occupational hearing loss benefits which could be filed on or after the January 1, 1981 effective date of the occupational hearing loss act without exceeding the limitation period of section 85.26(1) is a valid occupational hearing loss claim within the parameters of the Act. Claimant's claim, on its face, meets that criteria. The additional question of whether the limitations of section 85.26(1) were actually exceeded must next be decided.

Section 85.26(1) permits commencement of an original contested case proceeding within two years of the injury date. Claimant commenced his claim March 16, 1984, a date clearly more than two years beyond his July 9, 1979 injury date.

Claimant states he discovered his injury March 16, 1983 when Dr. McClenahan of John Deere presented him with written notice of his hearing loss.

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 Disgrict, 298 N.W.2d 256, 261 (Iowa 1980).

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, 819 (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 to 15-66 (1976)" as cited in Robinson at 812.

Claimant's claim is not saved by the discovery rule. While little evidence of claimant's education or intelligence was presented, claimant is a high school graduate who appeared to be of at least average intelligence and insight. Claimant had an audiogram August 25, 1975. He knew he worked in areas of high noise exposure from 1971 through July 9, 1979. Claimant could report an awareness of decreased hearing with background noise, TV and people with high pitched or soft voices to Dr. McClenahan in March 1983. Reasonably, if claimant had experienced a hearing loss on his July 1979 injury date, he would have had this same awareness of decreased hearing then. It can reasonably be inferred that a person of claimant's education and intelligence should have recognized the work-relatedness of his problem at that time. Claimant also then had enough information to put him on inquiry as to whether his loss was compensable. Further, even if claimant were granted a reasonable time after January 1, 1981 to discover the existence of chapter 85B (something the legislation on its face clearly does not contemplate) that time had certainly passed by March 16, 1983. Hence, claimant's claim died of his own dilatoriness and he cannot now revive it through application of the discovery rule.

We need not reach the other questions presented by claimant's petition.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant has been employed by defendant John Deere Dubuque Works for 21 years.

Claimant worked in plant areas where the weighted average noise exposure by job classification exceeded 85 dba from June 21, 1971 through July 8, 1979.

Claimant transferred to the job of mechanic on July 9, 1979. His weighted average noise exposure then decreased by at least 11 dba.

Claimant's July 9, 1979 transfer was a transfer from excessive noise level employment.

Claimant is forty-one (41) years old and a high school graduate of at least average intelligence and insight.

Claimant had a company audiogram in April 1975.

Claimant was aware of decreased hearing difficulties in March 1983 and reported these to Dr. McClenahan.

Claimant could be expected to be aware of his hearing problems on July 9, 1979 and to have recognized their probable work relatedness.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury date of July 9, 1979 which is his date of transfer from excessive noise level employment.

Defendant has established that claimant's claim is barred because filed beyond the applicable limitation period.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

Defendant pay costs of this proceeding.

Signed and filed this 13th day of September, 1985.

Helen Jean Wallesen

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MITCHELL VEEDER, Claimant,	:	
vs.	:	FILED JUL 18 1985 IOWA INDUSTRIAL COMMISSIONER
COMMERCIAL CONTRACTING COMPANY, Employer,	:	File No. 456333 A P P E A L D E C I S I O N
and	:	
JOHN DEERE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

The claimant, Mitchell Veeder, appeals from a review-reopening decision wherein claimant was awarded additional healing period benefits and 85.27 benefits. However, the claimant did not establish entitlement to additional permanent partial disability. The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 33; defendants' exhibits A through J; and various briefs filed by both parties.

ISSUES

The issues on appeal are: 1) Whether the deputy erred in assigning the claimant a rating of 45 percent permanent partial industrial disability and further erred in the factual findings supporting such a rating; 2) That the claimant has three categories of treatment (orthopedic, urological, and sexual dysfunction), and that the deputy erred in not considering all three areas in reaching her decision.

REVIEW OF THE EVIDENCE

The industrial commissioner's file shows a first report of injury received August 5, 1976. A memorandum of agreement was filed on the same day. A form 2A shows the payment of healing period benefits from July 25, 1976 through December 10, 1977 and a total of 1 2/7 weeks in the period from May 10, 1982 through September 10, 1982. Claimant has also been paid medical expenses, rehabilitation benefits, and permanent total disability payments for 45 percent of the body as a whole. At the time of hearing the parties stipulated to a healing period rate of $174.00 and a permanent partial disability rate of $160.00.

The claimant, at the time of the hearing, was twenty-nine years old. After high school the claimant attended two years of college, then discontinued college to work for a few years. The claimant's pre-injury work history consisted of working in a plastics factory, a sheet metal factory, and as an iron worker.

Around the age of five the claimant contracted polio. As a result the claimant developed what is known as hammertoe and footdrop in his left leg. The claimant had two operations to help correct these deficiencies but still experienced limitations with his left leg. The claimant could not participate in any athletic activities as a child and walked with a limp. In spite of this, the claimant testified that he could do his job. He said that he could overcome any problems he had with his left leg due to the fact that his right leg and upper body were very strong and healthy.

The claimant testified that he was involved in an accident on July 23, 1976 while working for the defendant. The claimant's relevant testimony was as follows:

> A. Well, what we were doing was dismantling machinery in the old engine plant in Waterloo, setting it up on truck beds so they could haul the machines out to the new engine plant. In the course of this work, a rather large, awkward machine we were moving was suspended between two forklifts by a series of cables. One of the cables broke, and all the weight came my way, pinned me against the wall, and just about crushed me to death.

(Transcript, page 20)

The claimant was given emergency medical treatment at the plant, and transferred to Schoitz Hospital in Waterloo where he was taken by air ambulance to University Hospitals in Iowa City. The claimant was hospitalized for 3 1/2 months immediately after the accident. The claimant's right leg, despite efforts to save it, was amputated. Claimant suffered other injuries as well: a burst bladder, severed urethra, multiple fractures in his lower spine, and multiple breaks in his pelvis. During the initial hospitalization the claimant began physical therapy in relation to his amputation. A suprapubic catheter was put in place during this hospitalization. The claimant was discharged on November 11, 1976.

At the time of his discharge the claimant had been outfitted with a quadrilateral socket. The quadrilateral socket utilized various stump socks placed between the stump and the socket. A belt attached to the prosthesis would come across his waist. Another belt would go around his shoulder. The claimant stated that ambulation with the quadrilateral socket was difficult.

The claimant returned to University Hospitals on February 14, 1977 to undergo urethroplasty to reconnect the claimant's urethra. Claimant was in the hospital for this treatment for about a month. After the urethroplasty the claimant was able to urinate rather than being catherized. The claimant was seen in follow-ups regarding the urethroplasty. He still suffers from incontinence and on semiregular occasions discharges urine into his pants. The claimant's final urological follow-up was on November 26, 1979.

The claimant's orthopedic doctors in Iowa City determined that the claimant could be fitted with a suction socket prosthetic device. The claimant said that the suction socket was more natural and much easier to walk with. However, before the suction socket could be placed, the claimant developed an "ulcer" at the end of his stump which required a few months to heal. November 15, 1978 was the last time the claimant saw anyone regarding the ulcer. It was then determined that the claimant needed a stump revision. The revision to claimant's stump took place in Waterloo around the end of December 1978. Edward Sitz, M.D., was the surgeon that performed the revision. After the revision, the claimant went to Dale Clark in Waterloo to have his new socket made. The claimant first saw Mr. Clark for the fitting of his socket in February of 1979. The claimant was actually fitted with a socket and the final adjustment made on July 5, 1979. However, the claimant testified that adjustment is an ongoing process. The claimant testified that due to the critical nature of the fit, he has to keep his weight within a five to seven pound range.

As a further result of claimant's injuries he was sexually impotent. In March of 1981 the claimant decided to undergo a procedure to implant a penile prosthetic device. The claimant received what he termed the "most modern" implantation device which utilized a pump reservior. The claimant stated that the device "broke down" around the end of 1982. The claimant testified regarding how the sexual dysfunction has affected him: "It's hard on me. It's hard on my wife. I mean, I get depressed about it sometimes. Jane gets depressed about it sometimes. It's just generally not a good situation." (Transcript, pages 40, 58-61)

By August of 1977 the claimant had married and had moved to Waterloo. Claimant had also returned to school at the University of Northern Iowa completing a degree program in psychology in December 1979. After graduation the claimant and his wife moved to Denver to find work. The claimant got a job as a door-to-door interviewer with his present employer, Colorado Market Research at a starting wage of approximately $3.35 per hour. He stated that this job caused problems for him in relation to his orthopedic limb. The claimant found some neighborhoods "treacherous," and generally, "[i]t was just a bad situation." Stairs leading up to houses presented particular problems in navigating. The claimant was especially troubled in ambulating due to the fact that because of his childhood bout with polio his left leg was not able to support him as well as if he still had his right leg but lost his left. The claimant was unable to continue in the door-to-door capacity and now is working a "desk job" at a gross biweekly wage of approximately $588. The claimant testified on cross-examination that at his present job, he cannot see himself lifting more than 20 or 25 pounds.

The claimant testified that he is not satisfied with his present position and feels he has more to offer society. But to do that, the claimant feels he needs more education in the field of psychology.

Roger Franklin Marquardt, the senior director of North Central Rehabilitation Service, was called to testify. In assessing the claimant, Marquardt analyzed claimant's work history prior to the accident and correlated that with the functional capacity of the claimant after the amputation. Marquardt's conclusions regarding his evaluation of the claimant were as follows:

> In looking at the vocational options that he has for an individual with the functional capacity that is illustrated by the reports that I reviewed as well as the bachelor's degree in psychology. we're basically looking at areas in the behavioral sciences such as in the area of psychological technician, a social worker. A counselor is more or less a vague term or a catchall term.
>
> It would depend upon the population that the person was counseling, whether it would be alcoholism treatment counselor or whether it would be family therapy counseling or whatever it might be, but as a technician or an aide under possibly a licensed psychologist would also be an option.

Any type of work dealing with assisting individuals in the work world such as an employment counselor, a job placement counselor, personnel clerk, personnel-type work.

Also into the area of sales using the knowledge that he's developed in psychology as far as persuasive techniques in recognizing needs of individuals. It could very easily -- It would very easily allow him to get into the area of public relations or sales type of work. That's looking at his skills in psychology or in the behavioral sciences.

There are also many unskilled jobs of a light or sedentary nature that an individual with his function and capacity could perform when we're to ignore his education. There are so many to choose from. In fact, by the Department of Labor, there are 1600 light or sedentary jobs within the national economy that are classified as unskilled and classified as light or sedentary, but it would be basically assembly positions, security guard positions, ticket taker positions, anything that would be considered light or sedentary and would take less than 30 days or so to learn.

(Tr., pp. 92-93)

Marquardt listed specific areas which was in a salary range of $16,500 and $25,800 annually. Marquardt stated that the more academic expertise you have in psychology, "the better off you are, so it opens up positions."

Daniel Stansberry, supervisor of workers' compensation for the defendant insurance company, was called as a witness for the defendants. Claimant's exhibit 1 is a letter from Colorado Orthopedic Clinic to the defendant insurance company. I. Stephen Davis, M.D., stated that he saw claimant on August 19, 1980 regarding his socket not fitting properly. Claimant's exhibit 2 is a group of letters and a medical report. Claimant's exhibit 3 is a wage history of the claimant at Colorado Market Research Services. The last entry dated August 3, 1982 shows the claimant to be making $5.50 per hour. Claimant's exhibit 4 is a collection of medical reports and entries regarding claimant's sexual dysfunction and the subsequent surgical implant of a penile prosthesis. A letter to claimant's attorney from Kent E. Johnson, M.D., dated November 19, 1982 states in part: "His impotence is certainly compatible with the severe degree of pelvic fracture." Claimant's exhibit 5 is a letter from Dr. Sitz regarding claimant's stump revision and subsequent follow-up.

Claimant's exhibit 6 is page 128 of the AMA Guides to Impairment Evaluation which reads in part:

<ins>Class 3--Impairment of Whole Man--20%</ins>. A patient belongs in Class 3 when no sexual function is possible.

<ins>Example</ins>: An 18-year-old boy suffered traumatic dislocation of the penis. Corporal repair and urethroplasty have preserved genital appearance and urethral function, but erection is not possible.

Diagnosis: Posttraumatic vascular and neurological penile insufficiency.

Impairment: 30% impairment of the whole man, which includes due consideration for the patient's age.

Claimant's exhibit 7 and 8 are a record of claimant's urethroplastic and orthopedic follow-ups at University Hospitals in Iowa City. Claimant's exhibits 9 through 13 inclusive are various invoices from Dale Clark Prosthetics. Claimant's exhibits 14 and 15 are clinical notes dated September 13, 1978 and August 9, 1978 respectively. The notes are in reference to claimant's stump. Claimant's exhibits 16 through 20 inclusive are further clinical notes regarding claimant's stump and amputation. Claimant's exhibit 21 is a clinical note. Claimant's exhibit 22 is a Urology Record. An entry dated May 21, 1979 states "Pt does have intercourse with great difficulty and he is fearful of postop complications."

Claimant's exhibit 23 is a letter from Stefan Loening, M.D., to R. A. Mandershied, M.D., regarding claimant's urethroplasty. Claimant's exhibit 24 is a letter regarding a September 15, 1978 urethroplasty follow-up. Claimant's exhibit 25 is records of urethroplastic follow-ups. Claimant's exhibit 26 is a clinical note in reference to claimant's stump and urethroplasty. Claimant's exhibit 27 is a discharge summary relating to claimant's urethroplasty. Claimant's exhibit 28 is a collection of clinical notes regarding claimant's urethroplasty admission. Claimant's exhibit 29 is a discharge summary from the department of orthopaedic surgery at University Hospitals at Iowa City. Claimant's exhibit 30 is a copy of claimant's original admission and clinical notes prepared by the intensive care unit at University Hospitals in Iowa City. Claimant's exhibit 31 is an out-patient and emergency record prepared by Boone County Hospital. Claimant's exhibit 32 is a compilation of medical reports, clinical notes, and nurses reports on the claimant from University Hospitals beginning on July 23, 1976. Claimant's exhibit 33 is a collection of the claimant's medical records from University Hospitals in Iowa City.

Claimant's exhibit 34 is the deposition of Donald Shurr, director of physical therapy at the University of Iowa Hospitals and Clinics. Mr. Shurr stated that the claimant was sent to the physical therapy department by the trauma team. Mr. Shurr testified that the problems with the claimant which consist of walking on uneven surfaces, and quick balance changes particularly where the terrain is uneven are related to the condition of his left leg. The claimant's ability to ascend and descend stairs would also be limited. The witness testified as to the claimant's performance with a right leg amputation and a left leg weakness due to polio.

> Most of the studies that I would use to support that statement have been done on patients with unilateral above-knee amputations and presumably normal other extremities. In this situation, we've got an abnormal other extremity which I believe will contribute to the problem of speed, endurance and the problems that are associated with walking on uneven surfaces, ramps or stairs.
>
> (Claimant's Exhibit 34, pp. 3,7,23,28)

Claimant's exhibit 35 is the deposition of Elias Jacobo, M.D., a urologist. Dr. Jacobo expressed his medical opinion as to claimant's degree of impairment arising from the urological and sexual condition as follows: "According to the AMA guidelines of disability, he is 30 percent disabled whole man."

Defendants' exhibit A is a letter from Dan Stansberry to William Quinn dated January 26, 1978 inquiring into claimant's date of maximum medical recovery. Defendants' exhibit B is a letter to William Quinn from Dan Stansberry. Defendants' exhibit C is a reply from James W. Quinn to Dan Stansberry stating claimant's date of maximum recuperation as August 24, 1977. Defendants' exhibit D is a letter from Bernard Fallon, M.D., to R. A. Mandersheid, M.D., dated September 20, 1978 Defendants' exhibit E is a deposition of the claimant. Defendants' exhibit F is claimant's answers to interrogatories. Defendants' exhibit G is an amendment to answers to interrogatories. Defendants' exhibit H is records from vocational rehabilitation. In part it states: "The tests would suggest Mr. Veeder has the intellectual ability to attempt most of the available training programs." Defendants' exhibit I is a report to Dan Stansberry from Rehaberco, Inc., dated August 30, 1976. Defendants' exhibit J is a letter from Dan Stansberry to University Hospitals seeking information as to claimant's maximum medical improvement.

APPLICABLE LAW AND ANALYSIS

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 impairment 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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

From the facts above the deputy correctly held that the claimant was not entitled to any further permanent partial disability. As shown above, it appears that the claimant is an articulate, intelligent man with a positive outlook. He has received a bachelor's degree in psychology and appears headed toward graduate work. Claimant's post injury job history suggests that he has more job security now than in the past.

The claimant has obvious physical limits, such as climbing, with certain terrain being difficult to traverse. Claimant also has a limitation in his lifting. However, it appears as though the claimant has been able to overcome these physical limitations and by working, the claimant himself is proof that there are jobs out there which he is capable of performing. With the further education that claimant wishes to pursue he should be better equipped to handle the career that he ideally wants, and make more money at the same time.

The claimant's physio-sexual problems are not considered in determining industrial disability. It is the loss of earning capacity and the factors bearing upon earning capacity which are included in the consideration of industrial disability. The claimant's sexual dysfunction is not a proper element for consideration in determining his industrial disability because it does not effect his earning capacity.

Claimant brings up the issue that the deputy's findings upon which the holdings were based were in error. It appears that the deputy made an exhaustive review of the evidence. As the trier of fact, the deputy may accept or reject testimony or evidence. The deputy properly considered all evidence required by the Iowa Administrative Procedures Act and the Industrial Commissioner Rules. Therefore such findings are affirmed for purposes of this appeal.

FINDINGS OF FACT

WHEREFORE, it is found:

1. That claimant is 29 years of age.

2. That claimant is a high school graduate.

3. That claimant obtained a bachelor's degree in psychology in December of 1979.

4. That claimant had polio as a young child which left him with hammertoe and footdrop on the left.

5. That claimant had surgery on his left side to transfer a tendon and to transplant a muscle.

6. That claimant had pre-injury work experience in an auto parts store, plastics factory, a sheet metal plant, and in ironworking.

7. That claimant began work as an ironworker under a permit in August of 1975.

8. That claimant was on layoff from December 31, 1975 to July 1976.

9. That on July 23, 1976 claimant was pinned underneath a heavy machine as he worked on his job site and sustained severe injuries.

10. That claimant underwent a series of surgical procedures including an amputation of his right leg.

11. That claimant was involved with much physical therapy.

12. That claimant had an additional surgical procedure relating to avulsion and extravasation of his membraneous urethra.

13. That claimant's injury rendered him impotent.

14. That claimant has a penile implant which has ceased to function.

15. That claimant prefers not to lift more than 20 to 25 pounds.

16. That claimant continues to have difficulty with prolonged standing and walking and with climbing stairs.

17. That claimant cannot return to work as an ironworker.

18. That claimant requires work with minimal lifting and no climbing, squatting, or stooping.

19. That claimant has functional impairment of his right lower extremity and of his urogenital system.

20. That claimant has occasional incontinence.

21. That claimant's total condition has stabilized as of August 24, 1977.

22. That since his injury claimant has had work experience as a personnel manager for an insurance company, an interviewer, and an editor.

23. That claimant is dissatisfied with his present position.

24. That claimant wishes to obtain additional education.

25. That claimant has not sustained additional loss of earning capacity.

CONCLUSION OF LAW

Claimant has not established entitlement to additional permanent partial industrial disability.

THEREFORE, the decision of the deputy is affirmed.

THEREFORE, it is ordered:

Claimant take nothing from this appeal proceeding.

Defendants are to pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 18 day of July, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY WATTERSON, Claimant,	:	File No. 640582
vs.	:	APPEAL
CITY OF SIOUX CITY, IOWA, Employer, Self-Insured, Defendant.	:	DECISION

FILED
JUL 31 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant, City of Sioux City, Iowa, appeals from a review-reopening decision wherein claimant was awarded 25 percent permanent partial disability. The record on appeal consists of the hearing transcript; claimant's exhibits A4 through A7; and briefs filed by both the parties.

ISSUES

The defendant states the issues on appeal as follows:

I. Did the deputy commissioner err in finding that claimant sustained an industrial injury on June 25, 1980, resulting in permanent partial disability of twenty-five percent of the body as a whole?

II. Did the deputy commissioner err in applying the provisions of section 85.34(2)(u) to claimant's June 25, 1980 injury?

III. Did the deputy commissioner err in awarding statutory interest to claimant from August 15, 1980, as weekly payments become due, until the date of actual payment?

REVIEW OF THE EVIDENCE

The review below, for what it encompassed, was adequate. However, there are several aspects of the evidence that need to be illuminated further. The deputy sets out, in part, beginning on page 2, a letter from Michael F. E. Jones, M.D., dated February 3, 1983 to Harry P. VeVer. The portion omitted is set out below:

> I don't know what the monetary value of that would be to him, nor could I say with any certainty that another surgical intervention would cure this. He does not have any cosmetic deformity to his face and as far as any industrial work there is no reason why he can't be engaged in any full time employment similar to the activity he was doing before his accident.

The claimant alluded to the fact that he cannot put up hay anymore. However, the record is vague as to whether or not the claimant made any attempt to put up hay or merely felt he would be unable to do so.

The claimant testified that he is able to perform his duties as he has done in the past. He speculated it was "possible" that if he became an equipment operator that the movement of the vehicle might cause him some discomfort. An equipment operator, the claimant speculated, would be a job possibility up the ladder from where he is at now. His supervisor testified that he is a good worker now.

APPLICABLE LAW AND ANALYSIS

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

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 claimant has not established by a preponderance that he has sustained an industrial disability. He works at the same job as he had prior to the accident. His supervisor stated he was a good worker. It is apparent that claimant has not suffered any diminishment of earning capacity. The lost earnings in respect to putting up hay have not been established preponderately.

FINDINGS OF FACT

1. Claimant suffered an injury arising out of and in the course of his employment on June 25, 1980.

2. Claimant was hospitalized, treated by a specialist for facial injuries, and returned to his employment on August 14, 1980.

3. Claimant suffers from some occasional pain and discomfort.

4. The pain and discomfort have not interferred with the performance of his job duties.

5. Claimant received temporary total benefits.

6. Claimant has not incurred any permanent partial disability.

CONCLUSION OF LAW

The claimant has not established by a preponderance of the evidence that he is entitled to permanent partial disability benefits.

WHEREFORE, the proposed agency decision is reversed.

ORDER

THEREFORE, it is ordered:

That the claimant take nothing further from these proceedings.

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

Signed and filed this 31 day of July, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA WEATHERWAX, Claimant,	:	
vs.	:	File No. 756229
POCAHONTAS MANOR CARE CENTER, Employer,	:	A P P E A L
and	:	D E C I S I O N
ARGONAUT INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	

FILED
AUG 6 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision and a rehearing decision wherein it was concluded that the claimant received an injury arising out of and in the course of her employment and that defendants had failed to establish the affirmative defense of lack of notice. The issue of permanent partial impairment to claimant's extremities has been bifurcated out of the arbitration proceeding. The proposed decision awarded the claimant 31 3/7 weeks of temporary total compensation benefits. The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 5; defendants' exhibits A through H; and briefs filed by the parties.

ISSUES

The issues as stated by the defendants are:

1. Whether claimant sustained an injury arising out of and in the course of employment on December 6, 1983 as alleged.

2. Whether the employer received notice or knowledge of injury within ninety days after the occurrence thereof as provided in Section 85.23, Code.

3. Nature and extent of temporary disability.

REVIEW OF THE EVIDENCE

The evidence was well summarized by the deputy in the statement of the case and will not be repeated herein.

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

WHEREFORE, the proposed arbitration decision and rehearing decision are adopted as the final agency decision.

FINDINGS OF FACT

WHEREFORE, it is found:

1. That claimant is 42 years of age.

2. That claimant commenced work for defendant employer on January 25, 1982.

3. That claimant's duties included washing windows, dusting, mopping rooms, and occasional vacuuming.

4. That in addition to her job duties she cared for her family and did crocheting, painting, and bread baking.

5. That claimant experienced numbness in her left hand and arm as she was performing her job duties on December 6, 1983.

6. That claimant was hospitalized for testing in December of 1983 thereby incurring medical expenses.

7. That claimant had a carpal tunnel decompression on the left on January 6, 1984.

8. That claimant had a carpal tunnel decompression on the right on January 20, 1984.

9. That claimant has not worked since December 6, 1983.

10. That claimant continues to be troubled by lifting and by loss of grip.

11. That defendant employer received a copy of claimant's original notice and petition on February 18, 1984.

12. That Don Shepherd had at least one conversation with claimant regarding her entitlement to workers' compensation within 90 days after December 6, 1983.

13. That claimant was off work for some time after surgery.

14. That claimant incurred medical expenses as a result of her treatment.

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.

That defendants have failed to establish by a preponderance of the evidence the affirmative defense of notice.

That claimant has established entitlement to weekly compensation benefits from December 6, 1983 through May 1, 1984.

That claimant has established entitlement to benefits under Iowa Code section 85.27.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant weekly compensation benefits at a rate of ninety-three and 90/100 dollars ($93.90) from December 6, 1983 through May 1, 1984.

That defendants pay amounts due and owing in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay the following expenses:

Marian Health Center	$5,264.76
Dennis Nitz, M.D., P.C.	240.00
Eckman Neurological Assoc., P.C.	495.00
Alexander Kleider, M.D., P.C.	1,865.00

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

That this matter be returned to docket for further analyses of status/certificates of readiness. See Industrial Commissioner Rule 500-4.2.

Signed and filed this 6 day of August, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY WHITEAKER, Claimant,	:	File No. 637043
vs.	:	REVIEW-REOPENING DECISION
STEEL WAREHOUSING, INC., Employer,	:	
and	:	FILED AUG 16 1985 IOWA INDUSTRIAL COMMISSIONER
EMPLOYERS MUTUAL CASUALTY CO., Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Gary Whiteaker, claimant, against Steel Warehousing, Inc., employer, and Employers Mutual Casualty Company, insurance carrier, for the recovery of further benefits as the result of an injury on May 20, 1980. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed and as stipulated by the parties at hearing is $212.22. A hearing was held before Deputy Industrial Commissioner Helmut Mueller on May 30, 1984 at the office of the Iowa Industrial Commissioner, Des Moines, Iowa. The case was considered fully submitted at the conclusion of the hearing. On April 24, 1985 this case was assigned to the undersigned by order of the industrial commissioner for the reasons specified in that order. A transcript of the proceedings was filed on May 31, 1985.

The record consists of the testimony of claimant, Roger Russell and Patricia McCollom; the depositions, including exhibits, of William R. Boulden, M.D., Joe F. Fellows, M.D., and claimant; claimant's exhibit 1; defendants' exhibits L, M, N and O; claimant's answers to interrogatories; and, official notice of the form 2A filed with the industrial commissioner's office on June 3, 1983.

ISSUES

The issues presented by the parties at the time of the pre-hearing and hearing on this matter are whether there is a causal relationship between the injury and disability upon which this claim is based; the extent of healing period and permanent partial disability to which claimant may be entitled and whether claimant should be authorized to incur additional medical expenses as recommended by Paul From, M.D.

EVIDENCE PRESENTED

Claimant testified that on May 20, 1980 and for some time prior thereto, he had been employed as a semi tractor/truck driver for the defendant employer. On May 20, 1980 he was returning from a delivery of steel in Centerville, Iowa, to defendant's warehouse in Des Moines. He said he was southeast of Knoxville, Iowa, when he was involved in a truck accident. Claimant said he was attempting to avoid an oncoming car and struck a bridge.

Claimant testified that he was taken by ambulance to the hospital in Knoxville where he was treated and admitted overnight. Claimant advised that his injuries from the accident included a large cut on the right side of his forehad; a severely contused and possibly broken sternum; a large cut on the inside of his right knee; severe contusions of the right leg and foot; a broken tooth and a broken little finger. Claimant said that he remained at home and inactive for about nine and a half weeks after the accident. During that time he consulted his family physician, John C. Tapp, D.O., at the Urbandale Medical Clinic. He advised that he developed an infection in the cut in his leg that eventually required hospitalization.

Claimant stated that after he was able to be up and about a little more he began experiencing pain in his right knee. At that time Dr. Tapp referred claimant to Marshall Flapan, D.O. Claimant said Dr. Flapan examined his knee and began talking about surgery. Claimant said he believed such an approach was premature so he requested that the insurance carrier give him authority to seek a second opinion. Claimant was given authority to, and did consult, G. Charles Roland, M.D.

Claimant testified that his knee cleared up to some degree and was improving when he began to develop pain in his right foot. Claimant returned to Dr. Roland with this problem who conducted an examination and certain tests. Claimant advised that Dr. Roland was unable to follow up on his case so the insurance carrier referred him to Joe F. Fellows, M.D. He recalled that he came under Dr. Fellows care in the summer or fall of 1981. Claimant said his knee continued to show improvement and that his foot also began to improve. After consultation with Dr. Fellows, it was decided that conservative therapy was best advised for the foot. Claimant said he was also seen and evaluated for the foot by William R. Boulden, M.D., and was seen and examined by Dr. From. Claimant advised that as of the date of hearing in this matter he had no appointments with any doctor but considered Dr. Fellows to be his treating physician.

Claimant stated that he has not been employed since his injury in May 1980, supporting himself instead with his personal savings, workers' compensation and unemployment insurance. Claimant said he has looked for jobs at a number of different employers but contended he has not been able to find one he could do within his limitations. Claimant alleges he can no longer drive a truck, climb or be on his feet for any length of time.

Claimant acknowledged that the employer had provided him with the services of a vocational rehabilitation counselor but that his cooperation and participation was given only on the threat that he benefits would be terminated. Claimant further acknowledged that his physicians had repeatedly told him to loose weight and that the employer had offered to enroll him in a weight loss program. Claimant rejected this offer. He did loose weight on his own, but by the time of the hearing he had gained back several pounds. At the time of hearing claimant was requesting that the employer be ordered to provide him with psychological treatment. Claimant said he was not wearing a foot support at the time of hearing as was recommended by one of his physicians because he did not believe it did any good.

Roger Russell testified that he is the vice president and director of operations for defendant employer. Mr. Russell explained his function in the organization and the type of business in which the employer is engaged. Mr. Russell advised that claimant's earnings with his company were $1,618.94 in 1978 and $7,061.96 in 1979. Mr. Russell recalled that claimant had come to the employer after his injury seeking a job as a supervisor, but at the time his company had no position available.

Patricia McCollom testified that she is a rehabilitation job placement consultant. She stated that she came in contact with the claimant when he was referred to her by the insurance carrier. Ms. McCollom said she was asked to do an employment assessment of claimant. She advised that she contacted claimant and scheduled an appointment but that claimant later called and advised her he could see no reason why he should keep the appointment. Ms. McCollom said she advised the insurance carrier of claimant's position and closed her file on the case. Claimant called later and said he had been told that if he did not accept her services his benefits would be cutoff so he would come for an interview.

Ms. McCollom stated that claimant did come in for an interview and she reviewed with him the nature of his injuries and limitations. She also obtained a detailed history of his work experience and educational background which included three and a half years of medical college. Ms. McCollom stated that she spoke with Dr. Fellows concerning claimant's medical condition and discussed with claimant the possibility of a weight loss program. Ms. McCollom had some additional contact with claimant after his release by the doctor and discussed with him his vocational plans. Ms. McCollom opined that claimant was employable and that his skills were in demand in this location and in this labor market.

William R. Boulden, M.D., testified by deposition which was taken on May 15, 1984. Dr. Boulden stated that he is an orthopedic surgeon and outlined his expertise and qualifications. He stated that he examined claimant on February 7, 1983 after reviewing claimant's medical history. He also took a personal history from the claimant. Claimant's main complaint was his foot though he said his knee does bother him on occasion if he twists it.

Dr. Boulden examined claimant and opined that he had a two-fold problem with his foot; a chronic ligament irritation from a soft tissue injury and a Morton's neuroma. Dr. Boulden said he treated the neuroma with an injection. He also suggested a soft cast to help claimant's soft tissue injury. The doctor said claimant returned ten days later showing some improvement in the forefoot pain but still complaining of pain in the midfoot. He advised that claimant expressed displeasure with the doctor's suggestion of conservative treatment for the soft tissue injury.

Dr. Boulden testified that he believed claimant achieved maximum medical recovery from his injuries in February 1983. He further testified that claimant had a permanent impairment to his foot of ten percent as a result of the injury. He said the ten percent rating was based entirely upon claimant's complaints of pain. Dr. Boulden stated that claimant made no complaints about anything other than his foot and knee and that the knee was not much of a problem at the time of his examination.

Joe F. Fellows, M.D., testified by way of deposition taken April 3, 1984. Dr. Fellows outlined his educational background and qualifications. He is an orthopedic surgeon. Dr. Fellows stated that he began treating claimant on May 26, 1981. At that time the doctor took a history from claimant concerning his injuries. Dr. Fellows conducted an examination of claimant and outlined his findings. He said his primary focus was the claimant's right foot. The doctor's examination found claimant's foot to be within normal limits with the exception of a small cystic area in the proximal end of the fourth metatarsal near its articulation with the fifth metatarsal and cuboid bone. Dr. Fellows said he could not arrive at a clear diagnois but felt claimant may have had an undiagnosed fracture in the base of the metatarsal which had healed, but was still suffering from a chronic ligament sprain/strain. A bone scan revealed some abnormalities, but the joint looked normal. Dr. Fellows then outlined the course of treatment which followed. Basic treatment was conservative in nature coupled with the suggestion that he lose weight to take stress off the joint.

Dr. Fellows referred claimant to Stephen G. Taylor, M.D., in September 1983 for a consultation. Dr. Fellows referred to Dr. Taylor's clinical notes and indicated that Dr. Taylor was uncertain about the source of claimant's pain, but did not believe surgery would be recommended. Dr. Taylor did recommend an arch support or mobile inlay for claimant.

Dr. Fellows said that claimant had complained to him about a knee problem, but that his primary complaint was the foot. He said that claimant made no other complaints to him until his next to last visit when he brought in a list of complaints that claimant attributed to his accident. Dr. Fellows opined that claimant had a ten percent permanent impairment to his foot. The doctor stated that he thought claimant's weight was an aggravating factor to his foot problem.

Claimant's deposition was submitted into the record and reviewed. Claimant's deposition testimony was similar to that at hearing; however, he did mention pulled ligaments in his right shoulder while employed at AMF Western Tool.

Claimant's medical records were made a part of the record as part of the depositions of Drs. Boulden and Fellows. A review of those records confirms the lacerations received by claimant as a result of his injury. They also confirm the testimony of the doctors and reflect that claimant suffered a ten percent permanent impairment to his foot. The records further reflect that x-rays of claimant's knee and foot were within normal limits. An arthrogram of the knee failed to disclose any internal derangement. Both Dr. Boulden and Fellows rated claimant's foot as ten percent functionally impaired in February 1983. Dr. Fellows repeated this rating in October 1983, at which time he indicated claimant had achieved maximum medical recovery.

There are reports dated January 15 and February 12, 1981 from Dr. Tapp in which the doctor makes reference to buristis in the left shoulder. According to the reports claimant attributed the cause of his bursitis to the accident and the doctor concurred. There is no indication that this was a permanent condition.

Exhibit H is an evaluation report from Paul From, M.D. Dr. From outlines claimant's numerous complaints and concludes that further evaluation is necessary including pscyhological evaluation.

APPLICABLE LAW

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). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

ANALYSIS

After careful and deliberate consideration of all of the evidence in this matter, it must be concluded that claimant has failed to prove he is entitled to additional benefits. Claimant presents numerous complaints, but has failed to causally relate these problems to his injury or that he has any disability beyond ten percent of the foot. Even after claimant was given the opportunity to obtain an independent evaluation he was unable to produce evidence of any additional impairment.

Dr. From does suggest the need for psychological evaluation, but he is not the treating physician and there is no showing that his expertise extends to such matters. Further, claimant has thus far rejected assistance in weight loss, failed to follow recommended advise to use an arch support and has been uncooperative in rehabilitation efforts. There is no reason to believe he would benefit from psychological counseling.

Although claimant contends he suffers from a variety of ailments, most of these did not appear until almost two years after the injury. None of the experts support claimant's contention that these problems were complained of before claimant's petition was filed. Claimant had many opportunities prior to hearing to have these things evaluated.

Claimant's healing period terminated on February 17, 1983. By that time two doctors had rated his foot and it has remained the same since. He did not show any improvement after that date even though he did receive further treatment and evaluation.

The only thing for which claimant may be entitled to additional benefits is his little finger. He has not, however, presented any evidence of functional impairment of this finger which can be used to base an award. He is therefore entitled to nothing as a result of these proceedings.

FINDINGS OF FACT

IT IS THEREFORE FOUND:

1. On May 20, 1980 claimant received an injury at work.

2. As a result of the injury, claimant received numerous cuts and abrasions.

3. As a result of the injury, claimant received a ten percent permanent impairment to his right foot.

4. Claimant achieved maximum medical recovery on February 17, 1983.

5. Claimant's rate of compensation is $212.22.

6. Claimant will not benefit from psychological evaluation or counseling.

7. As a result of his injury, claimant has a permanent impairment to his little finger of an unknown extent.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED:

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional benefits beyond ten percent of the right foot.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

Costs of this action are taxed to defendants.

Signed and filed this 16th day of August, 1985.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
323 South Franklin Street, Suite 806
Chicago, Illinois 60606

Volume 2

No. 2

STATE OF IOWA
INDUSTRIAL COMMISSIONER DECISIONS

July 1, 1985 – June 30, 1986

ROBERT C. LANDESS
Industrial Commissioner

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STATE OF IOWA

INDUSTRIAL COMMISSIONER DECISIONS

July 1, 1985-June 30, 1986

Robert C. Landess

Industrial Commissioner

TABLE OF CONTENTS

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

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DECISION INDEX

SUBJECT INDEX

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN L. ADAMS,	:	
Claimant,	:	
vs.	:	FILE NO. 776513
DOUGLAS AND LOMASON COMPANY,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
MICHIGAN MUTUAL INSURANCE COMPANY,	:	FILED NOV 19 1985 IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Marvin L. Adams, claimant, against Douglas and Lomason Company, employer, and Michigan Mutual Insurance, insurance carrier, for temporary total disability benefits from September 17, 1984 to October 10, 1984. The petition makes no claim for medical expenses or permanent disability benefits. No evidence was presented at the hearing to claim medical expenses or permanent disability benefits. The claimant, appearing pro se, stated that he only wanted to be paid weekly compensation for his time off work from September 17, 1984 to October 10, 1984. This hearing was held on October 22, 1985 in Council Bluffs, Iowa and the case was fully submitted on that date.

The record consists of the testimony of the claimant; the claimant's exhibits 1, 2 and 3; and the defendants' exhibits A, B and C.

At the time of the hearing the parties stipulated that (1) an employer-employee relationship did exist at the time of the alleged injury and (2) if benefits are allowed that the claimant earns $7.25 per hour and works a 40 hour week for a gross pay of $290.00 per week and that he has a wife and three children (five exemptions) making his weekly rate of compensation $194.68 per week.

ISSUES

The issues submitted at the time of hearing were (1) whether there was an injury which arose out of and in the course of the claimant's employment, and (2) whether there is a causal connection between the alleged injury and the temporary total disability alleged by the claimant.

SUMMARY OF THE EVIDENCE

Marvin Adams, the claimant, testified that he is 38 years old, married, has three children and lives at Coin, Iowa. He has been employed by Douglas and Lomason Company since November of 1983 and was employed by them as a welder on the date of the alleged injury of September 12, 1984. His job required him to hold his arm up and out at a 90 degree angle with part of the arm straight down and then he had to rotate his wrist back and forth from left to right all day long.

He encountered sharp pain in his right shoulder on September 12, 1984 and went to see his family physician, Floyd A. Jones, D.O., F.A.A.F.P. Dr. Jones diagnosed his condition as a severe rotator cuff injury (and capsulitis) related to his job of welding and recommended a job other than welding to the claimant's employer in a report dated September 12, 1984 (Exhibit 1-Item 1). Dr. Jones says that the claimant "complained that he had been having increasing difficulty at work as a welder because he was having to suspend heavy metal parts while welding them." (Exhibit 2)

Dr. Jones states in a report dated September 17, 1984 that he referred the claimant to an orthopedic specialist Dr. D. S. Todd. (Exhibit 1-Item 2) There is no medical report from Dr. Todd himself, but Dr. Jones, in a report dated October 15, 1984, states that Dr. Todd felt that the claimant was suffering from acute tendonitis of the long head of the biceps. (Exhibit 2) Dr. Todd recommended physical therapy in the form of ultrasound, electric muscle stimulation and ice and to stay off work until released. (Exhibit 2)

Mr. Adams testified that he followed an outpatient program of cold packs, ultrasound, physical massage and exercise for approximately 14 days at the Shenandoah Memorial Hospital. He testified that the company requested him to come back to work and that he wanted to go back to work. On October 3, 1984, Dr. Jones released Mr. Adams to go back to work in one week (October 7, 1984) with the hope he would find a lighter job that did not require suspending heavy metal parts while welding. (Exhibit 2)

At the request of the employer Mr. Adams saw Rodmond Smith, M.D., on October 4, 1984 who diagnosed his condition as "?tendonitis?" and bursitis. (Exhibit 3) Dr. Smith indicated that treatment required was "continued therapy--?inject steroids--try change of job first" and directed him not to return to work until October 10, 1984.

The claimant testified it is not uncommon to get bumped or bruised doing his particular job. On cross-examination the claimant admitted that Dr. Jones may have been wrong in his initial diagnosis of rotator cuff injury since Dr. Todd diagnosed tendonitis. (Exhibit 2); that Dr. Smith diagnosed his condition as tendonitis which could also be bursitis in a letter to Crocker Claims Service on October 18, 1984 (Exhibit A); and that Michael J. Morrison, M.D., an orthopedic specialist, who examined the claimant at the request of defense counsel found "from his description of his job and no accounts of any actual fall or trauma in September of 1984, I see no evidence of any on-the-job injury to substantiate his possible bursitis which has gone on to resolve." (Exhibit B)

Defense counsel further elicited on cross-examination that the claimant admitted in his deposition of April 29, 1985 that he had injured his right shoulder in a fall from a combine as a volunteer fireman in 1981. (Exhibit C, page 13), even though the reports of Drs. Jones, Todd, Smith and Morrison indicated claimant told them that he had no previous injury to his shoulder. Claimant responded that these doctors had not asked him that question.

APPLICABLE LAW AND ANALYSIS

Iowa law provides for the payment of compensation for personal injuries arising out of and in the course of employment. Iowa Code section 85.3(1). The Iowa Supreme Court has very broadly defined injury as any impairment of health which comes about not through the natural building up or tearing down of the human body. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). An accident is not required. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Proof of a special incident or unusual occurrence is not required. Ford v. Goode, 240 Iowa 1219, 38 N.W.2d 158 (1949). A personal injury may develop gradually over an extended period of time. Black v. Creston Auto Company, 225 Iowa 671, 281 N.W. 189 (1938). The claimant has the burden of establishing an injury arising out of and in the course of employment. Sparks v. Consolidated Indiana Coal Co., 195 Iowa 334, 190 N.W. 593 (1922). And must prove a causal connection between the impairment and the employment. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Arising out of and in the course of are separate and distinct standards. Crowe v. DeSoto Consolidated School District, 246 Iowa 402, 68 N.W.2d 63 (1955). Arising out of refers to causal connection between the employment and the injury. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). Although there are some exceptions, in a majority of the cases the answer to the issue of whether an injury or disease is causally related to employment will be found in expert testimony. Lawyer & Higgs, Iowa Workers' Compensation - Law and Practice, section 5.1. "In the course of" refers to time and place of the injury and injuries "in, on, or about the premises" are specifically included by Iowa Code section 85.61(6). The employer takes the employee the way he finds him subject to any preexisting active or dormant health impairment. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A preexisting condition which is aggravated, accelerated, or lighted up by employment activity is deemed a personal injury under the act. Nicks v. Davenport Produce Company, 254 Iowa 130, 115 N.W.2d 812 (1962).

The claimant testified the precipitating sharp pain occurred at work on September 12, 1984 and he went to see Dr. Jones, his personal physician the same day. This pain and the resulting difficulties of this claimant are an impairment of health more than the natural building up and tearing down of the human body and do constitute a personal injury. Dr. Jones was the first to tell Mr. Adams his health impairment was work related. "This is a job related injury, I believe, and I strongly recommend that Marvin be allowed to work at another job in your company other than welding." (Exhibit 1-Item 1) This was affirmed by Dr. Todd and Dr. Smith. Dr. Todd stated "he was to stay off of work until released in the future." (Exhibit 2) Dr. Smith wrote "continue therapy--inject steroids--try change of job first." All three of these doctors prescribe staying off work apparently because they believe the tendonitis or bursitis was either caused by or aggravated by his job as a welder. Dr. Morrison, by contrast, did not believe the injury was work related.

The reports of Drs. Jones, Todd, and Smith, coupled with the claimant's own testimony, established by a preponderance of the evidence that Mr. Adams suffered a work related injury under Iowa law even though no accident, special incident or unusual occurrence has been established other than the sharp pain in the right shoulder on September 12, 1984. The fact that the injury is causally connected with his work is established by the fact that he was required to suspend heavy parts while welding and hold his arm in a difficult position for long periods of time. The injury arose in the course of employment because it occurred on the employer's premises during the hours of work. Whether this was a new injury or an aggravation of a preexisting tendonitis or bursitis is immaterial under Iowa law. It is further established that the injury caused the time off work from September 17, 1984 to October 10, 1984 for treatment.

FINDINGS OF FACT

1. The claimant, Marvin Adams, suffered an injury to his right shoulder on September 12, 1984.

2. He was doing his job as a welder on the employer's premises at the time of the injury.

3. The work he does as a welder places a great deal of stress on his shoulder for long periods of time because of the way he must hold his arm and because he has to suspend heavy metals as he welds.

4. That the injury caused him to be off work from September 17, 1984 to October 10, 1984 for treatment.

CONCLUSIONS OF LAW

That the injury which Mr. Adams suffered is a work related injury or a work related aggravation of a preexisting condition.

That the injury arose out of and in the course of employment as a welder for the employer.

The injury caused temporary total disability from September 17, 1984 to October 10, 1984.

ORDER

IT IS THEREFORE ORDERED:

That the defendants pay the claimant temporary total disability benefits of three and two-sevenths (3 2/7) weeks for the period from September 17, 1984 to October 10, 1984 in the amount of one hundred ninety-four and 68/100 dollars ($194.68) per week in a total amount of six hundred thirty-nine and 72/100 dollars ($639.72).

That the defendants pay the accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30 from the date of this decision.

That the defendants pay the costs of this action in accordance with the provisions of 500-4.33.

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

Signed and filed this 19th day of November, 1985.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES D. ATHEN,	:	
Claimant,	:	File No. 711821
vs.	:	
EARL MAY SEED AND NURSERY COMPANY,	:	D E C I S I O N
Employer,	:	O N
and	:	A T T O R N E Y
THE TRAVELERS INSURANCE COMPANY,	:	F E E S
Insurance Carrier, Defendants.	:	

FILED
OCT 10 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding regarding attorney fees brought by the claimant, James D. Athen, against his attorney, Richard Davidson, in the matter of James D. Athen versus Earl May Seed and Nursery Company, and Travelers Insurance Company. This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Council Bluffs, Iowa, on June 14, 1985. 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 in the original matter on August 31, 1982.

The record in this case consists of the testimony of claimant and of Mr. Davidson as well as of defendants' exhibits 1 through 21.

ISSUE

The sole issue is the appropriateness of the attorney fee requested.

REVIEW OF THE EVIDENCE

Claimant testified. He indicated that counsel had told him that the fee would consist of one-third of any settlement achieved with checks taken occasionally before then so that the final fee would not be as great. Claimant indicated that five checks were endorsed to counsel during the healing period. Claimant indicated that an offer for settlement was made and that he had informed his attorney that he was not satisfied with that offer and would seek a second attorney. Claimant reported that after contacting the second attorney, he found that the settlement was already final. Claimant indicated that his main dispute centers around the checks endorsed over to counsel during the healing period in that he believes that that amount should be subtracted from the one-third of the settlement which he believes is his attorney's proper fee. Claimant indicated that he and his attorney had not entered into a written contract regarding fees.

Richard Davidson testified and indicated that claimant's petition in review-reopening was filed October 7, 1982 with an answer not filed until January 19, 1983. He reported that he agreed substantially with claimant's testimony but indicated that two checks only were taken during the healing period for expenses incurred in litigation. Mr. Davidson indicated that claimant's case was difficult in that claimant's had a low income and, therefore, would need a large industrial disability to achieve a high monetary award, but that claimant was too intelligent with too many skills to be considered greatly industrially disabled. Mr. Davidson identified defendants' exhibits 4 and 5 as receipts for payments to claimant from the settlement and indicated that per his agreement with claimant, the one-third fee disputed remains in his trust account. He identified exhibits 12 and 13 as healing period checks endorsed to him and stated that the amounts were used to pay filing fees and other litigation expenses. He identified exhibits 19, 20, and 21 as printouts of amounts paid claimant's physicians for reports. He identified exhibit 17 as a printout billing statement regarding claimant's case. He stated that under the original agreement, he told claimant his fee would be one-third of any permanent partial disability settlement while he would recover his expenses through having healing period benefit checks endorsed over to him.

Claimant's exhibit 1 is a history and progress report statement for claimant in the amount of $7.50 from Floyd A. Jones, D.O. Defendants' exhibit 2 is an unsigned letter of Mr. Davidson to claimant indicating that the total amount of checks held by the firm of Davidson & Bailey, P.C., is $2,997.02 with one-third of that amount being $999.01 and expressing Mr. Davidson's understanding that that latter amount is the fee amount. Defendants' exhibit 3 is a copy of the answer filed in the original matter. Defendants' exhibit 4 is a copy of a draft No. 1590 received from Davidson & Bailey, P.C., Trust, dated September 24, 1984 paid to the order of Jim Athen in the amount of $500. Defendants' exhibit 5 is a copy of a draft No. 1584 received from Davidson & Bailey, P.C., Trust, dated September 13, 1984 paid to the order of Jim Athen in the amount of $1,500. That draft contains the notation both on the "received from" and the "pay to the order of" portion that it is part payment settlement with Earl May Seed Company. Claimant signed both the "received from" receipt and the draft itself in the capacity of executor, personal representative, administrator, or guarantor. Defendants' exhibit 6 is a notice of taking deposition of Maurice P. Margules, M.D. Mr. Davidson testified at hearing that this deposition was cancelled because Dr. Margules did not feel claimant had a viable causation issue. Defendants' exhibit 7 is a May 16, 1983 unsigned letter of defense counsel in the original matter to Mr. Davidson relating to the scheduling of claimant's deposition. Defendants' exhibit 9 is a July 21, 1984 letter requesting copies of medical records for claimant from Jennie Edmundson Hospital. Defendants' exhibit 10 is a July 21, 1983 letter of Mr. Davidson to the Travelers Insurance Company regarding claimant. Defendants' exhibit 11 is a July 6, 1983 letter of defendants' counsel in the original matter to Mr. Davidson. Defendants' exhibits 12 and 13 are explanations of payment from Travelers Insurance Company-Omaha indicating that the explanation is for payment of compensation from May 3, 1983 to May 10, 1983 and May 10, 1983 to May 16, 1983 with the amount of the former payment being $115.27 and the amount of the latter payment being $98.80. Payee name in each explanation is James D. Athen and R. Davidson, attorney. Defendants' exhibit 14 is a letter report of Wallace E. Duff, M.D., indicating that claimant has a good prognosis and should have no further problems as a result of his injury and subsequent nasal septal reconstruction and clean out of his sinuses. Defendants' exhibit 15 is a January 20, 1984 letter of defense counsel in the original matter to Mr. Davidson discussing settlement terms in that matter. Defendants' exhibit 16 is an August 10, 1983 letter of defense counsel in the original matter, unsigned, to Mr. Davidson indicating that the proposed settlement would be a lump sum commutation in the amount of $3,000 representing five percent permanent partial disability and approximately $200 in future medical payments. The letter also notes that as a condition of the settlement, Travelers would pay outstanding bills of claimant relative to his July hospitalization and testing. Defendants' exhibit 17 is an itemized statement of counsel's services, costs, and charges in this matter. The exhibit indicates that Mr. Davidson's customary fee is $60 per hour, that a total of $1,617.50 in charges were incurred in claimant's case, and that that amount includes costs advanced of $200. Defendants' exhibit 18 is a copy of the original notice and petition filed in this matter. Defendants' exhibit 19 is a statement of Thomas P. Ferlic, M.D., for a report in the amount of $50. Claimant's exhibit 20 is a statement of Wallace Duff, M.D., for a report in the amount of $50.

A review of the industrial commissioner's file indicates that claimant was injured on August 20, 1982 with disability beginning August 21, 1982 and a first payment on September 9, 1982. Claimant earned a gross weekly wage of $170 and was paid at a weekly rate of $115.27. His healing period disability ended May 16, 1983 with a last payment of May 16, 1983. Total medical benefits in the amount of $7,630.35 were paid and total healing period benefits of $4,413.19 were paid. An Auxier notice was apparently sent May 16, 1983. An agreement for settlement in the amount of $2,881.75 was approved August 7, 1984. That agreement specifies that it is paid at the rate of five percent permanent partial disability to the body as a whole and represents weekly payments of 25 weeks.

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 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 professional relationship between the attorney and client. Kirkpatrick v. Patterson, 172 N.W.2d 259, 261 (Iowa 1969). Disciplinary Rule 2-106(B) Iowa Code of Professional Responsiblity for Lawyers.

For a contract to be enforceable it must be clear, concise and mutually understood. Carmichael v. Iowa State Highway Commission, 219 N.W.2d 658, 665 (Iowa 1974). A contract which is contrary to public policy may not be enforced. Rowen v. LeMars Mutual Insurance Company, 282 N.W.2d 639, 650 (Iowa 1979). Contingent fee contracts are generally enforceable. Wunsched Law Firm, P.C., v. Clabaugh, 291 N.W.2d 331, 333 (Ioa 1980). Fees ranging from 25 percent to 40 percent of the recovery have been found to be reasonable. Stoebe v. Kittey, 249 N.W.2d 667 (Iowa 1977), Blazek, Continental Casualty Company v. Knowlton, 232 N.W.2d 789, 794-795 (Minn. 1975).

While little evidence was presented on this point, it appears from the file that claimant's case would have presented some difficulty in that the injury was not such as would routinely result in a high degree of physical impairment disability. Likewise, Mr. Davidson testified claimant's intelligence and level of skills also mitigated against a high industrial award. The settlement is relatively modest and its impact on the client may also be modest. While the employer's side of this case was not presented, it appears Dr. Margules felt claimant did not have a case insofar as causally relating any permanent disability to his injury. Hence, the five percent permanent partial disability settlement agreement appears a good result for claimant. The record reflects that counsel devoted a fair effort to achieving that settlement agreement including the advancing of some $200 in costs. The record suggests, however, that claimant's healing period benefits were paid up front and without effort on counsel's part.

While it is generally assumed that an attorney with a high level of expertise or with a reputation for proficiency in a particular area of law can perform the work in a minimum of time and/or obtain a more favorable result for the client than some other competent attorney of lesser repute or expertise. There is no showing that counsel should be awarded a higher fee based upon his status, reputation or experience.

There is no showing that counsel's handling of this case was in any way prejudicial to the remainder of his law practice.

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 counsel were not such as to have any effect on the fee to be charged in this proceeding.

A one-third contingency fee arrangement for obtaining a permanent partial disability settlement agreement in a case such as this is not unreasonable and can be upheld in principle. Problems arise from the absence of any clearly articulated written fee arrangement and from the fact that counsel and claimant's financial arrangement was tied into the healing period benefits received. Clearly, the oral contract between claimant and counsel was not clear, concise, and mutually understood. The parties had substantial misunderstandings as to the effect of endorsement of healing period amounts upon the overall fee to be received. Claimant believed those amounts represented an advance payment of attorney fees. Counsel asserts they were payment for costs advanced. The record does not clearly support either view. It appears, however, that counsel would not be entitled to any healing period amount as an attorney fee since claimant apparently received those amounts without effort on counsel's part. Those amounts endorsed to counsel should, therefore, be returned to claimant. Counsel, however, generally should be able to recover sums personally advanced as costs of pursuing a claim. Those amounts are generally deducted from the overall recovery, in this case $2,881.75. Deduction of the $200 in costs advanced leaves a settlement sum of $2,681.75. Counsel is entitled to one-third of that amount which is $893.92.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant employed counsel to represent him in the matter of James D. Athen v. Earl May Seed and Nursury Company and the Travelers Insurance Company.

Claimant and counsel did not have a written fee arrangement setting forth the contingency fee arrangement or the apportionment of costs advanced and the oral agreement was not clear, concise and mutually understood.

Claimant's claim presented difficulties as regards the issues of causal connection between claimant's injury and any permanent disability and as to whether any industrial disability resulted.

The employer paid healing period benefits of its own initiative and without effort on claimant's counsel's part.

Counsel devoted a fair effort to achieving the five percent (5%) permanent partial disability settlement award and advanced some two hundred dollars ($200) in costs in doing so.

Claimant endorsed healing period checks to counsel. The precise number cannot be determined.

A one-third contingency fee arrangement is reasonable for achieving a permanency settlement in claimant's case when the arrangement is construed as permitting subtraction of costs advanced from the overall settlement amount with the attorney fee being one-third of the remainder. This results in a fee of eight hundred ninety-three and 92/100 dollars ($893.92).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Counsel is entitled to a fee of eight hundred ninety-three and 92/100 dollars ($893.92) and to payment of two hundred dollars ($200) in costs advanced.

Counsel is not entitled to the amounts of healing period benefits endorsed to him.

ORDER

THEREFORE, IT IS ORDERED:

Counsel deduct costs advanced in the amount of $200 from the overall settlement amount of two thousand eight hundred eighty-one and 75/100 dollars ($2,881.75). Claimant pay counsel one-third of the remainder which is the sum of eight hundred ninety-three and 92/100 dollars ($893.92).

Counsel reimburse claimant the sum of healing period benefits endorsed to counsel by claimant.

Counsel pay costs of this action.

Signed and filed this 16th day of October, 1985.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KARLA AYERS, Surviving Spouse of JAMES T. AYERS, Deceased,	:	
Claimant,	:	
vs.	:	
CROP PRODUCTION SERVICE, INC.,	:	File No. 750898
Employer,	:	A P P E A L
and	:	D E C I S I O N
ARMCO INSURANCE GROUP c/o CRAWFORD & COMPANY,	:	
Insurance Carrier, Defendants.	:	

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NOV 8 1985
IOWA INDUSTRIAL COMMISSIONER

Defendants appeal from a ruling denying their motion for summary judgment.

Claimant filed a petition for death benefits on February 3, 1984 in which she improperly captioned the claimant as "James T. Ayers Estate." In all other manner the claim was clearly for benefits to the survivors as indicated in paragraphs 6, 7, and 16 of the petition.

Defendants filed an answer to the petition on February 15, 1984 in which they referred to "claimant's decedent's" injuries. Request for production of documents was directed to the claimant on March 12, 1984 as if she were the surviving spouse rather than other capacity as witnessed by interrogatories 12, 14, 20, 22, 22 (repeated), 23, 24, 25, 26, 27, and 28.

Interrogatories were served on March 12, 1984 requesting, among other things, identification of persons making claim for benefits. These were answered on July 6, 1984.

Considerable discovery and pretrial procedures ensued up to the time defendants, on July 16, 1985, filed a motion for summary judgment for improperly naming the estate of decedent as claimant. Claimant moved to amend to name the appropriate party as claimant which defendants resisted.

The motion to amend was granted together with the ruling denying summary judgment on August 27, 1985.

"The key to pleading in an administrative process is nothing more nor less than opportunity to prepare and defend." Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188 (Iowa 1968).

Defendants knew of the nature of the claim in this matter from the outset as witnessed by their actions in pleading and discovery. They cannot, some seventeen months later, be heard to complain they knew not with whom they were dealing.

WHEREFORE, the ruling on summary judgment is affirmed.

THEREFORE, the summary judgment is denied and amendment to the petition is allowed.

Signed and filed this 8 day of November, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD L. BANE,	:	
	:	File No. 770499
Claimant,	:	
	:	ARBITRATION
vs.	:	
	:	DECISION
ROBERT J. FOLEY and FRAMING CONTRACTORS, INC.,	:	FILED
	:	NOV 12 1985
Employer, Defendant.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Ronald L. Bane, claimant, against Framing Contractors, Inc., and/or Robert J. Foley, employer, defendant, for benefits as a result of an alleged injury on May 30, 1984 to claimant's foot. On September 10, 1985 an evidentiary hearing was held on claimant's petition.

Claimant and defendant are representing themselves in these proceedings. Defendant did not physically appear at the hearing. Claimant waived in writing the requirements under Iowa Code section 817A.12(7) for recording and maintaining the record of oral proceedings of the hearing on September 10, 1985 and further agreed that the only official record of this oral proceeding shall be the exhibits received into the evidence and this decision. Sworn testimony was received from claimant during this hearing. Three exhibits consisting of medical bills were received into evidence at the hearing. Pursuant to order, claimant submitted additional information pertaining to his rate of compensation in affidavit form after the hearing. This affidavit is now labeled as exhibit 4 and received into the evidence.

ISSUES

The following issues are presented for determination:

I. Whether claimant received an injury arising out of and in the course of employment;

II. Whether there is a causal relationship between the alleged injury and the claimed disability;

III. The extent of weekly disability benefits and the rate of weekly compensation to which claimant is entitled; and,

IV. Claimant's entitlement to medical benefits under Iowa Code section 85.27.

Claimant stated at the hearing that he is not seeking permanent disability benefits in these proceedings.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

Claimant stated in his affidavit, exhibit 4, submitted on October 30, 1985 that at the time of his work injury, his gross rate of compensation was $280 per week; he was married; and he was entitled to four exemptions on his state and federal income tax returns.

Claimant testified that Robert J. Foley was the owner of either a sole proprietorship or a corporation known as Framing Contractors or Framing Contractors, Inc. At the time of the work injury, he was working for defendant as a carpenter performing the assigned task of rough framing with a power nailing device operated by compressed air. At approximately 2:00 p.m. on May 30, 1984, claimant said that he reached down with the nailer and accidentally shot a common #10 nail into his right foot. The nail measured approximately three and one-half inches long with a diameter of one-eight of an inch. Claimant said that the nail traveled through his shoe and into the joint of his big toe. According to his physician, the nail chipped a piece of bone.

Claimant was treated by his family physician, Thomas E. Bergstrom, M.D., immediately after the work injury. Dr. Bergstrom took x-rays, wrapped the foot, and gave claimant a tetanus injection. The doctor then sent claimant home. While at home, claimant began to notice red lines extending up his right leg after a few hours and he returned to Dr. Bergstrom. Dr. Bergstrom found infection in the right foot and immediately admitted claimant into the hospital. Claimant said that he was treated with ice packs and various forms of medication during a two day hospital stay. Dr. Bergstrom released claimant for full duty with no restrictions on work activity on June 7, 1984. Claimant said that he returned to work at that time but was immediately laid off by defendant. The reasons for the layoff are not clear from the evidence. Claimant said that he missed a total of six and one-quarter days of work as a result of the work injury. Although claimant stated that Dr. Bergstrom told him that the joint in his toe would never return to the same condition as before the work injury, claimant believes that he can perform the same work as before the incident and that the injury did not result in any physical impairment.

Claimant submitted three exhibits into the evidence consisting of medical bills. Exhibit 1 is a copy of the hospital bill he received for his admission to the hospital following the May 30, 1984 work injury amounting to $604.45. Exhibit 2 is Dr. Bergstrom's bill for his services in treating the work injury. The circled portion of exhibit 3 represents the costs of the medical prescriptions given by Dr. Bergstrom for treatment of the work injury. Claimant said that defendant has voluntarily paid $100 of these medical bills.

Claimant's appearance and demeanor at the hearing indicated that he was testifying in a candid and truthful manner.

APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of 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 therein.

Claimant is a credible witness and his testimony is uncontroverted. The evidence is clear that he suffered an injury which arose out of and in the course of his employment with defendant.

II. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). In the case of a preexisting condition, 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).

Claimant is only seeking temporary total disability weekly benefits as he does not claim that he received any physical disability or permanent impairment as a result of the work injury. Again, claimant's testimony was credible and uncontroverted. Therefore, claimant has shown a causal connection between the work injury and temporary disability or an inability to work along with lost wages during his absence from work.

III. Claimant must next establish by a preponderance of the evidence the extent of weekly benefits for temporary disability to which claimant is entitled. Iowa Code section 85.32 states that compensation shall begin on the fourth day of disability after a work injury except in the case of an injury resulting in permanent disability or which results in absence from work for more than fourteen days. Iowa Code section 85.33(1) requires a termination of temporary total disability benefits when claimant returns to work or is medically capable of doing so. Claimant not only returned to work on June 7, 1984 but was given a full release to do so by Dr. Bergstrom. Claimant testified that he was absent from work for six and one-quarter days. Therefore, claimant is entitled to temporary total disability benefits for three and one-fourth days or four hundred sixty-four thousands (.464) of a week. From the information provided by claimant in his affidavit, claimant's rate of weekly compensation is $186.28 per week. Therefore, claimant shall be awarded a total of $86.49 in temporary total disability benefits.

IV. Giving claimant's credible and uncontroverted testimony, the causal connection between the medical bills submitted into the evidence and the work injury were clearly established. Claimant is entitled to medical benefits under Iowa Code section 85.27 in the total amount of $919.78 less the $100 already paid by defendant toward these medical bills.

FINDINGS OF FACT

1. Claimant is a credible witness.

2. Claimant was in the employ of defendant at all times material herein.

3. On May 30, 1984, claimant was performing carpentry work for defendant.

4. On May 30, 1984 while performing his work for defendant, claimant injured his right foot by driving a nail into the joint of the large toe.

5. Claimant later developed infection from the work injury and was hospitalized from May 30, 1984 until June 1, 1984.

6. As a result of the work injury, claimant was absent from work and lost wages for six and one-quarter days.

7. Claimant returned to full duty on June 7, 1984 with a release to do so by his physician without work restrictions.

8. Claimant has some continuing difficulty with his right big toe but such a condition is currently causing no functional loss of use of his toe or foot nor does it at this time affect his ability to work.

9. At the time of his work injury, claimant's gross rate of weekly compensation was $280 per week; he was married; and, claimant was entitled to four exemptions on his state and federal income tax returns.

10. Claimant's rate of compensation for the May 30, 1984 work injury is $186.28 per week.

11. Claimant has incurred the medical expenses as set forth specifically in the order portion of this decision for the treatment of his work injury on May 30, 1984.

12. The charges for the medical services claimant received as listed in the medical bills in the order portion of this decision are fair and reasonable.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that on May 30, 1984 he suffered an injury which arose out of and in the course of his employment with defendant.

II. Claimant has established by a preponderance of the evidence that the injury of May 30, 1984 was a cause of temporary total disability.

III. Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits for three (3) days and two (2) hours at the rate of one hundred eighty-six and 28/100 dollars ($186.28) per week.

IV. Claimant has established by a preponderance of the evidence entitlement to medical benefits in the total amount of eight hundred nineteen and 78/100 dollars ($819.78) per week as ordered below.

ORDER

Accordingly, the following is ordered:

1. Defendant Robert J. Foley and Framing Contractors, Inc., shall pay to claimant temporary total disability benefits in the amount of eighty-six and 49/100 dollars ($86.49).

2. Defendant Robert J. Foley and Framing Contractors, Inc., shall pay to claimant the following medical expenses which total eight hundred nineteen and 78/100 dollars ($819.78):

Madison County Memorial Hospital	$504.45
Thomas E. Bergstrom, M.D.	279.00
Montross Pharmacy	36.33

3. Defendant Robert J. Foley and Framing Contractors, Inc., shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

4. Defendant Robert J. Foley and Framing Contractors, Inc., shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

5. Defendant Robert J. Foley and Framing Contractors, Inc., shall file an activity report upon payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 12th ~~day of~~ November, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JEROME C. BECK, Claimant, vs. AMERICAN COMMUNITY STORES, Employer, and AETNA INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA and CIGNA COMPANIES, Insurance Carriers, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 745309/638065 A P P E A L D E C I S I O N

FILED
DEC 20 1985
IOWA INDUSTRIAL COMMISSIONER

Claimant appeals from a proposed arbitration decision (No. 745309) and a proposed review-reopening decision (No. 638065) in which recoveries were denied based on lack of subject matter jurisdiction. The record on appeal consists of the transcript of the consolidated hearing, claimant's exhibits 1 through 9, and defendants' exhibits A and B together with the appeal briefs of all parties.

ISSUE

Whether or not the industrial commissioner has subject matter jurisdiction over claimant's alleged injury of April 25, 1980 in South Dakota and February 26, 1982 in Nebraska.

REVIEW OF THE EVIDENCE

The review of the evidence in the proposed decisions is adequate and accurate and will not be represented herein.

Briefly stated, claimant received an injury to his right leg in South Dakota in 1980. For this injury an Iowa Memorandum of Agreement was filed and payments made for the injury to claimant's leg. A subsequent compromise special case settlement was approved for alleged disability to claimant's back as a result of the injury. Claimant received an alleged injury to his left leg in Nebraska in 1982.

Claimant resides in Iowa but was hired in Nebraska and works out of Nebraska making deliveries to Kansas, Nebraska, South Dakota and Iowa.

APPLICABLE LAW

The applicable law is set out quite adequately in the proposed decisions. Additional authorities relied on by claimant for the most part predate the pronouncement of the Iowa Supreme Court in Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981).

ANALYSIS

The proposed decisions detail the application of the law to the evidence which is adopted. Claimant urges res judicata on the issue of subject matter jurisdiction by the filing of the memorandum of agreement and approval of the special case settlement. Subject matter jurisdiction can be raised at any time. If subject matter jurisdiction had been previously erroneously exercised it would not preclude the issue in a subsequent proceeding to reopen the same case as long as there had been no prior adjudication of the issue.

FINDINGS OF FACT

1. In June 1965 claimant went to Omaha, Nebraska, to complete an employment application with the defendant employer and was interviewed for the position.

2. Three days after claimant completed his application and interviewed the defendant employer called him from Omaha, Nebraska, and told him he was hired and to report to work in Omaha the next day.

3. At the time of claimant's hiring and at all times since, claimant has been domiciled in the state of Iowa.

4. Since claimant commenced his employment with defendant, he has worked out of Omaha, Nebraska, as an over-the-road truck driver.

5. Claimant's employment activities are directed out of Omaha, Nebraska; he reports to work in Omaha; he is paid out of Omaha; he is dispatched out of Omaha; and he returns from work out of Omaha.

6. Claimant works in Iowa about one day per week on an average, though he occasionally works in Iowa up to one-third of the time on a driver/route rotation scheme.

7. Claimant received an injury while at work on April 25, 1980; the injury occurred in the state of South Dakota.

8. Defendant employer filed an Iowa Memorandum of Agreement concerning the injury of April 25, 1980.

9. Claimant received an injury while at work on February 26 1982; the injury occurred in the state of Nebraska.

10. The workmen's compensation law of the state of Nebraska is applicable to claimant's employer concerning his injuries of April 25, 1980 and February 26, 1982.

CONCLUSIONS OF LAW

Claimant has failed to prove by a preponderance of the evidence that the Iowa Industrial Commissioner has subject matter jurisdiction over these actions, in the following particulars:

He has failed to prove he was working under a contract of hire made in the state of Iowa.

He has failed to prove that his employment is principally localized in the state of Iowa.

He has failed to prove that the workmen's compensation laws of the state of Nebraska are not applicable to his employer concerning his injuries.

He has failed to prove that he regularly works in the state of Iowa.

He has failed to prove that his employment is not principally localized in any state.

WHEREFORE, the proposed aribtration and review-reopening decisions are adopted in this final agency decision.

THEREFORE, it is ordered:

That these matters should be and are hereby dismissed.

That each party shall bear its own costs including the costs on appeal.

Signed and filed this 20 day of December, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM A. BELZ,	:	
Claimant,	:	
vs.	:	File No. 776813
ROYAL MACHINE & FOUNDRY, LTD.,	:	A R B I T R A T I O N
Employer, and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE, COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	NOV 27 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by William A. Belz, claimant, against Royal Machine and Foundry, employer, hereinafter referred to as Royal, and Liberty Mutual Insurance Company, insurance carrier, defendants, for benefits as a result of an alleged injury on September 30, 1984 to claimant's right knee. On October 29, 1985 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a pre-hearing report of contested issues and stipulations pertaining to this case which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Debra Belz, Tonya Belz, and Chester Knapp. Exhibits 1-10 and A-G were received into evidence at the hearing and are described in the pre-hearing report. In addition, exhibit 11, an itemization of costs, and exhibit 12, a football game program, along with commissioner's exhibit 1, claimant's deposition, were admitted into the evidence.

According to the pre-hearing report, the parties have stipulated to the following matters:

1. Claimant has not worked for defendant employer since September 30, 1984;

2. Claimant's rate of weekly compensation in the event of an award for benefits from these proceedings shall be $259.94 per week; and,

3. The medical bills submitted by claimant at the hearing are fair and reasonable but that the issue of their causal connection to any work injury was an issue to be decided herein.

ISSUES

As set forth in the hearing assignment order and the parties' pre-hearing report, the parties submitted the following issues for determination in these proceedings:

I. Whether the issue of where and when the injury to claimant's right knee occurred is precluded from determination in these proceedings by a prior final agency decision rendered by a hearing officer of the Iowa Department of Job Service;

II. Whether claimant received an injury arising out of and in the course of his employment;

III. Whether there is a causal relationship between the alleged injury and the claimed disability;

IV. The extent of weekly disability benefits to which claimant is entitled; and,

V. The extent of entitlement to medical benefits under Iowa Code section 85.27.

SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed in this summary. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

Claimant stated at the hearing that he is thirty-three years of age, married, and has an eleventh grade education. Claimant has worked for Royal for several years and achieved a supervisory position or as termed by claimant, "lead man" status, at the time of the alleged work injury. Claimant was third in the chain of command at Royal's foundry in Davenport, Iowa.

The primary issue in dispute in this case concerns whether or not claimant injured his right knee at home on the evening of September 29, 1984 or at work on the morning of September 30, 1984. Claimant testified that he went to the foundry on the morning of September 30, 1984, a Sunday, to light one of the furnaces. Claimant testified that he had a regular practice of lighting furnaces on Sunday morning for the following Monday morning's foundry work rather than late Sunday or early Monday because it was more convenient to him and his family. Claimant said that while walking to the furnace area inside of the foundry he tripped over a small mound or clog of sand and injured his knee. Claimant said that he did not light the furnace and he immediately drove home. Claimant said that he then called his wife who was working at a nursing home that morning and his wife then transported him to Davenport Osteopathic Hospital.

In the afternoon of September 30, 1984, claimant contacted Royal's owner, Chester Knapp, to meet him at the foundry and assist him in lighting the furnace. Knapp did as claimant requested. After being informed by claimant that he was injured that morning, Knapp contacted Per Mar, a private security company, who operates security devices at the foundry. Knapp was informed that claimant had not contacted them that morning to notify them of his presence in the foundry and to deactivate the security devices. Claimant was then fired by Knapp for falsely reporting a work injury.

Claimant responds that he regularly did not contact Per Mar when he would enter the foundry after hours because he had a habit of forgetting to bring his security card which contains a number code that must be expressed to the security company in order to deactivate the security devices. Apparently, claimant had keys to unlock the plant doors and explained that the security device consisted of only a single beam photoelectric cell. He explained that he could easily enter the foundry without activating the alarm by crawling under this beam and frequently did so.

Claimant filed for both unemployment and workers' compensation benefits immediately after his termination from Royal. Claimant was awarded unemployment compensation after his initial interview with job service personnel but this award was appealed and a hearing was scheduled on claimant's entitlement to unemployment compensation for April 24, 1985. According to the decision of the job service hearing officer dated May 2, 1985, "due notices [of this hearing] were issued." Approximately eight days before the scheduled hearing, claimant's deposition was taken by defendants' attorney in this proceeding. During this deposition, claimant was asked to explain an admission record signed by him at Davenport Osteopathic Hospital prior to receiving treatment for the knee injury on September 30, 1984. According to this admission record, claimant had told the admitting registered nurse that he had injured his knee the night before by "stepping in a hole in yard." In her deposition, exhibit B in this proceeding, the nurse testified that it is normal procedure for her to review the admission record with a patient before requesting a signature from a patient and that the emergency room doctor reviews this history with the patient before beginning his treatment.

Claimant had no explanation in his deposition for this record except that he states that it is inaccurate. At the hearing in this proceeding, claimant stated that he was in considerable pain at the time and received medication which could have affected his mental processes that morning. Claimant testified that he did not have the opportunity to review the document with the nurse before signing it. Claimant's wife and daughter both verified claimant's testimony and stated that claimant's knee was not injured before he left for work on September 30, 1984. Apparently, the family traveled out of town the day before, September 29, to attend a football game and returned home late that evening. Claimant admitted to having a sufficient amount of alcohol beverages both during and after this football game to prevent him from operating an automobile during the trip home after the game.

On April 24, 1985, claimant attended and participated in the hearing before a job service hearing officer but without the assistance of an attorney. Claimant did not present testimony other than his own. Claimant stated at the hearing in these proceedings that he was unaware that he could present witnesses at the prior job service hearing. Royal presented testimony at the job service hearing from Knapp and the plant manager, Allen Huss. According to the hearing officer's decision, Royal's attorney also presented as evidence the admission record referred to above. According to the decision, claimant contended before the hearing officer that his wife provided the information to the admitting nurse. As a result of this hearing, the hearing officer found that the injury to claimant's right knee occurred in the yard at home the evening before and that claimant falsely reported to his employer that the injury occurred while at work. The hearing officer determined that claimant was discharged for misconduct in connection with his employment and denied unemployment benefits accordingly. There is no mention in this decision of any request by claimant at the time of the hearing or subsequent to the hearing to present additional evidence. The decision of the hearing officer was not appealed and became a final agency decision of the Iowa Department of Job Service.

APPLICABLE LAW AND ANALYSIS

It is well settled that the doctrines of claim preclusion and issue preclusion (formerly called res judicata) are applicable to administrative quasi-judicial adjudications when those proceedings afford a "full legal opportunity for an investigation and determination of the merits of the suit." Board of Supervisors, Carroll County v. Chicago and Northwestern Transportation Company, 260 N.W.2d 813, 815 (Iowa 1977); see also Gear v. City of Des Moines, 514 F.Supp. 1218 (S.D. Iowa 1981); Compare Zywicki v. Moxness Products, Inc., Division of Versa Tech., Inc., (D.C. Wisc. 1985). An allegation that an issue is precluded by a prior adjudication is an affirmative defense. Israel v. Farmers Mutual Insurance Association of Iowa, 339 N.W.2d 143 (Iowa 1983). Therefore, defendants herein have the burden to establish by a preponderance of the evidence that a determination in this proceeding on the issue of where and when the injury to claimant's right knee occurred is precluded by the findings of fact contained in a prior final administrative decision involving claimant's entitlement to unemployment compensation benefits.

Before an issue can be precluded by a prior adjudication and when the same parties are involved in both proceedings, the following four requisites must be established:

(1) The issue concluded must be identical;

(2) The issue must have been raised and litigated in the prior action;

(3) The issue must have been material and relevant to the disposition of the prior action; and

(4) The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Aid Insurance Company (Mutual) v. Chrest, 336 N.W.2d 437, (Iowa 1983); Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981).

The analysis, however, does not end with a finding that these four requisites are present. Footnoted in the Hunter decision cited above, is §68.1 of the Restatement (Second) of Judgments which states as follows:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (a) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action; or
>
> (b) The issue is one of law and (i) the two actions involve claims that are substantially unrelated, or (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> (c) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedure followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
>
> (d) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
>
> (e) There is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (ii) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (iii) because the party sough to be concluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Also, according to the holding in Hunter, when mutuality of the parties is not present and a stranger to the judgment desires to offensively or defensively utilize the prior adjudication, a further analysis is necessary and the following additional exceptions must be examined:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue's being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) Other circumstances make it appropriate that the party be permitted to relitigate the issue.

The contention of claimant that the initial four requisites are not present in this case does not have merit. The issue of when and where the injury occurred is precisely the same issue now before this agency in this proceeding as one of the prilimary factual determinations which must be made under the mixed question of law and fact of whether an injury arose out of and in the course of claimant's employment. The issue was certainly raised in the prior hearing before job service. Claimant admits that he was discharged because his employer felt that he had falsely reported a work injury. Therefore, determination of the issue when and where the injury occurred was material, relevant, and necessary to a determination of the ultimate issue of whether or not claimant was discharged for misconduct and eligible for unemployment compensation benefits.

Second, none of the exceptions to the general rule contained in section 68.1 of the restatement and those expressed in the Hunter case are applicable to the particular facts in this case. In the prior job service proceeding, claimant was able to secure a de novo review of the hearing officer's decision as well as judicial review of the agency action and chose not to do so. No legal issues or factual issues such as questions of disability or the interpretation of complicated medical or medical-legal questions in a workers' compensation context were present in the prior job service determination so as to warrant a separate determination of such issues by this agency due to this agency's special expertise or judgment in such matters or to achieve consistency or equitable administration of the law of workers' compensation. The issue of the time and place of an injury in this case involved simply an assessment of the credibility of a claimant. This agency is no more competent or better suited than job service to adjudicate a person's credibility.

The limited factual issue of when and where the knee injury occurred is not so complicated as to necessitate for reasons of due process or fairness the extensive pre-trial procedures and formalities that characterize proceedings before this agency. Claimant cannot claim unfair surprise of the evidence used against him at the job service hearing. Claimant was informed of Royal's most damaging evidence, the admission report, in his deposition well in advance of the job service hearing.

Claimant claims to have been unaware that he could present witnesses on his own behalf at the job service hearing. To the extent that this is true, claimant had ample opportunity to obtain and consult an attorney and did not do so. Claimant exhibited above average intelligence during his testimony in these proceedings and his supervisory position at Royal is not indicative of someone who is unable to competently handle his important affairs. Furthermore, there is no indication that claimant sought a continuance of the hearing or leave to preser. additional evidence after the hearing when it was apparent that such testimony could be offered. Also, if the notice of hearing was defective in any manner, claimant's remedy was to appeal the decision or to seek judicial review of the job service action. Claimant chose not to do any of these things and he is therefore bound accordingly.

In light of the above discussion, there is no need to analyze the other issues present in this case as claimant is unable to establish that an injury occurred which arose out of and in the course of his employment.

FINDINGS OF FACT

1. Claimant was in the employ of Royal at all times material herein.

2. Claimant worked for Royal for many years before September 1984.

3. Claimant's job in September 1984 was that of a lead person with supervisory and management responsibilities.

4. On September 29 or 30, 1984, claimant injured his right knee and reported to Chester Knapp, the owner of Royal, that the injury occurred on the premises of Royal while performing his work duties earlier that day.

5. Claimant received initial treatment of his right knee condition on September 30, 1984 from emergency room personnel at the Davenport Osteopathic Hospital.

6. On or about September 30, 1984 or soon thereafter, claimant was terminated from his position with Royal by the owner, Chester Knapp, for falsely reporting a work injury.

7. Claimant applied for unemployment compensation benefits with the Iowa Department of Job Service and for workers' compensation benefits with this agency soon after his termination from Royal and was intially granted unemployment compensation benefits from job service, but this initial determination of eligibility was appealed by Royal.

8. On October 19, 1984, a contested case petition was filed with this agency seeking workers' compensation benefits as a result of a work injury on September 30, 1984 and the allegation of the work injury was denied by defendants in their answer to this petition.

9. On or about April 16, 1985 claimant's deposition was taken by defendants' attorneys in this case and claimant was informed of an admission report from the Davenport Osteopathic Hospital dated September 30, 1984 containing claimant's signature which reports that claimant injured his knee while stepping into a hole in a yard the night before.

10. On or about April 24, 1985, a hearing was held before a hearing officer of the Iowa Department of Job Service on the appeal by Royal from the initial determination that claimant was eligible for unemployment compensation benefits.

11. Claimant participated in this job service hearing of April 24, 1985 at which time testimony from claimant and claimant's employer and the admission record were received into the evidence.

12. On May 2, 1985 a proposed decision of the job service hearing officer presiding at the April 24, 1985 hearing was issued and contained therein the following findings of fact:

> Claimant received due notice of the proceedings.
>
> On September 29, 1984, the claimant stepped into a hole in his yard and broke his right knee.
>
> Claimant falsely reported to his employer that he injured his right knee on the premises of Royal on September 30, 1984 during the performance of his duties.

13. The above identified findings of fact were necessary for a determination of claimant's eligibility for unemployment compensation benefits under Iowa law.

14. The above indentified May 2, 1985 decision of the hearing officer was not appealed and became a final agency decision of Iowa Department of Job Service.

15. Claimant had full and fair opportunity to litigate the issue of when and where the injury to the knee took place in prior proceedings before the Iowa Department of Job Service.

16. As exhibited by his demeanor at the hearing, claimant has above average intelligence and is fully competent to handle his important affairs.

CONCLUSION OF LAW

Defendants have established by a preponderance of the evidence that claimant is now precluded from relitigating the issue of when and where the injury to his right knee occurred in September 1984 by a prior finding in a quasi-judicial administrative adjudication before the Iowa Department of Job Service that the injury occurred at home and not at work. Therefore, claimant is unable to show by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment.

ORDER

It is ordered that claimant shall take nothing from these proceedings and his petition for benefits filed herein is dismissed with costs to the claimant.

Signed and filed this 27 day of November, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
NOV 12 1985
IOWA INDUSTRIAL COMMISSIONER

W. C. BERNS,	:	
Claimant,	:	File No. 734816
vs.	:	A R B I T R A T I O N
FMC CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by W. C. Berns, claimant, against FMC Corporation, his self-insured employer. Claimant alleges that he sustained an injury to his back May 6, 1983. The hearing was held in Cedar Rapids, Iowa on September 24, 1985.

ISSUES

The issues identified in the case are whether claimant sustained an injury which arose out of and in the course of his employment; whether a causal connection exists between the alleged injury and any disability which claimant has experienced; and determination of claimant's entitlement to benefits for any disability which is causally connected to the alleged injury.

It was stipulated that claimant's rate of compensation is $288.31 per week. The parties stipulated that compensation for permanent partial disability should be payable commencing November 14, 1983, that the employer has paid all weekly compensation due for healing period, and that it has also paid 98 weeks of permanent partial disability compensation in accordance with the form 2A dated August 24, 1985.

The record in this proceeding consists of the testimonies of W. C. Berns, Lester Schmitz, Norma Berns, Steven Delles, Carma Mitchell, and William Holtz. The exhibits received were claimant's exhibits 1 through 14 and defendant's exhibits A through J.

SUMMARY OF EVIDENCE

The following is a brief summary of pertinent evidence. All of the evidence received at the hearing was considered when deciding the case.

W. C. Berns, a 57 year old married man, testified that he completed the eighth grade in school but has no additional formal education or technical training. Claimant learned to weld while working in a machine shop. He has some skills as an electrician, plumber, carpenter, and auto mechanic. Claimant had been employed by FMC Corporation for 27 years, most of which was as a welder. He has also welded for other employers. Claimant's work experience also involves work as an electrician's helper and a farmhand. His plumbing and carpentry skills were described as self-taught and used in performing remodeling and repairs at his own home.

Claimant testified that he felt that he began having back problems in 1961 or 1962 when he tried to use his back to push a car out of the ditch. He stated that the incident caused him to miss some work and that he thereafter had recurrent back problems for which he sought chiropractic care. Claimant stated that he sought medical care in 1975 when he hurt his back lifting a chain. Claimant stated that in 1979 he developed symptoms similar to those he experienced following the alleged injury in 1983. He underwent back surgery performed by William J. Robb, M.D. He felt that after making his recovery from the surgery his back was nearly perfect. He recalled only one flare-up which resulted in his being placed in traction for a couple of days, but stated that he recovered fully. Claimant stated that he did not receive any chiropractic care between 1980 and 1982.

Claimant testified that on the day of injury he had been working outside of a welding booth and that his partner had performed some cleanup of the area. He stated that it was near the end of the work day and he was walking, carrying his helmet and tools in his arms. He stated that he noticed that a metal ground strip was suspended two or three inches off the floor. He described the strap as two and one-half or three inches wide, three-eighths of an inch thick, and nine feet long. He stated that normally a strap lays flat on the floor and that items being welded are placed on it. Claimant testified that he stepped on the strap, that it went to the floor, and that he walked on toward the toolbox. He stated that his partner yelled a warning and that a welder fell, causing four or five 50 pound boxes of welding rods to hit his shins and that the ground strap slapped him in the back. Claimant stated that he felt immediate pain and, from his prior problems, knew that he had injured his back. He reported to the company nurse and stated that he was advised to rest over the weekend and that if he had trouble, he should go to the emergency room at a hospital.

Claimant testified that his back worsened over the weekend and that he had pain in the low back and down his left leg. He stated that his daughter had surgery on the following Monday and that immediately after her surgery was performed, he then went to the Mercy Hospital emergency room. Claimant stated that the physician at the emergency room directed him to go home and to remain at bed rest with moist heat. He stated that he was directed to get up only as necessary to eat or go to the bathroom.

Claimant's condition did not improve and he again underwent back surgery performed by Dr. Robb. He stated that he was released to perform light duty work in October 1983.

Claimant stated that he worked in the template room from October 1983 until March 1984, at which time the job was discontinued and he was laid off. He stated that the company attempted to terminate his employment but that the union was able to avoid the termination which allowed him to take an early retirement. Claimant stated that the part of FMC where he worked is no longer in existence and that it is unlikely that FMC will have any work in the future. Claimant stated that even if work became available, his status of retirement would prevent him from being recalled.

Claimant stated that the job in the template room involved filling orders for templates, delivering them to workers in the shop, and returning templates which were no longer needed in the shop to the template room. He stated that he was unable to do all of the work which the job required but that he received the same rate of pay as if he were at his prior welding position. Claimant stated that when he was working in the light duty position, he had been authorized to take a break whenever he needed one. He stated that he was present at the job but that he really did not consider it to be bonafide work. Claimant stated that during the time of his light duty assignment, he had a relapse for which he received medical care but returned and continued to work until March 1984.

Claimant stated that the restrictions shown in exhibit 1g which prohibit lifting of more than 30 pounds and recommends that he avoid prolonged sitting, extensive climbing, and limit stooping or bending more than 30 times per hour or to floor level, were imposed before he had the relapse. He stated that his current restrictions, as told to him by Dr. Robb, are similar and indicate that he should limit bending, stooping, and crawling, and that in general, if any activity bothers him he should not perform it.

Claimant testified that he currently experiences numbness in his right foot from the arch forward, pain in his low back, buttocks, and down the leg. He stated that the pain is normally dull, but that it becomes extreme when he is strained. He complained that he does not sleep well. He stated that he can usually sit for approximately one hour before moving to relieve discomfort. He stated that standing bothers him as much as anything, but that being able to move around helps. He stated that once the pain starts to increase, it worsens as long as he continues to irritate it.

Claimant described a number of attempts to obtain employment following his retirement from FMC. These included car sales, new car preparation manager, parts person in a car dealership, the automotive departments at K-Mart and Target stores, maintenance, plumbing and electrical sales at Sutherlands and Cashway lumber yards, maintenance work at the Jacks store, a welding job at a manufacturing plant, and Job Service of Iowa. He stated that all of the positions for which he applied were minimum wage jobs but that he was not hired for any of them. Claimant felt that the physical demands of any of the positions which he has previously held during his lifetime exceeded his current capabilities. Claimant stated that he had conferred with John Hughes of the State Vocational Rehabilitation Department where he filled out forms and was tested for a hearing loss which he stated he has had for quite a few years.

Claimant testified that in May 1984 he and his wife purchased a restaurant and convenience store, known as the Nibble Nook, which is located near the entrance to Lake McBride State Park. The primary merchandise sold in the convenience store is fishing bait, tackle, groceries, and gasoline. The restaurant was described as what could be termed a short order grill, which also sells beer. The building in which the business is housed also contains living quarters for claimant and his spouse. Claimant testified that the building was remodeled shortly after he purchased it but that he hired all of the remodeling work done and performed none of it himself. Claimant stated that his role in operating the business consists of caring for the bait shop, pumping gas occasionally, and occasionally waiting on a customer or frying a hamburger in the restaurant. Claimant stated that his wife performs the bookkeeping for the business since he has no bookkeeping skills. He stated that he is not proficient with math or reading. He related that he lays down to rest approximately one hour each morning and afternoon. He stated that they hire part-time help for work in the restaurant at busy times. He stated that there are a lot of times during the day when no customers are in the establishment. He reported that the business has not been profitable.

Claimant testified that he ceased seeking other employment after the business was acquired. He stated that prior to purchasing the business, he consulted with the manager of a successful restaurant in the Cedar Rapids area. He stated that he also sought assistance from the Small Business Administration but found it to be of little benefit. He still reads the local newspaper searching for job opportunities but has not seen any which he felt he could perform.

Claimant testified that he was contacted by Carma Mitchell, from Crawford Rehabilitation, approximately ten months after the Nibble Nook had been purchased. He was unable to understand why there had been such a delay before any vocational assistance had been offered to him. He stated that Mitchell made no recommendations for a change of jobs, but suggested that he seek business counseling from the Service Corps of Retired Executives. Claimant felt that the service he had obtained from Lester Schmitz was preferable to that available from other sources. He stated that he had the business and that it had to be operated. He additionally stated that he did not feel that there were any other jobs available in the job market that he could perform. He stated that the jobs that Mitchell had suggested were fields that he had already checked into without success. Claimant stated that he could work as an automotive service manager if the job involved checking boxes rather than handwriting and spelling. He felt that he could work as a general inspector if the work involved walking around and looking without substantial lifting. He felt that he could read scales in order to be a production weigher, and he also felt that he could work as a paint spray inspector. Claimant, in reference to his deposition, stated that when it was taken, he felt that he could work a full 40 hour week if he stayed within the restrictions recommended by his physician, but that he has seen Dr. Robb since then and feels that his condition has changed to where he could no longer work a full 40 hour week even if the restrictions were complied with.

When questioned concerning a number of job descriptions which had formerly existed at the FMC plant, claimant felt that he could work as a janitor but that the job was never offered to him. The other jobs discussed were positions which he felt he was unable to perform or with which he was unfamiliar. Claimant stated that he enjoyed his work as a welder and would have continued working until normal retirement if he had not been injured.

Claimant acknowledged that part of his difficulty in finding work was due to the fact that a great many people in the Cedar Rapids area have been laid off and are unemployed. He stated that there were 150 union electricians who were laid off and that because of this he did not inquire about electrician jobs. He stated that a number of his former coemployees from FMC were attending training at the Kirkwood Community College to enhance their employability and their job-seeking skills.

Lester Schmitz testified that he is manager of the Springhouse Restaurant in Cedar Rapids, Iowa, an establishment which has been in operation for 16 years. Schmitz stated that claimant and his wife discussed the restaurant and bait shop business with him and that he provided them information concerning menu, customer relations, and hours of operation. He stated that since claimant's business has opened, claimant has sought additional advice and assistance and that he has provided it. Schmitz stated that he has provided guidance for selection and preparation of foods. Schmitz confirmed that he has observed claimant work on the grill occasionally but that most of claimant's time was spent in the bait shop. Schmitz confirmed that claimant's restaurant had some additional help at mealtime.

Norma Berns testified that she is claimant's wife. She stated that claimant's back had been bothering him quite a bit prior to the 1979 surgery, but that between the 1979 and 1983 surgeries, their life returned to normal. She stated that she and her husband went dancing and that he also hunted and fished. She stated that since the 1983 surgery, claimant has not resumed his hobbies.

Mrs. Berns testified that claimant does what he can in operating the Nibble Nook. She stated that he makes ice cream cones and pumps gas for approximately five customers per day. She stated that she does more than claimant in operating the business.

Mrs. Berns stated that since claimant's injury, she has observed indications that he is in pain. She stated that prior to the injury he did everything that needed to be done around the home and with their vehicles but that he is no longer able to do so.

Mrs. Berns stated that the Nibble Nook has been unprofitable thus far. She stated that they have tried different forms of advertising and have implemented a number of recommendations made by Lester Schmitz. She stated that revenues from May to September of 1985 were less than revenues for the same period in 1984.

Steven Delles testified that he had been claimant's supervisor at FMC since 1970. He stated that there has been no production in claimant's department since June 1985 and that management's intention is to close both Cedar Rapids plants.

Delles stated that the light duty jig and fixture clerk job which claimant held during his last few months of employment was a position which was not regularly filled at the time when claimant was injured. It was a position which had previously been regularly filled, however. Delles stated that claimant was assigned to that job since it was the only job in the plant consistent with claimant's abilities and medical restrictions. Delles stated that claimant did a good job of what was expected in the position. He stated that claimant took authorized breaks, but did not take excessive breaks. He had no specific information concerning claimant's practices being different from the practices of other employees.

Delles stated that the templates were stored in bins and cabinets, the highest of which was approximately six feet, and the lowest of which were at ground level. He stated that the small light templates were kept in the higher compartments and that it was necessary to stoop or squat to retrieve templates from the lower storage compartments. He stated that if a template weighed more than 30 pounds, someone else was provided to handle it, but that no other modifications of the job were made for claimant. He stated that no complaints were made of claimant's performance and that claimant had a nearly perfect attendance record when in the position. He described most templates as weighing in the range of five to ten pounds. Claimant's job duties were described as filling orders for templates, loading them from the storage bins onto a two-wheel cart, delivering them to machine operators, picking up templates which were not in use from the shop area and placing them back into the proper storage compartments. He described the job as requiring moderate bending, stooping, pulling, and lifting up to 30 pounds, but that it did not involve climbing. He stated that the jig clerk position was one which claimant could not have obtained through regular procedures due to the union agreement.

Delles stated that with the medical restrictions, claimant could not have continued to work as a full-time employee of FMC, primarily due to the weight restriction. He stated that claimant could have done janitorial work before job consolidation had occurred. He described the jig clerk position as one which claimant could not have gotten into due to provisions of the union contract, but that he could have performed the job with a 30 pound limit.

Delles stated that claimant's original welding job required reading blueprints, working with fractions, and making computations from the blueprints. He was unaware of claimant making errors in that work and stated that when working with decimals and fractions, charts were available to the welders for assistance. He stated that in the jig clerk position, reading and bookwork were limited to filling orders.

Carma Mitchell testified that she is a vocational consultant with Crawford Health and Rehabilitation Services. She stated that she was assigned to do an evaluation of claimant and to see if she could assist in his business. She testified that after evaluating claimant's capabilities, transferable skills and other pertinent data, she reached the opinion that claimant is competitively employable in the positions identified in her report dated February 14, 1985. She stated that she expected that any employment that he would obtain would be in the five to eight dollar per hour pay range. She did not know if any of the jobs which she felt he was capable of performing were available in the Cedar Rapids, Iowa area. She stated that none of the jobs would permit claimant to rest for one hour each morning and afternoon.

Mitchell testified that she suggested that claimant seek business assistance from the Service Corps of Retired Executives but that claimant advised her that he had already tried to get assistance from the Small Business Administration and that it had not been helpful. She stated that SCORE would send out a person who had restaurant experience to assist. Mitchell stated that claimant wanted to try to make the Nibble Nook profitable and did not seem interested in looking for other jobs. Mitchell stated that Lester Schmitz did what SCORE would have done but that SCORE could have possibly provided some additional assistance.

.liam Holtz, the manager of industrial relations for the Cedar Rapids FMC plant, testified that all production at the Cedar Rapids plants has ceased as a result of a reduction in business volume which started in 1979. Holtz confirmed Delles' testimony of claimant's jig clerk position and stated that there were no janitorial jobs in the plant at the time when claimant retired. He stated that in March 1984 there were no jobs with FMC that met claimant's medical restrictions. Holtz stated that the company had attempted to terminate claimant's employment before the early retirement was given. He also stated that approximately 100 of claimant's coworkers are participating in a company funded program at Kirkwood Community College which is intended to increase their chances for reemployment.

Exhibit 1b, a report from Dr. Robb, indicates that claimant was examined on July 23, 1985 for complaints of significantly increased symptoms in his lower back, left hip and leg. It is indicated that a CT scan showed bulging of the L4-5 intervertebral disc and herniation of the L5-S1 disc centrally and to the left of a degree possibly capable of causing nerve root irritation. Dr. Robb opined that the work which claimant had been doing during the proceeding months was causing the increased symptoms and recommended an alteration of work habits.

Exhibit 1c, a report from Dr. Robb dated April 11, 1984, indicates that claimant made a complete recovery from the 1979 surgery and that claimant has a 20 percent functional impairment rating which is entirely related to the injury of May 6, 1983.

Exhibit 1f, a report from Dr. Robb dated October 14, 1983, indicates that claimant returned to light duty work on October 3 but that he developed increased symptoms and that Dr. Robb then advised that he remain off work for an additional three weeks.

Exhibit 1g is a report from Dr. Robb dated September 29, 1983 in which he authorizes claimant to return to light work which he defined as lifting that does not exceed 30 pounds, avoidance of sitting that exceeds one hour at a time, and avoidance of extensive climbing. Dr. Robb stated that stooping or bending should be moderate, not to exceed 30 times per hour, and that claimant should not bend to floor level.

Exhibit 1n is the operative report from claimant's June 2, 1983 surgery. The surgical observations were that there was no protrusion of the disc at the L4-5 interspace. The disc at the L5-S1 interspace was found to be protruding in the midline and a discectomy was performed resulting in the removal of a large amount of disc material.

Exhibit 1q is the report from a CT scan conducted May 24, 1983. It identifies bulging of the disc at the L4-5 level from the midline to the right and central herniation at the L5-S1 level.

Exhibit 2 is a report from John S. Koch, M.D. Dr. Koch examined claimant on June 12, 1984. His examination included the benefit of X-ray films and CT scan films going back to January 2, 1979. Dr. Koch estimated that claimant had a ten percent disability related to the 1979 surgery and at most a 20 percent impairment of the body related to the 1983 injury. He also found claimant to have osteoarthritic changes of the spine which he found contributed to produce a total of a 65 percent disability of the whole body. He felt that claimant was 80 percent disabled from the occupation of a welder. Dr. Koch felt that claimant's disability could be decreased through further medical treatment in the nature of injection therapy, spinous process resection, weight control, anterior abdominal support, and anti-inflammatory medication.

Exhibit 3 is a report from John R. Walker, M.D., dated February 18, 1985. Dr. Walker examined claimant and formed the opinions that claimant had an eight percent disability of the body as a whole related to the first spinal surgery. He felt that the 1983 injury and surgery produced an additional 25 percent permanent partial disability of the body as a whole, with a resulting total disability of 33 percent. Dr. Walker felt that claimant would get along satisfactorily if he remained sedentary and did not recommend further surgery or other active medical treatment.

Exhibit 5 is a report from Carma Mitchell dated February 14, 1985. On the fourth page of the report, she identifies jobs which she felt claimant was capable of performing, but she went on to state that availability of those jobs was limited and that a more realistic approach was to look into light sedentary unskilled work such as light janitorial work, security guard, delivery driver, or self-service gas station attendant. She related that claimant advised her that he was not qualified for a security guard position at Quaker Oats due to his inability to crawl.

Mitchell's impressions, as stated in the report, were that the Nibble Nook business was an appropriate job for claimant. Her recommendation was that SCORE counseling be performed and that a Small Business Administration loan be sought.

Exhibit 7 is the deposition of Dr. Robb taken February 12, 1985. At page 6, Dr. Robb indicated that claimant's 1979 surgery was related to a snow shovelling episode and that it did not play a direct role in producing the herniation of the disc in 1983. At page 11, Dr. Robb indicated that claimant had a minimal five percent impairment of the low back immediately prior to the injury of May 6, 1983. At page 16, Dr. Robb opined that the surgery which he performed in 1983 was related to the May 6, 1983 incident with the welding unit which claimant had described. Dr. Robb confirmed his 20 percent functional impairment rating which was causally related to the second surgery and the May 6, 1983 injury and stated that his rating did not take into consideration the degenerative changes which are present in claimant's spine. (Exhibit 7, page 17.) Dr. Robb opined that claimant could work a 40 hour work week if he complied with the restrictions and recommendations which had been imposed. (Ex. 7, p. 22.)

Exhibit 10, the FMC dispensary-medical aid record, shows that at 3:30 p.m. on May 6, 1983 claimant reported the injury from the incident which he described at hearing and that the examination performed showed a small reddened area on claimant's back at the left side of his spine.

Exhibit 12 contains claimant's income records. It shows that in 1982 claimant earned $25,238.00 from FMC.

Exhibit G-1 indicates that claimant was off work with a back ache from December 11, 1980 until January 26, 1981.

Exhibit B is the deposition of James A. Smrha, M.D., taken February 19, 1985. Dr. Smrha indicated that he had been claimant's family physician. He indicated that claimant was treated by Dr. Robb in 1979 for a herniated disc, that claimant was hospitalized with back complaints in December 1980, and that the final dischage diagnosis from that period of treatment was severe lumbosacral strain. He stated that he saw claimant again on January 17, 1981 with mild recurrent back pain. He subsequently had no further contact with claimant for back complaints until May 1983.

There is also in the record a collection of claimant's medical records compiled in exhibits A through E. Exhibit E contains a report from W. J. Friesen, M.D., from 1970, which indicates that claimant had early degenerative spurring in his lumbar spine.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 6, 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 appeared at hearing and testified to suffering a traumatic event. He made immediate complaint and reported the incident to the appropriate personnel at the plant. The incident was apparently witnessed by other personnel in the plant, but none appeared to give conflicting testimony. It is therefore found that claimant did sustain an injury which arose out of and in the course of his employment on May 6, 1983 in the manner which he described at hearing.

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

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 record clearly shows that claimant had preexisting physical impairment in his spine as a result of degenerative arthritis and the prior injuries leading up to the 1979 surgery. The evidence from the physicians uniformly relates some part of claimant's current disability to the May 6, 1983 injury. It is therefore found and concluded that the injury of May 6, 1983 is a proximate cause of the disability which claimant currently experiences relative to the condition of his spine.

This is a case where some ascertainable disability did previously exist. It has been rated at five percent, eight percent, and ten percent. It is proper that the disability be apportioned. Varied Industries v. Sumner, 353 N.W.2d 407 (Iowa 1984).

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 impairment 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).

Immediately prior to the May 6, 1983 injury, claimant was physically capable of being gainfully employed as a welder for FMC. After the injury, FMC determined that there was no regular position in its entire operation which claimant was capable of performing. Claimant has sought employment from other sources but has found none. He is 57 years old and nearing the point of life where most individuals are thinking of retirement rather than starting a new career. The fact that he is approaching retirement age is a factor in considering his industrial disability. Breck v. Turner-Bush, Inc., 34th Biennial Report 34 (App. 1979). That factor alone, however, does not prevent an award of permanent total disability. Diederich v. Tri-City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935). It should be noted, however, that an award of permanent total disability under the law that existed when Diederich was decided provided only 500 weeks of payments rather than a lifetime of benefits as currently provided by the controlling statute.

Claimant's literary and mathematical skills appear to be limited and it does not appear that he has an aptitude for academic pursuits. One factor to be considered is that the economic situation in the Cedar Rapids area has been depressed by recent plant shutdowns, such as that of FMC. As claimant himself indicated, a number of physically able-bodied individuals are also out of work. The fact that claimant has not obtained any employment has, in all likelihood, been to some degree a result of the currently depressed employment situation. Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Claimant has made a prima facie showing of permanent total disability in accordance with the guidelines of Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). It should be noted, however, that the term "prima facie" means that the evidence would be sufficient to support an award if it were viewed in the light most favorable to claimant. That is not, however, the standard upon which a decision is based. Even though this finding shifts the burden of proof to defendant to establish that claimant is not permanently totally disabled, evidence in the case, from any source, may be considered in reaching that determination. A proper interpretation of the shifting of the burden of proof can be most accurately characterized by stating that the absence of evidence of employability is to be held against the employer rather than to require a claimant to go through an exhaustive analysis of identifying potential jobs and showing his inability to be employed in any of them. Simply stated, if the employer contends that claimant is employable, the employer has the obligation of showing such in the record.

When all the applicable factors of industrial disability are considered, it is clear that claimant's disability is high. Some of the most convincing evidence of this fact is that FMC Corporation found him to be unemployable. Jobs such as claimant's work in his current business do not exist in significant proportions in the general work force. He himself identified several lines of work, such as janitorial, hardware retail sales, and the like, which it appears that he would be capable of performing. A significant number of such positions exist in the regular job market. It is important, however, to note that if claimant were to obtain such a position, he would still suffer a very substantial wage loss since most of the positions would pay entry level wages which would probably pay somewhere in the range of minimum wage rather than the approximate $12.00 which he had been capable of earning prior to the injury. Claimant is also approaching normal retirement age. It is therefore found and concluded that claimant has a 75 percent permanent partial disability when the same is measured industrially.

FINDINGS OF FACT

1. On May 6, 1983 claimant was a resident of the state of Iowa employed by FMC Corporation in the state of Iowa.

2. Claimant was injured at his employer's place of business on May 6, 1983 when a welder fell, causing boxes of welding rods to strike his shins, a ground strap to strike his back, and in the process claimant moved or twisted in a reaction to the falling welder.

3. At the time of injury claimant was working as a welder for the FMC Corporation.

4. Claimant is a credible witness.

5. Claimant is 57 years of age, married, and has no other dependents.

6. Claimant's healing period ended November 14, 1983 as stipulated by the parties.

7. Claimant's rate of compensation is $288.31 per week as stipulated by the parties.

8. The injury produced a herniated L5-S1 lumbar disc which was surgically excised by Dr. Robb.

9. The injury and its treatment produced an additional permanent functional impairment of claimant's spine of approximately 20 percent.

10. Claimant had preexisting back difficulties, including a preexisting permanent impairment from a remote injury and a 1979 surgery.

11. Claimant was also afflicted with osteoarthritis in his spine and reduced ability to hear.

12. Claimant has an eighth grade education and has limited reading and math ability. He has no demonstrated ability to be successful in academic pursuits.

13. Claimant is capable of performing work which allows him to sit, stand, or move about as he deems necessary, and which would also permit him to refrain from any substantial amount of bending, stooping, twisting, crawling, or climbing. Any such position would also require that he not lift more than 30 pounds.

14. The Cedar Rapids, Iowa area is currently afflicted with an unusually high unemployment rate as the result of recent industrial plant closings. Such has produced a higher level of competition for available jobs than what would normally exist.

15. Claimant has work experience as a welder, electrician, auto mechanic, and self-taught experience in plumbing and carpentry, but his physical restrictions are such that he could not be expected to be able to work fast enough to be competitively gainfully employed in those fields.

16. Claimant's knowledge and experience from his prior occupations is such that he could be gainfully employed in light jobs in related fields. Claimant has not returned to gainful employment since retiring from his employment with FMC even though he has made reasonable attempts to do so.

CONCLUSIONS OF LAW

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

Claimant sustained an injury to his back on May 6, 1983 which arose out of and in the course of his employment with FMC Corporation.

The injury was a proximate cause of the disability in claimant's back.

The injury of May 6, 1983 produced disability which is 75 percent of total disability when the same is measured industrially.

ORDER

That defendant pay claimant three hundred seventy-five (375) weeks of compensation for permanent partial disability at the rate of two hundred eighty-eight and 31/100 dollars ($288.31) per week commencing November 14, 1983. Defendant shall receive credit for all amounts of permanent partial disability previously paid and shall pay any past due amounts in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendant pay the costs of this proceeding pursuant to Industrial Commissioner Rule 500-4.33.

IT IS FURTHER ORDERED that defendant file claim activity reports as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 12 day of November, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS J. BLACKFORD,	:	
Claimant,	:	
	:	File Nos. 744940/747501
vs.	:	
	:	A P P E A L
SWIFT FRESH MEATS COMPANY,	:	
	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
NOV 20 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals and claimant cross-appeals from an arbitration decision which concluded that the claimant sustained an injury to his leg on April 7, 1983 which arose out of and in the course of his employment with defendant, however, claimant had no entitlement to compensation benefits. The arbitration decision also concluded that claimant sustained a compensable back injury while working for the defendant on August 9, 1983 with healing period of eight weeks. Permanency was not an issue.

The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 40; defendant's exhibits A and B; and claimant's brief on appeal.

ISSUE

Did the deputy industrial commissioner properly conclude that Mr. Blackford's back injuries and attendant disabilities arose out of and in the course of his employment at Swift?

ANALYSIS

The evidence was well summarized by the deputy in the review of the evidence and will not be repeated herein.

In addition, except for the brief magnification below, the deputy cited the correct applicable law and correctly analyzed the fact in relation to the law. Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971) stands for the proposition that the claimant need not prove that the alleged work-related injury is the sole proximate cause of the disability upon which he bases his claim. It need only be directly traceable to the work-related injury, without which it would not now exist. Id. at 670

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

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

FINDINGS OF FACT

1. Claimant is a resident of the state of Iowa who is married and has two dependent children.

2. On April 7, 1983, claimant sustained an injury to his left leg in the nature of a muscle rupture. It is possible, but not established, that claimant also suffered an injury to his back at that time. Claimant lost no time from work as a result of that injury and it has not been established that the injury resulted in any permanent impairment.

3. On August 9, 1983 claimant injured his back while shoveling. Thereafter he was medically incapable of performing work in employment substantially similar to that he performed at the time of the injury from August 29, 1983 until September 24, 1983 when he returned to work.

4. Claimant received medical care for the injury of August 9, 1983 from Dr. Lester, Philip G. Abood, Iowa Methodist Medical Center and prescription medicines from the medicine store. Defendant has paid a portion of those expenses but there remains unpaid at this time a balance of $738.53. The amount of the medical charges are fair and reasonable for the services rendered.

5. Claimant traveled 105 miles in obtaining medical care.

6. Claimant quit his job with defendant employer in November and has obtained other work which pays less than his work with the defendant employer.

7. As a result of the injury of August 9, 1983 claimant has protruding discs, one of which impinges upon the left S1 nerve root.

8. Further medical care for claimant's protruding discs is indicated.

9. It is likely that claimant will have some permanent impairment to the body as a whole as a result of the injury but the extent of such cannot be determined until his medical treatment has been completed.

10. Claimant's activity in golfing on August 28, 1983 did not play a substantial part in producing the protruding discs from which claimant presently suffers.

CONCLUSIONS OF LAW

The injury claimant sustained to his leg on April 7, 1983 arose out of and in the course of his employment with Swift Fresh Meats.

Claimant has no entitlement to compensation for temporary total disability, healing period or permanent disability based upon the injury of April 7, 1983.

The injury claimant sustained to his back on August 9, 1983 arose out of and in the course of his employment with Swift Fresh Meats.

Claimant's healing period from the injury of August 9, 1983 commenced August 29, 1983 and ran up to October 24, 1983, a period of eight weeks.

Defendant is responsible for the medical expenses and mileage incurred by claimant in obtaining care for the back injury of August 9, 1983.

Where claimant's condition has its basis in the work related injury of August 9, 1983, the subsequent activity of golfing does not become the sole proximate cause of claimant's condition even though it may have played some part in bringing about those symptoms.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant eight (8) weeks of compensation for healing period at the rate of two hundred thirty-four and 23/100 dollars ($234.23) per week commencing August 29, 1983. Defendant shall pay the amount due and owing in a lump sum together with interest at the rate of ten percent (10%) per annum from the date each weekly payment of compensation became due pursuant to Iowa Code section 85.30. Defendant shall receive any credit to which it is entitled under Iowa Code section 85.38.

That defendant pay claimant's travel expenses in the amount of twenty-five and 20/100 dollars ($25.20).

That defendant pay the following medical expenses:

Dr. Carl O. Lester	$ 20.00
Philip G. Abood, physical therapist	340.00
The Medicine Store	57.13
Iowa Methodist Medical Center	321.40
Total	$738.53

That defendant provide claimant with such additional care as he may be entitled to under section 85.27 of the Code of Iowa.

That defendant pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

That defendant file an activity report within twenty (20) days from the date of this decision.

Signed and filed this 20 day of November, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY L. BROWN,	:	
Claimant,	:	File Nos. 496674/696308 751480
vs.	:	REVIEW-REOPENING
WILSON FOODS CORPORATION,	:	A N D
Employer, Self-Insured,	:	A R B I T R A T I O N
and	:	D E C I S I O N S
SECOND INJURY FUND,	:	
Defendants.	:	

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IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

By order dated April 25, 1985 the above matters were consolidated for hearing. File number 496674 is filed in review-reopening and concerns an injury on June 8, 1977. Claimant is not seeking additional benefits against the employer in this matter, but rather second injury fund benefits. File number 696308 is filed in review-reopening and concerns an injury on February 18, 1982. Claimant seeks additional benefits against the employer and recovery against the second injury fund. File number 751480 is filed in arbitration and concerns an alleged injury on October 12, 1983. These matters were heard before the undersigned on October 1, 1985 at the courthouse in Storm Lake, Buena Vista County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant; claimant's exhibit A; and, official notice of claimant's answers to interrogatories

STIPULATIONS AND ISSUES

At the time of the pre-hearing and hearing on these matters the parties stipulated that claimant has been paid ten percent permanent partial disability to the right arm as a result of the injury of June 8, 1977 as reflected in filed number 496674; that claimant has been paid ten percent permanent partial disability to the left arm as a result of the injury of February 18, 1982 as reflected in file number 696308; and, that claimant's rate of compensation in file number 696308 is $288.62.

The parties further stipulated that claimant's rate of compensation, if awarded, in file number 751480 is $218.98. Further, that claimant has previously been paid all temporary total or healing period benefits to which he is entitled and that the appropriate date for commencement of permanent partial disability, if awarded, is July 6, 1985.

There appears to be no issue in filed number 496674 because that petition was filed merely to establish a prior injury to a scheduled member for purposes of imposing liability against the second injury fund. The following issue will, however, be raised: Whether the agency may on its own motion determine that file number 496674 is time barred because the petition filed on July 6, 1983 did not commence a contested case within three years of the last date of payment of benefits (November 27, 1977). See Iowa code section 85.26 (1983); City of Des Moines v. Des Moines Police Etc., 360 N.W.2d 729, 730 (Iowa 1985) (concept of jurisdiction over a particular case is discussed); Molitor v. City of Cedar Rapids, 360 N.W.2d 568, 569 (Iowa 1985) (parties cannot confer jurisdiction by consent; jurisdiction of case is given to this agency solely by law).

In file number 696308 the issues are whether there is a causal relationship between the injury of February 18, 1982 and the disability upon which this claim is based and, if so, the nature and extent of that disability.

In file number 751480 the issues 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 upon which this claim is based; and, the nature and extent of disability to which the claimant may be entitled.

Finally, there is the issue as to whether or not the second injury fund of Iowa is liable for any or all of claimant's alleged disability from the above injuries or alleged injury.

EVIDENCE PRESENTED

Claimant testified he is forty-one years old, married, and the father of four children, three of whom are minors. Claimant has an eighth grade education. Claimant said his working life has been as a farm laborer, construction laborer, and packing plant laborer. He has been am employee of the Wilson Foods Corporation since October 15, 1965.

Claimant advised that he has never suffered from any major sicknesses or illnesses. He said that he had had two serious accidents prior to June 1977. In one instance a steel rod was run through his chest and in the other he was in an automobile accident resulting in a ruptured spleen. Neither of these incidents caused residual problems. Claimant reported that he did have some minor cuts and sprains while employed for Wilson Foods.

Claimant testified that he received an injury to his right shoulder in June 1977 when he pulled on a hog in one of the scalding tubs. Claimant was treated for this injury by Cortisone injections over a period of about six months. As a result of this injury, claimant was paid permanent partial disability benefits equal to ten percent of the right upper extremity. (This payment was made pursuant to a mememorandum of agreement.) Claimant testified that he has had continuing problems with this arm since the injury in the form of numbness and soreness.

Claimant advises that upon his return to work after the right arm/shoulder injury he first went back to the scalding tub but was then transferred to the chitter link machine. Claimant explained that because of his continuing problems with his right arm he began to use his left arm more.

Claimant stated that on February 18, 1982 he was carrying a 120-140 pound tub of lard when he slipped causing a jerk on his left arm and shoulder. He felt a sharp pain in his shoulder when this occurred. Claimant was sent to a doctor who told him there was nothing wrong with his shoulder. Claimant was sent back to work but was unable to perform his ob so he went to another physician who prescribed medication and physical therapy.

Eventually claimant came under the care of O. Max Jardon, M.D., at the University of Nebraska Medical Center. Dr. Jardon admitted claimant to the hospital and performed surgery on his left shoulder. He was released to return to work in August 1982, but was still having problems with both his arms.

Claimant said he returned to his job on the chitter link machine but had difficulty. On October 12, 1983 claimant reported to the company nurse his continued problems. Claimant was referred to a Dr. Garner and eventually ended up again at the University of Nebraska Medical Center this time under the care of an orthopedic surgeon, John F. Connolly, M.D. He said a second surgery was performed on his left shoulder which involved the transplantation of a tendon. Claimant said he remained off work for about a year, returning in November 1984. His doctor restricted him to light duty.

Claimant worked for five or six weeks, was off again, and then returned for a week or less around March 1985. He has not worked since. He said that he has been advised by his physicians to get out of the packing plants.

Claimant stated that he has not done much of anything since he quit working. He did clarify on cross-examination that his last day of work was April 4, 1985 plus one day in May. Claimant said he would like to work and hopes to go into sales with his father-in-law doing refrigeration service in Texas. He has reduced his activities considerably. He has not sought rehabilitation.

On further cross-examination claimant stated that there was no specific injury in October 1983 and opined that it was a continuation of the same problem he had in February 1982.

Claimant's exhibit A contains various medical reports concerning claimant's injuries. Among the medical reports included are progress notes from Orthopaedic Associates of Sioux City from August 9, 1977 to May 18, 1979. These notes concern claimant's right shoulder injury of June 8, 1977. These records show that claimant's injury was a partial tear of the rotator cuff, right shoulder. They further show that claimant's condition is basically untreatable except for symptoms and that he would have continuing problems. The records indicate an impairment rating of ten percent of the right upper extremity.

The remaining medical records in exhibit A concern claimant's left shoulder injury. The first of these reports is a July 13, 1982 discharge summary authored by Dr. Jardon. Dr. Jardon outlines the circumstances of claimant's injury in February 1982 and explains that claimant was admitted to the hospital for resection of the acromoclavicular ligament. In a February 22, 1983 letter to a union representative Dr. Jardon explains that claimant's surgery was roughly analogous to a resection of the distal end of the clavicle and from this analogy opines that claimant has a ten percent permanent partial impairment of the left upper extremity. The last letter from Dr. Jardon is dated April 8, 1983 and is directed to Keith O. Garner, M.D. This letter reiterates the rate Dr. Jardon assigned to claimant's left upper extremity and the reasons therefore.

A July 29, 1983 letter from A. D. Blenderman, M.D., to claimant's attorney is also included in exhibit A. This letter merely states that Dr. Blenderman could not assess claimant's additional disability, if any, since 1979 without a reevaluation.

Exhibit A contains three medical reports from John F. Connolly, M.D., concerning claimant's left shoulder. The first letter from Dr. Connolly is dated December 17, 1984 and is directed to Dr. Garner. In this letter Dr. Connolly assigns a rating to claimant's left upper extremity following the second surgery and arrives at a functional impairment of 20 percent. Dr. Connolly also opines that claimant would not be able to continue his job in the packing plant and that he should look for lighter work that does not involve repetitive lifting and use of the shoulder. In a follow-up letter to Dr. Garner on February 4, 1985 Dr. Connolly again rates claimant's impairment to the left upper extremity at twenty percent and recommends he retire from his packing house job.

Dr. Connolly makes a final impairment rating in a letter dated May 30, 1985. Because of increased weakness and limitation of motion Dr. Connolly assigns a thirty percent functional impairment rating. An evaluation report by Richard P. Murphy, M.D., dated April 15, 1985 assigns a thirty-five percent impairment rating to claimant's left upper extremity.

Official notice was taken of claimant's answers to interrogatories and they have been reviewed. The information contained therein need not be set forth because the information contained therein has been adequately set forth in the presentation of evidence above.

APPLICABLE LAW

In an arbitration proceeding claimant has the burden of proving by a preponderance of the evidence that he received an injury on October 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 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.

Although the filing of a memorandum of agreement conclusively establishes the employer-employee relationship and that an injury arose out of and in the course of employment, the nature and extent of disability caused by that injury remains subject to a later determination by the industrial commissioner. Freeman v. Luppes Transport Co., Inc., 227 N.W.2d 143 (Iowa 1975).

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

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

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber, Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960). See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

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).

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 (Appeal Decision 1981).

Iowa Code section 85.64, first paragraph, provides;

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

The three year statue of limitations established in section 85.26, The Code, is clear and unambiguous; thus, any claim for additional weekly compensation must be commenced within three years of the last date of payment of weekly benefits or the claim is barred. Whitmer v. International Paper Co., 314 N.W.2d 411 (Iowa 1982).

For injuries occurring between July 1, 1973 and July 1, 1982 there is no statute of limitations on medical benefits so long as there has been an award, agreement for settlement or memorandum of agreement filed. Iowa Code section 85.26(2); Beier Glass Co. v. Brundige, 329 N.W.2d 280, 286 (Iowa 1983).

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 synonymous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

ANALYSIS

Claimant is time barred from any recovery of further weekly compensation as the result of his injury of June 8, 1977. Filings indicate that he was last paid weekly compensation for this injury on November 27, 1977. His review-reopening petition was filed July 6, 1983 which is more than three years from the last date of payment of compensation, thus no recovery can be made by the claimant for this injury. Although defendant does remain liable for medical expenses, claimant has made no claim for such expenses. Accordingly, file number 496674 should be dismissed.

It is noted, however, and will be found, that the injury of June 8, 1977 was to claimant's right shoulder, even though he was paid benefits for the right upper extremity. The injury being to the shoulder, it is an injury to the body as a whole and thus no recovery against the second injury fund can be predicated on the injury of June 8, 1977.

Claimant's injury of February 18, 1982 is also to the shoulder and, consequently, an injury to the body as a whole. There is ample evidence that there is a causal connection between that injury and claimant's disability to the left shoulder. The only issue for determination is thus the extent of disability. As with the injury of June 8, 1977, no recovery against the second injury fund can be predicated on the injury of February 18, 1982.

Claimant has failed to prove by a preponderance of the evidence that he received an injury arising out of and in the course of employment on October 12, 1983. There is little in the medical records which demonstrate such an injury. Indeed, the medical records merely support claimant's testimony at trial that the problems which occurred on October 12, 1983 were a continuation of the same problems he previously had. Claimant specifically denied having any incident at work on October 12, 1983; only that his condition had reached the point where he could no longer perform his work. Thus, since claimant did not suffer a compensable injury on October 12, 1983 no recovery against the second injury fund can be predicated on that alleged injury.

We thus turn to the only remaining issue which is the extent of disability caused by the injury of February 18, 1982. The record shows that claimant had no disability to the left shoulder prior to his work injury. He now suffers substantial disability and has been precluded from returning to the same type of employment. Indeed, it would appear that claimant will never be able to return to the heavy manual labor jobs he was able to maintain prior to the injury.

Claimant required a considerable healing period from his injury. Altogether, with intermittent returns to work, claimant took almost three and a half years to achieve maximum medical recovery. The location of the injury is such that with claimant's prior work experience, jobs will be most difficult to obtain.

Claimant appears well motivated as is evidence by his repeated efforts to remain on the job. Notwithstanding his motivation, however, his very limited education and his age raise serious questions about possible rehabilitation. Claimant should be encouraged to seek rehabilitation. He indicated at hearing a desire to go into sales and this should certainly be explored. Even the sales position claimant spoke of is with a relative, raising serious questions as to whether an employer in an arms-length transaction would give much consideration to hiring him for such a position. It is difficult to say, however, what claimant's employability may be since he has not shown he has sought employment.

Weighing all of the factors relative to a determination of industrial disability, it will be found that claimant's injury of February 18, 1982 resulted in a disability of forty-five percent of the body was a whole. This rating is based solely upon the injury to claimant's left shoulder and does not include industrial disability, if any, caused by the June 1977 injury.

FINDINGS OF FACT

In file number 496674 it is found:

1. On June 8, 1977 claimant suffered an injury to his right shoulder while at work.

2. Claimant was last paid weekly compensation for his injury on November 27, 1977.

3. Claimant filed his petition in review-reopening on July 6, 1983.

In file number 696308 it is found:

1. On February 18, 1982 claimant suffered an injury to his left shoulder while at work.

2. Claimant's injury to his left shoulder occurred when he slipped while carrying a bucket of lard.

3. As a result of his injury, claimant has a substantial impairment to the left arm and a moderate impairment to the body as a whole.

4. Claimant is well motivated.

5. Claimant is forty-one years old and has an eighth grade education.

6. Claimant's injury precludes him from returning to work for defendant and precludes him from the type of work in which he has been engaged in the past.

7. It took claimant approximately three and a half years to achieve maximum medical recovery from his injury.

8. Claimant achieved maximum medical recovery on July 6, 1985.

9. Claimant has not sought other employment or rehabilitation since his injury.

10. Claimant's rate of compensation is $288.62.

11. As a result of his injury, claimant has suffered an industrial disability equal to forty-five percent of the body as a whole.

In file number 751480 it is found;

1. Claimant did not suffer an injury at work on October 12, 1983.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

File Number 496674 - June 8, 1977 injury

That claimant's claim is barred by the statute of limitations.

It is further concluded that claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits from the second injury fund of Iowa.

File Number 696308 - February 18, 1982 injury

That claimant has proven by a preponderance of the evidence that there is a causal connection between his injury and the disability to his left shoulder.

It is further concluded that claimant's disability to the left shoulder has resulted in a permanent partial disability equal to forty-five (45) percent of the body as a whole.

File Number 751480 - October 12, 1983 injury

That claimant has failed to prove by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment.

ORDER

IT IS THEREFORE ORDERED that in files numbers 496674 and 751480 that claimant take nothing.

IT IS FURTHER ORDERED that in file number 696308 defendant Wilson Foods Corporation pay unto claimant two hundred twenty-five (225) weeks of compensation at his rate of two hundred eighty-eight and 62/100 dollars ($288.62) commencing July 6, 1985 and continuing thereafter until paid in full.

Defendant Wilson Foods Corporation shall file a claim activity report within thirty (30) days.

Costs of these actions are taxed to defendant Wilson Foods Corporation.

Signed and filed this 20th day of December, 1985.

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LYLE BURMEISTER,	:	
Claimant,	:	File Nos. 756232/756813 779884
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.	:	FILED OCT 31 1985 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

These are consolidated proceedings brought by Lyle Burmeister, claimant, against Oscar Mayer Foods Corporation, self-insured employer, for the recovery of benefits under chatpers 85 and 85B, Code of Iowa. File number 756232 alleges an injury to claimant's head and neck on March 8, 1983. File number 756813 alleges an injury to claimant's back, arms, and legs on January 27, 1984. File number 779884 alleges an occupational hearing loss with an injury date of June 1, 1984. These matters were heard before the undersigned on August 21, 1985 at the bicentennial building in Davenport, Scott County, Iowa. They were considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Barbara Burmeister, Monica Murphy, Myrna Stevens, Ph.D., and Vernon Keller; claimant's exhibits 1 through 6; and, defendant's exhibits A, B, and C.

ISSUES

At the prehearing and hearing on these matters the parties indicated that in each file the following issues need to be determined, to wit:

1. Whether the claimant received injuries arising out of and in the course of employment;

2. Whether there is a causal connection between the injuries alleged and the disabilities upon which these claims are based;

3. Whether the claimant is entitled to temporary total disability or healing period and permanent partial disability as a result of his alleged injury; and,

4. Whether claimant has satisfied the notice requirements of Iowa Code section 85.23.

The parties stipulated at hearing that claimant's rate of compensation in the event of an award is as follows:

File No. 756232 --- $267.54
File No. 756813 --- $268.65
File No. 779884 --- $168.65

It was further stipulated in file number 779884 that in the event an occupational hearing loss is found that the entitlement for such loss is 14.2 weeks of disability.

EVIDENCE PRESENTED

Fifty-eight year old claimant testified that he quit school in the eighth grade because, being one of eleven children, his parents could not afford to continue sending him to school. Claimant entered the labor force soon thereafter at the age of fifteen when he began working at a dairy farm. He worked at this farm for three and a half years and then worked for another dairy farm for three years. At age twenty-two claimant began his own business grinding livestock feed and continued in this enterprise for one and a half years. Claimant then found a job with J. I. Case Company where he was a "molder" for about two years. He then worked as a floor molder for one and a half years at the Russell Rory Foundry. After this claimant returned to farming and worked as a share cropper until beginning work for the defendant in 1960.

Claimant advised that his first two years at defendant's was on the kill floor. Claimant said this was an extremely noisey place to work because of the machinery. During those first two years claimant said he was laid off two times for a total of thirteen weeks, but had no other job during his layoff. Claimant said his next position at defendant was in the receiving department where he moved and sorted hogs as they came into the plant. He was in this position for six years.

Claimant next served the defendant in the "slice pack" department where luncheon meat was sliced and packaged. He said his work exposed him to high noise levels and for the first five years on the job there he did not wear hearing protection. Claimant was working in this department when his employment came to an end on January 27, 1984.

Claimant said that from 1960 to March 1983 he had no physical complaints connected with his employment except on one occasion when he slipped and fell. Claimant advised that he was x-rayed following this incident but that it involved no lost time. Claimant said that there was one occasion when he was disciplined for being late to work. Claimant testified that claimant's exhibit 3 is an internal memorandum of defendant to him thanking him for some suggestions on how to improve operations at defendant's plant. He said exhibit 2 is a letter and certificate of appreciation he received in August 1984 for twenty-four years of loyal service to the company.

Claimant testified that in March 1983 he began to develop severe sinus headaches which he attributed to working in an area where cold air blew onto the right side of his face. He consulted a physician who prescribed medication. He reported that he told his foreman about the problem and the foreman placed a piece of cardboard between claimant and the cooler to cut down on the exposure to the cold air. Claimant recalled that he was off work because of this problem for three to six weeks during which time the company paid him sick leave. It was stipulated by the parties that the sick leave paid was in the amount of $634.77.

Claimant advised that defendant gave him a hearing test during his last year of employment. Further, that he has always had bad hearing in his left ear.

Claimant testified that on January 27, 1984 he was working on "square line" and while doing so was standing on a one foot by four foot by one foot platform when he slipped and fell. He landed on his right side injuring his hip and shoulder. Claimant reported his injury to his foreman who sent him to the first aid office. The company nurse suggested that claimant take aspirin for pain relief. Claimant said he did not feel real bad when he left the nurse's office but was getting stiff by the time he had changed his clothes and headed home.

Claimant said he went to the bank and got gasoline for his automboile on the way home. By this time he was in sufficient discomfort to call his wife and tell her he could not help her clean a doctor's office. [Claimant testified that he and his wife operated a small cleaning service]. Claimant said he ate lunch and then began to feel dizzy. He decided to go to the emergency room at Mercy Hospital. Claimant was examined, given a prescription for pain, and sent home.

Claimant said he had a difficult time sleeping that night. The next morning he went with his wife to the doctor's office that they cleaned, but did no work. When he returned home, he soaked in hot water. Claimant said he continued to have problems sleeping Saturday and Sunday nights and experienced severe pain in his back, arms, and legs.

On Monday morning claimant called into work and reported that he had gone to Mercy Hospital and would not be in to work. Claimant said he reported this to the company nurse who advised him that his actions were illegal. Claimant advised that he then consulted an attorney who referred him to John T. Johnson, D.O. On cross-examination, claimant admitted that when he talked to the company nurse she referred him to a company doctor. Claimant had no explanation of why he did not see the company doctor and instead chose to follow the suggestion of his attorney. Claimant testified he has since seen several doctors besides Dr. Johnson.

Claimant stated that he has continuing problems with his arms, shoulders, back, and right leg. He said his face will bother him if it gets cold. He also said he is bothered by a hearing loss.

Claimant testified that most of his medical expenses have been paid by the defendant, but some remain unpaid. He was uncertain as to the expenses for which he has been reimbursed. He stated that he had no dispute with defendant's records as to those expenses or amount of reimbursement paid to him.

On cross-examination, claimant explained that most of his medical treatment has been under the direction of Dr. Johnson. He said he was examined by a Barry Lake Fischer, M.D., at the request of his attorney. He said Dr. Fischer spent about a half hour on the examination. He advised he has been examined by two doctors at the request of the defendant. He admitted that no doctor has told him he cannot work.

Claimant denied having ever said it was his intention to "stick it to" the defendant. He also disagreed with certain statements attributed to him in a report by J. H. Sunderbruch, M.D.

Barbara Burmeister testified she is the wife of the claimant. Mrs. Burmeister said that prior to his injuries claimant had never missed much work at defendant. She also said that since the fall in January 1984 claimant has reduced his activities and no longer mows the lawn.

Monica Murphy testified that she has been employed by the defendant for seven years and now serves in the capacity of head nurse. Ms. Murphy stated that claimant called her on January 30, 1984 and reported that he would not be in to work because of his injury the previous Friday. She said she advised the claimant that the defendant would not pay for medical treatment unless they chose the doctor. She advised that she scheduled an appointment for claimant with Dr. Sunderbruch and then called claimant to advise him of the time of the appointment. Ms. Murphy said she had some trouble contacting claimant and when she did he told her he had talked to his attorney who advised him he could see any doctor he chose. She said claimant had a hearing test on July 1, 1982.

Myrna Stephens, Ph.D., testified she is an audiologist who acts as a consultant and conducts hearing tests for industries. She said she conducted a hearing test on claimant on June 28, 1985. She said she tested for hearing loss in each ear. Dr. Stephens found a 46.88 percent hearing loss in the left ear and a 2 percent hearing loss in the right ear. The hearing loss in the left ear was a sensorineural loss and would be 31.88 percent when adusted for age. Dr. Stephens' opinion that a hearing loss from exposure to excessive noise at work would generally be equal in both ears. Dr. Stephens' findings are set forth in a narrative report which was admitted as defendant's exhibit A-11.

Vernon Keller testified that he has been employed by defendant for fifteen years, serving since 1976 as the safety manager. He advised that he is acquainted with claimant and first learned of his injury on January 27, 1984 at about 4:00 p.m. that afternoon. Mr. Keller was told of the injury by claimant. He said that claimant did not appear to be in distress at the time.

Mr. Keller advised that the defendant scheduled a doctor's appointment for claimant, but claimant refused to see the company doctor. Mr. Keller said he made several attempts to call claimant on January 31, 1984, and when finally contacted, claimant said he had an attorney and knew the law. Further, claimant refused to meet with the company and claimant's union representative.

Mr. Keller also testified that noise levels where claimant worked never exceeded 90 dBA. He said the decision not to pay claimant workers' compensation was based upon the fact that the company never had any information that claimant could not work.

Mr. Keller advised that in April 1984 claimant came to the company and announced that he had decided to take early retirement.

On cross-examination, Mr. Keller stated that claimant's work area generally had a noise level in excess of 80 dBA but less than 90 dBA.

Claimant's exhibit 1 contains the medical records and reports submitted by the claimant. There are several reports dealing with the problems claimant experienced in March 1983. The diagnosis of this condition includes sinusitis, neuralgia, and Bell's palsy. The only narrative report dealing with this problem is that of Gerald J. Cooper, D.O., found at page fourteen of exhibit 1. Dr. Cooper states that there may be a possibility of a connection between claimant's employment and his condition but that it would be difficult to define the mechanism by which the cause and effect worked. This report also indicates that Dr. Cooper treated claimant in November 1983 for back pain.

Claimant's exhibit 1 also contains audiological evaluations and narrative reports from audiologists. The first narrative report is from Michael C. Hartman, clinical audiologist, dated March 22, 1985. This report indicates that claimant has normal hearing in the right ear between 250 Hz -- 2kHz, with a moderately severe sensorineural hearing loss above 2kHz. The left ear showed a precipitously sloping, moderately-severe hearing loss in the left ear. Mr. Hartman conducted two tests on claimant, February 22, 1984 and March 13, 1985. His evaluation of March 13, 1985 contains a notation the results of the latter examination were unchanged from February 22, 1984.

Claimant's exhibit 1 also contains the results of hearing tests conducted on claimant in April 1974, October 1975, July 1977, July 1982, August and October 1983. There is a report dated February 17, 1984 from Gordon R. Johnson, D.O., which reflects that claimant has suffered a gradual loss of hearing in the left ear over a period of years. In a report dated February 7, 1984 from E. L. Manning, M.D., it is opined that claimant has suffered a hearing loss possibly secondary to his work in a foundry. The remaining portions of claimant's exhibit 1 are related primarily to the incident of January 27, 1984.

The first record concerning claimant's January 1984 incident is an emergency department record from Mercy Hospital dated January 27, 1984. The record reflects that claimant presented himself to the emergency room at 6:15 p.m. with complaints of pain in the right shoulder, right side of the head, and right greater trochanter area. The history reflected in the report is the same as that given by claimant during his testimony. A final diagnosis of multiple contusions was made. Claimant was given a prescription for pain and sent home.

Exhibit 1 contains outpatient admission records from Davenport Osteopathic Hosital concerning claimant's treatment there in early February 1984 under the supervision of Dr. Johnson. The records reflect that claimant suffered a right scapular strain and was experiencing numbness in the left hand. A report from Dr. Johnson dated March 13 1984 states that Dr. Johnson was treating claimant for a hearing loss which he said was attributable to being around loud noises for prolonged periods of time, probably at Oscar Mayer. Also, Dr. Johnson says claimant had a mild carpal tunnel syndrome caused by repetitious use of the arms at work and aggravated by the fall on January 27, 1984. Dr. Johnson also attributes to the fall an aggravation of degenerative arthritis at C4-through C7 and L5-S1. Dr. Johnson states that these conditions were permanent and totally disabling to the claimant.

A long and detailed report from Dr. Sunderbruch is included in exhibit 1 at page 4. Dr. Sunderbruch concluded, following an examination of claimant on February 16, 1984, that claimant had no acute, disabling findings at that time. X-rays demonstrated some degenerative findings and the doctor opined that "there would be an outside possibility that this fall could have aggravated some of these problems...." Dr. Sunderbruch apparently did not have the benefit of reviewing the reports of the CT scan and EMG studies which were done at Franciscan Hospital. The degenerative changes noted by Dr. Sunderbruch were at the lower part of the cervical spine, at L5-S1 and the acromioclavicular joints of the right shoulder.

There are two reports from Dr. Fischer dated April 20, 1984 and August 31, 1984. These reports are found at pages 19 and 25 of claimant's exhibit 1. In his first report Dr. Fischer outlines claimant's history and the results of the examination. He concludes that claimant suffered from a strain injury to his cervical, rhomboid, and trapezius areas bilaterally with associated myositis. He also diagnosed residual bilateral sciatica and disc space narrowing at L5-S1. Dr. Fischer further states that claimant suffered a compensable occupational hearing loss. According to Dr. Fischer, claimant was disabled from working at the time of the first examination. In his report dated August 31, 1984 Dr. Fischer again reviewed claimant's history and conducted an examination. The August 31, 1984 report, with one exception (reference to EMG studies), is exactly word for word the same report as was made in April 1984. Physical examination was the same, range of motion the same, history is the same, conclusions are the same, even the language and paragraph arrangement are the same except Dr. Fischer assigns a thirty percent whole body functional impairment.

Finally, there is a report and clinical notes of Robert J. Chesser, M.D. The report is found at page 21 of exhibit 1 and is dated May 31, 1984. Dr. Chesser conducted EMG studies which showed some evidence of carpal tunnel on the left, but nothing the doctor believed was significant. He found full range of motion in both shoulders, straight leg raising to 90 degrees bilaterally, normal strength, normal reflexes, and no indication of neurological deficit or radiculopathy. He did find diffuse tenderness in the upper trapezius and cervical paraspinals. He noted degenerative changes in the lower cervical spine. Dr. Chesser states that he believed the tenderness in the trapezius and cervical paraspinals was due to a tension myositis.

Dr. Chesser believed claimant should be placed on some restrictions at the time of his examination but does not say whether they are of a permanent nature. He believed there may have been some psychological factors contributing to claimant's disability.

Claimant's exhibit 5 and 6 are unpaid medical expenses of the claimant. Exhibit 5 is for services at Osteopathic Radiology Associates in the amount of $59 rendered on February 8, 1984. Exhibit 6 is a bill From Franciscan Medical Center in the amount of $72.80 for services rendered on February 3, 1984. Claimant's exhibit 4 are claimant's cancelled checks for payment of medical expenses.

Defendant's exhibit C is the original transcript of claimant's deposition given April 2, 1984. Claimant's deposition testimony is substantially the same as that which he gave at hearing.

Defendant's exhibit B are illness and accident disability reports and a sick leave report concerning claimant's neuralgia in March 1983. These reports indicate that claimant's condition was not work-related. The sick leave report shows that claimant was off work for thirteen days during which time he was paid sick leave in the amount of $634.77.

Defendant's exhibit A contains many of the same medical and audiology reports as previously submitted and discussed herein. There is contained in the exhibit a report dated February 7, 1984 from Michael A. Cronkleton, M.D. to Vernon E. Keller. In that report Dr. Cronkleton states that he examined claimant on January 27, 1984 at Mercy Hospital. According to Dr. Cronkleton, claimant had diffuse tenderness on examination, but no objective signs of injury. Dr. Cronkleton's x-ray findings were consistent with the findings of the other physicians who noted degenerative changes in claimant's lower cervical spine, the acromioclavicular joint, and the lumbar spine at L5-S1. Dr. Cronkleton states he did not believe it was necessary for claimant to be off work.

Exhibit A also contains reports from Drs. Sunderbruch and Chesser which have been reviewed as part of claimant's exhibit 1.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on March 8, 1983, January 27, 1984, and an occupationa hearing loss 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 injuries of March 8, 1983, January 27, 1984, and the occupational hearing loss 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).

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Section 85B.4(1) and (2) states:

> 1. "Occupational hearing loss" means a permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels if measured from international standards organization or American national standards institute zero reference level, which arises out of and in the course of employment caused by prolonged exposure to excessive noise levels.
>
> In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of five hundred, one thousand, two thousand, and three thousand Hertz shall be considered.
>
> 2. "Excessive noise level" means sound capable of producing occupational hearing loss.

Section 85B.5 establishes certain noise levels which are excessive noise levels within chapter 85B.

Although this record does establish that claimant suffers from a sensorineural hearing loss, claimant has not established that the loss arose out of and in the course of employment with defendant. First, claimant has not shown that he was exposed to noise levels in excess of 90 dBA. While such a showing is not necessary, claimant must still establish proof of causation with sufficient qualified evidence that his hearing loss arose out of his employment. Morrison v. Muscatine County, Iowa, File No. 702385 (May 2, 1985). The problem here is that claimant has not met his burden of proof. Loss of hearing was noted in claimant's left ear as early as 1974. He has had previous exposure to high noise levels at the foundries where he worked. Most significantly, however, is the fact that claimant's hearing loss is substantially greater in the left ear than in the right. Dr. Stephens' statement that a loss in both ears would be most likely if the loss was the result of noise at work is given considerable weight. Her expertise is also given weight in this reguard. Accordingly, claimant has not established an occupational hearing loss within the meaning of section 85B.

Claimant also failed to carry his burden of proof concerning the alleged injury of March 1983. The only expert opinion addressing this issue is that of Dr. Cooper. Dr. Cooper never goes beyond saying that there was possibly an aggravation of claimant's neuralgia for his exposure to cold at work and even then he admits he would have difficulty explaining the mechanism by which such an aggravation could occur. This is insufficient evidence to meet claimant's burden of proof by a preponderance.

The incident which occurred on January 27, 1984 can only be understood on the basis of the record as a whole. First, it should be noted that claimant is both credible and candid. The record shows a long time, devoted employee of defendant. Nothing prior to January 27, 1984 indicates that claimant ever acted with any thought except the best interest of his employer. He had established a good and consistent work record. He had been commended by his employer for a money saving suggestion.

The record fully establishes that claimant fell at work on January 27, 1984. This is reflected not only by claimant's testimony, but also by the medical records and testimony from the plant safety manager. The employer was well aware of this fall and offered medical treatment which claimant rejected. Claimant offered no satisfactory reason for this attitude though the record leaves one with the suspicion that his actions were at least in part based upon the advice of his attorney at that time. There was no good reason for claimant to have behaved in this way and there was no good reason for this matter to have taken on an adversarial relationship between the parties. The actions of claimant actually appear to have hindered the employer's effort to fulfill their obligations under the workers' compensation act.

The first physician seen by claimant, Dr. Cronkleton, did not believe claimant's incident caused sufficient injury to require time off work. He did, however, note degenerative changes in those areas (cervical spine, right shoulder, low back) where claimant was contending he was in pain. When claimant was examined by Dr. Sunderbruch on February 16, 1984, he found also that claimant did not have a truly disabling condition but likewise noted degenerative changes. Dr. Sunderbruch raises the possibility that the fall could have aggravated the preexisting degenerative changes. Dr. Johnson, however, opines in a letter dated March 13, 1984 that claimant was totally disabled at that time.

If Dr. Fischer's reports have any validity at all (in light of claimant's testimony that Fischer's examinations were less than thirty minutes), it lies in the fact that there was no change in claimant's condition between April 20, 1984 and August 31, 1984. Thus, whatever his condition, there was no medical improvement after April 20, 1984. Dr. Johnson attributes claimant's temporary total disability in part upon a diagnosis of cervical radiculopathy. Dr. Chesser who examined claimant at the request of Dr. Johnson and defendant rules out cervical radiculopathy as a diagnosis. He does, however, suggest tension myositis throughout the upper trapezii and cervical paraspinals. He also rules out carpal tunnel which was another diagnosis of Dr. Johnson. Dr. Chesser did recommend some lifting restrictions at that time.

Given the testimony of claimant, together with the medical evidence in the record, claimant has established that the incident of January 27, 1984 was an injury within the meaning of chapter 85. It would appear more likely than not that as a result of the fall claimant did aggravate some preexisting degenerative changes. Claimant's testimony and the medical records indicate that this aggravation, though small, is of a permanent nature. He has some restrictions, but he could have returned to work had he chosen to do so.

The record does not establish that claimant is entitled to healing period benefits. The better medical evidence suggest that claimant's fall did not cause any temporary disability. It would appear that he was medically capable of returning to work the Monday following the Friday injuy. In any event, it is claimant's burden and he has not shown healing period entitlement. In retrospect, it would appear that claimant's disability was permanent and did not improve after the date of injury.

Although there is an indication that claimant should have work restrictions, those restrictions would still have allowed claimant to perform his job. He has not shown an actual loss of earnings attributable to his injury. Claimant's medical condition is stable though he continues receiving some sort of treatment from Dr. Johnson. There is some evidence that claimant had pain in his shoulders prior to the injury, but nothing of significance. Claimant though poorly educated appeared intelligent and capable of returning to the work force though unmotivated to do so.

Weighing all of the factors relative to industrial disability, claimant has established a permanent partial disability for industrial purposes of seven and a half percent of the body as a whole.

At the conclusion of the evidence defendant waived its section 85.23 notice defense. It was obvious that defendant had actual notice of the injury.

Claimant has established a causal connection between his injury of January 27, 1984 and some of his medical expenses. Reimbursement is appropriate as follows:

John T. Johnson, D.O.	$194.50
Rock Island Radiology	72.00

The following medical expenses should be paid, with credit for any amounts previously paid:

Franciscan Medical Center	$72.80
Osteopathic Radiology Assoc.	59.00

Should claimant need further medical treatment, defendant is entitled to select the care and is encouraged to do so.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. Claimant is fifty-eight years old, married, and has an eighth grade education.

2. Claimant has a significant hearing loss in his left ear.

3. In March 1983 claimant developed neuralgia in his face.

4. On January 27, 1984 claimant fell while at work and landed on his right side.

5. Claimant's rate of compensation as of January 27, 1984 was $268.65.

6. Claimant was not off work because of his injury of January 27, 1984.

7. Claimant's loss of hearing in his left ear was not the result of his employment with defendant.

8. Claimant's neuralgia was not the result of his employment with defendant.

9. As a result of his fall on January 27, 1984, claimant aggravated a preexisting condition in his neck, shoulder, and low back.

10. In April 1984 claimant voluntarily quit his job and retired.

11. Claimant is credible and candid about his injury and disability.

12. As a result of his injury of January 27, 1984, claimant incurred the following medical expenses:

John T. Johnson, D.O.	$194.50
Rock Island Radiology	72.00
Franciscan Medical Center	72.80
Osteopathic Radiology Assoc.	59.00

13. As a result of his injury of January 27, 1984, claimant has a minimal functional impairment of a permanent nature.

14. Defendant had actual notice of claimant's injury of January 27, 1984.

15. Claimant is not well motivated to return to work although he is physically and emotionally capable of doing so.

16. As a result of his injury of January 27, 1984, claimant suffered a permanent partial disability of seven and a half percent of the body as a whole.

17. Claimant has not presented sufficient evidence to establish a healing period.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has failed to prove by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment in March 1983.

Claimant has failed to prove by a preponderance of the evidence that he has suffered a hearing loss arising out of and in the course of his employment.

Claimant has established by a preponderance of the evidence that on January 27, 1984 he received an injury arising out of and in the course of his employment.

Claimant has established by a preponderance of the evidence that there is a causal relationship between his injury and industrial disability of seven and one-half (7 1/2) percent of the body as a whole.

Claimant has established by a preponderance of the evidence that there is a causal relationship between his injury of January 27, 1984 and the medical expenses set forth in finding 12 above.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant thirty-seven and one-half (37 1/2) weeks of permanent partial disability benefits at his rate of two hundred sixty-eight and 65/100 dollars ($268.65) commencing January 28, 1984. All accrued benefits to be paid in a lump sum together with interest thereon at the statutory rate.

IT IS FURTHER OREDERED that defendant pay unto claimant two hundred sixty-six and 50/100 dollars ($266.50) as reimbursement for medical expenses and seventy-two and 80/100 dollars ($72.80) to Franciscan Medical Center and fifty-nine dollars ($59) to Osteopathic Radiology Associates. Defendant shall be given credit for amounts previously paid.

The costs of this action are taxed to defendant.

Defendant shall file an activity report as requested by this agency.

Signed and filed this 31st day of October, 1985.

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

MARGARET CHAMP,	:	
Claimant,	:	
vs.	:	FILE NO. 737264
ANSWER IOWA, INC.,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	FILED
LIBERTY MUTUAL INSURANCE,	:	OCT 16 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Margaret Champ, claimant, against Answer Iowa, Inc., employer, and Liberty Mutual Insurance Company, insurance carrier.

The case was heard in Ottumwa, Iowa on July 2, 1985 and was considered fully submitted upon the conclusion of the hearing. The record in this proceeding consists of the testimony of Margaret Champ, Roberta Stice and Gretta Nydle; claimant's exhibits one and two; and defendants' exhibits A through O. The record also includes a written stipulation of facts filed July 2, 1985.

ISSUES

The only issue identified by the parties at the time of hearing is a determination of claimant's entitlement to compensation for permanent partial disability. It was stipulated by the parties in the written stipulation that claimant did sustain an injury which arose out of and in the course of her employment at Answer Iowa, Inc., on May 20, 1983 while lifting a wooden case of empty pop bottles. It was further stipulated that claimant underwent surgery and sustained a 10 percent permanent partial impairment as a result of the injury according to William R. Boulden, M.D. It was further stipulated that claimant had been paid all healing period benefits and 50 weeks of permanent partial disability compensation at the rate of $92.68 per week which was stipulated to be the correct rate of compensation. The stipulation further showed claimant to be 59 years of age at the time of hearing. The stipulation further showed claimant to have worked an average of 28 hours per week with pay at the rate of $5.02 per hour while she was employed at Answer Iowa, Inc.

REVIEW OF EVIDENCE

Claimant testified that she graduated from Ottumwa High School in 1944 and has no other formal education or training. She stated that prior to commencing employment with Answer Iowa, Inc., she had worked filling orders for a wholesale drug company, as a billing clerk, rate clerk, cashier for two trucking companies and as a telephone operator.

Claimant testified that she had been employed as a night operator at Answer Iowa, Inc., and normally worked three nights on one week and four nights the following week on a alternating basis. Her duties involved receiving calls, dispatching pages, book work and cleanup work. Claimant stated that she had requested to be assigned to work 25 hours per week.

Claimant testified that she was hospitalized for back problems in 1974 and that she had further back problems in 1978 or 1979. She did not recall what event had brought on the problems but stated that following her recovery she was able to return to her job at Answer Iowa, Inc. She denied having any other back problems which interrupted her work during the span of 1967 through 1983 until the May 20, 1983 injury. She agreed that she had taken sick leave on occasion for her back problems but stated that prior to 1983 her treatment had been in the nature of physical therapy and injections. She stated that she had not been placed in traction prior to 1983, did not recall any restrictions upon her activities being recommended by physicians prior to 1983. She denied being hospitalized for back problems in 1971.

Claimant testified that prior to 1983 she could work a full eight hour shift without any problem and that she also performed all of the housework and yard work at her home.

Claimant testified that when she was injured in 1983 she had been cleaning a meeting room. She stated that the task included picking up empty pop bottles. Claimant related that she had stooped over to pick up a wooden case full of empty glass pop bottles when she experienced pain in her back below the waist. She stated that she let go of the case and performed her other duties of taking calls and performing book work for the remainder of the shift. Claimant stated that during the evening she continued to experience discomfort and limited her activities to taking calls and doing book work.

Claimant testified that she sought medical care from her regular physician, D. Dale Emerson, M.D. She stated that she was referred to Scott P. Neff, D.O., and William R. Boulden, M.D., by the insurance carrier. Claimant stated that she has followed the recommendations which her physicians have made and has tried to comply with the restrictions contained on the release given by Dr. Boulden.

Following surgery claimant was seen every two or three weeks by Barbara Chaldy, R.N., M.S. Claimant stated that she reported her job seeking activities to Chaldy but that Chaldy did not give her any job leads. Claimant testified that she consulted Paul Halferty, a counselor with the Iowa Rehabilitation, Education and Services Branch of the Department of Public Instruction on the recommendation of Chaldy.

Claimant testified that she has obtained a part-time position through a federally funded senior citizen employment program. She stated that she performs general office and clerical work. Claimant testified that the job has been adapted so that she need not perform filing in the bottom two drawers of file cabinets. Claimant works four hours per day, five days per week and is paid $3.35 per hour. Claimant stated that the position is of indefinite duration and that there is possibly a two year limit upon it. She started November 19, 1984.

Claimant testified that after sitting for 30 or 40 minutes she needs to get up and move about to relieve discomfort in her back and hips. She stated that she has not tried to work more than a four hour shift since her surgery and does not feel that she could work a full eight hour shift. She stated that she rides a bus to and from work and that upon returning home following work she is quite tired and rests. She stated that she would like to work as she did at Answer Iowa, Inc., but feels that her back would not permit her to do so. Claimant stated that she now does not do her own yard work and that her daughter performs the vacuuming and scrubbing portions of her housework.

Claimant testified that Stan Hawkins of Liberty Mutual Insurance Company told her that she could not return to work at Answer Iowa, Inc.

Roberta Stice testified that she sees claimant nearly every day. Stice testified that since May 1983 claimant's activities around her home have decreased substantially and that claimant no longer does her own yard work, vacuuming or scrubbing floors.

Stice stated that when claimant returns home from work she seems tired and lays down on the couch or bed for 30 minutes to one hour. She stated that claimant does her own laundry but does not carry baskets of wet clothes. Stice felt that claimant was happy to obtain the job which she presently holds.

Gretta Nydle testified that she has been the manager of Answer Iowa, Inc., since June 13, 1983. She confirmed claimant's testimony concerning the duties of claimant's position. Nydle testified that claimant perferred to work three nights per week but that since claimant's injury the work force has been changed so that the present night operator works 40 hours per week. Nydle testified that claimant took sick leave on several occasions due to her back and used a pillow behind her back when working.

Nydle testified that claimant had attempted to return to work on June 26, 1983 but only came in one night. She stated that she sent exhibit O to claimant and on a later occasion she found exhibit N lying on her desk.

Nydle testified that Answer Iowa has no four hour night shifts. She stated that the business uses three eight hour shifts and one six hour shift which is a day shift. She confirmed that she performs the hiring for Answer Iowa, Inc. Nydle stated that the letter, exhibit O, was the last communication between her and claimant and that following it neither of them called the other. Nydle stated that when she received exhibit N she forwarded it to Liberty Mutual. Nydle agreed that there is much unemployment in Ottumwa, Iowa.

Claimant's exhibit 1 is a written industrial disability appraisal prepared by G. Brian Paprocki. He felt that claimant was 100 percent industrially disabled due to contributory factors of her inability to return to her employment with Answer Iowa, Inc., her medical restrictions, limited transferable skills and her advanced age. He did not believe that she was competitively employable.

Claimant's exhibit 2 is a report from Paul Halferty, a counselor with the Rehabilitation, Education and Services Branch of the Iowa Department of Public Instruction. He characterized claimant's current employment as "noncompetitive." He declined to open a case file for claimant because he did not believe that he could place her in any type of competitive employment within the 10 county geographical area served by his office.

Exhibit A is a collection of medical records concerning claimant's hospitalization at the Ottumwa hospital in 1974 for an acute back strain. X-rays taken at that time were interpreted as showing claimant to have mild osteoarthritic spurring in the dorsal spine and partial sacralization of the right transverse process of the fifth lumber vertebra.

Exhibit B is a collection of medical records showing claimant to have received outpatient care for back pain in 1978.

Exhibit C shows claimant to have been hospitalized at St. Joseph Hospital on August 13, 1979 with complaints of back pain. An x-ray report again showed degenerative changes in the posterior apophyseal joints and a condition described as a "transitional vertebra with partial lumbarization of the S1 vertebral body segment." She was also diagnosed as having bursitis of the hips. Exhibit D is a duplicate of the x-ray report which appears in exhibit C.

Exhibit E is claimant's emergency room record from May 21, 1983 wherein she was diagnosed as having an acute back strain.

Exhibit F contains an x-ray report which again shows the transitional vertebra at the lumbosacral junction, osteoporosis and degenerative changes. The exhibit shows claimant to have received physical therapy.

Exhibit G is a collection of records and reports dealing with claimant's evaluation and care from Drs. Neff and Boulden.

Exhibit H is a series of reports from Barbara Chaldy, rehabilitation cousultant.

Exhibit I is a report from David M. Paul, M.D., who examined claimant on December 18, 1984. He reports that claimant described her discomfort as an ache or a hurt and a feeling of tiredness. He found her overall condition to be "status postoperative for lower left lumbar decompression laminotomy." He felt that she could work at least four hours per day initially and that she should attempt a gradual increase in her work hours. He did not find her to have any appreciable functional limitations.

Exhibit J is a summary of claimant's work hours for 1982 and 1983. Exhibit K is a collection of notes which claimant had from time to time provided to Gretta Nydle. Exhibit L shows claimant's useage of her sick leave entitlement.

Exhibit M is the deposition of William R. Boulden, M.D., taken June 18, 1985. Dr. Boulden testified that claimant had been suffering from degenerative spurring in her spinal canal which was compromising the openings were the nerves exit. He stated that on December 16, 1983 he performed a decompression laminectomy to relieve that condition. He stated that claimant did not have a ruptured disc. He characterized the condition as one which had preexisted for a long time. (Exhibit M, pages 6 and 7). Dr. Boulden stated that claimant had a 10 percent permanent partial impairment of her lumbar spine based on the surgery and recommended that she not be placed in a position where she had to perform repetitive bending, stooping, lifting or prolonged sitting. He felt that an exercise program would decrease some of her symptoms. (Exhibit M, pages 8 and 9).

Concerning the cause of claimant's present condition, Dr. Boulden stated: (Exhibit M, pages 13 and 14)

> A. As I stated earlier, I think she had a preexisting condition with a certain disability from that point, or from that entity, of spinal stenosis. I think the accident has attributed another percentage, and that percentage I rated her out at 10 percent, based on the fact that conservative measures had not helped her that necessitated trying surgery....my opinion is I think the injury, so described, accentuated a preexisting condition which necessitated surgery. The surgery is what I rated her out as.

Dr. Boulden stated that his normal practice is to have his patients gradually increase their work activities to the extent that their symptoms permit. (Exhibit M, page 14)

Exhibit N is Dr. Boulden's release to permit claimant to return to work on July 30, 1984.

Exhibit O is a letter to claimant from Gretta Nydle indicating that claimant's group life and health insurance coverage was being terminated.

APPLICABLE LAW AND ANALYSIS

There is little conflict in the record of this case. The many stipulations leave determination of claimant's entitlement to compensation for permanent partial disability as the only remaining issue in the case. This also carriers with it, however, the necessity for determining how much of claimant's current disability is related to the injury of May 20, 1983.

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

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).

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). If a worker already has some disability and the disability is increased by compensable injury, the worker is entitled to compensation to the extent of the increased disability. DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777, 780 (Iowa 1971).

Dr. Boulden clearly recognized that claimant had some preexisting disability as a result of her spinal stenosis. He also stated that the accident produced additional disability, which he rated at 10 percent of the lumbar spine. This is a case where claimant had a preexisting disability which had been symptomatic. It was not latent or undiscovered. Although the record does not reflect that an impairment rating had previously been imposed there are certainly sufficient indications in the record to show that some permanent partial impairment did exist prior to May 20, 1983. Accordingly, claimant's recovery is limited to the disability produced by the injury and she is not entitled to recovery for the preexisting condition.

Industrial disability means reduced earning capacity. Bodily impairment is merely one factor affecting industrial disability. Other factors include the worker's age, intelligence, education, qualifications, experience and the effect of the injury on the workers' ability to obtain suitable work. Doerfer Division of CCA v. Nicol, 359 N.W.2d 428, 438 (Iowa 1984).

Paul Halferty and G. Brian Paprocki both believe that claimant is not employable in competitive gainful employment. Claimant searched for work for a significant amount of time. The position which she obtained does not appear to have been under truely competitive conditions. Claimant has made a prima facie case for a showing of total disability. Guyton v. Irving Jensen Company, ___ N.W.2d ___ (Iowa 1985). Although the burden is on the employer, evidence which has a bearing upon the issue of claimant's disability is properly considered, regardless of which party introduced it. Claimant's position with Answer Iowa, Inc., could be characterized as sedentary. It would seem that the employer would have had the ability to adapt the position to avoid the vacuuming and cleaning. The record shows that claimant and Nydle did not discuss any return to work. The record also shows, however, that the employer, acting through its insurance carrier, hired a private rehabilitation consultant to assist claimant in finding employment. It can only be concluded that the employer felt that claimant was not capable of performing the work of her former position. The decision was made to hire a rehabilitation consultant. No attempt was made to restore claimant to her former position either directly by the employer or through the rehabilitation consultant. Claimant testified that a representative of Liberty Mutual had informed her that she would not be restored to her former position and the events which occurred corroborate her testimony. When the nature of the former position is considered, the employer's lack of re-employment indicates that the employer felt that claimant had very substantial limitations.

According to the medically imposed restrictions it is clear that claimant is not totally disabled from all forms of competitive gainful employment. Claimant has obtained employment but the position does not provide a significant degree of long term job security. Claimant would appear to have the capacity to work as a retail store cashier and to perform receptionist or billings clerk, all of which are positions for which a reasonably stable job market does exist. Her work history, education and training are such that any employment which she is able to obtain is likely to be a minimum wage type of position. That factor alone shows a significant loss of earning capacity when compared with her $5.00 per hour position with Answer Iowa, Inc. The Ottumwa area has a depressed local economy as shown at several points in the record. It is found that the prevelant relatively high unemployment rates are a substantial factor in claimant's inability to find competitive gainful employment. Webb v. Lovejoy Construction Company, II Iowa Industrial Commissioner Report 430 (1981). The prevailing high unemployment rates effect all unemployed workers similarly. Another factor to be considered is that claimant is approaching the age where it is anticipated that most workers retire from gainful employment. Accordingly, it would be inconsistent to award her a lifetime of total disability compensation when her earnings were likely to cease in the near future due to normal retirement even if no injury had occurred. Becke v. Turner-Busch, Inc., 34 Bienniel Report 34 (1979).

Claimant appeared at hearing and is found to be a credible witness. She appeared to be of at least average intelligence and reasonably motivated to be gainfully employed. She has physical limitations. She does not appear to have any technical or highly specialized work skills which would enhance her employability. When all the appropriate factors are considered, it is found and concluded that the injury of May 20, 1983 produced industrial disability which is 30 percent of total disability.

FINDINGS OF FACT

1. Claimant injured her back on May 20, 1983 when lifting a case of pop bottles while cleaning the meeting room at her employer's place of business. The injury was an aggravation of a preexisting condition which had independently produced some ascertainable disability prior to the time of the injury.

2. Claimant is 59 years of age.

3. Claimant is a high school graduate and has work experience as a telephone operator, cashier, billing clerk, limited bookkeeping experience, and general office clerical experience.

4. Claimant is of at least average intelligence, emotionally stable and motivated to be gainfully employed.

5. As a result of the injury claimant sustained a 10 percent permanent functional impairment of the lumbar spine. She is restricted in her ability to perform repetitive bending, stooping, lifting and prolonged sitting.

6. The geographical area where claimant resides has an unusally high unemployment rate.

7. Following the injury claimant did not return to work with the defendant employer and was only able to find suitable work through a government funded program.

8. Claimant's inability to find work in the competitive job market is more a factor of the prevailing unemployment rates and her age than it is a result of her physical impairment.

CONCLUSIONS OF LAW

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

When the disability which claimant incurred as a result of the May 20, 1983 injury is evaluated industrially, it is 30 percent of total disability.

Even though claimant made a prima facie showing of total disability, the other evidence in the case is sufficient to show that she is not an "odd-lot" employee.

Where defendants have already paid 50 weeks of compensation for permanent partial disability, an additional 100 weeks is due.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred fifty (150) weeks of compensation for permanent partial disability at the rate of ninety-two and 68/100 dollars ($92.68) per week commencing July 31, 1984. Defendants shall receive credit for the fifty (50) weeks of permanent partial disability compensation which they have previously paid. Any past due unpaid amounts shall accrue interest from the date the same came due under the provisions of 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 claim activity reports as requested by this agency pursuant to Rule 500-3.1.

Signed and filed this 16 day of October, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT D. CIEMINSKI, Claimant,	FILE NO. 669545
vs.	D E C I S I O N
RAGAN PLUMBING & HEATING, Employer,	O N
and	85.27 B E N E F I T S
IOWA MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	FILED NOV 22 1985 IOWA INDUSTRIAL COMMISSIONER

This is a proceeding brought by Robert D. Cieminski, claimant, against Ragan Plumbing & Heating, employer, and Iowa Mutual Insurance Company, insurance carrier, for further 85.27 benefits as a result of an injury on September 13, 1979. An arbitration decision was filed in this matter on August 31, 1983 awarding claimant permanent partial disability of 35 percent of the body as a whole. The parties entered into and filed the following stipulations:

1. This is a proceeding for medical benefits (§85.27, Iowa Code).

2. Claimant seeks payment of the bills included as a part of the stipulated record, representing physical therapy services furnished by St. Joseph Mercy Hospital, Clinton, Iowa (Total: $3,897.00), and Jane Lamb Health Center, Clinton, Iowa (Total: $1,676.00).

3. The Employer and Insurance Carrier, as stated in their Answer filed herein (¶15), admit the outstanding balances as set forth herein, but contend that such charges are excessive and were unnecessary.

4. The parties agree to submission of these issues for determination on the following stipulated record:

(a) The Arbitration Decision filed herein August 31, 1983.

(b) Claimant's Petition, filed September 21, 1984.

(c) The Employer/Insurance Carrier's Answer, filed November 19, 1984.

(d) The Deposition of Dr. Jay P. Ginther, taken February 1, 1985, including Deposition Exhibits "A", "B" and "C".

Jay Paul Ginther, M.D., who testified by way of deposition, indicated that he is an orthopedic surgeon and saw claimant regarding an injury to his shoulder. Dr. Ginther indicated that on July 7, 1981 he performed surgery on claimant's shoulder and six weeks later started daily physical therapy. In December of 1982, Dr. Ginther advised claimant to seek physical therapy using a Cybex unit. Dr. Ginther indicated that the therapy with the Cybex unit increased his rate of recovery. Dr. Ginther opined the physical therapy bills were necessary and as far as he knew the charges were the standard prices.

No live testimony was presented.

482

ISSUE

The only issue that the parties have submitted is whether the charges set out in the stipulation are fair and reasonable.

APPLICABLE LAW

Section 85.27 states in part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatrial, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services....
>
> Charges believed to be excessive or unnecessary may be referred to the industrial commissioner for determination, and the commissioner may, in connection therewith, utilize the procedures provided in sections 86.38 and 86.39 and conduct such inquiry as he shall deem necessary....

ANALYSIS

The uncontroverted testimony of Dr. Ginther not only indicated that the charges for the medical bills submitted were fair and reasonable but that they were prescribed by him and shortened the period of claimant's recovery. Defendants may look at the total amounts and conclude there is a great deal of expense involved in claimant's therapy but without some evidence to support a finding that the therapy was unnecessary or the changes unreasonable it would be mere speculation to make such a conclusion.

The undersigned is unable to read all of the attachments that are part of the deposition exhibits. However, this does not become a major problem because the parties stipulated to the amounts which remain unpaid.

FINDINGS OF FACT and CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. On September 13, 1979 claimant received an injury arising out of and in the course of his employment.

Finding 2. As a result of his injuries claimant's treating physician prescribed physical therapy.

Finding 3. The physical therapy prescribed improved claimant's condition.

Finding 4. The charges for the physical therapy were the standard prices.

Conclusion A. Defendants are responsible for the physical therapy bills submitted.

THEREFORE, defendants are to reimburse claimant three thousand eight hundred ninety-seven and no/100 dollars ($3,897.00) for the bill of St. Joseph Mercy Hospital and one thousand six hundred seventy-six and no/100 dollars ($1,676.00) for Jane Lamb Health Center.

Defendants are to be given credit for amounts previously paid against these expenses.

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 22nd day of November, 1985.

David E. Linquist

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD CURRY, Claimant, vs. L & L INSULATION, IOWA ASBESTOS and ICM INSULATION Employers, vs. U. S. FIDELITY AND GUARANTY COMPANY, EMPLOYERS MUTUAL COMPANIES, and WESTERN CASUALTY & SURETY COMPANY, Insurance Carriers, Defendants.	File No. 728712 RULING ON MOTION FOR SUMMARY JUDGMENT

FILED
OCT 14 1985
IOWA INDUSTRIAL COMMISSIONER

Defendant Iowa Asbestos filed its motion for summary judgment June 25, 1983. Claimant filed a resistance under this file number but addressing the issue presented in Western Casualty's May 24, 1985 motion for summary judgment in file number 728713 on July 17, 1985. Oral arguments were made before the undersigned August 8, 1985 at the office of the industrial commissioner in Des Moines, Iowa.

In its motion, defendant Iowa Asbestos asserts that claimant was employed intermittently with it from July 1957 through October 29, 1976 and that claimant was not disabled from asbestos within three years of October 29, 1976 as required for liability under section 85A.12 of the occupational disease law. Defendant supports its motion with a supporting statement and with a report of Robert D. Conner, D.O., dated Nobember 19, 1984 as attached to interrogatories served May 14, 1985 and by affidavit of Dana Kever, comptroller for Iowa Asbestos Company. Kever states he has control and custody of the company's business records and that these show claimant was not employed for the company after October 29, 1976. Dr. Connor in the medical report indicates claimant's pulmonary function study of December 5, 1982 was essentially within normal limits. He further reports chest x-rays from March 22, 1976 onward show scattered modular calcifications in the lung field which in light of claimant's history as an asbestos worker may in fact represent old asbestos lesions. He states the probability of an asbestos-related pneunoconiosis exists. Claimant's petition was filed May 27, 1983 and as to injury date refers the reviewer to paragraph 10 which states: "Exposure as insulation worker to conditions of work and various insulation materials during entire employment with said employers, the nature of said injury being discovered 12-5-82." Claimant's written resistance in no way addressed the issue presented in defendant's motion. Oral arguments made were consistent with the motion and resistance.

APPLICABLE LAW AND ANALYSIS

In order to be entitled to a summary judgment, defendant Iowa Asbestos must show there is no genuine issue of material fact involved in the case and that summary judgment should be entered in its favor as a matter of law. Iowa Dept. of Trans. v. Read, 262 N.W.2d 533 (Iowa 1978); Schulte v. Mauer, 219 N.W.2d 496 (Iowa 1974). In determining whether a genuine issue of material fact exists which would preclude granting the motion for summary judgment, the agency must view all material before it in a light most favorable to the opposing party. Steinbach v. Continental Western Insurance Co., 237 N.W.2d 780 (Iowa 1976); Schulte, 219 N.W.2d 496. Every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 195 (Iowa 1985). (Citations omitted) In resistance to a motion for summary judgment, the resisting party must set forth specific facts showing there is a genuine issue for hearing. Graham v. Kuker, 246 N.W.2d 290 (Iowa 1976); Iowa Civil Rights Commission v. Massey-Ferguson Inc., 207 N.W.2d 5 (Iowa 1973). A party opposing a motion for summary judgment is not entitled to rely on the hope of a subsequent magical appearance at trial of a genuine issue of material fact. Prior v. Rathjen, 199 N.W.2d 327 (Iowa 1972). Where there is no genuine issue of fact to be decided, the party with a just cause should be able to obtain a judgment promptly and without the expense and delay of trial. Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974).

Section 85A.10 provides:

> Where compensatin is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, shall be liable therefor. The notice of injury and claim for compensation as hereinafter required shall be given and made to such employer, provided, that in case of pneumoconiosis, the only employer liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of not less than sixty days.

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 one year in case of any other occupational disease, after the last injurious exposure to such disease in such employment, or in case of death, unless death follows continuous disability from such disease commencing within the period above limited for which compensation has been paid or awarded or timely claim made as provided by this chapter and results within seven years after such exposure.
>
> In any case where disablement or death was caused by latent or delayed pathological conditions, blood, or other tissue changes or malignancies due to occupational exposure to X rays, radium, radioactive substance or machines, or ionizing radiation, the employer shall not be liable for any compensation unless claim is filed within ninety days after disablement or death or after the employee had knowledge or in the exercise of reasonable diligence should have known his disablement was caused by overexposure to ionizing radiation or radioactive substances, and its relation to employment.

Section 85A.4 provides:

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

In McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188-91 (Iowa 1980), the court examined section 85A.10 and held that the section does not require a claimant to prove causation by any particular employer, or that the last "injurous exposure" in fact caused his disease; claimant need only prove certain hazardous conditions induced his disease and that these conditions existed at the last place he was employed in a concentration sufficient to cause the disease. In Doefer Division of CCA v.

Nicol, 359 N.W.2d 428, 433 (1984), the Iowa court adopted the time of disability test described in 4 A. Larson, The Law of Workmen's Compensation § 95.25(a). Larson states:

> In the search for an identifiable instant in time which can be used to determine...who is the last employer for purposes of the last injurious exposure rule, the date of disability is frequently chosen. Once the date of disability is determined, the determination of which insurer is liable is accomplished by simply searching backwards to find the last time when claimant was exposed to the disease-causing substance, subject, of course to the jurisdiction's rules on the degree of exposure required.
>
> When the onset of disability is the key factor in assessing liability under the last injurious exposure rule, it does not detract from the operation of this rule to show that the disease existed under a prior employer or carrier, or had become actually apparent, or had received medical treatment, or, indeed...had already been the subject of a claim filed against the prior employer, so long as it had not resulted in disability.

Defendant Iowa Asbestos is not entitled to judgment as a matter of law. Questions of fact remain as to when or if claimant became actually incapacitated from performing work or from earning equal wages in other suitable employment. Questions of fact remain as to whether claimant was employed after leaving Iowa Asbestos and as to whether claimant was exposed to hazardous conditions in any such employment which induced or might have induced his alleged occupational disease. Questions of fact exist as to whether claimant has sustained any occupational disease. Dr. Connors' report on its face raises fact questions. He both notes claimant has pulmonary function within normal limits and that claimant has had lung calcification since at least March 22, 1976. He noted on December 5, 1982 that the probability of asbestos related pneumoconiosis existed. These are all unresolved factual issues which bar summary disposition of this matter. It is noted that claimant, as the nonmoving party, has not set forth facts showing a genuine issue for hearing exists. Had movant, through its motion and supporting materials and through the pleadings, shown the absence of any factual issue for trial, claimant's inexcusable failure to properly defend against Iowa Asbestos' motion would have been wholly untenable and would certainly have resulted in summary judgment in movant's favor.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Genuine issues of material fact remain which cannot be resolved on the pleadings and materials submitted in defendant Iowa Asbestos' motion for summary judgment.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Defendant Iowa Asbestos is not entitled to judgment in its favor as a matter of law.

ORDER

THEREFORE, IT IS ORDERED:

Iowa Asbestos' motion for summary judgment is denied.

Signed and filed this 14th day of October, 1985.

Helen Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRED CURRY,	:	
Claimant,	:	File No. 728713
vs.	:	RULING ON MOTION FOR
L & L INSULATION, IOWA ASBESTOS and ICM INSULATION	:	SUMMARY JUDGMENT
	:	AND
Employers,	:	OTHER MATTERS
vs.	:	
U. S. FIDELITY AND GUARANTY COMPANY, EMPLOYERS MUTUAL COMPANIES, and WESTERN CASUALTY & SURETY COMPANY,	:	FILED
	:	NOV 25 1985
Insurance Carriers, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

Claimant filed his motion styled as a summary judgment September 18, 1983. Resistances were filed on behalf of the named defendants. An oral hearing on this matter was held before the undersigned deputy industrial commissioner October 23, 1985. Claimant's motion is less than artfully styled and moves for summary judgment against the defendants seeking a declaratory judgment to ascertain insurance coverage among the various insurance company defendants and to determine which defendant is liable on this claim. It is difficult to determine whether claimant seeks a summary judgment as provided for in Iowa Rule of Civil Procedure 237 or a declaratory judgment as provided for in Iowa Rule of Civil Procedure 261. In the interests of finally disposing of this motion, claimant's motion will be treated as if he had sought a declaratory judgment regarding the questions of insurance coverage and then had sought summary judgment on that motion as provided in Iowa Rule of Civil Procedure 237(a). No statement of uncontroverted material facts material to the liability issues accompanies claimant's motion.

Claimant argued orally that filings of record support a ruling that Iowa Asbestos was the last employer for whom claimant worked for 60 days or more and, therefore, Iowa Contractors Compensation Group, should be declared the insurance provider liable to claimant. Defendants variously argued that factual issues remain as regards this question and that due process requires that the question of liability be tried on the merits with all potentially liable defendants heard.

APPLICABLE LAW AND ANALYSIS

In order to be entitled to a summary judgment, defendant must show there is no genuine issue of material fact involved in the case and that summary judgment should be entered in its favor as a matter of law. Iowa Dept. of Trans. v. Read, 262 N.W.2d 533 (Iowa 1978); Schulte v. Mauer, 219 N.W.2d 496 (Iowa 1974). In determining whether a genuine issue of material fact exists which would preclude granting the motion for summary judgment, the agency must view all material before it in a light most favorable to the opposing party. Steinbach v. Continental Western Insurance Co., 237 N.W.2d 780 (Iowa 1976); Schulte, 219 N.W.2d 496. Every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 195 (Iowa 1985). In resistance to a motion for summary judgment, the resisting party must set forth specific facts showing there is a genuine issue for hearing. Graham v. Kuker, 246 N.W.2d 290 (Iowa 1976); Iowa Civil Rights Commission v. Massey-Ferguson Inc., 207 N.W.2d 5 (Iowa 1973). A party opposing a motion for summary judgment is not entitled to rely on the hope of a subsequent magical appearance at trial of a genuine issue of material fact. Prior v. Rathjen, 199 N.W.2d 327 (Iowa 1972). Where there is no genuine issue of fact to be decided, the party with a just cause should be able to obtain a judgment promptly and without the expense and delay of trial. Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974).

Claimant is not entitled to summary judgment as a matter of law. Beyond the procedural irregularities in claimant's motion, it cannot be said that the questions of employer and insurer liability can be resolved at this juncture. As defendants Iowa Asbestos Company and Western Casualty & Surety Company ably state in their resistance to the motion, "[f]actual issues concerning liability of particular defendants in this case should be resolved by evidentiary hearing, following discovery performed by the parties to the extent allowed by the Iowa Rules of Civil Procedure and determined to be necessary by the parties. Claimant's motion improperly seeks to have ultimate factual issues in the case determined without the benefit of completed discovery or an evidentiary hearing."

For like reasons, claimant's motion to bifurcate under section 85.21 filed August 20, 1985 is denied. Questions as to the compensability of claimant's claim as well as questions concerning which, if any, defendant is liable remain. Without a clearly reasonable belief that claimant's claim is compensable and benefits are due claimant, an order of payment from one or several defendant employers is inappropriate.

Claimant's motion to amend his petition to include a section 86.13 penalty issue is sustained in accordance with the rule enunciated in Galbraith v. George, 217 N.W.2d 598 (Iowa 1974).

All defendants were ordered to report their compliance with the discovery order filed August 19, 1985 in accordance with claimant's report of defendants' noncompliance filed September 13, 1985. All defendants have done so and it does not appear that further action by the undersigned regarding compliance is warranted.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Material issues of fact remain as to the compensability of claimant's claim.

Material issues of fact remain as to which, if any, employers and insurance carriers are liable to claimant.

Granting claimant's section 86.13 amendment will not be prejudicial and will not delay progress of this case.

All defendants have substantially complied with the August 19, 1985 discovery order and further action regarding the order is not now warranted.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established he is entitled to summary judgment as to employer and insurer liability as a matter of law.

Claimant's claim is not ripe for an order of payment of benefits due claimant under section 85.27.

Claimant's 86.13 amendment may appropriately be granted.

Defendants are in substantial compliance with the August 19, 1985 discovery order and the October 23, 1985 oral order to report on claimant's report on compliance with the August 19, 1985 order.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's motion for summary judgment is denied.

Claimant's motion for section 86.13 order of payment of benefits due claimant is denied.

Claimant's motion to amend to include an 86.13 issue is sustained.

No further action is now taken regarding the August 19, 1985 discovery order and claimant's subsequent report of compliance thereon.

Signed and filed this 25th day of November, 1985.

Helen J Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID DES PLANQUE, Claimant, vs. FIRESTONE TIRE & RUBBER CO., Employer, and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	FILE NO. 717001 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 12 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a review-reopening proceeding brought by David Des Planque, claimant, against Firestone Tire & Rubber Co., employer, and Insurance Company of North America, insurance carrier, for further benefits as the result of an alleged injury on June 24, 1982. A memorandum of agreement was filed on January 11, 1983. A hearing was held on October 11, 1985 at Des Moines, Iowa and the case was fully submitted.

The record consists of the testimony of David Des Planque (claimant), Donald D. Des Planque, and Paul Neff; joint exhibits 1 through 6; and a joint stipulation, exhibit 7.

ISSUES

The issues presented by the parties at the time of the pre-hearing and the hearing are whether there is a causal relationship between the alleged injury and the disability on which he is now basing his claim and the extent of permanent partial disability benefits to which he is entitled.

SUMMARY OF THE EVIDENCE

On June 24, 1982 the claimant received an injury arising out of and in the course of his employment when, while working as a janitor, he slipped on some steps and twisted and jammed his left knee.

Claimant reported the injury immediately to the plant nurse. On the following day he saw John Gustafson, M.D., the plant doctor, who put him on light duty. He continued on light duty for approximately four weeks during which period he saw Dr. Gustafson about three times. Claimant requested to see a specialist and was sent to Ronald E. Bunten, M.D., who, after taking an arthrogram, diagnosed a small peripheral tear of the medial meniscus for which he recommended conservative "wait and see" treatment. After two months the claimant wanted more aggressive treatment so Dr. Bunten referred him to Stephen Taylor, M.D., an orthopedic surgeon.

On October 11, 1982 Dr. Taylor performed arthroscopy and a menisectomy at Iowa Methodist Hospital. The arthroscopy revealed a mild chondromalacia on the undersurface of the patella and a small radial tear of the medial meniscus with some fraying and some mild fragmentation in the adjacent tibial plateau surface. Both of these areas were debrided, irrigated, and drained.

The claimant returned to work on November 2, 1982. Claimant testified that after he returned to work he had pain daily like a dull ache or a toothache. He noticed it more during the break at about 3:30 a.m. or 4:00 a.m. Claimant indicated that he did not have too much difficulty with his left knee in 1983. He continued to work until his voluntary severance on August 9, 1985.

Dr. Taylor, claimant's treating orthopedic surgeon on February 24, 1983, assessed a permanent partial impairment of five percent of the lower left extremity based on the menisectomy.

The claimant first noticed additional problems when the golf season started in 1984. His game was worse; his handicap increased; and he needed to rest every 50 minutes. He noticed it most during his swing when he placed weight on his left knee. Sometimes the knee would buckle or give out on him. Claimant indicated it was hard to concentrate because of the pain. Claimant stated that when building large tires in the giant tire department or when moving heavy equipment in his regular heavy duty tire department his knee would buckle. Claimant testified that driving a car or cold weather would make his left knee stiff.

On February 12, 1985 the claimant saw Walter B. Eidbo, M.D., one time for an evaluation. In a report dated March 7, 1985, Dr. Eidbo summarized what the claimant told him about the injury. Dr. Eidbo reports that "the patient felt that 20 to 25 percent disability would be more reasonable for what he was disabled." Dr. Eidbo's objective physical findings are a 1 cm. scar on the median side of the left knee; full motion to the knee; and that x-rays taken by him of both knees did not show any real damage or changes. Dr. Eidbo's clinical diagnosis found that the claimant had an internal derangement of the left knee with some chondromalacia and arthritis which he evaluated as "four to eight percent would average down to approximately a five or six percent total body disability on the basis of the left knee. This would average down to a five or six percent disability."

A clarifying letter from Dr. Eidbo on July 25, 1985 to the claimant's counsel only repeated his earlier quoted rating. A second clarifying letter to claimant's counsel dated September 20, 1985 from Dr. Eidbo translated this rating as follows: "It would be my opinion that the specific amount of disability as pertains solely to Mr. Des Planque's knee injury and the resultant derangement and arthritis in his knee would be approximately 20 percent."

Donald D. Des Planque (uncle of the claimant) and Paul Neff (friend of the claimant) have respectively fished and played golf with the claimant in the last year. They both corroborated the claimant's testimony that they observed him limp; heard him complain about his knee; and saw it buckle on a few occasions. On cross-examination Mr. Neff revealed that the claimant was able to play 18 holes of golf two or three times a week on a number of occasions. Sometimes they walked; sometimes they used a cart due to his knee.

On cross-examination the claimant conceded that he had not returned to Dr. Gustafson, Dr. Bunten or Dr. Taylor after his knee began to give him additional trouble in 1984. Nor did he seek any treatment for it from Dr. Eidbo or any other doctor of his own choosing on the assumption that it was just something that he was going to have to live with. Dr. Eidbo did not recommend any further treatment or surgery on the knee. Furthermore, the claimant admitted that he did perform all of the duties of his job as a heavy duty tire builder from when he returned to work after the surgery in November 1982 until his voluntary severance on August 9, 1985. He also admitted that he played golf, went fishing, danced and attended a rock-n-roll reunion notwithstanding the fact these activities sometimes caused him difficulties. He found that his ability to participate was more limited than before his injury.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 24, 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).

Permanent partial disability benefits are paid to an employee for a scheduled member injury pursuant to Iowa Code section 85.34(2). A knee is treated as a portion of the leg. Wichers v. Johnson & Sons, 224 Iowa 1097, 267 N.W. 841 (1937). When the loss of a scheduled member is something less than total loss of function, benefits are paid for the number of weeks that the percentage of functional loss bears to the total loss of the member. Lawyer & Higgs, Iowa Workers' Compensation -- Law and Practice, section 13-4.

The parties are in agreement that there is a loss to a scheduled member, to wit the left knee and it is to be rated as a percentage of the leg. The only question is the percentage of permanent partial disability to be allowed.

Dr. Taylor, an orthopedic surgeon and the treating physician, rated the disability at five percent on February 24, 1983. The claimant saw Dr. Eidbo, a general practitioner, on only one occasion for an evaluation, on February 12, 1985. He told Dr. Eidbo he thought his disability was 20 to 25 percent. Dr. Eidbo allowed him 20 percent of the knee based upon internal derangement and arthritis resulting from this injury. At the same time Dr. Eidbo states that he had full motion and x-rays do not show any real damage or changes.

The claimant testified that after a period of "not too much difficulty" in 1983 he suffered stiffness, weakness and pain causing him to limp and sometimes causing the knee to buckle under stress in 1984. At the same time he was able to perform all of the duties of his job from November 1982 until his voluntary early separation on August 9, 1985. Also he continued to play golf, dance and fish even though he encountered some difficulty in doing them.

The burden of proving causal connection and the degree of disability is upon the claimant by a preponderance of the evidence. His testimony as corroborated by his two witnesses is some evidence of increased disability. Dr. Eidbo's report is some evidence of increased disability. At the same time the fact that he could perform all of the duties at work and could continue to engage rather extensively in recreational activities of golf and dancing, coupled with the fact that he did not seek any further medical treatment for these increased symptoms would indicate the degree of increased disability would not be great.

Furthermore, Dr. Eidbo found the claimant has full motion and that the x-rays do not show any real damage or changes. Dr. Eidbo's report did add the element of arthritis which had not previously been mentioned. The claimant's testimony and the testimony of his witnesses did add the element of a knee that buckles under stress.

The greater weight of evidence indicates that claimant presently has a total functional impairment of 10 percent of the left lower extremity.

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 June 24, 1982 claimant was injured while working for defendant.

FINDING 2. As a result of his injury on June 24, 1982 claimant has a total physical impairment of 10 percent of the left lower extremity.

CONCLUSION A. Claimant has met his burden of proving that as a result of his injury on June 24, 1982 he is entitled to permanent partial disability of ten percent of the left lower extremity.

ORDER

THEREFORE, defendants are to pay unto claimant twenty-two (22) weeks of permanent partial disability at a rate of two hundred twenty-five and 44/100 dollars ($225.44) per week.

Defendants are to be given credit for all permanent partial disability payments previously made.

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.

The claimant is to pay the costs of this action. The defendants had already paid a permanent partial disability of five percent (5%) prior to hearing and offered to confess judgment to an additional seven and one-half percent (7 1/2%) at the time of the hearing which offer the claimant did reject at that time.

Defendants shall file a final report upon payment of this award.

Signed and filed this 12th day of November, 1985.

Walter R. McManus, Jr.

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
OCT 17 1985
IOWA INDUSTRIAL COMMISSIONER

VERDA E. DIEDE, Claimant,	:	
vs.	:	
CONTEMPORARY INDUSTRIES CORPORATION d/b/a 7-ELEVEN STORE NO. 402,	:	File No. 752991
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
U. S. INSURANCE GROUP,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Verda E. Diede, claimant, against Contemporary Industries Corporation, d/b/a 7-Eleven Store No. 402, employer, and U.S. Insurance Group, insurance carrier. The case was heard at Sioux City, Iowa on August 6, 1985 and was considered fully submitted upon conclusion of the hearing.

The record in the case consists of the testimonies of Verda E. Diede and Floyd Diede. Claimant's exhibit A and defendants' exhibits 1 through 8 were received into evidence. Official notice was taken of the life expectancy tables shown in Industrial Commissioner Rule 500-6.3(1), showing claimant to have a life expectancy of 858 weeks.

ISSUES

Claimant alleges that she sustained a compensable injury to her back on November 14, 1983 and seeks compensation for healing period and permanent disability incurred as a result of the alleged injury. She also seeks an additional award under the fourth unnumbered paragraph of section 86.13 of the Code for the alleged unreasonable delay or denial of compensation. That issue is bifurcated in accordance with Industrial Commissioner Rule 500-4.2. The issues identified by the parties at the time of hearing are whether claimant sustained an injury which arose out of and in the course of her employment; whether a causal relationship exists between the alleged injury and any disability which claimant has experienced; a determination of claimant's entitlement to weekly compensation; and a determination of the costs in accordance with the motion filed by claimant on December 12, 1984. It should be noted that the claim for costs was not identified as an issue in the order assigning the case for hearing. An order of deputy commissioner Mueller filed December 27, 1984 directed that the costs be taxed at the time of hearing. Accordingly, the issue of taxation of costs will be decided in this decision.

It was stipulated that in the event of an award, claimant's rate of compensation is $71.06 per week and that claimant last worked for the employer on November 14, 1983. The defense stipulated that the costs which claimant seeks to have taxed were actually incurred and official notice was taken of claimant's motion to tax costs and the bills attached thereto. It was further stipulated that healing period compensation in the total amount of $2,141.95 had been paid for the period of November 14, 1983 to June 13, 1984. It was also stipulated that defendants paid claimant $2,842.40 on January 29, 1985, representing an eight percent permanent partial disability of the body as a whole.

SUMMARY OF EVIDENCE

The following is a brief summary of pertinent evidence. All of the evidence received at hearing was considered when deciding this case.

Verda Diede testified that she has been a resident of Sioux City, Iowa for 40 years, is 63 years of age, and has been married to her husband, Floyd Diede, for 43 years.

Claimant testified that she is a high school graduate and that following high school, she took a one and one-half year business course in bookkeeping and typing. Claimant worked for the war department for two years commencing in 1942. She operated a Teletype machine. She stated that she has not used her business school training since 1944. Claimant's children are now grown but she stayed at home to raise the children until approximately 1960 when she obtained work as a clerk at a Woolworth's store in Sioux City. Claimant also worked as a clerk for a dairy company for approximately 15 years and began her employment with the defendant employer in the spring of 1977. Claimant stated that her duties for the defendant employer consisted of running the cash register, sacking groceries, stocking shelves, sacking ice, and general cleaning of the store. She stated that she usually worked alone. Claimant felt that stocking shelves in the cooler and bagging ice were the most strenuous part of her duties. She stated that she was required to lift cases of pop and beer.

Claimant denied having suffered any back injuries prior to November 13, 1983. She stated that she fractured her arm in 1978 from a fall on an icy street and she also has problems with her right hip which began at the time of that fall.

Claimant testified that on November 14, 1983 she was in the cooler at the store lifting a case of empty pop bottles when another stack of cases shifted and knocked her backwards. She stated that she fell onto her buttocks. She stated that the fall made her entire back hurt but she was able to get up and go to the cash register. Claimant stated that no one else was in the store at the time and that she reported the incident to the store manager, Maureen.

Claimant testified that she left work at approximately 4:00 p.m. and that during the night her back hurt so badly that she telephoned Robert E. Ashmore, D.O., who examined her and arranged for X-rays. She stated that the results from the X-rays were received on November 15 and she was sent to be fitted for a back brace. Claimant stated that she was hospitalized on November 16 where she was examined by E. M. Mumford, M.D., who advised her to continue using the back brace and who then assumed responsibility for her medical care. Claimant stated that she thereafter wore the back brace from the time she got up in the morning until going to bed at night, until July of 1984 when she limited it's use to long car rides or times when her back was bothering her. She stated that she has not worn it since October 1984. Claimant stated that she last saw Dr. Mumford on November 5, 1984 and has not returned because she did not feel that his care had actually helped.

Claimant stated that she continues to experience pain in her back constantly but that it is worse with activities such as lifting, bending, or stooping. She stated that she is able to do her housework with assistance from her husband. She stated that she also assists in gardening but that most of the work associated with it is performed by her husband. She stated that since her injury, her husband has assumed a greater share of the household and gardening work.

Claimant stated that sitting causes discomfort, depending upon the design of the chair. She stated that she takes daily walks for exercise. Claimant recalled Dr. Mumford telling her to return to work. Claimant stated that she did not feel that she would be able to do the lifting associated with her job and made no attempt to return. She stated that the company had a rule against sitting in the store and she made no inquiry about whether any type of light duty work would be available. She stated that the housework which she performs is not as strenuous as the work at the store.

Claimant testified that her husband was on vacation at the time she was injured and his vacation ran until January 1984 when he retired from his employment. She stated that both she and her husband currently draw social security. Claimant stated that she was 61 years of age when she was injured and had not planned to take social security at age 62. She stated that her plan had been to keep working until she was 65 and to work part-time thereafter. She stated that no one from the employer ever contacted her about returning to work or offered her a light job. She stated that she would rather be working than totally retired. She stated she enjoyed working.

Floyd Diede testified that claimant had no back problems before the injury. He stated that before claimant was injured, the housework did not take her very long to perform. He stated that now she starts projects which he has to finish. He felt that she is now more careful in her activities.

Claimant's exhibit A contains a collection of reports. Part I is a standard surgeon's report from Dr. Ashmore which indicates that claimant had suffered a compression fracture at the L3 and L4 levels of her lumbar spine and that the accident which she described was the only cause of the condition.

Part II of exhibit A is a collection of reports from Dr. Mumford. A report dated May 29, 1984 indicates that on May 23, 1984 claimant was directed to return to work in three weeks. A report dated July 12, 1984, directed to claimant's attorney, indicated that claimant's permanent partial disability would be around eight percent of the body due to the fracture healed with compression and residual symptoms. It also indicated that she would be seen again on September 5, 1984.

Part III of exhibit A is a collection of records from St. Lukes Regional Medical Center. Among them are an X-ray report of November 14, 1983 which diagnoses a compression fracture involving the second and third lumbar vertebrae. Another X-ray report dated January 13, 1984 also makes reference to the second and third lumbar vertebrae. The other entries in the records refer to the third and fourth lumbar vertebrae as the site of the compression fracture.

Defendants' exhibits 1, 2, 3, 4, and 5 are duplicates of records which are part of claimant's exhibit A.

Defendants' exhibit 6 is a report from Dr. Mumford dated August 30, 1984 which indicates he examined claimant on July 11, 1984 and again advised that she return to work. He stated that he evaluated her as having an impairment of eight percent of the body as a whole. The report indicates that X-rays showed sound healing of the fracture.

Defendants' exhibit 7 is a report from Dr. Mumford dated September 12, 1984. In the report he states that he evaluated her on September 5, 1984 and that she had improved but still had continuing complaints of pain. He stated that X-rays revealed her fractures to be well healed and that he advised her to decrease use of her brace and increase her activities.

Defendants exhibit 8 is a report from Dr. Mumford dated November 26, 1994 (the date is perceived as a typographical error and is assumed to be 1984). The report indicates minimal complaints, good mobility, and a lack of neurovascular alteration. It also indicates that claimant was directed to return if she was having further problems.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on November 14, 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 appeared at hearing and testified. She is found to be a credible witness. There is no evidence in the record which conflicts with her description of the injury. It is found that she did sustain an injury on November 14, 1983 which arose out of and in the course of her employment with Contemporary Industries Corporation, d/b/a 7-Eleven Store No. 402.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 14, 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).

Dr. Ashmore, in the standard surgeon report, line 8, found the fall at work to be the cause of claimant's condition. A compression fracture could be expected to result from a fall of the type claimant described, particularly with a person who exhibited osteoportic changes as indicated in exhibit 1. Claimant had immediate complaints and obtained immediate medical care. It is therefore found and concluded that the fall of November 14, 1983 which claimant described is a proximate cause of the compression fractures which were medically diagnosed and any disability which has resulted from those compression fractures.

Claimant seeks healing period compensation. As shown in exhibit 4, Dr. Mumford directed claimant to return to work on a date three weeks subsequent to May 23, 1984, the date he examined her. Such would be June 12, 1984. Exhibit 6 recommends that she return to work and provides an impairment rating. Exhibit 7 indicates that claimant had improved. Under section 85.34 of the Code, the healing period ends at the earlier of the three occurrences stated in the statute. Dr. Mumford released claimant to return to her normal employment on June 12, 1984, as shown in exhibit 4. Such makes June 11, 1984 the last day of her healing period. Accordingly, it is a total of 30 1/7 weeks, the precise amount which the stipulation of the parties showed defendants to have previously paid, although the dates shown in the stipulation vary slightly.

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 impairment 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).

Claimant's recent work experience is limited to that of a retail sales cashier. She could perform such work in a number of retail establishments where substantial lifting was not required. Such types of establishments could include clothing or fabric stores or restaurants. She is not totally disabled. Claimant has, however, been significantly limited in the number of places where she could be employed. She has in fact lost access to a very substantial part of the job market which was previously open to her. The fact that she is approaching normal retirement age is a factor when considering her industrial disability but it is not a complete defense. Diederich v. Tri-City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935). Brecke v. Turner-Bush, Inc., 34th Biennial Report 34 (1979). Claimant's office work experience and training is too remote to be of substantial value. It is found and concluded that when claimant's disability is evaluated industrially, it is 20 percent of total disability.

Industrial Commissioner Rule 500-4.33, in subsection (6), includes the reasonable costs of obtaining no more than two doctors' or practitioners' reports. The charge of $35.00 from Dr. Mumford clearly follows within the Rule. The claim for $12.75 paid to St. Lukes Regional Medical Center for copies of hospital records is not as obviously within the Rule. Hospital records are, however, generally considered to be practitioners' reports under Rules 500-4.17 and 500-4.18. For this reason, they will also be considered as practioners' reports under Rule 500-4.33 and the charges for obtaining copies of the reports will be included as costs of the action. Defendants will therefore be responsible for payment of claimant's costs in the amount of $47.75.

FINDINGS OF FACT

1. On November 14, 1983 claimant was a resident of the state of Iowa employed by Contemporary Industries Corporation, d/b/a/ 7-Eleven Store No. 402, in Sioux City, Iowa.

2. Claimant was injured on November 14, 1983 when a stack of cases of bottles shifted, causing her to fall to the floor, landing on her buttocks. The injury was a compression fracture of her spine at the L3 and L4 levels.

3. At the time of injury claimant was employed as a convenience store clerk.

4. Following the injury, claimant was medically incapable of performing work in employment substantially similar to that she performed at the time of injury from November 14, 1983 until June 12, 1984 when claimant became medically capable of returning to employment substantially similar to that in which she was engaged at the time of injury.

5. Claimant is 63 years of age, married, and at the time of injury, had no dependent children.

6. Claimant's rate of compensation is $71.06 per week as established by stipulation of the parties.

7. Claimant has an eight percent functional impairment of the body as a whole. She suffers continual pain which is worsened by activities such as bending, lifting, stooping, walking several blocks, or sitting for extended periods of time.

8. Claimant is a high school graduate whose recent work experience is limited to that of a retail sales clerk. Claimant had intended on continuing to work until she was at least 65 years of age.

9. Claimant appeared to be of at least average intelligence and emotionally stable but she did not appear to be highly motivated to return to gainful employment.

10. Following her release from medical care, claimant did not seek to return to employment with the employer and the employer made no attempts to offer work to her. Claimant has not made significant efforts to find employment.

11. The witnesses who testified at hearing are credible to the extent of their knowledge.

12. Claimant incurred costs in the total amount of $47.75 in obtaining doctors' and practitioners' reports.

CONCLUSIONS OF LAW

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

The injury claimant sustained to her back on November 14, 1983 arose out of and in the course of her employment with Contemporary Industries Corporation, d/b/a 7-Eleven Store No. 402.

Claimant is entitled to receive 30 and 1/7 weeks of compensation for healing period, which amount has been previously satisfied by payments made by the employer.

Claimant sustained industrial disability which is 20 percent of total disability as a result of the injury, with the same being payable commencing on June 12, 1984. Defendants are responsible for interest on those payments which were not paid at the time the same became due under section 85.34(2) and are entitled to credit for the $2,842.40 paid on January 29, 1985.

Claimant is entitled to recover costs from the defendants in the amount of $47.75.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant one hundred (100) weeks of compensation for permanent partial disability at the rate of seventy-one and 06/100 dollars ($71.06) per week commencing June 12, 1984. Defendants shall pay all past due amounts in a lump sum together with interest pursuant to section 85.30, computed from the date each payment came due until the date of actual payment. Defendants are entitled to credit in the amount of two thousand eight hundred forty-two and 40/100 dollars ($2,842.40) towards this liability.

IT IS FURTHER ORDERED that claimant has been fully paid her entitlement to thirty and one-sevenths (30 1/7) weeks of healing period compensation.

IT IS FURTHER ORDERED that defendants pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33, including forty-seven and 75/100 dollars ($47.75) representing the cost of doctors' and practitioners' reports.

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

IT IS FURTHER ORDERED that this case be retained in an active status and assigned for hearing upon claimant's claim for additional compensation under the fourth unnumbered paragraph of Code section 86.13.

Signed and filed this 17th day of October, 1985.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES ALLEN DODGE, Claimant.	File No. 709494
vs.	
ROGER ESKILDSEN, d/b/a ESKILDSEN AUTO PARTS, 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	
IOWA KEMPER INSURANCE CO., Insurance Carrier, Defendants.	FILED DEC 20 1985 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening and for medical benefits brought by the claimant, James Allen Dodge, against his employer, Roger Eskildsen d/b/a Eskildsen Auto Parts, and its insurance carrier, Iowa Kemper Insurance Co., to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained July 30, 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Mason City, Iowa, on September 17, 1985. 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 August 5, 1984.

The record in this case consists of the testimony of claimant, of Cathy Marie Dodge, and of Roger Eskildsen. The record also consists of joint exhibits 1 through 38. Joint exhibits 1 through 31 are various medical reports and notes relative to claimant as identified on the exhibit list attached to the pretrial report submitted at time of hearing. Joint exhibit 32 is a CETA information report. Joint exhibit 33 is a health insurance claim form of Dr. Janda of September 2, 1982. Joint exhibits 34 through 37 are statements of medical costs totaling $2,766.34. Joint exhibit 38 is an itemization of claimant's expenses.

ISSUES

The issues for resolution are:

1) Whether a causal relationship exists between claimant's injury and any disability;

2) Whether claimant is entitled to permanent partial disability benefits;

3) Whether claimant is entitled to payment of certain medical costs under section 85.27; and

4) Whether claimant is entitled to payment for a section 85.39 examination.

REVIEW OF THE EVIDENCE

Pursuant to their pretrial report, the parties stipulated that claimant's rate of weekly compensation is $89.73; that the conversion date from healing period to permanent partial disability is June 6, 1983; and that all medical bills submitted are fair and reasonable. It is noted that the hearing assignment order filed August 29, 1983 indicates that healing period benefits also remain at issue.

Pursuant to request of both parties, official notice is taken of the arbitration decision filed April 14, 1983. The review of the evidence found in that final agency decision including references to exhibits reoffered at this hearing is incorporated by reference into this decision and will not be reiterated here.

Claimant is now 22 years old, married, and has two children. He was single on his injury date. Claimant has been employed at Rat's Restaurant in Mason City from June 11, 1985. He reported that he worked at general maintenance such as moppings and sweeping and make sandwiches. He indicated that he once mowed the lawns and was "bothered" by doing so. He agreed that he must at times squat on his knees to perform his maintenance work and at times he must use a ladder to go onto the building's roof.

He agreed that as far as he knows he has been performing this job satisfactorily and is able to do most of his duties. Claimant subsequently reported that he cannot unload supplies. Claimant works 25 to 30 hours per week at $3.35 per hour in this employment. Claimant reported that at Eskildsen Auto Parts, he did painting, sweeping, inventoried and shelved auto parts and delivered auto parts by car. He reported that he lifted box paints and auto engine parts, some of which weighed up to several hundred pounds. He also mowed the grass, painted, took phone orders and did counter work. Claimant opined that he could not continue work such as he did at Eskildsen because of the lifting and delivering involved. Claimant reported that prior to his 1982 work injury, he had hoped to become trained as an auto mechanic. He had previously done mechanical work on transmissions, brakes, and engine overhaul and parts replacement. He opined that he can now only do about a fourth of the mechanical work that he was previously able to do. Claimant reported that he has considered vocational rehabilitation through state vocational rehabilitation services. They suggested he consider taking business and computer courses. "[T]hat was something he didn't know if he wanted to do." Claimant has no special training and has not been in the military. Claimant agreed on cross-examination that his father works on cars and he assists without pay at times. Claimant reported that he receives no pay for doing this. Claimant reported that he registered with Job Service for employment on April 1, 1985 and stated that he has applied for jobs at a few businesses other than through Job Service. He indicated he had applied for jobs at the Vickers Gas Station and the Golden Corral but couldn't remember any other places at which he had applied. Claimant reported that he had conversed with Mr. Eskildsen regarding a work return following his injury, but was told no job was available.

Claimant experienced a depression following his July 30, 1982 injury which he opined was related to that injury. He sought psychiatric help through the Mason City Mental Health Center and received both pharmaceutical treatment with Elavil and counseling. Claimant opined that beginning work with Rat's helped relieve his depression even though he still experienced physical pain. Claimant stated that he experiences headaches; that he has back pain from his upper shoulders to midway down back, and that his arm and leg are partially numb. Claimant attributed all of his back problems to his July 30, 1982 injury, but agreed that he had received injuries as outlined in the arbitration decision and had received prior chiropractic treatment for back pain. Claimant also agreed that he had injured himself at Eskildsen on July 6, 1982 while putting cans on a shelf. He reported that he pulled a muscle in his neck while looking way up and was treated chiropractically by a Dr. Haas. Claimant agreed he had not reported this injury and expressed his feeling that that was unnecessary since he worked throughout the period of treatment at full wage and the injury did not interfere with his working. He agreed he had missed two days of work as a result of that injury on Dr. Haas' recommendation.

Claimant reported he continues to have problems sleeping and has a decreased energy level. He reported he is unable to do what he wants with his two toddlers, is no longer as social as he used to be, and no longer hunts or runs.

On cross-examination, claimant agreed that he had had complaints of neck and shoulder pain following his 1979 snowmobile injury. Claimant could not remember an auto accident in September 1981. Claimant agreed he had had an auto accident in 1981 and was treated chirpractically by Dr. Haas on approximately twenty occasions from January through May 1982. Claimant stated it "could have been" that he saw his chiropractic doctor in 1981 for back and shoulder complaints, but he could not recall if he had seen anyone for such complaints in 1980 or 1979. Claimant agreed that A. G. Chanco, M.D., saw him on August 2, 1982 with complaints of back pain and reported that claimant stated those had been ongoing for several months. Claimant also agreed that the case notes from CETA concerning his 1982 pain complaints report an injury of July 8, 1982 which claimant's father reported on August 2, 1982. Claimant could not recall reporting a July 8 injury; agreed his father had called in on August 2, 1982 to discuss a back injury at work approximately a month earlier; and expressed his belief that his father was mistaken in not reporting a July 30, 1982 injury on August 2, 1982. Claimant reported that contrary to arbitration testimony that he had only told Mr. Eskildsen that he had to see a doctor to explain what was wrong with his back, he had told Eskildsen he had injured his back on the injury date.

Claimant's wife of two years, Cathy Marie Dodge, substantiated his testimony as regard his injury and life restrictions therefrom.

Roger Eskildsen, former owner-operator of Eskildsen Auto Parts, testified. He reported that he how glazes windows for River City Glass and had glazed the Rat's restaurant windows in June 1985. He testified that he then saw claimant mowing a ditch approximately 150 to 200 feet long by 25 by 30 feet wide with a mower which claimant had to run into the ditch. He observed claimant in this activity for more than four hours.

Page D of exhibit 32, Comprehensive Employment and Training Act (CETA) records concerning claimant, indicate that on August 2, 1982 claimant's father called the CETA office and indicated that claimant was reporting a back injury that had occurred on July 8 or 9 at Mr. Automotive. The report does not refer to any accident in late July 1982.

S. J. Laaveg, M.D., admitted claimant to St. Joseph Mercy Hospital on January 28, 1985 where lumbosacral through cervical myelogram was performed. Both claimant's thoracic and cervical myelogram were negative. Claimant's admission summary notes that he occasionally gets occiputal frontal headaches and that he continues to have muscle spasms at night and is unable to sleep. Claimant was complaining that his left leg felt weak but without numbness or tingling. Claimant's discharge summary notes that on examination, he had full range of motion of upper extremities, but some weakness of both the plantar and dorsiflexion of the left foot without sensory loss. Dr. Laaveg had noted in a report of February 7, 1983 that he expected no permanent residual from claimant's injury. He also noted that claimant then was depressed and that he felt claimant's depression had exacerbated his problem. On June 6, 1983, the doctor reported, however, that claimant had persistent pain in the upper thoracic back with no evidence of severe organic disease but limitation of motion. He assigned a physical impairment of three percent. In a February 6, 1985 report, Dr. Laaveg states that he does not intend surgery for claimant and that he has nothing further to offer claimant in terms of therapy or care. He further states that he had admitted claimant for myelographic studies to clarify that no organic basis for claimant's symptomatology existed.

In an April 19, 1984 report, R. M. Larsen, M.D., notes an impression of chronic back pain with secondary depression. The doctor notes that claimant stated that over the past several months he had noted the worsening of low mood, insomnia, decreased energy, worrying and a feeling of despair. Claimant had been on Elavil, 75 mg., at bedtime, but continued to note ruminations about going back to work and wanting something to be done about his back.

John R. Walker, M.D., examined claimant on or about March 22, 1985. He reported that claimant had headaches in the front of his head or in the frontal region and that these usually start in the afternoon and with loud noises increasing the pain. He stressed that these occurred only after the apparent sternal puncture myelogram. The doctor outlines claimant's past history of injuries and states: "[h]e doesn't seem to put too much weight as far as an injury is concerned on these incidents. I think the main statement here that is important to me is that he states that before the barrell-rolling incident of July 30, 1982 he had absolutely no problems in his neck, midback, dorsal spine, low back, legs or any other area."

On examination, claimant's cervical spine was essentially negative; his forward flexion produced some discomfort in the upper dorsal spine but this was not severe; neck motion was normal; and ranges of motion were within normal limits without particular tenderness. Claimant had normal alternate motion range and finger to finger and finger to toe tests and exhibited no ataxia of the upper or lower extremities. The Hoffman signs are negative. He had some deviation of reflex of the upper extremity with the triceps being 1-/1+; the biceps 0/1 +; the radial reflexes 1+/1+. He had three quarter of an inch atrophy of the left forehand with grip markedly down on the left side. Claimant is righ-handed. The doctor notes that straight leg raising tests were positive. Claimant's patellar reflexes were found to 2+/2+ on the right andl+/1+ on the left. The ankle and plantar reflexes were 3 beat clonus/3 best clonus. Claimant had extremely cold feet and a quarter inch atrophy of the left calf. He was reported to have a five-eighths inch shortening of the right lower extremity with a Lasegue sign positive on the left and negative on the right. The patient was mild to moderately tender in the lumbosacral area and his back motion was not particularly good. Other ranges of motion were fairly good throughout but were somewhat painful particularly in the dorsal spine. The doctor assigned claimant a permanent partial impairment of 12 percent of the whole man for claimant's dorsal spine condition and added an additional three percent for the cervical spine and headache condition. He noted the following as to causation:

> It appears that this young man has had some injuries to his back off and on as indicated in the history. He appears to have gotten over them pretty well. I don't think there is much more than we can say about this. Certainly he dates almost all of his problems particularly from the accident which occurred on July 30, 1982. Also, we have the problem of the cisternal puncture for the myelogram. This probably was not a successful one in the sense of the word and I don't mean to say that there was negligence in performing it, [sic] however, from this time on, he appears to have developed some headaches in the frontal region and a certain amount of discomfort in the neck and problems with the left arm. I would suspect that possibly the myelogram

may have contributed rather definitely to this. The headaches are somewhat incapacitating and certainly would be a bother to him in any type of work that he attempted. His main injury, of course, as far as the July 30th, 1982 accident is concerned is to the dorsal spine in the regions above. These consist of rather marked sprains in these areas which appear to disable him fairly markedly.

On exhibit 33, a health insurance claim form for services rendered from August 11 through August 16, 1982, claimant's condition is characterized as not employment-related.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether a causal relationship exists between claimant's injury and any disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 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 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (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 work 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).

A treating physician's testimony is not entitled to greater weight as a matter of law than that of a physician who later examines claimant in anticipation of litigation. Weight to be given testimony of physician is a fact issue to be decided by the industrial commissioner in light of the record the parties develop. In this regard, both parties may develop facts as to the physician's employment in connection with litigation, if so; the physician's examination at a later date and not when the injuries were fresh; his arrangement as to compensation, the extent and nature of the physician's examination; the physician's education, experience, training, and practice; and all other factors which bear upon the weight and value of the physician's testimony. Both parties may bring all this information to the attention of the factfinder as either supporting or weakening the physician's testimony and opinion. All factors go to the value of the physician's testimony as a matter of fact not as a matter of law. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 192 (Iowa 1985).

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 1032, 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 percentages of disability arising from the original injury would not justify a finding of change of condition. Bousfield vs. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957).

On October 11, 1982, Dr. Laaveg characterized claimant's problem as a work-related mid thoracic back sprain. Claimant had then given a history of both a can lifting incident with resulting neck pain and of having had minimal mid thoracic back pain which increased after he lifted a 55 gallon drum. Dr. Janda had an impression that claimant's problem was back sprain with right leg radiculitis which claimant's history related to a July 28, 1982 injury at work. While claimant remains a less than credible witness, those opinions are sufficient to establish a work relationship to claimant's thoracic and low back complaints. Likewise, an inference can be drawn from the notes of both Drs. Laaveg and Larsen that claimant's depression related in part to his work injury and its sequale. That condition was of a nonpermanent nature and has resolved. Dr. Laaveg wrote on February 7, 1983 that he expected no permanent residuals from claimant's (back strain). On June 6, 1983, the doctor noted claimant had persistent upper thoracic pain and assigned claimant a three percent physical impairment rating. Such suggests the doctor had revised his view as to claimant's lack of permanency and is sufficient to justify review-reopening of the compensation issue as will be further discussed below.

Dr. Walker has attempted to relate claimant's numerous other complaints to his work injury. He relies on claimant's assertion that he had had no problems before the work incident in doing so. Claimant's lack of candor noted in the original review-reopening decision was also apparent at this hearing, however. Claimant has had numerous other incidents which could have resulted in his cervical and headache conditions and had had treatment for these almost to the date of his work incident. Hence, the doctor's opinion in this regard because developed from claimant's unreliable subjective assertions is rejected. Further, claimant's myelographic admission summary notes his complaints of occipitol frontal headaches. Therefore, the doctor's belief that these headaches resulted from the myelographic procedure itself is not warranted. The three percent permanent partial impairment Dr. Walker assigned claimant for his cervical spine and headache condition is disregarded. Likewise, the twelve percent permanent partial impairment rating he assigns claimant for his dorsal spine condition is given less weight than is the three percent Dr. Laaveg assigned. Dr. Laaveg, as treating physician, was in a considerably better position to assess permanency.

We next consider fully the question of permanent partial disability benefits.

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 impairment 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.

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.

Claimant is 22 years old. The record is silent as to his educational background but overall suggests that he is at best a high school graduate. He has a very mild permanent partial impairment as a result of his injury. Claimant testified his employer fired him following his injury. Given claimant's general lack of candor, it is difficult to assess the reliability of that testimony. Testimony of Mr. Eskildsen and of claimant as recorded in the previous arbitration decision is also not of assistance. On balance, it appears, however, that claimant was not well motivated to continue working and may have made only a feeble attempt at a work return. Likewise, claimant made little effort subsequent to his injury to seek other work. Undoubtedly, claimant's depressive condition has been a factor in this. Nevertheless, even when claimant's depressive condition is considered, more diligent efforts would have been appropriate and might have secured claimant employment sooner. Claimant was receiving minimum wage at Rat's. It can be assumed he is receiving at least the minimum hourly wage in his current position. He testified his hours are limited. This appears a function of tne economy and not of claimant's disability, however. Claimant testified as to physical limitations and as to jobs he believes he can no longer perform. No physician imposed restrictions are in evidence, however. Mr. Eskildsen testified claimant worked almost four hours mowing lawn on an incline. While it was obvious that feelings run high between claimant and that gentleman, Eskildsen appeared the more credible witness. Furthermore, claimant himself agreed that he must squat to perform certain janitorial duties and must climb ladders on occasion. All these activities are inconsistent with claimant's characterization of his physical limitations. Claimant has chosen not to pursue vocational retraining for less demanding work. That also reflects his lack of motivation and his general contentment with his present status. When all the above is considered, it cannot be found that claimant has sustained any loss of earning capacity on account of his injury. An award of industrial disability benefits would be inappropriate.

The best evidence as to termination of claimant's healing period pursuant to section 85.34(1) is Dr. Laaveg's assignment of a permanent partial impairment rating on June 6, 1983. Claimant's healing period is found to run to that date.

Claimant seeks payment of certain medical costs under section 85.27 and of medical mileage expenses. Costs evidenced in exhibits 34, 35, and 36 are found related to claimant's compensable injury. On February 6, 1985, Dr. Laaveg reported he had nothing further to offer claimant in terms of therapy or care. That remark indicates that further medical care for claimant is likely not in order.

Claimant seeks payment for an independent medical examination by Dr. Walker under section 85.39. Claimant is entitled to one such examination. Payment of costs for claimant's examination by Dr. Walker including mileage and meals is allowed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant injured his thoracic back on July 30, 1982 while attempting to roll a 50 gallon barrel at work.

Claimant subsequently experienced a depressive reaction which has resolved without residuals.

Claimant has persistent thoracic back pain.

Claimant had had numerous injuries to both his cervical and lumbar spine prior to his July 30, 1982 work injury.

Claimant had had occipital headaches prior to his January 1985 myelographic studies.

Claimant is twenty-two (22) years old.

Claimant worked at minimum wage for Eskildsen Auto Parts and now works for minimum wage at Rat's Restaurant.

Claimant has no physician imposed restrictions and has engaged in activities inconsistent with his self-alleged physical limitations since his injury.

Claimant was not well motivated to return to work or to seek other employment following his injury.

Claimant has not pursued suggested retraining.

Dr. Laaveg was claimant's treating phsician; Dr. Walker claimant's examining physician.

Claimant has a very mild physical impairment.

Claimant's myelographic and radiographic studies and his visits to Surgical Associates of North Iowa relate to his compensable injury.

Claimant's examination by Dr. Walker was an independent medical examination as contemplated in section 85.39.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established a causal relationship between his injury of July 30, 1982 and the disability to his thoracic back on which he now bases his claim.

Claimant has not established an entitlement to permanent partial disability benefits on account of his injury.

Claimant has established an entitlement to healing period benefits to June 6, 1983. Defendants are entitled to credit for healing period benefits already paid claimant.

Claimant is entitled to payment of medical costs evidenced in exhibits 34, 35, and 36 in the amount of three thousand three hundred forty and 34/100 dollars ($3,340.34).

Claimant is entitled to payment of costs related to section 85.39 examination by Dr. Walker including mileage and meals in the amount of four hundred eighty-six and 46/100 dollars ($486.46).

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant healing period benefits to June 6, 1983 at a rate of eighty-nine and 73/100 dollars ($89.73). Defendants receive credit for healing period benefits previously paid.

Defendants pay accrued amounts, if any, in a lump sum.

Defendats pay claimant section 85.27 medical expenses as evidenced in exhibits 34, 35, and 36 in the amount of three thousand three hundred forty and 34/100 dollars ($3,340.34).

Defendants pay claimant costs of an independent medical examination by Dr. Walker in the amount of four hundred eighty-six and 46/100 dollars ($486.46).

Defendants pay interest pursuant to section 85.30.

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 20th day of December, 1985.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL K. DOLL, Claimant,	:	
vs.	:	File Nos. 725711 725710 & 724413
CONSUMER'S INC., Employer,	:	A P P E A L
and	:	D E C I S I O N
RETAIL LUMBERMAN'S INTER INSURANCE EXCHANGE, Insurance Carrier, Defendants.	:	

FILED

OCT 04 1985

IOWA INDUSTRIAL COMMISSIONE

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision wherein it was concluded that the claimant received a permanent partial disability resulting from his injuries of 20 percent. The record on appeal consists of a printed reproduction of tape recorded testimony; claimant's exhibits A through K; defendants' exhibits 1 through 3; and briefs filed by the parties.

ISSUE

The issue as stated by the defendants is: "The proposed arbitration decision of the deputy industrial commissioner is unsupported by substantial evidence in the record made before the agency when viewed as a whole so as to support a finding that he is entitled to a permanent partial disability resulting from his injuries of 20 percent."

REVIEW OF THE EVIDENCE

Examination of the record discloses the statement of facts of the deputy to be accurate and is adopted herein.

APPLICABLE LAW AND ANALYSIS

The applicable law cited by the deputy was proper and is hereby adopted. Further, the analysis of the deputy was correct and thorough. A few magnifications are in order.

First, contrary to defendants' assertion, David L. Hoversten, D.O., did state that there would be some permanency resulting from claimant's condition although claimant could be expected to have a full range of motion. It also must be remembered that the deputy determined that claimant did not suffer a facet fracture. She writes, "When all the above is considered, it is concluded claimant has not suffered a facet fracture but rather has developmental spondylolysis which is beginning to deteriorate into spondylolisthesis." Spondylolysthesis, according to the excerpted portion of Dr. Neff's testimony, is often confused for a fracture.

The deputy accepted Dr. Carignan's impairment rating which was based upon the doctor's observable physical difficulties and motion limitations. The deputy's consideration of industrial disability was also correct.

FINDINGS OF FACT

1. Claimant sustained an injury to his back in the course of his employment August 6; the injury was aggravated by employment incidents on August 16, and September 10, 1982.

2. Claimant's injury aggravated a preexisting spondylolysis.

3. Claimant was terminated as a result of his back injury.

4. Claimant can no longer engage in a substantial number of his preinjury life activities and may not engage in heavy lifting generally required in his preinjury vocation.

5. Claimant completed tenth grade and has work experience only as a manual laborer in carpentry and the construction trades.

6. Claimant does not desire to complete his schooling or pursue alternatives suggested by vocational rehabilitation counselors.

7. Claimant is 28 years old.

8. Claimant has a functional impairment of 13 percent to 15 percent of the body as a whole.

9. Claimant has returned to work as a roofer but limits his activities to nailing on shingles.

10. Claimant has an industrial disability to the body as a whole of 20 percent.

CONCLUSIONS OF LAW

Claimant is entitled to healing period benefits from his initial injury date to September 1, 1983 except for those periods in which he actually worked.

Claimant is entitled to permanent partial disability benefits commencing at the termination of his healing period for 100 weeks.

Claimant is entitled to payment of his medical expenses in the amount of $821.00.

Claimant is not entitled to benefits under section 86.13.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant healing period benefits from August 6, 1982 to September 1, 1983 but not for those periods in this time span in which claimant actually worked.

That defendants pay claimant permanent partial disability benefits for one hundred (100) weeks at the rate of one hundred seventeen and 21/100 dollars ($117.21) commencing September 2, 1983.

That defendants pay Iowa Lutheran Hospital medical costs of seven hundred twenty-six dollars ($726.00).

That defendants pay LCM medical costs of forty-five dollars ($45.00).

That defendants pay Dr. Carignan medical costs of fifty dollars ($50.00).

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to section 85.30, The Code, as amended.

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 4 day of October, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

505

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GLENN J. DROESSLER, Claimant, vs. FDL FOODS, INC., Employer, Self-Insured, Defendant.	:	File No. 787518 APPEAL DECISION

FILED
NOV 8 1985
IOWA INDUSTRIAL COMMISSIONER

Claimant appeals from a ruling on a motion to compel requiring him to answer interrogatories 6 and 7 asking for information relative to prior or subsequent injuries or diseases and the identification of practitioners to which he went for such conditions.

Even if, as claimant contends, a prior ruling was made on the same or similar issue by a ruling on a motion to produce it is not controlling here. Ordering claimant to produce records regarding unknown conditions is one thing and ordering claimant to disclose injuries or diseases known to him and where records relating to such conditions might be is quite another.

Claimant further contends that his counsel filed a number of similar actions at the same time; that the actions in most of the cases in response to interrogatories 6 and 7 was the same; that defendant filed motions to compel in all the other cases in which claimant objected to interrogatories 6 and 7; and that rulings on the motions to compel have not been uniform. Although this may be so, not all of the other rulings were appealed. Were the inconsistent rulings appealed also, it would be possible to conform each of them but to alter the ruling in this case only for the purpose of making it the same as rulings which were not appealed would be in effect dictating to an appellate body the outcome of an appeal matter by a lower tribunal.

The appeal in this case as in the others with similar issues is interlocutory and should not be entertained. As is indicated in Citizens State Bank of Corydon v. Central Savings Association, 267 N.W.2d 33, 34 (Iowa 1978), "[g]reat harm would result to litigants under a system which tolerated indiscriminate appeals from each and every adverse ruling." Under normal circumstances this appeal would be dismissed as it is not "[a] final judgment or decision...that finally adjudicates the rights of the parties" and which puts it "beyond the power of the court which made it to place the parties in their original positions." Crowe v. DeSoto Consolidated School District, 246 Iowa 38, 40; 66 N.W.2d 859 (1954).

However, as this case is one of many in which similar conditions exist a ruling will be made in hopes that some order may be brought out of the chaos involved in these multiple actions.

Claimant refers in his resistance to defendant's request for information that his is one of many cases which were filed at about the same time and that his counsel has difficulty responding to all the requests for information by the defendant. This objection is noteworthy but certainly not compelling. Interrogatories were first served in December 1984. Claimant asked for and received additional time to respond.

Defendant must also defend all of the multiple actions at the same time and in order to do so is entitled to discoverable information to aid in preparation of its cases. Claimant contends defendant's request is too broad but do not indicate that it is improper for discovery. The condition claimant complains of may be limited to a scheduled member as far as result is concerned but causation may be systemic. The fact that it may be inadmissable at a hearing does not mean it cannot be discovered. The information requested is discoverable and within the knowledge of the claimant. Interrogatories 6 and 7 should be answered.

WHEREFORE, the ruling on motion to compel is affirmed.

THEREFORE, claimant is ordered to respond to interrogatories 6 and 7 within twenty (20) days of the signing and filing of this order and failure to do so may result in sanctions under Industrial Commissioner Rule 500-4.36.

Signed and filed this 8 day of November, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WALTER H. FARRAND, JR., Claimant,	:	File Nos. 645545/703177
vs.	:	A P P E A L
IOWA BEEF PROCESSORS, INC., Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
NOV 25 1985
IOWA INDUSTRIAL COMMISSIONER

Claimant appeals from a review-reopening decision in which he was awarded no additional benefits as a result of an injury he sustained August 19, 1980 and a 25 percent industrial disability as a result of an injury he sustained May 20, 1982. The record on appeal consists of the transcript of the hearing on review-reopening together with claimant's exhibits 1 through 8, 11, 13, 14, 16, 18, and 20, and defendant's exhibits A, B, D, F through K, and M through Q. Claimant also filed a supplemental appeal brief after the appeal was considered fully submitted.

ISSUE

The sole issue on appeal is the extent of claimant's industrial disability.

REVIEW OF THE EVIDENCE

The review-reopening decision adequately recites the pertinent evidence in the record and will not be repeated herein.

APPLICABLE LAW AND ANALYSIS

The evaluation of the evidence and application of the law thereto in the review-reopening decision is appropriate and correct. The recent Iowa supreme court decision in Guyton v. Irving Jensen Company, ___ N.W.2d ___ (Iowa 1985), is not on point as the claimant returned to regular employment subsequent to his injury. He was not terminated from employment with defendant for reasons related to his injury.

It is further noted that a new review-reopening petition has been filed and is pending for an alleged deterioration of his condition since the proceeding sub judice.

WHEREFORE, the proposed review-reopening decision is adopted as the final agency decision.

FINDINGS OF FACT

1. Claimant is forty-one (41) years of age and has a tenth grade education.

2. Prior to August 19, 1980, claimant's work experience consisted of mainly unskilled, physically demanding employment including loading dock worker, truck driver and packinghouse worker, all of which required heavy lifting, pushing and pulling of material ranging from forty (40) to two hundred fifty (250) pounds in weight.

3. Prior to August 19, 1980 claimant had no back injuries that would have prevented him from full employment in any of his occupations.

4. Claimant has had since birth retinitis pigmentosa or "tunnel" vision which limits only his peripheral vision.

5. Claimant has a valid Iowa driver's license.

6. On August 19, 1980 claimant suffered a protrusion of the disc in the L4 interspace of his spine from an injury sustained while at work.

7. Subsequent to the August 19, 1980 injury, claimant sufficiently recovered, without surgery, to return to work on September 15, 1980.

8. After his return to work on September 15, 1980 claimant was eventually able to return to the same job he was performing at the time of the injury on August 19, 1980.

9. On May 20, 1982 claimant suffered an injury to his back at work which caused him pain sufficient to warrant his hospitalization on May 31, 1982.

10. Claimant, from his work injury on May 20, 1982, suffered a herniated disc requiring surgery at the L4 interspace of his spine.

11. On June 2, 1982 a lumbar laminectomy was performed upon claimant's spine which removed a loose fragment of disc at the L4 interspace.

12. After bed rest and gradual exercise program, claimant was able to return to work for light duty on August 2, 1982 which consisted of operating a forklift.

13. As a result of the surgery to the L4 interspace of his spine, claimant has suffered a twelve percent (12%) functional impairment of his body as a whole.

14. Claimant was laid off from his employment with defendant from February 2, 1983 through August 19, 1983 at which time he was terminated by defendant.

15. Continually since August 2, 1983 claimant's work restrictions have been that he cannot lift more than forty (40) pounds, shall not engage in repetitive lifting and should not do excessive straining, twisting, or bending.

16. Claimant was terminated by defendant for his failure to report to work or to provide defendant with a doctor's report indicating that he was unable to work.

17. While on layoff from defendant's employ claimant attended and successfully completed an auto upholstery school in Des Moines, Iowa.

18. Claimant was attending the above upholstery school at the time he was called back from layoff in July and August, 1983.

19. Since completing the school, claimant has been self-employed as an auto upholsterer.

20. Claimant, since leaving the employment of defendant, has experienced a drop in annual gross income of approximately twenty thousand and 00/100 dollars ($20,000.00).

21. Claimant's back condition continues to cause him great pain with activity and numbness in his legs and this condition limits his ability to perform the tasks of an auto seat upholsterer.

22. Due to his back condition, claimant is not able to perform many household chores and recreational activities.

23. Claimant's current employment prospects are limited to sedentary positions.

24. Claimant received treatment for his injury of May 20, 1982 from Dr. Robert A. Hayne and for such services between May 31, 1982 and July 14, 1982 claimant has incurred expenses in the amount of one thousand two hundred twenty-five and 00/100 dollars ($1,225.00).

25. Claimant received treatment for his injury of May 20, 1982 from Iowa Methodist Medical Center of Fort Dodge, Iowa and for such services between May 31, 1982 and June 5, 1982, claimant has incurred expenses in the amount of two thousand two hundred seventy-eight and 32/100 dollars ($2,278.32).

26. Claimant has incurred a twenty-five percent (25%) loss of his earning capacity as a result of his injury of May 20, 1982.

CONCLUSIONS OF LAW

Claimant has not established by a preponderance of the evidence that his injury of August 19, 1980 is a cause of the disability on which he now bases his claim, but claimant has established by a preponderance of the evidence that his injury of May 20, 1982 is a cause of the disability on which he now bases his claim.

Claimant has not shown by a preponderance of the evidence that he is entitled to temporary total disability or healing period benefits in excess of those he has already received for the injuries he sustained on August 19, 1980 and May 20, 1982.

Claimant has established by a preponderance of the evidence entitlement to permanent partial industrial disability of twenty-five percent (25%).

Claimant has established by a preponderance of the evidence that due to causal connection to the May 20, 1982 injury, defendant is liable for the payment of medical expenses incurred by claimant subsequent to the injury at Iowa Methodist Medical Center and with Dr. Robert A. Hayne.

ORDER

THEREFORE, it is ordered:

That defendant shall pay to claimant, in a lump sum, with interest under Iowa Code section 85.30 one hundred twenty-five (125) weeks of permanent partial disability benefits at a rate of two hundred thirty-seven and 68/100 dollars ($237.68) per week less credit from amounts previously paid.

That defendant shall pay claimant the medical expenses from Iowa Methodist Medical Center in the amount of two thousand two hundred seventy-eight and 32/100 dollars ($2,278.32) and for Dr. Robert A. Hayne in the amount of one thousand two hundred twenty-five and 00/100 dollars ($1,225.00).

That defendant shall pay the costs of the review-reopening action pursuant to Industrial Commissioner Rule 500-4.33. The claimant shall be responsible for his own costs on appeal.

Defendant is to file a final report upon payment of this award.

Signed and filed this 25 day of November, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY ALAN FESTER,	:	File No. 776844
Claimant,	:	
vs.	:	A R B I T R A T I O N
R and M CONSTRUCTION,	:	D E C I S I O N
Employer, Defendant.	:	

FILED
OCT 22 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Gary Alan Fester, claimant, against R and M Construction, employer, for the recovery of benefits as the result of an alleged injury on May 29, 1984. This matter was heard before the undersigned on October 15, 1985 at the courthouse in Sioux City, Woodbury County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of the claimant, and claimant's exhibits 1 through 5.

ISSUES

The issues to be determined are whether the claimant received an injury arising out of and in the course employment; whether there is a causal relationship between the alleged injury and the disability upon which this claim is based; the nature and extent of disability, if any; and, the claimant's rate of compensation.

EVIDENCE PRESENTED

Claimant testified he was employed by R and M Construction on May 29, 1984 when he received an injury to his little finger on the right hand. The accident severed the end of his little finger. Claimant said he was off work from May 29, 1984 until released to return to work on July 15, 1984. Claimant said his employer refused to take him back as an employee. Claimant said he suffered no permanent impairment to the finger.

Claimant stated that he began his employment with R and M Construction in March 1984 as a part-time employee. He became a full-time employee two weeks before his injury. He was paid $4.00 per hour. He regularly worked a 40 hour week.

Claimant advised that his employer has paid a $212 medical bill at Marian Health Center and an $87 doctor bill to D. M. Youngblood, M.D.

Claimant's exhibit 1 contains the medical reports from Marian Health Center; claimant's exhibit 3 and 4 are progress notes from Dr. Youngblood and a report from Dr. Youngblood to claimant's attorney. These records reflect that claimant's finger suffered a fracture in the mid-portion of the terminal tuft. There was some soft tissue deformity. Dr. Youngblood states in his letter that claimant's healing took approximately six weeks.

Claimant testified he was seeking six weeks of temporary total disability.

Exhibits 2 and 5 are the bills for medical expenses which the employer has paid.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 29, 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 claimant has the burden of proving by a preponderance of the evidence that the injury of May 29, 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).

ANALYSIS

The employer in this case did not appear. Claimant's testimony is credible and fully supported by the medical evidence.

Claimant has established that he is entitled to temporary total disability from May 29, 1984 to July 15, 1984.

Claimant's rate of compensation is $104.29 per week pursuant to section 85.36(7), Code of Iowa.

FINDINGS OF FACT

1. On May 29, 1984 claimant injured his little finger on his right hand while at work.

2. As a result of his injury, claimant was off work from May 29, 1984 to July 15, 1984 when it was medically indicated he could return to substantially similar employment.

3. Claimant's injury did not cuase permanent disability.

4. Claimant's rate of compensation is one hundred four and 29/100 dollars ($104.29).

CONCLUSIONS OF LAW

On May 29, 1984 claimant received an injury arising out of and in the course of his employment.

There is a causal relationship between the injury and claimant's temporary total disability from May 29, 1984 to July 15, 1984.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant six and five-sevenths (6 5/7) weeks of temporary total disability at a rate of one hundred four and 29/100 dollars ($104.29). All accrued payments to be paid in a lump sum together with statutory interest.

IT IS FURTHER ORDERED that the costs of this action in the amount of thirty-five dollars ($35) are taxed to the defendant.

Defendant shall file an activity report as requested by this agency.

Signed and filed this 22nd day of October, 1985.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHNNIE FRANKLIN,	:	
Claimant,	:	
vs.	:	File No. 688355
HAZEL L. VELDHUIZEN,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
UNION INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

FILED
NOV 13 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision wherein it was found that claimant sustained a permanent partial disability of 20 percent of the body as a whole as a result of a November 19, 1981 injury to claimant's right leg. The record on appeal consists of claimant's exhibit 1; defendants' exhibits A through C, briefs filed by both parties; and the hearing transcript. Claimant's rate was stipulated to be $112.74.

ISSUE

Whether or not the deputy industrial commissioner erred in determining the claimant's industrial disability was 20 percent to the body as a whole, in the absence of medical evidence of permanent impairment.

REVIEW OF THE EVIDENCE

It is undisputed that claimant sustained a scheduled permanent partial disability to her right lower extremity. What is disputed is whether the claimant sustained a permanent partial disability to the body as a whole as a result of an alleged permanent aggravation of a preexisting back condition which was allegedly caused by the permanent knee condition for which claimant has already been compensated. Evidence pertaining to the knee/leg injury has been reviewed and will be incorporated herein only with respect to the alleged back injury.

Testifying as to her present complaints, the claimant stated that her whole back hurts.

One of claimant's treating doctors, Peter D. Wirtz, M.D., wrote: "This patient has had some symptoms of muscular lower backache, and I feel that these will clear when her rehabilitation is completed with her knee area." (Claimant's Exhibit 1, December 29, 1982 letter) In a letter of April 4, 1983 Dr. Wirtz wrote:

> This patient's lower back symptoms are somewhat better but she has upper neck pain at this time.
>
> The examination of the neck and the lower back shows essentially full range of motion without any neurological.
>
> The x-ray shows an L5-S1 disc space narrowing.
>
> This patient has a pre-existing [sic] disc degeneration which has been aggravated by abnormalities of the knee with variance in gait. This aggravation is a musculoskeletal strain.
>
> This musculoskeletal strain of the back area has cleared at this point because the low back pain is no longer present. The disc degeneration was a prior problem to her knee surgery situation.

(Claimant's Exhibit 1)

A letter by Dr. Wirtz dated October 13, 1983 reveals: "She has a musculoskeletal strain to the back area and she has been advised this is managed the best way and will not require any other specific management."

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 19, 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).

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).

Larson has written:

> In compensation law, the administrative-law-evidence problem of expert opinion and official notice finds its principal application in the handling of medical facts. The usual question is the extent to which findings of the existence, causation or consequences of various injuries or diseases can rest upon something other than direct medical testimony--the claimant's own description of his condition, for example, or the commission's expert knowledge acquired not by formal medical education but by the practical schooling that comes with years of handling similar cases.
>
> To appraise the true degree of indispensability which should be accorded medical testimony, it is first necessary to dispel the misconception that valid awards can stand only if accompanied by a definite medical diagnosis. True, in many instances it may be impossible to form a judgment on the relation of the employment to the injury, or relation of the injury to the disability, without analyzing in medical terms what the injury or disease is. But this is not invariably so. In appropriate circumstances, awards may be made when medical evidence on these matters is inconclusive, indecisive, fragmentary, inconsistent, or even nonexistent.

3 Larson, The Law of Workmen's Compensation (1983), §§79.50, 79.51 Medical Evidence (emphasis added).

Citing Larson, Supra, this agency has awarded compensation when medical evidence was lacking. In Lee v. American Roofing, II Industrial Commissioner's Report 235 (1981), this agency stated:

> While defendant is correct in pointing out that claimant has the burden of proof, the record establishes that claimant has met that burden; apparently without challenge. The fact that claimant has not introduced medical testimony to point out the obvious is of no consequence....

....

> The introduction of medical evidence may have strengthened claimant's case. But defendant did not overcome the Obvious conclusions one would make from the evidence presented by the claimant. (emphasis added)

Id. at 236

This agency has recently held.

> In the case at bar the nonmedical evidence does not permit one to draw an obvious conclusion. Further, the medical evidence has one common characteristic and that is that there is no evidence presented to support a conclusion by a preponderance that the claimant has sustained an injury which resulted in a permanent partial disability. While this agency has vast experience in dealing with medical evidence and causation, the use of this accumulated experience in place of medical evidence should be limited to cases where the lay testimony and evidence is overwhelming and the accompanying medical evidence is inconclusive or even nonexistent.

Lundy v. Radio Shack Corp., (Appeal Decision, August 30, 1985)

The claimant in this case certainly did sustain a back injury arising out of and in the course of her employment but the disability is one of a temporary not permanent nature.

The claimant's temporary back condition was first medically apparent on December 29, 1982. On April 4, 1983 Dr. Wirtz stated that claimant's musculoskeletal strain had cleared. There is not adequate evidence to show that the condition continued beyond this point or flared up again. There is not competent evidence to allow the inference that claimant suffered a permanent material aggravation of her back condition.

FINDINGS OF FACT

1. Claimant sustained a compensable, scheduled knee injury on November 19, 1981.

2. Claimant has a preexisting disc degeneration.

3. The degeneration was aggravated by abnormalities of the knee with variance in gait.

4. Claimant's aggravation was a musculoskeletal strain of a temporary nature.

5. The temporary condition lasted between December 29, 1982 and April 4, 1983.

6. Claimant has not suffered any permanent partial industrial disability as a result of the November 19, 1981 injury.

CONCLUSION OF LAW

The claimant has established entitlement to temporary total benefits from December 29, 1982 to April 4, 1983 at the stipulated rate of $112.74.

The decision of the deputy is therefore modified.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant thirteen and six-seventh (13 6/7) weeks of temporary total benefits at a rate of one hundred twelve and 74/100 dollars ($112.74) per week with credit given to amounts already paid.

That defendants are to pay the costs of this proceeding.

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

Signed and filed this 13 day of November, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY L. FREY,	:	
Claimant,	:	
vs.	:	File No. 656118
BREMCO CONSTRUCTION COMPANY,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
IOWA MUTUAL INSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	OCT 8 1985
		IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 28, 1985 this 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 remand decision filed March 22, 1985 in which he was awarded temporary total disability benefits and medical expenses.

The record on appeal consists of a transcript of the original hearing; claimant's exhibits 1 through 3 and 6 through 13; a form 2; requests for admissions 1, 5, 9, and 11; interrogatory 18 and its answer; an exhibit to the application filed August 11, 1983; and the eight additional exhibits set out in the remand decision. All evidence was considered in reaching this final agency decision.

The decision herein will be the same as that of the hearing deputy.

ISSUES

The issues on appeal as stated by claimant are:

I. Whether the deputy industrial commissioner erred in concluding that claimant failed to show that his work injury of November 29, 1980, was causally connected to his disability of chronic debilitating pain.

II. Whether the deputy commissioner erred in failing to award claimant a permanent partial disability.

III. Whether the deputy commissioner erred in terminating claimant's healing period on March 1, 1981.

IV. Whether the deputy commissioner erred in finding that the carrier was not liable for certain medical expenses incurred by claimant.

V. Whether the deputy commissioner erred in failing to impose on the carrier a penalty pursuant to I.C. §86.13.

STATEMENT OF THE CASE

Five foot, eleven inch, 250 pound, forty-three year old married claimant, father of four children, an eighth grade graduate who quit school to support his mother and himself and who served with the navy where he worked on aircraft doing sheet metal work and painting, testified to some self-employment doing body work and to additional employment as a heavy equipment operator, semi-driver, logger, grain hauler, and service station manager.

Claimant testified to having two ruptured eardrums while he was in the service for which he is paid a disability pension and to slipping on a puddle of oil and falling in 1970. Thereafter he had traction therapy and a hemilaminectomy. After his surgery he operated a logging and firewood business in which he split logs. He observed tiredness in his back the day after that activity. He also acknowledged hernia surgery and a "kink" in his neck for which he received one chiropratic adjustment. He was burned on his right buttock and back when a battery in a bulldozer exploded.

Claimant, who had financial trouble in his own business and took bankruptcy, recalled that he was hired in mid-September to run a small bulldozer. He agreed that his application for employment indicated that he had no prior back troubles and that he had eleven and a half years of school. He later operated a bigger dozer and another machine which was used to move large section of pipe weighing from 100 to 250 pounds. He lifted and moved pipe by hand and also did shoveling. He worked overtime. Claimant described the incident of Friday, [sic] November 29, 1980 as follows: He was taken off his usual crew to go backfill a ditch. The temperature was below freezing and the ground was frozen. He came off the seat twice when he ran over a chunk of frozen dirt. He bounced in the air and hit his head the first time. He had pain in his lower back, left buttocks, and left leg. He worked the next day and never left his machine. On Monday he had too much pain to work so he went to a chiroprator who told him to seek medical help.

He saw Steven E. Hart, D.O., who sent him for x-rays and hospitalized him in traction and referred him to Robert E. McCoy, M.D., who in time sent him to Iowa City. Later he went to the Veteran's Hospital. Thereafter he asked the insurance carrier to find a doctor for treatment and arrangements were subsequently made for him to see Martin F. Roach, M.D., whose examination lasted ten minutes and who offered him no treatment. He then told the insurance company he was going to David F. Poe, M.D., who admitted him to the hospital, did a myelogram, and referred him to Marvin F. Piburn, Jr., M.D., who recommended he go to Minneapolis for treatment. He was given medication and a TENS for which the insurance carrier did not pay. No alternative care was offered by the carrier.

Claimant acknowledged that he had not sought permission from his employer or its insurance carrier to see any of the physicians he initially saw. The TENS unit which was provided for his low back did no good there, but it did help his neck. He agreed the doctors had suggested that he reduce his weight and do exercises, but he said that he was told to stop the exercises when they irritated his back. He has a brace from 1970 which he wears for long trips.

Claimant's only work since his injury has been three weeks of driving a pickup in the spring of 1981. He quit because he could not take the bouncing. Claimant indicated that rehabilitation services employed by the insurance carrier had not worked to gain him a job. He had been provided with two rehabilitation services because his spouse did not get along with the first counselor.

Claimant asserted that he has not had a day without some pain which comes out of his shoulder and goes into his hand. He also has had headaches. He gets some relief from his TENS.

Claimant claimed that he first made neck complaints to Dr. Hart when he was hospitalized in Hampton and that he mentioned them to all his doctors thereafter. He alleged he had been treated for a neck problem by Dave Smith, D.C., and by Dr. Panegos.

Claimant testified to the importance to him of workers' compensation payments being made in a timely manner. He claimed that on numerous occasions they were a week late and at other times two weeks late. The late checks resulted in overdrafts at the bank and trouble with electrical services. Claimant recalled being notified in March of 1983 that his healing period would be terminated.

Kathleen A. Benson, certified rehabilitation counselor who has a master's degree in rehabilitation counseling, testified to routinely conducting a review of medical history, other vocational assessments, employment history, and transferrable skills. Thereafter career alternatives are examined, but evaluation of the possibility of returning to the original employer is always considered first.

Claimant's file was received on August 1, 1983; medical information from Drs. Piburn and Poe was reviewed; and Benson seemingly examined other records as well. She took an employment history from claimant whom she found to be a poor historian. She determined that the majority of claimant's work was heavy and semi-skilled in nature. She recorded claimant's self-imposed limitations on reaching, standing, walking, bending, twisting, lifting, driving, and sitting.

Prior to Dr. Piburn's deposition she came up with the following light jobs for claimant: Grader operator, street sweeper, service station manager, manager of an agency renting or leasing parts, and assembler on a production line. After Dr. Piburn's report she thought manager of a service station with accommodations would provide the best opportunity for claimant. She identified his transferrable skills as

> the ability to work with your hands [sic] and use an assortment of hand tools; to operate various types of equipment; to coordinate eyes, hands, and feet to control the movement of a vehicle; to use arithmetic for collecting delivery receipts or money; to operate heavy machinery and equipment following work orders; signals, and oral instructions; to tolerate jolting, vibration, and the noise of heavy equipment; to estimate distances to move materials to specified sites; to perform routine work repeatedly; to use an assortment of tools and equipment to shovel materials, clean work areas, and oil machinery; to use hands to carry and pull objects of varying weights; to analyze and interpret administrative policy and procedures; to plan and organize the work of others; to make decisions based on business reports or similar data; to prepare budgets, keep records, and inventory stock; to deal tactfully and courteously with the public, employees, and other officials, and to apply math skills to read and interpret business reports and records.

Benson said the weighted average wage range for heavy equipment operators in Lynn County in 1983 would be from $9 to $13.21. The weighted average for the entire state of Iowa from 1982 would be $12.75 per hour. In 1982 there were 2,434 service station managers in Iowa. The weighted average salary in Lynn County was $8.13 per hour. She anticipated claimant's beginning work as a service station manager at only slightly above an entry level wage. The expert thought claimant might be able to work as a cashier in a gas station. Wage range for a cashier's position in Lynn County would be from $2.95 to $4.90 per hour.

Regarding claimant's motivation to return to work Benson testified: "I would say at this point, from what he's indicated to me, that he would need some work. I think his motivation is there, but I think he has adapted to the situation in seeing the things that would get in the way rather than the skills." (Transcript, pp. 155-156) Dr. Piburn's report was dated December 29, 1982.

Phillip G. Clark, claims supervisor for Iowa Mutual Insurance Company who has responsibility for the management of claimant's file, testified that claimant's recorded statement was taken by a claim adjustor. As instances in which claimant's veracity had been called into question, the witness pointed to an employment application in which he denied previous back problems and the inconsistent history given to Dr. Piburn.

Clark agreed that claimant was paid benefits until November of 1983, but he said that those benefits were not characterized as either temporary total or permanent partial. Benefits were terminated on a basis of a report from Dr. Roach. He acknowledged that at the time of termination of benefits he was aware of Dr. Piburn's recommendation claimant be sent to the low back institute. Dr. Piburn's report was not given consideration because it was not in accord with other medical evidence.

Claimant's authorized physicians were Dr. Hart, Dr. McCoy, and physicians at the Univerity of Iowa and the Veteran's Hospital. It was the recollection of this witness that claimant told his rehabilitation counselor he was dissatisfied with the rating of Dr. Roach and wished to see Dr. Poe. Clark understood that claimant was going to Dr. Poe for a rating rather for treatment.

Regarding the time of payment, the claim supervisor said there was a possibility of delays having occurred and he knew of one occasion in which the check was issued two or three days late. He asserted that claimant was consistently paid early. He knew the importance of timely payments to claimant. Clark said claimant's medical history and reports were relied on in electing not to send him to a pain institute.

Six foot two inch, two hundred pound Jerry Dean Frey, formerly of Des Moines and at the time of his deposition of Nora Springs, recognized a discharge summary from a hospitalization in May of 1972 as relating to him. He denied ever having taken Darvon and ever having fallen from a car. He acknowledged an admission to the hospital in late 1973. He reported seeing Dr. McCoy during the winter after injury to his back while snow-mobiling at a time when Dr. Fisher was out of town. He indicated he was a gunner's mate in the navy who suffered a hearing loss. He claimed knee surgery, but no back surgery.

Claimant was seen on January 15, 1970 by a Dr. Paulson with complaints of headaches and backaches which came on when he slipped and fell after getting out of his car about three months before. The doctor believed there was a functional overlay to claimant's problem.

Claimant was seen in November 1970 at the University of Iowa Hospitals and Clinics with complaints of lumbar pain radiating into his right leg and along the lateral aspect of his right thigh and calf to his heel and throbbing headaches following an accident in 1969 in which he fell on his buttocks and also hit his occiput on concrete. At that time he had immediate back pain and a numb feeling in both legs. He also spoke of light headedness and loss of consciousness. A myelogram was done which was interpreted as showing a herniated intervertebral disc at L4-5. An electroencephalogram and brain scan were negative, but the electroencephalogram was not thought sufficient to rule out a convulsive disorder. A hemilaminectomy was performed at L4 with a large ruptured disc removed. Claimant was found to have a severe sensorineural hearing loss, but the reliability of the history was subject to question.

When claimant was seen in follow-up he continued to have pain in the right buttock and tightness in the right thigh. He had a slight limp.

Claimant was readmitted to the hospital on August 3, 1971 with a diagnosis of recurrent disc herniation at L4-5. Surgery was discussed with him, but he elected to postpone it because of a family illness.

In March of 1972 he was seen for a follow-up evaluation of his back and leg pain and also for gastritis which was thought to be related to his drinking. He refused hospitalization. He was fitted with a back brace and encouraged to continue Williams exercises.

Claimant returned in July and wanted surgery. His complaints were not found to be consistent with the findings on examination. A trial of weight reduction with flexion and extension exercises was proposed with a return in three months.

When claimant was seen in October his back pain had decreased, but he was still obese. Claimant decided with his doctors' agreement that he did not want surgery. He was to continue his exercise.

In February of 1973 claimant complained of low back and left leg pain which was exacerbated by heavy lifting, straining, coughing, or sitting. It was concluded that claimant might have a recurrent disc at L4-5 with compression of the L5 and S1 roots. He reported an inability to return to truck driving, but he refused treatment. He was instructed to lose weight.

Arnold H. Menezes, M.D., neurosurgeon, saw claimant for a final evaluation on August 14, 1974. Claimant was self-employed wiring motorcycles and working on carburetors and lawn mowers. He reported occasional pain in the back of his left thigh after standing for a long time. He said he could walk five or six miles without back or leg pain. Following his examination, the doctor wrote: "We felt he was doing well."

In February of 1979 claimant had a left inguinal hernioplasty and excision of multiple skin lesions and a foreign body in the left hand.

Tom B. Hoogestraat, D.C., examined claimant on December 2, 1980 and suggested he go to a medical doctor. Dr. Hoogestraat saw claimant again on April 12, 1982 with complaints of cervical pain which claimant thought were coming from his low back. The doctor did not think they were related and he proposed an exercise program and weight loss to relieve the low back complaints.

Steven E. Hart, D.O., hospitalized claimant on December 4, 1980 with severe back pain. He was treated with traction, physical therapy, and medication. Pain at rest was eliminated, but claimant continued to have pain with activity. Dr. Hart anticipated claimant would be unable to remain out of the hospital because of a painful and medically unresponsive problem. X-rays were thought at one point to show an essentially normal lumbosacral spine except for flecks of contrast material and at another to evidence question of a fractured transverse process at L4. Claimant was given a lumbosacral support. It was anticipated he would need to see an orthopedic surgeon.

Claimant was hospitalized in late January of 1981 for epigastric pain and hematemesis, but he also complained of pain in the left buttock and left posterior superior iliac spine which caused discomfort radiating down the left lower extremity. He was examined by Dr. McCoy. Claimant's tenderness was localized to a fat pad in the left posterior superior iliac spine which caused discomfort radiating to the left lower extremity.

Dr. McCoy saw claimant on March 17, 1981 and admitted him to the hospital on March 23 at which time claimant had pain radiating into his left testicle and left lower extremity when traction was attempted. The doctor felt there were "very considerable functional elements" to claimant's problem. Claimant was sent to Iowa City for additional treatment.

Dr. Menezes saw claimant on March 27, 1981 at which time claimant complained of back and leg pain for the past four months. Claimant limped on his left leg. He was x-rayed and disc space narrowing at L4-L5 was observed by the radiologist, but Dr. Menezes reported normal disc spaces. The doctor was uncertain as to the origin of claimant's pain.

Claimant was admitted to the veteran's hospital on June 21, 1981 with complaints of left groin pain, but he gave a history of chronic low back and lower abdominal pain as well. The next month he had an orthopedic evaluation during which he complained of discomfort in his left buttock which radiated to his left lower limb and was associated with paresthesia of his first toes. Claimant complained of intermittent claudication. Electrodiagnostic studies were normal. On March 8, 1982 claimant was complaining of a stiff neck, aching arms, headache, and diarrhea as well as a painful left testicle and cord.

Physician's assistant Sistrunk saw claimant in mid-July of 1982 for complaints of a stiff neck, headache, and low back pain. Claimant was found to be actively depressed with no range of motion in his neck. He had a urinary tract infection. His diagnoses were osteoarthritis, headache secondary to degenerative disease of the cervical spine, and acute left nephritis. He was treated with medication and a cervical collar.

Claimant was seen by C. E. Robinson, M.D., on July 19, 1982 for severe neck pain. He was in a wheelchair. Movement of his back and neck was limited. X-rays showed moderately advanced osteoarthritis.

Claimant saw Dave W. Smith, D.C., on July 20, 1982 with complaints of headache and neck pain. He denied having headaches before, but he reported a low back history. He was referred to a medical doctor for low back problems. Dr. Smith found claimant's prognosis "extremely guarded" and he anticipated continuous episodes of pain exacerbating claimant's neck problem.

Martin F. Roach, M.D., saw claimant on November 8, 1982. Claimant gave a history of developing cervical and head pain about three or four days after he had low back pain from the November 1980 incident. Claimant's complaints on the day of the exam were pain in the left leg, neck, and low back. Claimant moved guardedly with voluntary restriction of his movements. Dr. Roach's diagnosis was mild degenerative disc disease at C3-4 and C4-5 with lumbosacral pain of an undetermined etiology. The doctor commented: "Based on normal x-ray findings and an equivocal physical examination, I think that with adequate weight reduction and back exercises, the patient could control his pain. His symptoms seem to be far in excess of his physical or x-ray findings." A five percent permanency rating was given. Claimant was thought capable of medium work lifting up to thirty pounds at a time. He was to avoid heavy lifting, frequent climbing, or working at heights. Clerical or maintenance work was deemed suitable.

David F. Poe, M.D., saw claimant on December 14, 1982 at which time claimant had limited motion of his lumbar spine and positive straight leg raising. Claimant was admitted for diagnostic studies and subsequently referred to Dr. Lehmann.

A myelogram was done on December 30, 1982 which was interpreted as negative with a slightly narrowed lumbar interspace. A CT scan a few days later was essentially negative with a minimal midline bulging disc at L4. During claimant's hospitalization he was treated with physical therapy to both his lumbar and cervical areas. Other treatment was aimed at reducing claimant's anxiety, tension, and pain behavior and to increasing his physical tolerance and self-esteem. He was given epidural injections.

Marvin F. Piburn, Jr., M.D., saw claimant in consultation on December 31, 1982. In taking claimant's history, the doctor noted that claimant had pain down his left leg whereas he had pain down the right leg in 1970. Dr. Piburn's impressions were myalgia of the spine with the lower spine more severely involved, perhaps a low grade arachnoiditis or left lumbar stenosis and an adjustment disorder with mixed emotional features. For treatment the doctor suggested cool spray or ice massage with muscle stretch, neuroprobe with laser, and continuous use of a TENS and medication to normalize claimant's sleep pattern and reduce muscle tension.

Claimant spent two weeks in the pain and stress management program, but he was unable to master the pain group or relaxation training. He was treated with injections and medication. Dr. Piburn thought claimant might be a candidate for a facet block procedure, but not for conventional surgery.

Dr. Piburn, who devotes fifty percent of his practice to pain management, explained that a pain center approach was attempted with claimant because he had responded slowly to his first surgery and there were not neurological findings which could deteriorate. Treatment consisted of high intensity physical therapy, medication, and psychological pain management resulting in a "total strike out" producing only mild and transient improvement. He did not feel claimant worked well with either group or individual psychological treatment. He suggested a low back institute which he thought would present only a possibility of improvement because claimant was a "tough client."

Dr. Piburn felt that claimant now relates to others as a crippled individual because of his chronic pain syndrome which has altered his behavior, attitude, and perception of pain. He did not think that claimant was fabricating, but he believed a feature of claimant's condition is exaggeration. As objective manifestations of claimant's pain, the doctor pointed to claimant's body posture and active multiple trigger points in his muscles. He thought claimant's CT scan and myelogram had been the same for years.

Dr. Piburn attributed claimant's adjustment disorder with mixed emotional features to "the events between 1970 and the present time, his health problems, the pain he suffered and his loss of functioning." He viewed the accident of November 29 as the event preceding the worsening of claimant's back condition. Later he said the accident exacerbated claimant's preexisting condition.

In a letter dated January 21, 1983 Dr. Piburn stated claimant would be fit only for a sedentary occupation. The psychiatrist suggested using claimant's own psychology to let him set his functional level, but because he could be easily injured he could not recommend him for general manual labor.

A few days later he used the Orthopedic Surgeons Manual to reach a combined rating of the upper and lower spine of forty-five percent based on "muscle tension, muscle spasm and pain in the upper spine region associated with degenerative changes in some bone spur formation" and "a persistent pain syndrome in the low spine region producing muscular pain, muscle spasm and persisting following a laminectomy." That rating broke down to twenty percent for the neck and twenty-five percent for the back.

The physician had reviewed a number of medical records, but seemingly he had not seen the confused medical records. He recognized the lack of reliability in claimant as a historian by saying that claimant "selectively says things and he exaggerates for psychological reasons certain aspects of his history, and so he is not someone that you are going to take word for word like it was from the Bible because it just isn't that way." Dr. Piburn said that if claimant did not hit his head on the cab and if he did not complain of his neck until 1981, his opinion on causation would be different. He offered as explanation that a doctor will not pay attention to the neck when he has a severe low back syndrome.

Dr. Piburn indicated it was some time after his treatment and after providing information to the carrier that he learned that he was not to be paid.

Claimant was seen for low back pain in March of 1983 and treated for prostatitis in May of 1983.

Darrell E. Fisher, M.D., testified that Surgical Associates maintains its own office medical records department with records from the medical center entirely separate. All x-rays are stored in the radiology department of North Iowa Medical Center. A request dated June 2, 1983 for records from Jerry L. Frey was filed and the doctor assumed that the records of Jerry D. Frey to that point were sent. Patients are indentified both by name and by a computerized number. Dr. Fisher reviewed the records of Jerry D. Frey whom he had treated and of Jerry L. Frey whom he had not treated.

Dr. Fisher noted that Jerry D. Frey was not a patient in the office until May 11, 1972, that Jerry L. Frey was last seen prior to November 28, 1980 on April 22, 1971 for evaluation of hoarseness, that Jerry L. Frey was last seen for an orthopedic complaint on January 15, 1970. The files were separated on December 16, 1980.

Robert E. McCoy, M.D., reviewed patient charts for both Jerry Freys. He did not recall whether he actually treated both men, but he did recall some of the circumstances from Jerry L. Frey's record.

Regarding his referral of claimant to Iowa City, Dr. McCoy stated his feeling that there was an element of exaggeration in claimant's findings. A Minnesota Multiphasic Personality Inventory showed that tendency. He did not think claimant was definitely malingering. Dr. McCoy acknowledged that a disc herniation could have been related to the November incident and that a herniation could have occurred after the time he referred claimant. He believed claimant's complaints of his head and neck could be explained by osteoarthritis. He observed that he made no mention of headaches in his note of December 16, 1980; therefore, he did not think he related the headaches to the November episode.

Correspondence shows an attempt to locate some of claimant's x-rays. A log reveals they were sent to Franklin General Hospital on February 28, 1980. A letter dated August 2, 1984 from claimant's counsel complains that altered records were supplied in response to a request he made. A letter from Nancy Kloberdanc asserts that there has been no alteration. A letter from North Iowa Medical Center relates to x-rays taken of the two Freys.

APPLICABLE LAW AND ANALYSIS

The first issue raised by claimant is whether or not the deputy commissioner erred in concluding that he failed to establish his chronic debilitating pain is causally connected to his injury of November 29, 1980.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 29, 1980 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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).

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).

Initial attention must be focused on the mechanics of the injury found in claimant's testimony and the medical history provided by claimant to practitioners in this case. It must be noted that the hearing deputy specifically found a tendency on claimant's part to exaggerate his symptoms, that claimant was not well-motivated on his own behalf, and that claimant is an unreliable historian. Claimant testified he was backing an endloader and hit a chunk of frozen dirt first with his back wheel and then with the front. He claimed that both times he flew into the air and then down on the seat. The first time he hit his head. He first had pain in his lower back and left buttock and leg. Claimant claimed he made complaints of neck pain to Dr. Hart and thereafter told the doctors at Hampton of neck trouble.

Claimant has an extensive medical history which begins in 1970 when he had a headache and lumbar pain which radiated to the right side. A myelogram in November of 1980 showed nerve root defects in the cervical spine from C4 through C7. A hemilaminectomy was performed at L4. Thereafter claimant continued to have pain and a year later was diagnosed as having a recurrent herniated disc. Eventually claimant was given a back brace and started on exercises and weight reduction. In 1973 claimant complained of left leg pain. A final evaulation was done of claimant in 1974 at which time he was found to be doing well.

Dr. Hoogestraat was the first practitioner to see claimant after his November 1980 injury. Interestingly when he saw claimant again in 1982 when claimant presented with cervical complaints which claimant felt were coming from the low back, Dr. Hoogestraat did not agree.

Dr. Hart recorded only low back ache when he admitted claimant to the hospital on December 4, 1980. X-rays were confined to the lumbosacral area. Claimant did complain to the physical therapist and nursing staff of head and neck pain as well.

Dr. McCoy evaluated claimant during a January 1981 hospitalization for hematemesis after seeing claimant in his office. He was unable to elicit physical findings consistent with a herniated disc. On January 9, 1981 claimant complained of a headache and discomfort.

Dr. Menezes, neurosurgeon, saw claimant for a final evaluation in 1974 and then saw him again in March of 1981 at which time claimant spoke of low back pain which radiated to the thigh and was worse on the left than on the right. Evaluation again was limited to the lumbosacral spine. Dr. Menezes was uncertain of the etiology of claimant's pain.

Claimant was hospitalized at the Veteran's Hospital in June of 1981. He gave a history of chronic low back pain, but his major complaint was of left groin pain. The following month claimant was seen for an orthopedic evaluation. His complaints were confined to his low back and left lower extremity.

There is no record of claimant's being treated from July of 1981 until April of 1982 when he saw Dr. Hoogestraat who thought his complaints were not related to his injury. In mid-July he had no motion in his neck, a headache, low back pain, and dysuria. X-rays of the cervical spine showed moderately advanced osteoarthritis.

Claimant saw Dr. Smith, a chiropractor, in the same month. Claimant told of his accident which he said injured his neck and low back. Dr. Smith believed claimant's neck pain and stiffness was probably due to the original injury.

When Dr. Roach saw claimant near the end of 1982, he diagnosed mild degenerative disc disease and lumbosacral pain of an undetermined etiology. Dr. Roach provided claimant with an impairment rating, but his letter fails to state to what that impairment is related.

Claimant had a myelogram and CT scan in late 1982 which were interpreted as negative.

Dr. Piburn saw claimant on December 31, 1982. He rated claimant at forty-five percent of the upper and lower spine attributable to muscle tension and spasm, degenerative changes and bone spur formation in the upper spine, and muscle pain and strain in the lower spine. He attributed claimant's adjustment disorder to events between 1970 and 1982, claimant's health problems, and his pain. Dr. Piburn thought claimant's accident of November 29, 1980 exacerbated claimant's condition. Dr. Piburn acknowledged that his opinion on causation would be different if claimant had not hit his head and if he did not make complaints until 1981. Claimant did not report hitting his head to any doctor until 1982, although he told nurses and a physical therapist of head and neck pain.

Dr. McCoy attributed claimant's head and neck complaints to osteoarthritis.

Claimant's burden is a preponderance. 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).

Claimant's argument regarding weight to be given to Dr. Piburn's testimony has some validity. He is the only pain specialist to testify and he was well aware of claimant's unreliability. As documentary evidence of claimant's pain, the doctor pointed to active trigger points in the muscles at the time of his evaluation.

Dr. Smith and Dr. Piburn are the only practitioners to make a causal connection between claimant's injury and his disability. Dr. Smith spoke only to claimant's neck condition and he was not aware of the myelographic findings from 1970 and of claimant's complaints thereafter. Dr. Piburn did not see claimant until more than two years after the injury. He is a psychiatrist, not an orthopedist. His testimony is persuasive, but it has to be weighed against that of the other practitioners -- a neurosurgeon and orthpedists some of whom saw claimant in the 70's as well as in the 80's and who fail to connect claimant's disability with his injury. Claimant has a number of other conditions which have resulted in his having pain in his groin, left testicle, and prostate. He also has suffered pain with urinary tract infections and left nephritis. Claimant has failed to undertake a regular exercise program and to lose weight. Claimant makes the best argument he can make based on this record, but the totality of the evidence is against him. The hearing deputy did not err in failing to find claimant had a permanent condition based either on chronic debilitating pain or on his orthopedic condition.

The hearing deputy terminated claimant's temporary total benefits as of March 1, 1981 when claimant returned to the work force. A return to work does terminate temporary total benefits pursuant to Iowa Code section 85.33.

The discussion above resolves the second and third issues raised by claimant.

Claimant's fourth argument is that there was error in failing to award certain medical expenses. Claimant's assertions in that regard revolve around hearing exhibit 5. There is no exhibit 5 in the record. Clark testified that claimant's authorized physicians were Drs. Hart and McCoy and those at the University of Iowa and veteran's hospital. Defendants should pay any outstanding medical expenses for treatment of claimant's back received from those doctors and hospitals. The order of the hearing deputy will be upheld on the issue of medical benefits.

The final issue raised by claimant is his entitlement to additional benefits pursuant to Iowa Code section 86.13. It is apparent that claimant has been paid well in excess of fifty percent of benefits to which the hearing deputy and this decision conclude he was entitled. In any event, a claim of benefits under 86.13 is not substantiated.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-three years of age.

That claimant is five feet, eleven inches tall and weighs 250 pounds.

That claimant has an eighth grade education.

That claimant served with the navy where he did painting and sheet metal work.

That claimant receives a disability pension for a service connected sensorineural hearing loss.

That claimant's work experience includes that of a heavy equipment operator, semi-driver, logger, grain hauler, and service station manager.

That some of claimant's work experience has been as a self-employed person.

That claimant was injured on November 29, 1980 as he was operating an endloader back filling a ditch.

That claimant's employment was terminated on December 11, 1980.

That claimant first had back pain in 1969 after a fall on his buttocks and occiput.

That claimant had nerve root defects in his cervical spine from C4 through C7.

That claimant had a hemilaminectomy at L4 in 1970.

That after surgery in 1970 claimant continued to complain of back pain.

That claimant tends to exaggerate his symptoms.

That claimant is an unreliable historian.

That claimant is not well-motivated.

That claimant has failed to engage in regular exercise and to lose weight.

That claimant has suffered pain in areas of his body other than his spine and from conditions other than orthopedic problems.

That claimant was not authorized to receive medical treatment from Parkersburg Chiropractic Clinic, St. Francis Hospital, Park Clinic, Dr. Piburn, Dr. Smith, or Dr. Panegos.

That claimant incurred mileage expenses for his authorized medical treatment related to his injury.

That claimant's treatment at Franklin General Hospital was authorized.

That claimant has not established a need for further medical treatment related to his injury of November 29, 1980.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to prove by a preponderance of the evidence that there is a causal relationship between his injury and any permanent disability which he now may suffer.

That claimant has established entitlement to certain medical expenses pursuant to Iowa Code section 85.27.

That claimant has failed to establish by a preponderance of the evidence that defendants unreasonably delayed or denied payment of benefits to him.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay the following expenses pursuant to Iowa Code section 85.27:

Franklin General Hospital	$1,501.15
Mileage expenses	59.20

That defendants be given credit for all amounts previously paid.

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

Signed and filed this 8 day of October, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

524

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT FRY,	:	
Claimant,	:	
vs.	:	
SWIFT INDEPENDENT PACKING CO.,	:	FILE NO. 764672
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
NATIONAL UNION FIRE INSURANCE COMPANY,	:	FILED OCT 7 1985 IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Robert Fry, claimant, against Swift Independent Packing Co., employer (hereinafter referred to as Swift), and National Union Fire Insurance Company, insurance carrier, defendants, for benefits as a result of an alleged injury on March 28, 1983 to claimant's left hand. On August 13, 1985 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

ISSUES

The parties have submitted the following issues for determination in these proceedings:

I. Whether claimant has filed a timely claim within the prescribed limitations of Iowa Code section 85.26;

II. Whether claimant received an injury arising out of and in the course of employment under Chapter 85 of the Code or an occupational disease under Chapter 85A of the Code; and,

III. Whether there is a causal relationship between the alleged injury or occupational disease and the claimed disability.

At the start of the hearing, defendants indicated that they desired to raise the defenses of untimely claim under Iowa Code section 85.26 and lack of notice under Iowa Code section 85.23. Neither of these defenses or issues were raised at the pre-hearing conference or listed as a hearing issue in the assignment order. The defense under Iowa Code section 85.23, however, was specially pleaded in defendants' answer to claimant's petition.

For the purpose of eliminating unfair surprise, promoting administrative efficiency and providing the parties with fair notice of all issues to be dealt with at a hearing, contested issues are identified at the pre-hearing conference. It has been the experience of this agency that many issues raised in the pleadings are not actually issues at the time of hearing and such matters should not be dealt with by this agency if not at issue. Therefore, the parties are expected to identify all issues at the time of the pre-hearing conference. See Industrial Commissioner Rule 500-4.20. Those issues and defenses not raised are waived. The only exceptions are jurisdictional issues. The defense of untimely claim is jurisdictional. Jurisdictional defenses need not be specially pleaded or asserted and may be raised by defendants at any stage of the proceedings in any manner. See Mousel v. Bituminous Material and Supply Company, 100 N.W.2d 763 (Iowa 1969). Accordingly, defendants are allowed to assert the defense of untimeliness of claim under Iowa Code section 85.26 but not the affirmative defense of lack of notice under Iowa Code section 85.23.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The parties have submitted a pre-hearing report of certain matters pertaining to this case which was approved and accepted as a part of the record of this case. The record of the hearing consists of the oral testimony of claimant; joint exhibits 1-3; and claimant's exhibits 1-4. The parties have stipulated to the following matters:

1. An employer-employee relationship existed between claimant and the defendant employer at the time of the alleged injury;

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from these proceedings shall be $248.81; and

3. Claimant is not seeking temporary total disability or healing period benefits in these proceedings and that in the event defendants are held liable for the alleged work injury, claimant shall be entitled to permanent partial disability benefits of 38 weeks for a 20 percent loss of use of the left hand and such benefits should commence on March 28, 1983.

Claimant stated at the hearing that he is 59 years of age and has worked for defendant employer for the last 32 1/2 years. This employment has involved the extensive use of both of his hands. For 16 years he skinned cattle using his hands and a knife. For another 10 years he be-headed hogs which required grasping the head with his left hand and arm and using a knife to cut off the head with his right hand. In 1978, at the time claimant was performing the job of removing hog heads, he ruptured tendons in the little finger of his right hand which resulted in loss of grip and motion in his right hand. This condition was rated by his physician at the time, Patrick Bowman, M.D., an orthopedist, as constituting a 20 percent impairment to his right hand. Claimant is not seeking compensation benefits in these proceedings for this injury. According to the medical reports submitted into evidence, claimant has a long history of osteoarthritis in both of his hands.

Claimant testified that sometime prior to 1983, he injured his left hand. He states that he was, at the time, performing the job of cleaning chitterlings or hog intestines which involved the use of his hands to pull the intestines from a machine. He stated that while pulling intestines on one occasion, he felt a numbness and tingling sensation in the little finger down to the pad at the base of his palm on his left hand. He said that no specific pull brought on the problem but that the problem developed over the course of one day. Claimant was not specific as to the exact date of this incident but stated that he had reported the problem to the nurse the next day following the incident. Apparently, in his deposition, claimant had previously stated that he waited four to five months before reporting the condition to the nurse. Neither the testimony of the nurse nor her records were offered into evidence by either party at the hearing. Claimant stated that he saw the nurse a few more times after the initial onset of his problems and received minor treatment from her. However, his problems worsened and he was sent by the nurse to the company doctor. Claimant testified that his condition deteriorated further and approximately one or two months later, he was sent to Dr. Bowman. The records of Dr. Bowman indicated that he initially saw claimant on April 13, 1983 for an injury to the left hand which had occurred "several months" earlier. Upon examination, the doctor found evidence of a ruptured tendon in the little finger, similar to the condition of the right hand. With no history of trauma, the doctor felt that the condition was the result of an attritional process. After x-rays failed to show an osteoarthritis condition to explain the rupture of the tendons, claimant's condition was considered by Dr. Bowman to be "stenosing tenosynovitis" or an inflammatory process involving the tendons and the tendon sheath in the little finger. Due to claimant's advanced age, the doctor did not feel surgery was appropriate. In May 1983, Dr. Bowman noted that claimant had no function of the little finger and doubted if claimant could continue in packinghouse work. At that time, the doctor rated claimant as having a 20 percent permanent partial impairment of the left hand due to the immobility of the little finger and the resulting loss of use of the hand. In April 1984, Dr. Bowman reported that claimant had suffered a spontaneous rupture of the tendons in his little finger in his left hand which resulted in minimal function of that portion of the left hand and a "gross loss of grip." The doctor opined that the condition is related to "over use of the extremity" over 30 years in the packinghouse but again indicated that there was no specific history of trauma.

At the request of defendants, claimant was examined in September 1983 by Michael T. O'Neal, M.D., another orthopedist, who felt that claimant's problems in both of his little fingers were not the result of stenosing tenosynovitis. Dr. O'Neal pointed out claimant's osteoarthritic changes in the joints of the little finger. However, the doctor did indicate that such a condition could be aggravated by working with his hands in cold water or in a damp climate.

At the hearing claimant demonstrated a severe loss of movement in his left little finger and an inability to fully form a fist. He testified that he has a significant loss of grip. Claimant continued on the job of cleaning chitterlings after the onset of his left hand problems but was later moved to a job called saving giblets. Claimant did not lose work as a result of his left hand problems and continued to work until the plant in which he was employed was closed by Swift for economic reasons.

APPLICABLE LAW AND ANALYSIS

I. In all cases, claimant must establish by a preponderance of the evidence that he filed his claim with this agency within the prescribed period of time allowed under Iowa Code section 85.26. Such a showing is necessary to demonstrate this agency's subject matter jurisdiction over the controversy and constitutes a condition precedent to filing suit for compensation benefits with this agency under Chapters 85, 85A, 85B and 86 of the Iowa Code. See Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763 (1969). Lack of subject matter jurisdiction may be raised in any manner at any time during the course of legal proceedings. Qualley v. Chrysler Credit Corp., 261 N.W.2d 466 (Iowa 1978). A tribunal may raise the issue of subject matter jurisdiction on its own motion at any time. See Uchtorff v. Dahlin, 363 N.W.2d 264 (Iowa 1985). Generally, a petition for workers' compensation benefits must be filed within two years of the date of injury or within three years of the date of the last payment of weekly benefits. There is no limitation on a claim for medical benefits under Iowa Code section 85.27, if no denial of liability is filed with this agency or if no notice of such denial is served upon an injured worker within six months after the commencement of payment of weekly benefits.

In this case, claimant has demonstrated that he has filed his claim in a timely manner. Claimant filed his petition in October 1984. Claimant testified that the injury occurred sometime prior to 1983 and Dr. Bowman's report indicates that he was informed that an injury had occurred several months previous to his examination in April 1983. Such evidence by itself would be insufficient to establish a timely claim. However, this is an arbitration proceeding with no previous payment of weekly benefits and the so called "discovery rule" is applicable. This rule permits claims to be filed beyond the two year limitations. In original proceedings, so long as claimant has filed his claim within two years after he or she first knew that his injury was both serious and work connected. Otis v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980). Although claimant sought medical assistance from the plant nurse soon after the incident, he was not appraised of the full extent of his injuries until the office visit of Dr. Bowman in April 1983. Claimant's testimony that he ignored the pain at first and did not seek out medical treatment until the condition became serious was credible.

II. Claimant alleges to have an occupational disease under Chapter 85A of the Iowa Code or in the alternative a work injury under Chapter 85 of the Code. In the case of work injuries, claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of 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 therein.

Iowa workers' compensation law distinguishes between work injuries and occupational diseases. Iowa Code section 85A.8 states as follows:

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

In further explanation of the distinction between work injuries and occupational diseases, the Iowa Supreme Court in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) at page 190 states as follows:

> ...to prove causation of an occupational disease, the claimant need only meet the two basic requirements imposed by the statutory definition of occupational disease, given in section 85A.8. First, the disease must be 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....

Therefore, the basic difference between an occupational disease and a work injury in Iowa is one of causation. If the injury or disease is the result of an exposure to a harmful condition while at work and that such a condition is more prevalent at work than in everyday life or other occupations, an occupational disease has been shown. Otherwise, all other injuries or diseases caused by an injury which arise out of and in the course of employment are "work injuries."

Questions involving causation are essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

In the case sub judice, claimant has not shown an occupational disease for the reason that there has been no showing, that he was exposed to harmful conditions more prevalent at work than in other occupations. There was no testimony as to the environmental conditions in the Swift plant. Although claimant testified that he used his hands extensively and that the work was not easy, such evidence does not demonstrate that such hard work is more prevalent in a packinghouse environment than any other strenuous occupation or industry.

However, claimant has shown a work injury. The views of the treating physician, Dr. Bowman, must be given greater weight in this case as he was the most familiar with his clinical findings after the incident and with claimant's previous history. The spontaneous rupture of a tendon did occur in the doctor's opinion similar to the rupture in claimant's right little finger and such a diagnosis is consistent with claimant's discription of a fairly quick onset of problems. Although Dr. Bowman attributes the rupture to excessive use of the tendons during claimant's employment at Swift over a long period of time, it was the rupture, not the underlying condition which led to claimant's disability. Claimant's testimony that the rupture occurred while he was extensively using his hands at work was uncontroverted. Therefore, the greater weight of evidence establishes that claimant's work aggravated the tendonitis condition and that the resulting rupture was a significant cause of disability.

III. Claimant has also shown by a preponderance of the evidence that the left little finger condition is a cause of permanent disability. Although the two physicians in this case disagree as to causation, both agree that the condition is a cause of permanent impairment to the hand, although they disagree as to the extent of such impairment. The parties have already stipulated to the extent of entitlement to permanent total disability benefits and there is sufficient evidence in the record to support this stipulation.

FINDINGS OF FACT

1. Claimant is a credible witness.

2. Claimant was in the employ of Swift at all times material herein.

3. Claimant's job in the latter part of 1982 consisted of cleaning chitterlings which required the extensive use of his hands.

4. Claimant has worked for Swift for over 30 years in positions requiring the extensive use of both of his hands.

5. Prior to the work injury claimed herein, claimant had a 20 percent permanent partial impairment of the right hand due to rupture of a tendon in his right little finger.

6. Claimant's work at Swift involving the strenuous and extensive use of his hands is not more prevalent at Swift than in any other strenuous occupation or employment environment.

7. As a result of his work at Swift, claimant developed stenosing tenosynovitis in his left little finger which eventually ruptured the tendons in this finger either in the latter part of 1982 or the first part of 1983.

8. Claimant did not realize the seriousness of his injury to his left hand until being advised of the ruptured tendon by his physician in April 1983.

9. Claimant filed his claim for benefits herein in October 1984.

10. Prior to the work injury herein, claimant had no physical impairments or ascertainable disabilities in his left hand.

11. Prior to the work injury, claimant was able to perform strenuous work with his left hand.

12. After the work injury, claimant would have extreme difficulty performing many of the jobs that he had previously performed in the past for Swift.

13. Claimant has a substantial loss of the range of motion in his left little finger; is unable to completely form a fist with his left hand; and has a significant loss of grip strength in his left hand.

14. As a result of his work injury, claimant has incurred a 20 percent permanent partial impairment to his left hand.

15. Pursuant to the parties' stipulation, claimant's rate of compensation is $248.81 per week.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that he has filed his claim for compensation benefits herein within two years from the time that he realized the seriousness and work relatedness of his work injury;

II. Claimant has established by a preponderance of the evidence that on or about the latter part of 1982 or the first part of 1983, he suffered an injury arising out of and in the course of employment.

III. Claimant has established by a preponderance of the evidence that the injury is a cause of permanent disability; and,

IV. Claimant has established entitlement to permanent partial disability benefits for 38 weeks.

ORDER

Accordingly, the following is ordered:

1. Defendants shall pay to claimant thirty-eight (38) weeks of permanent partial disability benefits at the rate of two hundred forty-eight and 81/100 dollars ($248.81) per week from March 28, 1983.

2. Defendants shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

3. Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

4. Defendants shall file activity reports on payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 7th day of October, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SAMMIE L. GATES, Claimant, vs. SWIFT INDEPENDENT PACKING, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 669207 APPEAL DECISION

FILED
AUG 30 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a proposed review-reopening decision wherein it was concluded that the claimant failed to establish entitlement to additional healing period or permanent partial disability benefits. The record on appeal consists of the hearing transcript; claimant's exhibits 2 through 12 and 14 through 18; defendants' exhibit A; and briefs filed by the parties. At the time of the hearing the parties agreed that the claimant had been paid six weeks and six days of temporary total benefits.

ISSUES

The issues as stated by the claimant are:

I. There was sufficient evidence to establish a causal connection between the injuries sustained by claimant on March 12, 1981, and the disability which the claimant now suffers.

II. The deputy industrial commissioner disregarded expert medical testimony and did not state why she did so.

III. The deputy industrial commission [sic] erred in admitting into evidence a newspaper article and records pertaining to complaints brought against one of the examining doctors before the Iowa state board of medical examiners.

ANALYSIS

The evidence was well summarized by the deputy in the statement of the case and will not be repeated herein except to state that defendants' exhibit A, as it pertains to E. J. Drew, M.D., is given no weight on appeal.

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

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

530

FINDINGS OF FACT

1. Claimant is 31 years of age.

2. Claimant is right handed.

3. Claimant is five feet six inches tall.

4. Claimant's work entailed cutting heads from cattle carcasses, removing horns from a small percentage of cow's heads and then hanging them on hooks.

5. The hooks on which claimant placed heads were no higher than 50 inches.

6. Claimant developed carpal tunnel syndrome.

7. Claimant had a carpal tunnel release on the left on May 8, 1981.

8. Claimant was terminated when he walked off the job because his hand was hurting.

9. After leaving defendant employer claimant worked as a mechanic.

10. Claimant worked for six weeks in 1983 with a cleanup crew.

11. Claimant labored slightly more than a month for a construction company using a jack hammer with some work done overhead in the fall of 1983.

12. Claimant collected unemployment for periods of time in which he was not working.

13. Claimant continues to have diffuse complaints of his left hand and arm.

CONCLUSIONS OF LAW

Claimant has failed to establish by a preponderance of the evidence any causal connection between his injury of March 12, 1981 and any disability he now suffers.

Claimant has failed to establish entitlement to additional healing period or permanent partial disability benefits.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

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

Signed and filed this 30 day of August, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS GARRELS,	:	
Claimant,	:	
vs.	:	File No. 713648
FARMLAND FOODS,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	FILED
AETNA CASUALTY & SURETY,	:	DEC 20 1985
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision which concluded in part that, "claimant's injury required surgery in the body cavity and the severing of nerves running to body organs as part of its treatment, such an injury is an injury to the body as a whole and compensation is not limited to that for the scheduled member." The stipulated record on appeal consists of the arbitration decision; the exhibits introduced at the hearing; and depositions of John C. Goldner, M.D., and Maurice P. Margules, M.D.

ISSUES

1. The finding of fact that claimant has a disability to the body as a whole is not supported by substantial evidence.

2. The [deputy] industrial commissioner made an error of law in concluding that the claimant is entitled to a determination of industrial disability.

REVIEW OF THE EVIDENCE

The hearing transcript is not available for review due to the stipulation. Therefore the portions of the arbitration decision reviewing the testimony are set out below for background.

Claimant testified that he is 30 years of age, resides in Lakeview, Iowa, has been married six years and has a child who is five years of age. He testified that he attended school for 12 years and graduated in 1973. He stated that his reading skills are poor, at approximately a second grade level, and that his spelling is also poor. He related that he took a special reading course in school due to his less than average reading ability and that he received D's and F's in that course.

Claimant testified that upon completion of high school he worked for a few months moving houses and then entered the army where he served as a communications specialist. He described his work experience as including welding, carpentry, drafting and truck driving. He stated that all of his work experience had been in the general nature of heavy labor except the drafting work which he performed for only three months and left due to its low pay and his inability to do it well.

Claimant stated that he suffered an injury to his left knee while wrestling in high school which resulted in fluid on the knee and medical treatment. He denied having any subsequent care for his left knee and stated that it felt fine when he started work at Farmland.

Claimant testified that his starting wage was $7.90 per hour and that he had worked at jobs that paid more than $10.00 per hour. He stated that on September 16, 1982 he was earning $9.35 per hour. On that date he stooped to pick up an inedible carcass and felt something give in his knee. He related that he reported the injury to his foreman and went to see a nurse named Mary who referred him on to Dr. Uy. He was then referred to Ronald K. Miller, M.D., who placed a cast on his leg. Claimant testified that after approximately a month the cast was removed but that he was still experiencing pain and locking of his knee. He returned to work for approximately a month and then subsequently underwent surgical treatment for his knee. This was followed by a manipulation, physical therapy and another surgery in March, 1983. He stated that his leg continued to be painful in that it was hot, sweaty, swollen and discolored. He saw Maurice P. Margules, M.D., who performed two nerve blocks which provided him with some temporary relief of his symptoms. Claimant stated that he then underwent surgery in which the nerve was severed. He stated that the incision was made on the lower left side of his stomach.

532

Claimant stated that since the surgery his symptoms have improved but are not completely resolved. His leg is no longer sweaty and no longer discolored. It is now less sensitive to cold but more sensitive to heat and humidity than his other leg. He stated that at night he experiences cramps which run from his waist down to his foot. He denied having any problems with his bladder or sexual disfunction. Claimant testified that Dr. Margules wanted to perform a myelogram and that Dr. Miller has recommended removal of his kneecap. Claimant stated that he has declined those recommendations because he is "tired of being cut on." He feels that the efforts at rehabilitation have not produced much benefit. He stated that he wanted to obtain schooling but that he was unable to get it. He stated that he presently is in a reading course which is improving his reading skills. Claimant testified that he has searched for work which involved sit down type jobs but that he has been unable to find any. He stated that his physical problems prohibit him from standing for long periods of time and that he is unable to work in a cooler. Claimant stated that he has not looked into small engine or appliance repair. He stated he felt that he could do that type of work and that he enjoyed it. He stated that most of his job hunting was done in the last few months.

Claimant testified that his reading ability is at the second grade level and that his math ability is at the sixth grade level. He stated that he learns quickly, however, at "hands on" type of work.

Claimant testified that he returned to Farmland seeking light duty work but that all available work required standing. He related that he sought unemployment benefits and that Farmland contested his claim. Claimant stated that when he returned to Farmland seeking light duty work he applied to his foreman but not the company nurse. He stated that no light duty work was found. He stated that his employment was terminated on October 19, 1983 when he quit because the doctor said he could not do the work.

Claimant testified that he presently spends his days at home watching TV. He said that his wife does not work outside the home and that she performs the household chores.

Penney K. Garrels testified that she was married to claimant on May 26, 1978 and is presently 24 years of age. She stated that prior to the injury claimant did not complain of knee problems and that his leg did not sweat extensively or turn color. She described him as very active and stated that he boated and played football. She stated that his activities are now curtailed, that he is restless and does not sleep well. She stated that his leg has swollen this summer and that in the winter the cold causes a cramping effect.

Claimant's spouse testified that she was not present when he fell in March, 1983 but that the fall did not change any of his symptoms. She confirmed that he has searched for work.

Mary Margaret Daniel, R.N., testified that she is the supervisor of safety and health at Farmland and has two nurses who work under her. She stated that Farmland has a return to work program but that claimant did not talk to her about returning and that she was not notified that he wanted to return. She testified that she follows the workers' compensation cases but that when an attorney gets involved she no longer discusses the matter with the worker.

She stated that reemployment of claimant has been discussed but that no decision could be made. She related that if he were to return he would have to reapply as a new employee.

Exhibit 1 is a collection of various medical reports and records. An operative report of June 29, 1983 is included. It was dictated by the surgeon, Maurice P. Margules, M.D., the type of surgery is described as "Lumbar sympathectomy, LEFT, Leriche type approach." In describing the procedure the report states a "leriche type" incision was made starting at the tip of the 11th rib and angling in the front of the anterior and superior iliac crest. The incision was carried down through superficial layers, and the abdominal musculature was exposed. The report continues: "The sympathetic chain was identified. First, a small connecting chain was identified which lead to a ganglion. The ganglion was exposed and the chain was then exposed, then transected between two ganglions at the level of L3 and L4. This was a large chain with a large ganglion structure."

Office reports of Ronald K. Miller, M.D., are also included. On September 6, 1983 Dr. Miller states: "Probably has at least 20% impairment of the leg based on his patella and on the sympathectomy I would probably give him another additional 15% of the leg. Patient will be seen again in six weeks."

On January 4, 1984 the above impairment ratings are reviewed and the entry reports that these ratings should continue.

A letter from Dr. Miller to defendant insurance carrier dated September 9, 1983 states in part: "There appears to be very little vascular instability."

Dr. Margules, claimant's surgeon, in a letter to claimant's counsel dated January 10, 1984 states that "the patient has a partial permanent physical disability which is rated at 15% of the body as a whole."

A letter from John C. Goldner, M.D., to defendants' counsel dated May 22, 1984 states:

> At the present time, Mr. Garrels has no evidence of impairment of the central or peripheral nervous system....However, I would concur with Dr. Miller's view that he has about 20% disability to the left leg on the basis of the injury to the left knee. I would consider this a permanent partial disability at this time. I do not feel that the lumbar sympathectomy done in an attempt to relieve pain in the left leg has resulted in any further impairment to the left lower extremity or the body as a whole.

In a letter of July 3, 1984 Behrouz Rassekh, M.D., to defendants' counsel, Dr. Rassekh felt that the fact of having unilateral sympathectomy should not give any permanent partial impairment. In a follow-up letter of July 14, 1984 Dr. Rassekh explains that this is because "all patients compensate for loss of vascular tone after unilateral sympathectomy."

Exhibit 2 is a letter to claimant's attorney dated January 10, 1984 from Dr. Margules. Dr. Margules renders an opinion that the injury the claimant sustained on September 16, 1982 resulted in a reflex sympathetic dystrophy of the left lower extremity (treated by means of a left lumbar sympathectomy on June 28, 1983). Dr. Margules stated that the claimant has a permanent physical impairment of 15 percent to the body as a whole.

Exhibit 3 is a letter report from O. M. Jardon, M.D., Associate Professor of Orthopaedic Surgery, University of Nebraska Medical Center. Dr. Jardon saw the claimant on August 24, 1983. It was Dr. Jardon's opinion that the claimant gave a history which was fairly typical of reflex osteodystrophy or Sudeck's type atrophy of the lower extremity. He writes further:

> Final diagnostic impression is that of reflex osteodystrophy or Sudeck's atrophy of the lower extremity. It is also my opinion that the man has suffered some partial permanent disability. I think it is logical that the rating for partial permanent disability from a sympathectomy be estimated by the operating neurosurgeon. A combination of pain and disturbed motion and atrophy and previous surgeries of the left knee would in my opinion represent about a 20% partial permanent disability of the lower extremity which would convert to 8% or 10% partial permanent disability of the whole man.

Exhibit 4 is the deposition of Dr. Margules, a neurosurgeon, who first saw the claimant in May 1983 on a consult/referral from Dr. Miller. The claimant presented with a history of pain in his left leg and with it he had swelling of his leg, and vasomotor dysfunction in the nature of cyanosis of his leg and foot -- what the claimant called discoloration. The claimant's symptoms indicated to Dr. Margules that the claimant was experiencing reflex sympathetic dystrophy. To confirm the diagnosis the claimant had to undergo two lumbar sympathetic blocks. After the second blook, Dr. Margules put the claimant on Dibenzyline, however, the claimant couldn't tolerate the systemic effect of Dibenzyline which caused the claimant to have orthostatic hypotension and a tendancy to syncope.

Dr. Margules described reflex sympathetic dystrophy as follows:

> A. Well, the reflex sympathetic dystrophy in reference to this patient is the fact that he has the symptoms that I described before that has to do with dysfunction of the sympathetic system. The sympathetic system is totally independent, of course, from our will and conscience. That's why it's called the autonomic nervous system. It is not under the control of the patient. And it has to do with the visceral innervation, vesicular

innervation because the sympathetic system innervates the smooth fibers, smooth muscle fibers, versus the cortex of the brain that innervates the voluntary muscle, striated muscles. In other words, we can control moving our fingers because the cortex innervates the striated muscle. We cannot control the muscle fibers of our heart, for example, because the sympathetic system innervates the fibers of the coronary artery as well as the arteries in the extremities, like Mr. Garrels, and in the viscus, in the visceras. This is somewhat, then, difficult to understand for people, somewhat difficult to understand for people who are not physicians, because it's quite complicated.

....

A. The sympathetic nervous system is the nervous system that involves the entire body. In fact, in the phylogenic development of man, it is present before the cerebral spinal system develops. It precedes the development of the cortex of the brain. It innervates the heart, it innervates the lungs, it innervates all of the blood vessels, all of the colon, stomach, all the viscus and all the organs of the pelvis. It has a number of centers. Some centers are in the brain, in the frontal lobe, for example; some are in the brain stem. The one in the brain stem, we all know what it does. It has to do with the cardiac centers and one fast in the heart and one slows it down, which is done without our control, as we all know; and emotions cause usually a fast pulse rate, and that has to do with the sympathetic center there in the brain stem. Then there is a center in the cervical cord and one in the lumbar cord. But it would take hours to describe this, but it obviously involves the entire body, not only the lower extremities.

(Margules Deposition, pages 11 - 13)

Dr. Margules described the sympathectomy procedure as follows:

A. Well, a sympathectomy is a procedure that was described and developed by mainly Leriche, which was a -- specialized in diseases involving the sympathetic nervous system. It is performed to permanently interrupt the flow of sympathetic functions to a limb. Therefore, the only way we know that we can do this is by injecting the medication, which is temporary, or paralyzing the system by removing a portion of the sympathetic chain.

(Margules Dep., p. 13)

While performing the sympathectomy Dr. Margules removed a portion of claimant's sympathetic chain.

Dr. Margules described the effects of the sympathectomy and why he rendered a rating in terms of the "body as a whole."

A. Because, as I explained to you before as well as I could, which is not easy because I have limited time, the sympathetic system has its effects on the entire body; and, as I said, mainly in this individual, when you resect a portion of the lumbar sympathetic chain, you affect all the visceras that are below the level of the lumbar region. That affects, therefore, the colon, the rectum, it affects the bladder, it affects the vesicle muscle, it affects the sphincter, et cetera; so therefore, it can hardly be called a localized affair to the lower extremity.

One cannot deprive the limb of sympathetic function without depriving the rest of the organs of sympathetic function, so therefore, it should be a description of his disability to the body as a whole and not only to the left lower extremity.

(Margules Dep., p. 20)

On cross-examination Dr. Margules explained that the claimant will go through life with the problems associated with his condition and the sympathectomy because there is no way to avoid these. What Dr. Margules did not know was whether they become major and disabling problems.

Exhibit 5 is the deposition of Ronald K. Miller, M.D. Dr. Miller explains that the reason he rates the claimant as having a 15 percent permanent partial impairment to the body as a whole is "[m]ainly because of the effects that the sympathetic nervous system would have. It doesn't just simply confine itself to the leg, but actually -- I would suppose -- should be considered as a body rating." (Exhibit 5, p. 3)

Exhibit 6 is the deposition of John C. Goldner, M.D., a neurologist. Dr. Goldner saw the claimant on May 21, 1984. Dr. Goldner opined that the lumbar sympathectomy which was done did not result in any further impairment to the left lower extremity or to the body as a whole. Dr. Goldner's opinion was that claimant's functional impairment was limited to claimant's left leg. He rated the claimant's impairment as 20 percent to the left leg.

Exhibit 7 consists of the records involved with the claimant's examination at the Iowa Department of Public Instruction, Rehabilitation, Education and Services Branch.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 16, 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 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).

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).

If we isolate the lumbar sympathectomy and assume that the sympathectomy is the only problem/treatment that claimant had, then there would be, of course, no doubt that the claimant would have suffered an impairment to the body as a whole. This is evidenced in Dr. Margules testimony which was set out in great detail in the review. The sympathetic nervous system is the nervous system that involves the entire body. As Dr. Margules stated, when you resect a portion of the lumbar sympathetic chain, you affect all the visceras that are below the level of the lumbar region. If the claimant would not have had the leg injury then no left lumbar sympathectomy would have been performed. It is generally held that a worker who receives an injury which entitles him to workers' compensation may have compensation for an aggravation or increase thereof in its treatment. Bradshaw, 251 Iowa 375, 386, 101 N.W.2d 167. This case, while the surgery was successful, has left the claimant with an impairment to the body as a whole for which he is entitled to industrial disability. The deputy correctly analyzed the facts in the determination of claimant's industrial disability and hence will not be disturbed on appeal.

FINDINGS OF FACT

1. On September 16, 1982 claimant was a resident of the state of Iowa employed by Farmland Foods, Inc., working in the state of Iowa.

2. On September 16, 1982 claimant injured his knee while bending to pick up an inedible carcass from the floor.

3. As a result of the injury claimant underwent two arthroscopic surgeries on his left knee.

4. The injury to the knee resulted in a sympathetic nervous system dysfunction affecting claimant's left lower extremity.

5. Treatment for the sympathetic dysfunction involved surgery in claimant's body cavity which severed sympathetic nerves running to some of claimant's internal body organs as well as to the left lower extremity.

6. Claimant has not lost any body function beyond the left lower extremity.

7. Claimant has a 20 percent functional impairment of his left lower extremity due to the condition of his knee and has also lost the sympathetic responses in that extremity.

8. Claimant is 30 years of age, married and has one minor child. His rate of compensation, as established by stipulation of the parties, is $260.94 per week. At the time of injury he was earning approximately $9.35 per hour.

9. Claimant is presently unable to stand for extended periods of time and any employment in which he can engage must be predominately performed from a seated position. An acceptable employent environment for claimant would protect him from temperature extremes or permit the use of clothing and apparel which would protect him from exposure to temperature extremes.

10. Claimant's previous work experience consisted primarily of heavy labor which required extended standing except for a drafting position which he held for a short time. Claimant is not presently sufficiently proficient at drafting in order to be employed as a draftsman.

11. Claimant is well motivated, emotionally stable and reasonably intelligent. His reading and math ability is severely limited to an elementary school level.

12. When claimant sought to return to work with the defendant employer no suitable work could be found for him as a result of the limitations which had arisen from the injury.

13. Claimant has made bonafide efforts to return to work but has been unable to do so.

14. Claimant will require substantial retraining in order to obtain employment which provides compensation comparable to that which he enjoyed while working for the defendant employer.

CONCLUSIONS OF LAW

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

The disability which claimant presently exhibits is causally connected to the injury of September 16, 1982 which arose out of and in the course of his employment with Farmland Foods, Inc.

Where claimant's injury required surgery in the body cavity and the severing of nerves running to and affecting the functioning of body organs as part of its treatment, such an injury is an injury to the body as a whole and compensation is not limited to that for the scheduled member.

Where a claimant suffers an injury to the body as a whole and an actual reduction of his earnings occurs his disability should be measured industrially.

When claimant's disability is measured industrially, he has sustained 30 percent of total disability.

Pursuant to the stipulation of the parties claimant's healing period ended on December 10, 1983.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant one hundred fifty (150) weeks of compensation for permanent partial disability at the rate of two hundred sixty and 94/100 dollars ($260.94) per week commencing December 11, 1983.

That defendants be given credit for all compensation for permanent partial disability which has been previously paid. All past due amounts shall be paid in a lump sum together with interest pursuant to Iowa Code section 85.30 from the time the same became due until the date of payment.

That defendants pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33 and that defendants file an activity report upon payment of this award.

Signed and filed this 20 day of December, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWIN F. GREEN,

Claimant,

vs.

EAGLE IRON WORKS,

Employer,

and

AETNA CASUALTY & SURETY COMPANY,

Insurance Carrier,
Defendants.

File No. 668779

A P P E A L

D E C I S I O N

FILED
NOV 26 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision wherein it was concluded that he was entitled to 10 percent permanent partial disability as a result of an injury which arose out of and in the course of claimant's employment with defendant Eagle Iron Works. The record on appeal consists of the hearing transcript; the deposition of Thomas D. Carlstrom, M.D.; claimant's exhibits 1 through 4; defendants' exhibit A; and briefs filed by the parties.

ISSUES

The claimant states the following in his amended appeal brief and argument:

> In the "Statement of Facts" Claimant sets out three issues:
>
> 1. That claimant's healing period ended in the latter part of 1982 and not in April of 1982.
>
> 2. That testimony by Mr. McCluhan as an expert is arbitrary and has no foundation in which to be admitted as expert.
>
> 3. Claimant also feels the full extent of his industrial disability was not properly considered.
>
> This third issue is entwined in Issue I of the original Brief and Argument. Therefore this Amended Brief and Argument sets out the above Issue as follows:
>
> ISSUE 3
>
> Disability can only be adequately determined when maximum healing benefits have been reached. Both functional and industrial factors are considered in determining disability.

REVIEW OF THE EVIDENCE

The record was thoroughly and carefully set forth by the deputy and will not be repeated herein.

APPLICABLE LAW AND ANALYSIS

The applicable law cited by the deputy was correct. Further, the analysis of the law and facts were correct and proper. There is ample evidence supporting the cessation of healing period as found. The analysis does not indicate much reliance was placed on the opinion testimony of Rick McCluhan and its admission in the record was not error. The factors concerning industrial disability were adequately considered. The finding of fact and conclusions of law made by the deputy were correct.

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

FINDINGS OF FACT

1. Claimant is twenty-eight (28) years of age and is a high school graduate.

2. Claimant was honorably discharged from the U.S. Navy and learned to work with hand tools and electrical wiring in the navy.

3. Prior to April 27, 1981 claimant's work experience consisted of mainly unskilled, physically demanding employment including pouring cement walls, tire inspecting, working with molds, operating furnaces and maintenance work.

4. Prior to April 27, 1981 claimant had no back injuries that would have prevented him from full employment in any of his occupations.

5. On April 27, 1981 claimant suffered a myofacial strain in his low back as a result of slipping on a ladder and catching himself in his armpit.

6. Thomas A. Carlstrom, M.D., has given the claimant a permanent partial impairment rating of about six to eight percent (6-8%) of the body as a whole, and it is found that claimant has a functional impairment of eight percent (8%).

7. The claimant's last day of physical labor at Eagle Iron Works was on or about January 5, 1982, and on April 18, 1982 claimant reached his maximum healing.

8. Between December of 1981 or January of 1982 and September of 1983 the claimant did not apply for any jobs.

9. Surgery has not been recommended for the claimant; however, exercise and weight loss have been recommended in order to help his back.

10. Claimant does not do any exercises even though he is slightly to moderately obese.

11. Being overweight is bad for an injured back.

12. Claimant's back condition continues to cause him pain on most days.

13. Claimant's current employment prospects included residential wiring, welding, maintenance work, selling guns, repairing guns, restaurant management, retail management, press operator and printer.

14. Claimant has not been well motivated in seeking other employment after separating from Eagle Iron Works in early 1982.

15. In September of 1983 the claimant was hired by Ed Gardner Sandblasting and Painting on a part-time basis at $5.00 per hour.

16. In 1984 the claimant earned about five thousand five hundred dollars ($5,500.00); in 1983 he earned about two thousand four hundred dollars ($2,400.00); and in 1982 he received workers' compensation and unemployment compensation benefits of about eight thousand dollars ($8,000.00). In 1982 the claimant earned about seventeen thousand six hundred dollars ($17,600.00) at Eagle Iron Works even though he missed about two months of work.

17. The defendants to date have paid the claimant eleven thousand four hundred fifty and 49/100 dollars ($11,450.49) as a result of his injury of April 27, 1981 and have paid his medical bills.

18. Defendant Aetna has retained a rehabilitation counselor to help the claimant find work.

19. Claimant's industrial disability is ten percent (10%) as it relates to the body as a whole.

20. Claimant's stipulated weekly rate of compensation is two hundred eighteen and 40/100 dollars ($218.40)

CONCLUSIONS OF LAW

Claimant is entitled to healing period benefits for fourteen and six-sevenths (14 6/7) weeks at a weekly rate of two hundred eighteen and 40/100 dollars ($218.40) for the period commencing on January 5, 1982 and ending on April 18, 1982; he is also entitled to healing period benefits for the periods of April 28, 1981 through May 10, 1981 and December 9, 1981 through January 3, 1982.

For his industrial disability of ten percent (10%), the claimant is entitled to fifty (50) weeks of permanent partial disability benefits at a weekly rate of two hundred eighteen and 40/100 dollars ($218.40).

ORDER

That defendants pay unto claimant healing period benefits for a period of fourteen and six-sevenths (14 6/7) weeks at a weekly rate of two hundred eighteen and 40/100 dollars ($218.40) for his last healing period which commenced on January 5, 1982 and ended on April 18, 1982, and that he is entitled to the other healing period benefits listed above.

That defendants pay unto claimant fifty (50) weeks of permanent partial disability at a weekly rate of two hundred eighteen and 40/100 dollars ($218.40) with such benefits commencing after the payment of healing period benefits.

That defendants pay accrued amounts in a lump sum, and pay interest pursuant to section 85.30, The Code.

That defendants be given credit for benefits already paid to claimant.

That defendants pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 26 day of November, 1985.

MARLIN HAINEY, Claimant,	
vs.	
PROTEIN BLENDERS, INC., Employer,	File No. 708955
and	APPEAL DECISION
TRANSAMERICA INSURANCE SERVICES, Insurance Carrier, Defendants.	

FILED
OCT 18 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant, Marlin Hainey, appeals from a review-reopening decision wherein it was concluded that the claimant had established that his current disability was causally related to his work injury which occurred on April 5, 1982 and that he was entitled to permanent partial disability benefits equal to 15 percent body as a whole. Claimant was entitled to healing period benefits from September 1, 1982 until August 14, 1983. The record on appeal consists of claimant's exhibits 1 through 7; defendants' exhibits A through G; briefs filed by both parties; claimant's answers to interrogatories numbers 10 and 11 (filed on December 8, 1983); claimant's answer to interrogatory number one (filed on February 22, 1984; answers to interrogatory number one of second set of interrogatories served by the defendants); and claimant's answers, filed on April 16, 1984 to defendants' requests for admission numbers one, two, three, four, five, eleven, and twelve.

ISSUES

The sole issue presented upon appeal is the determination as to the extent of the industrial disability of the claimant. On that primary issue, the following issues are presented upon appeal:

1. That the Deputy Industrial Commissioner failed to follow the guidelines established by the Iowa Supreme Court in connection with the determination of industrial disability.

2. That there is not substantial evidence to support the finding of 15% permanent disability of the body as a whole, when in fact there is substantial evidence to support total or major disability to the claimant.

At the hearing the parties stipulated that claimant's rate, in the event of an award, would be $253.69. The fairness of medical bills was also stipulated.

John Baumgartner testified that he has known the claimant for five or six years. He got to know claimant through his work with Duffy & Ludeking Feeds. On April 5, 1982 a pancake and sausage day promotion was planned. The claimant arrived in a pickup loaded with grills. The grills were about four feet wide and six feet long. The witness testified that the claimant backed up to a dock where the grills would be unloaded. To unload the grills, they had to be lifted about three feet from the bed of the truck up to the dock. Baumgartner and the claimant got into the bed to lift. The claimant let his end down saying that he hurt his back. Baumgartner had to help claimant out of the truck. The witness had no knowledge of the claimant having previous back problems.

David J. Hanson, claimant's son-in-law, testified that he has known claimant for seven years. Prior to April 5, 1982 he had no knowledge that the claimant had back problems nor did the claimant ever complain of back problems. Hanson observed that prior to April 1982 the claimant did not have difficulty participating in activities around the house.

Hanson first had knowledge that the claimant had hurt his back around April 1982. The claimant was using a cain, having difficulties bending over, and complained of pains shooting down his legs.

According to the witness, the claimant presently has difficulty working in his garden, due to the fact that the claimant can stand for only short periods of time. The claimant cannot ride a motorcycle, boat, nor ride in a car without some difficulty. Further, Hanson testified the claimant has problems standing, walking, and sitting for any length of time. By Hanson's observation the claimant has not improved since April 1982. Hanson does not think the claimant could work presently in the job he had at the time of the accident.

On cross-examination, Hanson testified that the claimant is knowledgeable about grain buying and trading, nutrition, and farm accounting. He admitted that under the "right circumstances" claimant could get a job. Hanson was aware that claimant had cataract surgery. The claimant often drives to West Union (nine miles) to talk to friends. It is part of the claimant's routine.

The claimant, at the time of the hearing was 64 years old. He has completed formal schooling through the eighth grade. After serving in the armed forces, the claimant took three years of night school at Creston Junior College. The classes at Creston were concentrated in the areas of nutrition, animal health, and farm management. The claimant never received a degree.

While the claimant was attending night school he was also engaged in farming. After farming for five or six years, the claimant gave up farming to enter the grain elevator business where he thought he could make more money. He stated that farming did not cause his back problems.

While in the service the claimant suffered a back injury. He recalled that he had a herniated disc between the fourth and fifth lumbar region and underwent surgery in 1942 to correct it. The claimant denied during cross-examination that he left farming because of pain in his back due to the injury he suffered in the service. In fact the claimant asserted that he had no pain as a result of the 1942 injury. The claimant admitted that he had an impairment as a result of the 1942 injury and that he had no facts to prove John R. Walker, M.D., wrong when he assigned the claimant an 18 percent disability as a result of the 1942 injury and subsequent surgery.

The claimant was in the service until 1942. After farming for six or seven years, in 1952 the claimant entered the grain elevator business. This he pursued for five years. In 1947 [sic] the claimant went to work for Swift & Company where he was primarily involved in feed sales work.

On August 13, 1973 the claimant began working for Protein Blenders (hereinafter P.B.). His title was territory manager, feed sales. His duties included acquiring new dealers, promoting the feed, holding open houses, and traveling to call on dealers.

Duffy & Ludeking were dealers in P.B. products and in April 1982 P.B. was holding a promotional feed for the dealers' customers in Waukon, Iowa. At the time of the injury the claimant's supervisor was Paul Fite, and Fite asked claimant to go to Iowa City to pick up the grills. The claimant was at Duffy & Ludekings when the injury occurred. The claimant testified as follows:

> Q. And you said you were turning them around?
>
> A. Well, these grills were placed in my pickup bed crosswise, so I grabbed ahold of this handle to straighten it out so both of us could grab the handles.
>
> Q. And what happened?
>
> A. Well, I slipped and fell.
>
> Q. Were you involved in the act of lifting of pulling or what?
>
> A. Yes, I was lifting and pulling and of course my feet went out from under me and -- I don't know if I fainted at that particular time or not, you know, it just -- but I was in pain.
>
> Q. Where were in pain [sic]?
>
> A. In my back.
>
> Q. Any other place?
>
> A. Well, from my buttocks up.
>
> Q. So then when that happened, what did you do?
>
> A. Well, naturally the boys were out there on the dock to assist me and they did the heavy work, they unloaded the grills for me.
>
> (Transcript, page 50)

The claimant said that he told Fite of the injury.

The claimant was off work the week following the accident (April 19 - April 24) because of his back. He testified that he was paid for that week. The claimant was seen in LaCrosse, Wisconsin by Balaji Vishwanat, M.D., and Richard A. Fink, M.D., of the Gunderson Clinic. The claimant also saw a doctor in Fayette.

The claimant had x-rays taken and Dr. Vishwanat made an appointment for the claimant to come in for a myelogram and surgery. The claimant, fearing such surgery, declined.

The claimant saw Dr. Walker in Waterloo who told the claimant on March 26, 1984 that surgery was the answer. The claimant's reluctance to undergo surgery is based, he testified, on the surgery he had in the service. However, he does think that he will probably have to have surgery.

The claimant stated that he was fired on August 6, 1982, the day he told his supervisors that he needed eye surgery. The claimant had some knowledge that he might be terminated. He has not worked since August 6, 1982. He testified that he was paid temporary total disability benefits from October 5, 1982 to August 14, 1983. Thereafter he received payment for 15 percent permanent partial disability.

Presently the claimant's physical complaints from the April 1982 injury are as follows: constant back pain; right leg numbness when standing; pain shooting across to left leg; and discomfort when riding in a car. The claimant can walk without a cane for a while. He tries to walk daily for exercise.

The claimant admitted telling others that his ambition was to retire at 62 but explained that he was not committed to it. He has not sought work because he feels he cannot physically do what he is qualified for. He does not know what type of work he could perform.

On cross-examination the claimant stated that he was paid through August 31, 1982. The claimant has experience in grain buying and selling, farm accounting, and sales. He said he could lift things. The claimant testified he saw Dr. Walker in August 1983 and March 1984, but did not recall telling him that he had to quit farming because of his back. He agreed that some of the doctors told him to spend seven to twelve days in bed. He also agreed that he could not stand to be in bed that long.

The claimant saw a chiropractor on his own. He stated that the chiropractor was not helping his condition. He did not tell Dr. Walker in March 1984 that he had seen a chiropractor. The claimant admitted that no doctor has told him he cannot work.

Sidney C. Stedman testified for the claimant. He remembered on cross-examination that he has seen the claimant sitting on a stool, pulling weeds. Since April 1982 he has seen claimant operating a riding lawn mower "once in a great while."

Claimant's exhibit 1 is a weekly route sheet indicating where claimant will be during the week. Claimant's exhibit 2 is a salesman's expense record showing that claimant used his own pickup truck to pick up grills in Iowa City and deliver them to Eldorado, Iowa.

Claimant's exhibit 3 is a letter to claimant from Bruce Gower, defendants' insurance company's service office manager. The relevant portions are set out below:

> The changes are as follows:
>
> 1. Starting on October 5, 1982, Temporary Total Disability payments began, based on a weekly rate of $253.69.
>
> 2. Based on Dr. Turner's report stating the "Healing Period" has ended on August 14, 1983, Temporary Total Disability payments will terminate and Permanent Partial Disability shall commence.
>
> 3. Using both Doctor Turner's and Dr. Vishwanat's past evaluation of the 15 percent impairment rating. Commencing on August 14, 1983, Permanent Partial Disability Payments will begin weekly payments of $253.69 for the 15% period of seventy-five (75) weeks.

Claimant's exhibit 6 is a deposition of John R. Walker, M.D. Relevant excerpts are provided below:

> Q. Doctor, then after the completion of the x-rays and your examination, did you reach a diagnosis as to the condition of the man at that time?
>
> A. Yes.
>
> Q. And what was that?
>
> A. I thought that he had some pre-existing [sic] residuals of the spinal surgery and injury. And that now he had a sciatica, probably with a stretch of the nerve roots within the new bone and scar, with a chronic sprain at L-5, S-1 and a little bit of sprain at L-4, L-5, due to the injury back when he was lifting the grates or grills.
>
> Q. And with regard to the findings that you have detailed, do you relate those at all to the incident in April of '82 with regard to the grills?

A. Well, some of the findings, of course, are due to the previous injury and developmental things, such as scoliosis, and over the period of years the hypertrophic, post-traumatic arthritis developed before I'm sure the man was involved in this recent grill lifting accident. But, basically, I related this positive Lasegue sign and some of his back pain and perhaps some of his back motion loss to the more recent episode in which he injured his back, twisting his back when he slipped. I think the reflex -- it's possible the reflex was either out before or was out after, got knocked out after this. There is no way I can tell. Unless I could get the records of some doctor who saw that he had an Achilles and plantar reflex on the right before, just prior to the injury in lifting the grills. But, basically, his pain and his discomfort I thought, particularly on a historical basis, was due to his recent injury in question here, I believe.

....

Q. And with regard to a condition of that nature that might be dormant could a traumatic incident cause it to give problems?

....

A. Yes. Well, the dormant conditions, of course, are the scoliosis, the narrowing and the osteoarthritic spurring, which in all fairness to the people involved with the recent grill accident, we wouldn't want to blame on them. But, of course, the patient did have some trouble with his back and some stiffness and admitted this freely, but did fairly well. But since he did have this grill slipping and lifting accident injury, he had rather marked pain in the right leg in the form of sciatica, and also low back pain. And so the answer really, of course, is that this so-called quote-unquote dormant condition, which let's call it simidormant condition, really was lighted up by this injury, at least according to the history that I got from him. And I think that that type of an injury certainly can light up a so-called semidormant condition and make it painful. Which in this case it's my opinion that it did.

....

Q. And with regard to that what is your opinion [regarding permanent impairment]?

A. I thought that he had suffered -- I thought that he had a pre-existing [sic] impairment of 18 percent of the body as a whole, based on all of the surgery and the findings I found on x-ray, which I have reported on. Secondly, I thought that because of this injury that he had had recently with the grill episode, he had added another 15 percent permanent impairment to the man as a whole, with the total then being 33 percent of the body as a whole, impairment.

(Tr., pp. 18-20)

Claimant's exhibit 4 is a letter to claimant's counsel from Dr. Vishwanat dated July 11, 1983. It stated that he was not aware that the claimant had sustained an injury at work.

Claimant's exhibit 5 is a letter report by Dr. Walker dated August 10, 1983 which states in part:

DIAGNOSIS: This man has a pre-existing [sic] problem consisting of residuals of a spinal surgery having been done in 1942. He has marked degeneration of the 3rd, 4th and 5th lumbar discs. He has a scoliosis. He has marked degeration [sic] and spondylosis of the 4th and 5th discs and to some degree a spondylosis of the 3rd disc. He has a sciatica on the basis of probably stretch of the nerve root with new scar and bone formation. He has a chronic lumbar sprain particularly bad at L-5, S-1. This had been superimposed upon all of the above.

....

To summarize then, we would state that he has a total permanent impairment of 33% of the body as a whole of which 15% is due to the recent injury while working for Protein Blenders Co. As far as treatment is concerned, we are going to send him down to St. Francis for instructions on the pelvic roll which is a good back flexion exercise which he should do daily t.i.d.

Claimant's exhibit 7 is a collection of medical data on the claimant compiled by the Gunderson Clinic Ltd. A May 6, 1982 impression states: "1. Lumbar spondylosis (generalized); 2. History of discectomy--level unknown; 3. Exacerbation of number 1 through recent injury."

Defendants exhibit D is a letter report from James W. Turner, M.D., dated March 14, 1983. It states in part:

> At this time I feel the patient has some evidence of a disc herniation on the right side. This is indicated by the positive straight leg raising. This is also the side that had suggestive L5 radiculopathy on the EMG studies performed at Gundersen Clinic. I agree with the opinion from Gundersen Clinic that a Myelogram would be most helpful in further delineating the problem. However, even if it were positive, I would not be overly optimistic that further surgery would completely alleviate the patient's problem. Based on present assessment, I would rate him as having a 15 percent man as a whole permanent impairmency.
>
> Exact diagnosis will remain unclear until a Myelogram is performed and even this may not be completely helpful. A CAT Scan is often of questionable value with a history of previous surgery. Because the patient was so adamantly opposed to even considering further diagnostic studies, I gave the above permanent impairmency rating. I would like to point out that I am not sure the patient has had a truly vigorous attempt at conservative management. By this I mean a period of a week to 10 days of completely enforced bedrest with attempts at weight reduction with supervised physical therapy.

Defendants' exhibit F is a letter to defendant insurance carrier from Dr. Turner dated August 2, 1983 wherein Dr. Turner states that March 9, 1983 is probably the best date when claimant reached a stable or plateaued level of recovery from his injury.

The defendants introduced into evidence claimant's answers, filed on December 8, 1983, to their interrogatories numbers 10 and 11:

> INTERROGATORY NO. 10: What symptomatic complaints do you now have that you claim from this injury?
>
> ANSWER: Back and leg pains; numbness in right leg.
>
> INTERROGATORY NO. 11: Have you ever had similar complaints before?
>
> ANSWER: Not before being injured.

Defendants also introduced into evidence claimant's answer, filed on February 22, 1984, to their interrogatory number 1 (second set of interrogatories):

> INTERROGATORY NO. 1: Identify all persons having knowledge of any vocational rehabilitation efforts that have been made by the claimant in this case, briefly summarizing the basis for the person's so identified involvement in this case and basis for any opinions formed as well as said opinions.
>
> ANSWER: No vocational rehabilitation efforts have been expended by either party in this case. Because of the age of the claimant, it would appear that vocational rehabilitation would be fruitless.

Defendants also introduced into evidence the claimant's deposition (employer's exhibit G) and claimant's response to request for admissions, filed on April 16, 1984 in answer to requests numbers 1, 2, 3, 4, 5, 11, and 12.

APPLICABLE LAW AND ANALYSIS

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Functional impairment 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).

It is apparent that the deputy correctly analyzed the evidence before him. The facts are clear that the claimant is approaching retirement age. It could be argued that by the claimant's own testimony he considers himself retired.

Age is certainly a relevant factor in determining industrial disability. However a distinction must be drawn between a case where, for instance, persons age 45 to 50 are displaced from the only line of work for which they are trained or educationally qualified, and the present case where the vast majority of claimant's earning years are behind him. In the former case (of course dependent upon various factors) the injured worker's earning capacity has seriously been reduced due to his age. This is because he or she has been injured not at a time when they are younger and more easily retrainable, nor at an advanced working age when working earning capacity will be curtailed by the fact that a person will soon retire and that their earning capacity will not be based upon their work but upon their age, retirement schemes, etc. These people have been injured at the prime of their earning years, where they have many working years ahead of them-where their earning capacity is based upon their ability to work--to be employed. Industrial disability is based upon lack of earning capacity due to a compensable injury that has diminished the injured worker's ability to maintain the earning capacity he enjoyed prior to his injury.

FINDINGS OF FACT

1. Claimant was injured on the job while working for Protein Blenders, Inc., on April 5, 1982.

2. Claimant was discharged by Protein Blenders on August 6, 1982, but was paid by the company until August 31, 1982.

3. Claimant is 63 years of age.

4. Claimant has not looked for a job since his discharge by Protein Blenders on August 6, 1982.

5. Claimant is receiving social security old age assistance.

6. Claimant has well-developed skills in the grain sales business.

7. Claimant is physically able to get around to some extent.

8. Claimant has sustained an industrial disability of 15 percent.

9. The claimant was paid wages until and including August 31, 1982 and reached his maximum healing on August 14, 1983.

10. Claimant's healing period began September 1, 1982.

11. Claimant received healing period benefits beginning October 4, 1982 and ending on August 14, 1983.

12. The stipulated rate is $253.69 per week.

13. Claimant has received all the permanent partial disability benefits to which he is entitled, but is still owed healing period benefits at the rate of $253.69 per week for the period commencing September 1, 1982 and ending October 4, 1982.

CONCLUSIONS OF LAW

Claimant has established that his current disability is causally related to his work injury which occurred on April 5, 1982, and that he is entitled to 75 weeks of permanent partial disability at a weekly compensation rate of $253.69 as he has an industrial disability of 15 percent--these benefits have already been paid.

Claimant is entitled to healing period benefits from September 1, 1982 until August 14, 1983.

Defendants are entitled to credit for healing period and permanent partial disability benefit payments already made to the claimant.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant additional healing period benefits for the period commencing on September 1, 1982 and ending on October 4, 1982 at the rate of two hundred fifty-three and 69/100 dollars ($253.69) per week.

That defendants pay accrued benefits in a lump sum together with interest pursuant to section 85.30 on the additional healing period benefits ordered above.

That defendants pay the costs of this action.

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

Signed and filed this 18 day of October, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELMER HAMANN,	:	
Claimant,	:	
vs.	:	File No. 785100
RANDALL STORES, INC.,	:	A R B I T R A T I O N,
Employer,	:	D E C I S I O N
and	:	FILED
FIREMAN'S FUND INSURANCE COS.,	:	DEC 11 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Elmer Hamann, claimant, against Randall Stores, Inc., employer, hereinafter referred to as Randall's, and Fireman's Fund Insurance Company, insurance carrier, defendants, for benefits as a result of a work injury on January 15, 1983 to claimant's left knee. On October 31, 1985 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a pre-hearing report of contested issues and stipulations pertaining to this case which was approved and accepted as a part of the record of this case at the time of the hearing. Oral testimony was received at the hearing from claimant. Claimant's exhibit 1 and defendants' exhibits A-D were received into the evidence at the time of the hearing. According to the pre-hearing report, the parties have stipulated to the following matters:

1. On January 15, 1983 claimant received an injury which arose out of and in the course of employment at Randall's;

2. Claimant is entitled to temporary total disability or healing period benefits from January 15, 1983 through May 8, 1983 and from March 12, 1984 through June 10, 1984. Claimant is not seeking additional temporary total disability or healing period benefits in these proceedings;

3. If the injury is found to have caused permanent disability, the type of disability is a scheduled member disability to the left leg;

4. Claimant's rate of weekly compensation in the event of an award of benefits from these proceedings shall be $317.18 per week;

5. In the event of an award of permanent disability, the commencement date for such benefits shall be June 11, 1984; and,

6. Defendants have paid claimant a total of 66 5/7 weeks of weekly compensation benefits as a result of the January 1983 work injury prior to the hearing of this matter.

ISSUES

As set forth in the hearing assignment order and the parties' pre-hearing report, the parties are submitting the following issues for determination in these proceedings:

I. Whether there is a causal relationship between the work injury and the claimed disability; and,

II. The extent of weekly disability benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed in this summary. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

There is no evidence submitted in this matter which would indicate that claimant had problems with his left knee or leg prior to the work injury in January 1983.

Claimant was a meat cutter for Randall's at the time of the work injury. Claimant has not worked since leaving Randall's on March 10, 1984 as a result of the work injury herein. Claimant is currently receiving social security benefits for a total disability as defined by the social security statutes and applicable federal regulations. 547

On January 15, 1983, claimant slipped and fell on a wet floor while working for Randall's and severely fractured his left kneecap. Claimant was immediately treated by an orthopedic surgeon, Richard L. Kreiter, M.D., for a displaced left patellar fracture. This treatment included physical therapy, medication, and multiple surgeries on claimant's knee to repair the fracture. Subsequent to the surgery, claimant has developed early arthritis in the joint and chondromalacia or degeneration and softening of the cartilage tissue in the knee.

Dr. Kreiter has imposed permanent work restrictions consisting of no repeated squatting, kneeling or climbing, and no lifting over fifty pounds as a result of claimant's left knee problems subsequent to the work injury. Dr. Kreiter in his report of February 19, 1985 states that claimant has a normal range of motion but feels that claimant should continue anti-inflammatory medication and exercises to maintain this range of motion. However, Dr. Kreiter in his letter report of June 13, 1984 states that range of motion should not be the only criteria in rating a disability. Dr. Kreiter rates claimant's loss of physical function to the left lower extremity as constituting a fifteen percent permanent impairment due to residual pain and stiffness claimant continues to experience.

Robert J. Chesser, M.D., evaluated claimant's knee disability in February 1985. In his report of February 15, 1985, Dr. Chesser evaluates claimant's left leg condition as constituting a fifteen percent permanent partial impairment using the AMA Guidelines which utilizes range of motion as the only criteria in evaluating an impairment. This rating is based upon a range of motion of a 110 degrees. There is no indication in the record what Dr. Chesser's speciality, if any, may be. His letterhead indicates only that he is accredited by some commission on accreditation of rehabilitation facilities which is apparently located in the state of Illinois.

John C. Barker, M.D., has also evaluated claimant's knee condition. It is the opinion of Dr. Barker that due to the pain involved, the instability of the knee, the limitations in standing, the inability to climb stairs without discomfort, and the stiffing of the knee from cold temperatures, claimant has a thirty percent disability of the leg "as a part of the whole." Dr. Barker is a family practice physician who, according to the curriculum vitae presented with his opinions, was a founder and director of Physical Medical and Rehabilitation from 1974 through 1978, director of Mercy Physical Medication and Rehabilitation 1980-1981, and made a presentation to a Des Moines conference on workers' compensation in May 1977. In an apparent attempt to attack Dr. Barker's qualifications, defendants have introduced exhibit B which for the most part contains records of disciplinary proceedings before the Iowa Board of Medical Examiners against Dr. Barker in 1984 for alcohol abuse. These proceedings were resolved by consent order in which Dr. Barker was placed on probation for five years under the condition that he receive treatment for alcoholism. There is nothing in the records to suggest that Dr. Barker was accused of incompetency in these proceedings.

Claimant testified that his leg at the current time is stiff and that he performs a number of exercises every morning to alleviate some of the stiffness. Claimant stated that he has frequent pain during activity. Claimant said that he has considerable difficulty climbing and descending stairways, standing, squatting, and walking due to his pain. After sitting for any length of time, he must straighten his leg frequently to avoid the onset of pain. Claimant demonstrated a range of motion of the knee in the neighborhood of 110 degress at the hearing.

Claimant's appearance and demeanor at the hearing indicated that he was testifying in a candid and truthful manner.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). In the case of a preexisting condition, 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).

In the case sub judice, the only question involves the extent of permanent knee impairment and its causal connection to the work injury. All the physicians who have rendered opinions in this case rate claimant as having some degree of permanent impairment. The medical evidence clearly shows a direct link between claimant's left knee problems and the work injury of January 1983. Claimant therefore has rather overwhelmingly established that the work injury is a cause of permanent impairment to his knee.

II. Claimant must extablish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. 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); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

For many reasons, the opinions of Dr. Kreiter are given the greater weight in the determination of claimant's leg impairment in this case. First, Dr. Kreiter was very convincing when he states that criteria other than a range of motion is not always a reliable measure of impairment to a body member. The use of the AMA Guides is useful but is not the only tool available for a physician to rate a person's functional loss of use. See Industrial Commissioner Rule 500-2.4. A loss in range of motion in some cases in not indicative of a loss of use. However, in this case, Dr. Chesser's rating using range of motion tables in the AMA Guides was not much different than Dr. Kreiter's rating after taking into account other criteria. Interestingly, Dr. Kreiter states in his most recent report that claimant had a normal range of motion.

Second, the rating of Dr. Barker cannot be given much weight but not because the doctor is under probation for alcohol abuse. Such disciplinary proceedings have not been shown to effect the competency of his evaluation in this case. The problem with Dr. Barker's rating is in his choice of words when he said "as a part of the whole" in expressing his impairment rating. Dr. Barker appears to be giving a body as a whole impairment rating rather than a scheduled member rating. Without explanation, the doctor's use of such terminology is confusing and must be rejected in light of the clear ratings of other doctors in this case.

Third, claimant was a credible witness and his primary complaints involve pain which restricts the performance of his knee and stiffness in the morning and in cold temperatures. These complaints were rated by Dr. Kreiter and his rating appears to be most consistent with claimant's complaints of loss of use.

Finally, Dr. Kreiter was the treating physician and is a specialist in orthopedic surgery. Due to his specialized training and frequent clinical contact with claimant, Dr. Kreiter appears to be in the best position to rate claimant's knee difficulties. No other doctor who has rendered opinions in this case was shown to have greater qualifications than Dr. Kreiter in evaluating impairments to a body member.

Therefore, claimant has shown by a preponderance of the evidence that he suffered a fifteen percent permanent partial disability to the left leg as a result of his work injury in January 1983 which entitles him to thirty-three weeks of compensation. The extent of claimant's entitlement to healing period benefits was resolved by stipulation of the parties in the pre-hearing report which total twenty-nine and two-sevenths weeks. By stipulation, claimant has been paid sixty-six and five-sevenths weeks of compensation. Therefore, claimant has been paid in excess of his current entitlement to sixty-two and two-sevenths weeks of disability benefits as a result of the work injury. Consequently, claimant shall take nothing from these proceedings.

FINDINGS OF FACT

1. Claimant is a credible witness.

2. Claimant was in the employ at Randall's at all times material herein.

3. Claimant's job at Randall's was that of a meat cutter.

4. On January 15, 1983 while performing his work as a meat cutter, claimant injured his left knee which required a considerable amount of medical treatment including two surgical procedures.

5. Prior to the work injury herein, claimant had no impairment of his left knee or leg.

6. As a result of the work injury of January 1983, claimant's ability to climb, walk, stand, stoop, and lift without the development of left knee pain has been significantly restricted and he has considerable difficulty with left knee stiffness in the morning and in cold temperatures.

7. As a result of the work injury of January 1983, claimant has a fifteen percent permanent partial impairment of the left leg.

8. As a result of the work injury herein, claimant was either absent from work for treatment of his condition or it was medically indicated that claimant's condition would improve from medical treatment from January 15, 1983 through May 8, 1983 and from March 12,, 1984 through June 10, 1984, a total of twenty-nine and two-sevenths weeks.

9. Pursuant to the parties' stipulation, claimant's rate of compensation is $317.18 per week.

10. Pursuant to the parties' stipulation, claimant was paid sixty-six and five-sevenths weeks of compensation at the rate of $317.18 per week prior to the hearing in this matter.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that the work injury of January 15, 1983 is a cause of permanent disability.

II. Claimant has established by a preponderance of the evidence entitlement to permanent partial disability benefits for thirty-three (33) weeks and healing period benefits for twenty-nine and two-sevenths (29 2/7) weeks at the rate of three hundred seventeen and 18/100 dollars ($317.18) per week, but that all of his entitlement to weekly compensation benefits has already been paid to him by defendants prior to hearing in this matter.

ORDER

Accordingly, the following is ordered:

1. Claimant shall take nothing from these proceedings.

2. Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 11th day of December, 1985.

Larry P. Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

550

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM L. HANEY,	:	
Claimant,	:	
vs.	:	FILE NO. 494298
STATE OF IOWA,	:	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
SECOND INJURY FUND,	:	
Defendants.	:	

FILED
OCT 1 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by William L. Haney, claimant, against the state of Iowa, employer, and the Second Injury Fund for the recovery of further benefits as a result of an injury on March 4, 1977. A final arbitration decision for this injury was filed on December 15, 1980. This decision held that although claimant established a work injury, the injury was not a cause of either temporary or permanent disability. Claimant is basing his claim for disability in these proceedings upon various conditions allegedly caused by the work injury. On July 23, 1985, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

It should be noted that claimant was essentially representing himself in these proceedings despite the presence of his attorney of record at the hearing. Apparently, there was a disagreement between claimant and his attorney as to what should have taken place at the previous arbitration hearing. Claimant's attorney stated at the hearing in these proceedings that claimant desired to make his own presentation of evidence. Without objection from defendant, claimant was allowed to testify in narrative form and introduce his own exhibits. However, claimant was assisted on occasion by his attorney during the hearing.

At the request of claimant, the claim in his petition filed herein against the Second Injury Fund was dismissed at the hearing as there was no allegation of a prior loss of use of a body member such as would invoke Second Injury Fund liability.

ISSUES

The parties have submitted the following issues for determination in these proceedings:

I. Whether there is a causal relationship between the work injury and a change of condition; and,

II. The extent of weekly disability benefits and the weekly rate of compensation to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The parties have submitted a pre-hearing report of certain matters pertaining to this case which was approved and accepted as a part of the record in this case. The record of the hearing consists of the oral testimony of claimant and his exhibits 1-7. The parties have stipulated that claimant's rate of weekly compensation in the event of an award of benefits from these proceedings shall be based upon gross weekly earnings of $170 and marital status at the time of the injury but that the number of exemptions to which claimant was entitled to at the time of injury is in dispute.

Claimant is 77 years of age, married and testified that he has one adult child wholely dependent upon him.

At the request of defendant, official notice was taken of the prior arbitration proceedings concerning this work injury. According to the prior arbitration decision, as a result of an altercation with a fellow employee in 1977, claimant was struck in the head and received a minor laceration (which did not require sutures) to the left frontal region of his head. Claimant's complaints at the last arbitration hearing centered around dizziness, ringing of the ears and cervical back problems. A diagnostic test procedure called a myelogram was performed upon claimant's back in 1977 and a residual irritation of his lower back was noted in the report of Kenneth J. Judiesch, M.D., dated May 7, 1979. Although a disability rating was given by a neurologist who had treated claimant, Richard F. Neiman, M.D., due to the other statements in reports from this physician; the presence of severe degenerative arthritis in claimant's cervical spine before the injury; claimant's primary complaints after the injury of dizziness and ringing of the ears rather than neck impairment; and the lack of severity of the original injury, a decision was made by this agency that no causal relationship existed between the claimed disability and the work injury.

During claimant's testimony at the previous arbitration hearing, claimant also complained of an inability to jog after the myelogram test. The prior arbitration decision was not appealed by either party.

Despite being informed at the onset of the hearing that compensation benefits can only be awarded in these proceedings if a change in condition subsequent to the prior arbitration hearing is established and that such a change of condition must be causally connected to the original work injury, claimant introduced a considerable amount of written material, mostly authored by him, concerning alleged errors or factual inaccuracies during the original arbitration proceedings and the decision. Upon inquiry, claimant stated that he was basing his claim of changed condition upon a decreased use of his legs and permanent impairment to his spine from the 1977 myelogram performed after the work injury. Although mentioned in his exhibits, claimant stated at the hearing that he is not claiming benefits in these proceedings for his tachycardia or tinnitis conditions.

Claimant's testimony concerning the condition of his legs was extremely confusing and contradictory. He stated that although his leg problems are due to increased arthritis, the arthritis, he claims, is partly due to limited mobility during recovery from the 1977 work injury. Later in his testimony, claimant emphazied that his arthritic legs are now cured by his recent use of a tea made from tree bark by South American indians. Claimant demonstrated this cure at the hearing by standing up and repeatedly raising each of his legs into the air.

Claimant's testimony concerning his back problems was likewise confusing. He connects his back problems to his claimed loss of leg use. He expresses discomfort in his shoulders and neck but did not describe any specific low back problems. Claimant again stated that he was not able to jog after the 1977 myelogram but was able to do so prior to the procedure. In his written testimony, claimant mentions a loss of movement of a knee from 105 degrees to 90 degrees within three months after the myelogram. No medical records in evidence mentions such a loss of function and claimant did not explain how he arrived at these figures.

In one of claimant's hand written exhibits, claimant cites the views of R. (first name unknown) Lipschitz in a handbook of clinical neurology dated 1976, wherein the doctor states that no patient can completely recover from the shock of a myelogram. No direct quotation was made in the evidence presented by claimant from these cited works of Dr. Lipschitz. A report from Dr. Neiman dated June 25, 1985, states that although the injury (the doctor never specified which injury to which he was referring) may have caused his knee and back problems, the aging process may equally be responsible and the doctor does not think that a definite answer is possible. Claimant's chiropractor, Craig V. Carr, D.O., states in his report of July 22, 1985 that the 1977 injury and myelogram "apparently caused" further inflammatory changes in claimant's lumbar spine and resulted in some compression of the cauda equina or spinal nerves but the doctor only opined that this "can" cause some loss of nerve function to lower areas of the body controlled by these spinal nerves.

On cross-examination, claimant admitted to numerous auto accidents and injuries subsequent to the last arbitration hearing. In December 1980, claimant was involved in a car accident in which he hurt his neck. Claimant was also involved in two other auto accidents for which he received medical treatment. In November 1984, claimant fell off a ladder while working for an automotive dealer in which he fell backwards landing on his left leg. According to the report of Dr. Judiesch dated December 17, 1984, claimant temporarily aggravated a preexisting arthritic condition of his leg in the incident. The report of Dr. Carr submitted into evidence also mentions this fall and describes an injury not only to the leg but to the low back from the fall. Dr. Carr also notes a recent fall at home which aggravated claimant's neck and low back problems.

APPLICABLE LAW AND ANALYSIS

In a review-reopening proceeding, claimant has the burden of establishing by a preponderance of the evidence that he suffered a change of condition as a proximate result of his original injury, subsequent to the date of the award or agreement for compensation under review, which entitles him to additional compensation. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969). Such a change of condition is not limited to a physical change. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change of condition under Iowa Code section 85.26(2) and 86.14(2). See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

With reference to causation, 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

Claimant does not prevail in this case. Claimant's contention of leg disability is certainly not a new claim. Claimant expressed leg problems after the myelogram in the prior arbitration proceeding. The only new aspect in this case is that claimant now asserts that his use of a South American tea has now cured his leg arthritis. It is not clear how such a "cure", if true, helps claimant's case. Claimant has also introduced in these proceedings opinions from doctors showing a possible connection of his current back and leg problems to the 1977 work injury and myelogram. However, none of these doctors expressed an opinion as to whether or not claimant's condition has changed since the date of the arbitration hearing or the extent to which all of claimant's injuries since the last hearing have contributed to claimant's current condition, if his condition has in fact deteriorated. Given the medical evidence presented, any finding of a changed condition would have to be primarily based upon claimant's testimony. However, due to his demeanor and confused testimony at the hearing, claimant is not credible. Consequently, the preponderance of the evidence does not establish a change of condition caused by the 1977 work injury.

FINDINGS OF FACT

1. Claimant is not a credible witness.

2. Since the date of the last arbitration hearing on July 9, 1980, claimant continues to suffer neck, low back, leg and knee problems.

3. Claimant has a severe degenerative arthritis in his spine, hips and knees.

4. Since July 9, 1980, claimant has severely injured his back, leg and knees in three auto accidents and two falls.

CONCLUSIONS OF LAW

I. Claimant has not established by a preponderance of the evidence that the injury of March 4, 1977 is a cause of any change of physical condition or other condition effecting earning capacity since July 9, 1980.

ORDER

Accordingly, the following is ordered:

1. Claimant shall take nothing from these proceedings.

2. Claimant shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 1st day of October, 1985.

Larry P. Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JANICE J. HELMICH,	:	FILED
Claimant,	:	DEC 31 1985
vs.	:	IOWA INDUSTRIAL COMMISSIONER
McQUAY-PERFEX, INC.,	:	File No. 705505
Employer,	:	A P P E A L
and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a review-reopening wherein claimant was awarded 15 percent permanent partial disability to the body as a whole. Interest was ordered to be paid from the date of the decision, November 27, 1984. The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 3; defendants' exhibits A through C; and briefs by the parties. A memorandum of agreement was filed on August 14, 1980.

ISSUE

The sole issue on appeal is whether interest should accrue on the award from the date of the decision.

REVIEW OF THE EVIDENCE

Insofar as the parties have adopted the deputy's "Statement of the Evidence," a review will not be repeated herein.

APPLICABLE LAW AND ANALYSIS

By filing a memorandum ot 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). The deputy concluded that the claimant sustained a permanent partial impairment which caused the claimant to sustain industrial disability. No issue has been raised as to the permanency.

This agency considered the issue concerning interest in Doud v. Reed Construction Company, (Appeal Decision filed September 30, 1985).

In Kostohryz v. Lake Center Industries/Deco Products Company, III Iowa Industrial Commissioner Report 161 (1982) after analyzing Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957), this agency stated:

> This case is a review-reopening. A memorandum of agreement was received by this office on October 23, 1980. Claimant's petition in arbitration [sic] was filed January 19, 1981. As this is a proceeding in review-reopening, following the dictates of Bousfield, 249 Iowa 64, 86 N.W.2d 109, interest can be assessed from the time claimant applied or from the time a determination of the permanency was made. ...Since Bousfield was not overruled, it stands for the proposition that interest may not always begin on a certain date; interest should commence in a review-reopening action on that date which defendant knew claimant was entitled to permanent partial disability or had clear notice that claimant was making a claim for permanent partial disability.

Kostohrzy, at 163

In Sloan v. Great Plains Bag Corp., III Iowa Industrial Commissioner Report 237 (1982), the commissioner stated after analyzing Bousfield supra and Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979):

> In contrast to the case sub judice, Farmers Elevator Co., Kingsley, 286 N.W.2d 174, involved a situation where the employer from the beginning denied the compensability of the claim. In the present case on appeal, the defendants accepted the claim as compensable and paid compensation for healing period and permanent partial disability to the extent of functional impairment estimated by a physician.
>
> ....
>
> The cases of Farmers Elevator Co., Kingsley, where the employer does not admit the compensable nature of a claim, and Wilson Food Corp., calling for prompt compensation, may support a finding that section 85.30 interest should accrue when the employer becomes aware of a claimant's claim for such compensation. However, this case does not fall within the Farmers Elevator Co., Kingsley or

554

Wilson Food Corp., senario. Here the defendants admitted some degree of permanent disability and paid benefits accordingly, thus, the case falls squarely within the parameters of Bousfield, 249 Iowa 64, 86 N.W.2d 109.

Therefore, on the basis of Bousfield, where the employee makes permanent partial disability payments before the proposed determination and such payments were made in good faith, based upon a reasonable measure, the statutory interest on any increase in degree of permanent partial disability accrues on the date the amount is determined by the proposed award. It is determined, the defendants in the case sub judice have satisfied this criteria.

Sloan, at 237, 238

In Sloan the commissioner awarded statutory interest from the date of the deputy's proposed review-reopening decision.

Two factors enter our discussion, permanency and reasonableness or good faith. Where there is clearly established permanency, unreasonableness or bad faith on the part of the employer will be more easily proved and recognized than in a case, such as this one, where permanency, medically, is in question and where by the facts, it is apparent that defendants were acting reasonably and in good faith. Doud, (Appeal Decision). Therefore, based on the foregoing, interest will be due beginning on November 27, 1984.

In this case, while the letter of October 7, 1981 is not as clear as claimant would have us believe, it does set out the basis for the inference that A.J. Wolbrink, M.D., did believe that the claimant would have permanent effects of the already admitted injury. However, there is no evidence that defendants acted unreasonably or not in good faith. Therefore the deputy's decision is accepted.

FINDINGS OF FACT

1. Claimant was employed by McQuay Perfex on July 22, 1980.

2. Claimant fell down some stairs while working on July 22, 1980 and hurt her back.

3. Defendants filed a memorandum of agreement regarding a July 22, 1980 injury on August 14, 1980.

4. Claimant has been paid all healing period due her because of the injury of July 22, 1980.

5. Claimant sustained a permanent partial disability to the body as a whole as a result of the injury of July 22, 1980.

6. Claimant sustained a 15 percent permanent partial disability to the body as a whole as a result of the July 22, 1980 injury.

7. The rate of compensation in the event of an award was stipulated to be $152.05.

CONCLUSIONS OF LAW

Claimant was employed by McQuay Perfex, Inc., on July 22, 1980.

Claimant sustained an injury arising out of and in the course of her employment on July 22, 1980.

Defendants will be ordered to pay unto the claimant 75 weeks of permanent partial disability compensation at the rate of $152.05 per week.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

That defendants pay unto claimant seventy-five (75) weeks of permanent partial disability compensation at the rate of one hundred fifty-two and 05/100 dollars ($152.05) per week.

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

Interest is to accrue in this award pursuant to section 85.30, Code of Iowa, from the date of the deputy's decision, November 27, 1984.

Inasmuch as this award has accrued, defendants shall file a final report upon payment thereof.

Signed and filed this 31 day of December, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

ROBIN HOOTMAN,
Claimant,
vs.
WEYERHAEUSER COMPANY,
Employer,
Self-Insured,
and
SECOND INJURY FUND OF IOWA,
Defendants.

File Nos. 604512, 652333
700301
A P P E A L
D E C I S I O N

FILED
OCT 4 1985
IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 26, 1985 this 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 an decision of a deputy industrial commissioner in which she was awarded healing period and permanent partial disability benefits to be paid by her employer and in which she was denied benefits from the second injury fund.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 13 and 15 through 19 and defendant's exhibits A through D. All evidence was considered in reaching this final agency decision.

The decision herein will vacate one portion of that reached by the hearing deputy and reach the same result on the issue of entitlement to Second Injury Fund benefits.

ISSUES ON APPEAL

The issue on appeal as stated claimant is "whether benefits should be awarded to Claimant under Second Injury Fund."

Defendant employer has cross-appealed stating its "sole issue for appeal is derived from its claim that the Deputy Industrial Commissioner's ruling as to the liability of the Employer after the withdrawal of such issue from determination violates the Employer's guaranteed due process of law."

REVIEW OF THE EVIDENCE

Thirty-four year old married claimant, mother of three daughters, who began work for defendant employer on February 24, 1979, testified to a GED with additional training as a key punch operator. She has a license to drive a tractor-trailer combination with six months' experience as a driver. In addition to work as a key punch operator and truck driver she has worked as an assembler.

Claimant reported medical problems beginning with carpal tunnel surgery in 1979. She returned to full production work and then developed in mid-October of 1980 deQuervain in her right wrist and then the left. Pain initially came on as she was picking up cardboard. The pain was followed by swelling. Her right arm was placed in a cast and she felt that placed a strain on her left wrist. She had a release on the right but about half her hand remained numb. In January of 1982 she had surgery on her left wrist.

Claimant said that when she first returned to work, she was not under restriction. When swelling developed, limitations were placed. There was no work with defendant employer within her restrictions.

Claimant indicated her household activities have decreased. She expressed a desire to be rehabilitated so that she can work. She has made some dolls. She also has sought work. Claimant, who last saw a doctor the summer prior to hearing, stated that she is now taking aspirin. She still has pain, swelling and loss of strength and feeling; difficulty picking up and holding on to things; some pain up her arms; and trouble with some movements.

Claimant did not recall telling Leland G. Hawkins, M.D., that she had pain in her wrists when she first saw him. Claimant said both that she had seen Dr. Hawkins for trouble with her left wrist in August of 1979 and that she had not seen Dr. Hawkins for wrist problems. She denied having anything other than tenderness remaining from the carpal tunnel.

Betty Louise Johnson, claimant's mother, testified that claimant was better after the carpal tunnel release, but she still had some problems. Following claimant's first surgery, her activities decreased and they decreased even more after the second with claimant having less lifting power and being concerned about her ability to work.

Frederick Reed, an employee of defendant employer who has known claimant since she started to work for the company, testified that claimant was able to perform work before her injury in October of 1980, but that she was "[n]ot too good" at her job after surgery in January of 1982. He thought claimant was a good worker who wanted to work.

Mae Huggins testified that claimant's disability with her left wrist developed after problems with the right wrist and that since her surgery she has been unable to do things she had done before.

Kenny Hootman, claimant's spouse, testified that she healed following her carpal tunnel problem and did not have difficulty with her housework. He said that claimant had not complained of her left hand and arm prior to November of 1981.

Hootman indicated that claimant goes out each week to look for work and that she has been unsuccessful in obtaining any.

Lowell Steggall, who worked for defendant employer from 1953 to 1981, testified that claimant recovered "very well" from her surgery to the right wrist.

Loy Gibbs, production superintendent for defendant employer who claimed to have done "just about every job in production," described a unitizer job as including lifting spools of plastic strand weighing thirty or forty pounds. He noted that the eighty-nine employees in the plant work in basically four departments.

He believed claimant last worked July 15, 1982 and he could not account for notations on August 2 and 3. He stated that claimant remains an employee and has bumping rights when she returns to work, but he thought that jobs requiring lifting of less than twenty pounds would be filled by persons with more seniority than claimant. He thought claimant might be able to bump to a feeder or operator on a die cutter.

On December 3, 1982 the company sent a letter to a union representative stating that claimant needed a slip saying she was fit for regular duty. Thereafter no one other than the company physician was to keep her off work because of the tendonitis. If she were capable of only light work, then she would need to accept rehabilitation.

On March 9, 1983 claimant was sent a letter based on a letter from William F. Blair, M.D., reversing her dismissal and telling her that she could return to full duty as soon as her light duty restriction was lifted.

An investigation report completed October 13, 1980 describes claimant's injury as sprain of the right wrist. A form regarding an incident of April 30, 1981 reflects an injury to the right forearm.

Leland G. Hawkins, M.D., board certified orthopedic surgeon with a particular interest in upper extremity and hand surgery, testified to first seeing claimant on April 30, 1979 and taking a history of claimant's doing hand work and running machines. Pain, burning and numbness were present in both the right and left hands. The diagnosis was bilateral carpal tunnel and a bilateral release was performed. Claimant was allowed to return to work on July 9, 1979 and she had no permanent impairment resulting from her carpal tunnels.

Dr. Hawkins testified that claimant on July 9, 1979 had a new condition, tendonitis of the right flexor carpi ulnaris, which was treated with medication and a limitation on activities. His records do not contain that notation until October 8, 1979. The doctor did not believe he had diagnosed the same condition on the left, but he was unsure of his memory and unable to be exact.

Claimant was seen again in February of 1980 at which time she had tenderness over the extensor tendons of the left wrist and the right lateral epicondyle. Tenderness in both palms was related to the carpal tunnel. In October of the same year she was diagnosed as having deQuervain's disease on the right, a tendinous synovitis of the first compartment of the two wrist extensors. She was placed in a short plaster cast. On November 18, 1980 her extensor retinaculum was released. After surgery claimant had tingling and numbness over the dorsum of her hand.

In March of 1981 Dr. Hawkins felt claimant was in an early stage of deQuervain's on the left and in a letter of May 14, 1981 he talked about the development of the deQuervain's on that side.

Claimant began therapy on May 12, 1981. She was instructed in contrast baths and desensitization. The final assessment in a series of treatments was that claimant had a psychological overlay and it was suggested she could benefit from counseling and relaxation training to assist her with dealing with stress.

Steven R. Jarrett, M.D., saw claimant on July 15, 1981 at which time she had pain on both the right and the left. The doctor wrote that claimant's pain would necessitate work restrictions. He proposed investigation of metabolic and rheumatological causes and electrodiagnostic studies which were normal. Neither was there evidence of metabolic causes for peripheral neuropathy or a systemic rheumatological process.

Dr. Jarrett was unable to provide an impairment rating based solely on claimant's pain.

R. D. Beckenbaugh, M.D., orthopedic surgeon who specializes in traumatic and reconstructive surgery to the hand and upper extremity, saw claimant on October 23, 1981 at which time she complained of pain and a sensation of giving away and weakness of the hands. The surgeon felt that claimant's complaints on the right should gradually resolve. He suggested claimant try working outside the factory setting to ease her symptomatology and he proposed use of strengthening exercises.

Claimant was seen by William R. Blair, M.D., on November 10, 1981. She gave a history of continued pain in both hands following a bilateral carpal tunnel release. The pain tended to be on the radial and slightly dorsal aspect of her arm and occasionally radiated to the elbow. Claimant told of switching from right to left depending on which side was symptomatic. The doctor's impressions were bilateral deQuervain's disease, a neuroma in the previous incision and possible Guyon's canal or bilateral flexor carpi ulnaris irritation. Claimant subsequently was started on Tolectin and then scheduled for a left first dorsal compartment release which was carried out on January 8, 1982.

Claimant returned on February 23, 1982 and told of trying her job, but having pain in both arms. She had tenderness and swelling over the left extensor pollicus longus tendon and the FCR tendon. There was tenderness and swelling over the right extensor pollicus longus tendon.

On July 29, 1982 Dr. Blair assigned a five percent impairment rating to the right upper extremity due to injury to a small branch of the superficial radial nerve and resultant neuroma. He anticipated no permanent impairment attributable to the tenosynovitis. Dr. Blair seemingly reviewed claimant's restrictions on November 16, 1982 and determined the restrictions should remain in force until she became asymptomatic. He believed that claimant's tenosynovitis or overuse syndrome was aggravated by her employment.

John R. Huey, M.D., orthopedic surgeon, first saw claimant on November 29, 1982 at which time she complained of bilateral tendonitis. She had some fullness over her left wrist. He took a history of bilateral carpal tunnel and a deQuervain's release on the right being done after a deQuervain's on the left.

On December 10, 1982 claimant returned because she wanted a disability evaluation. She was given an impairment rating of five percent of each wrist which the orthopedist then converted to six percent of the body as a whole based on the AMA Guides. The rating was attributed primarily on claimant's pain and discomfort.

Dr. Huey's evaluation was based on information provided to him by claimant and on what he could see. He did not record complaints by claimant of an inability to do her housework. He had the impression that she was unable to do the work assigned by defendant employer, but that she could do other work within the plant. Dr. Huey's note of December 10, 1982 suggests light work under fifteen pounds and not more than twenty repetitive motions a minute. He said that deQuervain's could be aggravated by repetitive motion.

Claimant was examined by Dr. Hawkins in January of 1983 at which time she told of pain coming on when she did too much repetitive activity or too much heavy lifting. She was having complaints on her left side. Dr. Hawkins recalled telling her prior to this examination and before he referred her to Iowa City that nothing would be done for her left side until she had made a satisfactory recovery on the right. He was not told by claimant that she had surgery at Iowa City. At the time of this examination, claimant had no restriction of motion, but she did report pain with excessive activity. She was given a permanent impairment of five percent of each wrist because of her long history of repeated episodes of tendonitis. He anticipated claimant might limit her motion if her pain became severe. He said that repetitive activity can aggravate synovitis.

APPLICABLE LAW AND ANALYSIS

This matter involves three files. File 604512 relates to bilateral carpal tunnel syndrome. A memorandum of agreement was filed and claimant was paid nine weeks and five days of temporary total disability. Beginning in January of 1982 she was paid an additional twenty-five weeks and four days. File 652333 involves an injury of October 13, 1980 for which claimant was paid eight weeks and six days of benefits under a memorandum of agreement. File 700301 is a claim for an alleged injury in January of 1982.

Defendant employer's contentions will be dealt with first. It is apparent from the transcript of hearing that defendant employer did not participate in the hearing of this matter on May 6, 1983 and that the hearing deputy's orders relating to it should be vacated. That conclusion is supported by the opening of the proceeding at the time of hearing. Deputy Linquist said:

> I understand that Mr. Shipman is not here but that evidently, a settlement has been reached with the defendant Weyerhaeuser Company; is that correct?
>
> MR. BLACKSTOCK: That is correct, Mr. Lindquist [sic].
>
> COMMISSIONER LINDQUIST [sic]: On December 7th, 1982, a prehearing order and notice of assignment for hearing was filed which indicated at that time the issues would be cause and connection of Second Injury Fund and authorized medical. Obviously, the issues have changed a little bit since then, since you've had a settlement. I guess all we're talking about now is Second Injury Fund benefits and maybe if there was a second injury, whether we are talking about the cause and connection of Second Injury with any disability?
>
> MS. POST: Yes. (Tr., pp. 3-4)

At a later point this discussion occurred:

> MR. BLACKSTOCK: Oh, I do need to stipulate the settlement that we reached or do you need that?
>
> COMMISSIONER LINDQUIST [sic]: I really don't need to know your settlement. Your settlement is between the parties. It's not binding on the Second Injury Fund at all.
>
> MR. BLACKSTOCK: Okay. Are you indicating that I should not --
>
> COMMISSIONER LINDQUIST [sic]: I'm saying I don't know. I'm saying it's maybe not necessary. If you wish to offer and she has an objection, that's another thing. I don't know if she'll object to it or not. I guess you can offer it and you find out.
>
> MR. BLACKSTOCK: That sounds fair. At this time we would state to the Court that the claimant and Weyerhaeuser Company have entered into a stipulation and agreement in which Weyerhaeuser Company in addition to all payments previously made and the medical bills that they have previously paid except for some that are outstanding that they have also agreed to pay, will pay Mrs. Hootman at the rate of 5 percent permanent partial disability of the upper left extremity and 5 percent permanent partial disability of the upper right extremity for a total of twenty-five weeks. And the rate of pay for that being determined for the right upper extremity for her pay in October of 1980 and for the left upper extremity for her rate of pay in November of 1981. And I would like the record to reflect that we're preserving our claim that rehabilitation can be probably ordered to be borne by the Second Injury Fund. And I realize the prior rulings of the Deputy on that, but we do want to preserve that in the record, that we're not waiving that claim. Thank you. (Tr., pp. 108-109)

It is noted that the industrial commissioner's file contains no record of an approved settlement. According to defendant employer's brief, the funds have been distributed to claimant. Settlement papers should be forwarded immediately.

The issue raised by claimant is her entitlement to second injury fund benefits. In order to receive such benefits claimant must show loss or loss of use of the hand, arm, foot, leg or eye; the loss or loss of use of a second enumerated member through a compensable injury and permanent disability as a result of both injuries.

The medical evidence of record is clear that claimant had a bilateral carpal tunnel release in 1979 and thereafter had no permanent impairment. However, she claims that she subsequently had two separate injuries. The hearing deputy specifically found that claimant injured both her wrists in October of 1980 and did not suffer any injury in either November of 1981 or January of 1982. The hearing deputy found some of the testimony of claimant and her friends not to be credible apparently in part because such testimony did not coincide with his views of the medical evidence. The hearing deputy's opinion on credibility of lay witnesses is valuable because he had the opportunity to see the witnesses, hear their testimony, and form judgments about them.

Claimant's testimony does shift and it does not always match the medical evidence. She testified:

> Q. Now, after that carpal tunnel surgery, were you injured at any other time at Weyerhaeuser?
>
> A. Yes. I developed de Quervain in my wrist -- my right wrist, then at a later point in time developed it in my left wrist.
>
> Q. Tell me when you suffered your first injury with the de Quervain.
>
> A. I believe it was around the middle of October in 1980.
>
> Q. All right. Your original notice indicated October 13 of 1980. Does that sound right?
>
> A. That sounds right, yes.
>
> Q. Can you tell the Commissioner what happened at that time?
>
> A. At that point in time, I went to see Dr. Hawkins.
>
> Q. Well, first tell us what happened at work.
>
> A. What happened at work?
>
> Q. Yes.
>
> A. I was picking a piece of double wall and started having real bad pains in my right hand and wrist to where I couldn't use it. Double wall is double thick cardboard.
>
> Q. Did you have any injury at that time of your left wrist or hand?
>
> A. No, none whatsoever.
>
> ....
>
> Q. Did you suffer any other injuries to either arm after that time?
>
> A. Yes. I started having problems with the left arm, very similarly to what I had had in the right arm. This would have been -- I believe it shows up in the medical records -- approximately six, seven months later. And I then went to see Dr. Hawkins again, and he at that time indicated that he did not want to operate on the left arm because of the fact that the right hand was halfway numb now and the surgery had not really done what it should have.
>
> ....
>
> Q. Can you tell the Commissioner to the best of your recollection when you would have injured your left wrist at work?
>
> A. It would have been probably around November of that year, of '81.
>
> ....
>
> Q. Okay. At that time you said the pain went away for a few months. Did the pain then return in both wrists?
>
> A. Not at the same time, no.
>
> ....
>
> Q. You've stated on direct examination that the next injury that you sustained was sometime in November of 1981; is that correct?
>
> A. Yes.
>
> Q. Okay. And do you recall what you were doing at the time that you had your second injury?
>
> A. I may be wrong. I believe I was feeding the ward.
>
> Q. Pardon?
>
> A. A ward is a rotary die cutter, and you have to pick up various sizes of sheets, depending on how big the order is, and put them into a place called the hopper and then they're pulled through the machine and cut and printed and things of that nature. I think I was doing that, but I'm not positive if I was doing that or feeding another machine.

Q. Would that be something that you would use both of your hands or wrists to do or something that you do with only one hand?

A. You would use both hands.

Q. Okay. So --

A. If I was feeding the ward, it would have been both hands. If I was on another machine -- I was on two of them quite a bit together. The other machine, you could -- you did actually use your hands together, but there was a definite difference with what you did.

....

Q. Okay. Would it be fair to say, then, that the left wrist pain developed over a period of time without pinpointing any exact injury date?

A. It would be more like last week it didn't hurt, this week it does as opposed to that, but it wasn't a period of several months of it hurting and then gradually hurting worse. That wasn't the way I remember it.

Q. Okay. So how do you remember it, one week it didn't hurt, the next week it would hurt?

A. That's -- Yeah. It's because of the nature of what I was doing with the repetitions and heavy lifting occasionally. Maybe last week I didn't do this type of work there, okay, it didn't bother. And then this week, I'm doing it and it's bothering and it didn't stop bothering.

Q. Mrs. Hootman, you were asked a question on cross-examination concerning the second injury on November of 1981 and whether this took some period of time or not to develop. Can you be more specific as to whether this took months or weeks or days or what?

A. I would say it took just a few weeks to develop to the point of needing surgery, yes.

Q. Had you had any problems before that time with that left hand other than the de Quervain which you indicated was a different thing?

A. I had one instance where the left wrist bothered me and it was resolved within a few days.

....

Q. Mrs. Hootman, just to make sure that the record is clear on a couple of matters, I want to ask you a few more questions about your injury in November of 1981. Was your injury in November of 1981 at work?

A. Yes, it was.

Q. Was it as a part of your duties at work?

A. Yes, it was.

Q. Was it connected with work?

A. Yes.

Q. Did you suffer an injury as a part of your work duties?

A. Yes.

Q. Did you suffer that injury due to the handling of boxes or other matters that you were called upon to do at Weyerhaeuser?

A. Yes, I did.

Q. Did you suffer that injury anywhere else than at work?

A. No.

Q. That is, the injury to your left hand in November of 1981?

A. Only at work.

561

Q. Was you left hand prior to that injury in November of 1981, okay?

A. Yes, it was.

. . . .

Q. Mrs. Hootman, would you associate the development of the problem described or diagnosed as de Quervain of the left wrist with your work activity after October, 1980 and over a long period of time due to favoring your right wrist?

A. There's a possibility that it did aggravate it to some extent.

Q. And your problem developed, then, over a period of time rather than at any specific injury date, isn't that correct?

A. It developed within like a few weeks to where it did not go away.

Q. Isn't it true, though that you -- Although the development may have been gradual, isn't it true that that did, in fact, start sometime in 1980?

A. I had the tendonitis in '79 and I could have had tendonitis after that. I really don't remember right at this point, but it was not diagnosed as de Quervain until November of '81. (Transcript, pp. 16, 17, 19, 20, 33, 35, 36, 38, 39, 48, 49, 68, 69, 70 and 71)

Her spouse was asked:

Q. Prior to this surgery and this problem in November of 1981, did she appear to have any problems with her left hand or left arm?

A. No, absolutely none.

Q. Did she ever complain to you prior to November of 1981 about any problems with her left arm or left hand after the carpal tunnel surgery?

A. No. (Tr., pp. 85-86)

The medical evidence shows claimant had a specific incident at work on October 13, 1980. Dr. Hawkins diagnosed deQuervain's on the right and performed a release on November 18, 1980. By February of 1981 complaints of the opposite side were recorded. In May claimant carried a diagnosis of bilateral deQuervain's. Regarding the development of the deQuervain's, Dr. Hawkins testified:

Q. Now, for clarification, was that diagnosis made bilaterally or only on the right on October 17th, 1980?

A. Right.

. . . .

Q. Okay, let's go back to that question if we could just for clarification. Are you saying that she had bilateral complaints and a diagnosis of bilateral deQuervain's was made in 1980, in October of 1980, and you simply elected to do one procedure first or were the complaints restricted to the right wrist?

A. Restricted to the right wrist and, as I followed her along, she began to tell me the other side was painful and I said we are not going to do anything to that until we are absolutely confident your right wrist is functioning to your satisfaction.

. . . .

Q. Doctor, at the time that you did the deQuervain release in 1980, at that time did Mrs. Hootman also have complaints about the other wrist?

A. She had -- I believe she did, but they were very mild but, because I made that statement in my note, I think that she had both wrists but very mild on the one side, on the left side. Most of her complaints were related to her right wrist.

Q. Doctor, what is your opinion regarding the time that Mrs. Hootman developed this tendonitis problem?

562

Would that have occurred in both wrists at the same time or would one have occurred first?

A. I think probably both of them together. That would be my opinion. Her carpal tunnels were symmetrical in severity. Her deQuervain, she had more problem on the right side, and I don't remember if that was her dominant hand, if she used her right hand or left, but it seems fairly symmetrical so I would say she developed both at the same time.

....

Q. Would Mrs. Hootman be the best person to tell us when she developed the problems and wether [sic] they were simultaneous or not?

A. I'm not sure that she had complaints in different areas at different times, and I think she would have a very difficult time recalling. I'm having a difficult time being exact with you people looking at my records, and I saw this lady just like clockwork over this time and so I think she would have a difficult time. (Hawkins deposition, pp. 13, 16, 17, 37, 38, and 39)

In other testimony he said:

Okay, basically they are really the same. They relate to the same problem. They relate to the tendons as they cross the wrist and in each case as in the deQuervain's disease, the tendons that are at the base of your thumb, as they travel through the first extensor, it gives pain and swelling and causes people to have painful limited motion primarily of the thumb.

If it comes to the tendonitis that is associated with carpal tunnel syndrome, in this case rather than it being primarily a painful problem for the patient, it's a problem of swelling and restricted space and the nerve is pinched between those two fingers, and so it's called a carpal tunnel syndrome but basically it's a tendonitis or a swelling of the synovial tissue as they travel through these compartments and become inflammed, so basically we are dealing with the same problem in a different location and with a different group of tendons. (Hawkins dep., p. 5)

Claimant's petition in this matter alleges an injury in January of 1982. She had surgery in January 1982, but her condition came on well before that. At hearing claimant was asked about an injury in November of 1981. Claimant first saw Drs. Blair and Huey at that time, but she had carried the diagnosis of bilateral deQuervain's well before that date. The hearing deputy was right to conclude that claimant was not injured in either November of 1981 or January of 1982. Claimant does have impairment to both her hands, but she cannot be awarded second injury fund benefits as she has not established two separates and distinct traumas. Her own testimony and that of other witnesses was found not credible and it does not comport with the contemporaneous medical evidence. She was first diagnosed as having deQuervain's on the right as a result of a specific traumatic event. There were no additional events thereafter. Dr. Hawkins goes both ways -- the deQuervain's was first on the right and the development was simultaneous. The greater weight of his testimony supports a simultaneous development or perhaps a changing symptomatology relating to the same condition. Claimant has not carried her burden and no second injury fund benefits will be awarded.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-four years of age.

That claimant has a GED and additional training as a keypunch operator.

That claimant is a licensed truck driver.

That claimant has work experience as a keypunch operator, truck driver and assembler.

That claimant had bilateral carpal tunnel releases in 1979. 563

That claimant's carpal tunnel surgery did not result in any permanent impairment.

That claimant had lateral and medial epicondylitis on the right.

That claimant developed bilateral deQuervain's disease.

That the deQuervain's was first diagnosed on the right following a specific traumatic event.

That claimant had no subsequent traumatic event.

That claimant's tenosynovitis was aggravated by her employment activities.

That claimant has a permanent impairment of each wrist.

That claimant has a permanent restriction against heavy lifting over fifteen or twenty pounds, quick movements and repetitive movements of more than twenty times per minute.

That there is no work with defendant employer within claimant's restrictions.

That claimant has a five percent permanent impairment to each hand.

That claimant continues to have complaints regarding her upper extremities.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish entitlement to second injury fund benefits.

ORDER

THEREFORE, IT IS ORDERED:

That all orders relating to defendant employer which were entered by the hearing deputy in the arbitration and review-reopening decision filed December 31, 1984 are hereby vacated.

That defendant second injury fund pay costs of the arbitration and review-reopening proceeding pursuant to Industrial Commissioner Rule 500-4.33. The costs of the appeal shall be borne by claimant.

Signed and filed this 4 day of October, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA A. HOOVER, Claimant,	:	
vs.	:	File No. 529 05
IOWA DEPARTMENT OF AGRICULTURE, Employer,	:	REVIEW - REOPENING DECISION
and STATE OF IOWA, Insurance Carrier, Defendants.	:	FILED OCT 8 1985 IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in review-reopening brought by Barbara A. Hoover, claimant, against the Department of Agriculture, 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 August 2, 1978. It came on for hearing on March 28, 1985 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 January 18, 1979. A memorandum of agreement was received on the same date.

At the time of hearing the parties stipulated to a rate of compensation in the event of an award of $137.25.

A number of evidentiary problems occurred surrounding the hearing of this matter. Defendants requested a continuance which was denied. The parties have submitted briefs. The approaches in these briefs are very different but overall both are excellent and were helpful in the resolution of this difficult matter.

Claimant's petition was filed on August 17, 1983. On February 27, 1984 a prehearing order A was issued which gave the parties a final discovery deadline of August 17, 1984. Answers to interrogatories were filed by claimant on March 30, 1984. In those interrogatories claimant was asked to identify all practitioners who had examined her in the past ten years. She listed Albert R. Coates, M.D.; James Hood, M.D.; R. E. Clark, M.D.; George Utley, M.D.; and E. F. Kopecky, M.D. She also identified St. Francis Hospital as a place where she had consulted for migraine headaches. In interrogatory 6 claimant was asked to disclose "any serious illness, mental disorder, sickness, disease, or surgical operation" which she had ever had. She responded with 1951, rheumatic fever; 1955, lumbar disc surgery; 1961, cholecystectomy; 1962, left knee surgery; 1967, pneumonia; late 1960's or early 1970's, migraine headaches and epigastric and chest pain; 1978, possible seizure disorders; and 1978, knee injury.

At the outset it is noted that defendants have expressed the philosophy routinely followed in proceedings before the commissioner. A full and complete disclosure and exchange of medical evidence is contemplated and expected. No consideration is being given to the effect the changes in counsel for the defense has had in this matter. That is an internal problem which should not prejudice the hearing of claimant's case. Neither will there be attributed to claimant any malicious or willful intent not to disclose information to defendants. It is apparent that she is a poor historian who may have adopted a selective memory. It is also clear that she has an extensive history of medical and psychological treatment. Claimant's objection to exhibit A is overruled in part and sustained in part. That small amount of material to which defendants would have been alerted through claimant's answers to interrogatories was excluded. The rest was considered. Defendants' objections to claimant's exhibits were considered in weighing the evidence. Dr. Patterson's testimony indicates that he was willing to answer questions about information which was withheld because of federal regulations and therefore his testimony was not struck. Defendants also had access to additional information after his deposition. Therefore, the record in this matter consists of the testimony of claimant, Carma Mitchell, Margaret A. Spillers, and Richard Andrews; claimant's exhibit 1, a report from George H. Utley, M.D.; claimant's exhibit 2, records from claimant's hospitalization of December 13, 1979; claimant's exhibit 3, medical information from James Hood, M.D.; claimant's exhibit 4, materials from Delaware County Memorial Hospital; claimant's exhibit 5, the notes of Albert R. Coates, M.D.; claimant's exhibit 6, a letter from Dr. Coates dated February 14, 1979; claimant's exhibit 7, a letter from Dr. Coates dated May 8, 1979; claimant's exhibit 8, a letter from Dr. Coates dated November 8, 1979; claimant's exhibit 9, a letter from Dr. Coates dated December 5, 1979; claimant's exhibit 10, a letter from Dr. Coates dated April 10, 1980; claimant's exhibit 11, a letter from Judy Fenster; claimant's exhibit 12, a letter from Dr. Coates dated July 2, 1980; claimant's exhibit 13, a letter from Dr. Coates dated August 13, 1980; claimant's exhibit 14, a letter from Dr. Coates dated November 18, 1980; claimant's exhibit 15, a letter from Dr. Coates dated June 2, 1981; claimant's exhibit 16, a letter from Dr. Coates dated September 22, 1982; claimant's exhibit 17, a letter from Steve C. Jayne; claimant's exhibit 18, a letter from Dr. Coates dated April 13, 1983; claimant's exhibit 19, a letter from Jayne dated May 2, 1983; claimant's exhibit 20, a letter from Dr. Coates dated May 19, 1983; claimant's exhibit 21, a letter from Jayne dated November 4, 1983; claimant's exhibit 22, a letter from Dr. Coates dated November 11, 1983; claimant's 23, a letter from Dr. Coates dated January 25, 1984; claimant's exhibit 24, a letter from Jayne dated February 3, 1984; claimant's exhibit 25, a letter from Dr. Coates dated February 14, 1984; claimant's exhibit 26, a letter from Jayne dated March 28, 1984; claimant's exhibit 27, a letter from William R. Boulden, M.D., dated March 30, 1984; claimant's exhibit 28, a letter from Jayne dated April 2, 1984; claimant's exhibit 29, a letter from Robert M. Lang, M.D.; claimant's exhibit 30, a letter from Jayne dated December 17, 1984 with an attachment of prescriptions obtained at Easter Pharmacy; claimant's exhibit 31, a letter from Allen Patterson, M.D., dated February 3, 1985; claimant's exhibit 32, a listing of drug purchases; claimant's exhibit 33, a report from Mitchell dated May 9, 1984; claimant's exhibit 34, a letter from Mitchell dated June 8, 1984; claimant's exhibit 35, a return to work slip from Dr. Coates and a return to work slip from Dr. Utley; claimant's exhibit 36, a letter from Spillers; claimant's exhibit 37, a job description for livestock inspector; claimant's exhibit 38, a memo relating to long term disability claim of claimant; claimant's exhibit 40, a report of personnel action; claimant's exhibit 41, a billing from Dr. Coates; claimant's exhibit 42, another billing from Dr. Coates; defendants' exhibit A, a series of medical records; defendants' exhibit B, a series of medical exhibits; defendants' exhibit C, a letter from Jayne dated August 1, 1983; defendants' exhibit D, a letter from Dr. Coates dated May 19, 1983; and the depositions of claimant, Spillers, Dr. Patterson, and Dr. Coates.

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 the degree of permanent disability to which claimant is entitled. She also seeks reimbursement of medical expenses.

STATEMENT OF THE CASE

Forty-nine year old, single claimant, a high school graduate, testified to beginning work with defendant employer on February 1, 1975 as a state livestock inspector with such duties as inspecting kennels and pet shops and investigating starvation and tuberculosis cases. Some time in mid-1980 she was terminated and has not been employed by the state since.

Claimant discussed her other work history as follows: She worked as a security guard who both hired and trained other guards. She has a chauffer's license and has driven both semitractors and straight trucks. She has worked as a bone cutter. She had a pilot's license for a time and did part-time work in aircraft maintenance and refueling. She functioned as a radio dispatcher and matron in a police department. In addition to dispatching she did some paper work and occasionally was in a situation where she had to run. At another time she worked as a farm laborer caring for livestock. She also has experience as a machine operator. A third position dealing with animals was as a veterinary's assistant. At one point she worked in a hospital supply room. She did radio mechanics putting knobs and dials on radios and testing and cleaning as well. She was an electronics assistant. She cared for elderly people in their homes. None of this work lasted for more than two years.

Claimant testified to her prior medical history thusly: In the 1950's she was working in a hospital and had severe pain down her leg which grew worse and required surgery on her lower back. Post surgery she gradually got better and she was able to engage in any activity she wanted. She did have some occasional soreness and stiffness which would send her to the doctor.

In 1962 she was hit on her head, shoulder, and left knee by a tree she was felling. After being in a cast for two or three months, she did leg strengthening exercises. She had no trouble by the late 1960's and she was able to ride motorcycles and chase livestock.

Claimant described the circumstances surrounding an incident on August 2, 1978: She was getting a state car repaired. As it was being repaired, she went for job supplies. She stepped in a hole with her right foot and twisted her right ankle in which she felt a pop. Her knee on the left side folded. She was assisted in getting help and taken by truck to the doctor. She told the doctor about her knee, but the ankle was of the most concern. It was swollen and painful. X-rays were taken. She was given medication and crutches and told to stay off her ankle. She was off work for two to four weeks.

When she was released to return to work, she did so. Her right ankle appeared to heal. Her left knee grew worse. It tired easily and it hurt. When she was out in the field inspecting dead livestock, it would swell.

On November 15, 1978 she was going to her car for a report. She started for the house. Her left knee went out and she crumbled to the ground. She elevated her leg and applied heat. She was taken to the hospital where her knee was immobilized and treated with heat.

Dr. Clark thought she needed to be in a bigger hospital so she was transferred to Cedar Rapids where she was seen by Dr. Hood and Dr. Coates to whom she gave a history of what had happened with her knee.

After her discharge from the hospital her knee continued to hurt depending on her activity. She saw Dr. Coates. She avoided strains and rough ground.

Surgery was discussed, but as claimant feared surgery and there was no guarantee of a good result, she wished to try alternatives. Eventually surgery was done and claimant was placed in a cast, then on crutches, and then given a walker. Her knee did not have greater stability. By later 1980 her back had become stiff and sore with muscle spasms.

As present complaints, claimant who has a vision problem with her right eye listed an inability to get up without help from a person or object once she gets down, painful bending, muscle spasm, inability to walk more than three or four blocks, pain with stair climbing, and inability to run. She takes one Feldene per day. Her back pain runs from her beltline to her neck.

Claimant was hospitalized for addiction to Darvocet N-100 which was initially prescribed by Dr. Coates on August 1, 1980. She took the pills at a rate of fourteen to sixteen per day and got them from other sources in addition to Dr. Coates. She carried prescriptions at two pharmacies. Claimant testified she tried to stop taking the medication on her own and had contemplated suicide. Later she said her thoughts of suicide were as a teenager.

After being in a drug program for over a month, claimant had additional physical therapy for her back including use of a TENS unit. She continues to attend alcoholics and narcotics anonymous meetings.

Claimant claimed she was upset by her termination, and she liked her work and the good benefits. She asserted that she intended to remain at the job until her retirement. Since her termination she has worked without pay for a detective agency doing observation from a car and occasionally checking doors on businesses. In 1982 she underwent evaluation at a junior college. She has applied at job service. She has investigated three cases of cruelty to animals by going to the animal's house and then seeing that the animal gets to the veterinarian.

Before she was hospitalized for drug addiction she had tried to work in a pet shop cleaning bird cages and runs and waiting on customers. She labored three to four days per week for four to six hours per day. Since her drug treatment she has tried to return but her pain has been too great. She found that she needed to go to her car to lie down. She received no pay for her pet shop work.

Claimant acknowledged having difficulty with her memory even to the present and more particularly at the time of her deposition. She testified that she did recall what Dr. Utley had done and more specifically that he had examined her knee and ankle and taken x-rays. She claimed that her ankle sprain healed and that she was able to go back to work on August 19, 1978. She denied that she had used crutches before August 2, 1978 because of trouble with her left knee or that she had any difficulty with her knee going out.

Claimant denied having been on pain medication almost constantly from 1959 to 1978. She did acknowledge having headaches and taking drugs for pain and other problems from the early 1960's to 1978. She was able to stop taking Percodan which she had been taking hourly. She also had Demerol for headaches.

Claimant stated that she stopped wearing her back brace and had not worn it since 1978.

Claimant was unsure whether or not she had ever had seizures. She did get a statement from a doctor allowing her to drive. She did not know of ever taking medication for seizures. She rejected the possibility of a seizure at the time of her fall in August or November. She was unable to recall instances in which she had given a history of seizures.

She also was unable to recollect times suggested by defendants' counsel that she had undergone medical treatment nor the doctor who had provided it. Neither could she remember a rehabilitation program being suggested to her.

Claimant admitted that some hospitalizations were left out of her interrogatories.

Claimant agreed that she had been advised by her department to apply for long term disability and she had applied guessing at the dates she used on the form.

Claimant thought the limitations placed on her by Dr. Coates were that she not climb over fences, that she not walk long distances, and that she not lift heavy objects.

Claimant did not remember a conversation with Spillers about a lab assistant job in Des Moines. She declared her unwillingness to live in a town as large as Des Moines where stress factors and expenses would be higher.

Margaret A. Spillers, who testified at the hearing and by deposition and who is a personnel management specialist II for defendant employer who had in June of 1984 305 employees, explained the procedure for moving persons from sick leave to lump sum vacation to leave without pay to long term disability. Persons who move to a 950 status would be terminated ninety days after they last physically worked at a job. Spillers explained than an attempt is made to see that long term disability will take over when other benefits are exhausted. She did not think the employment consequences of applying for long term disability were discussed with claimant. Long term disability guarantees sixty percent of base pay to age sixty-five. Status of the claim would be reviewed each year.

Records showed claimant's date of termination as April 25, 1980 which was the time claimant was no longer paid by defendant employer.

Spillers recalled a phone conversation with claimant about a position with the department. She suggested a work test position as a lab assistant I in which five persons had been placed since the summer of 1980. Those positions were in Des Moines and claimant did not wish to relocate because of her parents. The witness was not aware whether there were any actual positions available. She indicated that the department employs a person with a stiff knee as a livestock inspector. She suggested to claimant that she seek vocational rehabilitation. She stated that claimant could transfer to another position but she would have to meet minimum qualifications. Spillers was unaware of claimant's prior orthopedic and psychiatric problems.

Records showed claimant returned to work after a knee injury on February 16, 1979.

Richard L. Andrews, who has been supervisor of the state employees' workers' compensation program for eight years and who testified to familiarity with claimant's claim, indicated he only recently had learned of claimant's prior back and knee problems and of drug involvement.

Claimant was paid benefits based on an injury to her body as a whole and her expenses for treatment for drug addiction were paid as well. Andrews indicated claimant would be paid fifty percent permanent partial industrial disability.

Carma Mitchell, M.S., saw claimant on referral from her attorney who provided medical information. She met claimant at claimant's home and interviewed her regarding her work history and limitations as claimant saw them in an attempt to assess tranferrable skills and to determine what work is appropriate for claimant.

Claimant's self-described limitations were: restriction on standing of a half hour, walking one block, sitting one hour, and lifting fifty pounds from the waist up. She is unable to kneel and driving is uncomfortable for her. She is bothered by cold temperature, low pressure, and high humidity.

Mitchell recorded claimant's having a pilot's, chauffer's, and a private investigator's license. Claimant told Mitchell that the short term nature of her employment stemmed from her restlessness and her interest in bettering herself. Claimant listed her interests as working with the elderly, appliance repair, driving, law enforcement, and electronics.

Claimant's tranferrable skills were identified as:

> The ability to apply logic and technical knowledge of laws and regulations to investigate situations; making decisions and judgment on infomation gathered; writing and speaking clearly; inspecting establishments for hazards, sanitation, and other safety violations; changing tasks and activities frequently; using eyes, hands, and fingers to operate radios, and being firm and courteous with a variety of people.

As jobs claimant would be able to perform, Mitchell listed inspector of health care facilities, dispatcher, gate tender, security guard, parking enforcement officer, detective, and switchboard operator. Other jobs believed within the claimant's present capability were receptionist for a social service agency, a low volume cashier or sales job, and light assembly. Some of the jobs Mitchell listed would require modification. Given consideration was the type of surface on which claimant would walk.

The counselor's initial recommendations were that updated medical information be obtained, that claimant be provided with motivational counseling, that a JTPA application be facilitated, that claimant have counseling with a psychologist, that a labor market survey be conducted, and that employers be contacted for potential placement.

Claimant was seen again on June 8, 1984 at which time a discussion of counseling was undertaken with claimant expressing the opinion that she could handle her own problems. Mitchell concluded that claimant needed concentrated specialized placement efforts to secure employment and job seeking training as well.

Claimant was accepted into the JPTA program and a resume was developed for her. Claimant was found to be cooperative and motivated. Mitchell reported the results of a labor market survey and acknowledged a fairly high employment rate in Wapello County. She anticipated an entry level salary for claimant in the $3.35 to $5.00 range. Claimant preferred not to move because of her family obligation.

The counselor was not aware claimant had been in a psychiatric institution.

An August 27, 1959 letter from Donald F. Schultz, M.D., of the neurosurgery division reports claimant's being seen for left lower extremity pain. A lumbar myelogram showed a defect at L4-5 on the left. Surgery was performed. Claimant was at that time instructed not to lift with a back inflection and to lose weight. Claimant was later seen for pain and photophobia of the right eye. Among the possibilities considered was a functional impairment.

In July of 1962 claimant had back pain in the lumbosacral region which had occurred over the previous five months. Her lumbosacral curve was flattened. She had no radiation. An ankle jerk was absent. She was to take Darvon or aspirin, use a hard board underneath her mattress, do back strengthening exercises, and go on a diet.

In November of 1963 claimant was evaluated for "passing out" attacks. Psychotherapy was suggested to treat what was thought to be a psychogenic, convulsive disorder.

In February of 1964 she was seen for severe back pain which had existed for six weeks. At that time she gave a history of reinjury to her back in a tree felling incident. About this same time she was fitted with a lower back brace and given Darvon for pain. The impression of the physician who admitted her was chronic lumbosacral strain due to lumbosacral instability. There was no radiation. On discharge claimant was instructed to wear a back brace during waking hours, to take aspirin and Darvon, and to use heat and bed board. By the end of March, claimant was much improved, but she was advised to continue in her brace and with conservative therapy.

In July of 1966 claimant was hospitalized for evaluation of seizures and mental deterioration. Claimant was thought to have psychogenic overlay and a history of drug use. No true seizure activity was observed. Claimant was referred to the mental health institute for evaluation and treatment.

In May of 1970 claimant was seen in orthopedics where she reported her back was improved. X-rays showed no change from those taken four to five years before. On June 10, 1970 claimant was seen in the medical clinic where her diagnoses were idiopathic hypoglycemia, transient sinusitis, and passive-aggressive personality disorder with conversion hysteria.

The records of W. P. Garred, M.D., show claimant was seen for a number of common conditions for which she was prescribed various medications. In November of 1968 she had an acute low back strain. In May of 1970 she was having backaches for which she was given Darvon Compound 65. In October of the same year she had an acute low back strain. Later in the year she continued to have back pain and she remained on medication. In the fall of 1970 her prescription for Darvon Compound was renewed. On January 11, 1977 Darvocet N-100 was prescribed. In February of 1977 she was hospitalized with auricular tachycardia.

Horst Blume, M.D., saw claimant in August of 1977 and took a history of headaches beginning six months before July 27, 1976. She claimed no spells of unconsciousness for the previous ten years. Headaches were treated with electrostimulation.

Claimant was hospitalized in July of 1976 with complaints of severe headaches which sometimes were relieved by Darvon and at other times required injection. Claimant underwent inpatient psychiatric evaluation in mid-1978 at which time she had various somatic complaints. She was treated with psychotherapy and medications. Her final diagnosis was unipolar affective disorder of depressed type.

Gordon E. Rahn, M.D., has seen claimant and treated her for a lengthy period. In March of 1977 he began prescribing Percodan and noted a possible Percodan dependency. In May Talwin was prescribed. A TENS was ordered and claimant was diagnosed as a schizoid personality. She continued on Percodan and Talwin as well as injections of Demerol and Phenergan into 1978. In April of 1978 Codeine was prescribed.

George Utley, M.D., saw claimant on August 2, 1978 at which time she reported falling and hurting her right ankle. She was kept off work until August 14, 1978 at which time she was permitted to work on even ground. Dr. Utley's statement says "Exam of ankle and leg." Charges were made for two views of the right ankle.

Claimant was seen in the emergency room on November 16, 1978. The history given there was "States was walking outside and turned around injury L knee -- has had previous problems c̄ same knee 1962-tree limb fell on knee -- had torn ligaments -- casted @ that time." X-rays showed hypertrophic changes on the patellar surface. Claimant was treated with Demerol and Darvon.

Claimant was transferred to Cedar Rapids on November 18, 1978 because of increasing angina. James Hood, M.D., concluded she did not have organic heart disease. She gave a history of pain in the left knee beginning three weeks before and then of her fall three days before. She was seen in consultation by Albert R. Coates, M.D., who is board certified with special certification in sports medicine, to evaluate her left knee and right ankle. She gave a history of injury to her left knee and of placement in a long leg cast. She told of persistent ligamentous instability, an occasional slip in the knee, a little effusion, and no significant pain. She indicated that she sprained her right ankle (a questionable hairline fracture) and that the crutches she used stressed her left leg. The doctor found no significant instability in the right ankle, but there was some pain with tibiofibular compression which suggested an incomplete disruption of the distal tibiofibular joint. The left knee had severe laxity of the lateral collateral ligament in the posterior lateral corner of the capsule. There was a little laxity of the posterior cruciate ligament with a positive posterior drawer's sign and tenderness over the insertion of the semitendinosus on the medial side. The doctor thought claimant had an incomplete tear of the medial hamstring. Claimant was instructed to wear an immobilizer and to begin quadriceps building. Subsequent x-rays showed no present problem with the right ankle.

After claimant's release from the hospital, she continued to have pain and tenderness which led to Dr. Coates wishing to repair her lateral ligament. Claimant was opposed to surgery. In January claimant was fitted with an Iowa knee brace. By July claimant still had an unstable knee and she was told to continue wearing her brace. In September she was having symptoms of chrondomalacia of the patella. Near the end of the year claimant reported an allergic reaction to Talwin.

On December 5, 1979 the doctor wrote:

> This anticipated surgery on your left knee is because of chronic instability in the knee from an old injury to the medial and lateral collateral ligaments and probably the anterior cruciate ligament. This had been aggravated by an injury and actually made worst by the injury which you had sustained prior to my first visit in November of 1978.

On December 14, 1979 claimant underwent an exploration of the lateral aspect of the left knee with reconstruction of the lateral collateral ligament. The biceps femoris tendon was found to be imbedded in the scar.

After the surgery, claimant had several casts and seemed to be progressing. In March, however, she again had instability of the knee. Dr. Coates proceeded with quadricpes building. In April claimant was found unable to work. A Lennox Hill brace was proposed in July as claimant had instability in the medial, lateral, and anterior cruciate. The next month Darvon N-100 was prescribed. By September Dr. Coates noted "It has flared her back up some."

In March of 1981 Dr. Coates got new x-rays and predicted that in time claimant would require a total knee replacement. X-rays of claimant's hip and back showed degenerative disc disease with nearly complete collapse of L3 through S1. Physical therapy was commenced. Claimant was started on Naprosyn, but she continued to take Darvocet as well until at least the end of 1983 when it was discontinued.

In September of 1982 claimant told Dr. Coates that she was expected to be one hundred percent in order to work. The doctor questioned that requirement as he felt claimant had instability in her knee before she started the job.

When Dr. Coates' deposition was taken, he explained the disruption in the ligaments in her knee was attributable to the injury in November 1978. Dr. Coates related claimant's back to her knee condition by stating that she does not have symmetrical weight bearing and cannot trust her legs thereby putting additional strain on her back. The doctor stated claimant's knee failed to significantly improve after July 2, 1980 when he provided his first impairment rating. He acknowledged that claimant has degenerative disc and joint disease. Dr. Coates believed the July accident claimant told him about occurred at a stockyard. The doctor said that the chrondromalacia, a degenerative problem, was if not caused by her injury in November of 1978, at least aggravated by it.

After objective data was collected by the physical therapist, Dr. Coates made an impairment evaluation with a rating of fifty percent of the left leg. In making that rating the doctor seemed to presume that claimant was functioning and working with minimal problems. A twenty-eight percent impairment was assigned to the body as a whole which included the lower extremity and the back. The doctor's ratings were based on the AMA Guide, the Orthopedic Guide, and his own experience. As restrictions, the orthopedist said claimant should not stoop, run, squat, or climb stairs, ladders or hills. He thought fifteen to twenty pounds would be an appropriate weight restriction. He believed claimant could do work that allowed for change of positions and that she could do bench work. Dr. Coates believed claimant could perform the duties of a laboratory assistant. The doctor said that spurring, which is an attempt by the body to repair itself, would developed in three to six months. Dr. Coates agreed that claimant's weight would aggravate both her back and knee.

Dr. Coates was unable to know how to rate the percentage of disability existing in claimant prior to the November injury.

William R. Boulden, M.D., who was provided with various documents by claimant's counsel, saw claimant at the request of defendants. He took a history of claimant's twisting her right ankle and hyperflexing her left knee on August 2, 1978. Claimant told of subsequent surgery to her knee and of back surgery in 1955. She complained of ankle and back pain and knee instability.

On examination claimant's knee was found to be unstable. There was limitation of motion in her back. X-rays showed medial joint line narrowing in the knee, a normal ankle, and severe degenerative disc disease at L3 through S1.

The doctor's impressions were totally unstable left knee, overuse syndrome of the left ankle, severe degenerative disc disease with aggravation. Dr. Boulden agreed with the fifty percent rating of Dr. Coates. He recommended use of the braces. He acknowledged that claimant's knee would aggravate her back, but he thought that most of claimant's severe degenerative disc disease and probable spinal stenosis was preexisting. He also made note of her weight. Dr. Boulden wrote:

> But in reference to disability ratings it is hard for me to rate this patient out with an exact figure as I do not know the condition of her back prior to the injury and with the prior history of back surgery are we seeing just symptoms and signs of previous surgery and degeneration.

Allan D. Patterson, M.D., whose practice is limited to addictionology, testified that claimant was admitted to the hospital on September 24, 1984 and remained until September 27, 1984. She gave a history of using Darvocet N-100 for back and knee pain for five or six years. Detoxification was undertaken using a drug called Clonidine. She also was treated with individual and group therapy, heat, physical therapy, relaxation therapy, and stress management.

The doctor said that there is no cure for chemical dependency and claimant will need follow-up. She will have to rely on other methods of reducing pain and on further counseling.

During claimant's hospitalization, a neurologist was consulted because claimant had periods of time when she was awakened when she did not focus, was not oriented, did not respond, and had rigidity of her muscles suggesting the possibility of seizures. An electroencephalogram showed no abnormal seizure activity but did show increased muscle activity. Douglas Brenton, M.D., expressed the impression that claimant was having hysterical seizures, but her neurological was negative. An electroencephalogram did show a pattern ordinarily associated with hyperalertness, anxiety or drug withdrawal.

Dr. Patterson did not feel the medication claimant was taking for detoxification purposes would limit her capacity for employment. He believed involvement with others would be good for her but he thought she could be limited by time. He believed claimant's thinking could be hindered by the dependency in that claimant would not be as sharp as she once was. He explained weight loss would increase claimant's ability to tolerate a job. He anticipated claimant's reaching maximum benefit from chemical dependency treatment somewhere between two and three and a half years. He said that chemical dependency is a chronic disease.

Claimant did not tell the doctor of any involvement with drugs after her disc surgery or the injury to her leg or of any other involvement with drugs prior to her injury.

Dr. Patterson was asked specifically if claimant could perform work as a laboratory assistant and he said she could if she had the option of lying down. Dr. Patterson did not believe claimant was capable of gainful employment at the time of her admission nor at the time she was taking Darvocet.

Claimant underwent a neuropsychological assessment by Richard A. Dill, Ph.D., clinical psychologist, who administered tests and interviewed her. On the Wechsler Adult Intelligence Scale claimant seemed average to above average on all subtests. Testing suggested claimant was suffering from mild perifrontal deficits. Claimant's strengths were in the areas of new learning, memory, and differentiating essential from nonessential detail. None of the test results were seen as reflective of a seizure-type disorder. Suggested treatments were enhancement of concentration, stress management, and structured activity.

APPLICABLE LAW AND ANALYSIS

The first issue presented is whether or not there is a causal connection between claimant's injury of August 2, 1978 and her disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 2, 1978 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

Claimant was injured on August 2, 1978. A memorandum of agreement was received by the industrial commissioner on January 18, 1979. The nature of the injury was described as "Inj. to ankle and knee." Claimant testified that she stepped in a hole with her right foot and twisted her right ankle. At the same time her left knee folded. She was seen by Dr. Utley who reported an "Exam of ankle and leg." X-rays were taken of the ankle only. In approximately two weeks she was permitted to return to work. She indicated that her ankle improved, but her knee worsened, tired easily, hurt, and swelled. She claims that in November her knee gave way and she fell.

Defendants argue that claimant's injury of November 15, 1978 did not arise out of and in the course of her employment. She has not alleged an injury on that date. Her petition alleges August 2, 1978. The memorandum of agreement filed in this matter "settles the first element of liability, that an employer-employee relationship existed at the time of injury...[and] also settles...that the injury arose out of and in the course of the employment." The degree of disability remains. Freeman v. Lupes Transport Co., 277 N.W.2d 143, 149-50 (Iowa 1975).

Because of the filing of the memorandum of agreement this is a review-reopening. There are two avenues of recovery available to claimant as they are described in DeShaw v. Energy Manufacturing Co., 192 N.W.2d 777 (Iowa 1971) and Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). In DeShaw at 780 the Iowa Supreme Court set out 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 of two things: (a) that the disability for which he seeks additional compensation was proximately caused by the first injury, or (b) that the second injury (and ensuing disability) was proximately caused by the first injury.

In Langford at 670 the court directed that the disability must be "directly traceable" to the initial incident.

Claimant has three conditions which she must relate to her injury of August 2, 1978 -- impairment to her knee and back and her drug addiction.

Claimant cannot meet the first DeShaw standard. Her first injury was primarily to her ankle. Her disability is not proximately caused by that ankle injury. Therefore, claimant needs to show her fall on November 15, 1978 was proximately caused by her injury of August 2, 1978 or that the disability she has is directly traceable to that occurrence.

Overshadowing the issue of causal connection is claimant's extensive past medical history. In 1959 she had a partial hemilaminectomy. Thereafter she had periodic back complaints for which she took various pain medication. Claimant's emotional problems commenced in the 1960's. She injured her left knee in a tree felling incident in 1963.

When claimant's knee was x-rayed on November 16, 1978, claimant had hypertrophic changes. On transfer to Cedar Rapids, claimant reported pain in the left knee beginning three weeks before following her fall three days before. She gave a more specific history to Dr. Coates of persistent ligamentous instability, occasional slippage, and some effusion. Defendants correctly point out that Dr. Coates found conditions that had been present in claimant's knee on examination before.

However, it must be kept in mind that when an aggravation of a preexisting condition 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). 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. Coates causally relates the condition of claimant's knee to an aggravation from an injury prior to his examination in November 1978. A To Whom It May Concern slip of November 22, 1978 states: "This pt. has a re-injury of her Lt. Knee as a result of throwing more pressure on it necessitated by a sprained ankle on the opposite side. She should not work for 2 wks." Defendants argue that Dr. Coates' testimony should be disregarded because he did not have all the records from claimant's past examinations available to him. That is true, but Dr. Coates had sufficient history available to give his opinion weight. Viewing Dr. Coates testimony and the record as a whole allows claimant to establish that her knee condition is directly traceable to her injury of August 2, 1978.

The above finding is the linch pin on which the remainder of the case hinges. Once claimant's left knee impairment is found to be causally connected to her right ankle injury, defendants become responsible for whatever "consequences...naturally and proximately flow from the accident." Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480, 482 (1936).

Surgery to claimant's knee was not very successful in stablizing that knee and although she had back surgery in 1959 and chronic back problems thereafter as well as degenerative disc disease, Dr. Coates attributed the flare-up of claimant's back complaints which he noted in September of 1980 to her knee problem. On May 19, 1983 Dr. Coates wrote:

> I do feel there is a relationship between the August 2, 1978 [sic] and the chronic low back problem. This is [sic] rather indirect relationship and since she has such marked degenerative changes in her back, certainly the accident is not an etiological factor in the degenerative changes but I am sure aggravates the symptoms which she has from it.

At the time of his deposition he testified:

> Q. That's the first mention I find in your records, at least, of any problem with the back. First of all, in your opinion, based upon a reasonable degree of medical certainty, is there any relationship between the injury to her knee and the problems, if any, that she has with her back?
>
> A. Yes, I feel there's a definite connection because of the fact that she does not have symmetrical weight bearing on the two legs. In other words, she can't trust her two legs evenly and this puts additional strain on her back.
>
> Q. What harm does additional strain on the back do?
>
> A. Well, she has degenerative disk disease and degenerative joint disease in her back with the wear and tear of arthritis or osteoarthritis, if you will. When you have this type condition, then further strain further irritates the arthritis. (Coates deposition, pp. 13-14)

Claimant also had a preexisting problem with drugs and a history of emotional disturbances. Dr. Coates who has been claimant's treating physician prescribed Darvocet beginning in August of 1980. By the spring of 1981 claimant was taking substantial amounts of the medication. Dr. Patterson who is a specialist in addictionology, thought claimant would have been incapable of employment until she completed her chemical dependency treatment. As it is Darvocet N-100 which was used to treat claimant's compensable injury and which was the medication which led to treatment for drug addiction, that treatment and any disability claimant suffers as a result of that addiction is causally related to her injury.

It is concluded that claimant has permanent disability which is related to her injury of August 2, 1978.

Claimant argues that she is permanently and totally disabled. This deputy commissioner does not agree.

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 often 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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.
>
> Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant is approaching a difficult age in terms of employability and retraining. However, she has perhaps a quarter of her worklife remaining. She is a high school graduate with a number of licenses in various areas. She has a wide range of work experience albeit in some instances brief experience. Those work experiences have provided her with a number of transferrable skills. In all likelihood her work for defendant employer was the best job she had ever had. Claimant seemingly has expansive interests and that should increase her employability. A situation which does not help in terms of returning her to work is her unwillingness to relocate because of her family and that is understandable.

Claimant in all probability will need professional assistance in finding a job that is realistically within her capabilities. She is going to require help with job seeking skills. Mitchell found her motivated to work. Her ambition is evidenced by projects she has undertaken around the family acreage -- putting up a fence, installing a telephone, and setting up a intercom system. That ambition needs some direction and stability. She has moved from job to job toward what she seemingly thought was self-betterment. It is unfortunate that claimant's work with defendant employer was terminated and that she was not provided some aid in getting another job. This is an employer with extensive resources for returning claimant to work and more should have been done to accomplish that goal.

Mitchell came up with a number of positions claimant would be able to fill with selective placement. If she takes an entry level position paying minimum wage, she will have a decrease in her actual earnings as she appears to have been earning approximately $5.65 per hour at the time of her injury with additional benefits available to her as an employee of the state.

There is no doubt but that claimant had some physical and emotional problems prior to her August 1978 injury. That injury in itself was minor, but the sequale of the injury are extremely serious. Claimant has a very unstable knee, but with proper bracing some stability is achieved. Claimant has not lost weight. Weight loss would benefit both her back and her knee. Claimant's drug addiction is going to require continuing effort on her part to remain chemical free.

Claimant's treating physician has provided her with an impairment rating of twenty-eight percent of the body as a whole including both her back and her leg. Dr. Boulden agreed with a fifty percent rating for the leg alone, but he felt unable to rate what portion of her back impairment might be related to her injury because he did not know its condition before the injury. He believed that most of her severe dengerative disc disease and probable spinal stenosis were were preexisting. Some portion of claimant's back impairment is attributable to her injury. Claimant's drug addiction is not being treated as a condition resulting in permanent functional impairment.

As a result of her physical condition, claimant carries restrictions on stooping, running and squatting, and on climbing stairs, ladders, or hills. She also has a weight limitation. In addition she must avoid certain surfaces. These restrictions and limitations result in claimant's requiring selective placement as was discussed above.

Based on the Iowa case law, the findings of fact set out below and the discussion contained in this portion of the decision, it is concluded that claimant has a permanent partial industrial disability of fifty-five percent.

The remaining issue is a difficult one and that is claimant's entitlement to healing period. 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.

According to Dr. Coates claimant's condition failed to improve significantly after July 2, 1980. The back complaints that claimant had do not result in an extension of healing period. Dr. Coates thought that during the time of his treatment from November 1978 to December of 1983 claimant was developing a dependence on Darvocet, but he would not say she was addicted. Claimant was found unable to work when she was hospitalized at Powell. Ultimately Dr. Patterson said that claimant "was chemically dependent on Darvocet N-100 shortly after she started taking this medication and was not medically capable of engaging in her employment." Dr. Patterson's opinion is entitled to some weight as he indicates he has reviewed the records from Dr. Coates, but his opinion lacks definiteness.

Dr. Coates' notes provide some assistance. On September 23, 1982 he noted: "I have continued her on Darvocet which she takes intermittently and advised her to be very cautious on this because she could develop some addiction to this drug." On April 28, 1983 he wrote: "I hate to keep her on Darvocet for a protracted period of time but since she does get some relief and takes only approximately one every other day, I have given her another prescription for Darvocet and asked her to continue to function as best she can and return to see me if she has problems." His records on December 8, 1983 state: "She has been taking the Darvocet N quite abit, [sic] and so I have discontinued that and talked to her about why we have done it."

Although Dr. Coates expressed concern about claimant's taking Darvocet N-100 as early as September 1982, claimant's drug purchases became heavier in early 1983. Additional healing period will be commenced from April 12, 1983. Claimant will be awarded healing period benefits for her times off work from August 2, 1978 through July 2, 1980 and from April 28, 1983 through October 27, 1984 when claimant finished the drug treatment program.

Defendants seek credit for long term disability benefit payments. Their entitlement to credit was not at issue at the time of hearing. However, if they meet the criteria of the statute, by operation of Iowa Code section 85.38(2) they would be entitled to a credit.

Likewise, there was no issue presented at the time of hearing regarding claimant's entitlement to vocational rehabilitation. If claimant meets the criteria found in Iowa Code section 85.70 she would be entitled to those benefits.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty-nine years of age.

That claimant is a high school graduate.

That claimant worked for defendant employer as a livestock inspector.

That claimant has wide ranging work experience.

That claimant has had a pilot license and a permit to carry a weapon.

That claimant has a private detective's license and a chauffer's license.

That on August 2, 1978 claimant stepped in a hole and twisted her right ankle.

That a memorandum of agreement has been filed in this matter.

That claimant was permitted to return to work on even ground on August 14, 1978.

That on November 15, 1978 claimant's left knee gave way and she fell.

That claimant had a partial hemilaminectomy of L4 and L5 on the left on July 31, 1959 and thereafter had periodic complaints of lumbosacral pain.

That claimant has been advised to lose weight from the time of her back surgery.

That claimant has taken many pain medications over the past twenty years.

That claimant's emotional problems began in the early 60's.

That claimant dislocated her left knee in a tree felling incident in 1963.

That claimant was thought to have a drug dependency as early as 1977.

That claimant had an exploration of the lateral aspect of the left knee and reconstruction of the lateral collateral ligament.

That after surgery claimant continued to have instability of the knee.

That claimant has degenerative disc disease in her back.

That claimant used crutches following the incident of August 2, 1978.

That impairment to claiman's left knee is directly traceable to claimant's injury of August 2, 1978.

That impairment of claimant's knee has aggravated her preexisting back condition.

That claimant became addicted to Darvocet N-100 -- a drug needed to treat her compensable injury.

That claimant has motivation but she will need realistic direction.

That claimant has potential for rehabilitation.

That taking on an entry level position will result in a reduction in claimant's actual earnings.

That claimant has failed to lose weight which would benefit both her back and knee conditions.

That claimant has permanent functional impairment of her leg of fifty percent and additional permanent functional impairment to her back.

That claimant is restricted from stooping, running, squatting, and climbing.

That claimant is limited to weight lifting of fifteen to twenty pounds.

That defendant employer has not used its resources to return claimant to work.

That claimant has permanent partial industrial disability of fifty-five percent.

That claimant's orthopedic problem reached maximum medical improvement as of July 2, 1980.

That claimant was unable to work because of drug addiction from April 28, 1983 through October 27, 1984.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has proved by a preponderance of the evidence that her injury of August 2, 1978 is a cause of the disability on which she now bases her claim.

That claimant has established by a preponderance of the evidence entitlement to two hundred seventy-five (275) weeks of permanent partial industrial disability.

That claimant has established by a preponderance of the evidence entitlement to healing period benefits for her times off work from August 2, 1978 through July 2, 1980 and from April 28, 1983 through October 27, 1984.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant two hundred seventy-five (275) weeks of permanent partial disability at a rate of one hundred thirty-seven and 25/100 dollars (137.25).

That defendants pay claimant healing period benefits for her times off work from August 2, 1978 through July 2, 1980 and from April 28, 1983 through October 27, 1984 at a rate of one hundred thirty-seven and 25/100 dollars ($137.25).

That defendants be given credit for amounts previously paid.

That defendants pay drug expenses totalling nine hundred forty-five dollars ($945).

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33 including eighty-five dollars ($85) for the reports of Dr. Coates and an expert witness fee for Dr. Coates of one hundred fifty dollars ($150).

That defendants file activity reports as requested by this agency.

Signed and filed this 8 day of October, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BURTON HUBANKS,	:	
Claimant,	:	
	:	File No. 731726
vs.	:	
	:	A P P E A L
FDL FOODS, INC.,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED
OCT 29 1985
IOWA INDUSTRIAL COMMISSIONER

Claimant appeals from a ruling on a motion to compel requiring him to answer interrogatories 6 and 7 asking for information relative to prior or subsequent injuries or diseases and the identification of practitioners to which he went for such conditions.

Even if, as claimant contends, a prior ruling was made on the same or similar issue by a ruling on a motion to produce it is not controlling here. Ordering claimant to produce records regarding unknown conditions is one thing and ordering claimant to disclose injuries or diseases known to him and where records relating to such conditions might be is quite another.

Claimant further contends that his counsel filed a number of similar actions at the same time; that the actions in most of the cases in response to interrogatories 6 and 7 was the same; that defendant filed motions to compel in all the other cases in which claimant objected to interrogatories 6 and 7; and that rulings on the motions to compel have not been uniform. Although this may be so, not all of the other rulings were appealed. Were the inconsistent rulings appealed also, it would be possible to conform each of them but to alter the ruling in this case only for the purpose of making it the same as rulings which were not appealed would be in effect dictating to an appellate body the outcome of an appeal matter by a lower tribunal.

The appeal in this case as in the others with similar issues is interlocutory and should not be entertained. As is indicated in Citizens State Bank of Corydon v. Central Savings Association, 267 N.W.2d 33, 34 (Iowa 1978), "[g]reat harm would result to litigants under a system which tolerated indiscriminate appeals from each and every adverse ruling." Under normal circumstances this appeal would be dismissed as it is not "[a] final judgment or decision...that finally adjudicates the rights of the parties" and which puts it "beyond the power of the court which made it to place the parties in their original positions." Crowe v. DeSoto Consolidated School District, 246 Iowa 38, 40; 66 N.W.2d 859 (1954).

However, as this case is one of many in which similar conditions exist a ruling will be made in hopes that some order may be brought out of the chaos involved in these multiple actions.

Claimant refers in his resistance to defendant's request for information that his is one of many cases which were filed at about the same time and that his counsel has difficulty responding to all the requests for information by the defendant. This objection is noteworthy but certainly not compelling. Interrogatories were first served in December 1984. Claimant asked for and received additional time to respond.

Defendant must also defend all of the multiple actions at the same time and in order to do so is entitled to discoverable information to aid in preparation of its cases. Claimant contends defendant's request is too broad but do not indicate that it is improper for discovery. The condition claimant complains of may be limited to a scheduled member as far as result is concerned but causation may be systemic. The fact that it may be inadmissable at a hearing does not mean it cannot be discovered. The information requested is discoverable and within the knowledge of the claimant. Interrogatories 6 and 7 should be answered.

WHEREFORE, the ruling on motion to compel is affirmed.

THEREFORE, claimant is ordered to respond to interrogatories 6 and 7 within twenty (20) days of the signing and filing of this order and failure to do so may result in sanctions under Industrial Commissioner Rule 500-4.36.

Signed and filed this 29 day of October, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

518

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUDITH D. INGERSOL, Claimant, vs. CENTRAL HYDRAULICS CO., Employer, and FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	FILE NO. 704014 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 31 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Judith D. Ingersol, claimant, against Central Hydraulics Co., employer, and Fireman's Fund Insurance Co., insurance carrier, for the recovery of further benefits as the result of an injury on October 8, 1980. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed in this proceeding is $132.31. A hearing was held before the undersigned on June 12, 1985. The case was considered fully submitted upon completion of the hearing.

The record consists of the testimony of claimant; claimant's exhibits 1-3; and defendants' exhibit A.

ISSUE

The issue presented by the parties at the time of the pre-hearing and the hearing is the extent of healing period and permanent partial disability benefits she is entitled to.

FACTS PRESENTED

Claimant, who was employed by defendant as a machine operator, received an injury arising out of and in the course of her employment on October 8, 1980 when while installing a 15 pound drill kit into a drill press she began to experience pain in her back. Claimant testified that she told her union steward about the incident, was taken to the hospital and received medical treatment the same day. Claimant revealed that J. E. Ives, M.D., took her off of work and placed her in a hospital where she underwent a myelogram, traction and therapy. Claimant indicated that she was placed in a back brace which she was required to wear 24 hours a day. Claimant stated that she experienced a great deal of back and hip pain which also extended into her legs.

Claimant testified that in January of 1981 she re-injured herself and again saw Dr. Ives. In February of 1981, at defendants' request, she was seen by Dr. Russo.

Claimant was released a couple of times for light duty work but does not recall that she was ever released to her former duties. In 1982 claimant had a spinal fusion performed and in December of 1982 was prescribed a Tens unit which she still uses occasionally. Claimant disclosed that in July of 1982 she suffered a heart attack and in November of 1984 had some problems with her neck.

Claimant testified that since her injury she has not played softball, gone bowling and does not dance or swim as much as prior to her injury. Claimant indicated she has problems with housework, pain still goes down her legs, and after walking a few blocks has numbness in her right leg. Claimant testified that she has not worked since her injury and revealed that defendant employer is no longer in business.

On cross-examination claimant revealed that no doctor has informed her that she is under permanent restrictions and has not sought vocational rehabilitation or other employment.

A report dated October 15, 1980 by J. E. Ives, M.D., indicates that claimant injured herself when changing a 15 pound drill at work one week previously and then was hospitalized for two to three days. The doctor's diagnosis was spondylolisthesis at the L5-S1 level. The report indicates that Dr. Ives advised her not to return to work but to return to the hospital for more bed rest and physical therapy.

Claimant was given a back brace and on December 29, 1980 was told to try to return to work wearing the back brace. The reports also disclose that claimant was encouraged to lose weight and excercise to tone up her abdominal muscles.

On several occasions Dr. Ives released claimant to light work with a 25 pound weight restriction. The notes and reports of Dr. Ives indicate that on April 22, 1982 claimant had a L4-S1 bilateral lateral spinal fusion. Claimant continued to see Dr. Ives and was instructed to refrain from lifting objects over 15 or 20 pounds. The records reveal that claimant continued to complain of pain radiating down both lower extremities.

In a report dated October 8, 1980 Dale Weber, M.D., indicated that claimant was admitted to the hospital because of back pain which started when lifting a heavy bit at work. Dr. Weber revealed that claimant had a history of back trouble and knew she had spondylolisthesis for several years.

A discharge summary by Frank Rogers, M.D., dated July 25, 1982, indicates that claimant was hospitalized from July 15, 1982 until July 25, 1982 for an acute myocardial infarct.

In his report of April 17, 1984, F. Dale Wilson, M.D., opined that claimant is not able to be employed again and seems totally and permanently disabled. Attached to that report is a page which contains the following:

DISABILITY EVALUATION:

I. Symptomatic spondololisthesis, [sic] Grade II		25%
II. Fusion of three lumbar, L4, L5-S1		16
A. Motion of the back	2%	
B. Pain in the back	10	
C. Weakness	10	
D. Nerve incolvement [sic]	10	
E. Deformity (in fusion)	10	
	42%	42%

Contributing factors to her disability include:

A. Low level of education
B. Hypertension
C. Obesity
D. Diabetes

In what appears to be office notes of a Dr. Malvitz and a Dr. Lehmann of March 14, 1983, claimant is given a 10 percent impairment rating and it is opined that claimant's healing period is over.

APPLICABLE LAW

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 impairment 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 synonomous. 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 latter to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

ANALYSIS

There appear to be three ratings which appear in the record before the undersigned. In his report of April 17, 1984, Dr. Wilson opines that claimant is unemployable and permanently totally disabled. Although Dr. Wilson may be an expert that can testify as to a person's percentage of physical impairment, this rating of disability by Dr. Wilson is disregarded because there is no showing that he is an expert regarding the job market or any other factor used to determine industrial disability other than physical impairment.

Dr. Wilson also gives a disability rating of 42 percent or 83 percent which would appear to be a rating of physical impairment. However, Dr. Wilson then indicates contributing factor to claimant's disability which are non-work related and which may or may not be a factor which he used in making his conclusions regarding the 42 percent or 85 percent rating. It would also appear from Dr. Wilson's chart that Dr. Wilson considered the same problem more than once in making the rating. Furthermore, it is interesting to note that even though he conducted a very concise examination and report, he made no mention of claimant's heart condition.

The report of Dr. Lehmann indicates an impairment rating of 10 percent.

Physical impairment is only one of the factors in determining a persons industrial disability. Claimant is 42 years old and completed two years of high school. The evidence does not indicate that claimant has ever been given permanent restrictions by the treating physician but the restrictions which were given do not appear to have been lifted. Claimant disclosed that her job with defendant employer required her to lift objects from five to 20 pounds with the majority of the lifting around 20 pounds. It would appear that claimant's job with defendant employer was within her restrictions but defendant is no longer in business. Claimant's work history has been in the area of a machine operator or laborer.

On cross-examination it was brought out that claimant has not applied for any work or sought any vocational rehabilitation. The evidence and claimant's demeanor at the time of hearing would indicate that claimant is not highly motivated to find employment. Although claimant still has complaints of pain, her motivation is obviously a big factor in claimant's employment status at this time. Based on the evidence presented, it is determined that claimant has an industrial disability of 25 percent as a result of her injury with defendant employer. The evidence also indicates that claimant reached maximum recovery on March 14, 1983.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. On October 8, 1980 claimant was injured while working for defendant employer.

Finding 2. The injury of October 8, 1980 aggravated a pre-existing back condition.

Finding 3. As a result of her injury, claimant has a physical impairment of 10 percent of the body as a whole.

Finding 4. Claimant is 42 years old and completed two years of high school.

Finding 5. Claimant has lifting restrictions of 20 pounds.

Finding 6. Claimant's work history has been in the areas of laborer and machine operator.

Finding 7. Defendant employer is no longer in business.

Finding 8. Claimant is not motivated to find any work.

Finding 9. As a result of her injury of October 8, 1980, claimant has an industrial disability of 25 percent.

Conclusion A. Claimant has met her burden in proving that she is entitled to 125 weeks of permanent partial disability benefits.

Finding 10. Claimant reached maximum recuperation from her surgery on March 14, 1983.

Conclusion B. Claimant has met her burden of proving she was entitled to healing period benefits for the days she missed work between October 8, 1980 and March 14, 1983.

THEREFORE, defendants shall pay unto claimant healing period benefits for the time she missed work between the dates of October 8, 1980 and March 14, 1983 at a rate of one hundred thirty-two and 31/100 dollars ($132.31) per week and one hundred twenty-five (125) weeks of permanent partial disability benefits at a rate of one hundred thirty-two and 31/100 dollars ($132.31) per week.

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 activity reports upon payment of this award.

Signed and filed this 31st day of October, 1985.

David E. Linquist

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DON JACOBS,	:	
Claimant,	:	
vs.	:	
IOWA ROAD BUILDERS COMPANY,	:	File No. 688808
Employer,	:	A P P E A L
and	:	D E C I S I O N
WAUSAU INSURANCE COMPANIES,	:	
Insurance Carrier, Defendants.	:	

FILED
OCT 17 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision wherein it was concluded that the claimant has failed to prove a causal connection between the hearing loss in his right ear and his employment with the defendant. It was further concluded that the claimant had insufficient loss of hearing in his left ear to allow compensation. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 and 2; defendants' exhibits 1 through 6; and claimant's appeal brief. No appeal brief was filed by the defendants.

ISSUE

The issue as stated by the appellant is: "The Deputy Industrial Commissioner's analysis concerning the causal connection between Claimant's hearing loss and his employment was in error. Based upon the evidence presented and the applicable law, Claimant met his burden of proof which established a causal connection."

REVIEW OF THE EVIDENCE

Examination of the record discloses that the review of the evidence by the deputy was accurate and is adopted herein.

APPLICABLE LAW AND ANALYSIS

The applicable law cited by the deputy was proper and is hereby adopted. Further, the analysis of the deputy was correct and thorough. A few magnifications are in order.

The appellant states in his brief "This is important because medical testimony under Bradshaw needs only to be stated under terms of possibilities not probabilities."

The Iowa Supreme Court in Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380, 101 N.W.2d 167 (1960), stated:

> Dr. Einer W. Johnson, the Mayo surgeon, asked by a long hypothetical question to express his opinion whether there would be causal connection between the fall on March 30 and the condition he found in December, testified "I think there could be." Standing alone this is insufficient proof of the claimed causal connection. Such an answer is usually held to indicate only a possibility, rather than probability, of the alleged causal relation and hence insufficient....
>
> However, we have held such expert evidence as that given here is sufficient to warrant submitting to the jury the issue of proximate cause when coupled with other testimony, nonexpert in nature, that plaintiff was not afflicted with any such condition prior to the accident in question. (emphasis added)

What Bradshaw dealt with above was the avoidance of a directed verdict. It deals with the sufficiency of the evidence so as to present a jury question. The above quoted passage does not deal with the degree and quality of medical evidence needed to establish medical causal connection between the claimed injury and the disability on which the claimant bases his claim. See Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). The question of causal connection is essentially within the domain of expert testimony. Bradshaw, 257 Iowa 375, 383, 101 N.W.2d 167. Regarding that expert testimony, possibilities are insufficient, a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956). The general rule of course is that the commissioner's finding must be based on testimony that tends to establish that factor, upon proper inference, that may be drawn therefrom. It cannot be predicated upon conjecture, speculation or mere surmise. Burt, 247 Iowa 691, 701, 73 N.W.2d 732.

FINDINGS OF FACT

1. In 1979, 1980, and 1981 claimant was employed as a truck driver by Iowa Road Builders and exposed to excessive noise levels and vibrations.

2. Claimant has suffered a complete loss of hearing in his right ear and a mild loss of hearing in his left ear.

3. The loss of hearing in claimant's right ear is the result of a perulent fistula. Exposure to excessive noise and vibration is not a recognized cause of fistulas.

4. The hearing loss in claimant's left ear is of a type commonly associated with exposure to excessive noise levels.

5. Under the criteria of the Guides to Evaluation of Permanent Impairment published by the American Medical Association and section 85B.9 of the Code of Iowa, the hearing loss in claimant's left ear is so mild as to not support an award.

CONCLUSIONS OF LAW

Claimant has failed to prove a causal connection between the hearing loss in his right ear and his employment with Iowa Road Builders.

Claimant has insufficient loss of hearing in his left ear to allow compensation.

WHEREFORE, the proposed decision is affirmed and hereby adopted.

ORDER

THEREFORE, it is ordered that claimant take nothing from this proceeding. The costs of the arbitration proceeding are taxed against defendants, including expert witness fees for the testimony of Dr. Ferkins in an amount not to exceed one hundred fifty and 00/100 dollars ($150.00), and the costs of the appeal are taxed to claimant.

Signed and filed this 17 day of October, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EUGENE KAPLAN,	:	
Claimant,	:	File No. 621918
vs.	:	
RICHMAN GORDMAN,	:	REVIEW-REOPENING DECISION
Employer,	:	
and	:	
THE HARTFORD INSURANCE COMPANY,	:	FILED OCT 10 1985 IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier, Defendants.	:	

This is a proceeding in review-reopening brought by the claimant, Eugene Kaplan, against his employer, Richman Gordman, and its insurance carrier, Hartford Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained November 8, 1979.

The matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Council Bluffs, Iowa, on June 12, 1985. 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 8, 1980.

The record in this case consists of the testimony of claimant, of Ronald Simons, of Roger Marquart; of joint exhibits A through S; and claimant's exhibit 1.

ISSUES

The issues for resolution are:

1) Whether a causal relationship exists between claimant's injury and claimant's disability; and

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

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's rate of compensation is $259.57 and that claimant has been paid temporary total disability benefits from November 9, 1979 to January 29, 1981.

Claimant testified in his own behalf. Claimant was born February 10, 1939; is married; and has two children. Claimant reported that he completed high school, but did not attend college and had made only average to below average grades. Claimant was in the United States Navy for four years and attained the rank of petty officer second class. Claimant indicated that he has had no employment in the private sector other than with Richman Gordman. He characterized Richman Gordman as a privately owned company now controlled by the Gordman family, but indicated that his father had been a partner with the company's founders in one of its original Omaha stores. Because of that relationship, claimant became affiliated with the company at age 13 and has worked as a stock clerk, department manager, store manager, new store operator, and is now involved in all aspects of new store construction and planning. Claimant indicated that his present job is physically demanding and involves reviewing construction sites and reviewing the progress of construction. He reported that he held this position before his November 8, 1979 injury and had no problems performing it before then. Claimant reported that on his injury date, he was a passenger in a car driven by Nelson Gordman. The car hit a light pole and the engine came through the firewall and rammed into claimant's legs causing serious injuries to both his hips and lower extremities. Claimant underwent five different surgeries to either stabilize or remove nails or pins from his hips and legs and underwent extensive physical therapy both before and after returning to work on crutches in January 1981. Claimant reported that his condition stabilized during 1982 and 1983, but then worsened considerably in the last year when he developed increasing problems with his left knee and right hip. Claimant indicated that he remains under the care of Bernard L. Kratochvil, M.D., and that when he last saw the doctor, the doctor believed that left knee joint replacement surgery as well as exploratory right hip surgery would be necessary before the end of 1985.

Claimant reported that while his employer has been "super" and has modified his physical work environment and his job requirements on account of his handicap, as well as hired a full-time employee to do physically demanding work on the construction sites, claimant's continuing physical handicaps are limiting. Claimant reported that his left knee bends only 90 degrees and is persistently swollen; he reported numbness in his left leg from the knee to the toe for approximately a three inch wide band as well as left leg muscle spasm. Claimant also indicated that he has sharp pain in his right ankle and that his left extremity is now one and one-half inches shorter than his right. Claimant reported that he also has persistent right hip pain which increases in severity at night and goes into the small of his back. Claimant indicated that after several blocks of walking he must stop; that he can neither bend his knees nor stoop; and that he must use handrails to climb stairs. Claimant also cannot drive for over 45 minutes without needing to stop and stretch. Claimant indicated that he has nightly muscle spasms which prevent his sleeping comfortably. Claimant reported that his work assistant now does all climbing or walking required on construction sites and expressed his belief he could handle construction site management without an assistant but for the consequences of his injury. Claimant indicated that he falls quite frequently on nonlevel ground because he now needs a lift in his shoe to correct the difference in the length of his lower legs. Claimant indicated that the consequences of his accident have put a tremendous strain on his family in that he can no longer play ball with his sons, do yard work, fix up his home, nor motor boat.

Claimant reported that all Richman Gordman department heads are family members and that no other corporate staff person has received the special considerations which he has. Claimant reported that the Richman Gordman operation has grown from two Omaha stores to 26 stores throughout the mid central states and that he has been on the company's management team throughout this growth period. Claimant indicated that he was earning $20,000 when injured and now earns $43,000 with the company and reported that the increase results from an increase in company profits and cost of living adjustments. Claimant reported that his formal education in construction management consisted of attending seminars prior to his accident. He reported that he is familiar with the job qualifications for like jobs and that the minimum educational requirement would be a Bachelor of Science Degree in Engineering, Architecture, or Construction Sciences. Claimant opined that he would have a very difficult time getting a job in the field with another company as he lacks a degree and is physically unable to perform many required tasks. In his deposition, claimant expressed a fear that a corporate takeover of the company was possible. He believed that were such to happen, he would have a much greater difficulty in obtaining employment than would a person with a like work background and no physical handicap. Claimant reported that he once owned $107,000 worth of Richman Gordman stock, but liquidated that after his accident in order to purchase a home that was all on one level. Joint exhibit S is the deposition of claimant taken November 20, 1984. The deposition is substantially in accord with claimant's testimony at hearing.

Ronald Simons, administrative vice president for Richman Gordman, testified. He reported that he has known claimant socially and professionally since they were in high school and substantiated claimant's physical limitations, life restrictions, and job restrictions since his injury.

Roger Marquardt, senior director of North Central Rehabilitation Services, testified. Mr. Marquardt indicated that defendants' counsel employed him to undertake a vocational assessment of claimant and that in doing so he reviewed claimant's deposition and all medical records as well as other materials in joint exhibits A through S but for exhibit R. The witness reported that since claimant was under 50, he had a greater likelihood of a successful transfer to a new employment. The witness indicated that while claimant only has a high school education, his vocational experience is exceptional; he is well motivated; and he has a commendable work record where he acquired advanced technological skills. The witness opined that these characteristics would outweigh any detrimental effect of claimant's limited education on job placement. The witness opined that claimant is employable and is currently functioning in light to sedentary work. The witness reported that if he needed to vocationally place claimant, he would not place him in jobs such as his present one because of his physical limitations, but would look at positions which would utilize claimant's management skills. He reported that claimant has skills which could be transferred into management, supervision, retail development, wholesale construction, and business development and that through an extensive search, employment in such areas would be possible. The witness agreed that a college degree would be of assistance in most jobs considered for claimant and that claimant's lack of a degree would be a recognizable fact which would need to be dealt with in job placement. He also indicated that claimant's physical condition would limit his ability to walk as required of store managers. The witness was unaware of whether claimant's physical condition at time of hearing was worse than his condition as reflected in the reviewed medical records. He also was unaware that claimant had never been involved in corporate planning with Richman Gordman.

Joint exhibit A is the deposition of James T. Rogers, taken May 21, 1985. Mr. Rogers reported that he met with claimant at home for a two and one-half hour interview and also reviewed claimant's medical records before assessing his vocational options. He characterized claimant as very bright, articulate, knowledgeable, and competent and reported that he could be placed in the top one-third of the population exclusive of the top ten percent in terms of his intellectual aptitude. The Vdare and the Dictionary of Occupational Titles were utilized to assess claimant's vocational skills. The witness reported that he determined that claimant had done highly complex work within the data-people realm with low complexity within the things realm. He indicated that generally persons who have done work of greater complexity have greater skills transferability. The witness indicated that he and an assistant spoke with persons either familiar with claimant or familiar with positions such as that claimant holds and that generally the belief was expressed that claimant would have difficulty obtaining a similar position because of his physical limitations, his age, his lack of a college degree, and the narrowly defined nature of his work with Richman Gordman. The witness opined that claimant would not be employable in construction management outside of his present job, but that claimant was definitely employable in other fields, positions such as that of cashier. The witness opined that it would be reasonable for claimant to obtain a job paying between $15,000 and $20,000 annually. He also agreed that corporate mergers are problems for all executives, but then stated that claimant was in a vulnerable position because of his disability, age, and lack of education. Claimant's exhibit 1 is a May 16, 1985 report of Mr. Rogers concerning claimant. In the report, Mr. Rogers notes that while it is unlikely that claimant would be placed in a job with responsibilities similar to those which he now has, such position would normally pay $50,000 to $75,000 per year and that the candidates for such would have generally degrees in either engineering or business as well as a broker's license and a certificate in property management. Claimant apparently lacks all of those.

Joint exhibits E, G, H, I, J, K, L, M, N, O, P, and Q relate to claimant's treatment with Bernard L. Kratochvil, M.D. A March 10, 1980 report of the doctor indicates that in the auto accident, claimant sustained a closed fracture of the right femoral shaft, a fracture of the right ankle, a closed supra-condylar fracture of the left femur, and an introchanteric fracture of the left hip. Steinmann pins were placed in both proximal tibiae for skeletal traction. The ankle fracture was undisplaced and required conservative care only. A Massie nail was internally used to fix the left hip intertrochanteric fracture and Rush nails were used to fix the supracondylar fracture of the left femur. The right femoral shaft fracture, subtrochanteric type, was internally fixed with a Zickle nail. On February 29, 1980, the Rush nails were removed and claimant's left knee was manipulated to obtain a full range of motion passively. A cast brace was applied to the left leg on March 4, 1980. A September 15, 1981 report of the doctor indicates that claimant has reached his "maximum healing period" and has a permanent disability as a result of his lower extremity injuries. It states that left side, claimant has a fracture of the femoral neck which has healed but that some varus deformity remains as well as a possibility of development of avascular necrosis. He reports that claimant has limited motion of the left knee and is unable to gain the last ten degrees of full extension and cannot flex the knee beyond a right angle. Claimant limps because his left leg is now an inch shorter. He reports that on his right side, a Zickle nail remains in place securing a heel fracture of the subtrochantic area but that this fracture as well as claimant's ankle fracture cause him hip and ankle discomfort with ambulation. The doctor opines that claimant has a 45 percent disability of the left lower extremity because of limitation of the motion of the left knee and subsequent pain, as well as the varus deformity of the left hip and the shortening of the extremity. He opines that he has a 30 percent permanent partial disability of the right lower extremity because of the involvement of the right hip with the subtrochanteric fracture and the fracture of the medial malleolus of the right ankle. He opines that the lower extremity disabilities combine to give a 30 percent permanent partial whole body disability. A report of the doctor of February 23, 1984 indicates claimant is having discomfort in the leg and knee and that x-rays shows significant deformity of the knee joint, with loss of the lateral joint space and a strong possibility that claimant may eventually require a total joint replacement. Claimant had pain in the right hip due to the protruding Zickel nail, but because of bony involvement, removal was not recommended even though it might eventually be necessary. In an August 3, 1984 report, the doctor states that claimant's disabilities relate to his hips and not only to his lower limbs.

Joint exhibit B is Jennie Edmundson Memorial Hospital records for an admission of claimant of November 8, 1979. Joint exhibit C is St. Joseph Hospital medical report for an admission of claimant of November 13, 1979. Joint exhibit D is St. Joseph Hospital medical records for an admisson of February 28, 1980. Joint exhibit F is Archbishop Bergan Mercy Hospital medical records for dates from July 25, 1980 to August 1, 1980. All were reviewed in the disposition of this matter. Joint exhibit R is the deposition of Jane Flury taken November 12, 1984. In the deposition, Ms. Flury indicates that she is assistant director of health data systems at Jennie Edmundson Memorial Hospital and that the only medical records of claimant found in a search of the hospital's medical records are those for an admission of November 8, 1979 with a discharge of November 13, 1979.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether a causal relationship exists between claimant's injury and claimant's disability.

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

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).

Little dispute exists on this issue. Medical and lay witnesses apparently agree that claimant's current problems are all residuals of the insults his body sustained in his work-related auto accident. Hence, the requisite causal connection exists. Our primary concern is the nature and extent of claimant's benefit entitlement.

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

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 impairment 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.

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.

Claimant has sustained a serious functional loss. His treating physician has opined he has a thirty percent (30%) permanent partial whole man disability. (The record suggests the doctor was considering functional impairment only when he so opined.) Claimant has great difficulty performing routine physical maneuvers and reports severe restrictions on his life activities as well as an inability to perform the walking and climbing which his preinjury job responsibilities had entailed. Claimant has only a high school education. However, claimant is intelligent and very well spoken. He progressed to an executive level position in a closely held company where almost all other positions at that level are held within the corporate owner's immediate family. This is remarkable even when claimant's father's affiliation with the Gordman family is considered. The company has continued to employ claimant, has hired an individual to assist him by performing the physical operations his position requires, has modified his physical offices to better suit his physical needs, and has otherwise attempted to accommodate claimant. All of this demonstrates the value the company places on claimant's contribution to its operation and the company's secure efforts to vocationally accommodate claimant following his injury. Indeed, claimant's salary has more than doubled since his injury. That fact might suggest that claimant has not suffered an industrial loss on account of his injury and resultant functional impairment. While claimant's future with Richman Gordman currently appears secure, claimant fears his position with the company would not be secure should ownership transfer. Claimant's fear is not unrealistic. Despite his considerable experience with Richman Gordman, claimant lacks the formal education generally required of persons with like skills. He also no longer has the physical agility other employers would require of an individual holding his position. He may well need further surgical treatment if his condition continues to deteriorate. Indeed, defendants' vocational expert agreed that while claimant has transferrable skills, his physical problems are such that his vocational placement would be difficult. Claimant has experienced a real loss of earning capacity as a result of his injury despite the fact that his earnings have not been reduced. All factors considered suggest claimant's earnings capacity has been reduced by 40 percent. Industrial disability is awarded in that amount.

Claimant was paid temporary total benefits from his injury date until January 29, 1981, his work return. While he would be entitled to additional healing period benefits should he be off work for additional mdical treatment, the temporary total benefits paid parallel claimant's healing period under section 85.34(1) and no additional healing period award need be made.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant was injured in an auto accident arising out of and in the course of his employment with Richman Gordman on November 8, 1979.

Claimant sustained a closed fracture of the right femoral shaft, a fracture of the right ankle, a closed suprocondylar fracture of the left femur, and an introchanteric fracture of the left hip.

Claimant was off work from his injury date until January 29, 1981.

Claimant has a thirty percent (30%) functional impairment as as result of his injuries.

As a result of his injuries, claimant limps and can no longer do the walking and climbing formerly required in his position as supervisor of new store construction and planning with Richman Gordman.

Richman Gordman continues to employ claimant and has hired an individual to assist claimant by performing the physical aspects of his job.

Claimant's salary with Richman Gordman has more than doubled since his injury.

Claimant has a high school education but no further formal training.

Claimant is well motivated.

Richman Gordman has made serious efforts to assist claimant vocationally and accommodate his injury-related special needs.

Claimant may need further surgical treatment should his problems with his right hip and left knee continue.

Claimant has gained experience in store operation and construction as well as management business and supervisory skills through his long tenure with Richman Gordman.

Positions like claimant holds are generally held by individuals with advanced education and few physical limitations.

While claimant's position with the company is currently secure, claimant's lack of formal education and his severe physical limitatons would make vocational placement outside of Richman Gordman difficult should such placement become necessary.

Claimant has suffered a loss of earning capacity of forty percent (40%) as a result of his injury.

Claimant's healing period ended at his January 29, 1981 work return.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his November 8, 1979 injury is the cause of the disability on which he bases his claim.

Claimant is entitled to permanent partial disability resulting from his injury of forty percent (40%).

Claimant is not entitled to healing period benefits beyond his January 29, 1981 work return.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for two hundred (200) weeks at a rate of two hundred fifty-nine and 57/100 dollar ($259.57) with those payments to commence January 27, 1981.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

Defendants pay costs of this proceeding.

Defendants file a final report when this award is paid.

Signed and filed this 10th day of October, 1985.

Helen Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY KALLOWAY,	:	
Claimant,	:	FILE NO. 680840
LINN COUNTY, IOWA,	:	REVIEW-
Employer,	:	REOPENING
and	:	DECISION
SAFECO INSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	OCT 2 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Larry Kalloway, claimant, against Linn County, Iowa, employer, and Safeco Insurance Company, insurance carrier, defendants, for the recovery of further benefits as a result of an injury on July 31, 1981 to claimant's right knee. A memorandum of agreement for this injury was filed on September 8, 1981. According to the final report filed by defendant insurance carrier, claimant was paid temporary total disability or healing period benefits in the amount of 45 1/7 weeks and permanent partial disability benefits for a 12 1/2 percent disability to the right leg in the amount of 27 1/2 weeks. Claimant is basing his claim for additional disability benefits upon various physical problems allegedly arising from the original knee injury. On July 24, 1985, a hearing was held on claimant's petition and the matter considered fully submitted at the close of this hearing.

Prior to the hearing defendants moved the agency to suspend claimant's entitlement to compensation benefits for the reason that claimant refused to undergo a reasonable request for medical examination. Ruling on defendants' motion was reserved until this decision. Claimant stated at the hearing that he was not medically capable of attending the exam as it required travel from his residence in Cedar Rapids, Iowa to Des Moines, Iowa. Claimant contended at the hearing that he cannot endure such a long period of travel time and such a trip would require an extensive recuperation period after the trip before an examination could be possible. Claimant offered no medical reports or medical evidence to verify his claimed inability to travel to Des Moines. However, even if such a recuperation period was necessary, defendants agreed to pay for all necessary travel expenses which would include any such recuperation period. After review of all the evidence submitted at the hearing and after observing claimant sitting in a chair for over two and one-half hours during the hearing with no apparent discomfort and few rest periods, it is found that claimant has refused a reasonable request for medical examination without adequate excuse.

Iowa Code section 85.39 requires a suspension of compensation during the period claimant refuses to submit to examination. Black's Law Dictionary, Fourth Edition, page 354, defines compensation as "indemnification, payment of damages, making amends, making whole; giving an equivalent or substitute of equal value; that which is necessary to restore an injured party to his former position...." was necessary, defendants agreed to pay for all necessary travel expenses which would include any such recuperation period. After review of all the evidence submitted at the hearing and after observing claimant sitting in a chair for over two and one-half hours during the hearing with no apparent discomfort and few rest periods, it is found that claimant has refused a reasonable request for medical examination without adequate excuse.

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ISSUES

The parties have submitted the following issues for determination in these proceedings:

1. Whether there is a causal relationship between the work injury of July 31, 1981 and the claimed disability; and,

2. The extent of weekly disability benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The parties have submitted a pre-hearing report of certain matters pertaining to this case which was approved and accepted as a part of the record in this case. The record of the hearing consists of the oral testimony of claimant; claimant's exhibits 1-4 (except for the first four pages of exhibit 1); and defendants' exhibits 1-12. The written reports contained in the first four pages of exhibit 1 were excluded from the evidence due to claimant's failure to timely serve the reports upon the opposing party before the hearing so that defendants may have the opportunity to cross-exam the author of the reports. The parties have stipulated to the following matters:

1. That claimant was entitled to temporary total disability or healing period benefits from July 31, 1981 through August 29, 1982;

2. The commencement date for permanent partial disability benefits is August 30, 1982, if such benefits are awarded; and,

3. Claimant's rate of weekly compensation in the event of an award of weekly benefits from these proceedings shall be $127.38 per week.

Claimant stated at the hearing that he is 46 years of age. In either 1978 or 1979, claimant began working as a driver-dispatcher for the Linn County "Lifts" program, a government program to provide transportation services to retarded persons and senior citizens. Claimant has been unemployed since leaving his employment with Linn County on September 21, 1984.

Claimant's testimony and the medical reports submitted into evidence indicate that claimant had extensive medical problems before the work injury upon which he bases his claim. In his deposition, claimant describes a slip and fall in which he injured his left leg in 1970 or 1971. In 1974, claimant was in an accident which injured his neck but claimant stated he did not have continuing problems with his neck after this accident. In January 1976, claimant was evaluated by a neurologic department of the University of Iowa Hospitals and Clinics subsequent to a slip and fall in which he hit his head sometime in February 1975. The purpose of the evaluation was to rule out guillain-barre syndrome as a cause of claimant's symptoms of headache and weakness in his left extremities. Claimant was pursuing a workers' compensation claim against his employer at the time and the syndrome had been diagnosed by a physician in November 1975 as a possible cause of his symptoms rather than due to a fall in February 1975. Antonio Damasio, M.D., a staff neurologist at University Hospitals could not find evidence of the guillain-barre condition from his examination of claimant but stated that there was good support for such a diagnosis after review of the patient's medical history. Dr. Damasio stated that the symptoms claimant was having could be due to the 1975 fall but that his test results were all normal.

A record from a physician who could not be identified from his handwritten notes were submitted by defendants which indicated that claimant had complaints of backache and headaches in March 1980; acute cervical strain in May 1980; and acute cervical (neck) and back strain subsequent to another fall in December 1980.

The facts surrounding the alleged work injury are not in dispute. Claimant testified that on July 31, 1981, while attempting to assist a passenger who was exiting his vehicle, he twisted his right knee. Claimant was initially treated by Maurice Estes, M.D., with heat therapy and rest but was later referred to James Turner, M.D., an orthopedic surgeon. Claimant continued to have difficulties and Dr. Turner authorized his absence from work beginning September 8, 1981. After a positive arthrogram test, claimant underwent a surgical procedure called an arthroscopy and partial medial meniscectomy in September 1981. Although claimant's knee appeared to heal satisfactorily from the surgery by November 1981, according to the records of Dr. Turner, claimant testified that he had numerous physical problems after the surgery which he attributes to the 1981 injury. Claimant complained of continuous pain, swelling and redness in his right knee and leg for several months following the September 1981 surgery. These symptoms could not be explained by Dr. Turner. In December 1981, Dr. Turner consulted an internal medicine specialist, Richard M. Questsch, M.D. Dr. Questsch likewise was unable to find a cause for claimant's difficulties. Claimant attempted to return to work for three days in February 1982, but stated that he was unable to continue due to his pain. In April 1982, claimant was evaluated by the Departments of Rheumatology and Orthopedics at University of Iowa Hospitals and Clinics. The Department of Rheumatology could not explain claimant's symptoms and recommended that claimant lose weight to help his knee problems. The orthpedics department felt that claimant had synovitis in his right knee.

In July 1982, Dr. Turner released claimant for duty with restrictions against lifting, pushing or pulling in excess of 20 or 30 pounds and no climbing, kneeling, squatting or stooping. Dr. Turner gave claimant a permanent partial impairment rating of five percent to the right leg. Claimant returned to duty with defendant employer on July 19, 1982. Despite his return to work, claimant continued to have problems. In December 1982, his right knee was evaluated by D. C. Naden, M.D., who felt that the work incident of July 1981 aggravated a preexisting condition. Dr. Naden found claimant to have a 10-15 percent permanent partial disability of the right leg, one-half of which was attributable to the work injury.

Immediately after his evaluation by Dr. Naden, claimant fell on some ice on December 10, 1982. Claimant's initial complaints following this fall involved his right buttocks but within 10 days was complaining of left hand and arm weakness and paralysis. Claimant was initially treated for these problems by Warren Verdeck, M.D., another orthopedic surgeon. Dr. Verdeck could not find a cause for claimant's problems and consulted University of Iowa Hospitals who likewise was unable to arrive at a diagnosis. Dr. Verdeck prescribed a patellar knee sleeve for claimant's right knee problems and released claimant for duty on January 1983. Claimant was referred to a neurologist, Winthrop Risk, M.D., by Dr. Verdeck. Dr. Risk hospitalized claimant in February 1983 for evaluation of his problems with left side sensory and motor loss. Physicians at the hospital at that time diagnosed two conditions, a functional or psychological disorder called a conversion reaction and multiple sclerosis. Claimant was referred back to Dr. Risk and a psychiatrist, Robert Schultise, M.D. Dr. Schultise immediately began treating claimant for depression and anxiety and such treatment continues until the present time. From February 1983 until December 1983, claimant complained to Dr. Risk of multiple problems including paralysis and pain in both limbs, intermittent paralysis of the left upper limb, inbalance, double vision, nausea, headaches, neck pain and insomnia. In December 1983, claimant reported another fall to Dr. Risk which twisted his right knee.

In January 1984, claimant was again evaluated by the Department of Neurology at University of Iowa Hospitals. The department diagnosed at that time that claimant's left sided paralysis and sensory loss was due to functional or psychological causes and advised claimant to return to full activity as soon as possible. This impression that claimant suffered from functional or psychological problems was again stated in an evaluation by the same neurology department in April 1984.

In July 1984, claimant reported to Dr. Risk pain in his low back and hip radiating into his right leg. At that time Dr. Risk noticed a healed herpes rash and felt that claimant's low back and hip pain was attributable to herpes radiculopathy. Another neurologist at the University of Iowa Hospitals, Matthew Rizzo, M.D., examined claimant in July 1984. At that time, claimant was not complaining of problems on his left side but of pain in his right leg and hip. Dr. Rizzo diagnosed a probable right sided "functional or psychological disorder" as well. On September 8, 1984, claimant complained of worsening back and hip pain. On August 19, 1984, claimant reported a fall at work injuring his back and hip. Claimant was terminated by defendant employer on September 21, 1984. On September 24, 1984, claimant was hospitalized for traction therapy as a result of a lumbosacral strain.

Claimant stated that he has recently changed physicians and is currently being treated by a family practice physician, Gary P. Hayes, M.D., for constant pain and tenderness from his toes to his hips, back and shoulder areas. He testified at the hearing that he had no such pain before the 1981 work injury. Such treatment consists of neuroprobs and ultasound treatments five days per week and the treatment began two weeks immediately preceding the hearing. Claimant continues to use an electronic device called a TENS unit and takes medication called Darvocet to relieve his pain.

APPLICABLE LAW AND ANALYSIS

A memorandum of agreement has been filed for the work injury herein and such a document conclusively establishes an employer-employee relationship and the occurrence of an injury arising out of and in the course of employment. Trenhaile v. Quaker Oats Co., 228 Iowa 711, 292 N.W. 799 (1940); Fickbohm v. Ryal Miller Co., 228 Iowa 919, 292 N.W. 801 (1940); Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (1975); Whitters & Sons, Inc. v. Karr, 180 N.W.2d 444 (1970).

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of disability. 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

Although the medical evidence rather clearly demonstrates a causal connection between the work injury and permanent disability to the right leg according to the opinions of Dr. Turner and Dr. Naden, there is wholely insufficient medical evidence in the record to support a causal connection between the work injury and any hip, back, neck, shoulder, head, eye or psychological depressive disorders. Claimant's testimony that most of his problems began after the 1981 work injury is simply not credible given his extensive past medical history. The medical evidence rather clearly demonstrates that claimant is suffering from psychological disorders which precipitate his pain complaints and consequently claimant's testimony alone cannot be relied upon to establish the requisite causal connection. Claimant attributes his frequent falls after the work injury to his right leg giving out. However, the evidence clearly shows that his falling propensity existed before the work injury and that left leg and arm problems has been a primary complaint since 1976. Furthermore, there have been simply too many other diagnosed conditions unrelated to the work injury, such as multiple sclerosis, guillain-barre syndrome and herpes and too many falls and injuries since the work injury of 1981 to base a causal connection finding upon claimant's testimony alone, even if claimant had been credible. The opinions of medical experts in cases where other injuries and conditions are involved are extremely important. Unfortunately, the only causal connection opinions rendered in this matter concerning claimant's current problems are those of Drs. Hayes and Schultise which were excluded from the evidence at the hearing. Therefore, claimant has not established by the greater weight of evidence received at the hearing that the work injury is a cause of anything other than permanent partial disability to the right leg.

II. Claimant has shown a permanent partial impairment to the right leg, as a result of the work injury. Such a disability is a scheduled member disability under Iowa Code section 85.34(2)(o).

Permanent partial disabilities are classified as either scheduled or unscheduled. 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); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Claimant's right leg disability was rated by two physicians in 1982. Dr. Turner gave a five percent rating and Dr. Naden felt that only half of the total impairment of 10-15 percent was attributable to the work injury. No other physicians have rated claimant's right leg impairment since that time. Dr. Turner imposed numerous work restrictions when he released claimant's duty in July 1982. There is no evidence that these restrictions have changed. Claimant's current complaints concerning his right leg are not essentially different than those in 1982. Therefore, the greater weight of evidence establishes only a six percent permanent partial disability of the right leg. According to the final report of defendant insurance carrier, claimant has already been paid benefits for a 12 1/2 percent disability to the right leg under the memorandum of agreement.

As claimant has established entitlement to permanent partial disability, claimant is entitled to weekly benefits for healing period under Iowa Code section 85.34(1) from the date of injury until claimant returns to work; until claimant is medically capable of returning to substantial similar work to the work he was performing at the time of the injury; or until it is indicated that significant improvement from the injury is not anticipated, whichever appears first.

The parties executed a stipulation in this case which indicated that claimant was entitled to healing period benefits from the date of injury until August 29, 1982. This stipulation is not binding upon this agency when it is clearly not supported by the evidence presented at the hearing. Dr. Turner only authorized claimant's absence from work beginning on September 8, 1981. Claimant returned to work on July 19, 1982. By virtue of their permanent impairment ratings given at that time, both Drs. Turner and Naden apparently felt that claimant had reached maximum healing upon his return to work in 1982. The evidence and claimant's own testimony does not establish that claimant's treatment for his right leg since 1982 has been anything other than maintenance in nature. Claimant's absences from work after July 1982 before his termination in 1984 were due to hospitalizations and treatment for complaints concerning his left extremities subsequent to various falls which have not been causally related to the work injury in this case. Claimant's renewed complaints of problems with his right side in July 1984 did not result in any new or additional treatment and were considered primarily as functional or psychological in origin. His most recent treatment is subsequent to another claimed work injury to his back and other injuries to his leg. Therefore, claimant has only established by a preponderance entitlement to healing period benefits from September 8, 1981 through July 18, 1982 or 44 6/7 weeks. According to the final report filed in the agency file, claimant has already been paid 45 1/7 weeks of healing period benefits under the memorandum of agreement.

As claimant has not shown entitlement to additional weekly benefits from these proceedings, the suspension of benefits for refusal to submit to reasonable examination is limited to claimant's lifetime medical benefits for the cost of treatment of his right knee which is causally connected to the 1981 work injury.

FINDINGS OF FACT

1. Claimant is not a credible witness.

2. Claimant was in the employ of defendant, Linn County, at all times material herein.

3. Claimant's job on July 31, 1981 consisted of duties as a driver-dispatcher for a government program to provide transportation services to senior citizens and retarded persons.

4. On July 31, 1981 while performing his work for Linn County, claimant injured his right knee.

5. As a result of the work injury, claimant underwent a surgical operation termed a arthroscopy and partial medial meniscectomy.

6. Prior to the work injury, claimant injured his back and left extremities in falls and has continually complained of weakness, paralysis and pain in his neck, back and left arm and leg subsequent to these falls.

7. Claimant has suffered numerous falls after the work injury in which he has twisted his right knee and injured his left arm, back, neck and head.

8. Claimant has been diagnosed on two occasions as having an underlining neurological disorder unrelated to the work injury.

9. Claimant has a psychological disorder or depression and anxiety which is a cause of many of his pain complaints.

10. As a result of his work injury and corrective surgery,

claimant has a six percent permanent partial impairment to his right leg.

11. As a result of his work injury, claimant was absent for work for treatment of his right knee injury from September 8, 1981 through July 18, 1982.

12. Claimant reached maximum healing from his work injury upon his return to duty on July 19, 1982.

13. Pursuant to the parties stipulation, claimant's rate of compensation is $127.38 per week.

14. Claimant was physically able to travel by automobile from his residence in Cedar Rapis, Iowa to Des Moines, Iowa to attend an examination by Paul From, M.D., on May 13, 1985 but intentionally refused to do so.

15. Before the hearing in his manner, defendants have paid to claimant 27 1/2 weeks of permanent partial disability benefits and 45 1/7 weeks of healing period benefits.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that the injury of July 31, 1981 is a cause of permanent partial disability.

II. Claimant has established by a preponderance of the evidence entitlement to permanent, partial disability benefits for 13 2/7 weeks and healing period benefits for 44 6/7 weeks at the rate of $127.38 per week.

ORDER

Accordingly, the following is ordered:

1. Claimant shall take nothing from these proceedings.

2. Claimant's entitlement to all compensation benefits, including medical benefits and other benefits available to injured workers under Chapter 85 of the Iowa Code is hereby suspended until such time as claimant submits to medical examination by Paul From, M.D., or such other qualified doctors within the Des Moines, Iowa area as shall be designated by defendants.

3. Claimant shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 2nd day of October, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

NOV 26 1985

IOWA INDUSTRIAL COMMISSIONER

MONTY T. KING, :
:
Claimant, : File No. 722202
vs. :
: A R B I T R A T I O N
JOHN DEERE COMPONENT WORKS, :
: D E C I S I O N
Self-Insured, :
Defendant.

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Monty Truman King, against his self-insured employer, John Deere Component Works, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained September 16, 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Waterloo, Iowa, on August 28, 1985. The record was considered fully submitted at the close of hearing.

A review of the industrial commissioner's file reveals that a first report of injury was filed January 21, 1983.

The record in this case consists of the testimony of claimant, of Lanoda May King, and of Charles Buck, M.D.; of claimant's exhibits A; and of Joint exhibits A through E. Claimant's objection to admission of defendant's exhibit 1 on the grounds that it was not properly served is sustained. The undersigned notes that the problem with service of the document as admitted, that is, with the handwritten notation of Dr. Buck, does not result from an absence of good faith on the part of either party. Better policy, however, is to decide an issue of improper service adverse to the party responsible for such service.

Claimant's exhibit A is statements of Arnold E. Delbridge, M.D., P.C., of December 26, 1984 and February 28, 1983. The December 26 statement is for a disability evaluation for claimant and is in the amount of $50. The February 28, 1983 statement is for a medical report and is in the amount of $17. Joint exhibit A is physicians reports for claimant from 1977 through 1983 to the last date prior to claimant's September 16, 1983 injury. Joint exhibit B is physicians notes and reports regarding claimant's September 16, 1983 injury. Joint exhibit C is John Deere records and notes for claimant prior to his September 16, 1983 injury. Joint exhibit D is John Deere records and notes from September 27, 1983 onward. Joint exhibit E is hospital records for claimant from 1977 to the present.

ISSUES

The issues for resolution 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 the alleged injury and any disability; and,

3) Whether claimant is entitled to benefits for permanent partial disability.

REVIEW OF THE EVIDENCE

At hearing, the parties agreed that claimant's rate of weekly compensation is $281.89. They reported that claimant has been paid healing period benefits for all work absences from his injury date through May 1985 and that the conversion date from healing period to permanent partial disability benefits was the week of January 10, 1985 through January 16, 1985. They indicated that weekly permanent partial disability payments have been made from that date and were ongoing at time of hearing with 33 weeks paid to date of hearing.

Claimant testified that he is 42 years old, married, is a high school graduate who received below average grades, and that he served in the navy for four years but received no transferrable skills. He worked in construction for several months before his navy experience and began work with John Deere in 1967 immediately after his navy discharge.

Claimant reported receiving shock treatments for a psychiatric problem in 1969 and opined that he had recovered from that problem. Claimant injured his back at work in 1973 and at home in 1974. He again injured his back at work in 1975. On each of these occasions, claimant was either treated conservatively or with chiropractic care and recovered. Claimant injured his back at work in 1977 and Arnold E. Delbridge, M.D., treated him surgically for an L5-S1 disc protrusion and spurring. He reported that the doctor then assigned him an eight percent functional impairment rating and that per a settlement with John Deere on a nonlitigated claim, he was paid a lump sum of 10 percent permanent partial disability with retained medical rights. Claimant reported that he returned to work in 1978 and could perform all of his old duties, but that in 1979 he was working twelve hours per day, seven days per week and that he felt this was causing him back stress. He went to John Deere medical and asked for a restriction of nine hours per day, six days per week, which was granted. Claimant reported that in 1981 he was under considerable stress at work because coworkers harrassed him about his Jehovah's Witness religious affiliation and also wanted to keep a younger trucker in his department. On June 11, 1981, he was hospitalized in the intensive care unit for approximately a week for light-headedness, weakness, and chest pain. Claimant subsequently asked for and received a transfer. He then bid on and received a storage job in the new foundry.

Claimant reported that on September 16, 1982, a core box which he described as an item weighing between 20 and 350 pounds, was stuck under a rack. Claimant reported that when the item would not move with the truck, apparently a forklift, he tried to physically break it free and when he did so he felt a sharp pain in his back. Claimant indicated that he immediately returned to work but that his pain worsened each day until he reported to the Schoitz Hospital emergency room on the following Saturday. Claimant testified that he called John Deere on the following Monday and that personnel were very upset because he had not gone to medical immediately. Claimant explained that he had experienced back pains before which had dissipated and, therefore, he had not thought a report to medical was necessary.

On April 13, 1983, Dr. Delbridge performed diskograms and chymopapain injections at L3, L4, and L5. Claimant opined that after the injections, he periodically did quite well and then would intermittently need to crawl out of bed to soak in a hot tub. He reported attempting a work return in September 1983 with intermittent work absences thereafter. At the behest of the John Deere Medical Department, claimant was admitted to the pain clinic rehabilitation program of Sister Kenny Institute in January 1984 where he underwent a three week program for chronic pain syndrome relief. Claimant reported that the program helped initially and that he made good progress and could maintain the program which involves weight loss, physical reconditioning, and exercise while working four hour days, but that he no longer had enough "push" to implement the program when he returned to full eight hour days. Claimant agreed that his eight hour work days were light duty work, but stated that he had to walk on cement floors and that the work caused stress and fatigue such that after two or three days he could hardly get out of bed and needed to stay home with hot tub soaks. Claimant stated that he has attempted to continue working and that his goal is to work five days per week, eight hours per day, but that he generally misses one or two days per week and at times has to go to medical and lie down. He reported that he has had approximately nine work absences on account of his condition since May 1985 as well as a number of days on which he has gone home early on account of his condition.

Claimant reports that he experiences fatigue, tingling in his legs and feet, sharp buttock pain and sharp left leg pain and muscle spasm. He indicated that he does not sleep well and feels "very harsh" in his attitude. Claimant stated that his weakness, dizziness, and light-headedness while under stress differs from that experienced with back fatigue and weakness. He agreed, however, that he has had episodes of weakness when he was not stressing his back, but stated that he feels his weakness happens at times when his back is painful so that he feels they are intermixed even though at times he has fatigue without back stress.

Claimant reported that his leg gives away without warning, but that he had ceased using a cane during his pain clinic experiences but resumed its use when he began full time work. He reported that he occasionally wears an elastic back brace which was suggested "years ago" by John Deere's medical doctors.

Claimant is permanently restricted from repetitive lifting of over 20 pounds, from standing or walking over 45 minutes per hour, from twisting, bending, pulling, or reaching. Claimant reported that he has tried to perform his preinjury jobs at John Deere those of dolly operator, crib attendant, and forklift operator, but has not been able to handle them. He reported that he was assigned to running a computer following his injury and was able to do this. He opined that he could work as a die storage attendant for a few days but then would have difficulties with twisting and turning involved. He agreed that his current job is driving a forklift in the new foundry and did not deny that that floor is fairly smooth but stated that the floor was bumpy now and then and that this had caused him problems such that he had had to leave work in August. He elaborated that the forklift job requires him to climb up and down, that lifting a load can cause jolts and vibrations on the area where one is working and that the whole floor of the foundry shakes when a mold comes off of a unit.

Claimant expressed his belief that Mr. Neidert of John Deere has suggested he seek other employment. He reported his belief that the pain clinic program has suggested that he undergo vocational rehabilitation, but that John Deere did not follow up on that and that the clinic had suggested that he receive a health club membership, but that John Deere had refused to pay for this. He reported that he had joined a health club on his own, but has missed and has not paid for his membership for the last three month

Lanoda King, claimant's wife of 18 years, testified. She characterized claimant's 1982 injury as "totaling devastating" physically and mentally to him. She indicated that claimant is unable to maintain family responsibilities or engage in recreational activities. She reported that she attempted to work with claimant and put into effect for the family the program advocated by the pain clinic and that claimant had did fine on this until his work return. She reported that when claimant returned to work, the family had to make a decision as to whether to save claimant's energy for work or to do the program.

Joint exhibit A reflects that claimant sustained a disc herniation at L5, S1 in a work injury on September 15, 1977 for which Dr. Delbridge treated him with a laminectomy and smoothing of spurs on March 16, 1978. Claimant returned to work on July 5, 1978.

Joint exhibit B reflects that claimant sustained numerous lumbar muscle strains both at home and at work throughout the 1970's. These were variously treated with chiropractic adjustment, bedrest, and conservative medical measures. The records reflect that while claimant was undergoing harrassment at work because of his religious beliefs in 1981, he was noted to be depressed with some early morning awakening, but without suicidal idealization. On September 17, 1981, claimant's restriction on greater than nine hour days was removed. His restrictions on lifting of greater than 30 pounds and on more than six days of work per week were retained, however.

Joint exhibit C reflects the following post injury chronological events: On September 9, 1983, Dr. Delbridge suggested claimant return to work with no lifting over ten pounds and a sit down job with an opportunity to move about at least every hour. Claimant returned to work on September 16, 1983 and worked within the restrictions sorting and inspecting parts. Dr. Buck reports that claimant worked that Friday and the following Monday and Tuesday. On Wednesday, September 21, 1983, claimant reported that he could not work and was taken off work. Dr. Buck, at that time, stated his impression that he believed much of the problem was functional and, therefore, he would continue to try to keep claimant at work in some capacity. On October 4, 1983, Dr. Buck noted that claimant had had initial symptomatic improvement following his chymopapain injections and that his condition had deteriorated with chronic low back and leg symptoms without easily identifiable objective basis. He notes a number of episodes where claimant has collapsed and brought into the John Deere medical department via plant ambulance.

On October 11, 1983, Dale G. Phelps, M.D., examined claimant and found a slight decrease in ankle jerk on the left, but otherwise no abnormalities. In a report of November 25, 1983, Dr. Phelps diagnosed claimant's condition as post laminectomy nerve irritation and opined that the chymopapain injections had not helped claimant. He expressed his belief that claimant was not a malingerer, but was having chronic back pain with recurrent episodes.

On January 12, 1984, David W. Florence, M.D., director of the chronic pain rehabilitation program, of Abbott Northwestern Hospital, Sister Kenny Institute, evaluated and examined claimant. On examination, he found patellar reflexes 2+ bilaterally; normal hip ranges of motion; and that claimant's straight leg raising in the supine position was 60 degrees bilaterally with all pain referred to the left low back with sitting straight leg raising showing 85 degrees on the right and 90 on the left with the latter producing some pain in the left buttock area. The doctor noted a possible one-half inch shortening of the right lower extremity and a three-quarter inch atrophy of the left calf, but noted the patient is right-handed. Motor testing and sensory examination of the lower extremities were normal. The doctor diagnosed the following conditions:

1. Postoperative lumbar laminectomy plus three level chymopapain injecton without objective radiculopathy.

2. Disc space degeneration: L3-4 slight; L4-5 moderate; L5-S1 severe.

3. Physically deconditioned.

4. Slight exogenous obesity.

5. Hysterical personality response.

6. Situational depression.

7. Marked functional overlay.

8. Chronic pain patient and chronic pain syndrome.

Dr. Florence states that claimant's depression is situational and not endogenous and that his hysteria really fits more a hypochondriasis as is frequently seen in chronic pain syndrome. He felt claimant was both a chronic pain patient in that he had organic pathology and a chronic pain syndrome patient in that a perceptural component was involved. The doctor noted that his experience and that literature available demonstrated that multi-level chymopapain injections have a significantly high level of complications and that claimant would tend to demonstrate that fact. He opined that claimant's recovery would extend over a prolonged period.

Claimant entered the chronic pain program on January 22, 1984 and was discharged on February 10, 1984. Discharge summary notes state the consulting psychiatrist, Scott McNairy, M.D., felt a major concern was the amount of anger claimant had toward difficulties in the work place and that successful rehabilitation would need skilled intervention and careful selection of work which would meet both claimant's physical restrictions and avoid contact with prior work related stessers among his peers.

In a February 27, 1984 report, Dr. Florence advised that claimant not return to forklift operation at that time since bouncing of the seat could be a significant aggravating factor, but stated that claimant might be able to return to that work in a few months if he developed a tolerance to what the doctor characterized as a settling of his low back (interspaces). The doctor noted that claimant's overall orthopedic prognosis was somewhat guarded even without definitive radiculopathy.

On December 18, 1984, Dr. Delbridge reported that claimant had reported having flashes of pain with giving away of his legs on three separate occasions. The doctor characterized pain flashes as not uncommon for someone with back problems, but characterized the giving away of the legs as unusual. He stated without further explanation, that claimant was somewhat unique in that x-rays of November 16, 1984 showed narrowing of the L5 disc and minimal narrowing of the L4 disc though basically no change in back structure was seen. On examination of that date, the doctor found that claimant had a loss of 30 degrees of forward flexion; full extension; loss of 10 degrees of right side to side bending; loss of 10 degrees of left side to side bending; and normal bilateral rotation. The doctor reported as follows regarding claimant's permanent partial impairment rating:

> Because of his loss of motion of his lumbar spine I felt that a 7% impairment of his back was appropriate. From his previous back problems, he had one disc invaded and some residual leg symptoms. I had previously evaluated him as having an 8% impairment on that basis....In addition, he had two new discs invaded with chymodiactin which would give him an additional ten percent impairment.
>
> Adding up his various impairments we find that he hs a 7% impairment based on the loss of motion, an 8% impairment based on neurologic deficit in his his leg and a disc invasion and a 10 percent impairment more on the basis of his chymodiactin injection which were necessitated by his degenerative disc disease. This brings his total impairment to 25%. Since 8% of that was present previously, his new impairment as a result of his latest problems is 17% of the whole man.

Hosung Chung, M.D., examined claimant on February 27, 1985. He diagnosed claimant's condition as failed back syndrome without clear cut radicular signs. He noted claimant's lack of endurance and said that claimant was tired after a 20 minute examination. He advised claimant undergo a Metrizamide enhanced myelogram and a CT scan to establish the presence of suspected arachnoiditis, but stated that surgery was not indicated.

In an April 3, 1985 report to Dr. Delbridge, Charles Buck, M. D., of John Deere medical, notes that the treatment plan for claimant is the managing of his pain such that claimant will be able to work on a regular and sustained basis within the restrictions imposed. He states that claimant has missed a good deal of work recently on a day here, day there basis and that he had informed claimant that he did not feel there was a medical basis for his work absence pattern and that claimant was medically stable to the point where he could work. In the report, Dr. Buck stated that claimant "must accept responsibility for his choice not to work. Up to this point he has been unwilling to clearly accept responsibility and continues to look to physicians to solve his problems." In a May 3, 1985 report, Dr. Delbridge opines that claimant's work absences likely result from varying degrees of discomfort and claimant's fear of falling down. He indicates that objective reasons for claimant's back pain exist in that claimant has at least three degenerative discs. He reports that the intensity of pain experienced will vary daily and opines that at times claimant will not be able to work eight hours per days, five days per week, without occasional difficulties which will result in his being absent for a day or two.

On May 10, 1985, Charles V. Burton, M.D., of The Institute for Low Back Care, evaluated claimant. On examination, he found no evidence of recurrent disc, good surgical result, stabilization of the interspaces where chymopapain had been injected without residual disc herniation, and no central or lateral spinal stenosis. He also found no evidence of nerve root compression or other active pathological processes. The doctor stated that the examination was objectively within normal limits but for the absence of an ankle jerk on the left and decreased ankle jerk on the right. He noted that straight leg raising was positive bilaterally at 90 degrees. He noted that during the exam, claimant had a "fatigued feeling" which "drained his energy." Claimant became lightheaded and had to lie down. His blood pressure was found to be normal, but his pulse rate was decreased to 45 to 65 beats per minute. The doctor suspected a vasovagal response. He opined that claimant has a chronic pain syndrome with significant personal stress factors and opined that while there was some organcity to claimant's low back pain, that was not his primary problem. The doctor expressed his concern that claimant's problems were not then under active professional supervision and opined that claimant's functional stress, his chronic pain problems, as well as potential medical situations, were such that he was temporarily and totally disabled from performing any gainful employment within his outlined restrictions and that it would be, therefore, inappropriate to make a permanent partial impairment determination at that time.

In a May 10, 1985 report, Tracy L. Schroeder, R.N., notes that claimant's range of motion is 30 degrees of forward flexion; less than 50 degrees of extension and 15 degrees of lateral flexion bilaterally with rotation all within normal limits. She states that the range of motion is painless, but that claimant developed a sense of fatigue and weakness. She noted claimant was experiencing stress as a result of financial problems, of a stepson's prison sentence, an unmarried daughter's pregnancy. Contemporaneous notes of the John Deere medical department also record those personal stesses for claimant.

In a May 14, 1985 report, Matthew Monsein, M.D., of the chronic pain rehabilitation program, states that an impasse has been reached since claimant is not following through on the exercise program and has gained weight. He notes that it appears nothing further can medically be done for claimant since claimant is unwilling or unable to follow through with the rehabilitation recommendations.

A. E. Schmidt, M.D., an internal medicine specialist, saw claimant July 25, 1985 and opined after examination that it was unlikely claimant's complaints of weakness, of lightheadedness, fatigue, and dizziness were the result of a cardiovascular problem and noted that while he was not an expert in back complaints, he was not sure that back problems would provide an explanation either.

Dr. Delbridge again saw claimant on August 23, 1985. On examination, claimant had complaints of severe back pain with little radiation. Claimant's straight leg raising and neurological examinations were unchanged. The doctor noted that claimant's major complaint was that his job had been changed on August 20, 1985 and that he was using a "bumpy type" conveyance which seemed to cause increased difficulty. The doctor then opined that claimant had shown slow upward progress and stated it was possible claimant's current job needed reevaluatation.

A John Deere medical note of September 27, 1982 records a history of injury substantially that which claimant gave at hearing. Medical notes of John Deere from that date through August 27, 1985 reflect that claimant has had numerous intermittent absences with complaints of increased pain or fatigue with little supporting increased objective findings. They also reflect a conscientious effort on the part of John Deere medical personnel to work with claimant and rehabilitate him for work.

Charles Buck, M.D., a board certified general preventive medicine specialist, who has practiced in the specified area of occupational medicine since 1975, testified at hearing. The doctor was the director of the John Deere medical department in Waterloo from May 1982 through June 1985. The doctor reported that he became involved with claimant's case in early 1983 after claimant had been off work for some time. He indicated that initial attempts to return claimant to work were not very successful and that by the end of 1983, he was concerned because claimant continued to have problems in his functional state, which the doctor defined as claimant's ability to function in life as a whole. The doctor stated that by then he felt claimant's physical problems didn't explain all of his difficulties with functioning. The doctor testified that after claimant's pain clinic experience, a part time work return was attempted. Claimant initially was to work four hour days with an increase to eight hour days over three months. The doctor indicated that "things then began to plateau and at times regressed" as claimant missed work, failed to maintain his weight, and failed to maintain his exercise programs. The doctor indicated that in early 1985 he referred claimant to Drs. Chung and Burton. He indicated he had conversed with Dr. Burton regarding John Deere's attempts to work with claimant as regards his personal stress factors.

Dr. Buck opined that claimant's dizziness, lightheadedness, and acute weakness were not related to his low back injuries. He indicated that Dr. Schmidt had ruled out the possibility that a vasovagal response was the cause of those complaints as well.

The doctor expressed his belief that an impasse had been reached in treating claimant in that claimant felt all of his energies were devoted to work and that, therefore, he had no energy for physical conditioning. The doctor believed claimant must do physical conditioning if he is to recover and stated it is possible that claimant could do a limited modified exercise program. He opined claimant could work an eight hour day with appropriate restrictions. He outlined claimant's restrictions as noted above and opined that the forklift operator position in the new foundry was consistent with those restrictions. He characterized that job as a relatively bump-free job because the floor is rather smooth unlike that in older areas of the factory where the floor may be bumpy. The doctor later agreed that scrap metal was dumped on the floor and that this could make it rough. On cross-examination, the doctor characterized a three level chymopapain injection as a substantial procedure and stated that while he had not recently reviewed claimant's prior medical records, he was unaware of claimant having had problems returning to work following his prior back incidents.

APPLICABLE LAW AND ANALYSIS

We first consider 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 September 16, 1982 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

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 a work injury. Claimant was a credible witness insofar as he fairly and accurately reported his own perceptions of events. Claimant testified he did not immediately report his back problem because he had experienced back problem without serious difficulties earlier. That reasoning, while perhaps not an example of the soundest exercise of judgment or adherence to company policy, is understandable and does not alone support an inference that claimant did not receive a work injury. Claimant did report his injury within days of its occurrence when he recognized its serious nature. Furthermore, John Deere mecical notes of September 27, 1983 report a history of injury substantially that which claimant gaveat hearing. That consistency in claimant's injury description supports an inference that the injury happened.

Our next concern lies with the question of whether a causal relationship exists between claimant's work injury and his current complaints.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 16, 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).

Claimant sustained a work-related back injury in 1977. His 1983 injury is found to be a separate and distinct problem not an aggravation of that problem and claimant's back problems to the degree that these have increased following his September 16, 1982 injury are found to be causally related to that work injury and claimant's subsequent multi-level chymopapain injections. Dr. Florence has stated that multi-level chymopapain injections have a significantly high level of complications and claimant's [experience] demonstrates that fact. Dr. Delbridge reports claimant has at least three degenerative discs. He has assigned claimant a permanent partial impairment rating, and when the report containing that rating is read in context it as well as other comments of the doctor suggests that the doctor believed claimant's current back problems result from his 1982 work incident. A concern arises in that many of claimant's current complaints appear inconsistent with a back injury per se, however. Claimant has been diagnosed as having chronic pain syndrome. Claimant also has complaints of weakness, dizziness, lightheadedness, and fatigue. The record suggest these episodes predate claimant's work injury and have generally occurred at times when claimant was undergoing considerable personal stress. Claimant has been experiencing like stresses in the past year. These episodes are found related to those personal stresses and not related to his work injury. Expert opinion evidence contained in the reports of Drs. Burton, Schmidt, and Buck support that conclusion. (Medical notes regarding claimant's preinjury episodes also at times speak of chest pain. While express references to chest pain are absent in the post injury medicals, a vasovagal response was a suspected and ruled out cause for claimant's post injury episodes. That fact further supports the conclusion that the pre and post injury episodes were similar and not related to the 1982 work injury.)

Our next concern is whether claimant is entitled to benefits for permanent partial 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 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, 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.

While the question of healing period benefits is not before us, the record reflects some dispute as to whether ascertainment of permanent partial disability was appropriate at this time. Dr. Burton in May 1985 felt permanent partial impairment assessment was not appropriate. By May 1985, Dr. Monsein and Dr. Buck both felt an impasse had been reached and that claimant could not be further medically benefited. Dr. Delbridge assigned a permanent partial impairment rating. On the basis of the latter actions and expert opinions, it is concluded that claimant's healing period as provided for in section 85.34(1) terminated May 14, 1985 per Dr. Monsein's report and that a determination of permanent partial disability is appropriate.

Claimant is 41 years old and a high school graduate. He has worked in various manual labor jobs for John Deere since 1967 and is apprently intellectually best suited for this type of work. Claimant is permanently restricted from lifting over 20 pounds, from standing or walking over 45 minutes per hour, from twisting, bending, pulling, or reaching. He has a 25 percent permanent partial impairment rating of which Dr. Delbridge states 17 percent is attributable to this injury. On the other hand, claimant was permanently restricted from lifting greater than 30 pounds prior to his 1982 injury. Under Varied Enterprises, Inc. v. Summer, 353 N.W.2d 407 (Iowa 1984) that fact may be considered in apportioning the degree of ultimate industrial disability which may be attributable to claimant's current work injury. Claimant offered evidence suggesting he cannot now work in his former job and suggesting John Deere's attempts to rehabilitate him in its own work force have been unsuccessful. To be considered in this regard is the question of whether claimant functioned effectively at work within his then assigned restrictions until his 1982 incident. The record suggests that was not altogether the case. As noted above, claimant had episodic problems with weakness, fatigue, and dizziness related to personal stress for which he missed work or required reassignment before his work injury. That fact as well as the pattern of the absences following his post injury work return suggests that a great deal of claimant's current inability to work results from his personal stress and not from conditions related to his work injury. Hence, claimant's post injury work experience cannot, of itself, be considered evidence of injury-related industrial disability. John Deere has worked laudably to return claimant to gainful employment. Its success hs been only limited. Claimant's low level of motivation appears to be the principal factor in that unsuccessful outcome. Claimant and his wife apparently genuinely believe claimant is unable to pursue both his work and his physical reconditioning goals. Nevertheless, they persist in this belief and refuse to test its validity despite overwhelming asertions to the contrary by physicians both at John Deere medical and at the chronic pain program. Hence, claimant must primarily be charged with responsibility for the very limited success of his attempted work rehabilitation. Dr. Delbridge, on the other hand, has opined claimant can be expected to miss work on occasion on account of back problem. That fact is relevant to claimant's level of industrial disability. That opinion, claimant's age, education and qualifications, claimant's increased physical restrictions following his 1982 work injury, and his increased permanent partial impairment rating are the best objective evidence of the degree of industrial disability which claimant sustained on account of his 1982 injury. Claimant entered a settlement under which he was awarded 10 percent permanent partial disability following his 1977 work-related back injury. That is an appropriate level of industrial disability where physical impairment was less than 10 percent and where claimant was returned to work by the same employer. Claimant's current back injury is found to have increased his overall industrial disability to 40 percent of which 30 percent is apportioned to this employer.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant injured his back at work for John Deere on September 16, 1982 while attempting to manually move a core box of undetermined weight.

Claimant underwent chymopapain injections of L3, L4 and L5 per Dr. Delbridge on April 13, 1983.

Multilevel chymopapain injections have a significantly high complication level and claimant did not have a successful result from the procedure.

Claimant has been diagnosed as having chronic pain syndrome and has undergone pain clinic treatment.

Claimant did not continue the pain program's recommended weight loss, exercise and reconditioning program when he returned to eight hours of work per day.

Claimant had a work injury to his back in 1977 for which he underwent a laminectomy at L5-S1 and received permanent partial impairment of eight percent (8%) of the body as a whole.

Prior to his 1982 injury, claimant had a weight limitation of 30 pounds; following his injury, claimant had a weight limitation of 20 pounds; was restricted from standing or walking for more then 45 minutes per hour and from twisting, bending, pulling, or reaching.

Claimant's current restrictions result from his 1982 injury.

Prior to his 1982 injury, claimant had undergone episodes of dizziness, weakness, lightheadedness and fatigue while under personal stress which occasioned work absences and work transfers. Following his injury he experienced similar episodes while also under personal stress which also occasioned work absences.

Claimant's post injury episodes of weakness, dizziness, fatigue and lightheadedness and his related work absences are not attributable to his work injury.

Claimant has a twenty-five percent (25%) whole man permanent partial impairment, eight percent (8%) of which results from his 1977 injury; seventeen percent (17%) of which results from his 1982 injury.

John Deere has made laudable efforts to return claimant to its work force.

Claimant's nonwork-related personal stresses and his unwillingness to pursue the recommended pain clinic program are the primary factors underlying the limited success he has experienced as regards a post injury work return.

Claimant is forty-two (42) years old, a high school graduate who is most experienced in and best qualified for manual labor.

Claimant's ten percent (10%) permanent partial disability settlement for his 1977 injury reflected the industrial disability he sustained as a result of that injury.

Claimant's 1982 injury increased his industrial disability to forty percent (40%), thirty percent (30%) of which is attributable to that injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury of September 16, 1982 which arose out of and in the course of his employment.

Claimant has established a causal relationship between his September 16, 1982 injury and his back complaints.

Claimant has not established a causal relationship between his September 16, 1982 injury and his complaints of dizziness, lightheadedness, weakness, and fatigue.

Claimant is entitled to permanent partial disability resulting from his September 16, 1982 injury in the amount of thirty percent (30%). Defendants are entitled to credit for those permanent partial disability benefits already paid claimant.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for one hundred fifty (150) weeks at the rate of two hundred eighty-one and 89/100 ($281.89). Defendants receive credit for permanent partial disability benefits already paid claimant.

Defendants pay accrued amounts, if any, in a lump sum and interest, if appropriate, pursuant to section 85.30.

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 26th day of November, 1985.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES KLESNER,	:	
Claimant,	:	
	:	File No. 735428
HASSENFRITZ, INC.,	:	
	:	A P P E A L
Employer,	:	
and	:	D E C I S I O N
FEDERATED INSURANCE COMPANY,	:	FILED
	:	OCT 4 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed April 4, 1985 this 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 arbitration decision filed February 27, 1985 in which claimant was awarded healing period, permanent partial disability of nine percent and medical and mileage expenses.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 5 and defendants' exhibits A and C through I. All evidence was considered in reaching this final agency decision.

This decision will modify that of the hearing deputy.

ISSUES

The issues on appeal as stated by defendants are these:

A. Did claimant sustain an injury arising out of and in the course of his employment during June ?, 1982?

B. If an injury was sustained by claimant during June, 1982, what is the extent of claimant's disability?

STATEMENT OF THE CASE

Thirty-six year old married claimant, a high school graduate, testified that although he was unsure of the date of his injury, it was a Monday. As he was driving a lawn and garden tractor up a ramp, a rear tire fell through a hole. The tractor weighing around 700 pounds tipped over with him under it. His back hurt. He worked until Thursday at which time he saw Robert S. Wettach, M.D., who sent him for x-rays, prescribed medication and told him not to lift.

He continued to work, but he had trouble with twisting, bending and picking things up. He saw Raymond Hanks, Jr., D.C., who treated him until October of 1983.

Claimant said that he was laid off on June 17, 1983 and has not been called back although others have been rehired. Because he was told to take his tools, he felt he had been fired.

Claimant notes some difficulty in doing all the activities connected with his thirty-eight acre farm and cattle operation and he has developed some new methods of doing things. In addition to his farm work, he has a job keeping lawn mowers and tractors timed and the blades sharpened. He also has carried on some maintenance activities. He takes home $392 every two weeks. He has trouble working on ladders and standing in one spot for prolonged periods. His recreational activities also have changed. He continues to catch softball, but he "pretty much stand[s] straight up and down." He hunted deer with a bow and arrow in both 1982 and 1983.

Claimant denied telling Dr. Wettach he was able to lift a hundred pounds in 1982. He recalled making an appointment with the doctor in December of 1981 and being told that he had a low back spasm. He thought Dr. Wettach's note referring to a tractor falling on his left pelvis was a typographical error. Claimant asserted he felt pain down his left leg more after his x-rays. Immediately after his injury his back was hurting more than any where else.

Fifteen year old Sheila Klesner, claimant's daughter, and Diane Mary Klesner, claimant's spouse of more than fifteen years, verified his testimony regarding changes in his activities.

John Kramer who played softball against claimant's team, perhaps twice in 1984 saw no indication of a physical problem when claimant played as catcher. Paul Moeller described doing tune-ups on trucks as awkward work. Moeller said claimant builds clutches for lawn and garden tractors to be used in competition. He recalled claimant's returning to work in the fall of 1982 and in the spring of 1983 and performing his same job without modifications by the company.

James F. Hassenfritz, vice-president and secretary of defendant employer, completed a first report of injury with information supplied by claimant which included an injury of July 5, 1982. As he recalled, claimant returned to the same work he was doing before his injury and made no complaints.

Hassenfritz said that he had a conversation with claimant concerning a bill from Dr. Hanks in which claimant was told the insurance carrier did not pay chiropractors but that he would submit the bill.

Hassenfritz testified that in addition to business being slow, claimant was fired because of a mispresentation on overtime, his attitude and the quality of his work.

Records from Job Service show claimant claimed benefits on June 19, 1983 and collected $2,119 in the third quarter of 1983, $815 in the fourth quarter of 1983 and $1,304 in the first quarter of 1984.

Records from Robert S. Wettach, M.D., document claimant's being seen on December 9, 1981 with a complaint of sudden severe low back and left groin pain. A diagnosis of low back sprain and possible mild sciatic nerve root irritation was made.

On June 2, 1982 claimant was seen for a sebaceous cyst and also reported a tractor falling on him and bruising his left pelvis. X-rays of the pelvis were normal.

On July 7, 1982 claimant told of pain down the posterior left leg to the popliteal area and then down the calf to the foot. Straight leg raising was positive on the left. Dr. Wettach suspected a mild to moderate rupture to an intervertebral disc. Claimant was given Naprosyn and instructed to remain off work. Apparently three weeks later claimant was released for light work. A week thereafter he reported no back pain and only occasional pain in the left lower extremity. Claimant was allowed to return to lifting seventy to seventy-five pounds with caution.

By August 20, 1982 claimant's recovery was characterized as complete with claimant able to lift a hundred pounds without difficulty. There were no disc symptoms at that time.

In a letter dated December 8, 1983 Dr. Wettach declined to rate claimant's disability or to say whether or not it was permanent.

Raymond Hanks, Jr., D.C., who has additional training in chiropractic orthopedics and reading of x-rays and who is certified to do functional impairment ratings, testified to examining claimant on July 9, 1982 after taking a history of claimant's having a garden tractor fall on him on May 27, 1982. Claimant denied other injuries to his neck and back except for injury to his neck at age sixteen. He complained of tension, low back pain and stiffness, cold feet, leg numbness particularly on the left, pain radiating to his left hip and leg and trouble with excessive standing, walking, riding and bending. Claimant stood and walked in a protective stance. There was no tenderness of the cervical spine nor abnormalities on palpation. There was slight limitation on left lateral flexion. Claimant had tenderness and muscle spasm in the paravertebral musculature and at L5. Limitation of motion was found on flexion. Straight leg raising was positive on the left at thirty degrees. The Ely's, McBride's and Mannkopfs' -- all were positive. Dr. Hanks' diagnosis was acute severe post-traumatic lumbar intervertebral disc syndrome with pain radiating along the left lumbosacral plexus.

Claimant was seen for evaluation on August 9, 1983 at which time he continued to have trouble with standing, riding, bending and getting up to walk after sitting. Pain radiated to his left hip and leg which was worsened by bending, lifting or twisting and sometimes went into his right hip and thigh. On examination there was tenderness and muscle spasm in the paravertebral musculature at L3, 4 and 5. Range of motion testing produced some pain. Straight leg raising was positive on the left at fifty degrees, and on the right pain was elicited at sixty degrees. Kemp's, McBride's and Hibb's were positive. X-rays showed some decrease in the disc heights on the right at L4, pelvic unleveling on the right with a shallow right rotatory scoliosis, an anterior shift in the weight bearing line, retro-positioning of L4, and imbrication at L5/S1.

Dr. Hanks assessed claimant's prognosis as guarded. He causally related claimant's injury to the condition for which claimant was treated. Claimant's permanent impairment was rated at fifteen percent based on both the AMA and the Orthopedic Guides.

Dr. Hanks knew that claimant is a farmer and assumed that claimant did normal farming activities. He did not think claimant was working from July 8, 1982 to July 19, 1982. Thereafter, claimant was allowed to do what he could.

Claimant was treated until October 6, 1982 at which time he reached maximum medical improvement. However, claimant was released to return to work on July 19, 1982 without limitations.

The chiropractor did not agree with Dr. Wettach's finding of negative straight leg raising on August 20, 1982.

APPLICABLE LAW AND ANALYSIS

The first issue raised by defendants is whether or not claimant had an injury in June of 1982 which 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 his injury occurred in the course of his employment, claimant must also establish the injury arose out of his employment. An injury arises out of the employment when there is a causal connection between the conditions under which the work is performed and the resulting injury. Musselman v. Central Telephone Co., 261 Iowa 352 154 N.W.2d 128 (1967).

Claimant testified to an injury on a Monday when a 700 pound tractor tipped over with him under it causing injury to his back. He said that he saw a doctor on Thursday and had x-rays the following day. Claimant's petition alleges an injury in June of 1982. The first report of injury carries an injury date of July 5, 1982 and indication that the employer first knew of the injury on that date which is consistent with claimant's testimony that he told his employer on the date he was injured. Claimant first was questioned about an injury of May 27, 1982. Later after being told of x-rays on July 1, he decided his injury might have been in late June. Claimant stated that he had only one injury involving a tractor.

Claimant was seen by Dr. Wettach in December of 1981 for a low back sprain and possible mild sciatic nerve root irritation. The doctor's note of June 2, 1982 records claimant's report of a 900 tractor falling on him and bruising his left pelvis. X-rays of the pelvis were taken on July 1, 1982. On July 7, 1982 claimant told of pain down his left leg. Dr. Wettach's impression was mild to moderate ruptured intervertebral disc secondary to his injury.

Claimant saw Dr. Hanks at the same time he was seeing Dr. Wettach commencing on July 9, 1982 with x-rays taken of his back on that date. He reported a tractor falling on him in June although another document signed by Dr. Hanks listed an injury date of May 27, 1982.

A 1982 calendar shows May 27 was a Thursday. June 2 was a Wednesday. July 1 was a Thursday. July 5 is a Monday. July 9 is a Friday.

The hearing deputy reconciled the dates to her satisfaction and found claimant's account of the work incident credible and supported by the testimony of his wife and daughter. The hearing deputy had the opportunity to observe the demeanor of the witnesses and to actually hear their testimony and her assessments in that regard are accorded weight in resolving this matter on appeal.

While one would wish for perfection in the memories of those testifying in workers' compensation matters, that ideal is rarely achieved. This deputy agrees with defendants and does not the think the dates given by claimant truly can be reconciled, but viewing the record as a whole and acknowledging the credibility awarded to claimant's testimony by the hearing deputy allows claimant to prevail. Defendants recognize the crucial nature of that credibility. Claimant told Dr. Wettach on July 7, 1982 of posterior left leg pain which went down the calf and into the foot. Straight leg raising was positive on the left. Two days later on July 9, 1982 claimant voiced similar complaints to Dr. Hanks who found straight leg raising positive on the left.

The second issue raised is the extent of claimant's disability. Defendants urge that claimant had a complete recovery and was able to return to the same duties he performed without physical limitation. They point to claimant's testimony which was that his condition was the same on November 28, 1984 as on October 6, 1982 and they make note of a return of claimant's symptoms on July 11, 1983 as not being attributable to claimant's employment since he had been terminated for reasons unrelated to his injury. As proper findings made by the hearing deputy, defendants list rejection of the rating of Dr. Hanks, return to work at full salary without restrictions or difficulties, dismissal for noninjury reasons, and a decrease in actual earnings attributable to economic factors.

The hearing deputy awarded a nine percent permanent partial disability based on moderate low back impairment which responded well to conservative chiropractic treatment and which had not hindered claimant's ability to engage in most activities and on claimant's seeking "remunerated assistance with grain harvesting and cattle vaccinating which he did not seek prior to the injury."

Defendants are right. The award of nine percent cannot be assigned on this record. Dr. Wettach declined to declare whether any permanent impairment exists for claimant and to determine the degree of that impairment. He deferred to an orthopedist. By the time of the doctor's last examination on August 2, 1982 claimant was symptom free with no limitation of motion. No limitations or restrictions were assigned to his activities.

Claimant was treated by Dr. Hanks until October 6, 1982. He was seen only two times thereafter on May 18, 1983 and July 11, 1983. That second episode clearly was not related to employment activity with defendant because claimant was terminated before that time. Dr. Hanks predicted that claimant would continue to have recurrent weakness in his spine which would result in symptoms. He explained that claimant always will have muscle spasm:

> You can have muscle spasms without having a symptom when they become fibrotic with fibrosis after an injury. Because you have to remember, when the ligaments are torn and the muscles are torn they heal with adhesions, and when the adhesions are there, the muscle can never, ever go back to its normal state. It has to stay in a state of spasm because it grows that way. (Hanks deposition, p. 36)

As of May 15, 1984 claimant had not sought care from Dr. Hanks for nearly a year. The doctor's report of October 13, 1982 states that the injury will not result in a permanent defect. Another report from the same date responds "yes" to the question "Is patient capable of doing same work as before injury?" Dr. Hanks rated claimant's impairment based on the AMA and Orthopedic Guides. The findings from the doctor's examination are not consistent with the criteria for the guides. Overall there is nothing to substantiate a permanent functional impairment. Neither are there permanent restrictions on claimant's activities. There is potential for flare-ups, but there is no permanent impairment resulting in permanent disability. Therefore, claimant is not entitled to permanent disability benefits.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-six years of age.

That claimant is a high school graduate.

That claimant is married and entitled to three exemptions.

That claimant had gross weekly earnings of $314.90.

That claimant suffered a strain to his back when a garden tractor he was riding at his job site overturned.

That claimant was off work from July 8, 1982 through July 18, 1982.

That claimant's range of motion in August of 1982 was nearly full.

That claimant was first released for light duty and the released to return to work with no restrictions.

That claimant's treatment by Dr. Hanks was authorized.

That claimant was treated by Dr. Hanks until October 6, 1982.

That after October 6, 1982 claimant received treatment from Dr. Hanks on only two occasions.

That claimant was seen for a low back strain in December of 1981.

That claimant may have recurrent back symptoms.

That as a result of his injury in June of 1982 claimant has no permanent functional impairment.

That claimant has done some mechanical and maintenance work which results in take home pay of $392 every two weeks.

That as a result of his injury in June of 1982 claimant has no permanent limitations.

That claimant was terminated on June 17, 1983 and has not been called back.

That claimant continues to engage in farming and recreational activities.

That claimant has incurred mileage expenses as a result of his injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence an injury which arose out of and in the course of his employment in June of 1982.

That claimant has established entitlement to temporary total disability benefits for his time off work in July.

That claimant has failed to show entitlement to any permanent partial disability benefits as a result of his June 1982 injury.

That claimant's rate of weekly compensation is one hundred ninety-six and 47/100 dollars ($196.47).

That claimant has shown entitlement to medical and mileage expenses.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant temporary total disability benefits from July 8, 1982 through July 18, 1982 at a rate of one hundred ninety-six and 47/100 dollars ($196.47).

That defendants pay accrued amounts in a lump sum.

That defendants pay mileage expenses for one thousand nine hundred eighty (1,980) miles at the rate of twenty-four cents ($.24) per miles.

That defendants pay costs incurred with Dr. Hanks of one hundred ninety dollars ($190).

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 activity reports as requested by this agency.

Signed and filed this 4th day of October, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD KOWAL, Claimant,	:	File No. 729325
vs.	:	A P P E A L
LeROY WADE & SON, INC., Employer,	:	D E C I S I O N
and	:	FILED OCT 3 1985 IOWA INDUSTRIAL COMMISSIONER
FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed April 8, 1985 this 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 January 14, 1985 in which he was denied benefits.

The record on appeal consists of the transcript of the hearing; depositions of Frank Iwersen, M.D., Scott Neff, D.O., and James T. Rogers; claimant's exhibits A through Y; and defendants' exhibits 1 through 13. All evidence was considered in reaching this final agency decision.

The decision will have the same result as that of the hearing deputy.

ISSUES ON APPEAL

The issues on appeal as stated by claimant are these:

1. Did the Deputy Iowa Industrial Commissioner err when he found that Claimant did not prove by a preponderance of the evidence that his injury on October 16, 1982, [sic] either caused or aggravated, accelerated or lighted up his back injury resulting in spinal fusion at the L4-L5-S1 level; and,

2. Did the Deputy Iowa Industrial Commissioner err by denying the Claimant benefits since Claimant sustained his burden of proof as to the causal connection of his injury on October 16, 1982; [sic] and,

3. Did the Deputy Iowa Industrial Commissioner err by failing to find Claimant was permanently and totally disabled as defined in Section 85.34(3), The Code of Iowa, 1983?

STATEMENT OF THE CASE

Fifty year old married claimant, father of nine children, testified to having completed eleventh grade with "pretty poor" reading skills and math skills that are "not very good." After leaving school, claimant served with the navy. Following a brief time in a packing house he entered iron working. He became a journeyman ironworker in November of 1959. He began work in 1970 for defendant employer for a second time after an initial employment in 1957. He characterized his work as heavy requiring lifting of roughly one hundred pounds. Defendant employer engaged in moving heavy equipment and in doing mechanical work. Eventually claimant became a working supervisor.

As to his condition prior to injuries in 1982, claimant acknowledged tearing a cartilage in his knee in 1980, a car accident resulting in numbness in his arms and a broken neck for which he had surgery in 1981 and a broken foot. Claimant reported surgeries on his lower back in 1973 and in 1976. He again was treated for his lower back in 1978.

Claimant described his injury in March of 1982: He was working in Kansas. He was stepping over a beam. His heel got caught. He flipped over on his back and side. He had back problems and tingling in his leg. A month to a month and a half later he was hospitalized for a myelogram. He had caudal blocks which gave him brief relief.

After his hospitalization he returned to his normal job which included bending and stooping. He experienced some irritation and aggravation, but he was able to work. He was under no restriction from Frank J. Iwersen, M.D., whom he said had not advised him to give up ironworking.

Claimant who claimed he did seven or eight jobs a year in Iowa, recalled the circumstances surrounding his injury of October 17, 1982 as follows: He was to move a compressor engine. It was a Sunday after work was completed. His crew was loading equipment to be moved. He felt a sharp pain as he picked up a thirty inch block. He then felt a red hot pain. He thought he had ruptured his disc. Another worker came to see what was wrong with him.

When the job was finished, he drove home. He reported for work but did less.

He saw Dr. Iwersen who referred him to Mayo where nothing was done other than to suggest a myelogram. He continued to work until January 16, 1983 at which time he went to the hospital for a myelogram. He had surgery and about a year later caudal blocks. Claimant reported that he continues to have a shooting pain in his left hip. He can walk comfortably six to eight blocks. He estimated ninety percent of his time is spent lying down. He does not take medication.

Claimant assumed he could return to work for defendant employer any time he was capable of doing his job. He said that light duty jobs are available with the company, but all are filled. Claimant agreed he can complete time sheets, read blueprints, formulate plans for moving equipment, and use applied physics and mathematics.

Claimant testified to receiving workers' compensation under the Kansas Act, disability benefits through a plan with defendant employer, and social security.

Claimant admitted that after his hospitalization in early 1982 he continued to have distress and aching. He denied being told at that time of a herniated disc. Claimant was unsure about seeing Dr. Iwersen on September 28, 1982 with complaints of leg and low back pain, but he did recollect having a TENS. At the end of the month he was sent to physical therapy. Claimant acknowledged that he continued to be troubled with his back up until the time he went to the job on which he claimed injury in mid-October.

Claimant believed that Dr. Iwersen got information which resulted in his letter in February 1983 and which referred to the aggravation of claimant's condition in Iowa from claimant himself. Claimant was certain he would have told Dr. McKinney about the incident in mid-October because "doctors can't treat you unless you tell them to." Claimant was unsure where information regarding his giving up ironworking might have come from.

Claimant stated he has briefly reviewed several jobs for defendant employer in the time since January 1983. He had looked at other jobs with persons from the company, but he had not offered any advice.

Thirty-five year old Edward Gilbert, an ironworker, who first worked with claimant in 1972 and who is his friend, testified that claimant was a very good worker. He remembered working with claimant on a transformer in Omaha and observing that claimant could do stooping and heavy lifting, but he was unable to remember if that was between March and October of 1982.

Regarding October 17, 1982, Gilbert said that he was told by the claimant that claimant had hurt his back and had a numb tingling sensation in his leg. Thereafter he viewed claimant as doing little as possible.

Bernadette Kowal, claimant's spouse, testified that claimant was hospitalized for a myelogram in June. Thereafter he was released to return to work. Kowal claimed that no workers' compensation checks were received prior to January of 1983.

Kowal reported several contacts with a Mr. McCorkindale of the insurance carrier. She wrote a letter reporting her husband's injury in March of 1982 and his difficulty the weekend of October 16, 1982.

In October she contacted Dr. Iwersen. She remembered her husband's spine at that time as being "s-shaped." She suggested to Dr. Iwersen that claimant should go to Mayo Clinic. When she contacted the insurance carrier, it at first refused to authorize the trip. Later it agreed to claimant's going and paid the bill.

Kowal asserted that her husband had told Dr. Iwersen about the feeling he had in his back, but she did not remember a conversation with Dr. McKinney. She had seen claimant call someone at the company to tell them of the October incident. She recalled that from the time of the incident until claimant's surgery he would come home and spend the weekend in bed and not engage in other activities. While she acknowledged that he had pain before, she felt that the pain had not interfered with his leading a normal life.

Kowal said that claimant spends his day sitting or lying down.

Henry Appel, president of the successor to defendant employer, whose duties are to control the policies and operation of the company, testified that all injuries are to be reported as soon as possible after the occurrence of the injury. He said the company was aware of claimant's injury in Kansas and that claimant was receiving compensation benefits. He also was aware of the salary continuation program which pays an income of $2,000 a month beginning sixty days after work has ceased and continues to retirement age.

Appel recollected claimant's complaining from time to time for quite some time, but he was unable to pinpoint an incident prior to October 15, 1982. He did not know of the October incident until the time claimant went to Mayo. Appel claimed that claimant did not report his injury to anyone at the company. A first report of injury was prepared and filed January 18, 1984.

The president felt that claimant had underestimated his position and skills as he was a chief superintendent. His duties required knowledge of steel and equipment, the operation of heavy equipment, and the ability to visualize what must be done and to estimate the equipment and personnel needed. In his experience claimant was at home with steel books and with blueprints.

Appel thought claimant was restricted from doing anything requiring more than a forty-five minute drive. He said the company would be "delighted" to use claimant's expertise in any way it could and to consult with claimant as he was available. He reported that a salary for claimant had been discussed, but it was concluded that payment of a salary would mean that claimant would lose salary continuation.

James T. Rogers, a rehabilitation counselor for the state of Iowa who holds a master's degree in counselling and guidance and who has his own consulting business, first saw claimant on October 13, 1983 and took a medical, personal, sexual, financial, educational, and employment history. Claimant's interests and aptitudes also were discussed.

In working with clients, three criteria are applied: Does the person have a disabling condition? Does the condition impose a vocational handicap? Is rehabilitation feasible to return the person to productive, gainful employment?

Rogers observed that claimant was uncomfortable during his interview. Claimant was scheduled for testing with B. L. Cogley, Ph.D., and Drs. Neff and Iwersen were sent a physical capacities worksheet.

Dr. Neff restricted claimant's lifting to twenty pounds. He was not to climb, balance or stoop. Claimant was to have a break from standing every two to four hours. He was thought capable of sitting for four hours and walking a quarter of a mile. In addition to the medical reports Rogers listed in his report, he had seen a November 7 report from Dr. Neff and an October 14 report from Dr. Iwersen.

B. L. Cogley, M.S.W., Ph.D., saw claimant to assess his personality, intellectual functioning, and vocational interests. Claimant's I.Q. was found to be in the lower [sic] end of low average and the lower end of average. Claimant's reading level was at 7.4, spelling at 5.2, and arithmetic at 6.2. Claimant's Minnesota Multiphasic Personality Inventory when compared to that of others indicated a person who was self-centered, demanding, and preoccupied with physical complaints. There was potential for a hypochondriacal adjustment pattern. The Norviki-Strickland Internal-External Scale suggested claimant's tendency to feel more influenced by external events than his own behavior. On the Career Assessment Inventory claimant was shown to have a preference for mechanical, skilled or technical occupations, and for working with things. Claimant evidenced indifference or dislike for school work.

Dr. Cogley did not recommend psychotherapy, but he did recommend a job "where age does not matter, where average intelligence is not a necessity, where academic skills are not needed, and where physical work is not required."

Rogers viewed claimant as a difficult rehabilitation problem and he did not think claimant would be employable because of his pain and his reluctance and perceived inability to do office work. Rogers thought that if claimant's pain decreased he would be able to do bench work, a specially arranged job or a clerical job which would pay minimum wage.

The counselor was not aware of claimant's having been injured in March of 1982 or of his having received benefits. He agreed that knowing claimant's entire medical history would be helpful in better understanding his situation. Rogers admitted that he had not looked into the possibility of modification of claimant's former job, but he did know of claimant's consulting with defendant employer. He felt that claimant has supervisory skills and those skills would be more marketable than those in welding or driving. He acknowledged claimant also might be capable of work as an experimental welder, supervisor of machinery, model maker or cable splicer. Claimant was viewed as having an excellent attitude toward work, good appearance, good work history of responsible jobs, and the ability to work independently.

Claimant's work as an ironworker demanded climbing, balancing, stooping, bending, reaching, handling, good vision, and necessitated working outside in a noisy, hazardous environment.

Records from the employer show that after October 17, 1982 claimant worked as many as sixty-nine and a quarter hours and as few as twenty-nine and a half through the week ending January 16, 1983 with an average of more than forty-nine hours.

Frank J. Iwersen, M.D., board certified orthopedic surgeon, testified that claimant was first seen on September 1, 1968 for a fracture of the distal end of the fibula. Claimant returned in August of 1973 with left sacroiliac and lumbar pain which was diagnosed as low back strain. A myelogram was done which showed almost complete obstruction at the L4-L5 level. A herniated disc was removed from the right side. In early 1974 another myelogram was done and a disc was excised from the left side at L4-L5. Later in 1974 he had a medial meniscectomy on the left. Claimant was treated for low back and bilateral hip and leg pain in December of 1978. In mid 1980 his complaints were of his neck and both arms. He had an anterior cervical fusion with removal of disc between C5 and 6, and C6 and 7. Later in 1981 he had surgery on his right knee.

Claimant returned on April 23, 1982, gave a history of injury to his back, and complained of back and left leg pain as well as trouble with his knee. A caudal block was performed on April 27, 1982 during a hospitalization from that date through May 1, 1982. Claimant was admitted to the hospital on June 7, 1982. A myelogram was performed which showed a Grade I spondylolisthesis of L4-L5 and narrowing between L5, S1. A CT scan revealed a soft tissue fold at L5-S1 and L4-L5 which was thought to possibly represent a herniated disc. Claimant was treated conservatively.

Claimant was next seen on September 28, 1982 with complaints of left-sided sciatica. Claimant was given a TENS and physical therapy was ordered.

In November claimant continued to have trouble with loss of strength and numbness in his left leg. Prior to claimant's visit Dr. Iwersen received a call from claimant's spouse who told him claimant was injured in October while moving a big machine. Claimant mentioned trouble when he got home on that night and difficulty getting out of bed.

Early in February 1983 Dr. Iwersen wrote that claimant's condition was aggravated by the work incident. Claimant complained of a worsening of his condition to the point he could not straighten up or get his legs moving. He was hospitalized. Subsequently, surgery was performed to fuse the area from L4 to S1. Exploration at L4 and 5, and L5 and S1 was carried out.

Dr. Iwersen last saw claimant on April 10, 1984. His treatment at that time was to offer claimant the possibility of a caudal block, physical therapy, and a TENS.

Regarding the myelogram taken in June of 1982 and January of 1983, the doctor saw a difference and said that difference "could be based on strain or aggravation of a previous condition." The doctor was asked over objection:

> Q. Do you have an opinion, based upon a reasonable degree of medical certainty and your examination of Mr. Kowal as to whether or not the incident in Truro, Iowa, in October of 1982, most specifically October 15, of 1982, aggravated, accelerated or ligthten up this preexisting condition that Mr. Kowal's suffering from? (Iwersen deposition, p. 28)

He responded:

> A. I felt it could have aggravated this condition. (Iwersen dep., p. 28)

Dr. Iwersen did not believe claimant would ever be able to return to ironworking, but he was hopeful that claimant could do work of some sort. He was unsure whether he knew or did not know claimant continued to work into the next year. He did not think claimant had reached maximum medical improvement.

Dr. Iwersen anticipated claimant's rating after laminectomies in 1973 and 1974 at twenty to twenty-five percent of the body as a whole with an additional ten percent for the cervical trouble. In a letter dated February 16, 1983 Dr. Iwersen gave the opinion that claimant's condition was aggravated and flared up by the October incident. On June 21, 1983 Dr. Iwersen wrote that claimant's condition was aggravated by the accident in October and that "[t]here is no question in my mind that the injury in Toro, [sic] Iowa, was the catalyst which lighted up this man's problems which eventually resulted in his surgery." On May 2, 1984 the doctor said in a To Whom It May Concern letter: "I could not state this was the definite etiological cause of all Mr. Kowal's problems, this accident in October of 1982, but certainly this accident did aggravate a pre-existing condition which eventually necessitated him being hospitalized and having surgery."

P. J. Kelly, M.D., of the Mayo Clinic reported his findings in December of 1982. After taking x-rays, consultations were suggested, but claimant did not wish to utilize those. Dr. Kelly decided that claimant probably had a chronic mechanical low back problem with degenerative changes. He thought claimant's choice was between a spinal fusion and no fusion with a trial immobilization in a cast.

Daniel E. McKinney, M.D., examined claimant on January 28, 1983. He traced the development of claimant's difficulties to April 1982 when he slipped stepping over a beam and developed back and lower extremity pain. Claimant reported that condition was exacerbated in the fall of 1982 when he had excruciating pain and numbness in the left lower extremity.

Scott Neff, D.O., board certified orthopedic surgeon, who had reveiwed claimant's medical records, psychological evaluations, and vocational rehabilitation report, examined claimant on September 15, 1983. He thought the claimant had reached maximum medical recuperation. He found asymmetrical ankle jerks, diminished range of motion in the lumobsacral spine and weakness in the extensor hallicus longus on the left which suggested chronic damage to the nerve root at L5. As possible etiology for that damage, he suggested arthritic spurring, interforaminal narrowing, a tumor, infection, a ruptured disc or more commonly trauma. The orthopedist believed that claimant had an unstable lumbar spine before surgery which was related to his previous laminectomies and excision.

Dr. Neff found claimant's total impairment to the lumbar spine to be twenty percent of the lumbar spine. He did not think claimant could swing a fourteen pound hammer all day, twist to do heavy lifting or climb on high steel, but he thought claimant could work in a supervisory capacity. A functional capacity sheet was completed on claimant which restricted him from climbing and balancing. Claimant was judged capable of lifting twenty pounds occasionally and ten pounds frequently, stooping, walking a quarter of a mile, and either standing or sitting for four hours with breaks.

The orthopedist felt that a person who sustains a significant injury would not be able to work seventy or eighty hours. Dr. Neff acknowledged that he did not know claimant's current situation but he was certain claimant's condition could fluctuate from day to day.

APPLICABLE LAW AND ANALYSIS

Claimant filed a reply brief. Defendants filed a motion to strike that brief. The letter written by the industrial commissioner on April 8, 1985 makes provision for the filing of a brief by defendants with the matter to be fully submitted on April 23, 1985. There is no mention of a reply brief. Defendants were later granted an extension to April 30, 1985 to file their brief. As the case was fully submitted at that time and no provision was made for a reply brief, the brief was not considered.

The first issue raised by claimant is whether or not the hearing deputy erred when he found claimant did not prove that his injury on October 16, 1982 either caused or aggravated, accelerated or lighted up his back injury resulting in a spinal fusion of L4-L5, S1. The hearing deputy concluded that "Claimant's claim will be denied on the basis that his back condition as presently exhibited did not arise out of his employment." He found that "[t]he medical evidence in this case indicates that claimant did not prove by a preponderance of the evidence that the injury was caused by work activity on October 15, 1982."

Claimant's petition alleges an injury of October 15, 1982. At hearing he was questioned about an injury on October 17, 1982. His brief refers to an injury of October 16, 1982. He did claim injury on a Sunday which would be October 17, 1982.

The hearing deputy's decision is not very clear as to whether he is finding no injury or whether he is finding no causal connection between the incident and claimant's disability. The latter may be more likely as he does reach a conclusion on the issue of notice which ordinarily would not be addressed until the arising out of-in the course of issue was resolved and because of his specific reference to medical evidence. A finding will be made that claimant did experience back pain on his job site on October 17, 1982 as such a finding can be supported by the weight of the evidence.

The thrust of claimant's argument is that the hearing deputy did not consider two of claimant's exhibits and more specifically reports from Dr. Iwersen of May 2, 1984 and June 16 or June 21, 1983. Presumably claimant is referring to his exhibit F rather than his exhibit Q. The deputy's decision does not contain references to letters of May 2, 1984 or June 21, 1983; but that does not mean he did not consider them in what is an extensive recapitulation of the evidence. He clearly says what weight he gave to the evidence as is required by Catalfo v. Firestone Tire & Rubber Co., 213 N.W.2d 506 (Iowa 1973). The Iowa Supreme Court has recognized that not all testimony can be set out and it has cautioned that on the basis of only some testimony being included, "a losing party should not be able, ipso facto, to urge successfully that the agency did not weigh all the other evidence." McDowell v. Town of Clarksville, 241 N.W.2d 904, 908 (Iowa 1976).

A conclusion that whatever disability claimant now suffers is not causally related to his injury of October 17, 1982 is a proper one.

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

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. 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). 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).

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 has an extensive medical history much of which relates to his back. He underwent a laminectomy at L4-5 on the right in 1973 and L4-5 on the left in 1974. He was treated for low back and bilateral leg and hip pain in December of 1978. He had cervical problems which led to disc surgery and fusion in February of 1981.

More recently, in March of 1982, claimant had an injury at his job site in Kansas in which he fell on his back and side. Dr. Iwersen prescribed Norgesic Forte shortly thereafter. When claimant was seen in April he complained of back and left leg pain. He had limited straight leg raising and tenderness over the low back. He was hospitalized for a caudal block and Darvocet N-100 was prescribed.

Claimant was back in the hospital in June for a myelogram, bone scan, and CT scan. At that time he reported severe shooting pain in his left hip with numbness in his first and second toes. There was a suggestion of a disc at the L5, S1 area. Claimant began taking Tylenol 3. Less than three weeks prior to October 17, 1982 claimant saw Dr. Iwersen for left sciatic neuritis for which medication, physical therapy, and a TENS were prescribed. He had therapy on October 1, 1982.

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Dr. Iwersen did not see claimant until a month after his injury at which time he wrote: "The patient is still having difficulty with his back and left leg. He said his left leg went numb on him at one time, like he had not strength in it." The doctor said in his deposition: "His wife had told me that he got hurt in October and was -- when moving some big machines.... She called me on the phone before they come in that time. Said he came home from this episode and having a lot of trouble. And I said well, I better see him." (Deposition p. 17) There was no significant change in claimant's physical examination and the doctor made no notation of injury or of the phone call from claimant's spouse.

Dr. Iwersen's letter of December 7, 1982 refers to claimant's injury in April of 1982.

When claimant was seen at the Mayo Clinic, Dr. Kelly noted claimant "recently has had another episode which, as he and his wife described it to me, sounds as if he had an acute list with root irritation." Dr. Kelly's report suggests a recent root irritation and disc protrusion, chronic mechanical low back pain and degenerative changes.

Claimant was hospitalized on January 16, 1983 with this notation: "This followed an accident in April, 1982 and he has had difficulty ever since and been unable to carry on his work." Claimant was in fact working up to the date of this hospitalization. His present illness was described thusly: "In April of 1982 the patient slipped at work and fell injuring his back and after this he had pain in his back and left leg pain."

Dr. McKinney saw claimant in consultation and took this history:

> This 47 year old male enters the hospital because of low back pain and left lower extremity pain. He describes the pain in the left lower extremity as more of a discomfort and tingling, pins and needles sensation rather than a sharp pain. The patient's history dates to some 6 years ago when he underwent surgery for a herniated fifth lumbar intervertebral disk. The patient had the disk removed at that time and made a very satisfactory recovery. He had practically no difficulty until April, 1982, when while at work and stepping over a beam, he slipped and following that, developed low back pain with pain radiating into the left lower extremity. The pain goes to the ankle. The patient has been able to continue his work as an Iron-worker but states that it is becoming increasingly difficult for him.... About two months ago he had an excruciating episode of pain which occurred rather suddenly and at that time, caused him to fall. He stated at that time he was virtually unable to move or feel anything in his left lower extremity.

Dr. Iwersen's letter of February 16, 1983 is the first documentation of claimant's condition being aggravated or flared-up by an incident in Iowa. He followed that statement of causation with this: "Since that time, the patient has been unable to do any type of work." As it was pointed out above, claimant worked until January 16, 1983. A letter dated June 21, 1983 contains this by Dr. Iwersen: "There is no question in my mind that this injury in Toro, [sic] Iowa, was the catalyst which lighted up this man's problems which eventually resulted in his surgery."

Defendants suggest Dr. Iwersen was responding to a letter similar to that sent to Dr. McKinney and that might indeed be the case as he perpetuates the spelling error in that correspondence. That letter contains another error regarding the level of the herniation, but that is an error of which the doctor may have been aware.

In his deposition testimony, Dr. Iwersen stated, "I felt that it could do this. Could aggravate this condition, this recent injury that was told to me."

The second letter on which claimant relies is one which attempts to rehabilitate Dr. Iwersen's testimony. He says: "It is impression [sic] that I testified that I could not state this was the definite etiological cause of all Mr. Kowal's problems, this accident in October of 1982, but certainly this accident did aggravate a preexisting condition which eventually necessitated him being hospitalized and having surgery."

Dr. McKinney's letter on March 8, 1983 acknowledges the deficiency in his history:

> As you know, Mr. Kowal's difficulty dated to April, 1982, when he slipped while stepping over a beam at work and following that developed low back pain and left lower extremity pain. He was able to continue his work, however, in spite of this discomfort, until the fall of 1982, when he suffered a sudden exacerbation of his pain while at work. Mr. Kowal did not relate the details of that incident to me at the time of my initial examination. However, as recorded in your letter of February 10th, 1983, it would appear that the incident of October 16th, 1982, aggravated a pre-existing condition.

Dr. Neff's testimony is not supportive of claimant's position. He thought any difficulty with claimant's back in October was short-lived.

Claimant has a long history of back trouble. Unquestionably, claimant had a serious injury in March when he actually fell. That injury required treatment nearly to the time of the October incident. As defendants point out, claimant's surgery in March of 1983 removed a degenerative disc at L5-S1 which had been questioned on a CT scan in June of 1982.

Claimant has lots of magic words. However, claimant's evidence is flawed, and even evidence that might first seem favorable is also marred. We know that Dr. McKinney was provided with some information. We do not know what that information was in terms of the mechanics of the incident that befell claimant. Dr. McKinney makes no true statement regarding causation and in reality only regurgitates information he was fed. Dr. Iwersen also indulged in parroting. His contemporaneous notes and his deposition testimony make it unlikely if he considered his own examinations and evaluations as well as claimant's past treatment, he could have arrived at the conclusions he states in his reports. Claimant himself acknowledged that he was troubled by his back before the October incident.

There is no doubt that claimant has a bad back and the condition of that back may well stem from his work at some time. However, claimant's disability is not attributable to the work incident on October 17, 1982.

In light of the conclusion on this issue, it is unnecessary to consider the other issues raised by claimant.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is fifty years of age.

That claimant has an eleventh grade education.

That claimant is a journeyman ironworker.

That claimant's duties for defendant employer were as a working supervisor and involved lifting as much as a hundred pounds.

That claimant had a laminectomy at L4-5 on the right in 1973.

That claimant had a laminectomy at L4-5 on the left in 1974.

That claimant was treated for low back and bilateral leg and hip pain in December of 1978.

That claimant had discs removed C5-6 and C6-7 and anterior cervical fusion in February of 1981.

That claimant was injured on the job site in Kansas in March of 1982 and thereafter had back and left leg pain.

That claimant was hospitalized after his injury of March 31, 1982.

That claimant was totally disabled from April 23, 1982 to at least July 22, 1982.

That in September of 1982 claimant was treated with physical therapy and a TENS for left-sided sciatica.

That claimant experienced back pain on October 17, 1982 as he worked at his job site.

That claimant averaged nearly fifty hours of work per week after the October 17, 1982 injury.

That claimant worked until January 16, 1983.

That in March of 1983 claimant underwent removal of a degenerated disc at L5-S1; exploration of L4, L5 and a lateral spinal fusion of the transverse process of L4, 5 and S1.

That defendant employer was aware of claimant's injury.

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 October 17, 1982.

That defendants have failed to establish the affirmative defense of notice.

That claimant has failed to establish by a preponderance of the evidence that his injury of October 17, 1982 is a cause of the disability on which he now bases his claim.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That each party pay the costs of producing its evidence.

That defendants pay the costs of the attendance of the shorthand reporter at the time of hearing.

That claimant pay the costs of the appeal.

Signed and filed this 3rd day of October, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARLAN LARSON,	:	
Claimant,	:	File No. 705239
vs.	:	R E V I E W -
JOICE CO-OP ELEVATOR CO.,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
FARMLAND MUTUAL,	:	FILED
Insurance Company, Defendants.	:	OCT 22 1985
		IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Harlan Larson, claimant, against Joice Co-Op Elevator Company, employer, and Farmland Mutual Insurance Company, insurance carrier, for the recovery of further benefits as a result of an injury on May 19, 1982. The claimant's rate of compensation as reflected in the memorandum of agreement previously filed in this matter is $156.46. This matter was heard before the undersigned on July 10, 1985 at the courthouse in Mason City, Cerro Gordo County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Darlene Jorth, Roger Christianson, and Larry Peterson; joint exhibits A through P; and official notice was taken of the answers to interrogatories.

At the hearing the parties stipulated that claimant received an injury arising out of and in the course of his employment and further stipulated that if the claimant is entitled to permanent partial disability, that the conversion date for payment of permanent partial disability is February 7, 1983.

ISSUES

The issues to be resolved are whether there is a causal relationship between the injury and the disability upon which the claimant bases his claim; and, if so, whether the claimant is entitled to permanent partial disability benefits. Claimant has been previously paid from the date of injury through February 6, 1983.

EVIDENCE PRESENTED

Claimant testified he is fifty-four years old and is presently employed by defendant and has been so since 1963. He stated that he is a graduate of high school following which he engaged in farming and operated a truck prior to commencing work with defendant.

Claimant stated that his initial job with defendant was a mill operator which he continued to do until his injury on May 19, 1982. Following his injury claimant was unable to continue in the type of labor required to be a mill operator and has thus been assigned less heavy labor and more paperwork. Claimant advised that he received his injury on May 19, 1982 while walking across the rail yard and stepping into a hopper car. Claimant said he fell on the step and ended up falling about about one and a half feet to the ground. Claimant said he stayed at work that day, but the next day went to see a doctor in Lake Mills. He was referred to another doctor in Mason City and was eventually treated by Robert E. McCoy, M.D. Claimant said his injury involved primarily the left groin and back which resulted in severe pain in his hip and on the inside of his leg. He reported that for the first five or six months following the injury he had considerable difficulty in sleeping or finding a comfortable position because of this pain. He advised that he occasionally uses a cane but not very often and that it is not necessary for him to take the cane to work.

Claimant reported that prior to his injury he had been a very active individual engaging in bowling, bicycle riding, and particularly dancing. He stated that since his injury he has not been able to engage in the same degree of activity as he could before and has eliminated bowling and bicycling. He does occasionally walk as a form of exercise and recreation. Claimant stated that he still uses Tylenol to help control the pain and occasionally wakes up because of severe pain. Most of his problems seem to center around the left hip. Claimant said he is able to continue his employment and does many of the same types of jobs as he did before but does avoid heavy labor.

Claimant reported that defendant employer has been cooperative with him, has provided help, and been very good about accommodating his restrictions. Claimant advised that the town of Joice in which he lives has six businesses and to his knowledge there are no jobs available in Joice. Claimant attributed this lack of employment opportunities to the depressed farm economy. He said he used to work some overtime for the defendant but no longer does so.

On cross-examination, claimant stated that he has not sought a job since his employment with defendant in 1963. Claimant admitted that he had been treated for alcoholism at Minneapolis, Minnesota, but denied that he actually had an alcohol problem and stated that he agreed to treatment primarily at the insistence of his children. He stated that he has been employed full-time since returning to work except for the first week in February on his initial return. He stated that he presently has no plans to get another job and hopes to continue in his employ at Joice Co-Op Elevator. On the subject of overtime, claimant said he regularly works five hours per week overtime and that that overtime is considered a part of his regular job. He said that his present hourly rate of pay is $6.45.

Darlene Jorth stated that she lives about ten miles from Joice and has known the claimant for the past eight years. She stated that claimant used to coach softball and was known locally as an excellent dancer prior to his injury. She described claimant as a very active person prior to his injury, but since then very seldom goes dancing, has not been bowling, and has complained of physical pain. She said that claimant appears to be worried and depressed at times. She stated that claimant has advised her that he no longer does heavy physical labor but still thinks he does more than he should, and further that the claimant has expressed considerable concern about finding another job if he should lose his position at Joice Co-Op Elevator.

Roger Christianson testified that he is a banker and part-time waiter in Joice, Iowa. Mr. Christianson confirmed that claimant was an extremely active person prior to his injury and was extensively involved in community affairs. He stated that the claimant was a member of his bowling team, was a 175 to 180 average as a bowler. Since claimant's injury he has not seen claimant dance, bowl, or ride bicycles. He also stated that claimant has on numerous occasions expressed to him concern about losing his job and what he would do if he was not employed at Joice Co-Op Elevator. Mr. Christianson expressed the opinion that the claimant wants to be employed and that during his time off work claimant was extremely concerned about his financial situation.

On cross-examination, Mr. Christianson related three instances when he could recall claimant expressing concern about his job. Mr. Christianson stated that the Joice Co-Op is the largest employer in Joice, Iowa, and to the best of his knowledge employed about nine or ten people. He stated that he was aware of the fact that in the past year or so one or two persons have been laid off.

Larry Peterson testified that he is the manager of the coop elevator and has been so since March 1, 1985. He began his employment with the elevator in January 1974, left in September 1983, and returned again on March 1, 1985. Mr. Peterson advised that he has no biases against injured or handicapped workers and stated that he himself had suffered an injury at the co op elevator when he caught his leg in an auger, and as a consequence his right leg was amputated. He stated that the time claimant was injured he was working in the grain department in a similar position as that of Mr. Larson but did not do any mixing or grinding. Mr. Peterson advised exhibit P is a copy of the payroll records for claimant from 1981 to the present.

Mr. Peterson stated that claimant has been employed full-time since his injury and has received two raises. He denied that the coop has any plans to fire the claimant and stated that claimant gets along well in his job and that other workers assist him in those areas where heavy lifting is required. It was Mr. Peterson's opinion that claimant performs a valuable service for the coop and expressed the opinion that he hopes claimant will continue to do so.

Mr. Peterson confirmed that claimant now walks with a limp and he did not do so prior to his injury. He also agreed that there are limited employment opportunities in the town of Joice. He stated that claimant is now assigned much more paperwork to do and that he does this well.

Joint exhibit A is a letter from Lyle A. French, M.D., to Craig Ensign, claimant's attorney, dated March 27, 1985. In the letter Dr. French reviews in considerable detail claimant's history and his findings on examination of claimant. Dr. French stated that he believed claimant was somewhat overreactive to his problem, but does not appear to question claimant's statements regarding the pain from which he is suffering. Based upon the examination, Dr. French opines that claimant has approximately a twenty percent disability to the lower left extremity. He states that he does not have any explicit information as to why claimant continues to suffer from symptoms but stated that he has seen problems similar to claimant's and that these types of injuries generally take a considerable amount of time to heal. The doctor stated that he believed claimant's injury may have caused some aggravation of a progressive degenerative arthritis of the hip. He further stated that the injury probably caused a small tear of the abductor muscles with a hematoma formation in the left inguinal region which results in some left femoral neuropathy. He stated that if claimant's disability were to be determined on the basis of a body as a whole, that the impairment would be approximately ten percent.

Joint exhibit B are notes and records from Surgical Associates of North Iowa. The first of these reports dated January 21, 1983 by Dr. McCoy indicates that claimant seemed to be suffering from gradually increasing marginal osteophyte formation along the anteromedial articular margin of the femoral head and increasing degenerative cyst formation either in the femoral head or the acetabulum over which the femoral head superimposes. He reports that claimant has very definite evidence of progressive degenerative arthritis of the left hip. He believed that the progression of the degenerative arthritis of the left hip was probably accerlerated by the injury. Dr. McCoy assigns a functional impairment of twenty-five percent of the lower left extremity or ten percent of the whole man. Exhibit B also contains notes dated November 26, 1982 from N. W. Hoover, M.D., which reflects that claimant was not able to return to work at that time. The remaining notes in exhibit B concern an examination by a Dr. Colby on June 30, 1982 which again restates the type of injury that claimant received.

Joint exhibit C is a May 17, 1983 letter from John A. Heit, M.D., to Dr. McCoy which reports the results of an examination by Dr. Heit, a specialist in internal medicine. Dr. Heit reports the results of his examination and indicates that x-rays of the hip showed some hypertrophic changes suggestive of degenerative joint disease.

Exhibit D is also a letter from Dr. Heit to Dr. McCoy bearing the same date which contains additional detail concerning the examination he conducted on the claimant including the results of blood tests and other examination and diagnositc procedures.

Exhibit E is a copy of a report of Dr. Heit concerning a preliminary examination of the claimant on April 8, 1983. Exhibit E offers little in the form of additional evidence which has not already been discussed.

Joint exhibit F contains several physician reports from Dr. Hoover. These reports confirm the prior diagnosis and contain progress notes concerning claimant's recovery from his injury. Several reports in exhibit F were also contained in prior exhibits.

Exhibit O is the deposition of the claimant taken May 3, 1985. A review of that deposition shows that claimant's testimony at hearing does not vary from his testimony at the deposition.

Joint exhibit N is the deposition testimony of Robert E. McCoy, M.D., taken on May 3, 1985. Dr. McCoy outlined his professional and expert qualifications and indicated that he is an orthopedic surgeon with Surgical Associates of North Iowa. Dr. McCoy stated that he first saw the claimant on January 21, 1983 having taken over the case from an associate. Dr. McCoy conducted an examination and found some slight difference in the range of motion between the claimant's two hips. Dr. McCoy opined that claimant was suffering from degenerative arthritis in both hips and that the injury received by claimant to his left hip aggravated the condition and increased the progression of the disease in that hip. Dr. McCoy stated that several series of x-rays had been taken of the claimant beginning in June 1982 through May of 1984. He said that these x-rays showed that claimant did have a preexisting arthritic condition that was progressing over a period of time, more on the left than on the right. He said there was no way of assessing the degree of impairment that claimant suffered as a result of the preexisting condition as opposed to the impairment resulting from the injury which aggravated that condition. Dr. McCoy stated that the degenerative arthritis involved not only the femoral head but also the acetabulum which would indicate that the injury extended into the trunk of the body. The doctor agreed that trauma does aggravate arthritis and that the injury received by claimant in May of 1982 was an aggravation of this condition. The doctor reported that claimant had made no complaints of pain in the left hip prior to his injury. He did, however, estimate that thirty to forty percent of the arthritis in the left hip would be attributable to the injury and the remaining impairment to the preexisting condition. Dr. McCoy restated his opinion that the injury resulted in a twenty-five percent impairment to the lower left extremity or approximately ten percent to the body as a whole.

The doctor stated that he became aware of the fact that claimant may have had an alcohol problem but did not believe that claimant's alcohol problem was in any way contributory to the arthritic condition in the hip. He further stated that he was aware that claimant had a slip and fall incident in December of 1983, but did not believe that this caused anything other than a temporary delay in claimant's ultimate recovery. The doctor stated that it would not be possible to determine the rate of progression of the arthritic condition, but believed it entirely possible that the condition would eventually result in a total hip replacement. On cross-examination, the doctor again expressed his opinion that the injury suffered by the claimant aggravated the preexisting condition and lighted-up so that claimant became aware of it and it became symptomatic. The doctor stated that all his opinions expressed were expressed within a reasonable degree of medical certainty.

Exhibit P are copies of the defendant employer's payroll records concerning the claimant from 1981 through July 1985. These records reflect that claimant has been a full-time employee since his return to work and shows that some overtime has been performed by the claimant.

APPLICABLE LAW AND ANALYSIS

The first matter for determination is the nature of the injury received by the claimant. The medical evidence suggests two types of problems from claimant's injury: torn or stretched abductor muscles in the left leg, and aggravation of prexxisting arthritis of the left hip. The arthritic condition is demonstrated by degenerative cyst formations along either the femoral head or the acetabulum. This injury must be examined carefully because the right to receive workers' compensation is statutory and the statute fixes the amount to be recovered for specific injuries. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). It is the claimant's burden to prove an 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).

In this case, the problem with the abductor muscles appears to be confined to the lower left extremity. All manifestations of the injury were seen in the extremity, including the pain, bruising, and swelling suffered by claimant. If claimant's injury extends to the body as a whole, it must be on the basis of the arthritic changes in the hip joint and those changes must be causally connected to the injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 19, 1982 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-761 (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962).

Claimant, through the testimony of Dr. McCoy, easily carries his burden on the issue of the causal connection between his injury and arthritic condition. Certainly there was preexisting degenerative arthritis, but it is equally certain that this arthritic condition was lighted-up, worsened, and aggravated by the injury.

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.

In Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943), the court found that the acetabulum is not part of the leg and extends an injury to the body as a whole. Dr. McCoy was clear in stating that the arthritic changes in claimant's hip involved the acetabulum and further that in his opinion claimant's injury extended into the trunk of the body. Claimant has thus established that his injury is to the body as a whole and that the disability is causally related to his injury.

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

As stated above, there are many factors which are examined in determining industrial disability. Claimant suffered no disability to his hip prior to his injury even though he did have an undiagnosed arthritic condition. Since this condition was lighted-up he has continued to suffer pain and discomfort. Both his employment and nonemployment activities have been reduced. The location of the injury affects claimant's walking, climbing, and bending activities. Although it would not appear that claimant suffered a tremendously serious injury, he did have a substantial healing period. He has been assigned a minimal to moderate functional impairment.

There is some evidence that claimant initially suffered emotional problems following his injury, but it would appear that his return to and continued employment have helped this situation. Claimant has returned to his former employment and not suffered any actual reduction of earnings. Although claimant is an older worker with limited education, he appears to be intelligent, well motivated, and has adapted well to his new paperwork duties. Claimant continues to be employed where his past experience and qualifications are utilized to their fullest potential.

Weighing all of the factors relative to industrial disability, claimant has proven an industrial disability equal to fifteen percent of the body as a whole.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On May 19, 1982 claimant received an injury arising out of and in the course of his employment.

2. Claimant's rate of compensation is $156.46.

3. As a result of his injury, claimant suffered torn or stretched abductor muscles in the lower left extremity and materially aggravated a preexisting arthritis of the left hip joint.

4. Claimant's injury caused a permanent functional impairment to the body as a whole of approximately ten percent.

5. As a result of his injury, claimant was off work from May 19, 1982 to February 7, 1983.

6. Claimant continues in his same employment although his job now involves more paperwor. His rate of pay has not been reduced.

7. Claimant is inetelligent and well motivated.

8. Claimant is an older worker with limited education.

9. Claimant had no problem with his hip prior to his injury.

10. Because of his injury, claimant has reduced his employment and nonemployment activities.

11. Claimant's industrial disability is fifteen percent of the body as a whole.

12. Claimant has been paid all healing period benefits.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that there is a causal connection between his injury and the disability upon which this claim is based.

Claimant has proven by a preponderance of the evidence that he suffers a fifteen (15) percent industrial disability as a result of his injury.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of one hundred fifty-six and 46/100 dollars ($156.46) commencing February 7, 1983. All accrued benefits to be paid in a lump sum together with statutory interest thereon.

IT IS FURTHER ORDERED that the costs of this action are taxed to the defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendants are to file an activity report as requested by this agency.

Signed and filed this 22nd day of October, 1985.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED DEC 30 1985 IOWA INDUSTRIAL COMMISSIONER

ROBERT L. LEUENBERGER,	:	
Claimant,	:	
vs.	:	
HOLIDAY EXPRESS AND ROBERT SIENKNECHT d/b/a SIENKNECHT TRUCKING,	:	File No. 764423
	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
GREAT WEST CASUALTY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Robert L. Leuenberger, claimant, against Holiday Express and Robert Sienknecht d/b/a Sienknecht Trucking, employer, and Great West Casualty Company, insurance carrier. The case was heard at Waterloo, Iowa on November 6, 1985 and was fully submitted at conclusion of the hearing.

The record in this proceeding consists of the testimony of Robert Leuenberger, Cheryl Leuenberger, Norman Davis, and Robert Sienknecht. The evidence in the case also includes claimant's exhibits 1, 2, 3, 4, 5, 6, 12, 14, and 17, and defendants' exhibits A, B, C, D, E, G, H, I, J, K, and L. Exhibits 7, 8, 9, 10, 11, 15, and 16 are with the file as an offer of proof only. There was no offer of exhibits 13 or F. Exhibit 14 was received for the sole purpose as showing a request for alternate medical care.

ISSUES

Claimant alleges that he sustained a compensable injury on March 8, 1984 and seeks benefits based thereon. Defendants admit that claimant was injured on that date but deny liability for payment of any weekly compensation or other benefits under chapter 85 of the Code, except for the medical expenses which they have already paid and for transportation expenses of 360 miles for claimant's travel in keeping appointments with W. John Robb, M.D., in Cedar Rapids, Iowa. The issues presented by the parties at the time of hearing are whether a causal connection exists between the injuries sustained on March 8, 1984 and any disability which claimant has experienced or any of the medical expenses which claimant has incurred. Also at issue is determination of claimant's entitlement to compensation for temporary total disability, temporary partial disability, or healing period. Claimant also seeks payment of expenses under section 85.27. He also requests alternate medical care from that allegedly authorized by defendants. Defendants contend that the medical expenses which claimant has incurred, other than those which they have previously paid, are unauthorized. Defendants also contend that claimant received unemployment benefits during the time he was off work following the injuries and that he has therefore made an election of remedies which denies him workers' compensation benefits or, in the alternative, that the unemployment benefits should be credited toward any entitlement to workers' compensation. Counsel for claimant specifically stated that no claim for permanent partial disability compensation is being made at this time as he feels that claimant has not yet fully recovered. Claimant specifically seeks authorization for care by John R. Walker, M.D. The rate of compensation, in the event of an award, is also a disputed issue in this case.

SUMMARY OF EVIDENCE

The following is a brief summary of pertinent evidence. All evidence received at hearing was considered when deciding the case.

Robert Leuenberger has been married to his wife, Cheryl, for five years and they have two dependent children. He also has three other children from a prior marriage, for whom he pays child support, but who he does not claim as dependents for income tax purposes.

Claimant testified that on March 8, 1984 he was driving a truck for Robert Sienknecht. The truck was owned by Robert Sienknecht and leased to Holiday Express. At a location on highway 20, approximately four miles west of Ackley, Iowa, a mechanical failure occurred, the truck went over onto its side and slid approximately 250 feet. He stated that he was thrown about in the cab, that his leg was twisted on the steering column, that he was thrown partly through the windshield, and was stunned. He stated that when he regained his senses, it felt as if something was stuck between his shoulder blades and that he found it difficult to walk. He was taken by ambulance to the hospital. Claimant stated that he was treated with stitches in his head and that his neck and shoulder blades were X-rayed. He related that the emergency room physician offered him the option of staying in the hospital or going home. He elected to go home and was given a prescription for pain pills.

Claimant testified that on the following day he phoned Holiday Express Corporation, informed them of the accident, and was told that there was workers' compensation insurance coverage for him. He stated that his wife had also phoned Holiday on the day of the accident.

Claimant phoned Robert Sienknecht and informed him of the accident. Claimant and his wife then rode with Sienknecht to find the truck and observe the damage to it. Claimant stated that it was extensively damaged and Sienknecht elected not to have it repaired.

Claimant testified that following the accident he was stiff and sore throughout his body. He had particular discomfort in his back in the area of his shoulder blades and low back. He also had significant discomfort in his right leg, right arm, and shoulder. He complained of a headache.

Claimant testified that he applied for unemployment insurance benefits at the suggestion of Robert Sienknecht. He stated that on several occasions following the accident, he was informed by representatives of Holiday Express that workers' compensation benefits would be coming but that none were ever received. Claimant consulted his family physician, Danilo B. Ruiz, M.D. Claimant stated that he was X-rayed, examined, and given a prescription. He stated that Dr. Ruiz advised him to allow four to six weeks for healing.

Claimant testified that following the accident he gradually improved somewhat. He stated that he did not feel that he was capable of doing the same type of work that he had done for Sienknecht. He complained of a lack of strength and endurance. He felt that he could work but that it would cause discomfort and pain for him to do so. Claimant stated that he returned to Dr. Ruiz, had stitches removed, and was advised that he should allow additional time for healing.

Claimant testified that on April 20, 1985 Robert Sienknecht informed him that he had possibly arranged for claimant to obtain employment with Norman Davis. Claimant contacted Davis and accepted employment with him.

Claimant testified that since returning to work, he has had continuing difficulties in the nature of pain in his low back and right arm. He stated that his right leg gives out at times and that he has a lack of strength in his right arm. Claimant related that he sought care from John R. Walker, M.D., and that Dr. Walker recommended that claimant be hospitalized. Claimant stated that he did not follow through with the recommendations because defendants were denying his claim and he did not have the money to do so. Claimant stated that his office visit with Dr. Walker consumed a total of approximately three and one-half hours, of which approximately 45 minutes were spent with Dr. Walker. Claimant feels that his physical condition is gradually worsening.

Claimant was examined by W. John Robb, M.D., on two occasions. He stated that each examination took approximately ten minutes. He stated that Dr. Robb did not measure or check his strength and did not have him perform physical tests other than leaning forward from a standing position. Claimant stated that when doing so he felt discomfort when at approximately a 45 degree angle, but kept bending more until he was unable to bend further. He stated that Dr. Robb had recommended no particular treatment for him except exercise such as swimming or walking.

Claimant stated that on his second visit to Dr. Walker, he felt that the results of the tests showed that his condition had worsened. He stated that this appointment lasted for approximately one hour and that Dr. Walker again recommended hospitalization.

Claimant stated that on September 25, 1985 his leg gave out and he fell, breaking his ankle. He stated that he was in a cast for three and one-half weeks and that his ankle is still quite tender and swollen. Claimant also complained of a lump located behind his kneecap.

Claimant testified that his medical bills from Dr. Ruiz were sent to Holiday Express or Robert Sienknecht as were some other bills. With reference to exhibit L, claimant stated that he believed he had paid Dr. Ruiz on one occasion and that he had also paid approximately $20.00 to Ackley Medical Center. He stated that he did not return to Dr. Ruiz for any further care due to a lack of funds.

Claimant stated that he traveled 520 miles in obtaining medical care, of which 360 miles was to Cedar Rapids to see Dr. Robb, and 160 miles was to Waterloo to see Dr. Walker.

Norman Davis testified that he did employ claimant through a referral from Robert Sienknecht. Davis stated that claimant is unable to do some things such as lifting a spare tire or tightening loads which need to be very tightly chained. He stated that he has seen one of claimant's legs give out when claimant was getting out of a truck. He stated that on occasion, claimant has turned down potential loads because he was in pain.

Cheryl Leuenberger stated that during the period from March 8, 1984 to September 20, 1984 claimant was stiff, sore, and started limping. She stated that his condition has worsened continually since then.

Cheryl Leuenberger confirmed that she phoned Holiday Express and advised them of the accident on the same day as it occurred. She confirmed claimant's testimony regarding the duration of his medical visits with Drs. Walker and Robb.

Cheryl Leuenberger stated that claimant's right arm is so weak that she can nearly beat him at arm wrestling and that he is unable to tighten things such as the oil filter on a car or to change a tire. She stated that she has measured the biceps of his arms and that the right bicep is smaller than the left when they are flexed. She also stated that she has seen his leg give out as often as once or twice a month.

Robert Sienknecht confirmed that he had employed claimant. He stated that he became aware that Holiday was denying coverage for the accident approximately two or three months after it had occurred. He stated that Holiday had previously informed him that there was coverage. Sienknecht confirmed that he suggested that claimant file for unemployment and also that he arranged for claimant's job with Norman Davis. Sienknecht stated that he received claimant's unemployment claim sheet in the mail and did not dispute the claim because he did not have any work for claimant. Sienknecht related that at a subsequent time, claimant was somewhat disgusted with him because he had informed Holiday that unemployment insurance had been drawn.

Sienknecht stated that on March 9, 1984 he spent from approximately 10:00 a.m. until 4:00 or 5:00 p.m. with claimant, during which time they found and observed the wrecked truck. He confirmed that claimant was stiff and sore at that time.

Claimant's exhibit 1 is a deposition of John R. Walker, M.D., taken June 3, 1985. Dr. Walker diagnosed claimant as having a sprain of the cervical spine, causing radicular pain in the hand and headache, disruption of the right shoulder with crepitation, sprain in the area of the ninth thoracic vertebra, sprain in the low back at the lumbosacral area, and a popliteal cyst behind the right knee. Dr. Walker felt that the accident of March 8, 1984 was a cause of all those conditions. (Exhibit 1, pages 19-21.)

Exhibits 2 and 3 are medical reports from Dr. Walker which are generally consistent with the findings recited in the deposition. Dr. Walker, in exhibits 1, 2 and 3, recommends that claimant be hospitalized and treated with physical therapy and traction. Dr. Walker also recommends that claimant have an arthrogram to determine whether or not there is in fact a popliteal cyst. Dr. Walker feels that the injuries which claimant received in the accident require treatment and that they have produced some degree of permanent impairment.

Claimant's exhibit 4 is a report from Dr. Ruiz dated May 18, 1984. Dr. Ruiz indicated that he examined claimant on March 10, 1984 and found a contusion, hematoma, abrasion of the right shoulder and left thigh, contusion and sprain of the right pectoralis muscles. X-rays of the chest and ribs showed no fractures. Dr. Ruiz stated that he removed sutures from claimant on March 16, 1984 and that he last saw claimant on March 23, 1984, at which time claimant made complaint of tightness in his chest and back muscles. He advised claimant to return for reevaluation in six weeks but claimant did not do so.

Claimant's exhibit 5 is a statement from Dr. Walker showing total charges in the amount of $964.00 and a $50.00 payment from claimant with a remaining balance of $914.00.

Exhibit 6 is what appears to be an X-ray of claimant's right knee.

Exhibit 12 is a statement of claimant's earnings from Sienknecht Trucking commencing September 6, 1980 and running through March 5, 1983. The total earnings for the thirteen calendar weeks preceding the week which included March 8, 1984 are $4,749.24. This includes all payments made during those thirteen weeks which is a period commencing December 4, 1983 and ending March 3, 1984, both dates inclusive.

Exhibit 14 is a letter from claimant's counsel to defendants' counsel wherein dissatisfaction is expressed with the care from Dr. Robb and authorization for care by Dr. Walker is requested.

Exhibit 17 is a report from Dr. Walker, dated March 18, 1985. In the report, Dr. Walker comments upon a report dated February 21, 1985 authored by Dr. Robb.

Exhibit A is a copy of the emergency room record following claimant's accident. The physician's findings on the report are of limited legibility but they do appear to show a laceration at the right temple and tenderness in the cervical and scapular areas. The report indicates that claimant was sent home to rest and to see Dr. Ruiz the following Monday.

Exhibit B is a radiology report showing claimant's cervical spine, right shoulder, and dorsal spine to be negative for fracture or other abnormalities.

Exhibit C is another X-ray report showing claimant's chest and ribs to be negative for fracture or other abnormalities.

Exhibit D is a report from Dr. Ruiz, dated April 11, 1984. In the report, Dr. Ruiz indicates that claimant was not able to work and was to be seen again on April 19, 1984 for further evaluation.

Exhibit E is a statement from Dr. Ruiz showing total charges of $60.00.

Exhibits G and H are reports from Dr. Robb. Dr. Robb indicated that claimant had suffered a lumbosacral strain, contusion of the left thigh, puncture wound of the right lower leg, and strain of the muscles in his right knee in the accident of March 8, 1984. He felt that there was no popliteal cyst. He did not recommend any further treatment but, in exhibit H, did state that claimant will carry a five percent permanent functional impairment of the lumbosacral spine as a result of the lumbosacral strain incurred in the accident.

Exhibit J shows claimant to be purchasing a truck from Norman Davis.

Exhibit I is a collection of records from the Iowa Department of Job Service showing that claimant applied for unemployment benefits on March 13, 1984, representing himself to be laid off for lack of work. The exhibit also contains the customary weekly claim forms, showing that claimant represented himself to be ready, willing and able to work for the weeks ending March 17, 1984 through April 21, 1984. The last card shows claimant to have been hired by Davis Sand and Gravel on April 18, 1984.

Exhibit K is the deposition of W. John Robb, M.D., taken October 17, 1985. The deposition confirms Dr. Robb's diagnosis of claimant's injuries and permanent impairment. At page 41, Dr. Robb indicates that a popliteal cyst is not generally related to trauma. Dr. Robb stated that he had not been claimant's treating physician but that if he were, he would recommend that claimant take some time off work to rest and that he also participate in physical therapy and an exercise program. He did not feel that hospitalization was immediately necessary. He stated that the complaints which claimant voiced to him were possibly related to the truck accident.

Exhibit L is a statement from Great West Casualty Company wherein it claims to have paid a number of medical expenses, including $60.00 to Dr. Ruiz.

APPLICABLE LAW AND ANALYSIS

Defendants have admitted that claimant was injured in the accident which occurred March 8, 1984 and have generally confirmed that such an accident did occur. Accordingly, there is no disputed issue over whether or not claimant did sustain any injury which arose out of and in the course of his employment as a result thereof. The primary issue is the result of that accident and determining precisely what injuries and conditions arose from it.

Claimant's truck accident could reasonably have been expected to result in some significant injury. Dr. Walker found it to be the cause of the conditions which he diagnosed. Dr. Robb felt that it was possible that such an accident could cause the conditions which he diagnosed. Dr. Ruiz apparently related the conditions which he diagnosed to the truck accident. Accordingly, it is found that the accident of March 8, 1984 is a proximate cause of the healing period and of claimant's continuing complaints as the same relate to his right arm and shoulder and his low back. Without an arthrogram, the existence of a popliteal cyst can not be accurately determined and in that regard, claimant's evidence fails to establish a work related injury.

From the evidence, it appears that claimant returned to work on either April 18, 19 or 20. The unemployment card, contained as the last page of exhibit I, shows claimant to have been hired on April 18. The return appointment scheduled by Dr. Ruiz was for April 19. Claimant testified that he returned to employment on April 20. In exhibit D, Dr. Ruiz had indicated that the return appointment was scheduled for April 19, 1984. Under what normally occurs, it would have been quite unlikely for claimant to have been medically released to return to work before that return appointment. It is therefore found and concluded that claimant had a healing period, within the definition of section 85.34.1 of the Code, running from March 8, 1984 and through April 19, 1984, both dates inclusive. This is a total of six and one-sevenths weeks. It is found that claimant in fact returned to work on April 20, 1984, even though the arrangements for his hiring were made on April 18, 1984. The recovery period is termed a "healing period" on the basis of Drs. Walker and Robb both finding that claimant suffered some permanent impairment as a result of the accident.

Defendants' contention that claimant's action in obtaining unemployment insurance benefits in some way denies him workers' compensation benefits is without merit. Such has been previously established by this agency in the case of Redd v. Bil Mar Foods, Inc., I Iowa Industrial Commissioner Report 275 (1981). Credits or offsets against workers' compensation awards are generally not allowed, except where specifically provided by statute. 4 Larson's Workmen's Compensation Law, section 97.00 at et seq. There is no specific statutory reduction of workers' compensation for unemployment benefits. Section 85.38.1 of the Code states:

> The compensation herein provided shall be the measure of liability which the employer has assumed for injuries or death that may occur to employees in his employment subject to the provisions of this chapter, and it shall not be in anywise reduced by contribution from employees or donations from any source.

Section 85.18 states, "No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided." Where there is no specific statutory provision for credit or offset, no credit or offset can be granted. Anderson v. Woodward State Hospital-School, (App. Decn. 1985). Claimant was clearly not receiving workers' compensation benefits at the time the unemployment benefits were being paid and a disqualification for unemployment benefits does not appear to have existed at that time. This agency cannot rule upon whether or not the Department of Job Service can make some appropriate action in the nature of recovery of unemployment benefits if benefits were in fact improperly paid or if, as a result of this decision, some right to reimbursement or collection exists.

Claimant's rate of compensation should be computed under section 85.36.6. While the dates upon which claimant earned wages during the thirteen weeks preceding the week which included March 8, 1984 can not be ascertained, the wages actually paid during those thirteen weeks are clearly shown in exhibit 12. The payments commencing with December 8, 1983 and running through March 3, 1984 total $4,749.24. When divided by thirteen, the average is $365.33 per week. Claimant's exemptions for purposes of computing the rate of compensation include himself, his spouse, and the two children from his present marriage. His exemptions also include the three children from his prior marriage for whom he pays child support. Code sections 85.61(9) and 85.61(11) seem to indicate that the rate of compensation, which is based upon "spendable earnings", would be determined based upon actual income tax exemptions. The agency has ruled, however, that all assumptions regarding exemptions are considered in the light most favorable to the injured worker. Biggs v. Donner, II Iowa Industrial Commissioner Report 34 (1982). The fact that claimant does not claim the children for exemptions for income tax purposes does not conclusively establish that he is not entitled to do so. His rate of compensation, computed under the July 1, 1984 benefit schedule for a married individual with seven exemptions and weekly earnings of $365.33, is $242.87.

Claimant seeks an award of temporary partial disability. Temporary partial disability compensation has been interpreted as being limited to those situations where the employee returns to work for the employer in whose employment the injury occurred. Lawyer and Higgs, Iowa Workers' Compensation Law and Practice, section 13-2. Section 85.33.3 of the Code states, in part, "[i]f 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..." Section 85.33(2), in part, states, "...[t]emporary partial benefits shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employees' weekly earnings at the time of injury." Even if the restriction on returning to work for the same employer did not exist, it is clear that claimant would not be entitled to temporary partial disability benefits since he returned to full-time full-duty work. The fact, if it be a fact, that he earns less in the new position may be evidence of permanent disability of some degree, but it does not warrant payment of temporary partial disability benefits.

Claimant seeks to have his medical care provided by John R. Walker, M.D. He also seeks payment of charges incurred with Dr. Walker. Exhibits E and L show Dr. Ruiz to have been paid in full by defendants.

Section 85.27 of the Code gives the employer the right to choose the medical care an injured worker shall receive and also provides a duty to provide prompt reasonable care. An employer may, of course, allow an injured worker to seek care from any source the worker chooses. If an employer denies the compensability of an injury, it can not, as a hedge against its ultimate liability, seek to control the medical care. Barnhard v. M.A.Q., Inc., I Iowa Industrial Commissioner Report 16 (1981). Where the defendants chose to deny this claim until some time in 1985, and, by failing to pay weekly compensation, have continued to deny the claim through the time of hearing, they have waived any right to control the medical care and claimant's seeking treatment from Dr. Walker during the period of denial of liability avoids any defense of lack of authorization. A belated attempt by defendants to control the medical care will not cut off the right of the worker to continue with the physician he has chosen on his own initiative. Richards v. Department of General Services, (App. Decn. 1985). 2 Larson's Workmen's Compensation Law section 61.12(a) and section 61.12(e). It should be noted that Dr. Robb did not consider himself to be a treating physician.

While Drs. Walker and Robb have varied in their recommendations for future care, both have recommended additional care for claimant's continuing complaints. Sufficient time has passed since the injury that the results of medical care may have been jeopardized and claimant may very well be left with a greater degree of permanent disability than what would have resulted from prompt care. Such a determination will not, however, be made at this time and claimant is specifically authorized to seek further care under the direction of John R. Walker, M.D., at defendants' expense. This care will, of course, be limited by the statutory standards of reasonableness and necessity in the actual care provided and the expenses incurred as a result thereof.

Since claimant's care with Dr. Walker was not unauthorized, defendants will be held responsible for the charges incurred to date in the total amount of $964.00. The first step in engaging upon any course of treatment is a complete evaluation of the patient's condition. Even though the charges from Dr. Walker are in the nature of evaluation, rather than treatment, it appears the evaluation was, at least in part, for the purpose of planning treatment since recommendations for treatment followed. Dr. Walker appears to have performed two relatively throrough examinations. Normally, a second such examination could be considered unnecessary, but such is not the case here, in view of the amount of time which elapsed between the times when the two examinations were performed. Further support for the reasonableness of a second examination exists in view of the fact that defendants chose to have two examinations performed by Dr. Robb. Defendants' liability therefore is the total amount of $964.00. They shall not receive any type of credit for the $50.00 which was paid personally by claimant.

Defendants have agreed to pay claimant transportation expenses for his travel to be examined by Dr. Robb. They shall also be responsible for payment of the transportation incurred in seeing Dr. Walker. This is a total of 520 miles which, at 24 cents per mile in accordance with Industrial Commissioner Rule 500-8.1, totals $124.80.

Claimant's cost certificate seeks expert witness fees for John R. Walker, M.D., witness fees for Norman R. Davis, and court reporter fees. Since claimant prevailed, he is entitled to recover costs. The expert witness fee for Dr. Walker will be limited to the sum of $150.00 in accordance with Code section 622.72. Fees for taking depositions and the original transcript will be assessed in full in accordance with Industrial Commissioner Rule 500-4.33, but costs do not include copies. Costs assessed against defendants are:

Norman R. Davis (Witness fee and mileage)	$ 10.50
John R. Walker, M.D. (Medical report)	85.00
John R. Walker, M.D. (Expert witness fee)	150.00
VanWygarden & Abrahamson, Inc.	72.50
Total	$318.00

FINDINGS OF FACT

1. Claimant was injured on March 8, 1984 when the truck he was driving overturned.

2. At the time of injury, claimant was employed by Robert Sienknecht and Holiday Express working 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 injury, from March 8, 1984 until April 20, 1984, the date when claimant returned to work.

4. At the time of injury, claimant was married and had six dependents.

5. Claimant's average weekly earnings during the thirteen weeks preceding the week in which the injury occurred was $365.33.

6. Claimant received medical care for the injuries sustained in the accident from Drs. Ruiz and Walker. The charges from Dr. Ruiz have been paid by defendants.

7. The medical care sought by claimant was reasonable and necessary and the amount charged therefore was fair and reasonable.

8. Claimant is in need of further care for the injury.

9. Defendants denied liability for the injury until July 9, 1985.

10. Defendants had not directed Dr. Robb to provide medical care and treatment to claimant.

11. Claimant's return to work on April 20, 1984 was with an employer different from the one in whose employment he was injured.

12. In obtaining medical care for the injury, claimant traveled a total of 520 miles.

13. In prosecuting this action, claimant incurred costs which are taxable in the amount of $318.00.

14. The injuries claimant sustained in the accident of March 8, 1984 included an injury to his low back in the lumbosacral area, his right shoulder, and the portion of the spine affecting his right upper extremity.

CONCLUSIONS OF LAW

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

The injury claimant sustained on March 8, 1984 was a proximate cause of his inability to work during the period of March 8, 1984 through April 19, 1984 and the continuing complaints which he has in relation to his low back, right upper extremity, and possibly other portions of his body affecting the right upper extremity.

Unemployment insurance benefits do not in any way offset, reduce or prevent payment of workers' compensation for the same period of time when the worker is in a healing period status following an injury. No conclusion is made regarding whether or not the Department of Job Service, which administers unemployment insurance, has any right of recovery or other action against claimant based upon the unemployment benefits which were paid.

Claimant is entitled to seven exemptions in computing his rate of compensation and the same is $242.87 per week.

Where defendants denied liability for the injury and failed to pay weekly compensation, claimant was entitled to choose his own medical care. Once a choice of care is made, the employer may not, unilaterally and without cause, through a belated effort, render that originally chosen care unauthorized.

Defendants are responsible for payment of six and one-sevenths weeks of compensation to claimant for healing period payable commencing March 8, 1984.

Temporary partial disability benefits are payable only when the return to work is with the employer in whose employ the injury occurred.

Defendants are responsible for payment of claimant's medical expenses with Dr. Walker in the amount of $964.00.

Defendants are responsible for payment of claimant's travel expenses in the total amount of $124.80.

Defendants are responsible for payment of the costs of this proceeding in the amount of $318.00.

Where compensation for permanent partial disability is not sought, award thereof will not be made.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant six and one-sevenths (6 1/7) weeks of compensation for healing period at the rate of two hundred forty-two and 87/100 dollars ($242.87) per week payable commencing March 8, 1984. The entire amount thereof is past due and owing and shall be paid to claimant in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay claimant's medical expenses with John R. Walker, M.D., in the amount of nine hundred sixty-four and 00/100 dollars ($964.00).

IT IS FURTHER ORDERED that defendants pay claimant's travel expenses in the amount of one hundred twenty-four and 80/100 dollars ($124.80).

IT IS FURTHER ORDERED that defendants pay the cost of this proceeding in the amount of three hundred eighteen and 00/100 dollars ($318.00).

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by the agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 30th day of December, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAULINE LINN, Claimant,	:	
vs.	:	File No. 686205
WEBSTER CITY PRODUCTS,	:	A P P E A L
Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
OCT 04 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision filed November 3, 1983 wherein it was concluded that the claimant had failed to established her entitlement to further healing period benefits. The defendant employer appeals from a review-reopening decision filed December 12, 1984 wherein the claimant was awarded healing period benefits and additional benefits provided by Iowa Code section 86.13. The appeals have been consolidated and are considered in this decision. The record on appeal consists of the hearing transcripts; claimant's exhibits 1 through 45 and exhibit A (there is no claimant's exhibit 19); defendant's exhibits 1 and D; and briefs filed by the parties. The parties stipulated at the first hearing on March 17, 1982 that the claimant's rate was $156.10 and that she received benefits from September 11, 1980 through September 7, 1982. It was also stipulated that all medical bills were paid to date. There was no issue as to causal relationship between the injury and the resulting disability. The issues were stipulated to be, extent of disability and healing period.

ISSUES

The issues presented by the claimant/appellant are:

> I. Whether the Deputy erred in the Decision of November 3, 1983 by finding that the only issue for determination was Claimant's entitlement to Healing Period Benefits.
>
> II. Whether the Claimant is entitled to benefits under Iowa Code §85.34(4).
>
> III. Whether the Deputy's Decision of December 13, 1984 [sic] should be sustained as to the award of Healing Period Benefits.
>
> IV. Whether the Deputy's Decision of December 13, 1984 [sic] should be affirmed as it related to §86.13 penalty.

The issues presented by the defendant/appellants go primarily to the decision of December 12, 1984 and they are:

> 1. Is the claimant entitled to healing period benefits.
>
> 2. Should a penalty be imposed.

REVIEW OF THE EVIDENCE

Ardith Gillespie, the insurance coordinator for the defendant, was called by the claimant. Gillespie identified claimant's exhibit 1 as the claimant's attendance record for 1980. She indicated that the following codes were in use; S--Sunday; 3--the employee absent for a full eight hours due to illness; 7--the employee missed eight hours for an on the job injury; and 4--absence for personal business. The first entry of a "7" was made on September 12, 1980, a Friday, when the claimant missed three to four hours of work. The claimant was present on September 15 but beginning on September 16 the claimant did not return to work in 1980.

Gillespie identified claimant's exhibit 2 as the claimant's attendance record for 1981. Commencing in January 1981 and running through September 18, 1981 there was nothing but entries denoting "7". The witness testified that the claimant was terminated on September 10, 1981 and attributed the logging discrepency to the time lapse between termination and name removal from crew sheets.

Gillespie attributed the claimant's termination to Article 10, section F of the labor contract. This particular section, according to the witness, provided that if an employee was disabled for a year, the company will extend seniority for a year if the disabled employee can show that he or she can return to work the second year. After being presented with the agreement, Gillespie could find no language which gave the company authority to terminate an employee.

Claimant's exhibit 7 was identified as the 30 day termination of benefits notice. Gillespie indicated that this was the notice she sent the claimant on July 9, 1982. Claimant's exhibit 8 was the second notice sent to the claimant on August 9, 1982 stating her benefits would cease on September 7, 1982 because she was not under the care of a doctor. This was based on a note by John T. Bakody, M.D. Claimant's exhibit 12 is the first report of injury. The listed date of injury is September 11, 1980 and beginning date of disability was listed as September 11, 1980 and September 16, 1980. The claimant has not been paid weekly benefits since September 1982. A form 2A sent February 25, 1983 shows the claimant to have received 103 weeks and 3 days of benefits.

On cross-examination, Gillespie explained that the termination was based upon the note from Dr. Bakody plus a telephone conversation with Dr. Bakody's office. Dr. Bakody's office nurse allegedly indicated that the claimant had not been rescheduled for any further care.

On redirect examination, the witness identified claimant's exhibit 5 as the top portion of the notice to claimant dated July 9, 1982. Gillespie admitted that this was a day prior to the note by Dr. Bakody dated July 10, 1982 and also a day prior to the conversation with Dr. Bakody's office.

David Fisher was called by the claimant. Mr. Fisher is the director of industrial relations for the defendant and participated in the negotiations and drafting of the collective bargaining agreement. He stated that there is no language in Article 10, section F that gives the defendant employer the right to terminate an employee for noncompliance with the section. Fisher maintained that it was an implied right. It was the claimant's failure to submit written proof of continued disability beyond September 1981 which resulted in claimant's termination.

The claimant testified on her own behalf. The claimant was borne on September 24, 1933. She went to school through the tenth grade. Claimant is married with six children. When she was eighteen years old the claimant worked as a waitress. In 1958-1967 she worked as a nurses aide. From the fall 1968 to July 1969 the claimant worked as a carpenter for Sandler Built Homes. During a short layoff with Sandler Built homes the claimant worked for Heinry Envelope Company as a machine operator.

Claimant identified exhibit 24 as a 1970 employment application she filled out with defendant. Save for an appendectomy at age fifteen, claimant termed her physical condition prior to 1970 as fine. The claimant first began working for defendant on April 12 or 13, 1970. Her first task was a sander which required use of a vibrating tool. Shortly thereafter she worked in the press shop flipping cabinets with another employee. Her next job for the defendant consisted of running out parts for control housings. This job required lifting and the use of her arms and hands. Claimant also worked as a press operator which required the use of her arms and hands. She estimated that as many as 3,000 to 4,000 parts went through per day. This particular line was discontinued and claimant was moved to the big line of presses. This job required prying and the use of her hands and arms.

In 1973 claimant first started having problems with her right shoulder. She testified as follows:

> A. This was when I was taking these dryer and washer top panels out of the machine. I would take them off a roller that come by me, put them in the machine, and the other person that was working with me had to push the buttons, then we would have-- After they was blanked out I would have to pry the one out with a screwdriver because they always stuck, and then you took that, and you would turn it around and handed it to the other one, and then I went back and got another piece. This is repetitious work, back and forth.
>
> Q. And what did-- Were you attaching parts to the washing machines and dryers then?
>
> A. No. This was making the parts for them.
>
> Q. Okay. And tell us what you observed with respect to your arm and shoulder at that time.
>
> A. Oh, my arm just-- Well, of course the prying and the constant turning, it just -- really bothered my right shoulder.

(Transcript, page 58)

Claimant was off for six weeks. Joseph X. Latella, D.O., treated her. Robert C. Jones, M.D., also saw the claimant. The claimant testified that she got better by resting and that no surgical treatment was required.

In April 1978 claimant underwent carpal tunnel surgery on her right hand. The surgery was performed by Dr. Jones and the claimant was off work for approximately two months. On November 3, 1980 Albert L. Clemens, M.D., performed a rib resection on claimant's right side in response to diagnosis that claimant was suffering from thoracic outlet syndrome. In July 1981 claimant's C5, C6, and C7 levels of her spine were fused using bone from claimant's hip. The surgery was performed by Dr. Bakody at Mercy Hospital. The claimant underwent a myelogram, EKG, and EMG at Mercy Hospital on March 17, 1983 following the first hearing. A further carpal tunnel operation was performed by Dr. Bakody on the claimant's right hand where scar tissue was removed. Claimant last saw Dr. Bakody on September 9, 1983 and has future visits scheduled. The claimant related the possibility of surgery on her elbow due to the fact that she experiences pain in her elbow and arm and has two fingers which go numb. Claimant's right extremity has gotten a little better and that the condition is limited to her right arm. She has yet to receive a return to work release. On cross-examination at the second hearing the claimant admitted that her present complaints are the same as she had in 1980.

The claimant has not worked for defendant since September 1980. She has tried to sell lingerie and jewelry out of her home, but this has not met with much success. Claimant has not worked full time since September 1980. Roy Fisher, a car dealer, talked to claimant about a job washing and cleaning cars. However, due to the problems with her right arm claimant probably could not do that work. The claimant was not aware of any jobs that she could do on a regular basis.

The claimant has experienced a loss of strength in her right hand. She has difficulty even in turning lids. The smaller fingers on that hand fall asleep often. She testified that her right shoulder is in constant pain--"an ache." Claimant takes over the counter Tylenol every four hours. The pain "radiates up my [claimant's] neck, my shoulder and under where my rib was taken out." Prior to the thoracic outlet surgery the claimant recalled that her whole arm would swell up with any use whatsoever. The pain would radiate up her neck. She also experienced a stiff neck and constant pain through her shoulder blade. The surgery relieved some of the pain in her shoulder but she stated she still has the other problems. Her neck is no better and her arm continues to swell on occasion. The claimant recalled that her neck problems started with repeated use of air guns and lifting heavy parts. Prior to May 1980 the claimant had complained to the nurse about her physical problems. From April 1980 through May 15, 1980 the claimant was still performing the work with air guns that bothered her. She believed her hand problems began in February 1978.

On September 2, 1980 the claimant had returned to her split job which consisted of building up wirings and work on the line. On September 4 or 12, 1980 the claimant "[h]ad reported to Ardy during the week that [sic] arm was swelling up again, and it was radiating up into my neck and face and..." She testified that she had never before had pain that had radiated into her face. The claimant's entire arm would go numb at night the week after September 2, 1980. This, she said, had never happened before. On Friday, September 12, 1980 the claimant went to work on the dryer line and her hand just kept getting worse. Tylenol did not curb the pain. She went to see the nurse at break, 9:00 a.m. and the nurse sent the claimant to the hospital. The claimant saw Dr. Latella at that time. Her condition did not improve any over the weekend. The claimant returned to work on Monday using an air gun. She testified as follows:

> This is on sub-assembly, and it is standing, and my hand just started swelling, going numb, so I went in to Ardy, and so she says I'm going to find Roger, and she found Roger and brought him in, and she says now you tell me that this job is not causing her arm to swell, and he agreed with her then that I had problems, and they had me wait for a long time there.
>
> (Tr. #1, pp. 94-95)

The foreman told the claimant either she had to work the line that afternoon or go to the "tub fab." The claimant testified that what she did was go to work with a much bigger air gun that was so strong that it twisted her arm around. At the end of the day the claimant returned to Ardy who sent her back to Dr. Latella. Dr. Latella told the claimant not to return to work until she saw Dr. Bakody in Des Moines. On November 3, 1980 the claimant underwent the thoracic outlet release.

The claimant, testifying as to the strength in her right arm and shoulder compared to the left, stated, "I feel a lot less than I have in the left on my right now. It's just not there anymore compared to what it was."

The claimant's bone for her neck fusion in 1981 came from her right hip. As a result of this she said that she does not have much feeling in her hip because a nerve was damaged during the procedure. Her hip especially bothers her when she has to ride in a car for long periods of time. Since the cervical surgery the claimant cannot turn her head very far. She can do something active, but the next day she is in pain. She said she is not to use her arm over her head nor lift over five to six pounds. She also stated that she cannot operate the riding lawn mower anymore. When the claimant over exerts her arm or neck she experiences "migrane" headaches. She can vacuum if she uses her left hand. However, her children usually do it for her. The claimant also cannot quilt nor paint because of the repetitious use of her right arm. The claimant is a Brownie group leader. She enjoys it and it gives her something to do.

Regarding claimant's exhibit 5 the claimant testified that she did not see it until she went to defendants in August 1982. She received claimant's exhibit 7 a week later. Claimant's exhibit 8 was received August 18, 1982 and signed. The claimant has received no benefits since September 7, 1982.

On cross-examination the claimant testified as follows:

Q. Uh-huh. And you've been experiencing the same amount of pain and the same amount of difficulty raising your arms and hands since 1980?

A. Yes.

Q. So they haven't gotten any better; have they?

A. No.

....

Q. Well, you haven't gotten any better; you have reached a standstill; haven't you?

A. I have.

Q. And it's been that way since 1980?

A. Yes.

(Tr. #1, pp. 111-112)

The claimant has not looked into schools about learning a skill or another job.

Charles Linn, claimant's husband testified that he believes there has been no improvement in her condition since the surgeries began or since claimant left defendant's employment in 1980. Specifically he stated that there was no improvement from the rib resection of 1980 and little, if any, improvement from the 1981 cervical surgery.

Marcia Bradley and Maureen Lamb, two of claimant's children testified to the fact that their mother can't do the things she used to.

The second hearing was held September 21, 1983 and relevant testimony has been incorporated above.

While all the various exhibits have been reviewed, the following exhibits; claimant's exhibits A, 26, 27, 37, 40, and 41 bear special note.

Exhibit 26 is a letter from John A. Grant, M.D., to claimant's counsel dated December 22, 1982. Dr. Grant writes: "Based on the thoracic outlet syndrome, I have assigned a 6% rating of the upper extremity which converts to 4% of the whole man. Using the combined value tables, 22% previously calculated plus the new 4% gives a total partial permanent physical impairment of 25% of the body as a whole."

Exhibit 27 is a letter from Dr. Bakody to claimant's counsel dated October 11, 1982. Dr. Bakody states:

> Mrs. Linn does have a permanent physical impairment of the cervical spine as related to the body as a whole. Many physicians use the figure of around 20 percent to represent such a physical impairment and I have no argument with this figure which in turn must be related to her industrial capacity or lack thereof.

Exhibit 41 is titled "Orthopedic Report on Pauline Linn." The report is authored by Dr. Grant and is dated November 26, 1982. After reviewing the claimant's relevant medical history up to that point, Dr. Grant writes:

> There is no question she has a long past history of neck and shoulder distress dating to 1973 but I also feel it is distinctly possible that the

problems that prompted carpal tunnel surgery also aggravated any preexisting neck distress and contributed to the need for surgery for thoracic outlet syndrome as well as the cervical spine surgery. My experience with people doing very repetitious work requiring overhead reaching, reaching down inside some type of cabinet to work, or using vibrating equipment is that they frequently present with not only neck distress but upper extremity distress....

....If these two areas of impairment are to be combined, the combination of 20 percent and 3 percent produces a 22 percent partial permanent physical impairment of the body as a whole.

Exhibit 37 is a letter from Albert Clemens, M.D., to claimant's counsel dated October 5, 1981. Dr. Clemens stated, "...and I did feel there was a relationship between her subsequent need for a thoracic outlet surgery and her occupation." Dr. Clemens confirms in the letter that he performed a first rib resection on claimant on November 3, 1980.

Exhibit 40 is an earlier orthopedic report on claimant by Dr. Grant. It is dated February 7, 1981. It states in part, "In summary, I feel the thoracic outlet symptoms and ultimate surgery are a direct result of employment activities. These symptoms have cleared, but return to work should be carefully studies per the restrictions above."

Claimant's exhibit A contains a letter dated May 9, 1983 from Dr. Bakody to claimant's counsel. It states in part:

> 1. In reviewing the file, Mrs. Linn has continued to complain of aching of the right upper extremity during her many office visits so that there is no doubt a cause and effect relationship between her occupation and subsequent carpal canal surgery.
>
> 2. I would usually suggest that a patient not return to work for 4-6 weeks following this type of surgery. Work activities then depend on what is expected of the patient and how the work duties affect the patient.
>
> ....
>
> I would inform you that Mrs. Linn continues to be under my care and has not been released to return to work.

APPLICABLE LAW AND ANALYSIS

Claimant brings to issue whether the deputy erred in the first review-reopening in not determining industrial disability. It is quite clear from the record that the deputy did so err. It is preponderately clear from the lay testimony and the medical evidence that the claimant has suffered a permanent impairment affecting her body as a whole. Although the claimant has gone through a gruelling succession of surgeries, the impairment ratings offered by the various doctors hover at a 20 to 25 percent body as a whole. The 25 percent rating by Dr. Grant, in his report of December 22, 1982, is accepted.

The March 1983 carpal tunnel surgery should not affect the 25 percent rating for the simple reason that by the claimant's own testimony the symptoms in her right extremity have remained essentially unchanged. The issue of healing period benefits for this second carpal tunnel surgery has been raised by the defendant. Section 85.34, The Code, provides in part:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

The claimant is entitled to reasonable recuperation healing benefits as a result of this surgery. But an appeal decision by this agency held:

> That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond that point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition.

Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982).

Dr. Bakody stated that the normal recuperation period for this type of surgery was between four and six weeks. Due to claimant's age and previous medical history, her healing period in regard to this surgery will be set at six weeks after the surgery was performed. That claimant continues to see Dr. Bakody is not controlling for it has already been established that her condition did not improve.

The question of 86.13 benefits has been raised by both parties. Iowa Code section 86.13 provides in relevant part:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

The medical evidence and testimony in this case is not necessarily confusing but it is lengthy. The claimant has not made a preponderate showing that delay or noncommencement was without reason, probable cause, or excuse. Section 86.13 benefits will not be upheld. See Hoskins v. Quaker Oats, Appeal Decision (Filed July 18, 1985).

The issue now is to what extent, if any, claimant is entitled to industrial disability benefits.

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 impairment 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).

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief should be granted. Id.

The claimant is a very versatile worker as is evidenced by her varied work history. While difficult to gauge on appeal, the claimant appears to present herself intelligently and effectively. Although the claimant has only a tenth grade education, her age would not preclude her from doing a more sedentary job--such as clerical for a small business.

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

For the reasons set forth above claimant's industrial disability is determined to be 50 percent. Regarding the denial of additional healing periods at the first review-reopening. There is found no reversable error in that there has been no improvement from this regimen of surgeries.

FINDINGS OF FACT

1. Claimant was born in 1933.

2. Claimant is married and has six children.

3. Claimant finished the tenth grade.

4. Claimant began her employment relationship with Webster City Products in 1970.

5. Claimant has performed a variety of jobs for Webster City Products.

6. In 1973 claimant sustained a shoulder injury while in the course of her employment.

7. In February 1978 claimant began experiencing hand problems.

8. In April 1978 claimant underwent carpal tunnel surgery.

9. In September 1980 claimant began experiencing numbness of her arm and hand.

10. In November 1980 claimant underwent a first rib resection.

11. In July 1981 claimant underwent cervical fusion surgery utilizing bone from her hip.

12. In March 1983 claimant underwent further carpal tunnel surgery.

13. The above surgeries were all causally connected to injuries which she suffered within the scope of her employment.

14. Claimant has not been released to work.

15. Claimant has not worked for defendant since September 1980.

16. Claimant has not worked gainfully since September 1980.

17. Claimant was terminated from her employment with defendant in September 1981.

18. Claimant's healing period for the March 21, 1983 surgery is determined to be six weeks.

19. Claimant did not and has not improved over the course of her surgical history.

20. Claimant has engaged in various attempts at part-time home sales since leaving the employ of the defendant.

21. Claimant has a varied work experience and is a versatile worker.

22. Claimant has engaged in various non-employment activities.

23. There is no evidence that indicates claimant would be precluded from pursuing a more sedentary, clerical, or service related job.

24. Claimant has an industrial disability of 50 percent.

CONCLUSIONS OF LAW

The claimant has established an injury arising out of and in the course of her employment with defendant with a resulting industrial disability of 50 percent.

The claimant has established entitlement to healing period benefits as a result of the March 21, 1983 surgery in the amount of six weeks.

The decision of November 3, 1983 is affirmed and modified and the decision of December 12, 1984 is affirmed in part, modified in part, and reversed in part.

ORDER

THEREFORE, it is ordered:

That commencing upon March 22, 1983 defendant is to pay unto claimant healing period benefits at a rate of one hundred fifty-six and 10/100 dollars ($156.10) per week for a period of six weeks. Immediately thereafter defendant will pay unto claimant two hundred fifty (250) weeks of industrial disability payments at a rate of one hundred fifty-six and 10/100 dollars ($156.10) per week.

That all amounts due and owing are payable in a lump sum together with statutory interest.

That costs are assessed to the defendants.

That defendant is to file a final report upon compliance with the above.

Signed and filed this 4 day of October, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUSAN LOUTSCH,	:	
Claimant,	:	
vs.	:	
MERCY HOSPITAL,	:	File No. 762047
Employer,	:	A P P E A L
and	:	
ST. PAUL PROPERTY & LIABILITY INSURANCE,	:	R U L I N G
Insurance Carrier, Defendants.	:	

FILED
OCT 07 1985
IOWA INDUSTRIAL COMMISSIONER

Appeal is taken by the claimant from a ruling on application for attorney fees and lien. Claimant's former attorney in this action had an attorney fee contract with the claimant that provides in part:

> CONTINGENT FEE. Fee. 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 25% of the recovery after original notice is filed and before notice of appeal; a fee equal to 40% of the recovery after notice of appeal; and a fee equal to 45% of the recovery if retried. IN THE EVENT NO RECOVERY IS MADE, ATTORNEY SHALL RECEIVE NO FEE FOR SERVICES PERFORMED UNDER THIS CONTRACT. Fee On Termination. If Client terminates Attorney's employment before conclusion of the case, Client shall pay Attorney a fee based on the fair and reasonable value of the services performed by Attorney before termination. Other Attorneys. Attorney may employ another attorney or attorneys to assist in this case at Attorney's expense.

The ruling awarded attorney fees in the amount of 25 percent of the amount to be collected in the future. This does not take into account the provision that in case of termination the attorney will be compensated "based on the fair and reasonable value of the services performed...before termination."

Whether or not this would be 25 percent of the ultimate recovery cannot at this time be determined. Claimant's prior attorney has performed extensive and valuable services. If the value of them were to be determined at this time in dollar amount it might exceed or be less than 25 percent of the ultimate recovery.

Therefore, claimant's original attorney shall be allowed a lien against the ultimate recovery in an amount to be determined at the conclusion of this matter so that the value of his contribution to the outcome can then be determined. If the parties to this dispute can earlier agree on a dollar amount and payment is made accordingly then claimant's original attorney should file a release and satisfaction of his lien.

The ruling appealed from is vacated and replaced with the provisions of this ruling.

Signed and filed this 7 day of October, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH MASON, Claimant, vs. ARMOUR-DIAL, CO., Employer, Self-Insured, Defendant.	:	File No. 542142 A P P E A L D E C I S I O N

FILED
NOV 22 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

The defendant appeals from a review-reopening decision which awarded the claimant an additional five percent permanent partial disability. The record on appeal consists of the hearing transcript; claimant's exhibit 1; defendant's exhibit 1; commissioner's exhibit 1; and briefs of the parties.

ISSUES

1. "The Deputy Industrial Commissioner erred in ruling that interest begins on May 20, 1983."

2. "The Deputy Industrial Commissioner erred in awarding an additional industrial disability of 5% of the body as a whole."

REVIEW OF THE EVIDENCE

Claimant sustained a compensable injury on March 2, 1978. The review-reopening hearing was held on May 1, 1984. The claimant was called to testify. The claimant stated that since the arbitration hearing he has worked most areas of the plant. Because he has been laid off for the last six months, the claimant has been put on a log list from which temporary help is drawn. He stated that the unscrambling job was a good job opportunity. Approximately fifteen months prior to the review-reopening hearing the claimant worked in the unscrambling area. He found the job difficult to do. Claimant's exhibit 1 is a letter dated May 20, 1983 to the claimant from the defendant's employee relations manager stating that the claimant was disqualified from the job based on his physical restrictions.

On cross-examination the claimant testified that if he was called into work, there was a high probability that he would work in monitor and tap-out rather than in the unscrambling area. He testified further:

> Q. Isn't it a fact that when you are recalled, since this letter has been issued, that will have no effect on a recall because you'll not be foreclosed from a job as a result of that disqualification on the unscrambler? You'll have a job on recall?
>
> A. That's true.
>
> Q. So there is no financial detriment to you whatsoever on recall as a result of that letter?
>
> A. No.
>
> Q. That's correct?
>
> A. Correct.
>
> (Transcript, pages 18-19)

He stated that on recall there was no possibility that he would be moved to the unscrambler job. He admitted that if he was not moved to the unscrambler job on recall he cannot lose any money for not being able to do it.

In 1982 the claimant was never called in on the temporary log to work on the unscrambler. This was due to the fact that the claimant would not answer the phone if he thought it was his employer calling for work on the unscrambler. He admitted that the call could have been another job that he could have done. The claimant testified that he did in fact lose a lot of work because of this as he found out later other people were doing the jobs that the claimant could have done.

On redirect the claimant felt that his medical condition has not gotten any better. He further stated that he is making less because, pursuant to the union contract with the defendant, the company has reduced most pay by $2.00 an hour. On further cross-examination the claimant admitted that any diminution of earnings would not be because of his inability to perform the unscrambler job.

The claimant's back has not been examined since the arbitration hearing.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 2, 1978 is causally related to the further disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (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."

The original arbitration decision purported to give an award based on functional impairment only. When an award is given based on disability to the body as a whole it is necessarily industrial disability. The original decision therefore, although it did not specifically state, awarded the claimant 25 percent industrial disability based in part upon a permanent functional impairment to claimant's body as a whole.

Functional impairment 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 synonymous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

As was stated above impairment and disability are not synonomous. Disability awards are based upon many factors. The disability award attempts to take into account, by looking at these various factors, a claimant's reduced earning capacity. It is also forward looking in its scope. The review-reopening is a mechanism whereby the claimant or the defendant can show that there has been a change in circumstances thereby entitling the claimant to an increase or a reduction of an award. The prior arbitration decision was not appealed and therefore must stand as a final agency decision as to the extent of claimant's industrial disability to the body as a whole at that time.

In this case there has been no preponderate showing that the claimant has suffered a reduction in earning capacity not contemplated by the original arbitration proceeding. The claimant's physical condition has not deteriorated precluding him from additional jobs. The claimant is precluded from the unscrambler job by his original injury and physical restrictions related to that original injury. There has been no showing that claimant has suffered or has incurred further physical restrictions based upon his original injury precluding him from additional jobs thereby justifying an adjustment to the original award. His present condition was also present at the time and is covered by the original award.

FINDINGS OF FACT

1. Claimant has been restricted from working the unscrambler job.

2. Such restriction was based upon the physical limitations determined prior to and compensated by the original arbitration proceeding award.

3. Claimant has not suffered a material change in condition.

CONCLUSION OF LAW

Claimant has not suffered a change in condition thereby entitling him to further benefits other than those awarded in the original arbitration proceeding.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

Signed and filed this 22 day of November, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK F. McMULLIN,	:	
Claimant,	:	
vs.	:	File No. 698688
DEPARTMENT OF REVENUE,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	FILED
STATE OF IOWA,	:	OCT 7 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed February 15, 1985 this 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 arbitration decision in which claimant's injury was found to have arisen out of and in the course of his employment and in which he was found to be permanently and totally disabled and entitled to certain medical expenses. Claimant has filed a cross-appeal.

The record on appeal consists of the transcript of the hearing; the deposition of Marvin Hurd, M.D.; and claimant's exhibits A through F and H through N. All evidence was considered in reaching this final agency decision. The briefs submitted by the parties were excellent and were extremely helpful in the resolution of this matter.

This decision will reverse that of the hearing deputy.

ISSUES ON APPEAL

The issues on appeal as stated by defendants are:

1. Did Claimant's injury arise out of and in the course of his employment?

2. Does Dorman v. Carroll County, 316 N.W.2d 423 (Iowa 1981) apply to the facts of the within action?

3. Does the Going and Coming Rule deny compensability to Claimant in the within action?

4. Did the Deputy err in admitting several types of evidence and further compound that error in finding other classes of evidence immaterial?

5. Did the Deputy error [sic] in awarding damages in the within action?

The issues as stated by the cross-appellant are:

1. Is Claimant entitled to payment of additional medical expenses set forth in exhibit N and for similar future expenses necessary for his physical maintenance and survival?

2. Are the Defendants entitled to an offset or credit for payments received in settlement of the third party claim and if so, to what extent?

STATEMENT OF THE CASE

Thirty-two year old single claimant, a college graduate who first earned a bachelor's degree in economics, testified to work experience as a farmhand and as a registration clerk and night auditor in a motel. After beginning employment for the state of Iowa, he took further courses in accounting and received a master's degree in 1980.

On April 30, 1976 he began work for defendant employer as a revenue agent I whose primary duty was to contact taxpayers who were delinquent on either sales or withholding tax. He subsequently was promoted to a revenue auditor I, a position in which he worked outside his office in Polk and the surrounding counties. After eighteen months he became a revenue auditor II which meant that he sometimes worked as lead auditor with others assisting him. He occasionally traveled outside the state for a month at a time to audit companies at their corporate headquarters. Approximately two years later he moved to revenue auditor III and was transferred to an Ohio office.

At the time of the transfer for which his moving expenses were paid, five new out of state offices were being opened to make it easier to audit out of state companies. Claimant said that he was paid an extra ten percent for working outside the state. His lunches also were a reimbursable expense. He estimated that twenty percent of his time actually would be spent in the office where he arranged future audits and completed paperwork including writing up audits. Work assignments were received by mail from Frank Patera who was his immediate supervisor and who was responsible for his job evaluation.

His territory after he moved to Ohio included Ohio, Michigan, and western Pennsylvania. He was furnished with a state car which he drove to and from his home as well as to the companies he was auditing.

The office out of which he and Neely worked had an answering service which operated from eight until five on Monday through Friday. A post office box was maintained at the post office three blocks from the office.

Claimant explained the steps for performing an audit as follows: He would receive, in Cleveland, the assignment from Patera. He would contact the taxpayer and set up a schedule. He would go to the taxpayer's office and review records with an officer of the company. He would write a report of errors found which was sent to Des Moines.

He kept a record of his hours worked with the normal working hours being 8:00 a.m. to 4:30 p.m., Monday through Friday. He stated that he occasionally worked nights and weekends. Records did not reflect when more than eight a day were worked and no overtime was paid. It was claimant's understanding that he was to work more than forty hours when the situation demanded additional time. He did daily reports summarizing his hours, expenses, and mileage.

Claimant recalled the circumstances surrounding his November 22, 1981 accident as follows: From November 6 through November 20 he was doing an audit at the Monroe Company in Solon, Ohio. He believed he took vacation on Friday, November 20. On Sunday morning a coworker, Charles Neely, whom he had agreed to pick up at the airport, called to tell him of a one hour delay in his flight. Plans were to go from the airport to the office and stop at the post office in route to pick up the mail. On Monday he was scheduled in Pittsburgh. He intended to do whatever work was necessary before his Monday trip while he was at the office.

This was not his first expedition to the airport to meet someone. He had met Patera twice in Cleveland, once in Pittsburgh, and also when he was in Des Moines. Once Patera arrived in the evening after claimant already had worked a twelve hour day. Claimant stated that had he been unavailable Patera would have needed to arrange transportation for which he would be reimbursed by the state. He took Neely to the airport on a Saturday or Sunday before Neely went to Iowa. He used his own car on the southern route and did not seek reimbursement.

Claimant acknowledged that he would have been in the post office to mail an audit on either November 18 or November 19. In either event he was in the office all day on November 19 and that made him sure he would have gone to the post office. Claimant agreed that he was not expecting anything in the mail which would change his plans for the next week. He admitted that he had not called Neely about the mail they received because a majority of the mail would not require immediate attention.

Claimant said he would have not made the trip to the airport had he not been working with Neely. Claimant asserted that he considered taking Neely to the airport necessary for the smooth functioning of the office. Regarding the work-relatedness of the airport trip, claimant said:

> In this particular case, I considered it work-related. First, I consider picking him up in itself to be work-related. I also consider my additional time that may have been saved by being able to go to the post office, and to the office, which would save me from doing that on Monday morning, to also be work-related. (Transcript, p. 133)

He indicated that he was anxious to complete the three day's work he was assigned in Pittsburgh and he did not want to be slowed down by having to go to the post office on Monday; however, he agreed that he had all the material he would need in Pittsburgh available to him when he left on Thursday and that he did not anticipate receiving anything in the mail related to the audit.

Claimant's plan was that when he picked up Neely he would go first to the post office then to the office to get Neely's state car. He did not think Neely had a personal vehicle available to him and Neely would need the car for any out of town trips he would undertake on Monday.

Claimant described the circumstances of his accident thusly: He left his apartment to go to the airport about one o'clock. He was driving his personal car which was smaller and easier to park than his state car. A car crossed over the median and collided head on with his vehicle. As a result of the accident, claimant received payment for damage to his car, the policy limit of $100,000 and an additional $2,500.

He was taken to the hospital. He had two surgeries -- the first to wire his neck into place and to determine the extent of his injuries; the second to fuse some bones in his neck.

He was transferred to Des Moines. He was first at Mercy where a halo device was attached to his head. Then he was moved to Iowa Methodist for rehabilitation through occupational and physical therapy. Testing was also undertaken to find a cause for night fevers.

On discharge in June of 1982 he went to St. Mary's Hospital in Rochester for evaluation of spasticity which developed in his muscles. Physical and occupational therapy were continued along with nerve blocks and changes in medication. After three months he was returned to Younkers for additional therapy.

In less than three months he was released and he went to live his with parents. He needed assistance with bathing, dressing, changing his clothes, shaving, combing his hair, brushing his teeth, taking his medications, preparing his meals, and getting into his wheelchair. In addition to care from family members, a nurse aide came in each day to help with range of motion exercises. Twenty-four hour a day care was necessary.

About three months after moving to his parents he went to a long term care facility which specializes in care of persons confined to wheelchairs at a charge of $38 per day. After some months at the center he purchased a twenty-one unit motel.

Regarding the motel, claimant testified that he lives in a house on the grounds with two persons who take care of him and do the work of the motel. The two spend more time caring for him than working in the motel. A third person also is involved with his care. The three persons are paid a total of about $2,000 per month. Two are furnished with both room and board which claimant valued at $500 per person. The part-time person is an LPN who keeps track of the cash register and with whom claimant confers on a day to day basis. He makes major decisions. He uses a van which he purchased before leaving the care center for some business purposes as well as for personal things. Claimant indicated he has not been offered any employment by defendant, and he had not sought a job with it. Neither had he kept the department advised of his activities.

Claimant stated that he can read books and newspapers, but that he is unable to turn pages. He is able to write slowly using a special attachment to his splint. He can write for fifteen or twenty minutes at which time he becomes fatigued from holding up his arm and it tends to go into spasms. He can type for about ten minutes before he becomes fatigued again by using a special device. He can use a calculator. He operates a phone using preprogramed numbers.

In describing movement he is able to accomplish, claimant reported being able to wiggle his toes, but he is unable to move his legs otherwise. Movement of his arms may trigger spasm. His first and second fingers remained clamped. He uses splints, a corset, and support belts. Claimant listed his current medications as Lioresal, Colace, and Ducolax suppositories. In addition he takes large doses of vitamin C.

Claimant receives both long term disability benefits and social security.

Delores Joan McMullin, claimant's mother, testified to claimant's needs essentially as he testified. She said that he must be turned at least once during the night. It is also necessary to respond to his call if he has spasms or becomes uncomfortable.

Eugene Baker McMullin, claimant's father, who at the time of his deposition had power of attorney, testified to writing some checks for claimant. He noted that his son's condition has improved from no movement to some movement in the arms. He was not aware of any rehabilitation program being established for claimant.

Thirty-four year old Charles Neely, a finance major with a degree in business administration and a year and a half in law school, began work for defendant employer in September 1977 as a revenue agent I. After a short time he became a revenue examiner and finally a revenue auditor III in August of 1981.

He recalled that when he was an auditor I he went to different parts of the country. A day's distance would be driven; more than a day would be flown. Driving was done in a state car.

Neely said that during the summer of 1981 he was told by the director of revenue, Gerald Bair, that he would be going to Cleveland with an increase in salary and paid moving expenses.

Corporate income tax was the responsibility of this witness. His assignments were received from Patera whom Neely said had been in Pittsburgh with claimant and him. He said an eight hour day was to be worked and that he tried to work on the taxpayer's schedule. He agreed that no more than eight hours could be shown on a report. Neely estimated that ten to twenty percent of his time would be spent in the Cleveland office.

Neely recalled getting Patera from the airport. He thought Patera's practice was to arrive in the morning and to leave before five.

On a Saturday on the weekend of November 7 and 8 Neely went to Iowa to visit his mother who was ill and ultimately stayed two weeks. Claimant drove him to the airport using the southern route and leaving from the office because it was a central location and because Neely wished to leave his state car there. Neely agreed with the schedule to which claimant testified on the day of the accident. When claimant failed to pick him up at the airport, he took a cab to the office. He did not go to the post office or go into the office. He did not claim reimbursement for his cab fare because he felt it was a personal trip. He said that claimant had volunteered to pick him up at the airport and he remembered calling claimant to tell him the plane was late.

When he learned of claimant's accident on Monday, he called both Des Moines and Patera in Davenport. Patera and another person from the department came to Cleveland and Neely picked them up at the airport. He also met claimant's parents there. He was responsible for returning the state property claimant had including the state car.

Neely said that he did not use his state car for personal travel on weekends. He reported that he and claimant had keys to the office and therefore it was open to them twenty-four hours a day. Although his only intent on his return to Cleveland was to go home, he stated that if claimant had gone to the office he would have gone along.

Frank J. Patera, supervisor of audits conducted outside the state of Iowa and east of the Mississippi who was supervised by Don Cunningham, the director of field services, who was in turn directed by Gerald Bair, the director of revenue, testified to the difference in compensation for those working outside the state. State cars were made available to employees working in Cleveland and in addition to using those for trips to auditing cities they could be used for commuting to and from work.

Patera explained:

> I don't know whether I can give it to you exactly in detail, but in the State of Iowa each employee has assigned what is called a domicile, which is usually, but not always, designated where a large abundance of work may be. The employee, if he chooses, he can live elsewhere, but if he's commuting from an elsewhere location to the work it's always been considered that's his personal expense. But, if he lived in the domicile area, he still -- if he has an office job, he still had to come down to the office and that would be personal travel, but after he leaves the office and then is going to a job site that would be business travel. (Patera deposition, p. 17)

He stated that claimant's domicile was Beachwood. He estimated the persons in the field would not be in the office over ten percent of the time.

He was responsible for assigning work to claimant, making recommendations and assigning priorities. Contact would be made by mail or by using the answering service on the phone. Working hours would be 8:00 to 4:30 with no overtime authorized. Neither were employees instructed to pick up mail on nonwork days, but the recommendation was for daily mail pick up if the employees were in town.

Patera agreed that if both Neely and claimant were out of the office, no one would be getting the mail. Regarding the situation prior to claimant's accident he was asked:

> Q. Would it be of a benefit to the State of Iowa for them to stop and pick up the mail if they were going to be out of the office the next week?
>
> A. I can't see that it would.
>
> Q. Well, could there probably be instructions from you or other reports or other communications from Des Moines or Davenport that would be in that mail?

A. Very unlikely. Instructions we give for a specific assignment are given much in advance. Most of our assignments with large companies have to be made giving the taxpayer at least a month, sometimes two months -- in my case I even schedule them, if the taxpayer is preoccupied with other state auditors, schedule them six and seven months ahead of time, so there would be no last minute instruction or no immediate instructions given to the auditors. They would have had them much in advance. (Patera dep., pp. 40-41)

Later he was asked:

Q. Is there a benefit to the State of Iowa or the Department of Revenue for the employees to pick up their mail?

A. That is about the only way they can get it. If they left the carrier deliver it, I can't say what the schedule is in this particular case, but it's not uncommon in offices where we have the carrier bring it into the office it may arrive at ten-thirty or eleven o'clock the next morning, which means that our auditors like to keep current, they like to hear from base, they will always go in the office and sit there until that ten-thirty before they start moving out. This way, if they pick it up themselves, yes, it is an advantage. It better utilizes our time is what I'm saying. (Patera dep., pp. 46-47)

Patera indicated that he learned of claimant's accident from Neely.

The supervisor acknowledged that claimant had picked him up at the airport in a state car. He reported that he usually would get to Cleveland between 11:00 and 12:00 o'clock and leave between 12:00 and 2:00. He admitted that claimant had picked him up once in the evening and he characterized claimant's coming as a courtesy rather than a business function. He thought claimant had picked him up at the airport in Pittsburgh, but that he had returned to the airport in a limousine.

This witness also felt going to the office to pick up a car to be used the following Monday would be "rather seldom" done. Patera agreed that use of a personal car or the fact of whether reimbursement was or was not made would not determine whether a trip is personal or business.

Claimant's daily report showed he picked up Patera at the airport on the evening of October 14, 1981 and he took him back on October 16, 1981. He next got Patera from the airport on November 2, 1981.

The job description for a revenue agent III indicates travel may be necessary and that persons assuming that position may be required to furnish cars.

Marvin M. Hurd, M.D., who is board certified in physical medicine and rehabilitation, first saw claimant on December 23, 1981 at which time claimant was wearing a brace to support his head and neck. On January 18, 1982 claimant was transferred to Iowa Methodist where a program was undertaken to improve his tolerance and to move him to a more upright position. Claimant was able to pursue a rehabilitation program, but he developed more and more prominent spasticity in his upper and lower extremities.

Dr. Hurd noted that claimant had a fracture between C4 and C5 which resulted in his being a quadriplegic. Claimant's movement was described:

Patient can actively move his shoulders only slightly bringing the arms away from the sides or bring his arms forward at the shoulders. He can flex his elbows somewhat but has no significant ability to extend his elbows or control his wrists and hands. There is no significant voluntary motor control in the lower extremities. (Hurd deposition, pp. 19-20)

Rehabilitation efforts were aimed at developing and maintaining range of motion or mobility at the joints in the upper and lower extremities through a passive exercise program. An attempt was made to help claimant be able to sit up right and to maintain his balance. Claimant was unable to do transfers independently.

Dr. Hurd stated that the depression claimant had is common as was his urinary tract infection. The doctor characterized claimant's spasticity as the most severe he had seen in his time of practice. The spasticity precluded claimant's driving and made difficult or slow such things as typing.

Dr. Hurd recalled that claimant was referred to Mayo where an unsuccessful search was made for the cause of the spasticity. Motor point blocks were performed on the muscles in claimant's arm and chest so his spasticity was reduced, but his motor function was not improved. Air pressure splints also were tried.

He returned to the hospital in Des Moines on September 14, 1982. During this hospitalization he underwent the bilateral removal of his great toenails and was evaluated for episodic hematuria. Claimant underwent range of motion and strengthening exercises for his upper extremities, activities for daily living, and wheelchair evaluation.

At a discharge conference, an attempt to decrease claimant's spasticity was noted, but the therapy undertaken had little lasting effect. Also reduction in spasticity did not result in improvement in function. Claimant was able to feed himself, but he was inconsistent in the use of his electric hand brace. Goals for activities of daily living were not met.

Claimant was discharged on December 3, 1982 to his home to be cared for two hours each day by a private nursing service.

In August of 1983 claimant sought a recheck. He was able to do certain tasks and he was anxious to have more occupational and physical therapy. The following month he was admitted for reevaluation and his condition was good. He had some loss of range of motion in his left elbow and in his ankles bilaterally. Claimant's spasticity was extreme. His respiratory function was increased. Claimant was given a new writing device.

Dr. Hurd said that following an accident such as claimant had, most return of function would occur in the first year and certainly in the first two years and that healing from surgery could be as early as three months but within six months. The doctor did not anticipate claimant's having any more return of nerve function. As particular health concerns relating to claimant, Dr. Hurd listed bladder and kidney function, the development of pneumonia, the onset of osteoporosis, and skin complications such as pressure areas. He said that claimant will continue to need range of motion exercises and physical therapy as well as medications to treat his spasticity and to assist his bowel and bladder function.

The doctor did not think it would be safe for claimant to be alone for longer than two to four hour intervals. One of the reasons for claimant's being unable to be alone is muscle spasms which may require assistance from someone for relief.

Dr. Hurd included as adaptive equipment claimant needs, an electric wheelchair, telephone modification, and a van with a lift. The doctor agreed that even with the employment of adaptive equipment, claimant's use of business machines would be laborious and slow.

APPLICABLE LAW AND ANALYSIS

The first issue raised by defendants is whether or not the hearing deputy erred in finding 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 addition to establishing that her injury occurred in the course of his employment, claimant must also establish the injury arose out of his employment. An injury arises out of the employment when there is a causal connection between the conditions under which the work is performed and the resulting injury. Musselman v. Central Telephone Co., 261 Iowa 352 154 N.W.2d 128 (1967).

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

Although the parties engaged in some discussion of the arising out of issue, it is clear that the real issue is whether or not claimant was in the course of his employment. Slight shifts in the fact pattern in this case can move it from compensable to noncompensable and it is important to look at what happened on November 22, 1981 as opposed to any other fact pattern.

Iowa Code section 85.61(6) provides that employees in the course of employment include those "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." "'Required' as used in the statute, does not mean only an act in response to a command. It is sufficient if the act is in response to the company's bidding or any manner dictated by the course of employment to further the employer's business." Lindeman v. Cownie Furs, 234 Iowa 708 710, 13 N.W.2d 677, 679 (1944). The fact that claimant was not engaged in specific work activity at the time of his injury is not determinative. Bushing v. Iowa Railway & Light Co., 208 Iowa 1010, 1019, 226 N.W. 719, 723 (1929). As a general rule, "the course of employment commences after the employee reaches the premises where his actual work begins and is carried on and ceases when he leaves." Otto v. Independent School District, 237 Iowa 991, 994, 23 N.W.2d 915, 916 (1946). The latter citation is referred to as the going and coming rule.

Numerous exceptions have developed to the rule and they will be cited below. Employees who travel are generally exempted from the going and coming rule and are in the course of their employment from the time they leave home until they return. Heissler v. Strange Brothers Hide Co., 212 Iowa 848, 237 N.W. 343 (1931). In some aspects of his work claimant was a traveling employee; in others he was not. When he was out of the city doing audits, he was a traveling employee. He had a year's lease on his apartment and his assignment in Ohio was of a permanent nature. When he was within the city, he could not be classified as a traveling employee. As claimant was not a traveling employee at the time of his injury, it is unnecessary to discuss the effect of any deviation. See generally Pohler v. T. W. Snow Construction Company, 239 Iowa 1018, 33 N.W.2d 416 (1948); Volk v. International Harvester Co., 252 Iowa 298, 106 N.W.2d 649 (1960).

"If the employer assumes the burden of the workman's coming and going expense, that is held to imply that the time of coming and going is part of the time of employment." Bulman v. Sanitary Farm Dairies, 247 Iowa 488, 494, 73 N.W.2d 27 (1955). Defendant employer herein did furnish claimant with a state car which could be used to drive from his home to the office and he was reimbursed for mileage and parking expenses. However, at the time of his accident, he was driving his personal car as he had done when he took Neely to the airport -- a trip for which he did not seek reimbursement.

Another exception is for special errands. The supreme court has defined that exemption:

> The special duty or work exceptions to the so-called coming-and-going rule, in reality, are in the most instances the performance of duties not usually considered among those of the employee's regular employment. No matter how different they may be, if performed by direction of the employer, it is nevertheless employment under our workmen's compensation act. This direction of course can be specific, under the terms or permissible inferences of a contract or agreement, or by indirection. The facts control. Pribyl v. Standard Electric Co., 246 Iowa 333, 340, 67 N.W.2d 438, 443 (1954).

The trip that claimant made after hours to pick up Patera could well fall within this exception. Claimant's trip to the airport to get Neely and to the office was not made at his employer's direction. Claimant testified that he was meeting Neely at the airport to promote a good working relationship. His was not a special errand directed by his employer.

The remaining exception is the dual purpose exception. It is applied in those cases in which there are concurrent business and personal reasons for a trip. Defendants argue that Dorman v. Carroll County, 316 N.W.2d 423 (Iowa 1981) is not applicable to this case. While the facts are clearly distinguishable, a dual purpose theory is viewed as the only possibility for claimant's recovery.

The Iowa Supreme Court in Pohler, 239 Iowa 1018, 1023, 33 N.W.2d 416, 419 cited in In Re Marks v. Gray, 251 N.Y. 90, 93, 197 N.E. 181, 183 (1929) which contains this:

> If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own.***If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

The dual purpose of claimant's trip in this case was first of all to get Neely from the airport and secondly to go to the post office and get the mail.

Getting Neely from the airport was personal. Neely was returning from a trip to Iowa where he visited his sick mother. Claimant suggests he and Neely might have talked business on the trip from the airport. What business they would have to discuss is unknown since their work was different.

There is a conflict in the evidence regarding stopping at the post office. Claimant said it was his intent to proceed in that manner. At another point he said: "I was going to pick him up at the airport and take him to the office. And since it was on the way, we would be going to the post office. He was going to stop; I assume I would have gone in also." (Tr., p. 32) Neely testified he planned to go home.

The question to be asked is had claimant not gone to the post office would someone else have gone? See Golay v. Keister Lumber Co., 175 N.W.2d 385 (Iowa 1970). The answer to that question is no. Neely specifically testified:

> As far as I'm concerned, the trip was personal. I can't speak for Mark, what his intentions were, but my only intentions that day were to go home. I had to go to the office on Monday anyway, and I would have taken care of any related matters. However, if Mark had stopped at the post office on the way back, I would have stopped with him and the sequence of events probably would have been that I would have went into the office that day. (Tr., p. 191)

Claimant was not asked specifically whether or not he would have gone to the post office on Sunday had he not had to take Neely to the office anyway. It seems unlikely that he would. He was questioned:

> Q. Wasn't that basically because the types of correspondence you received didn't require immediate attention?
>
> A. A majority of the mail does not.
>
> Q. What kind of mail does?
>
> A. At that time, we were receiving quite a bit of mail from the Department, which related to having opened the office up. They were constantly requesting additional information relating to-- Oh, I mean, it's hard to say, from everything from the furniture that had been delivered, to if we had certain supplies. The personnel department, a lot of times, they would be sending forms that they needed filled in and sent back. It was much more than what I would expect to have been receiving, say a year later, once the office was operating.
>
> Q. Any other kinds of mail?
>
> A. Most other mail would be from individual taxpayers or assignments being sent out by Mr. Patera.
>
> Q. And any assignments wouldn't have dealt with the following Monday; isn't that correct, because you had already sent your itinerary for the following week; isn't that correct?
>
> A. That's correct.
>
> Q. And with regard to the personnel forms, or items dealing with the furniture or with supplies, is it your testimony that you were waiting to receive, or anticipated receiving something like that on November 20th, 21, or 22?
>
> A. No. I would-- I wouldn't have been anticipating anything in particular. (Tr., pp. 118-119)

Later he said:

> Q. And did you think that it was more important to anticipate then, correspondence dealing with office furniture than to go to the audit?
>
> A. I don't know specifically. I would have anticipated, but I would definitely have gone to the post office as a matter of practice on Monday morning if I had not gone there on Sunday.
>
> Q. So the choice was yours?
>
> A. Yes. (Tr., p. 134)

Claimant had all the materials he needed for his trip to Pittsburgh when he left his office on Thursday. He had mailed in his report to the department. He was not expecting any particular communication from any one. He would not be receiving money because checks were deposited directly to his account. He had gotten the mail on Thursday. Neely would have been there to get it on Monday. Picking up mail was important and Patera recognized that importance, but there was no necessity for checking for mail on Sundays. There was no testimony that claimant had ever before gone to the post office on Sunday to see if there was mail before going out of town the next day.

Defendants cite Larson, The Law of Workman's Compensation, and note that a good faith act of one employee to help another results in a compensable injury only when the employee being assisted is performing his work. Clearly Neely was performing no work activity. He was returning from a trip which was purely personal in nature.

This is a truly tragic case. However, the workers' compensation act is not a charity. Its administration does not depend upon the sympathy of the decision maker, but rather on logical rules. Bulman, 247 Iowa 488, 494, 33 N.W.2d 27. The employer is not an insurer of the safety of the employee. Any time the employee steps aside from the line of duty in the employment, compensation coverage ceases. Walker v. Speeder Machinery Corporation, 213 Iowa 1134, 1150, 240 N.W. 725, 732 (1932). It must be concluded that claimant was not in the course of his employment.

The second and third issues raised by defendants have been covered in the discussion above. As it has been concluded claimant's injury did not arise out of and in the course of his employment, discussion of the other issues raised on appeal is unnecessary.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-two years of age.

That claimant is a college graduate with a master's degree in accounting.

That claimant's work experience has been primarily with defendant employer in varying positions as an auditor.

That on November 22, 1981 claimant was assigned to an out of state branch office of the department of revenue.

That claimant used an automobile furnished by his employer to travel from his home to his office and to the various businesses he was auditing.

That Charles Neely was a coemployee whom claimant neither supervised nor by whom claimant was supervised.

That no overtime was authorized for the claimant.

That claimant occasionally worked overtime in the evenings and on weekends.

That claimant had some flexibility in his hours.

That at the time of his injury claimant was not driving a state car.

That claimant sometimes used his personal car for state business.

That claimant had not taken Neely to the airport in the state car and he did not seek reimbursement for the trip.

That claimant was not directed by his employer to meet Neely at the airport.

That Neely was returning from a trip that was purely personal in nature.

That it was unnecessary to pick up the mail on weekends; and under ordinary circumstances, no mail would have been picked up on Sunday.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant did not suffer an injury arising out of and in the course of his employment on November 22, 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 7 day of October, 1985.

Judith Ann Higgs
JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL E. MELLOR, Claimant,	File No. 773481
vs.	ARBITRATION
FDL FOODS, INC., Employer, Self-Insured, Defendant.	DECISION

FILED
NOV 13 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Michael Mellor, claimant, against FDL Foods, Inc., employer, hereinafter referred to as FDL, self-insured defendant, for benefits as a result of an alleged injury on July 25, 1984 to one of claimant's ribs. On September 18, 1985 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a pre-hearing report of contested issues and stipulations pertaining to this case which was approved and accepted as a part of the record of this case. Oral testimony was received during the hearing from claimant and Richard Sherman. The exhibits received into the evidence at the hearing are listed in the pre-hearing report. According to the pre-hearing report, the parties have stipulated to the following matters:

1. An employer-employee relationship existed between claimant and defendant at the time of the alleged injury herein;

2. Claimant was off work from August 1, 1984 through September 9, 1984 and he is seeking either temporary total disability or healing period benefits for this period of time;

3. If the injury is found to be a cause of permanent disability, the type of disability shall be an industrial disability to the body as a whole;

4. In the event of an award of permanent disability benefits, the commencement date for such benefits shall be September 10, 1984;

5. Claimant's rate of weekly compensation in the event of an award of benefits from these proceedings shall be $185.75 per week; and,

6. With reference to the medical bills listed in the pre-hearing report for which he is seeking reimbursement in these proceedins, the fees charged for the medical services and supplies rendered were fair and reasonable; that the expenses were incurred for reasonable and necessary medical treatment; and, that the expenses are causally connected to the condition upon which claimant is basing his claims herein, but the causal connection of this condition to a work injury remains an issue to be decided in this proceeding.

ISSUES

As set forth in the hearing assignment order and the parties' pre-hearing report, the parties submitted the following issues for determination in these proceedings:

I. Whether claimant received an injury arising out of and in the course of employment;

II. Whether there is a causal relationship between the alleged injury and the claimed disability;

III. The extent of weekly disability benefits to which claimant is entitled; and,

IV. The extent of claimant's entitlement to medical benefits.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

Claimant's testimony and the medical reports submitted into the evidence indicate that prior to claimant's employment with FDL, approximately eight months prior to the alleged work injury herein, he fell on his right side, injuring the area around his rib cage while assisting in the construction of a "haunted house" JC project. Claimant has told his physician that he was sore for about two weeks following this injury. The degree to which this incident caused a fractured rib condition, which was found in x-rays taken subsequent to the alleged work injury in this case, was a source of disagreement among the physicians who treated claimant in this case.

Claimant began working for FDL on October 31, 1983. Claimant's duties consisted of general meat packing work involving deboning, inspecting, and trimming various parts of a beef carcass in an assembly line fashion. On the day of the alleged injury, July 25, 1984, claimant was working with beef loins. Claimant had thought the date was July 24, 1984 and used this date in a written summary of events he prepared some time prior to the hearing in this case upon the recommendation of union officials. See exhibit C. At the hearing, claimant explained that after a review of the plant nurse's notes as to the time of his pain complaints to her which he was able to obtain after preparing this written summary, he now believes that the correct date of injury is Wednesday, July 25, 1984.

Claimant testified that on the day of the alleged injury, due to a "run" of bad or "scored" cattle which required additional work, claimant was not able to keep up at his work station. In the written summary described above, claimant stated that ten to twenty scored or bad cattle were involved. Claimant stated that approximately thirty to forty beef loins weighing from seventy to one hundred pounds had to be stacked on a table located immediately behind him. Claimant said that the loins were stacked in a pyramid shape and eventually the stack became quite large with a base of ten to twelve feet and an apex located eight feet from the floor. Claimant stating that while pulling one of these loins down from the stack with his meat hook, the loin struck his right side "a little hard." Claimant testified that he did not report the incident at the time because he did not feel that the injury was serious. However, the pain in his right side did not subside as he expected. Claimant called in sick on Thursday due to an unrelated cold but returned to work on Friday at which time he reported the Wednesday incident to the plant nurse. Claimant continued working that Friday and on the following Monday, claimant said that he dropped a piece of meat onto the floor and while attempting to pick up this meat he felt a "pop" in his right side and a shooting pain developed in the general area where the loin had earlier struck his right side. Claimant continued to work as only twenty minutes remained in his shift and he then immediately reported to the plant nurse. Claimant said that his right side was extremely sore and he experienced difficulty in moving or twisting his body. The nurse at that time arranged for claimant to see the company doctor, L. C. Fabor, M.D.

On July 31, 1984, Dr. Fabor examined claimant and took three x-rays of claimant's right front side. After Dr. Fabor's examination of these x-rays, claimant and Dr. Fabor had a considerable discussion concerning old and new rib fractures and Dr. Fabor reported to claimant that he had found only an old fracture in the x-rays and that claimant may simply have bumped this old fracture in the incident involving the loins. Dr. Fabor then returned claimant to full duty at work. Claimant subsequently returned to work on the same day as his appointment with Dr. Fabor and was assigned to assist in training a fellow employee. The following day, claimant was returned to his original work station working with beef loins. Claimant testified that he was not able to keep up due to the pain in his area of his injured rib when he began performing his work with the beef loins and he received a warning from his foreman. Claimant then asked for a second opinion as to the condition of his right side and he was sent then to John J. Hartmann, D.O.

According to the report of F. Dale Wilson, M.D., exhibit 3, Dr. Hartmann requested a release of the x-ray films taken by Dr. Fabor, but Dr. Fabor refused. Consequently, claimant was sent by Dr. Hartmann to Sung Hwan Chi, M.D., a private radiologist, who took additional x-rays of claimant's right rib area on August 1, 1984. After a study of these x-rays, Dr. Chi reported that he found a fracture of the seventh right rib but he felt that the fracture was recent in origin. According to the report of Dr. Chi, exhibit 2, a few days later Dr. Chi received an angry telephone call from Dr. Fabor concerning Dr. Chi's finding that the fracture was recent and told Dr. Chi that he would be called upon to testify before the industrial commissioner. Dr. Chi stated that he would be willing to do so. Dr. Chi then performed a bone scan on August 3, 1984 which revealed additional findings confirming his original opinion that the fracture was recent in origin.

After receiving the reports from Dr. Chi, Dr. Hartmann placed claimant on medical leave during his treatment of the rib condition extending from August 1, 1984 through September 9, 1984. According to the report of Dr. Wilson, Dr. Fabor also took additional x-rays after this bone scan which eventually indicated to him the correctness of Dr. Chi's views. No report was submitted into the evidence from Dr. Fabor. Claimant was then released for full duty on September 10, 1984 and claimant returned to work at that time.

Claimant was examined by Dr. Wilson in May 1985. After his review of all the previous medical reports and his personal examination of claimant, Dr. Wilson rendered an opinion in his report, exhibit 3, that the right rib fracture was sustained in the July 1984 incident at work.

In December 1984, claimant sustained another injury to his right front rib area during a karate lesson. Claimant said that he did not miss work as a result of this incident and fully recovered from the injury.

During cross-examination claimant admitted that he had suffered no physical handicap or impairment as a result of the July 1984 work incident. Dr. Hartmann reports that claimant has no residual impairment to his ribs. Dr. Wilson gave claimant a one percent disability as a result of a deformity in the fractured rib but states that the deformity "as far as we can tell is not interfering with the rib function." Claimant testified that he no longer works for FDL and is currently working at a nuclear powered electrical generation plant in the quality control department.

Richard Sherman, the general foreman over the area where claimant was working at the time of the alleged injury, testified at the hearing. Although he did not observe claimant at the time of the alleged work injury, Sherman testified that the production reports for the alleged dates of injury do not verify the contentions of claimant as to the source of his injury. According to Sherman and these reports, only eight bad or scored loins were processed by claimant on July 25, 1984 and only four such loins on July 24, 1984. Consequently, it was not possible for claimant to have stacked thirty to forty bad or scored loins. On cross-examination, Sherman admitted that over 360 good and bad loins were handled by claimant on the date of the alleged injury and approximately the same on the previous day. Sherman also admitted that it is impossible to determine from the production reports whether or not a "backup" occurred. Sherman said that the stacking of loins is not a normal procedure due to sanitary regulations because of the risk that the loins would fall to the floor. However, he admitted that some stacking has occurred in the past but not to the degree indicated by claimant in his testimony.

Claimant's appearance and demeanor at the hearing as well as that of Sherman indicated that they were both testifying in a candid and truthful manner.

APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of 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 therein.

From the evidence presented there is little question that if the incident at work happened in July 1984 as described by claimant, such an incident would constitute an injury arising out of and in the course of employment. The only evidence offered to refute claimant's testimony was the testimony of Sherman concerning the production reports. After careful review of Sherman's credible testimony and these production reports, it is found that such evidence does not refute the credible testimony of claimant. Although only eight scored or bad loins were processed by claimant on the date of the alleged injury, such evidence does not suggest that claimant only handled eight loins that day. Indeed, claimant handled over 300 loins that day, only some of which were bad. That claimant may have exaggerated the number of bad cattle processed that day in his written notes to himself to justify his inability to keep up with the work. However, his demeanor at the hearing indicates that he was truthful in explaining that the backup did occur. Also, at no time did claimant contend that all of the stacked loins were "bad or scored." Claimant's stated that he was compelled to stack the loins because of an unspecified number of bad loins that he was processing that day. Sherman admitted that stacking does occur. The fact that Sherman was not aware of the particular stacking incident which resulted in an injury to claimant is insufficient to outweigh the credible testimony of claimant. Notably absent from the evidence was testimony from the other foreman in the area as to the stacking incident. It also must be emphasized that claimant fairly quickly reported all of his problems to the plant nurse and the story of his incident is consistent with histories provided to physicians in this case.

The medical evidence is uncontroverted that claimant suffered a recent rib fracture soon after the July 1984 incident at work. The dispute between Dr. Fabor and Dr. Chi is interesting but not important to the issue of whether an injury occurred. An aggravation of a preexisting rib fracture can constitute a work injury as well. Therefore, claimant has shown by the greater weight of the evidence that he suffered an injury on July 25, 1984 which arose out of and in the course of employment at FDL.

II. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). In the case of a preexisting condition, 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).

Claimant is seeking weekly benefits for both temporary and permanent disability. The evidence in this case rather clearly establishes that a fractured rib condition resulted in a temporary absence from work for the stipulated period of time. The evidence that claimant was performing strenuous and heavy work for eight months prior to the work injury was uncontroverted. Claimant was not disabled in any manner until the July 1984 incident; whether or not he broke his rib then or only aggravated a prior fracture. The only expert opinion in the evidence presented on the issue of causal connection of the rib condition to the work injury supports the theories of claimant and this opinion is consistent with the credible testimony of claimant and the medical evidence concerning the injury.

However, claimant has not established that the work injury is a cause of permanent disability. The primary treating physician, Dr. Hartmann, clearly opines that claimant does not have permanent impairment following the injury. The views of Dr. Wilson are confusing in that he indicates there is a slight impairment to the rib as a result of a deformity but admits in the same report that the deformity does not impair the function of his ribs. Therefore, on the whole record, claimant has only established by a preponderance of the evidence that the work injury was a cause of temporary total disability, not permanent disability.

III. Given the stipulation of the parties with reference to the medical expenses, claimant has shown entitlement to the medical expenses as set forth in the pre-hearing report when he established that the work injury was a cause of the fractured rib condition. FDL is not claiming that these expenses were unrelated to the fractured rib condition.

FINDINGS OF FACT

1. Claimant is a credible witness.

2. Claimant was in the employ of FDL at all times material herein.

3. Claimant's job at FDL was meat packing work involving the boning, inspecting, and trimming of portions of a beef carcass.

4. On July 25, 1984 while performing his work at FDL, claimant fractured his seventh right rib.

5. As a result of his work injury, claimant underwent treatment of his fractured rib condition and was compelled to remain absent from work from August 1, 1984 through September 9, 1984.

6. Approximately eight months prior to the work injury herein, claimant injured his ribs but he fully recovered from this injury and was able to perform strenuous work and heavy lifting at FDL with little or no problem.

7. Claimant has not suffered a permanent impairment to his body as a whole as a result of the work injury herein.

8. Pursuant to the parties' stipulation, claimant's rate of compensation is $185.75 per week.

9. Claimant has incurred the following medical expenses as a result of his work injury of July 25, 1984:

John Hartmann, M.D.	$150.00
Sun Hwan Chi, M.D.	275.00

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that on July 25, 1984 he suffered an injury arising out of and in the course of his employment at FDL.

II. Claimant has established by a preponderance of the evidence that the injury of July 25, 1984 is a cause of temporary total disability but not permanent disability.

III. Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits in the amount of five and five-sevenths (5 5/7) weeks.

IV. Claimant has established by a preponderance of the evidence entitlement to medical benefits in the total amount of four hundred and twenty-five dollars ($425).

ORDER

Accordingly, the following is ordered:

1. Defendant shall pay to claimant temporary total disability benefits at the rate of one hundred eighty-five and 75/100 dollars ($185.75) per week from August 1, 1984 through September 9, 1984.

2. Defendant shall pay to claimant four hundred twenty-five dollars ($425) in medical benefits.

3. Defendant shall pay accrued weekly benefits in a lump sum.

4. Defendant shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

5. Defendant shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

6. Defendant shall file an activity report on the payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 13th day of November, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ESTHER M. MONTEZ,	:	
	:	File No. 771019
Claimant,	:	
	:	A R B I T R A T I O N
vs.	:	
	:	D E C I S I O N
HEINZ USA,	:	
	:	
Employer,	:	FILED
	:	
and	:	OCT 18 1985
	:	
LIBERTY MUTUAL INSURANCE	:	
COMPANY,	:	IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier,	:	
Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought Esther M. Montez, claimant, against Heinz USA, employer, hereinafter referred to as Heinz, and Liberty Mutual Insurance Company, insurance carrier, defendants, for benefits as a result of a work injury on January 24, 1984 to claimant's left shoulder. On August 28, 1985 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

ISSUES

The parties have submitted the following issues for determination in this proceeding:

I. Whether there was a causal relationship between the work injury and the claimed disability; and,

II. The extent of weekly disability to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision. The parties have submitted a prehearing report concerning matters pertaining to this case which was approved and accepted as a part of the record of this case. The record of the hearing consists of the oral testimony of claimant and Robert Albright, the personnel assistant at Heinz; claimant's exhibits 1 through 6; and, defendants' exhibit A. The parties have stipulated to the following matters:

1. Claimant sustained an injury on January 24, 1984 which arose out of and in the course of her employment at Heinz; and,

2. Claimant's rate of weekly compensation in the event of an award of benefits from this proceeding shall be $217.51 per week.

Claimant testified that she is a high school graduate with one year of college training in commercial art. Claimant's past employment primarily consists of several years of clerical and secretarial experience before starting with Heinz in 1981.

Claimant said that she was involved in an auto accident in November 1983 (approximately three months before the work injury herein) which involved a whiplash injury to her neck. Claimant stated that she received medical treatment for this injury at the time. Claimant emphasized that she incurred no injury to her shoulder in this accident. Claimant also had a previous workers' compensation claim involving her right wrist and hand. This injury involved a strain of the wrist and surgical removal of ganglion cysts. Claimant admitted to a prior existing permanent disability to the right wrist from this work injury. William Catalona, M.D., who treated claimant for this wrist injury indicates in his office notes that claimant has early right carpal tunnel syndrome. As a result of the right wrist condition, claimant was placed in a light duty status at Heinz which involved sorting lids. This job required claimant to take lids from a box, sort them, and place the sorted lids in another box. Occasionally, a heavy box full of these lids weighing approximately sixty pounds needed to be moved.

Claimant said that the work injury in this case occurred when she was moving one of the lid boxes. She said she felt a pull and a sharp pain in her left shoulder. Claimant stated that she reported the injury to her immediate supervisor and was sent to the plant nurse. The nurse placed hot oitment on the shoulder but did not authorize claimant to see a physician at that time. However, after repeated complaints to the nurse in the weeks following the injury, claimant was allowed to see

Duane A. Willander, M.D., an orthopedic surgeon, on February 2, 1984. After his examination of claimant, Dr. Willander felt that claimant's pain symptoms from the shoulder strain would subside after immobilization and physical therapy. Dr. Willander did not place any additional restrictions on her work activity and claimant returned to work the next day. On February 6, 1984, claimant began receiving treatment for the shoulder injury from Dr. Catalona, who is another orthopedic surgeon. Dr. Catalona likewise diagnosed only muscle strain of the left shoulder but provided a light duty slip to claimant which restricted claimant's work activity from excessive reaching, bending or stretching of her left arm. Dr. Catalona stated that the injury was not serious in his note of the exam of February 6, 1984. The light duty slip of Dr. Catalona resulted in a reassignment of claimant to a job which did not involve the moving of boxes according to Albright, the personnel assistant at Heinz. The new job involved inspection of empty cans and required claimant to throw away bad cans and place acceptable cans onto a pallet. Claimant stated that she continued to work in this capacity despite severe shoulder pain whenever she used her left arm.

On February 15, 1984, claimant was laid off. Albright explained at the hearing that after the wrist injury in 1983, claimant was placed into a restricted work-duty job and such jobs are only temporary and last only so long as work is available. Albright testified that on February 15, 1984 work for claimant on the job of inspecting cans ran out and claimant was laid off because there was no work available within her physician imposed restrictions. It is unclear from the evidence whether claimant at the time of her layoff could have returned to the lid sorting job (the job she was performing at the time of the work injury) if Dr. Catalona had lifted the left arm restrictions he imposed after the shoulder injury.

Treatment by Dr. Catalona of claimant's shoulder injury continued after her layoff. This treatment consisted of conservative treatment involving physical therapy and restricted activity. On July 11, 1984, Dr. Catalona reported in his office notes that claimant's shoulder pain had subsided and that she at that time wanted the previous work restrictions imposed by him lifted so that she could return to the lid sorting job. In a letter dated July 12, 1984, Dr. Catalona reported to Heinz that although he was unable to state whether or not claimant would be able to tolerate the repetitive use of her shoulders in the job of sorting cans, he certainly would not "have her doing any overhead lifting or use of her shoulders, so one can only allow her to try returning to work to see what happens."

On a number of occasions in July 1984, claimant requested Heinz to allow her to return to work. Heinz, however, refused to do so. Claimant felt that the July 1984 letter of Dr. Catalona removed the restriction against the use of her left shoulder. However, Albright stated that there was no work available within claimant's restrictions as described by Dr. Catalona. In his most recent report dated January 16, 1985, Dr. Catalona states as follows: "On reviewing this patient's record, it appears that should she return to work using her hands and shoulders that she would suffer a recurrence of her previous pain."

Claimant said that before her 1984 work injury, she had full use of her arm and was able to perform heavy work but that after the injury the use of her left arm became severely restricted and she could no longer perform heavy work. Claimant testified that her shoulder pain was constant from the date of injury until January 1985 but at the present time she has pain only when she tries to use her arm by moving or picking up anything. Claimant said that she takes no medication for her shoulder condition except for nonprescription aspirin or tylenol.

Claimant has not worked since her layoff from Heinz. She currently is receiving ADC benefits. Claimant admitted on cross-examination that she has not applied for work elsewhere nor has she sought assistance from job service to secure suitable employment.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). In the case of a preexisting condition, 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).

Claimant is first seeking permanent disability benefits for her inability to return to work as a result of her shoulder condition. Claimant also has a disability to her hand and wrist which greatly affect her ability to work but this fact does not prevent a finding of disability. As set forth in the Blacksmith case, the work injury need only be a significant cause, not the only cause of disability. There is little question in this case that claimant did suffer pain after the work injury and the work restrictions against excessive use of the arm were imposed after the work injury by Dr. Catalona which precipitated a change in jobs and eventually claimant's layoff. However, the crucial question is whether the pain and the additional work restrictions were the result of the work incident or simply a temporary aggravation of a preexisting degenerative condition or a prexisting physical inability to perform the assigned work task. In the latter case, claimant would only be entitled to temporary total disability benefits because the work injury would have only put the doctors on notice of the preexisting condition and compelled the impostion of work restrictions to prevent future injury as a result of the preexisting condition, not the work injury.

First, Dr. Catalona does not render an opinion in the evidence of this case as to causal connection between the work injury and the work restrictions he imposed or whether claimant suffered a permanent impairment from the work injury. Second, there is no clinical findings indicating a permanent impairment in the medical evidence presented. Pain alone is not a substitute for a showing of a permanent impairment. See Waller v. Chamberlain Mfg., II Iowa Industrial Commissioner Report 419, 425 (Review-Reopening Decision 1981). Although claimant testified that she had no problem with heavy work before the work injury, such testimony is somewhat misleading in that she had considerable problems with heavy work in the past due to her right hand conditions. Also, claimant's testimony is not credible when she seeks to establish permanent impairment or disability arising from a relatively minor work incident without the support of medical evidence. Both Drs. Willander and Catalona diagnosed only muscle strain after the incident. Dr. Willander felt that claimant's symptoms would subside. Dr. Catalona stated at the time he first examined claimant the injury was not serious. The medical evidence presented does not reveal a cause for claimant's continued pain nor has any abnormalities in claimant's shoulder been found. It may be possible for claimant to show permanent disability arising from a change of jobs as a result of the work injury without a showing of physical impairment. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). However, in this case claimant's reassignment was due to the work restrictions imposed by Dr. Catalona and a causal connection between those restrictions and the work injury has not been shown. Therefore, on the whole record, claimant's evidence of permanent disability does not preponderate.

Although no permanent impairment or disability has been shown, claimant may be entitled to temporary total disability benefits as a result of the work injury until claimant returns to work or until claimant is medically capable of returning to substantially similar work she was performing at the time of the work injury. Iowa Code section 85.33(1). The purpose of temporary total disability is to compensate an injured worker for lost wages during a period of recovery from a work injury. Barton v. City Wide Cartage, I Iowa Industrial Commissioner Report 12 (Appeal Decision 1980). A temporary return to work following a work injury does not preclude an award of temporary total disability benefits when an employee is compelled to leave work at a later time as a result of the original work injury. See Junge v. Century Engineering Corp., II Iowa Industrial Commissioner Report 219 (Appeal Decision 1981).

In this case, claimant did receive an injury and was temporarily placed in a light duty job within her physician imposed restrictions but was eventually laid off on February 15, 1984. The question is whether claimant was capable of returning to the lid sorting job at the time she was laid off. The problem in this case is that the work activity restrictions which prevented her from returning to the lid sorting job have not been lifted and those work restrictions have not been shown to be caused by the work injury. In such circumstances, the end of the temporary total disability period cannot be determined by either a return to work or at a time when claimant should be medically able to return to work because claimant may never be able to return to the lid sorting job. Therefore, the most appropriate end to the temporary total disability period should coincide with the termination of active treatment of the work injury. On July 11, 1984, Dr. Catalona reported that claimant's pain had subsided except with overhead use of her hands and claimant requested a release for a return to work at that time. Also, active treatment by Dr. Catalona ended on July 11, 1984 and claimant did not see the doctor again until January 1985. In January 1985 claimant apparently only desired an additional report from him. Therefore, the most appropriate date to end claimant's temporary total disability period is July 11, 1984.

FINDINGS OF FACT

1. Claimant was in the employ of Heinz at the time of the work injury on January 24, 1984.

2. Claimant's job at the time of the work injury was sorting lids which required her to extensively reach, bend or stretch her left arm.

3. Claimant's job on Janury 24, 1984 was a light duty job which was assigned to her as a result of a permanent disability to her right hand and work restrictions imposed by physicians for this condition which existed before January 1984.

4. On January 24, 1984 while performing her work, claimant strained the muscles in her left shoulder which resulted in pain during use of her left arm.

5. Subsequent to the work injury, claimant's physician imposed work restrictions against extensively reaching, bending or stretching her left arm.

6. As a result of the work restrictions imposed by her physician after the work injury, claimant was reassigned to a job of sorting cans which did not require the extensive use of her left arm.

7. On February 15, 1984, claimant was laid off from the job for reasons that work was not available within her physician imposed work restrictions.

8. As a result of her work injury, claimant was absent from work for treatment of her shoulder strain condition and unable to perform the lid sorting job from February 16, 1984 through July 11, 1984.

9. Pursuant to the parties' stipulation, claimant's rate of compensation is $217.51.

CONCLUSIONS OF LAW

I. Claimant has established by preponderance of the evidence that the injury of January 24, 1984 is only a cause of temporary disability.

II. Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits for twenty-one (21) weeks.

ORDER

Accordingly, the following is ordered:

1. Defendants shall pay claimant temporary total disability benefits from February 16,1984 through July 11, 1984 (twenty-one

[21] weeks) at the rate of two hundred seventeen and 51/100 dollars ($217.51).

2. Defendants shall pay accrued weekly benefits in a lump sum and shall receive a credit against this award for all benefits previously paid as a result of this work injury.

3. Defendants shall received credit for previous payments of benefits as a result of this injury under a nonoccupational group insurance plan, if appropriate and applicable under Iowa Code section 84.38(2).

4. Defendants shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

5. Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

6. Defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 18th day of October, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN C. MORRISON, Claimant,	:	
vs.	:	
MUSCATINE COUNTY, IOWA, Employer,	:	File No. 702385
and	:	A P P E A L
FREMONT INDEMNITY COMPANY, Insurance Carrier, Defendants.	:	D E C I S I O N

FILED
OCT 07 1985
IOWA INDUSTRIAL COMMISSIONE

Petitioners appeal from a declaratory ruling filed May 2, 1985 in which it was determined the tables in section 85B.5, Code of Iowa, did not set the minimum times and intensities to which one must be exposed in order to produce an occupational hearing loss.

An occupational hearing loss is a sensorineural one which arises out of and in the course of employment due to prolonged exposure to excessive noise levels. Excessive noise levels are those which are capable of producing occupational hearing loss.

The table in section 85B.5 lists times and durations which, if met, will be presumptively excessive noise levels requiring the employer to inform the employee of the existence of such levels. It is not a minimum exposure level necessary to establish excessive noise levels.

If the legislature has intended the tables to be the minimum standard the definition of excessive noise level in section 85B.4(2) could have easily so stated.

Petitioners have prepared an excellent brief in support of their position. In view of the clear words of the statute and the prevailing view that the workers' compensation statutes are to be liberally construed in favor of the working person, the arguments are not persuasive.

THEREFORE, the declaratory ruling is adopted.

Signed and filed this 7 day of October, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BEVERLY O'BRIEN,	:	
Claimant,	:	
vs.	:	File No. 720416
MOORE & ASSOCIATES,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
AID INSURANCE SERVICES,	:	FILED
Insurance Carrier, Defendants.	:	OCT 7 1985
		IOWA INDUSTRIAL COMMISSIONER

By order of the industrial commissioner filed June 28, 1985 this 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 an arbitration decision in which she was awarded medical expenses, healing period benefits and 100 weeks of permanent partial industrial disability.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 35 and 37 through 46 and defendants' exhibits A through Z and BB. All evidence was considered in reaching this final agency decision.

The decision herein will slightly modify that reached by the hearing deputy.

ISSUES

The issues on appeal as stated by claimant are:

1. Is claimant entitled to additional healing period benefits for the periords [sic] from September 18, 1982 thru April 7, 1983; April 9, 1983 thru April 24, 1983 and April 28, 1983 thru May 5, 1983?

2. Is claimant entitled to additional healing period benefits after March 7, 1984?

3. Is claimant entitled to additional permanent partial disability benefits?
4. Is claimant entitled to a treadmill?

STATEMENT OF THE CASE

Fifty-two year old married claimant, a high school graduate who dropped out of college to be married, testified to work of a clerical nature with a billing machine; as a receptionist-secretary at a hospital; "a trick of all trades," service manager and credit manager for phone companies; salesclerk and payroll clerk. She had some experience with computers. Beginning some time after 1976 she had her own business selling vitamins, lipsticks, cosmetics and soap. That business always has lost money. She began work for defendant employer on January 16, 1978 as a bookkeeper-receptionist, who performed janitorial services such as shoveling snow, with earnings of $3.25 per hour.

Claimant described the happenings of April 5, 1982 as follows: She went to work. There were four or five inches of snow. She shoveled in the morning and then again later in the day. Her back began to hurt. She told the office manager who was aware she was going to the doctor.

In May she was reduced to part-time and she applied for and received unemployment. She worked for defendant employer until September 17, 1982 at which time she was making $4.85 per hour. After her termination she began doing books for the pharmacy -- a job taking five or six hours each month. She spends about five hours doing books for another company. She has been asked by others to do work, but she has been unable to take on jobs for persons who expected her to come to Pella, get books and bring them back completed in the same day. She does books for her church on a volunteer basis.

Claimant recalled being treated in 1969 for nervous exhaustion, in 1972 for a back problem, in October of 1973 for an overingestion of medication, in 1975 or 1976 for an ulcer, in 1977 for epigastric complaints, and in 1978 for an anxiety attack and mixed anxiety depression. She had an automobile accident in November of 1974 which injured her neck and low back, in December of 1975 with injury to her head and neck, in October of 1977 when she hurt her neck and low back, and in February of 1979 when she hurt her sacral area. She has had a hysterectomy, anterior-posterior repair and an hemorrhoidectomy.

In January of 1982 she went to B. D. Lange, D.C., because she was having tightness in her back muscles. She claimed that after April of 1982 she began having trouble sitting and having pain down her right leg.

For treatment of her injuries she first went to Dr. Lange and then to H. M. Perryman, D.O., and to Kurt R. Vander Ploeg, M.D., who gave her from twenty to one hundred injections at a time. He eventually recommended a pain clinic. She then went to Ronald K. Bunten, M.D., who suggested a psychological or psychiatric evaluation and a pain clinic. In April she got to Kent Patrick, M.D., who hospitalized her for a CT scan and myelogram. Thereafter she had a chemonucleolysis.

Before her discharge from the hospital she was given a back brace which she wore until she went to the pain clinic. After her discharge, her leg pain was gone; but she had muscle spasms. In June of 1983 she had physical therapy. She was given a TENS unit which she continued to use.

She was seen by Kate Benson on August 30, 1983. At that time she was taking Valium, Novahistine, Premarin, Feldene, Tylenol 3, Dyazide, Disalcid and Desyrel. Benson helped her with a resume and encouraged her to develop a business at home. Claimant testified that she would like to get additional training in the bookkeeping-accounting area, but that the insurance carrier has refused authorization. Claimant admitted applying for jobs as a receptionist, secretary and salesperson but she said she did it to draw unemployment which she collected until just before her surgery in May.

She agreed she had been contacted by a meat market about doing books in July of 1983, but she was unable to do so in spite of Dr. Patrick's opinion that she could. She also was sought out by a couple to do bookkeeping in their home.

Claimant, in what she characterized as an act of vengenance, published the following notice in the Pella paper on October 20, 1982: "I am no longer associated with Moore & Associates. I am self-employed in doing bookkeeping. Experience includes all types of bookkeeping systems and payroll taxes. Very reasonable prices. Call Collect."

She got medical treatment in October and again in November for severe back pain. On November 21, 1983 she was hospitalized. Physical therapy was resumed and an egg crate cushion and gel pillow were ordered. When she started having stomach problems in January or February of 1984, Tagamet was prescribed. Her medications were changed to Darvocet and Tylenol 3, and Soma Compound was added. In approximately March of 1984 claimant was told she would need to have her prescriptions filled in a pharmacy other than the Vander Linden.

Claimant said that she spent from August 1 to September 14 at the pain clinic where she saw a psychologist. She felt that although her pain was not any less she had improved psychologically. She takes Tylenol 3 only when the pain is unbearable. She also takes Desyrel, Darvon, Soma Compound, Tagamet and Meclomen.

Claimant did not believe that there had been much change in the functioning of her waist, hips or back since September of 1983. She reported that she can sit for thirty minutes; that she can walk only shorter distances, but farther than she could before she went to the pain clinic; that she lifts less and with more care; that she cannot sit comfortably to watch TV or a movie; that she has discomfort putting on her shoes; that she no longer scrubs floors on all fours; that she avoids reaching or bending; that she drives only short distances; that she has pain when she puts on pants; that her legs feel as though they will give out once or twice a day at unpredictable times; and that she takes pain medication four or five times each week.

Claimant claimed that she has been paid for only one round trip to the pain center in spite of being unable to drive herself to the pain center.

Claimant acknowledged filing a claim with the department of labor after her termination because she did not receive full vacation benefits and because she felt she was treated unfairly in her final compensation. She also filed a claim with civil rights alleging she had been discriminated against because of age and disability. That complaint was denied.

Claimant asserted that she reported her injury on April 5, 1982 and left early on occasion for doctors' appointments which she assumed Nockels, the office manager, knew were because her back was not getting better. She claimed that in April of 1982 she was informed she could not take further sick leave and she was told she could only go to the doctor in Pella or Knoxville. Later she vacillated and could not remember whether that was what she had been instructed or whether it was that she had to take time off to see the doctor under a different policy. Claimant agreed that job service records showed trips by her to Knoxville on April 6, 8, 12 and 14 and to Pella on April 7 and 15. Claimant claimed that there should have been an hour's sick leave on April 6 rather than on April 7. She said that she went to Des Moines on April 23 because of her back, a change in her glasses and for a checkup with the allergist. She presented no bills for medical expenses to defendant employer until September of 1982.

Kathleen Benson, certified rehabilitation counselor who has a master's degree in rehabilitation counseling and who was permitted to talk to claimant's counsel only in the presence of defense counsel, testified to first being contacted by defendants' attorney in August of 1983 with some basic medical information and instructions to proceed with job placement through a vocational evaluation and recommendations. She contacted claimant's counsel and there was an intent that he should receive carbon copies of any reports; but through clerical error, none were sent until April of 1984. She was initially supplied with medical up through July 27, 1983 and then provided with medical as it came in.

Claimant was first seen at her home on August 30, 1983 to ascertain a work, social and educational history and to learn of claimant's self-imposed restrictions. Benson observed both on the August visit and on a subsequent one that claimant was slow to respond and drowsy. She viewed claimant as sad. She suggested to claimant that she complete a rough draft resume and get her references in order. She was told by the insurance carrier to obtain a job analysis of the work that had been offered to claimant by the two employers in the Pella area. On October 5, 1983 a rough draft of claimant's resume was received. A final was made and sent to claimant. Benson was subsequently asked to place her file on hold and then in January of 1984 she was asked to close it out.

In March she was requested to reopen and revisit claimant which she did on April 13, 1984. Her observations of claimant's demeanor were the same. As a result of that visit, she recommended a desk and supportive-type chair.

Benson's recommendations at the time of hearing were to get claimant "in sync" with her limitations so that employers could be approached in a consistent manner.

Benson characterized claimant's work experience as skilled and semi-skilled and clerical in nature. She viewed claimant's strong features as a solid work history of performing interrelated jobs. She believed placement was possible for claimant in the Pella-Knoxville area and within the restrictions placed by either Dr. Patrick or James L. Blessman, M.D. She thought some job hardening would be necessary.

Bette Nockels, a ten year employee of defendant employer and the office manager whose duties include handling payroll, coordinating work schedules and maintaining personnel files, testified that claimant's salary at the time of her injury was $4.60 per hour with a raise to $4.85 as of July 1, 1982. She indicated that company policy allows eighty hours of sick leave, eight hours for doctors' appointments and eight hours for funerals.

Nockels recalled being notified by claimant on April 5, 1982 that she had injured her back at work and records showed she took an hour's sick leave, but she denied any discussion of workers' compensation at that time. Thereafter on April 23, 1982 she saw an allergist. She missed another hour's work on April 28, 1982. No other time off was recorded.

Claimant's percentage of billable time was thirty percent which this witness said was low in comparison to other bookkeepers. Claimant's hours were changed to part-time from June until September. Brenda Christian, who had two years of college training as a bookkeeper and who could work either in Pella or Oskaloosa and do "heavier bookkeeping," was hired to replace claimant and claimant was terminated on September 17, 1982. The Pella office remains unprofitable with Christian working part-time at her request.

Nockels said claimant made no complaints of her back from May to September and submitted no bills for medical treatment from May to August. Claimant first submitted bills after notice of her termination.

Nockels agreed that she was unaware claimant was seeking treatment for her back from June to August or that claimant had been hospitalized. Nockels said that she had been told by Mark Gosselink who worked in the Pella office that claimant had no missed work. Nockels remembered that she did not notify defendant insurance carrier of a claim when she received doctors' certificates attached to claimant's time sheets.

The office manager identified a request for a recommendation for employment which was dated October 1, 1982. A letter was sent expressing the opinion that claimant was a "good bookkeeper, sufficient, good worker." Nockels acknowledged there was a strong competition to provide bookkeeping services in the Pella area.

Lorna Stephenson, a workers' compensation claim representative for four and a half years who has been with defendant insurance carrier for eighteen years with responsibility for claimant's case, testified that she with her supervisor disapproved the exercise modality suggested by Dr. Patrick on the basis that an exercise bike had been rented and purchased and the company was not advised until five months later that it bothered claimant. However, Dr. Patrick is claimant's authorized physician in Des Moines and Dr. Vander Ploeg is the authorized doctor in claimant's area. She recalled a conversation with claimant on October 13, 1982 at which time claimant was told that only Dr. Vander Ploeg would be authorized, and that treatment from Jefrrey J. Meyer, D.C., would not be paid.

Stephenson listed medical expenses which were not paid as follows: Prescriptions from Dr. Vander Linden for Tylenol 3 were not paid because they were written before claimant's injury. Payment for treatment by Dr. Meyer from October 2 to October 13, 1982 was denied, but three other physicians' bills were paid. Charges for Dalmane and Donnatal and accompanying mileage expenses were denied. On October 21, 1983 a bill from Dr. Hillyer which refers to an emergency was disallowed as were bills for emergency visits to the hospital based on an opinion by Dr. Patrick that trips to the hospital to get drugs for pain were not a good idea for claimant. The expense of a chair with no special features was not paid. In a letter dated March 14 claimant's attorney was told that trips to Vander Linden's would not be authorized. Only one round trip to the pain center was authorized for each of four weeks. Bills from Vander Linden's were corrected to the price claimant had been charged with an additional $5.00 monthly service charge. A treadmill had not been purchased because there was no indication it was "highly recommended."

Stephenson acknowledged that claimant had seen Dr. Patrick and was hospitalized the day after one of her emergency room visits and that Dr. Patrick's recommendation claimant not go to the emergency room for Demerol injections was made after the fact. She said that unwillingness to pay for a tax preparation course stemmed from lack of information about how long the course would take, where it would be undertaken or what it would accomplish. She agreed that having claimant's spouse provide her with transportation was reasonable under the circumstances. Stephenson said that she anticipated approving further assistance to claimant by Benson.

Tom Vander Linden, staff pharmacist and partial owner of Vander Linden Rexall Drugstore, testified that pharmacists cannot transfer prescriptions between drugstores. He recalled a conversation with Lorna Stephenson of defendant insurance carrier in which he was told the carrier would no longer pay the prescriptions charges which had been billed at the end of each month. He agreed that when claimant herself charged drugs she was charged the same amount as if she had paid cash. However, an additional thirty-three percent was charged to the insurance carrier. A bill delinquent sixty days would incur interest at a rate of one and a half percent with a monthly service charge of $2.00.

He claimed the insurance carrier now owes $219.41. He agreed that claimant does the monthly books for the company.

A letter from Phyllis S. Cohee dated October 13, 1982 reports claimant's inability to work as an assistant supervisor in her cosmetic business which included having monthly meetings with her distributors and providing them with products and information.

Counsel exchanged a series of letters. On March 13, 1984 claimant's counsel, Dennis Hanssen, asked that arrangements be made for claimant to purchase drugs somewhere else if she was not to obtain them in Pella and for the transfer of prescriptions. Another letter dated March 22, 1984 again asked where claimant should get prescriptions. It indicates claimant will give up additional mileage charges if she is permitted to continue with Vander Linden. Defendants' counsel, Cecil Goettsch, responded by pointing out the added cost of transportation and by seeking advice on where claimant needed additional rehabilitation assistance. A letter dated March 30, 1984 authorizes a pharmacy in Knoxville. A letter from Hanssen dated May 3, 1984 complains that claimant had no authorized pharmacy from March 15, 1984 to April 10, 1984.

Job service records show claimant received some payments from the quarter ending June 30, 1982 through the quarter ending June 30, 1983. From the week ending June 12, 1982 claimant certified she was ready, willing and able to work.

Early medical records show claimant was hospitalized in October of 1973 after an intentional overdose of Librium and Thorazine. She was treated for a low back strain following an auto accident in 1974. In 1975, 1976, 1977 and again in 1978 she underwent periods of physical therapy to treat various portions of her back. Claimant was treated for low back and cervical pain in 1977 following an accident. During the same time she lost a discrimination suit against her employer. Back pain continued into early 1978. Claimant was admitted to the hospital by R. R. McClung, M.D., with an acute anxiety attack and mixed anxiety depression. A history of long standing problems and emotional disturbance with periodic episodes of depressive feelings, interspersed with periodic agitation was recorded. Following an auto accident in 1979 she had tenderness over the sacral spine tips.

B. D. Lange, D.C., saw claimant on April 5, 1982 and took a history of back pain coming on as claimant was shoveling snow. A second treatment was rendered on May 1, 1982. Dr. Lange reported other treatment of claimant for degenerative joint disease of the fifth lumbar intervertebral disc and osteoarthritis.

H. M. Perryman, D.O., saw claimant on April 6, 1982 for a lumbosacral strain which occurred while she was working. She was treated on six occasions thereafter and did not keep a seventh appointment.

On July 2, 1982 claimant was seen by Kurt R. Vander Ploeg, M.D., who reviewed her x-rays which he interpreted as showing slight degenerative changes at L5-S1. His impression was that she had an acute low back strain which had become chronic. She was treated with injections which gave only temporary relief.

Claimant was hospitalized on October 26, 1982. She gave a history of being placed in traction for back problems in 1972 and of occasionally taking Tylenol 3 for her back.

In December Dr. Vander Ploeg reported that claimant's back pain had been reduced, but that she had trouble lifting over ten pounds or sitting to do her work. He believed claimant's problem was instability in the low back secondary to the shoveling incident which he characterized as chronic instability of the lumbosacral spine.

In a letter dated December 28, 1982 Dr. Vander Ploeg wrote that because claimant had been symptomatic since the shoveling incident, she probably should not have been working since that time.

Prior to claimant's hospitalization in October, she also was seeing Jeffrey J. Meyer, D.C., who treated her with hot packs and manipulations for marked spasm of the paravertebral musculature in the low back. He called claimant's condition "[a] marked subluxation complex of the lumbo-sacral area causing neuritis into the related left leg dermatones complicated by splinting spasm of the paravertebral musculature." He suggested that claimant sit no more than ten minutes at a time, stand in one position for no longer than fourteen minutes and lift no more than eight pounds.

Ronald K. Bunten, M.D., performed an examination on February 23, 1983 which resulted in a diagnosis of degenerative disc disease of the lumbar spine and depression. He found claimant to be anxious and tense, to have mild difficulty transferring position, and to guard her low back. There was mild restriction of motion. Neurologically she was normal with no radicular symptoms. X-rays showed mild degenerative changes in the low lumbar interspaces. The doctor indicated that the symptoms of degenerative disc disease in claimant's lumbar spine were either brought on by or aggravated by the shoveling incident. He suggested that claimant's primary problems were psychosocial and that these problems should be evaluated. He wrote: "I would think that her low back disorder should not prevent her from working on a full-time basis in sedentary work, such as office work. I suggested that in her home she try doing some of her bookkeeping activities while standing at an elevated desk."

Kent Michael Patrick, M.D., saw claimant a year after the shoveling incident which she told the doctor resulted in a pop or snap in her low back followed by low back and right leg pain. He recorded claimant's being fired in September because of her back. Claimant was taking Tylenol 3 at a rate of one to two per hour. Her lumbar spine motion was somewhat restricted and she was tender from the lumbosacral junction through the coccyx and sacrum. Neurologically she was negative.

Dr. Patrick ordered a CT scan which showed a disc bulge and probable protruded disc material at L5-S1 primarily on the right. On April 26, 1985 she underwent a myelogram which revealed diffuse bulging at L3-4, L4-5 and a slightly more central herniation at L5-S1. Dr. Patrick's letter of April 26, 1983 causally relates claimant's back difficulties to the snow shoveling incident.

Claimant was hospitalized on May 4, 1983 for chemonucleolysis of L4-5 and L5-S1. Sinesio Misol, M.D., saw claimant in consultation and advised evaluation of her depression before surgery. Allen Silberman, licensed psychologist, performed a Minnesota Multiphasic Personality Inventory which he interpreted as showing utilization of repression and denial to deal with psychological conflicts and current depression.

When claimant was seen on June 1, 1983 she had little lumbar spine motion, but she was tender to palpation. Dr. Patrick thought flexibility exercises would be useful to limber claimant's spine. He discouraged long sitting and suggested claimant should be standing, walking or lying. Claimant was referred to David A. Petersen, L.P.T., who treated her with various modalities including a home program.

On June 16, 1983 Dr. Patrick wrote: "At the present time, I would release her for some part-time work when she could either sit or stand and do her accounting type work. I would not want her doing any bending, twisting or lifting."

In July claimant was referred to James J. Kelso, M.D., who had previously done an anterior-posterior repair because of stress incontinence and a cystourethrocele. She was complaining of urinary incontinence at night which appeared to be urgency rather than stress. She also was examined by William R. Hornaday, Jr., M.D., whose impression was probable neurogenic component to increased spasticity of the bladder. He prescribed Donnatal. When claimant was seen on September 9, 1983 she was depressed and had muscle spasm on the right which the doctor believed was related to degenerative changes rather than to her disc problem. She was being treated by Karen Lachiewicz, L.P.T., who by October 17 saw no improvement in her condition.

At the end of September, Dr. Patrick found claimant's complaints consistent with a postinjection discitis. He wrote: "I would expect her to be able to perform her job as an accountant when she is over the back spasms."

On October 21, 1983 claimant sought treatment at the Mater Clinic, P.C., for low back pain. She was injected with Demerol and Phenergan and offered hospitalization which she refused.

Dr. Patrick saw claimant a week later and found bilateral paraspinal muscle spasm and some limitation of motion. She was encouraged to continue her exercises.

Claimant made visits to the emergency room on both November 18 and November 20, 1983 and received injections of Demerol and Vistaril.

Dr. Patrick ordered tomograms which were normal and showed no pathology. In November he determined that claimant should be hospitalized for bedrest, anti-inflammatories and narcotics as necessary. He noted that claimant had been to the emergency room where she received narcotics which he said was "not the way to handle her problem" and he felt that she needed to be put in a more controlled environment where her medication could be monitored.

Claimant began physical therapy with therapist Petersen in mid December of 1983. About a month later he observed that sitting was the worst position for claimant. On February 1, 1984 Dr. Patrick again thought pain of which claimant was complaining was from degenerative joint disease rather than paraspinal muscle spasm.

A month thereafter the doctor determined that claimant had received maximum benefit from physical therapy. Her range of motion was fifty percent and she was free of radicular symptoms. The doctor indicated he had nothing further to offer claimant. He rated claimant's permanent partial impairment at twenty percent of the body as a whole and he cautioned that claimant would always need to be careful with bending, twisting, stooping and lifting. He subsequently placed a limit on lifting of twenty-five pounds. Regarding employment, he stated:

> [A]s long as she has the ability to sit and to stand at will, I think she could continue to do her accounting work. She has done some of this in the past out of her home and this might be a good way for her to continue. The rigors of her regular job might not permit her the leeway to change her body position, including becoming supine from time to time.

Later he declared that claimant reached maximum healing on March 7, 1984.

James L. Blessman, M.D., examined claimant on August 6, 1984. She was admitted to the pain clinic. At the time of her admission she was found to have marked limitation of motion and to be depressed. While she was at the clinic she was treated with psychotherapy, adjustments in medication and physical therapy. An exercise bike for home use was recommended. Dr. Blessman thought it would be to claimant's benefit to return to work and he observed that claimant was able to sit for thirty to forty-five minutes. He suggested claimant work at a position where she would sit no more than thirty minutes at a time, lift no more than thirty-five pounds and do no repetitive bending or stooping.

Claimant was last seen by Dr. Patrick on December 5, 1984. His only suggestion at that time was to possibly exchange the exercise bike for a treadmill. He wrote: "I am including a prescription for this to the insurance company and if they wish to comply, I think it would be a benefit to the patient."

APPLICABLE LAW AND ANALYSIS

The first and second issues raised by claimant will be combined as they both relate to healing period. 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.

The hearing deputy awarded healing period benefits for April 8, 1983, from April 25, 1983 to April 27, 1983 and from May 5, 1983 to March 7, 1984. Claimant seeks benefits from September 18, 1982 through April 7, 1983; April 9, 1983 through April 24, 1983; April 28, 1983 through May 5, 1983; and for an unspecified period after March 7, 1984.

The hearing deputy based his award on too great an ambiguity in Dr. Vander Ploeg's statement "assuming that she is unable to work now, she probably should not have been working at any time since the injury;" on nothing in the doctor's restrictions preventing claimant's doing bookwork or clerical duties and on claimant's receipt of unemployment benefits.

Claimant worked from the time of her injury to the time of her termination in September albeit part-time for the larger portion of that period. When she changed to part-time work she began collecting unemployment benefits certifying her ability to work and she actively looked for employment. Documentary evidence shows claimant made trips to Knoxville and Pella in early and mid-April immediately prior to her myelogram. Nockels, the office manager, testified that claimant reported no back complaints to her from the time of her injury to the time of her termination. The records showed claimant was not missing work. Claimant countered by saying she assumed Nockels knew she was going to the doctor for her back.

Dr. Lange was the first practitioner to see claimant and he imposed no restrictions on her working. Dr. Perryman saw claimant next and treated her through mid-June. Dr. Vander Ploeg, at claimant's request, admitted her to the hospital in October because of her back pain. The doctor's notation indicated claimant was hospitalized so "that may we could do a little more extensive and thorough job." Dr. Vander Ploeg made the statement referred to by the hearing deputy and set out above, but he reported claimant's self-imposed inability to lift more than ten pounds and difficulty sitting. During this same period claimant had a series of manipulations and hotpack treatments from Dr. Meyer who responded "unknown" to the question of when she could resume work or light work, and he attached restrictions of ten minutes to sitting and fourteen minutes to standing. Dr. Bunten did not think claimant was precluded from full-time sedentary work.

Defendants propose that an award of workers' compensation benefits during the time claimant was receiving unemployment would create duplicate payments and a windfall to claimant. While that may be true, it is not a concern of this agency in the event that claimant meets the tests in section 85.34(1). Claimant was not working during the period she requested. Significant improvement cannot be evaluated as claimant's condition was nondiagnosed. While claimant might not have been able to perform all the janitorial tasks she did for defendant employer, she could have done substantially similar work. Claimant will be awarded healing period benefits for whatever time she was hospitalized by Dr. Vander Ploeg. She asked for the hospitalization, but the doctor's notes indicate there were medical reasons for it as well.

Claimant argues that "Deputy Industrial Commissioners as a result of their medical expertise should realize the impact that two herniated discs have on the ability of a person to perform any type of gainful employment." The preponderance of the lay and medical evidence of record does not permit any overriding by this deputy commissioner's expertise and with the exception of the period set out above no additional healing period will be allowed for the time prior to March 7, 1984.

The hearing deputy's determination that healing period ended on March 7, 1984 is correct; however, claimant is entitled to weekly benefits for the period she was treated at the pain clinic. Claimant argues first that healing period should extend beyond March 7, 1984 because Benson believed claimant could not work at a competitive level at the time of her visit on April 9, 1984. Benson does not really say that. What she does report is that "job placement activity at the time does not appear feasible due to Ms. O'Brien's self-described limitations" and at the time of hearing she responded, "Based on what she was telling me, no" to the question of whether claimant could work competitively at home. Claimant later asserts that she did improve during her time at the pain center. That assertion is supported by the record, but healing period ends at the first of three events in section 85.34(1). Claimant then suggests that healing period should be extended two months beyond the time of her discharge from the pain clinic to the time she was to be seen in follow-up by Dr. Blessman. No evidence was submitted regarding whether or not claimant was seen by Dr. Blessman after her discharge or what may have transpired in the interim period.

The next issue is claimant's entitlement to permanent partial disability. The hearing deputy awarded twenty percent industrial disability.

When a 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."

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 industrial commissioner frequently has described the process of evaluating industrial disability 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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.
>
> Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant is middle-aged with perhaps a quarter of her worklife ahead. She has a good education and steady work experience in a number of clerical areas. She also has worked with computers which is to her advantage.

The hearing deputy cited Beintema v. Sioux City Engineering Co., II Iowa Industrial Commissioner Report 24 (1981) and McKelvey v. Dubuque Packing Co., 33 Biennial Report of the Industrial Commissioner 227 (1976) and pointed out that "[c]laimant has not exhibited motivation to seek alternative employment and has refused offers of employment on grounds that are not verified by her physicians." The emphasis on claimant's lack of motivation is important. Initially she displayed good motivation by continuing to work in spite of her injury and one wonders if she might not have continued had she not been terminated. Her termination was not brought about because of her injury. Business in Pella was poor and the company had a more qualified person available. The accounting business climate in that area appears to be highly competitive, but claimant seemingly has a good reputation in the community in light of the fact that persons are seeking her out as someone to do their work. At the time of hearing Stephenson indicated a willingness to authorize Benson to work with claimant in getting her back to a job and that is a good thing. Benson was aware of claimant's needing some motivation and also of her requiring a period of job hardening. Benson was confident employment within claimant's restrictions could be found for her in the Pella-Knoxville area. The industrial disability award in this matter is based on claimant's having made no attempt to return to competitive employment. Claimant's actual earnings at the time of her injury were $4.60 per hour. The wage survey conducted by Benson suggests that for some job classifications at an entry level position claimant would have a decrease in actual earnings.

Claimant had a number of physical problems and a history of emotional problems prior to her injury. She had a series of accidents which resulted in trauma and treatment to her spine. None of these stopped her from working as did the injury of April 5, 1982. Dr. Patrick is the only doctor to rate claimant's impairment and he assigned twenty percent of the body as a whole. He limited claimant's lifting to twenty-five pounds and suggested she exercise care with bending, twisting, stooping and lifting. Dr. Blessman's limitations were thirty-five pounds lifting with no repetitive bending or stooping. He proposed that claimant sit no more than thirty minutes at a time although he observed she was capable of sitting perhaps fifty percent longer. Claimant has numerous complaints, but she did agree with Dr. Blessman's assessment of her ability to sit. The hearing deputy wrote: "The greater weight of medical evidence does not establish that claimant's medical condition prevents her from returning to substantially the same work that she was doing at the time of injury." As pointed out above, claimant did have some janitorial duties in the job in which she was injured, but she would be capable of doing many clerical jobs.

Based on the Iowa case law, the discussion herein and the finding of facts set out below, claimant's permanent partial industrial disability is found to be twenty percent.

The final issue presented by claimant is her entitlement to a treadmill. Regarding that issue the hearing deputy wrote:

> Claimant desires a treadmill under the theory that she is unable to sit on an excercise [sic] bike prescribed by Dr. Blessman. No prescription can be found on the record for such a treadmill. Only Dr. Blessman can change the prescription from an exercise bike to a treadmill, not claimant on her own. This expense shall not be allowed.

Iowa Code section 85.27 provides in part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services 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.

Defendant insurance carrier must be complimented for its efforts in monitoring the medical expenses in this file as it behooves us all to keep medical expenses controlled although some of the denials made were somewhat arbitrary. Medical expenses which are unnecessary or unreasonable should not be allowed.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA J. PADULLA, formerly PATRICIA MANNING CHAPMAN, Claimant,	File No. 760444
vs.	ARBITRATION
LOUIS CLAEYS, Employer,	DECISION
and	FILED OCT 15 1985 IOWA INDUSTRIAL COMMISSIONER
IOWA MUTUAL INSURANCE, Insurance Carrier, Defendants.	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Patricia J. Chapman, now known as Patricia J. Padulla due to her recent marriage, claimant, against Louis Claeys, alleged employer, hereinafter referred to as Claeys, and Iowa Mutual Insurance, insurance carrier, defendants, for benefits as a result of an alleged injury on October 24, 1982. On August 28, 1985 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of the hearing.

At the start of the hearing the parties agreed that the caption of these proceedings should be modified to reflect claimant's current name and such a change was approved.

ISSUES

The parties have submitted the following issues for determination in these proceedings:

I. Whether an employer-employee relationship existed between the claimant and Louis Claeys at the time of the alleged work injury;

II. Whether claimant received an injury arising out of and in the course of such alleged employment; and,

III. Claimant's rate of weekly compensation.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The parties have submitted a prehearing report of certain matters pertaining to this case which was approved and accepted as part of the record of this case. The record of the hearing consists of the oral testimony of claimant, Louis Claeys, and claimant's mother, Delores Sikkema, and claimant's exhibit 1. The parties have stipulated to the following matters:

(1) Although the amount of the gross earnings of claimant is in dispute, the rate of compensation shall be computed in these proceedings on the basis of single marital status and entitlement to one exemption; and,

(2) Defendant employer had workers' compensation insurance coverage at the time of the alleged work injury on October 24, 1982.

Claimant did not discuss at the hearing her prior medical condition or her past employment before her involvement with Claeys, a farmer in Scott County, Iowa. Some time in 1981 claimant first began living with Claeys and began to perform household duties and farm work for him at his residence. Claimant testified that she considered herself an employee of Claeys but admitted there was a boy-girlfriend relationship between herself and Claeys when she first moved in. Claimant stated that this personal relationship ended by the time of the alleged work injury. Upon cross-examination, however, claimant admitted that she always slept in the same bedroom as Claeys during the periods of time she claimed to have been working for him.

Claeys testified that claimant was only a live-in girlfriend who helped out in his household chores and farming operations. Both claimant and Claeys agreed that they were neither married to each other, nor considered themselves common law husband and wife at any time during their personal relationship. Claeys admitted that he supported claimant during the period she lived with him by providing her with free room and board. Claeys denied that he agreed to pay her any kind of compensation for services and only occasionally gave her money for expenses. Both claimant and Claeys stated that Claeys employed two other persons on an intermittent basis at the times claimant resided at the farm. These employees were paid at the rate of $4.00 per hour. The amount of hours and the manner in which these employees were paid was not discussed at the hearing.

Claeys testified that he did not give claimant money for her expenses on a more frequent basis, such as her car payment, because the relationship was not stable and she continually moved in and out of his residence. The relationship between claimant and Claeys was, indeed, very rocky and claimant moved out several times after heated arguments. Claimant stated that the arguments frequently occurred because Claeys was hard to please and that he never paid her for her work. During claimant's last period of absence from Claeys' residence, before her alleged work injury, she held two part-time jobs, one in a food store and the other in a nursing home. These jobs paid $3.35 per hour and claimant worked in these jobs approximately six weeks before quitting upon her return to Claeys residence in the fall of 1982.

The reasons for claimant's last return to Claeys' farm was a hotly contested matter at the hearing. Claimant said that she was persuaded by Claeys to terminate her part-time jobs and to work for him because he needed a trained person to assist him in the 1982 fall harvest. Claimant said that she needed money for her car payment and medical bills at the time and only agreed to move back to his residence and work for him when he offered to pay her in the same manner as he paid his other employees. Claeys denies that he offered to pay claimant wages but does admit that he did ask her to return and help him with the 1982 harvest. In rebuttal, claimant's mother largely verified claimant's story as to what was said at the time claimant agreed to return to Claeys' residence. The mother also stated that moving back into Claeys' house would provide larger accommodations for claimant's children by a previous marriage. Although these children were not living with claimant, apparently there was an ongoing visitation or custody dispute concerning these children and the mother's house was too small to accommodate the children when they were staying with her.

On two occasions prior to the work injury claimant was asked to describe her employment status at Claeys' residence. During a three month period, claimant's children resided with her at Claeys' residence. Claimant applied for and received ADC benefits for this period of time. In the application for ADC benefits, claimant indicated that she was employed by Claeys and that she received compensation in the form of free rent which she valued at $200 per month. Also, on one occasion when she was residing with Claeys, she applied for employment with a retail store and indicated on that application that she was unemployed at the time. Claimant explained that she intentionally misrepresented her employment status because she believed that preference would be given by the food store to persons who were without jobs at the time of the application.

Except for a couple of occasions when Claeys gave claimant money for various bills and gifts at christmas time, claimant never received cash money from Claeys. Also, claimant did not keep a record of her hours. Claimant said that Claeys told her that she would have to wait until after the end of the harvest season to be paid. Claimant said that she was to be paid for her work after both the 1981 and 1982 harvest but Claeys never did so. There is no indication in the record that claimant had at any time initiated legal proceedings against Claeys to recover wages for this work.

The facts surrounding the alleged injury on October 24, 1982 were not in real dispute at the hearing. Claimant testified that on the date of injury, she was helping Claeys in the harvest of his corn. The hired man was driving a grain truck. Claeys was operating the combine and claimant was operating a tractor pulling a grain cart. Claimant's assigned task that day was to periodically pull the cart alongside the combine and the harvested corn would be transferred from the combine into the cart with an auger on the combine. On one occasion, an argument began between claimant and Clayes as to the proper operation of the cart. Claimant testified that Claeys swung his hand at her in anger while she was on the cart and, in an attempt to avoid being struck, she fell to the ground. Claimant said that she landed on her right lower back and hip. Claimant said that the fall "knocked the wind out of her" and it took several minutes for her to stand up. After the fall, claimant said that she felt pain in her low back and right ribs. Claimant said that she resumed her job of operating the grain cart after the incident but "may" have went home early because of the pain. Claimant said that she worked the next day as well but on the following day she sought medical treatment.

Upon the recommendation of Claeys, claimant went to John C. Barker, M.D., on October 26, 1982. Claimant testified that she was told by Claeys to tell Dr. Barker that Claeys' insurance would take care of it. Claeys testified that he could not remember saying anything about insurance coverage at the time. Dr. Barker reports that claimant complained to him of pain while breathing and upon movement in the left lateral rib area and his diagnosis at the time was "bruised ribs." Dr. Barker's treatment consisted of limiting claimant's activity and prescribing a medication called "Tylenol 3" for her pain. Claimant was told by Dr. Barker to return if there was no improvement. Dr. Barker reports that claimant never returned to him after that time. Claimant did not discuss her current medical condition at the time of the evidentiary hearing.

The issues involving claimant's entitlement to disability or medical benefits as a result of the alleged work injury has been bifurcated from these proceedings.

APPLICABLE LAW AND ANALYSIS

To establish the compensability of her alleged injury under the workers' compensation law of Iowa, claimant has the initial burden to establish by a preponderance of the evidence that an employer-employee relationship existed between Claeys and herself at the time she alleges to have incurred the work injury. Only employees are entitled to compensation for work-related injuries and occupational diseases under Chapters 85 and 85A of the Iowa Code. Iowa Code section 85.61(2) defines the word "employee" as follows: "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied,...for an employer,...." Although claimant has the initial burden to establish an employer-employee relationship, if a compensation claimant establishes a prima facie case for such a relationship, 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. Nelson v. Citie Service Oil Co., 259 Iowa 1209, 1213, 146 N.W.2d 261 (1966).

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) responsibilities of 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 intentions of the parties is also an important consideration. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981).

Claimant in the case sub judice has not established an employer-employee relationship. The evidence clearly establishes that claimant did perform various work tasks for Claeys and that she received support and occasional cash money from Claeys while she was living with him. However, little has been shown to causally connect the performance of work to the receipt of living accommodations or the receipt of cash money. First, claimant has not shown that the work she performed for Claeys was unrelated to their personal relationship. In fact, all of the evidence suggests that claimant's performance of work for Claeys was entirely dependent upon the personal relationship. Her work activities in the residence and in the fields ended when she left and began again when their live-in relationship was renewed. Claimant's testimony that they were not lovers at the time when they were sleeping together is simply not credible. Although it must be recognized that it is possible for lovers as well as spouses to be in an employer-employee relationship, the existence of a personal relationship does hinder claimant's ability to show a professional relationship. The existence of a personal friendship between the parties may explain why a person would perform work without an expectation of payment of compensation. Such a friendship relationship may also explain why a person would give money or support to another person for reasons other than payment for services rendered.

Second, claimant has not shown that there was any responsibility on the part of Claeys to pay her wages. Although claimant and her mother were probably truthful in describing the promises made by Claeys to induce claimant to return to his residence and help him with the 1982 harvest, any professional relationship the parties may have had initially soon ended after she moved in and failed to receive wages at the same time wages were paid to Claeys' other employees. She apparently acquiescence in a relationship which involved her work without pay. Her claim that she was to be paid at the end of the 1982 harvest is not credible. Neither claimant nor Claeys kept a record of her hours as would normally be the case if she were to be paid at a later date. Also, claimant did not explain why she expected to be paid in 1982 after failing to receive payment for the 1981 harvest. Furthermore, claimant's failure to initiate legal proceedings against claimant, aside from these proceedings, to secure payment of a claimed entitlement to wages indicates that claimant herself felt there was no obligation to pay for her help.

Finally, claimant's mother has indicated another reason, apart from compensation, for claimant's desire to live with Claeys before the work injury. She explained that the house in which Claeys was residing was more suitable for claimant's children when they were visiting or living with claimant.

Therefore, on the whole record, the greater weight of evidence fails to establish that an employer-employee relationship existed between claimant and her alleged employer. In light of this finding, there is no need to resolve the other issues in this proceeding.

FINDINGS OF FACT

1. Claimant was not a credible witness.

2. At all times material herein, Claeys was a full-time farmer.

3. At various times in 1981 and 1982, claimant lived with Claeys and voluntarily performed housework and various work tasks for Claeys on his farm.

4. Claimant and Claeys had a personal relationship during the time claimant was living with Claeys and they were sleeping together at the time of the alleged work incident.

5. At the time claimant was living with Claeys, Claeys provided claimant with room and board and occasionally gave her money for expenses.

6. The periods of time which claimant performed work services for Claeys coincided with the periods of time she was living with him as his lover.

7. At no time during this relationship did claimant receive money in the form of wages or compensation for services rendered.

8. At no time during their relationship was Claeys under any responsibility to pay wages or compensation to claimant for services rendered.

CONCLUSION OF LAW

Claimant has not established by a preponderance of the evidence that there was an employer-employee relationship between Claeys and herself at the time of the alleged work injury on October 24, 1982.

ORDER

IT IS THEREFORE ORDERED THAT claimant's petition herein is dismissed and she shall pay the costs of this action pursuant Industrial Commissioner Rule 500-4.33.

Signed and filed this 15th day of October, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY PHILLIPS, Claimant, vs. NORTH STAR STEEL, Employer, Defendant.	File No. 698482 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 13 1985 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Jerry Phillips, claimant, against North Star Steel, employer, defendant, for the recovery of benefits as the result of an injury on March 16, 1982. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed is $264.26. This matter was heard before the undersigned at the bicentennial building in Davenport, Scott County, Iowa, on August 23, 1985. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Bill Clevenger, Don Kizer, and Patrick Doherty; and, claimant's exhibit 1 which consists of separtely marked pages as plaintiff's exhibits 1 through 18.

STIPULATIONS AND ISSUES

Pursuant to the prehearing order and report, the parties stipulated that claimant's rate of compensation is $264.26; that claimant seeks no additional healing period benefits; and, that the conversion date from healing period to permanent partial disability, if any, is June 1, 1982.

The issues to be determined are whether there is a causal connection between claimant's injury and the disability upon which he bases this claim; the extent of disability, if any, to which claimant is entitled; and, whether there is a causal connection between claimant's injury and certain medical expenses incurred by him.

EVIDENCE PRESENTED

Claimant testified he is forty-six years old, married, and a resident of Lucasville, Ohio. Claimant said he has a high school education plus some training in law enforcement since his injury.

Claimant testified about his work experience prior to his employment with defendant. He advised he has worked as a brick mason, forester, and steel mill worker. He served six months in the army reserve. Claimant recalled that his wages as a steel mill worker ranged from $13 to $15 per hour and as a brick mason around $10 to $12 per hour.

Due to poor economic conditions in Ohio, claimant moved to Iowa in 1981 and found a job with defendant starting July 28, 1981. Claimant's job was that of a forklift operator whose duty it was to provide the machine shop with steel for fabrication. Claimant said this job required a lot of heavy lifting which he was able to do without any difficulty. He was paid $10 to $11 per hour.

Claimant stated that he was doing his regular job on March 16, 1982 when he was injured. He was driving his forklift about ten miles per hour when the front forks struck a railroad tie. The forklift stopped immediately, but claimant did not until he struck the windshield. Claimant was taken to Muscatine General Hospital where he was examined. Claimant said he complained of severe pain in his upper back and shoulders and left knee. Claimant was released from the hospital that day.

Claimant said he called into work the next day and said he would not be in to work until he saw the doctor. Claimant was then examined by John E. Sinning, Jr., M.D., who told claimant to report back to work. Claimant said he did report to work as ordered but needed help getting into the plant. He said his foreman told him to get on the forklift, but he said he could not and requested to see another physician. He was allowed to see another doctor who referred him to the hospital for physical therapy.

Claimant explained that when he first moved to Iowa he rented a house and lived with his wife and children. He said his wife had worked in Iowa during the summer, but had no job thereafter. Since his wife did have a job available in Ohio, it was decided that she would return to Ohio while he stayed in Iowa. Because of this, claimant was living at the YMCA at the time of his injury. Claimant said that following his injury he found it very difficult to get up and down the stairs at the YMCA.

Claimant said that after he saw the second doctor he decided he should return to Ohio for medical treatment and to cut his living expenses. Claimant said he did not receive any workers' compensation benefits until after April 1 and he could not continue to support himself in Iowa. Claimant stated that he discussed these plans with the company nurse who said it was claimant's "tough luck" and he would be fired if he returned to Ohio. Claimant explained that he believed he had no choice, and thus returned to Ohio.

Claimant said he saw a physician in Ohio, Hector V. Soto, M.D., who placed him in Mercy Hospital in Portsmouth, Ohio. When claimant was discharged from the hospital, the doctor told him rest at home for two or three weeks and then return to work. Claimant advised that in May he contacted the personnel manager at defendant about returning to work. He told the personnel manager that he did have restrictions limiting him to fifty to sixty pounds lifting and no overhead work. Claimant recalled that the personnel manager told him that there was no job for him unless he returned one hundred percent.

Claimant stated that defendant in April and June requested that he return to Iowa for examination by defendant's doctors. Defendant offered to pay the expenses of transportation. Claimant, however, refused stating that he did not believe his physical condition would permit such a trip. Claimant added that he believed he was being harrassed by the insurance carrier and that they had insinuated that he was not trying to get better.

Claimant testified that in June 1982 he was able to get a masonry job through his brother. He stated that the lifting requirements of this job exceeded the limitations that had been imposed by the doctors. Claimant said he was on this job for about three weeks before the pain in his neck and shoulder caused him to quit. He then sought employment at several local manufacturing plants and steel mills, but was unsuccessful. Claimant stated that he tried masonry work again in May 1983 but this time he could only work a few hours before being forced to quit because of the pain. In addition to the pain, claimant experienced muscle spasms. He tried masonry work once again, this time cutting tiles, but was still not able to perform the work.

Between February and May 1983 claimant attended 308 hours of schooling in law enforcement training. He advised that this led to a job as a deputy sheriff in December 1983. He said his duties were primarily as a jailor. He was paid $6.20 per hour plus vacation and health care benefits. Due to budget cuts in local government, he was laid off from this job in March 1985. Claimant said he was able to perform this job without difficulty, but did have an episode of back and neck pain in April 1984 following a fight with a jail inmate.

Claimant testified that since his layoff as a deputy sheriff he has sought employment at least two to three times per week. He said he has been looking for a job paying $6 to $6.50 per hour. Claimant stated that brick masonry jobs in his local are now paying about $18 per hour and steel mill workers earn $12 to $15 per hour.

Claimant said that he has reduced his activities since his injury and no longer enjoys sport activities with his family. He believes he is not capable of returning to employment requiring heavy physical labor.

Claimant went on to say that prior to the injury his general health was good. He did admit that in November 1981 he received an injury to his low back and left arm when he was struck by a tree. He recalled he lost three to four weeks of work as a result of this accident. Claimant advised that this action is the first time he has collected workers' compensation. Claimant contended that defendant was aware of his November 1981 injury.

Claimant admitted that his hospital treatment in Ohio was for blood in the urine. He said he was last treated for his injury in late 1983.

Bill Clevenger testified that he is employed by defendant and worked with claimant while claimant was employed there. He stated that he had seen claimant at work prior to the injury and claimant appeared to have no difficulty doing his job. He testified that he had seen the forklift claimant was driving when the accident occurred and saw that the windshield was broken and the lift carriage was bent. Mr. Clevenger said he was present when claimant returned to work the day after the accident and was able to observe that claimant could hardly move.

Mr. Clevenger further testified that in June 1982 he was vice president of the local union. He advised that at that time the defendant had no light duty program. According to Mr. Clevenger, this was because the safety manager did not want anyone on the job who could not perform fully or who had any restrictions. He said this policy has since changed and defendant now has a light duty program.

Don Kizer testified that he is an employee of defendant and has been so since June 1976. He said he worked with claimant while the claimant was employed there. He described claimant as a good worker who was able to do the job with no apparent difficulties.

Mr. Kizer stated that he was in the same general area where claimant's accident occurred on the day it happened. After hearing a crash, he went to the accident scene and observed the situation. He recalled that the safety glass on the forklift was broken, the lift carriage on the truck was bent, and claimant's hard hat was on the floor. Mr. Kizer said he assisted claimant to the guardhouse.

Mr. Kizer advised that when claimant returned to work the following day it appeared as though he could barely move. He advised that both he and claimant talked to the foreman about claimant's inability to work. Mr. Kizer believed the foreman was in agreement that claimant could not work. Mr. Kizer said the company nurse had already scheduled a doctor's appointment for claimant and he drove claimant to the doctor. He said he helped claimant get up and down the stairs at the YMCA. Mr. Kizer believed claimant was still having a hard time moving around at the end of March.

Mr. Kizer testified that prior to the injury claimant was a very active person. He said that he often played tennis and basketball but has not seen him do so since the injury.

Patrick Doherty testified that he is a vocational rehabilitation counselor for Franciscan Medical Center where he has been employed for the past seven years. Mr. Doherty said his job entails explanation and evaluation of the physical, emotional, and psychological aspects of disability as it relates to employment. He said he works with people who suffer many types of disabilities.

Mr. Doherty stated that he evaluated claimant's disability upon request of claimant's attorney. As part of this evaluation, Mr. Doherty interviewed the claimant and reviewed his medical records. Mr. Doherty assumed, for purposes of his evaluation, that claimant was restricted to no overhead lifting and a weight lifting limit of fifty to sixty pounds. He stated that he looked at claimant's past work experience to determine the types of skills claimant had acquired. He believed some of the skills claimant had acquired from brick masonry and steel mill work were transferrable to other employment. He also believed that claimant had helped himself with the law enforcement studies.

Mr. Doherty opined that claimant's restrictions would keep him out of the higher paying job categories and that his earnings now would probably be around $6 to $7 per hour. He estimated that claimant's employment opportunities were reduced by about thirty percent because of his limitations. He stated that he believed claimant was a good candidate for rehabilitation and was well motivated.

On cross-examination, Mr. Doherty indicated that he did not consider a report by Dr. Sinning because he gave the most conservative disability evaluation. There was considerable discussion of what Mr. Doherty meant when he said claimant's job opportunities were reduced by thirty percent. Mr. Doherty said that he was the author of the report in exhibit 1 (also marked plaintiff's exhibit 1).

The following discussion will refer to the documents which were submitted as claimant's exhibit 1 by their separately marked numbers.

Exhibit 1 is the vocational evaluation report prepared by Mr. Doherty. The report goes into considerable detail of the method by which the evaluation was done. The report attempts to measure the degree to which claimant has lost employment opportunities because of his injury in the county in Ohio in which he lives. According to the report, claimant was qualified to work in seventy-six percent of the job classifications available in Scioto County, Ohio, before his injury but is now limited to forty-six percent of the available job classifications. Mr. Doherty points out as an example that claimant's earnings at defendant were approximately $26,000 as compared to $13,900 as a deputy sheriff. This he attributes to claimant's restrictions which keep him out of the higher paying categories.

Exhibit 2 is a report dated August 23, 1983 from Dr. Soto. This report indicates that Dr. Soto first saw claimant on April 28, 1982 at the hospital in consultation with another doctor. The doctor diagnosed a muscular sprain/strain of the neck and tendinitis. He recommended claimant stay off work for two or three weeks and then return under a fifty to seventy-five pound lifting restriction for another two or three weeks. The doctor saw the claimant again on June 22, 1982 at which time the doctor noted claimant was doing a lot better with only some pain. He was released to return to work on June 28, 1982.

The report shows claimant was seen again on November 4, 1982 complaining of neck pain. Claimant was last seen by the doctor on August 4, 1983 and was still having neck pain. The doctor injected his neck with a steroid and Xylocaine. The doctor's prognosis of claimant was "guarded to good."

Exhibits 3 and 4 are also reports from Dr. Soto. Exhibit 3 is dated February 22, 1984 and is apparently in response to questions asked by claimant's counsel. The questions are not part of the record. Of significant note is item 2 of the report which states that claimant's "present problems may be related to the accident of March 16, 1982 but could be caused by other problems or other recent injury." The doctor states in his letter that it is not his policy to give impairment ratings on people he is treating. Exhibit 4 is dated March 22, 1984 and is a follow-up at claimant's request to the February 22 report. In this report the doctor says claimant should not lift more than fifty to seventy pounds because of the March 15 [sic], 1982 injury. He also said claimant should not be doing overhead work.

Exhibit 5 is a letter from Duane J. Marchyn, M.D., to claimant's counsel dated February 13, 1984. In this letter Dr. Marchyn states that he believes claimant's neck injury "would probably give him a permanent disability on the order of about 10% of the whole man." The doctor says he bases this rating on the fact that claimant's condition has persisted for over two years and that there was very little demonstrated through x-ray findings. Exhibit 5 also contains some progress notes from Dr. Marchyn reflecting claimant's progress from July 21, 1983 through November 2, 1983. These show little except that claimant had continuing neck pain over this period of time. In October the doctor recommended the use of a TENS unit which claimant apparently could not afford.

Exhibit 6 is a report from Dr. Sinning concerning his examination of the claimant on March 18, 1982. The report outlines the circumstances of claimant's injury and describes the doctor's findings on physical examination. Dr. Sinning's diagnosis of claimant was contusion to the left knee and neck and back strain. The doctor opined that claimant's symptoms would not persist on the basis of the present exam. The doctor indicated that claimant could return to work.

Claimant's hospital records from The Mercy Hospital Corporation, Portsmouth, Ohio, were submitted as exhibit 7; it contains thirty-one pages. The discharge summary outlines claimant's history of injury, however, it also explains that claimant was admitted for hematuria. The precise language concerning this is found on page 2 of exhibit 7 and states:

> He was seeing Dr. Weems who had prescribed physiotherapy to him for his pain in the neck. When he last saw Dr. Weems, Dr. Weems found some hematuria on examination and the patient was sent to me and was seen by me, also having hematuria in the urine. The patient needed work up [sic] along this line and agreed to come to the hospital and was subsequently admitted.

The record shows that claimant did receive physical therapy for his neck while the workup was being done for the hematuria. The hematuria was found to be essentially benign and not traumatic in origin. Claimant was discharged with a diagnosis of (1) muscular strain and sprain of the neck, and (2) microhematuria, most likely secondary to benign hematuria. The discharge summary was authorized by R. O. Malaya, M.D.

Exhibit 7 also contains a consultation report from Dr. Soto (page 7). According to the report, Dr. Soto found some tender areas on palpation in claimant's cervical area but a good range of motion, unremarkable x-rays, and intact motor function. Dr. Soto's prognosis for claimant was that he would be able to return to his previous activities given two or three weeks of rest and two or three weeks of light duty work following the bedrest.

Exhibit 7 also contains a consultation report from D. F. Middendorf, M.D., concerning claimant's hematuria. This report need not be reviewed in detail except that it indicates the hematuria is of long standing duration and not related to recent trauma. The remainder of exhibit 7 contains x-ray and laboratory findings which need not be set out.

Exhibit 8 is a duplicate of exhibit 5-2.

Exhibit 9 is a brief note from Dr. Malaya indicating that claimant's orthopedic problems should be treated and managed by Dr. Soto.

Exhibit 10 is a return to work note from Dr. Soto indicating claimant could return to work on May 28, 1983 on a trial bais.

Exhibit 11 is a letter from claimant's attorney to the defendant requesting that they provide claimant with medical treatment in the state of Ohio.

Exhibits 12, 13, 14, 15, 16, and 17 are copies of bills from medical services. Those bills are as follows:

Exhibit 12 - Genesis Respiratory Services, Inc.
TENS Unit $649.00

Exhibit 13 - Mercy Hospital Physical therapy and cervical spine x-rays	$137.65
Exhibit 14 - Hector V. Soto, M.D. Injections to neck and checkup	$106.00
Exhibit 15 - Mitchel C. Neiman, M.D. Exam, office visit, injections	$165.00
Exhibit 16 - Portsmouth Radiologists, Inc. CT scan(abdomen) x-ray cervical spine	 $ 89.00 24.00
Exhibit 17 Ramon Malaya, M.D.	$ 83.00

Exhibit 18 is a prescription for physical therapy from Muscatine Health Center dated March 30, 1982. Exhibit 19 is a copy of discharge instructions to claimant from Muscatine General Hospital.

Exhibit 20 is a detailed report from Dr. Sinning concerning his examination of claimant on May 9, 1984. Dr. Sinning reviews claimant's history and then explains that the purpose of his examination was to "establish some objective evidence to support the complaint of problems of neck and arm pain." Dr. Sinning found that claimant had full range of motion in his neck, no muscle irritability, and no muscle spasms. He noted some tenderness in the neck on palpation of a general nature but nothing specifically. The doctor also found full range of motion in claimant's arms and shoulders. Five cervical x-rays were taken which showed a normal cervical spine. Dr. Sinning was of the opinion that claimant had a normal musculoskeletal system. Dr. Sinning did not believe claimant had a functional impairment or that he need be placed under physical restrictions

Exhibit 21 is a bill from Patrick Doherty for the vocational rehabilitation evaluation in the amount of $425. Exhibit 22 is a bill from Dr. Soto in the amount of $45 for a report on claimant. Exhibit 23 is a bill from Dr. Malaya in the amount of $25 for copies of reports on claimant.

APPLICABLE LAW

Although the memorandum of agreement filed in this case establishes an employer/employee relationship between claimant and defendant and that claimant received an injury arising out of and in the course of employment, the issue of whether claimant's disability is proximately caused by the injury remains open for determination. 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 March 16, 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).

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 synonomous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

ANALYSIS

This is an interesting case. Claimant's testimony at trial would indicate that he suffered a substantial disability as a result of his injury. The medical records and expert opinions, however, do little to support claimant's contentions. Dr. Sinning, both a treating and examining physician, does not believe claimant suffered any permanent disability because of his injury. Dr. Soto, also a treating physician, believes claimant should be under a fifty to seventy pound lifting restriction and restricted to no overhead work. On the question of causation for this disability, however, Dr. Soto merely states that claimant's condition may or may not be the result of his March 16, 1982 injury. Finally, there is a rating from Dr. Marchyn who states he would probably assign an impairment rating of about ten percent of the body as a whole. It would appear that this rating is not based upon any recognized guide for evaluating permanent impairment.

In addition, none of the medical records submitted show any significant loss of motion, x-ray findings or other objective signs of injury except general tenderness in the cervical region. Claimant's doctors have consistently opined that the prognosis for claimant's recovery was good. It would appear that claimant's symptoms exceed anything the medical profession can objectively verify. Nevertheless, claimant's testimony is sufficiently credible to find that he does suffer a disability of a permanent nature and the medical evidence indicates that it is more likely than not that the disability is the result of the work injury.

The medical evidence in this case, however, weighs heavily in assessing the extent of disabilility. Claimant's functional impairment is minimal. Further, although he has physical restrictions, they still allow claimant to perform a variety of jobs. While it may be true that claimant has suffered a thirty percent reduction in, the number of job categories he could work in this does not mean that the total number of jobs available to him have been reduced by that degree.

Claimant has shown motivation to return to work. When first released by his doctor, he contacted defendant about returning with his restrictions but this was not allowed. Further, claimant has attempted several jobs and obtained training to qualify himself for work he can perform. These are not the actions of a malingerer.

Claimant appeared to be intelligent and emotionally and physically capable, within the prescribed limits, of returning to the work force. As the vocational expert testified, however, his restrictions will probably preclude him from the higher paying jobs. claimant does have significant rehabilitation potential except for his age.

Claimant's medical condition appears to have stabilized and he has not apparently required treatment since late 1983. He has been forced to reduce his nonemployment activities. There was some evidence of prior injuries, but no evidence of prior disabilities.

Just as the medical evidence weighs heavily against claimant, the defendant's refusal to give him employment after the injury and his inability to find other suitable employment must be given serious consideration. Claimant's entitlement to compensation is not based upon the severity of the injury, but rather the extent of disability caused by the injury. The refusal to take claimant back after his injury in this case indicates that the disability is greater than what the injury might otherwise suggest.

Giving due consideration to all of the factors relative to a determination of industrial disability, claimant has established a loss for industrial purposes of four percent of the body as a whole.

Claimant has established a causal relationship between his injury and certain medical expenses incurred by him. Several of those expenses have been shown to be related to the injury and payment should be ordered. Claimant has not, however, established that the CT scan of his abdomen was necessary or related to his injury. It is just as likely, if not more likely, that this diagnostic procedure was undertaken because of his hematuria which was unrelated to his injury. Thus, the abdominal CT scan should not be paid by defendant.

FINDINGS OF FACT

1. On March 16, 1982 claimant received an injury arising out of and in the course of his employment.

2. As a result of his injury, claimant suffered a sprain/strain of the neck.

3. As a result of his injury, claimant has suffered a minimal functional impairment of a permanent nature.

4. Claimant has a high school education and some college level education.

5. Claimant is intelligent and well motivated.

6. Defendant refused claimant employment following his injury because of his injury.

7. As a result of his injury, claimant is precluded from performing all of the same types of jobs he had prior to his injury.

8. Claimant's rate of compensation is $264.26.

9. Claimant has been paid all healing period benefits to which he is entitled.

10. Claimant's healing period concluded on May 31, 1985.

11. Claimant has suffered a disability for industrial purposes of four percent of the body as a whole.

12. As a result of his injury, claimant incurred the following medical expenses:

Genesis Respiratory Services, Inc.	$649.00
Mercy Hospital	137.65
Hector V. Soto, M.D.	106.00
Mitchel C. Neiman, M.D.	165.00
Portsmouth Radiologist, Inc.	24.00
Ramon Malaya, M.D.	83.00

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that there is a causal connection between his injury and the disability upon which this claim is based.

Claimant has proven by a preponderance of the evidence that he suffers permanent partial disability for industrial purposes of four (4) percent of the body as a whole.

Claimant has proven by a preponderance of the evidence that there is a causal connection between his injury and the medical expenses set forth in paragraph 12 above.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant twenty (20) weeks of permanent partial disability benefits commencing June 1, 1982 at his compensation rate of two hundred sixty-four and 26/100 dollars ($264.26). All accrued payments to be made in a lump sum together with statutory interest.

IT IS FURTHER ORDERED that defendant pay the medical expenses of claimant which are set forth in finding of fact 12 above.

IT IS FURTHER ORDERED that the costs of this action be taxed to the defendant.

IT IS FURTHER ORDERED that defendant file a claim activity report within thirty (30) days of the date hereof.

Signed and filed this 13th day of November, 1985.

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL C. POLAND, Claimant, vs. RUAN COMPANIES, Employer, and CARRIERS INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	FILE NO. 718335 A R B I T R A T I O N D E C I S I O N FILED OCT 2 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Michael C. Poland, claimant, against Ruan Companies, employer (hereinafter referred to as Ruan), and Carriers Insurance Companies, insurance carrier, defendants, for benefits as a result of an injury on November 1, 1982 to claimant's left knee and right wrist. Claimant is contending in these proceedings to have incurred permanent disability as the result of the work injury. On August 6, 1985, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

ISSUES

The parties have submitted the following issues for determination in these proceedings:

I. Whether there is causal relationship between the work injury and the claimed disability; and,

II. The extent of weekly disability benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

The parties have submitted a pre-hearing report of certain matters pertaining to this case which was approved and accepted as a part of the record of this case. The record of the hearing consisted of the oral testimony of claimant and joint exhibits 1-3. The parties have stipulated to the following matters:

1. Claimant sustained an injury on November 1, 1982 which arose out of and in the course of his employment with Ruan;

2. Claimant is entitled to either temporary total disability or healing period benefits during a period of recovery from his work injuries from November 2, 1982 through November 21, 1982; and,

3. In the event of an award of weekly benefits from these proceedings, claimant's rate of weekly compensation shall be $193.29 per week and that the commencement date for any award of permanent disability benefits shall be November 22, 1982.

Claimant stated at the hearing that he is 30 years of age and has a ninth grade formal education. However, claimant has obtained his GED.

Claimant testified that he had no wrist or knee pain before the work injury upon which he basis his claim. None of the medical evidence submitted in this case contradicts this claim.

The facts surrounding the work injury are not in dispute. Claimant testified that on November 1, 1982 during his employment with Ruan he fell approximately 15 to 17 feet from a storage loft and landed on his left knee and right wrist. Following the injury, claimant was initially treated by a company physician and sent to the hospital for examination. He was later referred to Scott Neff, D.O., an orthopedic surgeon. In a report dated November 15, 1982 concerning his initial examination of claimant, Dr. Neff found no "bony" injury or ligamentous instability in claimant's left knee but stated that he would have to assume a wait and see posture regarding any possible meniscus tear. No mention was made by Dr. Neff of any wrist complaints at that time. The doctor released claimant for work on November 22, 1982. On January 20, 1983, claimant again saw Dr. Neff for persistent mild patellar pain. The doctor, at that time, diagnosed a grade I chondromalacia or softening of the knee cartilage. However, Dr. Neff felt that claimant should continue to work and prescribed anti-inflammatory medication.

On February 16, 1983, claimant reported to Dr. Neff that his knee was fine but that he had pain in the dorsum or top area of his right hand over a bony prominence of the proximal capitate bone. Claimant had a similar but smaller bony mass in his left hand. X-rays taken by Dr. Neff at that time did not reveal any fracture or dislocation in the right wrist. The doctor felt that the bony mass was of no clinical significance and continued to recommend that claimant return to full normal activity. On April 6, 1983, Dr. Neff reported that claimant returned complaining of pain on the opposite side of the wrist or the ulnar collateral area. Claimant did not report pain in the dorsum side of the hand as he had done a month earlier. Dr. Neff, at that time, found no specific point of tenderness or instability in the wrist and felt that claimant should continue to work. However, the doctor did give claimant a wrist splint to wear at work and prescribed additional anti-inflammatory medication. In May 1983, Dr. Neff opined that claimant did not suffer a significant injury as a result of the incident of November of 1982 and considered claimant discharged to return to normal activity.

Claimant did not receive additional treatment from Dr. Neff after April 1983 but was evaluated by another orthopedic surgeon, Jerome G. Bashara, M.D. Dr. Bashara's diagnosis of claimant's condition was that claimant suffered a strain of the right wrist. However, the doctor stated that he found an ununited fracture in the patella of claimant's left knee. Dr. Bashara opined that these conditions were the result of the work injury and rated claimant as having a 10 percent permanent partial impairment of the left lower extremity for the knee condition and a five percent permanent partial impairment of the upper extremity as a result of the right wrist condition. In a reply to the findings of Dr. Bashara, Dr. Neff refused to change his previous opinions that claimant had suffered no permanent impairment and felt that the ununited fracture found by Dr. Bashara was a bipartite patella, a prior existing congenital defect unrelated to the work injury. In September 1983, claimant was examined by another orthopedic surgeon, Josuha Kimelman, D.O. Dr. Kimelman's findings were similar to Dr. Neff and he agreed that claimant had a preexisting congenital bipartite patella. However, Dr. Kimelman did notice a qualitative weakness in the quadriceps of the left knee and prescribed aspirin for inflammation and straight leg raising exercises. Dr. Kimelman felt that the wrist pain was tendonitis. In March 1985, claimant underwent an evaluation on a Cybex machine, a machine designed to test for abnormalities and weaknesses in the extremities by comparing the function of one extremity to the function of a patient's other extremity. According to the report of Thomas W. Bower, LPT, claimant exhibited no abnormalities or weaknesses in the left knee in the Cybex evaluation.

Claimant testified that he continues at the present to experience continued pain in the dorsum or top of his right wrist and on both sides of his left knee. He also complains of weakness in these areas of the body. This pain, he states, is not sharp but is constant while he is working and that the wrist will swell after lifting. However, claimant admitted that the condition of his knee and wrist does not effect his ability to work. Claimant has been working in the park and street departments of the city of Des Moines, Iowa since leaving Ruan in 1983. This employment consists of manual labor, some of which is strenuous.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of disability. 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 opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact to determine and such a determination may be affected by the completeness of the premise given by the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with non-expert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (1974). To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In the case of a preexisting condition, 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).

Claimant in this case has not shown by the greater weight of evidence presented that the work injury is a cause of permanent impairment to either his right wrist or his left knee, despite his complaints of continued pain or weakness. The views of Dr. Neff concerning claimant's wrist and knee conditions must be given the greater weight as he was the treating physician and most familiar with claimant's condition in the months following the work injury. Dr. Bashara appears to base his opinions concerning permanent left knee impairment upon the ununited fracture of the patella but both Drs. Neff and Kimelman who are equally qualified orthopedists felt that the defect was congenital. Admittedly, Dr. Kimelman did find some quadracep weakness in the knee but the doctor did not state whether he felt that the condition was permanent or caused by the work injury. Furthermore, the lack of weakness or abnormality in function in the left knee was confirmed by Cybex evaluation.

The evidence of permanent impairment to the wrist was very weak. Dr. Bashara did not explain why he felt that claimant has permanent impairment from simply a wrist strain. Dr. Neff did not report any wrist pain complaints until almost three months after the work injury. Claimant's description of the location of his wrist pain to the treating physician was not consistent. The bony mass in the right wrist was not shown by the medical evidence to be the result of the work injury or even a cause of pain or loss of function.

Although claimant states that he continues to have pain in his wrist and knee, pain that is not substantiated by clinical findings is not a substitute for impairment. See Waller v. Chamberlain Mfg., II Iowa Industrial Commissioner Reports 419 (Review-reopening decision 1981). The evidence presented simply does not show that the pain causes impairment or is disabling. Claimant testified that his knee and wrist conditions do not affect his work activity and he has been regularly performing strenuous work since the work injury. Therefore, claimant has only shown by a preponderance of the evidence that the work injury is a cause of temporary disability for a short period of time immediately following the accident.

II. Temporary total disability benefits are available from the first day of disability 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 the injury, whichever comes first. Iowa Code section 85.33(1). The evidence presented in this case supports the parties' stipulation as to the extent of entitlement to temporary total disability benefits. The activity report in the agency file indicates that defendant has already paid claimant these disability benefits.

FINDINGS OF FACT

1. Claimant was in the employ of Ruan at the time of the work injury herein.

2. On November 1, 1982 while performing his work, claimant fell and injured his right wrist and left knee.

3. Claimant has a congenital defect in his left knee called a bipartite patella which existed prior to the fall on November 1, 1982.

4. Claimant was absent from work for treatment of his work injury sustained on November 1, 1982 from November 2, 1982 through November 21, 1982 and has been paid by defendant a total of two and six-sevenths weeks of temporary total disability benefits for this period of time.

5. Pursuant to the parties' stipulation, claimant's rate of compensation is $193.29 per week.

CONCLUSIONS OF LAW

I. Claimant has established by a preponderance of the evidence that the injury of November 1, 1982 is only a cause of temporary disability.

II. Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits of two and six-sevenths weeks at the rate of $193.29 per week.

ORDER

1. Claimant shall take nothing from these proceedings.

2. Claimant shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 2nd day of October, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL T. RAMSEY,	:	FILED
Claimant,	:	DEC 16 1985
vs.	:	File No. 679117 IOWA INDUSTRIAL COMMISSIONER
DILTS TRUCKING, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
GREAT WEST CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision which determined that the claimant had sustained an industrial disability of 25 percent. The record on appeal consists of claimant's exhibits 1 through 4; defendants' exhibits A through D; the transcript of the arbitration proceeding; and briefs filed by the parties. Official notice was taken of two prior knee injuries to claimant.

ISSUE

The issue on appeal as stated by the claimant is "that the evidence merits a rating of industrial disability in excess of 25 percent."

REVIEW OF THE EVIDENCE

Review of the record discloses that the deputy adequately and accurately set forth the evidence in the recitation of the evidence presented and it will not be represented here.

APPLICABLE LAW AND ANALYSIS

The deputy correctly applied the facts to the correct law on the issues. In addition to the deputy's analysis which is accepted, a few additional comments are necessary in the consideration of the issue presented on appeal.

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 synonymous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

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 clear from the facts that Diederich, 219 Iowa 587, N.W. 899, is quite applicable to this case. It must be remembered that impairment and disability are not synonomous. Peterson, (Appeal Decision). Industrial disability deals with loss of earning capacity. It is clear that the claimant has not suffered a reduction in earning capacity greater than the industrial disability rating found by the deputy. Recall that the claimant is making the same salary now as he did before the injury. However, it does take him longer to complete certain tasks. Therefore the findings of fact and conclusions of law proposed by the deputy are hereby adopted.

FINDINGS OF FACT

1. On January 7, 1980 claimant received an injury arising out of and in the course of his employment.

2. As a result of the injury claimant received, he suffered a comminuted intertrochanteric fracture and a herniated disc at L4-L5.

3. As a result of the injuries, claimant suffers a moderate to moderately severe functional impairment to his body as a whole.

4. Claimant is intelligent and well motivated, though he has a limited formal education.

5. Claimant's earnings after his injuries have increased because he receives the same pay for fewer hours.

6. Claimant's employment circumstances are not expected to change because of his injury.

7. Claimant underwent an extensive healing period which included two operations.

8. Claimant has significant potential for rehabilitation, if necessary.

CONCLUSION OF LAW

Claimant has proven by a preponderance of the evidence that claimant suffered an industrial disability as a result of his injury of January 7, 1980 equal to 25 percent of the body as a whole.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant one hundred twenty-five (125) weeks of compensation at the rate of two hundred forty-six and 73/100 dollars ($246.73) commencing January 10, 1984 and continuing until paid in full. Defendants shall take credit for ninety-eight (98) weeks of permanent partial disability previously paid.

That defendants pay unto claimant five hundred eighty-two and 67/100 dollars ($582.67) as reimbursement for expenses pursuant to section 85.27, The Code.

That the costs of this action be taxed to defendants.

That defendants file a claim activity report within thirty (30) days of the date of this decision.

Signed and filed this 16 day of December, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

DORENE I. RUBY,	:	
	:	Files Nos. 705500/705501
Claimant,	:	
	:	A R B I T R A T I O N
vs.	:	
	:	D E C I S I O N
OSCAR MAYER & CO.,	:	FILED
	:	
Employer,	:	
Self-Insured,	:	OCT 21 1985
Defendant.	:	
		IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a consolidated proceeding in arbitration in two claims brought by Dorene I. Ruby, claimant, against Oscar Mayer & Co., employer, hereinafter referred to as Oscar Mayer, self-insured defendant, for benefits as the result of an alleged injury on June 17, 1980 to her back and, in the alternative, an alleged occupational disease involving her back condition. On August 28, 1985, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

ISSUES

The parties have submitted the following issues for determination:

I. Whether the claims herein were timely filed pursuant to Iowa Code section 85.26;

II. Whether the notice requirement pursuant to Iowa Code sections 85.23 and 85A.18 have been complied with;

III. Whether claimant received an injury or occupational disease arising out of and in the course of her employment;

IV. Whether there is a causal relationship between the alleged injury or occupational disease and the claimed disbility or disablement; and,

V. The extent of weekly disability benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. Whether or not specifically referred to in this narrative, all the evidence received at hearing was considered in arriving at this decision. The parties have submitted a prehearing report of certain matters pertaining to this case which was approved and adopted as a part of the record of this case. The record of the hearing consists of the oral testimony of claimant, Leon Ruby, and Vernon Keller, and joint exhibits A through C. According to the pre-hearing report, the parties have stipulated to the following matters:

1. The period of time claimant was off work for which she is seeking either temporary total disability or healing period benefits in these proceedings extends from June 19, 1980 through December 15, 1982;

2. Claimant's rate of weekly compensation in the event of an award of benefits from these proceedings shall be $215.29 per week;

3. The issue of the extent of entitlement to medical benefits is no longer a contested issues in these proceedings;

4. Defendant is entitled to take a credit under Iowa Code section 85.38(2) against any award of weekly compensation benefits herein in the amount of $3,691.49; and,

5. Defendant has not paid weekly workers' compensation benefits as a result of the alleged injury on June 17, 1980.

Claimant is fifty-one years of age and graduated from high school. She has had no other formal training since high school. Other than her work at Oscar Mayer, claimant's past work history consists of only limited experience as a nurse's aid and as a long distance telephone operator.

Claimant began working for Oscar Mayer on July 5, 1963. Claimant's duties mainly consisted of labor work as a meat packer. Her assigned work tasks involved the sacking, packing, and lifting up to twelve pound boxes of meat products on a regular basis. Ocassionally, claimant would be required to handle heavier boxes. Before the alleged work injury, claimant had taken what is termed a "lifetime bump" into a lighter duty job as a result of her back problem. This job did not involve lifting over one-half pound but did require bending at the waist and reaching forward. Claimant, at the present time, is still working in this position.

Claimant's testimony and medical reports submitted into the evidence show that claimant has had back problems for over twenty years and has suffered frequent severe back injuries both at home and at work. According to the plant nurse's records, claimant made regular and frequent back complaints between 1967 and 1980. In May 1964, claimant suffered a severe onset of low back pain while at work after picking up a pan weighing approximately five pounds. Claimant had to be hospitalized for a few days for bedrest, heat packs, and physical therapy. At that time, claimant admitted to her physician, John Sunderbruch, M.D., that she had some difficulty with her back before the work incident and had been receiving chiropractic treatments for these problems. Following the May 1964 injury, claimant was off work for six to eight weeks and received a lumbosacral support corset to wear when she returned to work.

On July 5, 1967, claimant fell down a flight of stairs at Oscar Mayer and injured her left elbow and low back including the coccyx. Again, claimant was hospitalized for treatment of her injuries and did not return to work until December 1967. At this time, claimant's physicians imposed a twenty-five pound lifting restriction on claimant's work activity while at work. In October 1974, claimant reportedly turned rapidly to set down a box and experienced another sudden and severe onset of low back pain requiring hospitalization. During this hospitalization, Dr. Sunderbruch diagnosed hypertrophic and degenerative arthritic changes at the L4-5 level of claimant's spine. In a consultation report of John E. Sinning, M.D., an orthopedic surgeon, claimant was first diagnosed as having degenerative disc disease. Claimant was off work for several months following this incident.

In December 1976, claimant slipped on some ice in a cooler at Oscar Mayer and again complained of severe back pain. She was off work after this incident for four weeks. In January 1978, claimant saw Dr. Sinning and reported to the doctor that she suffered a recurrence of back pain while attempting to get out of bed three months prior to her appointment. She also described past incidents in which her leg momentarily "gave way." She was off work for three weeks after this office call with Dr. Sinning. In September 1978, claimant told Dr. Sinning that her back pain had been continuous for the past three years. In July 1979, claimant reported to the plant nurse that she fell from a chair at work and twisted her back.

In December 1979, claimant experienced another episode of severe low back pain and was off work until June 1980. Claimant testified that this incident occurred during her work activity at Oscar Mayer. During this period of absence from work, according to the office notes of Orthopedic Surgery Associates, P.C., claimant suffered two additional reinjuries of her back in February 1980 -- once during an attempt to move her belongings while changing residences and again after a fall, the circumstances of which were not described in the doctor's notes. Claimant did not discuss either of these injuries at the hearing.

Prior to June 1980, all of the treatment claimant received remained conservative. Such treatment generally involved periodic hospitalizations, prescriptions for pain and muscle medications, physical therapy, home exercises, limitation of activity, and back support devices. Claimant's primary treating physician since 1977 has been Dr. Sinning and his original diagnosis of degenerative disc disease of the lumbar spine with instability and reflex sciatica remains unchanged at the present time.

Since 1963, claimant has had recurrent episodes of depression which required treatment. The first reported episode occurred at the time of the birth of her first child. She received shock treatment therapy at that time. Claimant's physicians generally reported claimant to be a very anxious and nervous person. In his office note of October 14, 1967, Dennis L. Miller, M.D., an orthopedist who was treating claimant for the 1967 injury, stated as follows: "[A]fter considerable discussion, it becomes obvious that her pain is very much related to tension and anxiety at home." Claimant testified that she received treatment from a psychiatrist in 1982, Patrick G. Campbell, M.D., because of her concern over her back condition. Dr. Campbell reports that claimant had an adjustment disorder with a depressed mood which required her hospitalization on two occasions in March and July 1982. Dr. Campbell's diagnosis was recurrent depression. Following the last hospitalization, Dr. Campbell recommended continuation of treatment on an outpatient basis. There is no indication from the evidence presented whether claimant is currently receiving treatment for this psychological condition. Dr. Campbell did not offer an opinion as to causal connection of claimant's depression to her back condition or any work injury.

Claimant is basing her claim of a work injury upon the last incident of pain at work before her back surgery. Claimant testified that she returned from an extended leave on June 17, 1980 and after working only four hours she almost lost consciousness from the back pain. Claimant was placed back into the hospital as a result of this onset of pain. Following this incident, claimant did not return to work until December 1982.

Claimant was hospitalized from June 18, 1980 until June 26, 1980. After the hospitalization, claimant continued to be treated by Dr. Sunderbruch and claimant made application to social security for disability benefits. This claim was denied. Finally, claimant returned to Dr. Sinning in January 1982. After a diagnosis of a herniated disc and after conservative treatment failed to improve claimant's condition, Dr. Sinning performed back surgery in May 1982. This surgery consisted of a decompression laminectomy at the L4-5 level of claimant's spine with decompression of the L5 nerve roots. After surgery, claimant's condition improved and she was released by Dr. Sinning to return to work in December 1982.

In a letter dated August 25, 1982, Dr. Sinning reported that he expected claimant to have a fifteen to twenty-five percent permanent partial impairment of the whole body following a fusion surgery. The doctor also stated in this letter that claimant should be able to perform a job requiring sitting with the flexibility to change positions and only occasional lifting of twenty-five pounds. Claimant testified that her current lifting restriction is fifteen pounds and that she has returned to the job she was performing at the time of the June 17, 1980 work incident. In January 1983, claimant injured herself again at work. She said that she was pulling a tub of meat and pulled a muscle in her back. She was again off work for a short period of time.

In a report of Dr. Sinning dated August 9, 1984, the doctor gave a final impairment rating. He opines that claimant has a fifteen percent permanent partial impairment of the body as a whole using the Orthopedic Academy Guidelines to Permanent Impairment. The doctor also responded in this letter to inquiries concerning the causal connection of claimant's back condition to her work. The doctor stated that claimant has a developmental abnormality of her back in which the fifth lumbar vertebra is attached to the sacrum. This caused the fourth lumbar disc to be the lowest functional level of claimant's back and results in one less functional level in the lumbar spine. This situation places an unusual stress on the fourth lumbar disc and the disc became degenerative. The doctor also explained that degenerative disc disease occurs over many years. When asked if claimant's many work injuries contributed to claimant's problems, the doctor stated as follows: "No one knows if minor injuries can precipitate this series of events because it is a common happening and part of the process of growing older." In response to a question whether claimant would have any problem today if she had not injured her back at work in 1967 and had a series of intermittent episodes since, the doctor said: "Because we don't know what makes degenerative disc disease start and we don't know what aggravates it, there is no way to answer this question with assurance. The usual assumption is that the intermittent episodes probably contribute to the continuation of the symptoms." The doctor concludes as follows;

> I conclude that the injuries along the way have had a contributing effect. Based on the history provided I believe that the 1967 injury probably started this sequence. I can't be sure because of the lack of medical knowledge about what makes degenerative disc disease start and there is no way to tell how much of an aggravating effect the intermittent episodes have had.

Claimant submitted into the evidence an unsigned report from a chiropractor at Five Points Chiropractic Clinic, P.C., dated October 21, 1981. Claimant testified that she had received treatment from a chiropractor at approximately this time by the name of Dr. Troxeil before the back surgery. The report contains the following diagnoses: "Cervical spondylosis-traumatically induced; radicular headaches; brachial neuritis-bilaterally; paresthesia of the upper extremities-bilaterally; lumbar spondylosis, lumbalgia; sciatic neuritis-bilaterally; severe intervertebral disc degeneration." This report also states that the history of multiple work injuries "may well have resulted in her present condition and been further aggravated by the types of work performed." A professional opinion was rendered in this report as well that claimant was unable to resume any type of gainful employment at the time. Finally, this report contains a permanent impairment rating of "at a minimum of 55%."

Claimant and her husband testified that her condition continues to limit her activities at the present time both at work and at home. She cannot perform the normal household chores or walk for extended periods of time. She also explains that sitting for extended periods of time is also difficult. Claimant complains of pain in the shoulder blades and in the arm at night and also describes periodic numbness in her right leg. Claimant stated that bending and stooping causes her the most difficulties, especially in a cold environment. Claimant also describes muscle strain in the area of the surgery. Claimant said that she did not experience any of these problems before 1964.

Vernon Keller, the safety and security manager at Oscar Mayer, testified that despite Oscar Mayer's position that there was not a work injury, the company has been very cooperative with claimant. She returned to work in a limited capacity at first in December 1982 but now claimant is working full-time. He states that since her return claimant has had a good work record.

APPLICABLE LAW AND ANALYSIS

I. In all cases, claimant must establish by a preponderance of the evidence that she filed her claim with this agency within the prescribed period of time allowed under Iowa Code section 85.26. Such a showing is necessary to demonstrate this agency's subject matter jurisdiction over the controversy and a condition precedent to filing suit for workers' compensation benefits under chapters 85, 85A, 85B, and 86 of the Iowa Code. Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763 (Iowa 1969). Lack of subject matter jurisdiction may be raised at any time in any matter during the course of legal proceedings. Qualley v. Chrysler Credit Corp., 261 N.W.2d 466 (Iowa 1978). An administrative or judicial tribunal may raise the issue on its own motion at any time. See Uchtorff v. Dahlin, 363 N.W.2d 264 (Iowa 1985). Generally, claims for benefits must be filed within two years of the date of injury or the onset of an occupational disease or within three years of the date of the last payment of weekly compensation benefits. Iowa Code section 85.26.

A. THE CLAIM OF A WORK INJURY:

Claimant's petition under chapter 85 of the Iowa Code was filed on June 14, 1982. No weekly compensation benefits were paid as a result of this alleged injury. As claimant alleges a June 17, 1980 injury date, the claim was timely filed for benefits arising from that injury. However, if the evidence indicates earlier injuries have caused disability, any claims for benefits arising from the earlier injuries would be barred as not having been filed within two years of the injury or within three years of the last payment of weekly compensation benefits. Furthermore, the application of the so caled "discovery rule" would not be appropriate in this case for these earlier injuries. In Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980), the Iowa Supreme Court held that the two year period to file a claim does not start running until the worker should know his injury is "both a serious and work-connected." Claimant had been hospitalized at the time of most of her previous serious work injuries and frequently reported her injuries to her superiors and the plant nurse. She was also paid workers' compensation benefits for many of these injuries. She cannot now claim that she did not know that these injuries were serious or work-connected.

B. THE CLAIM OF AN OCCUPATIONAL DISEASE:

As an occupational disease occurs from injurious exposure to harmful environment or working conditions over a longer period of time, application of the limitations set forth in Iowa Code section 85.26 is much more difficult. Probably the most appropriate time to start the running of the limitations period would be the same time utilized by section 85A.18 for the ninety day notice requirement or when the "first distinct manifestation" of the disease occurs. In this case, the claimant seeks benefits for degenerative disc disease in her spine. The first manifestation of this disease process occurred in 1964 but was not fully diagnosed as degenerative disc disease until the consulation by Dr. Sinning after the 1967 injury. However, the application of the discovery rule to the occupational disease claim in this case operates much differently than for the alleged work injuries. Claimant was not informed that the degenerative disc disease would result in long term permanent disablement or disability until after the June 1980 work incident. Claimant had always returned to work following only a few weeks of recovery prior to 1980. The medical reports submitted in this case indicate that she did not discuss the work-relatedness of her degenerative disc disease with her physicians and her chiropractor until after the June 1980 incident. Before that time, many physicians had told her that her symptoms were unrelated to her work and psychologically induced. An employee may provide information to an employer which would satisfy the actual knowledge notice requirement without at the same time nullifying his right to the benefits of the discovery rule. Dillinger v. City of Sioux City,, 368 N.W.2d 176 (Iowa 1985). Therefore, under the discovery rule, the claim of occupational disease has been timely filed.

II. Defendant has raised the issue of lack of notice of the work injury within ninety days after the occurrence of the injury under Iowa Code section 85.23 and after the first distinct manifestation of an occupational disease under Iowa Code section 85A.18. Lack of such notice is an affirmative defense. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940). In Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941) the Iowa Supreme Court has ruled that once a 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. Although an employer may have actual knowledge of an injury, the actual knowledge requirement under Iowa Code section 85.23 is not satisfied unless the employer has information putting him on notice that the injury may be work-related.

Because the discovery rule is based upon entirely different purposes and reasoning than the notice requirement, the same set of facts may provide for a different result under sections 85.23 and 85.26. Dillinger, 368 N.W.2d 176, 180. At a time when the employee did not know the probable compensable nature of his injury, allowing him to later utilize the discovery rule to delay the commencement of the section 85.26 limitation period, the employer may have actual knowledge under section 85.23 of the reasonable possibility of a claim. Id., at 176.

Defendant has failed to establish by preponderance of the evidence that it did not have actual knowledge of the reasonable possibility of a workers' compensation claim arising from a work injury or occuptional disease. Claimant regularly and frequently reported her injuries and back problems to her superiors and to the plant nurse. Defendant had paid temporary total disability benefits for her back condition in the past. Claimant's physicians regularly reported their findings to Oscar Mayer. Oscar Mayer was aware of the degenerative disc disease diagnosed by claimant's physician as early as 1967. Many of the hospitalizations for claimant's back condition occurred immediately after performing work activity at Oscar Mayer.

III. Claimant alleges to have an occupational disease under chapter 85A of the Iowa Code and in the alternative a work injury under chapter 85 of the Iowa Code. In the case of work injuries, claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of 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 therein.

Iowa Workers' Compensation Law distinguishes worker injuries from occupational diseases. Iowa Code section 85A.8 states as follows:

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

In further explanation of the distinction between work injuries and occupational diseases, the Iowa Supreme Court stated in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) at page 190 as follows:

> [T]o prove causation of an occuptional disease, the claimant need only meet the two basic requirements imposed by the statutory definition of occupational disease, given in section 85A.8. First, the disease must be causally related to the exposure to harmful conditions of the field of employment.... Secondly, those harmful conditions must be more prevalent in the employment concerned and in everyday life or in other occupations.

With reference to either a work injury or occupational disease, the question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). In the case of a preexisting condition, 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).

A. THE CLAIM OF AN OCCUPATIONAL DISEASE:

The greater weight of evidence presented in this case does not establish a causal connection of the degenerative disc disease or psychological disease to the exposure to harmful conditions in the field of employment or that the harmful conditions are more prevalent in the employment than in everyday life or in other occupations. First with reference to the back condition, no practitioner of the healing arts has rendered a clear causal connection opinion in this case. The chiropractor who treated claimant only states that the work conditions "may" have caused or contributed to claimant's condition. Claimant's primary treating physician and board certified orthopedist, Dr. Sinning, states only that medical science can only attribute a continuation of symptoms to injurious aggravation of a degenerative disc disease. He states that the injuries contributed to claimant's condition but he did not know to what extent. However, even if the causal connection had been established, claimant has clearly not shown that her work activity which brought on the symptoms were "harmful" conditions or that such conditions were "more prevalent" in her job than at home or in other occupations. Most of the work incidents which resulted in severe pain were after the performance of rather light work and simple body movements which normally do not place a person at risk. Finally, although an occupational disease could aggravate a prior existing condition and render the prior existing condition compensable to the extent of the degree of aggravation. See Iowa Code section 85A.7(4). An aggravation of an underlying nonccoupational disease process is not an occupational disease but a work injury. Therefore, any claims with reference to an aggravation must be limited to the question of claimant's entitlement to compensation benefits under the work injury provisions of chapter 85 of the Iowa Code.

Also, claimant has not shown causal connection of her work at Oscar Mayer to her psychological problems beyond her testimony that she sought help for depression because she was concerned about her back. Claimant has a long history of depression and the establishment of causal connection on claimant's testimony alone would be improper. Claimant's treating physician rendered no opinion as to causal connection of his treatment of the depression to her back condition. Again, if claimant is basing her claim upon an aggravation of a preexisting susceptibility to depression or upon the fact that she was depressed because of the work injury, her claim is limited to injuries under chapter 85 of the Iowa Code.

B. THE CLAIM OF A WORK INJURY:

With reference to the claimed back injury, although evidence in this case clearly shows a work injury or an aggravation of claimant's degenerative disc disease on June 17, 1980 and that claimant has permanent impairment following the back surgery, the evidence does not establish a causal connection of the injury to the claimed permanent disability arising from the back condition. First, claimant had numerous injuries before June 1980 and she had just returned to work after being absent for an extended period of time after the December 1979 work activity. Claimant also admitted to two injuries which aggravated her back in February 1980 while she was absent from work. As a result of claimant's extended medical history and the existence of injuries, both at work and at home, relatively close in time to the June 17, 1980, the opinions of experts become extremely important on the issue of causal connection. However, no physician in this case was able to pinpoint the incident in June 1980 as a precipitating and substantial factor in the decision to operate on claimant's back or a precipitating or substantial factor in causing the extended absence from work after June 1980. The evidence presented indicates that after the June 1980 incident at work the type of treatment claimant received did not change until her surgery. Furthermore, nearly two years have lapsed between the time of the alleged work incident and the time the surgery was actually performed. Finally, Dr. Sinning states that he does not know to what extent any of the injuries including the injury in June 1980 contributed to claimant's condition.

It is possible for claimant to argue that the June 1980 incident was a cause of permanent disability because prior to that time she was always able to return to work following a few weeks of treatment but was only able to do so subsequent to June

1980 after back surgery and an extended period of recuperation. However, claimant's return to work on June 17, 1980 was extremely limited in duration. This return to work was insufficient to demonstrate an absence of permanent disability prior to the work incident and that such activity was a significant cause in her current condition. Any of the other injuries earlier that year or in the latter part of 1979 appear to be far more likely the cause of claimant's extended disability beginning in January 1980.

Also, claimant has not shown that the events of June 1980 or the aggravation injury to her back is causally connected to the psychological depression she suffered in 1982. As was the case for her back complaints, claimant's history of psychological problems extending back to 1963 increases the importance of medical opinions as to the determination of causal connection and no such opinions were offered in this case.

However, claimant's work injury in June 1980 was a significant cause of hospitalization from June 18, 1980 through June 26, 1980. After discharge, claimant's physician noted that claimant was improved and the doctor doubted that claimant would return to work. It is unclear from these statements whether the doctor meant that claimant's condition had worsened after the work injury in June 1980 or whether the events of June 1980 indicated to him that claimant was not as yet ready to return to work. The medical reports in this case are very scant as to her condition between the time of discharge from the hospital in June 1980 and the time she began seeing Dr. Sinning in January 1982. Therefore, claimant has not shown that her absence from work after the hospitalization in June 1980 and medical treatment she received after the June 1980 hospitalization was due to the June 1980 aggravation injury and not the result of her underlying degenerative disc disease. Apparently claimant simply returned to the same condition as before the aggravation injury. Consequently, claimant has only established entitlement to temporary total disability benefits for the period she was hospitalized in June 1980. According to Iowa Code section 85.32, if the total period of disability does not exceed fourteen days, then compensation shall begin on the fourth day of disability. As claimant was hospitalized for only eight days, claimant's entitlement to temporary total disability benefits is limited to five days. According to the stipulation of the parties, claimant has been paid sick leave benefits which qualifies for a credit against any entitlement to workers' compensation benefits pursuant to Iowa Code section 85.38(2). The amount of sick leave benefits exceeds her entitlement to temporary total disability benefits in this case. Therefore, claimant shall take nothing from these proceedings.

FINDINGS OF FACT

1. Claimant's petition for compensation benefits for a work injury under chapter 85 of the Iowa Code was filed in two years of the date of the alleged work injury of June 17, 1980.

2. Claimant's petition for benefits as a result of an occupational disease under chapter 85A of the Iowa Code was filed within two years of the time she realized the seriousness and the work-relatedness of her claimed occupational disease.

3. Claimant, at all times materially herein, advised her superiors and the plant nurse at Oscar Mayer of back injuries and back problems while at work between 1964 and 1983.

4. Claimant had received temporary total disability benefits for many of her back injuries at work prior to 1980.

5. Oscar Mayer had actual knowledge of the reasonable possibility of a claim by claimant for workers' compensation benefits as a result of her work injury on June 17, 1980 and her degenerative disc disease.

6. Claimant was in the employ of defendant at all times material herein.

7. Claimant began her employment with Oscar Mayer in 1963.

8. Claimant's jobs at Oscar Mayer during her employment primarily consisted of meat packing with regular lifting of less than fifteen pounds and occasional lifting of heavier items.

9. As a result of the work injury in 1967, claimant's lifting during work activity was restricted by her physician to less than twenty-five pounds.

10. Following her injury in 1967, claimant was diagnosed as having degenerative disc disease in her lower lumbar spine.

11. Claimant's degenerative disc disease at the L4-5 level of her spine is due to a developmental abnormality of her fifth lumbar vertebra.

12. Between 1964 and 1980, claimant suffered frequent work and some nonwork related injuries or aggravations to her degenerative disc disease in her back which resulted in hospitalizations and which compelled her absence from work for several weeks after each injury.

13. The work injuries between 1964 and 1980 contributed to claimant's symptoms arising from the degenerative disc disease in her spine but the underlying affect upon claimant's disc disease and the extent to which these injuries contributed to claimant's current back condition is unknown at the present time.

14. Medical treatment of claimant's back condition prior to 1982 remained conservative and consisted of periodic hospitalizations, limitations upon work activity, medications, physical therapy, home exercises, traction, heat packs, and back support devices.

15. Claimant has had a pyschological condition termed a "recurrent depression," since 1963 for which she has received medical treatment including hospitalizations, the most recent of which occurred in 1982.

16. On June 17, 1980, claimant returned from an extended absence from work following a recovery from a back problem which developed subsequent a work injury in December 1979.

17. On June 17, 1980, after only a few hours, claimant experienced another onset of back pain which required her hospitalization from June 18, 1980 through June 26, 1980.

18. After the June 17, 1980 work incident, claimant did not return to work until December 1982.

19. After June 17, 1980, the type of medical treatment claimant received for her back remained unchanged until May 1982 when she received a decompression laminectomy at the L4-5 level of her lower spine.

20. Claimant achieved maximum healing following the May 1982 surgery and returned to work on December 16, 1982.

21. Claimant is currently performing the same job at Oscar Mayer as she performed at the time of the June 1980 injury.

22. In January 1983, claimant suffered muscle strain in her back in the area of her 1982 surgery and was again off work for a short period of time.

23. Claimant continues to have back difficulties at the present time.

24. Pursuant to the parties' stipulation, claimant's rate of compensation is $215.29 per week.

25. Pursuant to the parties' stipulation, claimant has been paid a total of $3,691.49 in sick leave benefits for her absence from work for the period extending from June 18, 1980 through December 15, 1982.

CONCLUSIONS OF LAW

I. Claimant has shown by a preponderance of the evidence that her claims herein were filed timely pursuant to Iowa Code section 85.26.

II. Defendant has not shown by a preponderance of the evidence that the notice requirement of 85.23 and 85A.18 have not been complied with.

III. Claimant has established by a preponderance of the evidence that on June 17, 1980 she suffered an injury arising out of and in the course of employment. Claimant has not established by a preponderance of the evidence that she suffered an occupational disease.

IV. Claimant has established by a preponderance of the evidence that the injury of June 17, 1980 is a cause of temporary disability, but has not established by a preponderance of the evidence that the injury is a cause of permanent disability.

V. Claimant has not established by a preponderance of the evidence entitlement to temporary total disability benefits in excess of the sick leave benefits she received from Oscar Mayer during the period from June 18, 1980 through December 15, 1982.

ORDER

Accordingly, the following is ordered:

1. Claimant shall take nothing from these proceedings.

2. Claimant shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 21st day of October, 1985.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THEODORE RUMELIOTE,	:	File Nos. 734414
Claimant,	:	771061
	:	771062
vs.	:	683439
LEHIGH PORTLAND CEMENT CO.,	:	A R B I T R A T I O N
Employer,	:	A N D
and	:	R E V I E W
TRAVELERS INSURANCE CO.,	:	R E O P E N I N G
Insurance Carrier, Defendants.	:	D E C I S I O N

FILED
DEC 20 1985
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

These are proceedings in arbitration, review-reopening and for medical benefits brought by the claimant, Theodore Rumeliote, against his employer, Lehigh Portland Cement Co., and its insurance carrier, Travelers Insurance Co., to recover benefits under the Iowa Workers Compensation Act as a result of injuries allegedly sustained on September 25, 1981, January 3, 1983, and July 27, 1984 and sustained on May 26, 1983.

These matters came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Mason City, Iowa, on September 18, 1985. The record was considered fully submitted at close of hearing. A review of the industrial commissioner's files reveal that a first report of injury was filed October 7, 1981 as regards the September 1981 injury. A form 2A filed October 16, 1981 indicates that claimant was paid one day of temporary total disability benefits for that injury. A first report of injury was filed October 9, 1984 as regards the January 3, 1983 injury. A first report of injury was filed June 3, 1983 as regards the May 26, 1983 injury. A form 2A filed May 15, 1984 indicates that claimant was paid 27 3/7 weeks of healing period benefits on account of that injury and was paid permanent partial disability for a scheduled member at ten percent of the left leg. A first report of injury was filed September 28, 1984 as regards the alleged July 25, 1984 injury.

The record in this case consists of the testimony of claimant, of Beajoan Madsen Rumeliote, of Bradley James Pederson, of Louis B. Fasing, and of Ronald W. Guthrie. The record also consists of joint exhibits 1 through 13, claimant's exhibits 14 through 17, and defendants' exhibits A through H. Exhibit 1 is an employment examination physical of Dr. Song of January 15, 1970. Exhibit 2 is patient progress notes for claimant from February 20, 1945 through August 1, 1984. Exhibit 3 is patient progress notes for claimant from Park Clinic. Exhibit 4 is progress notes of Dr. Fisher for September 28, 1981. Exhibit 5 is St. Joseph Mercy Hospital emergency room records of January 3, 1983. Exhibit 6 is progress notes of Dr. Laaveg for May 26, 1983 through September 23, 1983. Exhibit 7 is St. Joseph Mercy Hospital records for an admission of May 26, 1983. Exhibits 8 through 12 are various medical reports of Dr. Laaveg. Exhibit 13 is a report of Dr. Walker of April 5, 1985. Exhibit 14 is a packet of unpaid medical expenses of claimant. Exhibit 15 is a statement for $406 from Orthopaedic Specialists and an attached St. Francis Cafeteria receipt for $4.27. Exhibit 16 is statements for medical reports for claimant in the amount of $30 and $85. Exhibit 17 is a list of mileage indicating a total of 29.6 miles for medical treatment by Dr. Laaveg and 180 miles for a trip to Waterloo on April 5, 1985. Exhibits A through D are claimant's Lehigh Portland Cement attendance records for 1981, 1982, 1983, and 1984, respectively. Exhibit E is a health insurance disability claim of May 7, 1979. Exhibit F is an injury report of October 1, 1981. Exhibit G is a job curtailment notice dated January 16, 1984. Exhibit H is a wage statement for the September 25, 1981 injury.

ISSUES

The issues for resolution as regards the September 25, 1981 injury are:

1) Whether a causal connection exists between the injury and the disability;

2) Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement;

3) Whether claimant is entitled to payment of certain medical costs under section 85.27;

4) Whether claimant is entitled to payment of costs for a medical examination under section 85.39;

5) Whether claimant is entitled to interest;

6) Whether claimant is entitled to medical mileage; and

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

Like issues remain as to the January 3, 1983 and July 27, 1984 alleged injuries. Additionally, an issue as to whether claimant received an injury which arose out of and in the course of his employment remains as regards those alleged injuries. Like issues also remain as regards claimant's May 26, 1983 injury. The parties have stipulated that claimant received an injury on that date to his left ankle, but an issue as to whether claimant received an injury to his left knee which arose out of and in the course of his employment remains as to that alleged injury.

STIPULATIONS

The parties stipulated that claimant's rate of weekly compensation as regards the May 26, 1983 injury is $285.28. The parties were unable to stipulate as to rate regarding the other three injuries and stated that the basis of disagreement is founded on the difference between the base hourly wage paid claimant and the base plus differential paid claimant in his hourly wage. They reported as regards the July 27, 1984 injury that claimant was paid a base wage of $12.45 per hour for a 40 hour week for a rate of $300.82. Claimant was paid a shift differential of $12.88 per hour for a 40 hour week for a weekly rate of $309.29. As regards the January 3, 1983 injury, claimant was paid a base rate of $11.84 for a 40 hour week resulting in a weekly rate of $283.20. Claimant received a shift differential hourly wage of $12.26 resulting in a weekly rate of $291.35. Claimant was paid a base wage of $11.09 with a shift differential of $11.48 as regards the September 25, 1981 injury. Claimant contends that claimant's weekly wage as regards the injury was $503.56 resulting in a rate of $286.40. Defendants contend that during the thirteen full work weeks immediately preceding that injury claimant worked 520 hours and earned $5,822.25 with an average gross weekly wage of $447.87. The parties stipulated that claimant was off work from September 25, 1981 through September 29, 1981 as regards the September 25, 1981 injury. The parties indicated that claimant claims no healing period for his January 3, 1983 injury. The parties indicated that claimant has been paid all healing period benefits due as regards the May 26, 1983 injury. The parties indicated that claimant was off work from August 1, 1984 through August 5, 1984 as regards the July 27, 1984 injury. The parties indicated that claimant's conversion date for permanent partial disability benefits was September 30, 1981, January 4, 1983, December 5, 1983, and August 6, 1984 as regards the injuries of September 25, 1981, January 3, 1983, May 26, 1983, and July 27, 1984, respectively. The parties stipulated that all medical bills were fair and reasonable.

REVIEW OF THE EVIDENCE

Claimant testified that he was born January 28, 1982, is a high school graduate and was in the military service in World War II, but that he has received no formal training beyond high school. Claimant is now retired, but gave a history of working as a bellhop, a bartender, a packinghouse general laborer, a textile mill machine operator and at Lehigh from January 2, 1952 until his September 1, 1984 retirement.

Claimant reported that on September 25, 1981 he was in the mill room "fighting" chunks, when he twisted his ankle on a klinker, apparently a large chunk of cement. He stated he hurt his right knee and reported it to his foreman, Brad Pederson, and received medical treatment at the St. Joseph Mercy Hospital emergency room. Claimant subsequently wore a knee brace. He returned to work on September 30, 1981. Claimant opined that his right knee problem has not resolved and that the knee bothers him when he walks, climbs stairs, and lifts. He reported that he has not sought further medical treatment for the knee because he fears surgery. Claimant identified exhibit 18 as wage stubs reflecting his wages received from his employer from the pay period ending July 5, 1981 through that ending September 27, 1981. Claimant reported that he received a shift differential during that period because he was working nights and that that hourly wage with the differential was $12.58 per hour. Exhibit 18 reflects that claimant worked a total of 528 regular hours during the period of the pay stubs. Exhibit H records claimant's wages for the weeks ending June 28, 1981 through September 20, 1981. It reports total hours worked of 525 hours of which five are overtime hours. His hourly rate is reported as $11.09.

Claimant testified that he saw Dr. Rosenfeld in the emergency room on May 31, 1975 after he had fallen off a curb and twisted his right ankle and knee. Claimant reported that that problem resolved itself within one week. Claimant reported that on January 27, 1981, he experienced pain in his knee and lower leg while using an exercise bike at home. He indicated that a record book which his wife keeps reports that the injury was to his left leg and stated he can recall no injury to his right knee but for that of September 25, 1981.

Claimant reported that on January 3, 1983, he was removing coating from a kiln and injured his left lower back while lifting a klinker chunk. Claimant reported that he was seen at the St. Joseph Mercy Hospital emergency room but returned to work the next day with continuing pain. He indicated that his back returned to its preinjury condition in about a week and stated that he had had back pain from both work and nonwork incidents from 1961 onward. Claimant testified to being off work in 1961, 1963, and 1979 for nonwork-related back pain. He reported having dorsal spinal pain in 1965 and that he fell through a grate on the job in November 1977, but that no time was missed on account of that back injury. Claimant apparently visited a physician on account of each of these conditions, but could recall no other mid or low back visits though he reported he continued to have back problems from April 1979 through January 1983.

Claimant reported that he reinjured his back on July 27, 1984 while using a jackhammer to try to raise a klinker sprout. He apparently saw a Dr. Beasley and was off work from August 1 through August 5, 1984. Claimant returned to work on August 6, 1984 and worked through August 31, 1984 with a September 1, 1984 retirement. Claimant opined that his back has not returned to the condition it was prior to his last back injury and that he cannot lift as he would have before his last two work-related back incidents. He indicated, however, that he has had less difficulties since his retirement.

Claimant reported that on May 26, 1983, he broke his ankle and hurt his left thumb and knees when a large steel plate fell and hit him. He reported that the plate threw him forward and he landed on his knees. Claimant was hospitalized and received a full cast to his left leg and treatment for his left thumb. He was off work to December 5, 1983. Claimant indicated this was his only injury to his left ankle and that he had had no subsequent left ankle injury. He reported that the pins in his ankle continue to bother him when he climbs or does heavy work.

Claimant reported that on his January 1984 work return, he was transferred from the mill room to more physically demanding yard work. He reported that because he was concerned for his injuries, he took a month's vacation and returned to work in late February 1984. The plant had a strike which lasted from May 14 through June 8, 1984. Following the strike, claimant returned to work in the mill room. He indicated that the shoveling and cleanup involved in that job were getting hard for him to handle and that he applied for retirement. Claimant stated that but for his injuries, he would not have sought retirement at that time but then stated that the rotating shifts the plant implemented in 1984 played some role in his decision to retire. Claimant receives a Lehigh monthly pension of $529.39.

Claimant reported that he lies down and bedrests when needed for his back pain and that he has taken Motrin for his knees and his back. Claimant identified a check for $18.67 at the Corner Drug as for a back support for himself. He reported that he obtained the support after his July 27, 1984 injury, but not on the recommendation of any physician. Claimant indicated that he paid $20 for an examination by Dr. Beasley of Internal Medicine Associates on August 1, 1984 following and on account of his July 27, 1984 back injury. He reported that his K-Mart prescriptions in August 1984 relate to his medicines prescribed by Dr. Beasley and that he seeks only $2.85 for medical prescription costs of August 20, 1984 because other costs relate to his heart condition. Claimant indicated that Dr. Laaveg ordered the x-rays of the lower spine and of the knee obtained on October 9, 1984. Claimant indicated that he recalled only a January 1981 injury to his left knee and reported that he had recovered from that prior to his May 26, 1983 injury. He reported that his left knee continues to be painful and that he has difficulty climbing stairs, squatting, and bending. Claimant reported that items on exhibit 15 relate to Dr. Walker's evaluation on April 5, 1985. He reported that he traveled 180 miles round trip to Waterloo for that examination and that exhibit 17 also reflects unpaid mileage to visits to Dr. Laaveg as well. Claimant opined that Dr. Laaveg's examination for permanent partial impairment evaluation was of considerable less duration and complexity than was that of Dr. Walker.

Claimant has not looked for work since his retirement and reported that as a result of his May 26, 1983 injury, he continues to have problems with his left hand aching when he tries to write letters.

On cross-examination, claimant agreed that Dr. Laaveg had been his treating orthopedic surgeon following his May 26, 1983 injury and that he last saw the doctor on March 2, 1985. He agreed he had seen Dr. Laaveg approximately thirteen times while he had seen Dr. Walker once. Claimant also agreed that after reviewing his wife's record book, he believed that he had injured his left knee on January 25, 1981. He agreed he had injured his right knee and ankle in May 1975 and that he had twisted his knee while stepping on a klinker at work in January 1983. Claimant stated, however, that he did not fall in that incident and had had no problems following it. Claimant agreed that an accident investigation report filed by his foreman, Brad Pederson, of September 26, 1981 states as regards his right knee injury: "No accident, was just walking and knee started hurting." Claimant reiterated, however, that that incident occurred when he stepped on klinkers and twisted his knee while walking back to the control room. Claimant agreed that he did not seek further medical care following his September 25, 1981 incident after his work return. He agreed that following his work return he did not seek medical treatment as a result of his January 3, 1983 incident. Claimant agreed that he was released to work following his May 26, 1983 incident in December 1983 without restrictions and that no physician has imposed restrictions on his activities. Claimant denied that in the spring of 1984 he was assigned primarily janitorial work, but stated that on account of his injury and his seniority he was given a choice of jobs he could handle. Claimant agreed he did not report his July 1984 alleged back incident to his supervisor or to anyone at the plant. He stated he had called the plant's answering service, however, and reported that he was sick and had seen a doctor for his back and leg. Claimant agreed that in his deposition, he stated that he retired because he was dissatisfied with the change from permanent to rotating job shifts. Claimant characterized the pain in his knees as approximately the same intensity and location in both knees.

Claimant's wife, Beajoan Madsen Rumeliote, testified and substantiated his testimony as to his injuries and his physical condition.

Bradley James Pederson testified and identified himself as a Lehigh Portland process foreman who had been claimant's immediate supervisor for the four years prior to his retirement. The witness reported that he had enjoyed a good relationship with claimant over the years and that he knew of no reason why claimant could not confide in him if claimant had so wished. The witness could not recall claimant receiving an injury in July 1984 and reported that had claimant reported an incident, the witness would have made an incident report therefor. The witness indicated that as a mill operator claimant ran mill controls and did sweeping and shoveling about the mill, and lubricated the mill. He reported that he saw no significant difference in claimant's job performance following his December 1983 work return and that claimant had said he would do what he could do and, with assistance from a helper, claimant "usually got the job done." He reported that after the change from mill work to yard work, employees were given a choice of jobs on the basis of seniority. Claimant had greater seniority than most plant workers. The witness expressed his belief that the change from standard to rotating shifts was not received well by employees even though their actual duties on each shift would have been the same as they had been on the standard shifts.

Louis B. Fasing, Lehigh safety and training supervisor, testified. He identified exhibit H as compilation of claimant's wages and hours in the thirteen weeks immediately preceding his September 25, 1981 injury. The witness reported that total hours listed reflect the total number of hours worked and the hourly rate listed is the base rate. He stated that a shift differential is paid as well as the base wage for weekend work under a contractural obligation and pursuant to exhibit 18 that amount is coded in a different manner. The witness agreed that claimant was regularly required to work weekends and the back shift from June 1981 through September 1981 and that when his shift differential and Sunday premium were considered, his gross wage per week would have been $556. The witness stated that he was first aware that claimant was claiming a back injury of July 1984 when he received notice of that claim in September 1984.

Ronald W. Guthrie, employee relations supervisor at Lehigh from April 1979, testified. He reported that claimant's $11.09 base rate in September 1981 resulted from a union contract and that under the contract claimant also received a shift differential of $.39 per hour for working the 3:00 to 11:00 p.m. shift. He reported that that shift differential was "often referred to" as premium pay. He indicated that employees also received premium pay of one and one-half times the base rate for working on Sundays and that that fact could account for the additional amount of pay on claimant's pay stubs. He stated that discrepancies in the hours shown on exhibits H and 18 could result from exhibit 18 reflecting pay for holidays where no actual work was done. He characterized that differential in rate as premium pay. The witness stated that following the June 1984 strike, the company went from fixed to rotating shifts and that claimant applied for retirement on June 22, 1984. He reported that under the company's pension plan, hourly employees can retire after thirty years without a decrease in their pension rate and that claimant had worked thirty-two years and seven months when he retired. He reported that claimant stated he sought retirement because he felt he could no longer handle the job, but that claimant did not say that this was because of physicial problems. The witness stated that claimant's decision to retire was entirely voluntary and expressed his understanding that claimant had sought retirement because the rotating shifts bothered him. Apparently, the shift rotations were not implemented until July 1984.

A note of Surgical Associates of North Iowa for Dr. Fisher/Dr. Cottingham states claimant injured his right knee at work when he twisted it on Friday, September 23, 1981. He reports that on examination, claimant had no effusion of the knee, but was minimally tender over the medial joint line. Rotation was negative and motion was from 0 through 140 degrees without difficulty. Claimant stated he was improved after three days of wearing a splint on his knee and x-rays showed very minimal medial joint line narrowing. The doctor opined that claimant had a probable degenerative cartilage injury of the right knee.

A St. Joseph Mercy Hospital emergency room record of January 3, 1983 gives a history of claimant bending a lot and developing a "kink" in the right posterior back. Claimant denied radiation of pain into the legs and stated he had injured his back on the job like this before. Claimant walked without obvious difficulty and was in no acute distress while seated. Forward flexion was limited to 45 degrees and straight leg raising and reflexes were normal.

St. Joseph Mercy Hospital records for a May 26, 1983 admission state that on that date claimant was standing beside a large steel plate measuring approximately one-half inchs thick and four by six feet long when it accidently fell against the lateral aspect of his left knee and leg causing immediate pain and deformity of the left ankle. X-rays revealed a trimalleolar fracture dislocation of the left ankle. Claimant received an open reduction and internal fixation of the left ankle fracture. Dr. Laaveg released claimant to return to regular work on December 5, 1983. No restrictions were imposed. Claimant again saw Dr. Laaveg on March 2, 1984. The doctor then reported that claimant remained apprehensive about doing any major work on the ankle, although because of his seniority claimant usually did not have to do heavy manual labor while at work. On examination, claimant had dorsiflexion of 20 degrees, plantar flexion at 55 degrees and no instability. The medial malleolar screws were somewhat prominant but did not appear tender and incisions were well healed. The doctor rated claimant's final physical impairment as ten percent of the lower extremity or four percent of the whole person.

Patient progress notes for Internal Medicine Associates of August 1, 1984 indicate that claimant presented with a four day history of low back pain. The note states claimant has had problems with low back pain off and on for a number of years and that this was recently exacerbated by some increased activity. Claimant had no radicular pain, no weakness, and no numbness. He found sitting in a chair painful. Claimant had pain in the low back on percussion over the diffuse lumbar area; straight leg raising was negative; and sensation of the lower extremities was unremarkable.

Claimant again saw Dr. Laaveg on September 10, 1984. Claimant was continuing to complain of pain and discomfort in his left ankle, especially over the medial and lateral malleolus. Claimant believed the metal from the screws and plate was problematic. He had aching discomfort on dorsiflexion and plantar flexion or when he stood too long on the ankles themselves. Claimant complained of his back stating he had had problems since 1961 when he injured himself while working at Lehigh. The record notes that in January 1983 claimant saw a Dr. So in the emergency room with back pain which improved and that this pain was due to irritation while at work but that claimant could not recall a specific incident. The reporter notes that claimant had had increasing pain in the back in the last couple of months for which he saw Dr. Beasley in August. It notes that claimant was subsequently off work for one week on medication with improvement of his symptoms but continued to have achy discomfort when he returned to work. Claimant denied radiation into his legs and stated his pain had improved since his retirement. The record notes that at work claimant had been working with a jackhammer for a period of time while doing heavy lifting intermittently. Claimant had complained of increased pain with clicking and aching in both knees though the left knee was worse than the right. On physical examination, claimant could move from table to chair quite easily; could flex forward to 90 degrees albeit hesitently; had negative straight leg raising and was neurologically intact. Knee jerk and ankle jerk were +2/+2; plantar response was down with all muscles 5/5. Claimant had full range of motion in both knees without effusion. Claimant had patellofemor crepititus, left slightly greater than the right with mild compression pain. Claimant had no swelling of the left ankle.

Dr. Laaveg again saw claimant on January 21, 1985. Claimant's back and knee were both improved though he had crepititus in the patellofemoral joint with minimal tenderness. Claimant's left ankle continued to bother him on occasion with irritation over the screws and plate at times. In a report of February 4, 1985, Dr. Laaveg stated that claimant had no final permanent physical impairment concerning his knees and no final permanent physical impairment concerning his back. He noted that claimant had a preexisting condition of L5-S1 spondylolisthesis. He reported that as a regards claimant's ankle fracture, claimant had a slight increased risk of degenerative arthritis and mild limitation of motion and stated that his final permanent physical impairment of the ankle was five percent of the lower extremity or two percent of the whole person.

John R. Walker, M.D., examined claimant on or about April 5, 1985. He assigned claimant a permanent partial impairment of ten percent of the body as a whole explaining:

> This patient has suffered a permanent, partial, impairment of the left, lower extremity amounting to 18% of the left, lower extremity. This is in spite of the fact that an excellent repair of this ankle was done by Dr. Laaveg. It is difficult for me to give him any permanent disability for either the left thumb, the low back or either knee, however, by scheduling an 18% permanent, partial impairment of the left, lower extremity we end up with a permanent, partial impairment of the whole man amounting to 7%. It is my opinion that 3% more should be added for all of the other injuries and complaints that the patient has complained of and presents himself with at this time.

APPLICABLE LAW AND ANALYSIS

File No. 683439

Our first concern is the causal relationship issue.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 25, 1981 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 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 claims a disability to his right knee related to twisting his ankle at work. While claimant reports the injury occurred when he stepped on a klinker, his foreman reported that claimant had initially stated claimant was just walking and his knee started hurting. A medical note relates a right knee injury at work in September 1981, but does not elaborate. Claimant's knee condition improved after he wore a splint for three days. Claimant returned to work and sought no further medical treatment. Claimant had at least one prior incident involving his right knee. No physician has causally connected claimant's present right knee complaints with his September 25, 1981 incident and both Drs. Laaveg and Walker opine claimant has no permanent physical impairment as a result of that incident or his right knee condition. Hence, little evidence suggestive of the requisite causal relationship was presented. Claimant does not prevail on this threshold issue. Because he has not so prevailed, the other issues need not be reached.

File No. 734414

Our first concern is whether claimant received an injury to his left knee which arose out of and in the course of his employment in his May 26, 1983 work incident. The parties concede a left ankle injury on that date.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 23, 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, 261 Iowa 352, 154 N.W.2d 128.

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.

Hospital records report that a large steel plate fell against the lateral aspect of claimant's left knee and leg in his work incident. Such suggests sufficient physical trauma to claimant's left knee in that incident to establish a work injury. That proposition is also supported by claimant's lay testimony. Claimant has established a causal relationship between the May incident and his alleged left knee and left ankle difficulties. The law of causal relationship recited above applies and will not be reiterated. Claimant has not established the requisite causal connection between any knee disability and that incident. Claimant had had prior injuries to his left knee. No physician support for a causal relationship or permanency is found.

Claimant has established the requisite causal relationship between his ankle injury and his work injury, however. Dr. Laaveg has treated the ankle fracture and opined on January 21, 1985 that it had resulted in a permanent partial impairment of five percent of the left lower extremity. (He had opined on March 2, 1984 that it resulted in a ten percent permanent partial impairment of the lower extremity.) The doctor's opinions with other evidence of the care and condition of claimant's ankle are sufficient to establish a causally connected disability.

We consider the benefit entitlement issue.

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)(o) provides 220 weeks of permanent partial disability benefits for loss or loss of use of a leg. Partial loss or loss of use is proportionately compensated. Dr. Laaveg's final five percent of the left lower extremity impairment rating is accepted over the 18 percent of the left lower extremity Dr. Walker assigned. The five percent rating was last in time of the ratings Dr. Laaveg assigned. As claimant's treating physician, Dr. Laaveg saw claimant on a more frequent basis and was better suited to assess claimant's overall disability than was Dr. Walker who examined claimant only once. Claimant is entitled to permanent partial disability benefits equal to five percent of the left lower extremity. A form 2 filed May 15, 1984 reflects payment of permanent partial disability benefits equal to ten percent of the left lower extremity. Defendants receive credit for those benefits paid.

Insufficient evidence exists as to any disability to claimant's left thumb causally related to his May 26, 1983 injury. Claimant's compensable medical costs related to his ankle procedure have apparently all been paid. Claimant saw Dr. Laaveg for his left extremity condition on September 10, 1984 and for evaluation on January 21, 1985. Mileage of 14.8 miles for those visits is ordered paid under section 85.27.

Section 85.39 entitles claimant to an independent medical examination. He sought such from Dr. Walker. That exam related primarily to his left ankle condition. Hence, reimbursement of the costs for such including claimant's mileage and meal is appropriate.

Claimant is entitled to interest on his benefit award as provided in section 85.30. Claimant's rate is stipulated to be $285.28.

File Nos. 771061 and 771062

Claimant alleges back injuries on January 3, 1983 and July 27, 1984. We consider the arising out of and in the course of and causal relationship issues as regards the January 3, 1983 incident. The applicable law is as set forth above. Sufficient credible evidence exists from claimant's report of his incident and from the emergency room record to establish a work incident which produced a back strain. The evidence is insufficient to establish a causal relationship between that incident and any disability, however. Claimant missed no work following the incident and reported his back returned to its preincident condition within a week. No medical opinion testimony supporting a causal connection was produced. Dr. Laaveg opined claimant had no final permanent physical impairment regarding his low back. Dr. Walker found assignment of a permanent physical impairment difficult. He assessed mere scientilla of impairment and did not causally relate that to a work-related back injury.

Because claimant has failed to establish the requisite causal connection between his work incident and any permanent back condition, the question of industrial disability need not be reached. Claimant has no uncompensated medical costs relating to the January 3, 1983 incident. The remaining issues are moot.

As regards claimant's alleged July 27, 1984 injury, claimant's report of a work incident is unsubstantiated by other lay testimony other than his wife's testimony that he had no nonwork back injury. Dr. Beasley's August 1, 1984 note does not refer to a work incident or to onset of symptoms at work. Claimant's other medical records and notes consistently refer to a reported work relationship to the complaint. Claimant did not report a work incident either to his foreman or when he called in sick. Claimant had 32 years and 7 months of services with Lehigh. He had had work injuries. He certainly understood both the company's policy as regards reporting work incidents and the importance of compliance with that policy. His failure to report an incident either to the company or to his doctor strongly undermines his assertion of a work incident. These facts counterbalance claimant and his wife's testimony. At best, a factual equipoise has been created. Claimant has failed to establish an injury of July 27, 1984 which arose out of and in the course of his employment. Because claimant has not preponderated on this threshold issue, other issues presented need not be decided.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

File No. 683439

Claimant injured his right knee on September 25, 1981 when he stepped on a klinker at work.

Claimant wore a knee splint for three days.

Claimant's knee improved and he returned to work and sought no further medical care for the knee.

Claimant had at least one other injury to his right knee.

Claimant has no permanent partial impairment of the right knee attributable to the September 25, 1981 work incident.

File No. 734414

A large steel plate fell against claimant's left leg at work on May 26, 1983 striking his left knee and ankle.

Claimant sustained a trimalleolor fracture dislocation of the left ankle for which he was treated with open reduction and internal fixation of the ankle.

A steel plate and pins remain in place.

Claimant was released to work without restrictions on December 5, 1983.

Claimant had no permanent partial impairment of the left knee.

Dr. Laaveg was claimant's treating physician; Dr. Walker his examining physician.

Dr. Laaveg assigned claimant a permanent partial impairment rating of ten percent of the left lower extremity on March 2, 1984. He assigned a permanent partial impairment rating of five percent of the left lower extremity on January 21, 1985.

Dr. Walker assigned claimant a permanent partial impairment rating of 18 percent of the left lower extremity.

Claimant's permanent partial impairment is to a scheduled member.

Claimant's examination by Dr. Walker was an independent medical examination as contemplated by section 85.39.

File No. 771061

Claimant experienced a back strain at work on January 3, 1983 when he stepped on a klinker at work.

Claimant visited the hospital emergency room that evening on account of that incident. He returned to work the following day.

His back returned to its preinjury condition within one week.

Claimant has no permanent partial impairment as a result of the January 3, 1983 incident.

File No. 771062

Claimant did not report a back injury at work of July 27, 1984 to his foreman or to his doctor or when he called in sick.

Claimant had had prior worker compensation injuries.

Claimant had had thirty-two (32) years and seven (7) months of work experience with the company.

Claimant knew and understood the importance of reporting work injuries.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

File No. 683439

Claimant has not established a causal relationship between his September 25, 1981 work injury and the disability on which he bases his claim.

File No. 734414

Claimant has established an injury of May 26, 1983 to his left knee which arose out of and in the course of his employment.

Claimant has established a causal relationship between his May 26, 1983 injury and his disability to his left ankle.

Claimant is entitled to permanent partial disability benefits resulting from his May 26, 1983 injury equal to five percent (5%) of the left lower extremity.

Claimant is entitled to payment of costs related to an independent medical examination of Dr. Walker including medical mileage for one hundred eighty (180) miles at a rate of twenty-four cents ($.24) per mile; meals in the amount of four and 27/100 dollars ($4.27) and examination in the amount of four hundred six dollars ($406.00).

File No. 771061

Claimant has established an injury arising out of and in the course of his employment of January 3, 1983.

Claimant has not established a causal relationship between the January 3, 1983 injury and the disability on which he now bases his claim.

File No. 771062

Claimant has not established an injury of July 27, 1984 which arose out of and in the course of his employment.

ORDER

THEREFORE, IT IS ORDERED:

File No. 683439

Claimant take nothing further from these proceedings.

Defendants pay costs of these proceedings.

File NO. 734414

Defendants pay claimant permanent partial disability benefits for eleven (11) weeks at a rate of two hundred eighty-five and 28/100 dollars ($285.28). Defendants receive credit for benefits already paid.

Defendants pay claimant costs for an independent medical examination including mileage and meals as delineated in the above conclusions of law.

Defendants pay interest under section 85.30, if applicable.

Defendants pay costs of these proceedings.

Defendants file a final report when this award is paid.

File No. 771061

Claimant take nothing from these proceedings.

Defendants pay costs of these proceedings.

File No. 771062

Claimant take nothing from these proceedings

Defendants pay costs of these proceedings.

Signed and filed this 20th day of December, 1985.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EUNICE C. RUTER,	:	
Claimant,	:	File No. 736820
vs.	:	
KWIK SHOP, 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
HOME INSURANCE COMPANY,	:	FILED OCT 9 1985 IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier, Defendants.	:	

This is a proceeding in review-reopening brought by the claimant, Eunice C. Ruter, against her employer, Kwik Shop, Inc., and its insurance carrier, Home Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained April 13, 1983.

This matter came on for hearing before the undersigned deputy industrial commissioner at the industrial commissioner's office in Des Moines on May 23, 1985. 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 30, 1983.

The record in this case consists of the testimony of claimant, of John Gast, of Jeanine Drahota; of claimant's exhibits 1 through 21; and defendants' exhibits A through F.

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 a causal relationship exists between claimant's alleged injury and claimant's disability;

3) Whether claimant is entitled to benefits and the nature and extent of any such entitlement;

4) Whether claimant is entitled to payment of certain medical costs under section 85.27; and

5) Claimant's rate of weekly compensation.

The brief submitted by defendants was considered in the disposition of this matter.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant's medical bills were fair and reasonable.

Claimant testified in her own behalf. Claimant is 39 years old, has been married, and has two children whom she characterized as ages 17 and 7 at the time of her alleged injury. It was later established that claimant's daughter was born on August 17, 1964. Claimant began work for Kwik Shop on April 6, 1984. Claimant reported that she injured her back while working as the late night cashier or front person. Claimant reported that she was filling cooler items when she stretched high and twisted her back. Claimant initially testified that her injury occurred on April 13, 1983 and characterized as mistaken exhibit 2, an accident report she completed which reports an April 20, 1983 injury date. Claimant indicated that she had reported her injury to her immediate supervisor, Pete Gnada, who had filled out the report and that John Gast then instructed her to complete it in her own handwriting. She reported that Mr. Gnada originally recorded the April 20, 1983 injury date when he mischecked the schedule board and that she did not notice the error in rushing to complete the report before attending an employees' meeting. It was later established that claimant had seen John Eilers, D.C., with complaints of back pain on April 16 and April 20, 1983. Claimant had reported that her injury occurred while she was working alone at approximately 1:30 a.m. It was later established that claimant had worked from 6:00 a.m. to 12:00 p.m. on April 13, 1983; that claimant had worked from 5:00 p.m. to 2:30 a.m. on April 20, 1983; and that claimant had earlier worked from 9:00 p.m. to 2:00 a.m. on April 9 and April 10, 1983.

Claimant characterized her pain as in her lower right back below the beltline. She indicated that she first saw Dr. Eilers on April 16, 1983 and that he continued to treat her until June 2, 1983 when he referred her to Mark Jones, D.O., because she had numbness on the right side. Claimant indicated that Dr. Jones hospitalized her at Des Moines General Hospital for traction and consulted Martin Rosenfeld, D.O. Robert J. Connair, D.O., also treated claimant with osteopathic manipulation. She was discharged on June 13, 1983. Claimant subsequently saw Dr. Connair for manipulation and received physical therapy at Des Moines General. Claimant reported that while these treatments were helpful, her pain was reoccurring and she saw Dr. Jones on January 30, 1984 when he referred her to Dr. Rosenfeld, who scheduled an admission to Des Moines General for myelographic studies and possible surgery or injection. Claimant indicated that the scheduled hospitalization was cancelled because she had no health insurance and defendants had denied her claim. Claimant agreed that she was seen by Scott Neff, D.O., on March 26, 1984 at defendants' request. Claimant later agreed that Dr. Eiler treated her in 1981 for low back discomfort and for neck problems and headaches which she attributed to a fall on ice approximately 17 years ago.

On cross-examination, it was established that claimant had traveled to Manfield, Missouri, a distance of approximately 350 miles, on Memorial weekend in 1983 and that she apparently asserted to a number of persons, including medical personnel, that this had increased her back difficulties. Claimant denied that she had engaged in boating and other water activities during that weekend.

Claimant reported that she ended her employment with Kwik Trip on May 9, 1983. She stated that she left because standing on the shop's cement floors aggravated her back pain. She "doubted" that she had told coworkers that her Kwik Shop employment interfered with her full-time job with Neuman Berma which she had begun in March 1983. Claimant stated that she had worked with Neuman Berma, as a sales representative. The company is a candy brokerage firm. Its representatives take orders and deliver items to both grocery stores and wholesalers. Claimant had her own wholesale and "down street" routes. On the wholesale route, she was required to lift cases weighing 30 to 40 pounds while making deliveries. Claimant indicated that she had worked 40 to 45 hours per week for Neuman Berma and earned $4.00 per hour plus a commission and $.20 mileage reimbursement. Claimant reported total earnings of $1,444 from April 11, 1983 to June 10, 1983 apparently at Neuman Berma. She later stated that she did not remember if she had worked there until August 9, 1983 and earned a total of $2,906.82, but reported she would not dispute this if it were in the records.

Claimant reported that she graduated from high school in 1964 and has also taken courses in sales, commodity brokerage, and income tax completion. Claimant has worked as a nurse's aide, factory worker, a school bus driver and as an office worker. Claimant has also been a commodity broker's office manager who did bookkeeping and order placement and has worked as a manufacturer's assistant with promotional duties and as a cost account clerk for a sports wear manufacturer. She has also worked in other forms of retail sales. Claimant reported that she ended her work with Neuman Berma after her June 1983 hospitalization because she could not physically handle the job. Claimant then worked as a cost account clerk for Bob Allen Company without undue physical difficulties, but was terminated in January 1985 because of difficulties between herself and a coworker. She was earning $5.80 per hour when terminated. Claimant received unemployment benefits following such and has sought other work, but reports that she has found none. Claimant opined that her inability to find other work resulted from physical restrictions Dr. Jones imposed. Claimant offered that she had begun a position in sales distribution of garage and car dealership maintenance items, but has been unable to continue this because carrying her sample case created back pain. Claimant reported that she currently has pain when she attempts to lift and walk and that her leg drags when she walks for more than twenty minutes. She reports that she has cramps in her legs at night, but no longer experiences much numbness.

Jeanine K. Drahota testified. She reported that she has been claimant's neighbor for five or six years and expressed her belief that claimant had not had physical problems before Spring 1983. She reported that following her 1983 hospitalization, claimant had to watch what she was doing, but agreed that she had not observed claimant walking or in her own home. She could not recall claimant having gone to Missouri on Memorial weekend in 1983.

John Gast, Division Manager for Kwik Shops for the past seven months, testified. Mr. Gast indicated that he worked as area supervisor for Kwik Shop for seven and one-half years and had been a Kwik Shop manager for two and one-half years as well as a part-time Kwik Shop sales clerk. Claimant indicated that a full-time Kwik Shop sales clerk works 40 hours per week while part-time workers' hours are nonspecified but are generally between 20 and 30 hours per week. The witness ind'cated that he has custody and control of Kwik Shop's business records including claimant's personnel file. He indicated that claimant was hired on April 6, 1983; had an orientation through April 7, 1983 and received an hourly wage of $3.50. The witness characterized that wage as the usual hourly wage paid adult part-time sales clerks in this locality. The witness outlined claimant's hours of work in April 1983 as contained in exhibit C. He indicated that claimant worked a total of 121.1 hours for Kwik Shop. The witness indicated that he received the injury report completed by claimant's supervisor, Mr. Gnata, on about April 23, 1983. He reported that the employee is to fill out the report if able to do so and, therefore, he contacted Mr. Gnata and arranged for claimant to meet him and fill out the report. The witness could not recall an employee meeting that day and stated if there were such a meeting it had been called by Mr. Gnata and not he. He indicated that the injury date was not discussed when he spoke with claimant, but that claimant signed the report in his presence. The witness reported that claimant terminated with Kwik Shop on May 12, 1983 and then stated she was leaving because the work schedule conflicted with her full-time hours at Neuman Berma and she was not available for flexible work hours as Kwik Shop required. The witness then reported that claimant stated in her exit interview that she hurt her back at work and the doctor told her to quit work because standing on cement was not helpful. The witness reported that Mr. Gnada had called him indicating that claimant had hurt herself while in Missouri and had been brought back and hospitalized in traction. The witness reportd that he investigated claimant's alleged April 13 injury and came to believe it did not occur because the alleged injury time did not coincide with claimant's work hours on April 13. The witness agreed that the history claimant gave Dr. Eilers on April 16, 1983 was consistent with claimant's allegation as to the cause of her injury and that claimant had worked until 2:00 a.m. on April 9-10 and April 10-11. The witness reported that pop cases are stacked in the back room at a height of approximately six to eight feet and that a case of pop bottles weighs between 30 and 35 pounds while a case of pop cans weighs approximately 25 pounds. The witness agreed that if claimant were to return to Kwik Shop's employ, she would need to be able to lift 50 pounds, as well as stand, stoop, twist, and that the business has a strict policy that employees either meet the physical requirements of their job or receive a doctor's release before attempting their duties. He agreed that Dr. Neff indicated claimant could work at Kwik Shop with her current problems; stated claimant has not applied for work, but if she did so, she would be considered for employment with a stipulation concerning her work availability.

Claimant's exhibits 3 and 4 relate to claimant's treatment by John A. Eilers, D.C. In an August 24, 1983 report, the doctor states that claimant was treated on April 16, 1983 for low back pain and that upon questioning as to the cause, she stated that her new job required her to lift heavy pop cases and in the process of doing this she sustained low back pain. The doctor then states that claimant was treated six times for low back discomfort in 1981, but had not been seen for seventeen months before the April 16, 1983 visit. He opines that claimant's extreme pain when seen in 1983 plus the interval between her visits then and her 1981 visits would suggest that her then current low back condition was probably brought on by lifting of the pop cases. The doctor appar'ently saw claimant on April 16, 20, 23, 1983 as well as May 20 and 31, 1983 and June 2, 1983.

Claimant's exhibit 5, 10, and 11 relate to claimant's treatment by Mark E. Jones, D.O. A report of August 29, 1983 indicates the doctor initially saw claimant on June 3, 1983 with complaints of back pain and that claimant stated that two months prior, she was lifting pop cases at a convenience store where she worked and began having back pain. He reports that claimant stated she took a car trip of approximately eight hours on the weekend prior to his seeing her, and that her pain then increased and radiated into her right leg. He reports that claimant's pain extended down to the medial toes and that she noticed some numbness, but physical examination revealed a negative straight leg raising test with reflexes equal bilaterally. There was weakness in the right anterial tibial muscles, suggestive of a radiculopathy on the right side at approximately the fifth lumbar nerve area. Claimant was hospitalized where an EMG suggested a left S-1 radiculopathy, but physical examination revealed a right L-5 radiculopathy which was confirmed upon consultation by Martin Rosenfeld, D.O. Claimant apparently improved and her discomfort and her leg numbness were decreased at discharge even though motor activity did not return to the anterior tibial region on the right. Claimant apparently did not have numbness when examined in the doctor's office on July 5, 1983 and apparently had gone back to her grocery route approximately one week prior without problems. Physical examination revealed continuing anterior tibial weakness on the right side, however. A report of the doctor of February 17, 1984 indicates that claimant was seen on January 30, 1984 and that her physical examination was essentially the same as previously, but that because of the persistence of her problem she was referred to Dr. Rosenfeld who scheduled a hospital admission on February 15, 1984 for myelographic studies and either chemonucleolysis or laminectomy.

Claimant's exhibit 6 is Des Moines General Osteopathic Hospital records from claimant's June 3, 1983 admission through her discharge. The admitting diagnosis is lumbar strain, rule out radiculopathy; the final diagnosis is lumbar radiculopathy per Drs. Jones and Rosenfeld.

Claimant's 7 is copies of handwritten notes related to claimant's physical therapy on June 14, 1983, June 16, 1983, June 21, 1983, and June 23, 1983.

Claimant's exhibit 8 and 9 relate to claimant's treatment by Robert J. Connair, D.O. A September 28, 1983 letter report of Roxanne R. Roeder, the doctor's secretary, indicates that Dr. Connair saw claimant on June 9, 1983 and initiated a treatment program of osteopathic rehabilitation including corrective manipulation and soft tissue manipulation to the cervical, thoracic and lumbar spine.

Defendants' exhibit A and claimant's exhibits 17 and 21 relate to claimant's evaluation and examination by Scott Neff, D.O. Exhibit A is the deposition of the doctor taken March 13, 1985. In the deposition, the doctor identified himself as a board certified orthopedic surgeon who first saw claimant on March 26, 1984. He indicated claimant told him of a dispute regarding various injuries she had had and that she could not give an exact date regarding her injury, but that she had injured her back in a lifting or twisting maneuver. He indicated later that claimant told him she hurt her back while lifting a case. He reported that claimant did not mention either her earlier fall on ice or chiropractic treatments received in 1981 and 1982. The doctor indicated that when first evaluated claimant stated she had pain in her back which radiated into her right leg. He reported that claimant was able to bend forward and touch her toes; had full range of motion; with deep tendon reflexes normal at the knees and ankles. He reported that claimant felt she had weakness of the extensor of the big toe on the right, but had no evidence of atrophy in the lower leg.

The doctor reported that claimant's history of weight problems was significant in that an overweight person places much more stress on the low back.

The doctor reported that x-rays revealed degenerative changes at the L5-S1 lev[l, and also a narrowing of the pars interarticularis, that is, spondylolisthesis. The doctor reported that the most common symptoms of spondylolisthesis is backache, buttock pain, and buttock aching on one or both sides which radiates down into the upper thighs. He reported that claimant's symptoms were compatible with those which that condition could cause and opined that those conditions revealed on x-ray were present long before claimant's alleged injury of April 1983. The doctor indicated that he wished an MMPI for claimant because he felt her multiple surgeries related to her weight problem might have been indicative of underlying personality problems which could also manifest themselves in back pain. The doctor opined that claimant could continue light office work as well as store front work such as she had performed at Kwik Shop.

The doctor indicated that claimant was impossible to contact for approximately five months and, therefore, the CT scan study was not arranged until mid-August 1984. The doctor indicated that a CT scan performed August 21, 1984 was interpreted to reveal an increased lordosis of the back with a slight spondylolisthesis, or narrowing of the pars interarticularis at L5 upon S1, indicative of instability of the lumbar spine. The doctor reported that the etiology of a spondylolisthesis is either developmental, which he indicated was not the case with claimant, or something that occurs at a time in a patient who is "genetically predisposed to it or who is overweight." The doctor then reported that the CT scan showed evidence of a herniated disc at L4-L5 extending into the right intervertebral foramen and having a central component with calcification present.

The doctor opined that a calcified ruptured disc in a relatively young person such as claimant means the (rupture) is a year or more old. The doctor further opined that where an individual has a history of significant past injuries, a calcified disc would probably be very old, but where a person had no history of injury one could believe that the disc rupture had occurred in the recent past. He then opined that claimant's calcified discs would be older than 18 months, the time from his deposition to April 1983, and would not be related to an April 1983 injury.

The doctor then explained that herniated discs often do not require surgical intervention and symptoms may abate over time until a degenerative change or another injury either reherniates the disc; makes it bulge more, or disrupts the scar and symptoms return. The doctor indicated that conservative treatment including job change if necessary would be appropriate for claimant before surgery should be considered.

The doctor reported that claimant could continue to do moderately light office work or store front work or sales. The doctor later opined that lifting pop cases that involves bending forward and picking up the case which he stated would weigh approximately ten pounds off a lower level and putting it on a higher level probably would not aggravate or exacerbate spondylolisthesis, but could create backache, which he characterized as one of the condition's symptoms. The doctor indicated that under the AMA Guides, an individual who has had back surgery would commonly be rated at ten percent while an individual who has done well with conservative treatment would commonly be rated at five percent. The doctor indicated that claimant's minimal pain, her range of motion, and her ability to bend fully forward would all be indicative of a minimum disability. Claimant's exhibits 17 and 21 are substantially consistent with the doctor's testimony at deposition. Claimant's exhibits 18, 19, and 20 report findings on her electromyogram and CT scan. They are consistent with the testimony Dr. Neff gave in his deposition.

Claimant's exhibit 16 is a chronology of claimant's medical treatment.

Claimant's exhibit 1 and defendants' exhibits D and E are correspondence relating to the dispute as to claimant's injury date. Defendants' exhibit C is copies of claimant's time card at Kwik Shop. These indicate that claimant was working at 1:30 a.m. on April 10, 11, 19, 21, 26, and 28, 1983.

Defendants' exhibit B is an employee earning record which claimant identified as probably from Neuman Berma. The record indicates earnings through June 1983 of $1,444 and total earnings in 1983 of $2,906.82. An attached mileage statement indicates claimant was paid mileage totaling $965.58 in 1983. Claimant apparently last worked for the company on September 9, 1983.

Claimant's exhibits 4, 12, 13, and 15 are statements of claimant's medical cost. Defendants' exhibit F is a copy of claimant's business card indicating that claimant is President, Iowa Division, Cash Discount Card of America.

Claimant's exhibit 2 is the Kwik Shop on-the-job injury report indicating an accident date of April 20, 1983 in the early a.m. The report indicates that the accident occurred while the employee was lifting pop cans and stacking the cooler. The report was filled out by claimant on April 25, 1983.

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 20, 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, 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 cannot be characterized as a credible witness. She fabricated about minutiae of only minimal benefit to her such as her daughter's birthdate and dependent status. Likewise, claimant's claimed injury date is inconsistent with her work schedule at Kwik Shop. Claimant's claims an early morning injury which she initially reported occurred on April 20, 1983. It became apparently she had already visited Dr. Eilers on April 16, 1983; she then claimed an April 13, 1983 injury date. Claimant worked a day shift that day. Claimant did work the 9:00 p.m. to 2:00 a.m. shift on her first two work days with Kwik Shop, April 9 and 10, 1983. Claimant did not visit her chiropractor until April 16, 1983. One suspects that had she experienced serious trauma on either the 9th or 10th, she would not have waited almost a week before seeking medical attention. Additionally, claimant continued to work both her Kwik Shop and her Newman Berma job in this time. Each involved lifting and bending. Yet, claimant did not report having difficulty performing either job from her claimed injury to her initial chiropractic visit. This is most curious; as is claimant's failure to report an injury to her supervisor on April 13, 1983, the first day she worked a day shift following either possible injury date. Likewise, claimant did not connect her injury time with beginning work with Kwik Shops. Had claimant been injured on either April 9 or 10, her injury would have occurred on either the first or second day on which she actually clerked for Kwik Shop. One suspects that would also be a fact claimant would have recalled in relation to her injury. That she did not further undermines her credibility. Only Dr. Eilers' medical note stating claimant stated she sustained low back problems on lifting heavy pop cases at her new job supports claimant's claim of a work incident. The report, however, does not relate claimant's statement to any specific work incident such as claimant claims. Further, the doctor's report is of August 24, 1983. No medical record contemporaneous to the doctor's initial treatment of claimant is in evidence. Hence, it cannot be determined when claimant reported a relationship between lifting at Kwik Shop and back pain to the doctor. Thus, the doctor's note, without more and when weighed against many discrepancies also found in this record is insufficient to carry claimant's burden of proving an injury which arose out of and in the course of her Kwik Shop employment. As claimant does not prevail on her threshold issue, the other issues presented need not be reached.

It is noted, however, that claimant would also not prevail on the causal connection issue. Claimant apparently only suffered minor problems from her alleged injury until early June 1983. She was then hospitalized for low back pain with radiation into her leg. During that period, claimant worked her candy sales job and had taken a long car trip. She may also have engaged in boating and other water sports. Each of these activities involved maneuvers which could have aggravated claimant's underlying spondylolisthesis and calcified disc. Hence, no direct chain of causation is apparent between claimant's alleged work incident and any current disability.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant began work with Kwik Shop April 6, 1983 and began clerking for her employer April 9, 1983.

Claimant initially alleged her injury occurred April 20, 1983 and then April 13, 1983.

Claimant worked from 9:00 p.m. to 2:00 a.m. on April 9-10, 1983 and April 10-11, 1983.

Claimant worked from 6:00 a.m. to 12:00 p.m. on April 13, 1983. Claimant worked from 5:00 p.m. to 2:30 a.m. on April 20-21, 1983.

Claimant alleged she injured her low back at approximately 1:30 a.m. while lifting pop cases from a cooler when working alone.

Claimant did not report a work injury to her employer on April 13, 1983, the first date after either possible injury date when she would have had personal contact with her immediate supervisor.

Claimant visited John Eilers, D.C., for chiropractic care for her back on April 16 and 20, 1983.

Claimant continued to work her full-time job as a candy sales broker while employed at Kwik Shop and during the alleged injury period.

Claimant's candy brokerage job involved lifting and carrying of a candy display case.

Claimant did not report difficulties either in performing that job or in performing her duties at Kwik Shop from her alleged injury to her initial chiropractic treatment.

Claimant did not recall her alleged injury occurring on her first or second day of clerking for Kwik Shop as it would have had she injured her back on April 9-10 or April 10-11, 1983.

Claimant reported no specific work injury to Dr. Eilers.

No contemporaneous medical evidence of claimant's alleged injury is in the record.

Claimant was not a credible witness.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established an injury which arose out of and in the course of her Kwik Shop employment in April 1983.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from these proceedings.

Costs of these proceedings are taxed equally to claimant and defendants.

Signed and filed this 9th day of October, 1985.

Helen Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT P. RUTKOWSKI, Claimant,	:	
vs.	:	FILED DEC 30 1985 IOWA INDUSTRIAL COMMISSIONER
COLONIAL BAKING COMPANY OF DES MOINES, Employer,	:	File No. 756699
and	:	APPEAL DECISION
INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision wherein it was found that as a result of his work injury on January 20, 1984 claimant had suffered an industrial disability in the amount of 15 percent. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 2 through 7; defendants' exhibits A through F; joint exhibit 1; and briefs filed by the parties.

ISSUES

The issues presented on appeal are:

I. It was error for the deputy to find under this record that claimant was entitled to industrial disability.

II. The deputy erred when he ordered the defendants to reimburse the claimant for the reasonable cost and treatment, including transportation expense, for the pain center at Mercy Hospital in Des Moines, Iowa.

REVIEW OF THE EVIDENCE

Review of the record discloses that the deputy adequately and accurately set forth the evidence in the statement of the case and it will not be represented here.

APPLICABLE LAW AND ANALYSIS

The deputy correctly applied the facts to the correct law on the issues.

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 synonymous. 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 a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. 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 indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a 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 Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

The finding of a 15 percent industrial disability is quite consistent with the claimant's medical condition and his opportunities now as opposed to prior to the January 1984 injury. The deputy's analysis and findings of fact are therefore accepted and adopted.

FINDINGS OF FACT

1. Claimant was in the employ of defendant, Colonial Baking, on January 20, 1984.

2. Claimant's job with Colonial Baking on January 20, 1984 consisted of performing work in addition to supervisory duties as a working foreman and in plant maintenance.

3. On January 20, 1984, while in the employ of defendant, Colonial Baking, claimant suffered an aggravation of his prior existing back condition consisting of an irritation of nerve roots adjacent to scar tissue arising from previous back surgery and an irritation to a prior shoulder condition.

4. In February 1976, claimant, in a work related incident, suffered a broken clavical and a disc problem at the intermediate level of his spine with pain in his right shoulder and right arm resulting in a 10 percent permanent body as a whole impairment.

5. In November 1977 claimant received another injury resulting in a herniated disc necessitating a lumbar laminectomy in 1979 at the L-5, S-1 level of his spine leaving him with a 12 percent body as a whole permanent impairment following the surgery.

6. Following the 1979 surgery, claimant was given a 30 pound lifting restriction by his physicians.

7. Claimant started working for Colonial Baking Company in May 1981 and stated in his employment application at the time that he had back surgery in 1979 and had previously received workers' compensation benefits.

8. In June 1982, claimant fell off a ladder and hurt his back while working for defendant, Colonial Baking, but no claim for workers' compensation was made for this injury.

9. In December 1983, claimant again slipped on some ice in the course of his employment with defendant, Colonial Baking, straining his right shoulder, right arm and right elbow.

10. Prior to January 20, 1984 claimant had suffered only occasional pain in his back, buttocks, leg and foot but after the work injury this pain became constant.

11. Prior to January 20, 1984, claimant was gainfully employed and missed work rarely due to the injury during his employment with defendant, Colonial Baking.

12. Prior to January 20, 1984, defendant, Colonial Baking, was aware of claimant's physical limitations during his employment from complaints of pain and inability to perform all job tasks assigned to claimant, but Colonial Baking made accommodations for these physical limitations.

13. As a result of his work injury on January 20, 1984, claimant has suffered a three to five percent permanent impairment of his body as a whole in addition to the previous physical impairments.

14. At the present time claimant is restricted by his physicians from lifting in excess of 30 pounds and from repetitive stooping, bending and twisting.

15. As a result of his added functional impairment and physical restrictions following the January 1984 work injury, claimant is unable to return to his previous employment at the time of the injury or in any other position which requires heavy lifting and strenuous work.

16. Claimant's work history consists of gainful regular employment as a maintenance person in a manufacturing environment and as a working foreman in such activity.

17. Claimant was terminated from his employment by defendant employer due to his physical condition following the work injury of January 20, 1984.

18. Claimant has suffered a significant loss in actual earnings from employment due to his inability to return to the employment of defendant, Colonial Baking, but his loss of earnings is also due, in part, to the current depressed state of the economy.

19. Claimant is motivated to find suitable alternative employment.

20. Claimant is 43 years of age, has a high school education and has above average intelligence with some college experience.

21. Claimant has high potential for successful vocational rehabilitation.

22. As a result of his work injury on January 20, 1984, claimant has suffered an industrial disability in the amount of 15 percent.

23. Claimant reached maximum healing following his work injury of January 20, 1984 on April 20, 1984.

24. Claimant can be reasonably expected to benefit from treatment at the pain center at Mercy Hospital in Des Moines, Iowa.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that the injury of January 20, 1984 is a cause of his claimed disability herein.

Claimant has established by a preponderance of the evidence entitlement to permanent partial industrial disability of 15 percent.

Claimant has established by a preponderance of the evidence entitlement to healing period benefits as ordered below.

Claimant has established by a preponderance of the evidence entitlement to treatment by the pain center as ordered below.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it was ordered:

Defendants shall pay to claimant with interest under Iowa Code section 85.30, seventy-five (75) weeks of permanent partial disability benefits at the rate of two hundred eighty-five and 02/100 dollars ($285.02) per week beginning on April 21, 1984, less credit for previous amounts paid. Accrued amounts to be paid in a lump sum.

Defendants shall pay to claimant in a lump sum with interest under Iowa Code section 85.30, healing period benefits from January 20, 1984 until April 21, 1984, totaling thirteen (13) weeks at the rate of two hundred eighty-five and 02/100 dollars ($285.02) per week less credit for previous amounts paid.

Defendants shall reimburse claimant for the reasonable cost of treatment, including transportation expense, by the pain center at Mercy Hospital in Des Moines, Iowa.

Defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Defendants shall file an activity report upon payment of this award.

Signed and filed this 30 day of December, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RON SHARK,	:	
Claimant,	:	FILE NO. 737461
vs.	:	R E V I E W -
FRUEHAUF CORPORATION,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	FILED
CNA INSURANCE COMPANIES,	:	NOV 13 1985
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Ronald Shark, claimant, against Fruehauf Corporation, employer, and CNA Insurance Companies, insurance carrier. Claimant seeks further benefits based upon the injury of July 5, 1983. The case was heard at Burlington, Iowa on September 10, 1985 and was considered fully submitted upon conclusion of the hearing. The evidence in this case consists of claimant's testimony, the testimony of Thelma Shark; claimant's exhibits 1, 2 and 3; and defendants' exhibit A. Official notice was taken of the notice of intent filed by claimant on February 9, 1984 and the agreement for settlement filed April 23, 1984.

ISSUES

The issues presented by the parties at the time of hearing are whether a change of condition has occurred since the prior settlement which permits review-reopening of the case and determination of the nature and extent of any disability which is related to the injury of July 5, 1983. It was stipulated that claimant's rate of compensation is $244.18 per week. Claimant's counsel stated that the case involved an injury to a scheduled member, namely claimant's right arm. It was further stipulated that claimant had been paid temporary total disability compensation [sic] from September 5, 1984 through October 22, 1984. Claimant seeks an order which requires that claimant also be paid compensation for permanent partial disability during that same period of time rather than having what is actually additional healing period interrupt payment of the permanent partial disability award and ultimately extend the date of final payment.

SUMMARY OF EVIDENCE

The following is only a brief summary of pertinent evidence. All of the evidence received at the hearing was considered when deciding the case.

On April 23, 1984 an application for approval of settlement was filed with this agency wherein claimant, the employer and insurance carrier sought approval of a settlement which awarded claimant temporary disability [sic] and compensation for a 44 percent permanent disability of the right arm in accordance with a rating made by Donald Mackenzie, M.D. The settlement was approved on pril 23, 1984.

Thelma Shark testified that she has been claimant's wife for more than three years, that she is aware of the injury to claimant's right arm and of the prior agreement for settlement made in this case.

Mrs. Shark testified that during 1985 she has observed differences in the manner in which claimant uses his right arm. She stated that if he uses it he suffers with pain and throbbing which makes him unable to sleep at night. She stated that he makes complaints and that his attitude changes when the arm is bothering him.

Mrs. Shark testified that claimant now takes aspirin in an attempt to relieve his pain and that before the settlement he was taking a different type of pain pill. She stated that she feels that the difficulty which claimant has with his right arm has increased since the settlement was made.

Ron Shark testified that he is 35 years of age and has been employed by the defendant employer for two and one-half years.

Claimant testified that while operating a punch press on July 5, 1983 a die exploded and went into his right arm. He related undergoing skin and bone grafts and wearing a cast. He displayed a scar on the inner part of his right forearm which was approximately eight inches in length.

Claimant testified that since the agreement for settlement his arm has become hard to use. He complained of a loss of strength and cramping in his fingers when he does work such as tightening knots. He complained of an increase in the amount of numbness which he experiences and described pain which throbs like an aching toothache.

Claimant testified that if he is relaxing he experiences pain only intermittently but that the more he tries to use his arm the less he is able to do with it. He stated that use of the arm brings on pain which in turn produces a loss of strength. Claimant stated that prior to the agreement for settlement he could work with his hand in tight places but that now such work causes his fingers to cramp and he experiences a burning pain in the forearm. Claimant stated that he is presently assigned as an assembler. He stated that the job requires lifting of little weight but that all of the work is done with his hands and arms. He stated that he works on an assembly line and often falls behind.

Claimant did not work from September 5, 1984 to October 29, 1984. He stated that he had been released effective October 22, 1984 but did not return to work until the 29th due to a misunderstanding.

Claimant testified that at the time the settlement was made he was working as a machine operator.

Claimant testified that, when compared to his condition at the time of the March 9, 1984 deposition, the ability to raise his wrist upward has improved. The ability to rotate the wrist outward has deteriorated and the ability to straighten the arm at the elbow has decreased. He stated that other ranges of motion of the arm are generally unchanged.

Claimant testified that he was taking prescription pain medication at the time the settlement was made but that the doctor would not give him anything stronger so he decided to use aspirin for pain relief.

Claimant's exhibit 1 is the deposition of Donald Mackenzie, M.D., taken March 9, 1984. Dr. Mackenzie indicated that claimant then had a 44 percent impairment of the right upper extremity of which seven percent was for the wrist, eight percent for the elbow and 19 percent for the forearm. In reaching that rating Dr. Mackenzie measured wrist dorsiflexion, active palmar flexion, supination, pronation, flexion and extension. Dr. Mackenzie indicated that when claimant was last seen prior to the deposition he was experiencing pain and synovitis.

Claimant's exhibit 2 is the deposition of Dr. Mackenzie taken April 10, 1985. Dr. Mackenzie confirmed that claimant had been placed on disability from September 5 through October 21, 1984 and had been released to return to work on October 22, 1984. Dr. Mackenzie stated that in approximately August 1984, claimant began experiencing increased levels of numbness and burning pain. Dr. Mackenzie indicated that such pain usually accompanies neural recovery but that the period of recovery is usually approximately six months. He stated that since claimant's burning pain has continued for more than six months it should be classified as dysesthesia, a sensory abnormality, which would probably continue indefinitely. (Exhibit 2, page 6)

Dr. Mackenzie also stated that claimant has suffered an increased permanent partial impairment since the time the deposition was taken in 1984. He stated that claimant's current impairment is 17 percent of the upper extremity due to loss of range of motion and 30 to 40 percent due to persisting neurological symptoms, namely the pain and burning sensation. Dr. Mackenzie stated that he felt that the subject of weakness should be included in the 30 to 40 percent. Dr. Mackenzie went on to state that he gave a range from 30 to 40 percent because he does not frequently give impairment ratings for the nervous system and admitted a lack of proficiency in rating neurological impairments. (Exhibit 2, page 7)

Dr. Mackenzie stated that he was using the Guides of the American Medical Association for the Evaluation of Permanent Impairment in making his disability ratings.

Dr. Mackenzie went on to state that when he examined claimant on the day of the deposition pronation was 85 degrees, supination five to ten degrees, flexion 130 degrees and that claimant lacked full extension at the elbow by 30 degrees. He found the remaining motions to have been static since January 26, 1984. (Exhibit 2, page 9)

Dr. Mackenzie felt that claimant's condition was not likely to improve. (Exhibit 2, page 11)

Claimant's exhibit 3 is a collection of medical records from the University of Iowa Hospitals and Clinics. Clinical notes which appear to be dated October 31, 1984 indicate that claimant was seen at the pain clinic for complaints of bilateral wrist pain and right forearm pain. Examination of the right forearm and wrist revealed small hard nondistinct masses which produced pain on palpation. Trigger point injections blocked the pain. Claimant was diagnosed has having small painful neuromas.

The notice of intent filed February 9, 1984 provides a history of claimant's injury and treatment which is beneficial in determining the case.

Defendants' exhibit A is a letter from V. Kumar, M.D., dated April 23, 1985 which declines to express any opinions material to this case.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of establishing that he has suffered additional loss of use of his arm which could not have been discovered by the exercise of reasonable diligence at the time the prior settlement was made. Gosek v. Garmer & Stiles Company, 158 N.W.2d 731 (Iowa 1968). The development of neurological problems is found to constitute such a change of condition which would warrant reevaluation of claimant's award.

Claimant's original impairment rating of 44 percent was based upon range of motion. Dr. Mackenzie did not give a current total impairment rating for the right arm. In determining the most recent range of motion impairment it does not appear that Dr. Mackenzie considered wrist dorsiflexion or active palmar flexion. Application of the AMA Guides to the ranges of motion expressed by Dr. Mackenzie at page 9 of exhibit 2 results in a 22 percent impairment of the upper extremity rather than 17 percent.

Dr. Mackenzie expressed a lack of certainty regarding his rating of claimant's neurological impairment. A rating from a qualified neurologist would certainly carry more weight than the rating from Dr. Mackenzie. His rating is, however, the only one in the record of this case. Accordingly, it will be accepted as correct and the case will be considered as if a 30 to 40 percent impairment of the arm existed due to the neurological problem.

The workers' compensation law pays compensation for the functional loss of use of a scheduled member. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Moses v. National Union Coal Mining Company, 194 Iowa 819, 184 N.W. 746 (1921). In making the assessment of loss of use the evaluation is not limited to use of a standardized guide for evaluating permanent impairment. Testimony and demonstrated difficulties may be considered so long as loss of earning capacity is not considered. Soukup v. Shores Company, 222 Iowa 272, 268 N.W. 598 (1936).

When compared to the ranges of motion which existed in 1984 there are some gains and some losses. The net effect is little actual change. Dr. Mackenzie did, however, rate the current impairment of the extremity at 17 percent. Why it was reduced from 44 percent to 17 percent is not explained in the record. If a 17 percent impairment is added to a 35 percent impairment the result is 52 percent. When claimant's actual use of the arm is considered it would appear that he currently experiences a 55 percent loss of its use. This figure takes into account the unexplained lack of considering the range of motion impairment for active palmar flexion and dorsiflexion.

Under the provision of section 85.34 compensation for permanent partial disability is payable only at the end of the healing period. This indicates that a claimant should not be receiving compensation for healing period and permanent partial disability simultaneously as a result of the same injury. Claimant's request for simultaneous payment is denied. Where additional healing period occurs during a time when permanent partial disability compensation was being paid, payments should continue uninterrupted but be characterized as healing period compensation for the extent of the actual healing period. At the end of the healing period the payments should revert to the status of permanent partial disability compensation and continue on a weekly basis until the entire entitlement of permanent partial disability has been paid.

FINDINGS OF FACT

1. Since the agreement for settlement was entered into on April 23, 1984 claimant has experienced an increase in the impairment of his right arm which was not discoverable in the exercise of reasonable diligence at the time of the settlement.

2. Claimant presently experiences a 55 percent loss of the use of his right arm.

CONCLUSIONS OF LAW

Claimant is entitled to receive 137.5 weeks of compensation for permanent partial disability representing a 55 percent loss of use of the right arm.

Compensation for healing period and permanent partial disability, resulting from the same injury, should not be paid simultaneously.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred thirty-seven point five (137.5) weeks of compensation for permanent partial disability representing a 55 percent loss of use of the right arm.

IT IS FURTHER ORDERED that defendants pay claimant six and six-sevenths (6 6/7) weeks of compensation for healing period commencing October 5, 1984.

IT IS FURTHER ORDERED that all compensation for healing period and permanent partial disability be paid at the rate of two hundred forty-four and 18/100 dollars ($244.18) per week.

IT IS FURTHER ORDERED that compensation for permanent partial disability commence effective March 13, 1984 in accordance with the prior settlement agreement and continue thereafter, with interruption for the six and six-sevenths (6 6/7) weeks of healing period running from September 5, 1984 through October 21, 1984. Payment of permanent partial disability compensation should than recommence effective October 22, 1984 and continue to be paid until such time as claimant's entire entitlement has been fully satisfied.

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 pay interest on any amounts which were not paid at this time the same became due. Defendants shall receive credit for all amounts previously paid.

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by this agency.

Signed and filed this 13th day of November, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLIFFORD ALLEN SISCO, Claimant, vs. SLOAN TRANSPORTATION CORP., Employer, and THE HARTFORD, Insurance Carrier, Defendants.	File No. 640842 A P P E A L D E C I S I O N

FILED
NOV 5 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

The claimant filed a motion to reopen the record to allow into evidence a letter from Byron W. Rovine, M.D., to the defendant insurance company dated June 25, 1980.

REVIEW OF THE EVIDENCE

To rule on this motion, it was necessary to review claimant's exhibit 3, the deposition of Dr. Rovine. In the deposition, it becomes clear that Dr. Rovine, at different times, had different opinions as to the possibility of the claimant having a disk protrusion.

It would appear that the letter by Dr. Rovine clears up an otherwise ambiguous opinion. Of course, the relationship between the letter and the deposition will be addressed in the weight or credibility given both exhibits. It is also apparent that Dr. Rovine's opinion and findings carried some weight with the deputy.

APPLICABLE LAW AND ANALYSIS

The job of the fact finder is to find the truth from conflicting evidence. Where the fact finder has unknowlingly considered incomplete opinion as complete opinion, his or her task is made more difficult and facts illusive.

The Iowa Supreme Court stated: "Moreover, it is clearly not the intention of the law that the provisions of the Workmen's Compensation Act should be construed with the strictness and according to the technical rules of evidence and procedure that are applied in other legal proceedings." Yates v. Humphrey, 218 Iowa 792, 799, 255 N.W. 639 (1934).

The letter of Dr. Rovine should not be admitted if it will work a substantial hardship upon the defendants. It does not seem that admittance of the doctor's letter would do so, because the defendant or defendant insurance company probably have the original letter somewhere in their files as it is addressed to them. Why Dr. Rovine withheld the letter from the claimant is not at issue.

Industrial Commissioner Rule 500-4.17 provides in part:

> 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).
>
> This rule is intended to implement sections 86.8 and 86.18, The Code.

FINDING OF FACT

Exhibit 13 is material evidence, newly discovered, which claimant exercised reasonable diligence to discover for production at the prior hearing.

CONCLUSION OF LAW

Exhibit 13, hereto attached, is now admitted and part of the record.

ORDER

THEREFORE, this case shall be remanded to the deputy for reconsideration of the entire record with the inclusion of Exhibit 13. This ruling in no way is to imply what the deputy's final determination should be.

Signed and filed this 5 day of November, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
OCT 10 1985
IOWA INDUSTRIAL COMMISSIONER

FRANK SOLLAZZO, Claimant,	:	
vs.	:	File No. 741751
COLLINS INSULATION, Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
AID INSURANCE, Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Frank Sollazzo, claimant, against Collins Insulation, employer, and AID Insurance Company, insurance carrier. Claimant alleges that he sustained a compensable injury on August 1, 1983 and seeks compensation for healing period and permanent partial disability or permanent total disability, as the evidence may warrant. The case was heard at Council Bluffs, Iowa on June 18, 1985 and was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of Frank Sollazzo, Dennis Collins, John Dominquez, Pamela Sollazzo, and Jan Bickley. Claimant's exhibit A, with its fourteen parts, were received into evidence and defendants' exhibits 1 through 118 were received into evidence.

ISSUES

The issues identified by the parties at time of hearing are whether claimant sustained an injury which arose out of and in the course of his employment; whether there is a causal connection between the alleged injury and any disability which claimant has experienced; a determination of claimant's entitlement to benefits for weekly compensation for the period of his recovery from the injury; and determination of permanent disability which has resulted from the injury. Defendants stated that all of claimant's section 85.27 expenses have been paid but that an issue exists as to the reasonableness of the expenses. Where such have been paid, the issue is moot.

It was stipulated by the parties that in the event of an award, claimant's rate of compensation is $197.70 per week. It was further stipulated that the conversion date for determining the end of claimant's entitlement to healing period compensation is June 1, 1984. It was also stipulated that the employer would receive credit for benefits during the month of January 1984 when claimant attempted to return to work.

SUMMARY OF EVIDENCE

The following is a brief summary of the pertinent evidence presented in this case. All evidence received at the hearing was considered when deciding this case.

Frank Sollazzo testified that he is 34 years of age and resides at Council Bluffs, Iowa. He stated that he has been married to his wife, Pamela, for 16 years and they have two children under the age of 18.

Claimant testified that he completed the tenth grade of high school and obtained a GED while in the military service. He stated that he has no formal vocational training. Claimant stated that he was failing during his last couple of years in high school. He stated that he reads newspapers but not books and that his wife handles the family finances. Claimant stated that he has built an addition on to his home, has worked around the building trades extensively, and has a basic knowledge of mechanics.

Claimant suffered his first back injury in 1980 while employed by Council Bluffs Dry Wall for which he underwent surgery in June 1980. He stated that after his recovery he experienced no pain in his leg or numbness and had no problems doing anything he chose.

Claimant testified that shortly after his release following the 1980 surgery, he obtained employment with Collins Insulation. Claimant's work for Mr. Collins involved a combination of office work and field work. Claimant performed estimates and made bids on jobs. He scheduled other workers, answered the telephone, performed inventory control, and collection work. When Mr. and Mrs. Collins were out of the office, claimant was in charge. Claimant stated that between 1981 and 1983, the proportion of his work which was performed in the field increased because he was not having any physical problems.

Claimant testified that on August 1, 1983 he was moving a machine which blows insulation to the second floor of a home and experienced a pull in his back. He stated that he ignored it. On the following day he was working insulating a garage. He stated that the job involved work from a ladder and as he bent over to pick up the hose from the blower, he felt something snap and experienced pain in his back and down both legs. He stated that he went to his knees and thought that he was paralyzed. Eventually, claimant was able to get back in the truck and return to the office. He then was sent home.

Claimant entered into a course of treatment with Maurice P. Margules, M.D. Claimant stated that rest and prescription medication did not relieve his condition. A myelogram was performed which was followed by chemonucleolysis.

Claimant stated that after the injection he still experienced pain.

Claimant attempted to return to work in January 1984 but still had pain in his back and leg. Claimant stated that he returned to Dr. Margules and a lumbar disc was then surgically removed. Claimant reported that he had a hernia repaired in March 1984.

Claimant testified that he has continuing symptoms following the surgery. He reported experiencing aches and numbness in his leg. He stated that he can walk approximately a block before pain sets in. He stated that if he sits for 30 or 40 minutes, his leg gets numb. If he drives more than 10 or 15 miles, the discomfort starts, and by the time he has travelled 150 miles he has to stop and get out. Claimant testified that Dr. Margules has advised him that he has to learn to live with his condition and has imposed a 40 pound maximum limit on his lifting activities. He stated that he now takes tylenol in the evenings but had recently been taking prescription medication.

Claimant testified that he now has three horses which are kept on an acreage which claimant owns with his brother-in-law. He reported that the location is approximately one and one-half miles from his home and he sometimes walks to it. Claimant reported that following his first surgery and prior to the second injury, he rode horses but that he seldom rides now. He stated that he feeds, saddles, and walks the horses. Claimant related that at times he also helps with the housework. He stated that shortly prior to the time of hearing, he had tried to help his son mow the yard and experienced an exacerbation of his symptoms for which he sought care from Dr. Margules. Claimant stated that in feeding the horses he moves bales of hay which weigh 40 to 60 pounds and that it sometimes causes problems for him.

Claimant testified that at the time he was injured on August 1, 1983 he was earning $7.50 per hour. At another point in his testimony he indicated that he had been earning $9.50 per hour at Collins.

Claimant stated that he is unable to climb into attics to perform the measurements necessary to make estimates and bids. He has discussed his conditions with Collins and has not returned to work. He stated that the employment relationship was specifically terminated at the end of 1984. Claimant stated that he drew unemployment during part of the time he has been off work, and some of his installment payments were paid by disability insurance plans.

Claimant testified that he has sought employment. He has dealt with James Rogers, a counselor with the Vocational Rehabilitation Department of the Iowa Department of Public Instruction. Claimant stated that he has undergone testing but was reluctant to leave his wife in order to go to the rehabilitation facility in Des Moines for two weeks. Claimant stated that he met with Jan Bickley and has applied for work at the places she suggested, one of which was a dry wall company. He stated that some of the places she suggested would not meet with him and that none of them offered any employment.

Claimant testified that he is currently employed at an automotive repair shop where he earns $3.50 per hour. He related experiencing discomfort from activities which required bending, such as changing a valve cover gasket or moving tires. Claimant stated that he started the job in April 1985 and has only missed one day of work, that being to attend a funeral. He stated that the employer allows him to work at his own pace.

Claimant testified that he has fear of injuring himself further and concern that if he did reinjure his back, nothing could be done for him. He stated that he trys to abide by the limits that Dr. Margules has placed upon his activities.

Dennis Collins testified that he is the owner of Collins Insulation, Inc., a business which installs insulation in residences and light commercial structures. Collins testified that he hired claimant in 1981 knowing that claimant had undergone back surgery. He stated that claimant initially started working a couple days per week in the field, with the balance of his time in the office. He stated that claimant made no complaints of back pain prior to August 1, 1983. Collins did not recall claimant ever missing any work due to illness and described him as an excellent employee who took on the tasks that needed to be done.

Collins testified that claimant sustained an injury on August 1, 1983. He stated that claimant was fine when he came to work that day but at approximately 11:00 a.m., he saw claimant in a bent over position in the office and offered to take him home. He testified that he remained in contact with claimant and that when claimant attempted to return to work in January 1984 he was unable to stay seated or do the types of things which he had previously done. He sometimes sent claimant home early and did not feel that claimant was capable of working in a normal work environment. Collins testified that he has remained in contact with claimant and, subsequent to the last surgery, has made some improvement but is not completely recovered.

Collins testified that claimant had performed bidding and had authority to bind the company on residential and light commercial projects. He stated that claimant assisted in scheduling, inventory control, collection work, ordering, and hiring and firing of other employees. He stated that claimant had complete access of the company checkbook and that he had trusted claimant completely. Collins estimated that at the time of injury, 85 percent of claimant's time was spent performing management tasks.

Collins testified that in the past he has had as many as 50 employees and that none of them had exhibited management abilities equal to claimant's. He stated that his business was not large enough to justify employing claimant for office work only. He stated that he would not now feel comfortable employing claimant in view of the lifting, climbing, and crawling, which the work requires. He stated that he now questions whether he should have hired claimant in 1981.

Collins stated that he was aware that claimant had a limited formal education and that if he had not known claimant personally, he would not have placed him in a management position. He stated that in August 1983 claimant was paid $7.50 per hour plus some irregular bonuses.

John Dominquez testified that he operates a truck and auto repair shop. He stated that he had been a friend of claimant's for a long time and employed claimant approximately April 1, 1985 when his former helper resigned to take a better paying job. Dominquez testified that claimant had spent quite a bit of time at the shop prior to the time he was hired and that he hadn't noticed claimant having any particular problems.

Dominquez testified that claimant's job includes changing oil, light tuneups, delivery and pick up of vehicles, getting parts, collecting money, and communicating with customers. He stated that on one occasion, claimant changed an intake manifold and could hardly move the next day. He related that he has observed claimant exhibiting a limp and that he stands funny at times.

Dominquez has testified that claimant is a helper and is not a mechanic. He did not feel that claimant had the experience to be able to diagnose mechanical problems but that claimant is good with customers and is a fast learner. He felt that claimant had exhibited management potential. Dominquez has confirmed that claimant is paid $3.50 per hour. He stated that he feels that claimant does earn his pay and that a raise is a possibility at some time in the future.

Pamela Sollazzo testified that she is claimant's spouse and confirmed that they had been married for 16 years and have two children under the age of 18.

Mrs. Sollazzo testified that after claimant's first surgery, he recovered very well and his activities were unchanged from what they had been prior to the time of that surgery. She stated that he had occasional aches and pains but never anything which kept him off work. She stated that since August 1, 1983 claimant experiences a lot of pain and that the pain has continued since the time of his most recent surgery. She stated that claimant's activities around the home and with the family have been reduced from the level which existed before August 1, 1983. She confirmed that claimant stacked hay in 1984 and works with the horses.

Jan Bickley testified that she has formal training as a registered nurse and a master's degree in occupational therapy. She related an extensive history of working with physically and mentally impaired persons. She is now employed with Professional Rehabilitation Management.

Bickley testified that she met with claimant and gathered information concerning his work history and physical condition from the resources which were made available to her. She indicated that claimant's counsel had restricted her ability to make direct contact with claimant and his physicians. He directed that all rehabilitation efforts be processed through James Rogers.

Bickley testified that as a result of her evaluation of the case, she feels that claimant has demonstrated skills in management, diesel mechanics, sales, crane operator, forklift operator, shipping and receiving, electrical work, and general building construction. She did not feel that claimant was strictly limited to sedentary employment. She felt that claimant could reasonably expect to earn approximately $6.00 per hour and that he has the potential for higher earnings. She felt that claimant was overqualified for his current job.

Bickley testified that her services include performing a job search which weeds out jobs which are unsuitable. She stated that she telephones employers and tries to set up interviews. She stated that in claimant's case she spent five hours on the telephone and talked with 54 potential employers. She stated that her job search revealed 23 openings and ten more employers who would accept a resume. She checks back with the potential employers.

Bickley stated that her interpretation of the reports from Dr. Margules is that claimant's abilities are no different now than they were in 1981. She felt that claimant's level of formal education was a hindrance in obtaining management jobs when dealing with people who are not acquainted with him but that the employers she spoke with gave no bearing to the fact that claimant had three surgical procedures performed on his back.

Bickley testified that the insurance company did not approve her to perform further job searchs or to assist in resume preparation for claimant and that his case is now inactive.

Claimant's exhibit A is broken down into 14 parts. A-1 is the deposition of Maurice P. Margules, M.D., taken March 6, 1985. Dr. Margules testified that he had treated claimant with surgery for a herniation of the L5-S1 intervertebral disc in 1980 and that as a result of that condition, a 10 to 15 percent permanent partial impairment rating of the body as a whole was determined in March 1981. He indicated that he placed restrictions upon claimant at that time which included "avoiding lifting over 40 pounds and avoiding movement--repeated movement-- of flexion, extension of his lumbar spine, and avoiding lifting and bending at the same time or working in cramped quarters with his back in flexion." (Claimant's Exhibit A-1, page 5.)

Dr. Margules stated that he saw claimant on August 5, 1983 and claimant then made complaint of severe pain in his back and lower extremities as a result of an injury which occurred on August 2, 1983 while lifting a blowing machine for his employer. He stated that he diagnosed claimant as having an acute disc herniation at the L4, L5 interspace and, in his opinion, the herniation was a result of the injury of August 1, 1983 which claimant had described.

Dr. Margules stated that he attempted conservative treatment which was unsuccessful. He stated that chemonucleolysis also failed and the herniated disc was then surgically excised on February 7, 1984.

Dr. Margules stated that claimant now has residual pain in the structures and muscle of his back and radicular pain. With regard to limitations upon claimant's activities, Dr. Margules stated:

> Well, the limitations I would place on him would be in order to avoid a recurrence of injury, which then becomes a measure of clinical catastrophe after the third occurrence, and, therefore, I think this should be avoided so the patient can remain active. Therefore, I feel that he should limit his activities to what I call sedentary type of employment. (Clmt.Ex.A-1, p.9.)

Dr. Margules felt that claimant had sustained a 20 percent permanent partial impairment of the body as a whole as a result of the August 2, 1983 injury. He stated that the 20 percent results because claimant has a second involvement and is now extremely vulnerable to future injury. (Clmt.Ex.A-1, p.32.) He felt that claimant had a total disability of 35 percent. Dr. Margules stated that claimant's increased disability arose from the injury which occurred in 1983. (Clmt.Ex.A-1, p.12.)

During the deposition, counsel for the employer provided Dr. Margules with a physical capacities evaluation form. In completing the form, Dr. Margules indicated that claimant could tolerate lifting weights of less than 25 pounds frequently but he should never lift 50 pounds or more. He stated that his estimates of claimant's capabilities assumed that claimant use proper body mechanics. He felt that claimant could bend, squat, crawl, and climb but he indicated that claimant should not carry while engaged in activities such as climbing a ladder. In general, Dr. Margules stated that claimant's ability to perform actions and to exist in a work environment were not affected by his injuries except for those activities which would place any significant or substantial amount of strain upon claimant's spine.

Exhibit A-2 is a deposition of James Rogers taken February 28, 1985. In the deposition, Rogers indicated that he had evaluated and tested claimant. He stated that he found claimant to be of average intelligence. He projected that claimant's return to employment would most likely be at a minimum wage entry level type of position unless claimant were to complete substantial formal training. Rogers indicated that claimant was reluctant to enter into an extended program of formal training and that claimant desired some type of a short on the job training program.

Exhibits A-3 through A-13 are consistent with the information contained in the Margules deposition. Exhibit A-14 is a bill in the amount of $151.00 for recording and transcribing the Margules deposition. It appears to have been paid by claimant's attorney.

Defendants' exhibits 1 through 114 consist of a collection of medical records, reports, written correspondence, disability insurance benefit applications, vocational rehabilitation records and reports, and records concerning payments paid to and on behalf of claimant. The medical records and reports extend as far back as 1978. They go on to cover claimant's 1980 back injury, a 1978 concussion, and some other minor medical problems, as well as claimant's most recent treatment for the injury of August 1983. The packet duplicates some of the information contained in claimant's exhibits. Some information in the packet is also duplicated in defendants' exhibits 115 and 116. Exhibit 112 shows claimant to have been paid 38 3/7 weeks of healing period compensation and 50 weeks of compensation for permanent partial disability based upon the August 1, 1983 injury.

Defendants' exhibit 115 is the deposition of Joel T. Cotton, M.D., taken April 1, 1985. Dr. Cotton, a board certified neurologist, examined claimant on January 7, 1985. He stated that he performed a complete neurological examination which produced normal results. He was unable to find anything from a neurological standpoint which would provide an objective basis for claimant's continuing complaints of pain and discomfort. Dr. Cotton felt that claimant had a five to ten percent disability as a result of surgery.

Defendants' exhibit 116 is the deposition of Alan H. Fruin, M.D., taken May 21, 1985. Dr. Fruin, a board certified neurosurgeon, examined claimant on February 21, 1985. The examination was essentially limited to claimant's lumbar spine and legs. Dr. Fruin found claimant to have negative straight leg raising test bilaterally, equal deep tendon reflexes at the knees and at the ankles, and the strength of the major muscle groups in claimant's lower extremities was normal and equal bilaterally. The only abnormality Dr. Fruin identified was a slight degree of decreased sensation over the L-5 dermatome of claimant's left leg and a ten percent reduction of the range of motion of claimant's lumbar spine. Dr. Fruin found no objective basis for the complaints of pain which claimant had voiced and he indicated that he expected the pain to improve with the passage of time.

Dr. Fruin did not feel that claimant was limited to sedentary work but advised that he avoid situations of repetitive heavy lifting. At page 13 of the deposition, he defined heavy lifting as weights of greater than 25 to 50 pounds. In deposition exhibit 3, Dr. Fruin had indicated that claimant should never lift weights in the range of 25 to 50 pounds. Dr. Fruin felt that claimant had a 10 percent functional disability to the body as a whole as a result of his back injury. He felt that if claimant did sustain another back injury, such would be a treatable situation.

Exhibit 117 is a statement of experience and education from Jan Bickley. Exhibit 118 is a copy of a form 2A.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on or about August 1, 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 concerning experiencing discomfort on August 1 and a subsequent event on August 2, 1983 from which his continuing symptoms have resulted. Claimant appeared at hearing and testified. He has held a responsible position of employment in the past. Claimant is found to be a credible witness and his description of the occurrences of August 1 and 2, 1983 is adopted as correct. Dennis Collins corroborated claimant's testimony regarding the occurrence of an injury which arose out of and in the course of employment. No conflicting evidence appears in the record from any source whatsoever. In view of the fact that both claimant and employer acknowledge the occurrence of the injury, it is difficult to understand why such was identified as a contested issue in this case. The events of August 1 and 2, 1983 which claimant described are found to be one injury which commenced on August 1, 1982 and which was completed and manifested on August 2, 1983.

The claimant has the burden of proving by a preponderance of the evidence that the injury on or about August 1, 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).

Claimant has been found to be a credible witness and his description of the onset of his symptoms is deemed to be correct. Dr. Margules found the injury which claimant described to be a cause of the herniated L4-5 lumbar disc, the treatment rendered, and the ensuing disability. No contrary evidence appears in the record. It is therefore found and concluded that the injuries of August 1 and 2, 1983 are a proximate cause of the herniated disc, the treatment, and the resulting disability. There is some indication in the record that a small defect at the L4-5 level may have preexisted August 1, 1983 but from the evidence presented it appears that such was asymptomatic and was not producing any disability prior to August 1, 1983.

The parties stipulated that claimant's conversion date was June 1, 1984 in accordance with an expression from Dr. Margules. Dr. Fruin concurs in that assessment and the stipulation is accepted as correct even though the evidence could arguably support some different date. According to exhibit 112, defendants have paid all healing period compensation at the stipulated rate of $197.70 per week. They are entitled to full credit in satisfaction of their entire healing period obligation.

What appears to be the primary litigated issue in this case is a determination of claimant's entitlement to compensation for permanent partial disability. According to the stipulation of the parties, payment for any permanent partial disability would come due commencing June 1, 1984.

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. * * *

The testing which has been performed indicates that claimant is of at least average general intelligence. He does not have any demonstrated ability for academic pursuits. He appears to have a better than average aptitude for planning construction work. Claimant has been described at several points in the record as being good at working with people and as having a great deal of management potential. At the time of hearing, claimant was one year past the end of his healing period. He had been assisted to some extent by two vocational rehabilitation counselors. Claimant has taken a job which does not appear to approach his potential. From the evidence, it appears that claimant's job seeking activities have been somewhat less than zealous. Why claimant has chosen to refrain from seeking employment which would enable him to make the best of his physical situation does not appear in the record. It is clear, however, that claimant has three important factors working against him. First, he has a very substantial impairment in his lumbar spine. Second, he has a limited formal education. Third, he is reluctant to engage in any long term training program. The doctors vary greatly in their impairment ratings but the physical capabilities forms completed by Drs. Margules and Fruin are actually quite comparable. It is those capabilities which are much more important than a percentage impairment rating. When all the applicable factors are considered, it is found that claimant has sustained a disability, in industrial terms, of 20 percent of the body as a whole as a result of the August 1 and 2, 1983 injuries.

Under Industrial Commissioner Rule 500-4.33(1)(2), claimant is entitled to recover $151.00 in costs for the services from Rex M. Blair & Associates as claimed in exhibit A-14.

FINDINGS OF FACT

1. On August 1 and 2, 1983 claimant was a resident of the state of Iowa employed in the state of Iowa by Collins Insulation, Inc.

2. Claimant was injured on August 1 and 2, 1983 when handling insulating equipment.

3. Following the injury, claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury until June 1, 1984 when claimant reached the point that it was medically indicated that further significant improvement from the injury was not anticipated.

4. Claimant is a credible witness.

5. Claimant is 34 years of age, married, and has two dependent children. At the time of injury, claimant was earning $7.50 per hour and his rate of compensation is $197.70 per week.

6. Prior to the injury of August 1, 1983, claimant had previously experienced a herniated disc at the L5-S1 level of his back which was surgically excised in 1980.

7. The injury of August 1, 1983 was the herniation of the L4-5 lumbar disc which was then surgically removed.

8. Following the 1980 injury, claimant was restricted in his ability to bend, lift, squat, and, in general, stress his back.

9. As a result of the 1983 injury, claimant's abilities are restricted to a greater degree than they were following the 1980 injury and claimant is, additionally, afflicted with pain which he did not previously experience. He is more susceptible to further injury.

10. Claimant has work experience in the construction trades, mechanical work, and as a cook. Most of his employment history has been in the areas of moderate to heavy labor.

11. Claimant dropped out of school following the tenth grade but did obtain a GED.

12. Claimant is of average intelligence and emotionally stable but not highly motivated to adapt himself to the types of employment which are consistent with his physical limitations. Claimant did not return to work with the defendant employer but has obtained other employment.

13. Claimant is underemployed in his present employment and has the ability to obtain and perform in better paying positions which are consistent with his abilities and limitations. Claimant has managerial skills and aptitudes which have not been developed.

14. Claimant had a small preexisting defect at the L4-5 disc level but such was not symptomatic and did not produce any disability prior to August 1, 1983.

15. Claimant incurred court reporter fees in the amount of $151.00, which charges have been paid by claimant's counsel.

16. Defendants have paid claimant 38 3/7 weeks of compensation for healing period at the rate of $197.70 per week, covering the period from August 2, 1983 through May 31, 1984 with a break therein for the period of January 1, 1984 through February 5, 1984 when claimant attempted a return to work with the defendant employer.

CONCLUSIONS OF LAW

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

The injury claimant sustained to his back on August 1 and 2, 1983 arose out of and in the course of his employment with Collins Insulation, Inc.

The injury was a proximate cause of the disability which arose from the herniated disc and its treatment.

Claimant sustained an industrial disability which is 20 percent of total disability from the August 1, 1983 injury. Accordingly, he is entitled to receive 100 weeks of compensation for permanent partial disability at the rate of $197.70 per week payable commencing June 1, 1984.

Defendants have fully satisfied their obligation to pay healing period compensation and are entitled to credit for all compensation for permanent partial disability which has been previously paid in this case.

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 ninety-seven and 70/100 dollars ($197.70) per week commencing June 1, 1984.

IT IS FURTHER ORDERED that defendants pay any past due amounts in a lump sum together with interest pursuant to section 85.30 of the Code. Defendants shall also receive credit for the amounts previously paid in this case.

IT IS FURTHER ORDERED that defendants pay the costs of this action including court reporter and transcription fees in the amount of one hundred fifty-one and 00/100 dollars ($151.00).

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by this agency pursuant to Rule 500-3.1.

Signed and filed this 10th day of October, 1985.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
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IOWA INDUSTRIAL COMMISSIONER

DORI D. TAYLOR, Claimant, vs. HUMMEL INSURANCE AGENCY, INC., Employer, and AID INSURANCE SERVICES, Insurance Carrier, Defendants.	File No. 760389 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 Dori D. Taylor, claimant, against Hummel Insurance Agency, Inc., employer, and AID Insurance Services, insurance carrier. Claimant alleges that she sustained a compensable injury on November 9, 1982 and seeks compensation for healing period, permanent partial disability, and payment of medical expenses. The case was heard at Council Bluffs, Iowa, on June 21, 1985 and was fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimonies of Dori D. Taylor and Don Hummel. The record also includes claimant's exhibits 1 through 37.

ISSUES

The issues in the case are whether claimant sustained an injury which arose out of and in the course of her employment; whether there is a causal relationship between the alleged injury and any disability which has occurred; a determination of the nature and extent of any disability which has resulted from the injury; a determination of claimant's entitlement to weekly compensation; and section 85.27 benefits. It was stipulated that the charges for the medical services which claimant has received are fair and reasonable except that defendants declined to concede the reasonableness of the charges from R. Schuyler Gooding, M.D. It was stipulated that claimant's rate of compensation is $145.61 per week, in the event of an award. It was further stipulated that claimant was off work from May 7, 1984 to July 19, 1984, that she worked part-time from July 20, 1984 through July 31, 1984, during which time she worked 28 hours, and that she was paid sick leave from May 7, 1984 through May 13, 1984. It was further stipulated that AID has paid some of claimant's medical bills, particularly the bills shown in exhibits 13, 14, 15, 16, 18, and 20. $955.00 has been paid toward the total charges shown on exhibit 17.

SUMMARY OF EVIDENCE

The following is only a brief summary of the pertinent evidence. All of the evidence received at hearing was considered when deciding this case.

Dori D. Taylor testified that she is 42 years of age, married, and had three children who were living in her home on November 9, 1982. Of the three children, two were in high school and the other was in college.

Claimant, a high school graduate, testified that she commenced her employment with the Hummel Insurance Agency, an independent agency, in January 1979. She initially performed general office work and has now advanced to where she is a secretary and manager of the office. Her duties include giving quotations and setting up policies. At the time of the alleged injury, her duties also included cleaning the office but such duties have now been assumed by the spouse of her employer, Don Hummel. Claimant stated that there were five people who work in the office, namely Don Hummel, his spouse, Don's son, a person identified as Jan, and the claimant.

Claimant testified that on November 9, 1982 she was cleaning the office and had been vacuuming. She stated that there were staples in the rug and that she had bent over to pick them up. While doing so, the telephone rang and she abruptly stood up and hit a cupboard which protruded from the wall as shown in exhibit 26. She estimated that the bottom of the cupboard was four feet to four feet three inches from the floor. She stated that the right side of her neck struck the point and that her shoulder struck on the bottom of the cupboard. The point on her neck which she identified was the lower part of the neck, approximately midway between the right side and the back of the neck. Claimant stated that the passage between the desk and the cabinet is narrow and that others in the office have also struck the shelf.

Claimant testified that her neck and shoulder were inflamed on the day the incident occurred and approximately a week later she felt a bone protruding near her throat on the right side of her chest. She also reported feeling numbness or tingling in her right arm and hand and sought medical care from Donald T. Stroy, M.D., who in turn referred her to Ronald K. Miller, M.D. Claimant stated that in January 1983 she was experiencing pain in her neck, the right side of her throat, her right shoulder, and down into the arm. Claimant stated that Dr. Miller sent her to therapy and the therapy gave her some relief but did not resolve the pain or numbness. Dr. Miller gradually reduced the frequency of her office visits and advised her to perform therapy on her own at home. She stated that in January 1984, Dr. Miller referred her to Dr. Gooding.

Claimant testified that Dr. Gooding is a neurosurgeon who performed tests and indicated to her that she had a pinched nerve which he could fix, but that he could not fix the protruding bone on her chest. She stated that he recommended surgery. Claimant testified that Mrs. Elnor Gilchrist, with AID Insurance Services, had initially authorized care by Dr. Gooding but then chose to deny the recommended surgery, revoked authorization for care by Dr. Gooding, and directed claimant to return to Dr. Miller. Claimant stated that when she returned to Dr. Miller she was referred back to Dr. Gooding and had the surgery in which vertebrae in her neck were fused. Claimant testified that she returned to work on a part-time basis on July 19, 1984 and resumed full-time duties on August 1, 1984.

While Claimant was off work recuperating from surgery, she studied in order to take the test to obtain her insurance license and passed the test. Her recovery included wearing a neck collar until November 1984. She stated that before she was injured she engaged in golfing, bowling, swimming, and other sports but her doctor has recommended that she avoid athletic ativities until a year following the surgery. Claimant felt that she had been progressively recovering from the injury and surgery but that her condition has been stable since January 1985.

Claimant testified that since surgery, the numbness has disappeared but she still tires easily. She complained of continuing stiffness in her neck and shoulder and exhibited a restricted range of rotation of her neck. She described a loss of range of motion of her right arm and stated that she experiences pain in the neck, right arm, and shoulder area if she tries to push, pull, or lift. She stated that anything over five pounds is a problem. Claimant described two lines of pain which she experiences, one running from the neck down the shoulder and arm, and the other running from her breastbone to her shoulder.

Claimant testified that she received a 25 cent per hour raise in January 1983, a similar raise in January 1984, and bonuses at the end of 1982, 1983, and 1984. She also received a raise in January 1985.

Don Hummel testified that he is president of the Hummel Insurance Agency. Hummel stated that claimant operates the computer, works with books, ledgers, and files. He stated that she performs all the duties which she performed before 1982 except vacuuming. He confirmed that claimant had taken rest periods while at work following her surgery but that he had not observed any in the last six months. He stated that claimant's physical problems have not affected her ability to do her job. He stated that her pay raises and bonuses were based on merit and were not simply cost of living type adjustments. He described her as a good employee.

Exhibits 1 through 11 are a collection of medical reports and hospital records. The exhibits show claimant's diagnostic testing which identified a herniated cervical disc, her hospitalizations with regard to testing, and the surgical treatment of the herniated disc. In exhibit 8, Dr. Gooding indicates that claimant apparently had preexisting degenerative arthritis of the cervical spine, that she had an injury, following which her arthritic condition became symptomatic.

Exhibit 12 is a work release indicating that claimant could return on July 23, 1984 and that she was to wear a cervical collar until November 1984. The release indicates an additional restriction that she work only four hours per day until July 27, 1984.

Exhibits 13 through 25 are bills for medical care as follows:

Exhibit	Date of Service	Provider	Amount
13	1-06-83	Donald T. Stroy, M.D. (Paid by AID)	$ 20.00
14	1-06-83	Jennie Edmundson Hospital (Paid by Employer)	42.00
15	1-11-83 1-27-84	Ronald K. Miller, M.D. (Claimant Paid $29.00) (AID Paid $103.00)	132.00

16	3-15-83 5-27-83	Bluffs Physical Therapy (Paid by Aid)	422.00
17	1-18-84 2-13-85	Bluffs Neurosurgical Assoc ($955.00 Paid by Aid)	4,075.00
18	1-23-84 - 1-25-84	Jennie Edmundson Hospital (Paid by AID)	1,782.90
19	5-07-84 - 5-16-84	Jennie Edmundson Hospital (Unpaid)	3,513.42
20	1-23-84 - 1-24-84	Medical Anesthesia Assoc (Paid by AID)	368.00
21	5-08-84	Medical Anesthesia Assoc (Unpaid)	483.00
22	6-13-84	Jennie Edmundson Hospital (Unpaid)	37.00
23	5-15-85	Jerome C. Tanous, M.D. (Unpaid)	112.00
24	5-15-85	Mercy Hospital (Unpaid)	134.00
25	5-16-84 6-23-84	Criswell Drug Store (Unpaid)	117.68
		TOTAL	$11,239.00

Exhibit 26 is a photograph of the protruding cabinet which claimant struck. Exhibits 27, 28, 29, and 34 are claimant's earning records during years 1982 through 1985. Exhibit 35 confirms claimant's testimony of the withdrawal of authorization for treatment by Dr. Gooding and directing that claimant return to Dr. Miller. Exhibit 36 confirms the denial of claimant's workers' compensation claim. Exhibit 37 authorizes claimant to receive one additional treatment from Dr. Gooding. The exhibit is dated April 12, 1984.

Exhibit 30 is the deposition of R. Schuyler Gooding, M.D., taken May 6, 1985. Dr. Gooding, a board certified neurological surgeon, testified that when he examined claimant on January 18, 1984 she described the occurrence of her injury and made complaints which included dislocation of the right clavicle where it joins the sternum, ongoing pain in her right shoulder, occasional weakness and numbness in her right hand, and aching in her neck. He stated that X-rays provided by Dr. Miller showed a loss of the normal curvature of the cervical spine which suggests some spasm of the muscles in the neck. Dr. Gooding stated that his initial examination showed a decreased range of motion of the cervical spine, a depressed right biceps reflex and diminished sensation of the right thumb. X-rays were taken which were normal except for a small fragment of bone density at the anterior-inferior margin of the fifth cervical vertebra. Dr. Gooding testified that following the examination, he suspected that claimant had a ruptured disc in her neck and that a diagnostic myelogram was indicated. He stated that the myelogram was performed on January 23, 1984 and revealed a defect at the C-5/6 disc level with progressively smaller defects at the C-4/5 and C-3/4 levels. Dr. Gooding diagnosed claimant's condition as degenerative disc disease which was aggravated and made symptomatic by the injury which occurred in November 1982. (Claimant's Exhibit 30, pages 10,11) The objection entered by defendants' counsel at page 10 of the exhibit is overruled. Rule of Evidence 705 permits the expression of expert opinion without the prior recitation of the underlying facts. The grounds for the objection go to the weight to be given the opinion and not to its admissability.

Dr. Gooding testified that when he initially saw claimant, she was reluctant to have surgery but that her condition subsequently worsened, as manifested by the loss of her right biceps reflex, to the extent that surgery should not have been postponed further. Dr. Gooding stated that the herniated disc was surgically removed on May 8, 1984 and that the adjoining vertebrae were fused. Dr. Gooding stated that the surgery was successful and claimant made a satisfactory recovery.

Dr. Gooding stated that claimant had a ten percent permanent partial impairment to the body as a whole by reason of her cervical condition and that a causal relationship existed between the impairment and the injury of November 9, 1982. (Ex. 30, pp. 16-18) Defendants' objection, as appears at page 17 of the deposition, is overruled based on Rule of Evidence 705.

At page 19 of the deposition, Dr. Gooding stated that the services which he provided to claimant were reasonably necessary to treat her condition, that the condition was related to the occurrence of November 9, 1983 [sic] and that his charges for those services, in the amount of $4,070.00, were fair and reasonable. Dr. Gooding acknowledged that $955.00 of the charges have been paid and that the outstanding balance was $3,120.00.

Dr. Gooding related some uncertainty regarding the precise point of impact which had been described by claimant regarding her neck and/or shoulder. (Ex. 30, pp. 21,22) Dr. Gooding stated that the abnormality shown in the X-rays taken January 18, 1984 was of significance in that it was located at the level where the ruptured disc was ultimately found and that it suggested the occurrence of an injury at that location. He indicated that the calcified particle shown in the X-rays was at least three months old and could have been substantially olde. Dr. Gooding stated that EMG studies which were performed prior to surgery were normal but that the test is not precise. He stated that the loss of the biceps reflex was a strong indication of significant injury. (Ex. 30, pp. 20-25)

Dr. Gooding explained his assessment of claimant's case as follows:

> In a situation that I suspect was the case with Mrs. Taylor, she probably had some degree of disc disease pre-existing [sic]. The disc was probably protruding somewhat, very close to the nerve, but never really particularly struck the nerve or pressed on the nerve very severely. I suspect that when she struck her shoulder rather sharply and appreciating that Mrs. Taylor is a large, strong, muscular woman, I suspect that she stretched the nerve or twisted her neck or wrenched things in such a way that this disc that was sitting very close to the nerve, but had never particularly bothered the nerve heretofore, they were brought into contact rather sharply and abruptly, and from that point forward, the proximity of the disc to the nerve became an ongoing source of irritation.
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> Q. So, at that point, you feel that there was nerve impingement?
> A. At least nerve irritation. And it must have been a progressive impingement situation, because her biceps reflex progressively decreased, and then eventually, totally went away on that side. And then when the disc was removed at that particular level, the reflex came back. (Ex. 30. pp. 26,27)

Dr. Gooding indicated that claimant had preexisting degenerative disc disease which could have possibly eventually caused problems for her even if the alleged injury had not occurred. (Ex. 30, p. 28)

Dr. Gooding indicated that claimant's description of her symptoms included weakness and numbness in her right hand which had occurred occasionally ever since the injury.

Exhibit 31 is the deposition of Ronald K. Miller, M.D., taken May 22, 1985. Dr. Miller, a board certified orthopedic surgeon, testified that he treated claimant beginning on January 11, 1983, at which time she related a history of striking her right shoulder underneath filing cabinets. He indicated that the point of impact was near the junction between her shoulder and neck, in the trapezius area. The examination he performed revealed fullness and thickness in the sternoclavicular region and pain on the lateral side of her neck. He stated that X-rays showed straightening of the cervical spine which indicates muscle spasm, an acute condition which generally resolves over a period of time. (Ex. 31, p. 8)

Dr. Miller testified that claimant did not recover as he had anticipated and when he saw her in September 1983, he began to suspect a neurological problem from claimant's cervical region but that he received negative responses from claimant to his questions concerning numbness or tingling in her arm or fingers. He stated that by January 1984 she was still symptomatic and he referred her to Dr. Gooding.

Dr. Miller examined claimant on May 15, 1985 at which time she exhibited a problem in her right shoulder. A click in the joint was observed and an arthrogram revealed a contracted joint consistent with capsulitis. Dr. Miller felt that the condition was a result of lack of use of the shoulder. (Ex. 31, pp. 20,21) Dr. Miller indicated that claimant had continuing complaints of pain and weakness. He felt that her condition, however, had improved from the time when he had previously seen her in January 1984.

Dr. Miller testified that he does not perform back or neck surgery and if a patient returned to him after a myelogram had disclosed a defect and a neurosurgeon had recommended surgery, he would then refer the patient back to the neurosurgeon. (Ex. 31, pp. 32,33)

Dr. Miller testified that in his opinion a relationship existed between the occurrence of November 9, 1982 and the condition which he found in his examination of Januay 11, 1983. He deferred to Dr. Gooding's opinion regarding a relationship between the injury and claimant's cervical problems. He was uncertain, however, regarding whether the problem in claimant's shoulder which he found on May 15, 1985 was related to the occurrence of November 9, 1982. He felt that a close relationship generally exists between the cervical spine and the shoulder and stated that the problem in the shoulder joint could be a manifestation of the cervical problem. He did state, however, that if it is assumed that the cervical problem were related to the November 9, 1982 injury, then the shoulder problem would also be related to that same injury. (Ex. 31, pp. 36,37) Dr. Miller felt that claimant had an impairment of the shoulder in the range of seven to ten percent.

Exhibit 32 is a deposition of Alan H. Fruin, M.D., taken May 23, 1985. Dr. Fruin, a board certified neurosurgeon, testified that he examined claimant on April 25, 1985. He found claimant to have a ten percent permanent partial impairment of the body as a whole, based upon the condition of her neck and shoulder. He felt that approximately 20 percent of her current disability was related to the 1982 injury and the remainder of it was related to the 1984 surgery. (Ex. 32, pp. 12,13) Dr. Fruin stated, however, that the surgery performed by Dr. Gooding was not necessary to treat the injuries which claimant sustained in 1982. He felt if the 1982 injury had produced any neurological injury, it would have manifested itself by September of 1983, and that any nerve injury which she experienced developed after September 1983. Dr. Fruin agreed that nerve root compression can develop without trauma. (Ex. 32, pp. 9,10)

Dr. Fruin testified that the sum of $1,648.00 is the amount which he charges for performing a cervical fusion of a single level, that such a charge is fair and reasonable and consistent with charges from the Mayo Clinic.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on November 9, 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).

Claimant appeared at hearing and testified on her own behalf. She related experiencing tingling and numbness since shortly after the time of striking the cupboard. Such complaints do not, however, appear in the records or memories of Drs. Miller or Stroy. Complaints of pain in her neck and shoulder are prevalent, however. Claimant appeared credible at hearing. She holds a responsible position which requires a high level of personal integrity. It would not be highly unusual for a person with a high level of discomfort in one part of the body to refrain from making complaints of minor discomfort in another part of the body. It is therefore found that claimant is a fully credible witness on her own behalf. It is found that she did strike her neck and shoulder on the protruding cabinet on November 9, 1982 as she described at hearing.

"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 was at her employer's place of business and it is clear that her injury arose out of and in the course of her employment. 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.

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 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).

Dr. Gooding clearly believes that claimant's cervical problem, including the surgery, was a result of the compensable injury. Dr. Miller defers to the opinion of Dr. Gooding on that issue but then states that if the neck problem were in fact related to the injury, then the shoulder problem is also a result of the injury. The opinion of Dr. Fruin is somewhat confusing. He relates a portion of claimant's permanent impairment to the injury but does not relate the surgery which was performed to that injury. He based that opinion upon the premise that the numbness and tingling in claimant's right hand did not develop until subsequent to September 1983. Such is in direct conflict with the testimony which claimant gave at hearing but is consistent with the notes contained in claimant's medical records. Drs. Gooding and Miller based their opinions of a causal connection upon the premise that claimant was free from symptoms prior to the injury and that she was afflicted with her symptoms continually following the injury. Claimant's testimony that she did experience the intermittent numbness and tingling in her right hand which indicated a nerve injury is accepted as correct.

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). It is therefore found that the injury which claimant sustained in striking the bookshelf on November 9, 1982 is a proximate cause of the disability which she presently experiences in her cervical spine and right shoulder and of all the medical care and treatment which she has received for those parts of her body as shown in the evidence, including the cervical fusion performed by Dr. Gooding. Claimant did clearly have preexisting degenerative arthritis in the cervical spine and the injury is found to have been an aggravation of that previously asymptomatic condition as explained by Dr. Gooding.

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). There was no apparent disability prior to the time the injury occurred. No physician has suggested the degree of any alleged preexisting disability. Accordingly, apportionment of claimant's disability between the injury and the preexisting degenerative condition is not warranted.

The point of impact was not limited to any scheduled member. The impairment rating imposed by Drs. Gooding and Fruin were based upon claimant's neck and/or shoulder. Each estimated a ten percent impairment of the body as a whole. Dr. Miller estimated a seven to ten percent impairment of the shoulder. It is clear that claimant's injury is an injury to the body as a whole and that it is not limited to any scheduled member.

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 impairment 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).

Claimant's formal education is limited to high school but she does possess her insurance license. She is also apparently proficient at typing and operating the office computer. It does not appear that the injury and its resulting disability has had any substantial effect upon her current employment. Claimant remains employed with the same employer. She has received periodic pay raises. Don Hummel has indicated that the injury has not significantly affected claimant's ability to perform her work and claimant feels that she is a valuable worker. A surgery of the type which claimant underwent does produce a potential for further problems in the adjoining disc levels. Claimant is restricted in her ability to perform physical activities. The problems in her shoulder have continued for long enough that there is a considerable likelihood that they are permanent. Wallace v. Brotherhood, 230 Iowa 1127, 1130 (1941). Claimant's employer has acted commendably in maintaining claimant's employment. This factor greatly mitigates what could otherwise be a substantially greater industrial disability award. Claimant appears relatively secure in her position but, of course, complete job security is never guaranteed. The physical limitations could be a barrier should she seek other employment. When all the appropriate factors are considered, it is found that the injury of November 9, 1982 produced a ten percent permanent partial disability when the same is evaluated industrially. It is merely a coincidence that the industrial disability has been found to be equal to the functional impairment rating.

It has been previously found that claimant's cervical condition and its treatment was related to the November 9, 1982 compensable injury. Accordingly, defendants are responsible for payment of the remaining unpaid balance of the charges incurred for treatment as follows:

Exhibit	Provider	Amount
19	Jennie Edmundson Hospital	$3,513.42
21	Medical Anethesia Associates, P.C.	483.00
22	Jennie Edmundson Hospital	37.00
23	Jerome C. Tanous, M.D., P.C.	112.00
24	Mercy Hospital	134.00
25	Criswell Drug Store	117.68
17	Bluffs Neurosurgical Assoc., P.C.	3,120.00
	TOTAL	$7,517.10

It is apparent that Dr. Gooding's charges exceed the amount which Dr. Fruin would charge. The amount indicated by Dr. Fruin of $1,648.00 is only 55 percent of the $2,960.00 charged by Dr. Gooding for performing the surgical procedure. From the record, it can not be ascertained whether Dr. Fruin's charge included postoperative care. It is assumed that his charge does not include the presurgical diagnostic testing which Dr. Gooding performed commencing in January 1984 and running up to the time claimant was admitted for surgery. Dr. Gooding has expressed the opinion that his charges are fair and reasonable. Dr. Fruin did not, however, state that the charges made by Dr. Gooding were unreasonable or excessive. The fact that Dr. Fruin and the Mayo Clinic may charge substantially less than Dr. Gooding does not make Dr. Gooding's fees unreasonable. In a free society which abstains from price fixing, some variance can be expected. The variance in this case seems large. Under the record made, however, particularly the absence of any professional statement that Dr. Gooding's fees are unreasonable or excessive, his charges for claimant's care are found to be reasonable.

The care provided by Dr. Gooding was successful. It made a substantial improvement of claimant's symptoms. Such establishs that the care was in fact reasonable and necessary.

Since the employer denied the compensability of the injury in its answer filed in this case, it is not entitled to guide the medical treatment. Barnhart v. MAQ, Inc., Iowa Industrial Commissioner Report 16 (App. 1981). Additionally, care by Dr. Gooding was not unauthorized. Under circumstances where claimant was referred back to Dr. Gooding by the authorized physician, Dr. Miller, such clearly makes care by Dr. Gooding authorized.

According to the stipulation of the parties, claimant was off work from May 7, 1984 to July 19, 1984. This is a span of 10 and 4/7 weeks. It was further stipulated that claimant was paid sick leave from May 7 through May 13, 1984. Nothing appears in the record which would show the sick leave payments to have been a group plan under which benefits would not be payable for work related injuries in accordance with section 85.38(2). Accordingly, claimant's healing period compensation will not be reduced by the amount of the paid sick leave. She is entitled to receive 10 and 4/7 weeks of compensation for healing period payable commencing May 7, 1984 at the stipulated rate of $145.61 per week.

Claimant's part-time work qualifies as temporary partial disability under the provisions of section 85.33(2). Based upon her rate of compensation, her weekly rate of gross earnings is $209.00. According to exhibit 29, she earned $168.00 during the time span of July 20 through July 31, 1984 while working on the part-time basis. Such is a span of one and five-sevenths weeks. Claimant was working four hours per day at the rate of $6.00 per hour which makes her weekly earnings $120.00 per week, assuming that she worked four hours per day for five days each week. When $120.00 is substracted from $209.00 the result is $89.00. Two-thirds of $89.00 is $59.33. Accordingly, claimant is entitled to receive one and five-sevenths weeks of compensation for temporary partial disability at the rate of $59.33 payable commencing July 20, 1984.

Claimant's mileage claim, as shown in exhibit 33, is consistent with the record of medical care shown in the remaining evidence of the case. She is therefore entitled to receive mileage for travelling 1,820 miles at the rate of 24 cents per mile for a total of $436.80.

FINDINGS OF FACT

1. Claimant was injured on November 9, 1982 when she stood up under a protruding bookshelf, striking the right rear side of her lower neck and right shoulder on the bookshelf.

2. Claimant continued to work following the injury for a substantial period of time but was medically incapable of performing work in employment substantially similar to that she performed at the time of injury from May 7, 1984 through July 19, 1984.

3. Claimant returned to work on July 20, 1984 but worked only four hours per day through July 31, 1984, as directed by her physician. Although the work she performed was identical to the work she had done prior to the injury, the employment itself was not substantially similar in view of the reduction of work hours. Claimant had a temporary partial reduction in earning ability during the span of July 20 through July 31, 1984.

4. Following July 31, 1984 claimant resumed regular full-time employment.

5. Claimant is a fully credible witness.

6. Claimant is 42 years of age, married and had three dependent children at the time of injury.

7. Claimant's average weekly earnings at the time of injury were $209.00 and her rate of compensation is $145.61 per week.

8. As a result of the injury, claimant received medical care as shown in exhibits 13 through 25 previously set forth in this decision. The care rendered was reasonable and necessary for treatment of the injury which claimant sustained.

9. Defendants have paid all of claimant's medical expenses incurred in providing treatment for the injury except the following:

Provider	Amount
Jennie Edmundson Hospital	$3,513.42
Medical Anesthesia Associates, P.C.	483.00
Jennie Edmundson Hospital	37.00
Jerome C. Tanous, M.D., P.C.	112.00
Mercy Hospital	134.00
Criswell Drug Store	117.68
Bluffs Neurosurgical Associates, P.C.	3,120.00
TOTAL	$7,517.10

The amount charged for the services rendered is fair and reasonable.

10. Claimant presently has a ten percent permanent partial impairment of the body as a whole based upon the condition of her cervical spine and right shoulder.

11. The injury of November 9, 1982 was a substantial factor in producing the currently existing disability in claimant's cervical spine and right shoulder.

12. Claimant has a high school education and holds an insurance license. She is experienced in office work as a typist and computer operator.

13. Claimant appeared to be of at least average intelligence, emotionally stable, and well motivated to be gainfully employed.

14. Following recovery from the surgery which was necessitated by the injury, claimant returned to work with her employer. She appears secure in that employment.

15. Claimant had a preexisting degenerative condition in her cervical spine which was asymptomatic. The injury of November 9, 1982 caused the degenerative condition to become symptomatic and produced a ruptured cervical disc.

16. Claimant travelled 1,820 miles in obtaining medical care for the injury.

CONCLUSIONS OF LAW

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

The injury claimant sustained on November 9, 1982 arose out of and in the course of her employment with Hummel Insurance Agency.

Claimant is entitled to receive ten and four-sevenths weeks of compensation for healing period payable commencing May 7, 1984.

Claimant is entitled to receive one and five-sevenths weeks of compensation for temporary partial disability at the rate of $59.33 per week payable commencing July 20, 1984.

Defendants are responsible for claimant's remaining unpaid bills as shown in exhibits numbered 17, 19, 21, 22, 23, 24, and 25 in the total amount of $7,517.10.

Claimant is entitled to receive $436.80 for travel expenses.

Claimant's disability is to the body as a whole and when evaluated industrially, it is ten percent of total disability.

Where there is no showing that the sick pay which claimant received was part of a group plan or that it would not have been payable in the event that claimant's absence from work was the result of a work related injury, defendants are not entitled to credit therefore under section 85.38(2).

ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant ten and four-sevenths (10 4/7) weeks of compensation for healing period at the rate of one hundred forty-five and 61/100 dollars ($145.61) per week commencing May 7, 1984.

IT IS FURTHER ORDERED that defendants pay claimant one and five-sevenths (1 5/7) weeks of compensation for temporary partial disability at the rate of fifty-nine and 33/100 dollars ($59.33) per week commencing July 20, 1984.

IT IS FURTHER ORDERED that defendants pay claimant fifty (50) weeks of compensation for permanent partial disability at the rate of one hundred forty-five and 61/100 dollars ($145.61) per week commencing August 1, 1984.

IT IS FURTHER ORDERED that the entire award be paid in a lump sum together with interest pursuant to section 85.30 from the day each payment of weekly compensation came due.

IT IS FURTHER ORDERED that defendants pay claimant's remaining unpaid medical expenses as follows:

Provider	Amount
Jennie Edmundson Hospital	$3,513.42
Medical Anesthesia Associates, P.C.	483.00
Jennie Edmundson Hospital	37.00
Jerome C. Tanous, M.D., P.C.	112.00
Mercy Hospital	134.00
Criswell Drug Store	117.68
Bluffs Neurosurgical Associates, P.C.	3,120.00
TOTAL	$7,517.10

IT IS FURTHER ORDERED that defendants pay claimant's travel expenses in the amount of four hundred thirty-six and 80/100 dollars ($436.80).

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 and any other claim activity reports requested by the agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 15 day of October, 1985.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

OCT 3 1985

IOWA INDUSTRIAL COMMISSIONER

MAX THOMAS,	:	
Claimant,	:	
vs.	:	
THOMAS HIDEWAY ANTIQUES, INC.,	:	File No. 755838
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
UNITED FIRE & CASUALTY CO.,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Max Thomas, claimant, against Thomas Hideway Antiques, Inc., employer, and United Fire and Casualty Company, insurance carrier. The case was heard at Council Bluffs, Iowa on June 17, 1985 and was considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimony of Max Thomas, claimant's exhibits 1 through 17, 19, and defendants' exhibits A through E.

ISSUES

The issues presented by the parties at the time of hearing are whether a causal connection exists between claimant's injury and any disability which he has experienced; determination of claimant's entitlement to compensation for healing period and permanent partial disability; and determination of claimant's rate of compensation. It was stipulated that claimant had sustained an injury which arose out of and in the course of his employment. Claimant contends that his healing period ended September 27, 1984 and that his rate of compensation should be based upon a gross weekly wage of $380.00. The defense contends that the healing period ended August 19, 1984 and that the rate of compensation is $179.18 per week. It was further stipulated by the parties that the employer has paid healing period compensation from December 7, 1983 through August 19, 1984 at the rate of $179.18 per week and that, at the time of hearing, the employer had paid 36 and 5/7 weeks of compensation for permanent partial disability in the total amount of $6,578.41.

SUMMARY OF EVIDENCE

Max Thomas testified that he is 49 years of age, married, and resides at Persia, Iowa. He stated that on November 26, 1983 he had no children who resided with him.

Claimant testified that he dropped out of school during the third month of tenth grade and has not attended any further formal training. He stated that he has difficulty in reading, spelling, writing, and is not proficient in math.

Claimant testified that he served four years in the navy and was honorably discharged in 1958. His other work experience includes loading and unloading farm machinery from box cars and trucks, route sales for Meadow Gold Dairy, farming, work on the line at Blue Star Foods, supervising a convenience food assembly line, operating snow making equipment at a commercial ski area, operating a convenience store, and, since 1973, working in the antique business.

Claimant testified that his wife had an antique business prior to 1973 and that he assisted her in its operation. He stated that his part in the antique business was picking up and delivering furniture. He stated that the work required driving a truck and loading and unloading the articles, some of which weighed over 300 pounds. Claimant stated that his part in the business also included repairing, refinishing, and restoring antique furniture. He stated that in general he worked on the furniture and his wife handled arranging shows, making sales, and record keeping. Claimant testified that the business bookkeeping is also performed by an accountant whose name is Donald E. Hunt. Claimant testified that over the years the business had grown by going to shows, including shows in California, Utah, and other western states.

Claimant testified that in 1983 he was earning $300.00 per week net pay and that his monthly net pay was $1200.00, all of which was paid in cash. He stated that the business paid the withholding taxes. He stated that the computations were performed by Hunt and that claimant's wife, Sara, made the actual payments. Claimant stated that the difference between his salary and the $26,398.00 of income shown in exhibit 19 was a bonus.

Claimant testified that his wife applied for the workers' compensation insurance in approximately September, 1982 and that the weekly pay of $128.00 was accurate in 1982 as shown on exhibit C. He stated that he had personally prepared the first report of injury, exhibit D, and entered the 13 week earning figure on it.

Claimant testified that he did not produce any tax returns other than those for 1982 and 1983, he did not produce withholding tax records, did not produce any of the business cancelled checks, and stated that salaries to himself and his spouse were paid in cash. Claimant was unable to explain the difference between his 1983 tax return and exhibit E, which showed him to have received $18,200.00 of nonemployee compensation. He stated that the 1984 tax return had not yet been filed. Claimant testified that presently his wife is earning a salary of $26,000.00 from the business and that he is not being paid anything. He stated that before the accident his wife earned $6,000.00 to $8,000.00 and he made $18,000.00 per year. Claimant agreed that such totaled $26,000.00, which is the same amount now paid to his spouse.

Claimant testified that he has not been paid any salary since December 7, 1983. He stated that the termination of his salary was a decision made between claimant and his spouse and that it was at that same time that his wife's salary was increased.

Claimant testified that he was at a show in Salt Lake City where his wife had sold a cabinet. Claimant stated that while unhooking a trailer, he fell on ice and hurt his back. He stated that he experienced a great deal of pain and that his right leg was numb. Claimant testified that he returned home before seeking medical care with R. Schuyler Gooding, M.D. Claimant testified that after a period of diagnostic tests and conservative treatment, surgery was performed. Claimant stated that following surgery he experienced a great deal of pain and that when released from the hospital, Dr. Gooding had advised him to lie down continuously except for when it was necessary to go to the bathroom and for meals. He stated that he hired a person to assist in caring for him at the times when his wife was away at antique shows. Claimant testified that he still has pain in his leg and that it has never returned to normal. He voiced complaints of continuing numbness and cramps in the leg. He stated that he can drive for approximately one hour and can usually sit for one-half hour to one hour. He stated that he does not have any problems if he avoids bending and follows the recommended lifting restrictions. Claimant stated that he performs exercises which had been recommended by the hospital even though they do not help, but they give him something to do. Claimant stated that he still takes pain medication occasionally.

Claimant testified that he now attends some shows with his wife and that a lot of the travel is by air. He stated that one truck is a super cab in which they have arranged a bed. He stated that at shows they now hire help to load and unload furniture, which costs approximately $40.00 per weekend.

Claimant testified that he presently does little with the company. He stated that he has tried to use a sander but that it causes sharp pains. He stated that he is unable to handle the four by eight sheets of plywood used to repair cabinets. He related that on some occasions he goes down to the shop to see what the other employees are doing and that he gives them guidance and assistance in the restoration work which they perform. He stated that he has tried to do sanding on eight or ten different occasions but that he has not tried to do any finishing work because it requires a lot of bending. Claimant stated that at shows he helps his wife with the selling, but receives no pay and his wife receives all the cash. Claimant stated that he is able to examine antiques and note how much work it would take to restore them, how much to pay to purchase them, and what they should sell for after restoration. He stated that he drives part of the way when going to shows. He felt that he will probably go back to work at some point in time, but that he and his wife have made no plans in that regard.

Claimant testified that the only time he had previous back complaints was when he went to see Dr. Rosa in 1979 when his back was sore from shovelling snow. He stated that he had never previously consulted a neurosurgeon or orthopedic surgeon.

Claimant testified that the business has become less profitable. He stated that the amount of inventory is down and that it needs a lot of repair. Claimant testified that the business now handles smaller items which are more easily handled. He stated that the refinishing and hauling had been the main part of the business.

Claimant testified that on one occasion he was rehospitalized and treated with therapy and hot packs which improved his condition.

Claimant testified that he does not know of any job which he could perform. He stated that he is unable to sit or be on his feet and that all the work he has ever performed has involved heavy manual labor. He stated that he considers lifting more than 50 or 60 pounds to be heavy lifting. Claimant testified that he can run a cash register, take inventory, and run a business. He stated that he could operate a convenience store if he did not have to be on his feet for extended periods or stock shelves. Claimant stated that he did not return to work at the time he was released by Dr. Gooding.

Claimant's exhibits 1 through 8 are copies of hospital records dealing with claimant's care. The records show that on January 25, 1984 surgery was performed upon claimant's back. The surgery revealed a herniated disc at the L5-S1 level, as well as two fibrous congenital bands which were attached to the annulus. The herniated disc was removed and the fibrous bands were surgically divided.

Exhibits 9 through 14 are reports from Dr. Gooding. In exhibit 11, a report dated April 17, 1984, Dr. Gooding indicated that the fibrous bands did not contribute to the ruptured disc. In exhibit 13, dated August 17, 1984, Dr. Gooding stated that claimant would possibly have continuing discomfort and sensory alterations which would be annoying but not disabling. Dr. Gooding also reported that claimant had been released to return to work on August 20, 1984 with a recommendation that he avoid excessive bending, heavy lifting, and prolonged sitting. Dr. Gooding imposed a ten percent permanent partial disability rating of the whole person. In a subsequent report dated September 27, 1984 Dr. Gooding, following a period of rehospitalization, stated that claimant had an ongoing neuralgia but that claimant did have a satisfactory result from surgery. He stated that sitting for long periods of time would pose a problem for claimant, the same as it does for most people who have had back surgery. He also increased his disability rating to 20 percent.

Exhibits 15 and 16 are hospital records dealing with claimant's admission of September 5, 1984. The reports indicate a lumbar myelogram was performed which was "absolutely and totally normal." The reports indicate that claimant was treated with physical therapy which improved his condition. The discharge date shown is September 12, 1984.

Exhibit 17 is a copy of a 1982 income tax return for claimant and his spouse. The return shows that it was prepared August 16, 1984 by Donald E. Hunt. Schedule W shows claimant's earnings to have been $18,000.00 and his spouse's earnings to have been $6,000.00. The return does not show any income tax to have been withheld. It shows the business to have operated at a loss of $10,172.00.

Exhibit 19 is the 1983 income tax return for claimant and his spouse which was also prepared by Hunt on August 16, 1984. Schedule W shows claimant to have earned $26,398.00 and his spouse to have earned $8,799.00. The return shows the business to have operated at a profit of $5,975.00. The income tax return shows no income tax to have been withheld and a tax liability in the amount of $4,727.00 after using all available credits.

Defendants' exhibit A is a report from Bernard L. Kratochvil, M.D., dated December 4, 1984. The report relates that Dr. Kratochvil examined claimant on December 4, 1984. Dr. Kratochvil interpreted X-rays which were taken as showing a surgical defect at the L4-5 level, but no other changes. He found that claimant had a disability of 15 percent.

Defendants' exhibit B is a record from Jennie Edmundson Memorial Hospital dated January 17, 1984 which appears to contain the following statement: "[Patient's] wife offer[ed] that [patient] had intermittent [right] sciatica even before recent injury, but it is much worse since injury."

Exhibit C is an application for workers' compensation insurance. The application shows claimant to have been the president and treasurer of the business and earning $128.00 per week. It also shows claimant's spouse to be vice president and secretary with an identical salary. The front page shows the business to have four employees with an estimated annual payroll in the amount of $20,312.00.

Exhibit D is a first report of injury wherein claimant indicated that his total earnings during the preceding 13 weeks had been $3,600.00. He also indicated that he was president of the corporation.

Exhibit E is copies of forms 1099-MISC for 1983 showing claimant to have been paid $18,200.00 in nonemployee compensation from the corporation, and also showing that his wife was given a similar payment in the amount of $16,600.00.

APPLICABLE LAW AND ANALYSIS

It was stipulated that claimant was injured as he described and that such arose out of and in the course of his employment. Claimant's testimony and the contents of exhibit D are consistent with such a stipulation.

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 described a fall. A ruptured disc is a known result of a fall of the type which claimant described. Following the fall, claimant made immediate complaints of pain, sought medical care, and he was then taken to surgery where a ruptured disc was identified. Claimant's prior medical history is generally unremarkable. The greatest indication of any preexisting problem arises from exhibit B, but even the statement recorded on exhibit B indicates a worsening of the condition following the fall in question. It is therefore concluded that the fall which claimant suffered on November 26, 1983 is a proximate cause of the disability in claimant's back.

Dr. Gooding released claimant to return to work on August 20, 1984 and imposed a ten percent impairment rating as shown in exhibit 13. Such marks the initial end of claimant's healing period. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). A healing period may also be interrupted by returns to work. Riesselman v. Carroll Health Center, III Iowa Industrial Commissioner Report 209 (1982). Accordingly, claimant is also entitled to healing period compensation during the time he was hospitalized from September 5 through September 12, 1984. Since further hospitalization was not contemplated at the time of claimant's release to return to work effective August 20, 1984, payment of compensation for permanent partial disability commences August 20, 1984 and is then interrupted for the one and one-sevenths weeks of healing period, running from September 5 through September 12, 1984.

The subsequent hospitalization, according to the hospital reports and claimant's testimony, resulted in an improvement of his condition and the treatment is therefore properly characterized as healing period rather than treatment which is maintenance in nature. Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa Appl 1981).

The record of this case is full of inconsistencies regarding claimant's earnings. Claimant testified consistently that taxes were withheld from his salary, but the income tax returns show no withheld taxes. Neither of the 1982 or 1983 returns were prepared until August 16, 1984. The earnings shown on the application for workers' compensation insurance, the tax returns, the first report of injury, and the 1099-MISC information returns are all inconsistent. The workers' compensation insurance application is dated September 14, 1982 at a time when two-thirds of the business year had been completed and it showed claimant to have been earning $128.00 per week. Claimant testified that such was correct at the time when the application was made, yet the 1982 income tax return shows claimant to have earned $18,000.00. According to claimant, the business paid salaries in cash. Following claimant's injury, claimant and his spouse conveniently shifted his earnings to his spouse. Claimant now has been working for the corporation, albeit on a limited basis, without any salary. Claimant described the business as his wife's and stated that she performs the record keeping, yet claimant carries the title of president and treasurer as shown on exhibits C and D. The income tax returns, exhibits 17 and 19, do not appear to have been signed by claimant or his spouse. The agency file shows a request for production of documents served September 26, 1984 which claimant testified had not been fully complied with. Since the employer corporation had employed the services of Hunt as accountant and tax preparer and apparently still does so, it would be expected that Hunt would be responsive to requests for copies of his work. Claimant was bound to obtain the records requested and the excuse that Hunt did not respond to requests is unpersuasive. Based upon all the foregoing inconsistencies in the record and upon claimant's appearance and demeanor at hearing, it is found that claimant has failed to establish his credibility. Accordingly, his testimony concerning his earnings is unpersuasive. The tax returns which were generated subsequent to the time claimant sought benefits for the injury are likewise unpersuasive. The same are found to be unreliable. Defendants urge that claimant's rate of compensation be fixed at $179.18 per week in accordance with the earnings shown on exhibit D. The undersigned is not convinced that such has any greater accuracy than the rate of earnings shown on exhibit C but defendants, who are responsible for payment, at hearing and in their brief have contended that the correct rate of compensation is $179.18 per week. Accordingly, the rate of compensation is fixed at $179.18 per week.

fact remains that he has undergone a surgical procedure of a type which commonly results in permanent disability. Dr. Gooding has rated that permanent disability at ten percent and twenty percent. Dr. Kratochvil rated it at fifteen percent. Since the disability arises from a condition of claimant's back, it is a disability of the body as a whole. The basis for raising the impairment rating from ten percent to twenty percent was not fully explained by Dr. Gooding. Dr. Kratochvil is mistaken on the level at which claimant's herniated lumbar disc existed. Whether the surgery was performed at the L4-5 or the L5-S1 level does not, however, have a great bearing on the resulting amount of permanent partial disability. The three ratings do not vary greatly and it is found that claimant's permanent partial impairment is in the range of fifteen percent 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."

Functional impairment 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).

Claimant's credibility in this case is severely impaired. He has testified that the business has not done well since his injury, yet he has also testified that it now pays his spouse a salary which is equal to what their combined salaries had been prior to his injury. This would seem to be difficult to accomplish if the business income were in fact decreased substantially. Claimant has been performing some valuable services to the corporation, yet has been paid nothing. What has in effect occurred is that he has arranged for his normal salary to be paid to his spouse and the same has been paid to her, according to his testimony, ever since December 7, 1983 when claimant ceased drawing pay from the company. Claimant's education is limited but he has work experience in many fields. His lack of credibility detracts from the weight given to his description of his continuing complaints and symptoms and, accordingly, greater weight concerning his actual physical limitations is placed upon exhibits 13 and 14 than claimant's testimony. Accordingly, when claimant's disability is evaluated industrially, it is found to be twenty percent of total disability.

FINDINGS OF FACT

1. Claimant was injured on November 26, 1983 when he fell while unhooking a trailer.

2. At the time of injury claimant was a resident of the state of Iowa, performing work for his employer which is an Iowa corporation.

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 December 7, 1983, when claimant ceased working, until August 20, 1984 when claimant reached the point that it was medically indicated that further significant improvement from the injury was not anticipated and he was released to return to work.

4. Claimant was also incapable of performing work of his normal employment from September 5 through September 12, 1984.

5. Claimant is 49 years of age and married. He has no other dependents.

6. Claimant's rate of earnings prior to the injury are not capable of being accurately determined but, at the request of defendants, are fixed at $276.92 per week.

7. Claimant's rate of compensation is $179.18 per week.

8. Claimant is presently restricted in his ability to bend, lift, and remain in a standing or seated position for extended periods. He suffers continuing numbness and cramps in his right leg and pain in his back and leg, all of an undeterminable severity. Claimant has a permanent functional impairment in the range of fifteen percent of the body as a whole.

9. Claimant's education is limited to completing three months of the tenth grade.

10. Claimant has work experience in farming, convenience store operation, antique purchasing, restoration and sales, operation of a recreational snow skiing facility, supervision of

convenience food assembly lines, and several forms of manual labor.

11. Claimant appeared to be of at least normal intellectual ability, and emotionally stable. He did not appear highly motivated to work.

12. Claimant has not returned to employment through his own choice.

13. Claimant has not made a bonafide effort to return to gainful employment.

14. Claimant's credibility is severely impaired.

15. The fall of November 26, 1983 was a substantial factor in bringing about the surgery which claimant underwent and the continuing problems in his low back. Any preexisting problems in claimant's back were minimal.

CONCLUSIONS OF LAW

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

Claimant's rate of compensation is $179.18 per week.

Claimant's healing period runs from December 7, 1983 through August 19, 1984 and from September 5 through September 12, 1984.

Claimant is entitled to 100 weeks of compensation for permanent partial disability, payable commencing August 20, 1984 representing a 20 percent industrial disability.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant thirty-six and five-sevenths (36 5/7) weeks of compensation for healing period at the rate of one hundred seventy-nine and 18/100 dollars ($179.18) per week commencing December 7, 1983. Defendants shall further pay claimant an additional one and one-sevenths (1 1/7) weeks of compensation for healing period at the same rate commencing September 5, 1984.

IT IS FURTHER ORDERED that defendants pay claimant one hundred (100) weeks of compensation for permanent partial disability at the rate of one hundred seventy-nine and 18/100 dollars ($179.18) per week payable commencing August 20, 1984, with the same being interrupted by one and one-sevenths (1 1/7) weeks of healing period commencing September 5, 1984. This makes defendants total liability to claimant one hundred thirty-seven and six-sevenths (137 6/7) weeks of compensation. Defendants shall receive credit for all amounts previously paid. According to the stipulation of the parties, compensation was being paid at the time of hearing. If compensation has been terminated during the intervening period between hearing and the entry of this decision, defendants shall also pay interest on any amounts which were unpaid at the time the same became due in accordance with section 85.30 of the Code.

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 claim activity reports as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 3 rd day of October, 1985.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
118 North Clinton Street
Chicago, Illinois 60606
312/876-9200

Claimant, :
: File No. 518242
vs. :
: R E V I E W -
TABOR GRAIN COMPANY, :
: R E O P E N I N G
Employer, :
: D E C I S I O N
and :

IDEAL MUTUAL INSURANCE CO., :

Insurance Carrier, :
Defendants. :

FILED

NOV 13 1985

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Lucille M. Tidd, claimant, against Tabor Grain Company, employer, and Ideal Mutual Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on November 13, 1978. This matter was heard before the undersigned on September 3, 1985 at the courthouse in Burlington, Des Moines County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant and Lisa Timmerman; joint exhibits 1 through 6; defendants' exhibits 11 and 12; and, official notice was taken of the file. Claimant's motion to allow a late medical report was allowed giving her until September 17, 1985 to file the same. No report has been filed.

ISSUE

The sole issue in this case is the appropriate date for termination of claimant's healing period benefits.

EVIDENCE PRESENTED

Several hundred pages of evidence was submitted in this matter all of which has been considered whether or not set forth in detail herein.

Joint exhibit 1 contains a chiropractic evaluation of claimant by Raymond Hanks, Jr., D.C., dated March 3, 1981 and concerning an examination conducted February 13, 1981. (This report is also admitted as defendants' exhibit 12.) In this report Dr. Hanks notes that claimant has been under the care of Thomas R. Lehmann, M.D., since 1979. Apparently Dr. Lehmann believed claimant's condition had not improved since January 1980.

Following examination, Dr. Hanks concluded that claimant had a forty percent impairment. Further, that "there is no reason to expect any major change in Mrs. Tidd's clinical picture, unless it would be a worsening of her condition." Joint exhibit 4 contains the transcript of Dr. Hanks' testimony at the hearing in this matter. In his testimony Dr. Hanks states that he examined claimant again in October 1983 and found an additional five percent functional impairment.

Joint exhibit 2 is claimant's answers to interrogatories with attached documents. Interrogatory number 21 specifically requests claimant to state the period she was claiming for healing period benefits. Claimant's repsonse is extremely vague and simply refers to the attached medical records marked as exhibits 1 through 186. Exhibit 2 thereof is an evaluation report from Koert R. Smith, M.D., dated June 15, 1982 concerning an examination on June 14. Dr. Smith found an impairment of seventeen percent of the whole man. Further, that the condition was permanent and that claimant would probably not benefit from any further surgery.

Joint exhibit 2 also contains a vocational rehabilitation evaluation by G. Brian Paprocki dated April 1, 1982. A review of this evaluation report shows that the medical basis of the evaluation were reports from Dr. Lehmann which established ten percent whole body impairment ratings and restrictions. The first of these ratings was apparently given in January 1980. The January report is included at page 38 wherein Dr. Lehmann states, "we anticipate that the patient will be totally, temporarily disabled until May 1, 1980." Dr. Lehmann assessed a ten percent whole body impairment rating. Progress notes from Dr. Lehmann at page 41 reflect that when claimant was seen on May 7, 1980 her condition had worsened. A February 11, 1981 progress note indicates that claimant's healing period is "essentially at an end" unless another doctor recommended further surgery. The records fail to disclose any recommendation for further surgery.

751

impairment.

Defendants' exhibit 11 is the deposition of D Lehmann who testified that he examined claimant in January 1980 and March 1983. Dr. Lehmann states that claimant's complaints, clinical history, and physical findings were ressentially the same in 1983 as they were in 1980 except claimant felt the pain was worse. On cross-examination, Dr. Lehmann advised that after January 1980 he extended claimant's healing period to August 1981 based upon the possibility that claimant might have further surgery.

A review of the file shows that claimant's petition was filed on July 26, 1982. Claimant's petition alleges that the dispute involved was the extent of claimant's permanent disability. Defendants in their answer specified May 1, 1980 as the date they terminated healing period benefits. A pre-hearing order filed February 2, 1983 indicates the only issue for determination at hearing was causal connection and extent of permanent disability. The review-reopening decision addressed only those issues.

APPLICABLE LAW AND ANALYSIS

Section 85.34(1) states:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of 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.

It has been held:

> [t]hat a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond that point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition. Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982).

There is nothing in this record which supports claimant's contention that her healing period terminated on any date other than May 1, 1980. There is not a single shred of evidence that her condition improved after that date.

Further, all of the evidence presented by claimant was known at the time the matter was heard in October 1983. Defendants' position was known to claimant and even spelled out in their answer to claimant's petition. Claimant never made an issue of the matter. There was no issue to make. Claimant received maximum medical recovery from this injury on May 1, 1980.

FINDING OF FACT

Claimant received maximum medical recovery from her injury of November 13, 1978 on May 1, 1980.

CONCLUSION OF LAW

Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional healing period benefits.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding.

Costs of this action are taxed to claimant.

Signed and filed this 13th day of November, 1985.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROY E. WALLER, SR., Claimant,	:	
vs.	:	
COMSTOCK SAWMILL, Employer,	:	File No. 731141
and	:	A P P E A L
BITUMINOUS CASUALTY CORPORTATION, Insurance Carrier, Defendants.	:	D E C I S I O N

FILED
NOV 5 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal an arbitration decision wherein claimant was determined to be permanently and totally disabled. The record on appeal consists of the hearing transcript; claimant's exhibits 1 through 14; defendants' exhibit A; and briefs filed by the parties.

ISSUE

Whether or not the deputy industrial commissioner erred in admitting into evidence the industrial disability appraisal of G. Brian Paprocki (claimant's exhibit 2).

REVIEW OF THE EVIDENCE

Examination of the record discloses the statement of facts of the deputy in his statement of the case to be accurate and are adopted except as modified herein.

APPLICABLE LAW AND ANALYSIS

The applicable law cited by the deputy was proper. Further, the analysis of the deputy was correct and thorough except insofar as it accepted the evidence presented in claimant's exhibit 2.

It is evident by claimant's exhibit 2 that Paprocki did not perform any test which would gauge or measure claimant's educational abilities.

Section 17A.14 of the Iowa Code provides in part:

> 1. Irrelevant, immaterial, or unduly repetitious evidence should be excluded. A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be required to be submitted in verified written form.
>
> 2. Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original, if available.
>
> 3. Witnesses at the hearing, or persons whose testimony has been submitted in written form if available, shall be subject to cross-examination by any party as necessary for a full and true disclosure of the facts.

The Iowa Court of Appeals in Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516 (Iowa App. 1977), stated:

753

Iowa is committed to a liberal rule which allows opinion testimony if it is of a nature to aid the jury and is based on special training, experience, or knowledge with respect to issue in question. Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977). However, sufficient data must appear upon which an expert judgment can be made, and if absent, the opinion is incompetent. See Lessenhop v. Norton, 261 Iowa 44, 153 N.W.2d 107, 114 (Iowa 1967). The receipt of opinion testimony rests largely in the discretion of the trial court and its ruling will not be disturbed absent manifest abuse of that discretion. Haumersen, supra.

In Bernal v. Bernhardt, 180 N.W.2d 437 (Iowa 1970), a new trial was granted on appeal because the trial court allowed a witness to testify as an expert who was not properly qualified and who failed to state a sufficient factual basis for his opinion. Although abuse of discretion was not found in Haumersen, the admission of the expert's opinion "went to the outer limits of the trial court's discretion." Haumersen v. Ford Motor Co., supra.

The deputy stated that Paprocki's opinion would not be given consideration as an expert opinion. This was the proper ruling and follows the dictates of Holmquist, 261 N.W.2d 516.

The issue arises as to whether Paprocki's assessment could be admitted as lay opinion evidence.

If the factual foundation for an opinion is insufficient it is nothing more than conjecture. Hegtvedt v. Prybil, 223 N.W.2d 186, 189 (Iowa 1974); Bernal v. Bernhardt, 180 N.W.2d 437 (Iowa 1970). Paprocki's statements and conclusions do not possess adequate foundation to render any opinion as to claimant's education. Therefore, it should have been excluded.

The present case is easily distinguishable from Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981) where there was an adequate foundation.

FINDING OF FACT

Claimant's exhibit 2 lacks foundation as to render it admissable either as expert or lay opinion.

CONCLUSION OF LAW

Claimant's exhibit 2 is not admissable

ORDER

THEREFORE, this case is remanded to the deputy for reconsideration without the evidence in claimant's exhibit 2. Nothing in this this decision should be taken to imply what the decision on remand should be. The determination rests fully with the deputy based on the present state of the record without claimant's exhibit 2.

Signed and filed this 5 day of November, 1985.

Robert C. Landess
ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STERLING WALTERS,	:	
Claimant,	:	
vs.	:	
DAVENPORT COMMUNITY SCHOOL DISTRICT,	:	File No. 487184
Employer,	:	A P P E A L
and	:	D E C I S I O N
THE HARTFORD,	:	
Insurance Carrier, Defendants.	:	

FILED
NOV 5 1985
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening brought by the defendants seeking a cessation of healing period benefits which were awarded to the claimant following a decision rendered on December 18, 1980. The review-reopening decision, from which defendants appeal, ordered them to continue to pay the claimant healing period benefits. The record consists of the hearing transcript; claimant's exhibits 1 through 4; defendants' exhibits A through E; depositions of Richard T. Beaty, D.O., and C. Norman Shealy, M.D.; and defendants' brief.

ISSUE

The defendants state in their notice of appeal.

> That Employer and Insurance Carrier submit that Deputy Mueller's Decision with reference to the above captioned matter is contrary to the greater weight of evidence and Employer and Insurance Carrier hereby appeal from any and all adverse rulings in the Review-Reopening Decision, including, but not limited to the finding that Respondents failed to sustain their burden of proving Sterling Walters' entitlement to healing period had ended.

REVIEW OF THE EVIDENCE

At the hearing on December 13, 1983, the movant having rested upon their medical evidence, claimant testified on his own behalf regarding his condition as follows:

> Q. Has your condition changed since July, 1980?
>
> A. Yes, it has.
>
> Q. In what way has it changed?
>
> A. My back is in worse shape than it was before. I get more pain in the lower part of the back when I walk now. My legs are weaker, I have -- I can't sit in a regular chair, I have got a wheelchair at home I sit in; and sleep pattern, I can't sleep all night like I used to. My ability to drive a vehicle any distance has diminished; my wife has to do that now, so --
>
> ....
>
> Q. Now, in 1981 -- what, if anything, did you notice about your condition in 1981, either getting better or getting worse or staying the same?
>
> A. In '81 I was more or less staying about the same, because at that time I was still using the cane. I still couldn't work. I was under doctor's care, which I still am, so -- and back then I could be -- they could get more done I think with my condition as I went on. One thing I was told, I could do no exercise --
>
> (Transcript, pages 12-15)

The claimant stated that as of 1983 his condition has deteriorated from what it was in 1981. Claimant has trouble walking, cannot climb stairs, unable to drive a car for any but short distances, cannot lift, and cannot ambulate without the use of a walker.

The claimant was hospitalized in September 1983 for left leg and ankle problems. The claimant stated that there was swelling of his left leg and ankle and he experiences trouble maintaining his balance. He was put on medication for his complaints and is currently still taking the prescribed medication.

755

The claimant testified that his "lower back is getting to where it hurts more now, and has gotten to the point where it keeps me [claimant] awake at night now." (Tr., p. 24)

Claimant's wife was called to testify. The following dialogue occurred:

> Q. I'm going to ask you to comment on your observations of your husband's condition. Have you seen any change in his condition from July of 1980?
>
> A. Oh, definitely.
>
> Q. All right. In what way?
>
> A. His legs are weaker. He would go to the store with me just so he could be with me at the time and help me, but he'd have his canes or his walker. And before he got his walker, his canes would just not hold him up. Several times he has fallen into shelves at stores.
>
> (Tr., p. 34)

A deposition of the claimant taken on July 3, 1980 reveals the following testimony:

> Q. Let's switch our focus and talk about your health at the present time or within the last couple of months. What areas of your body do you experience pain in?
>
> A. All lower part of my back, my legs -- I get numbness in my legs. I got a tendency to fall; I fall down stairs. In fact if I sit for any length of time, I've got to get up and move around; and I now have a wheelchair at home that I am sitting in, because I cannot sit in normal chairs. I cannot -- my walking capabilities are such that I cannot walk very far. I cannot sleep a full eight hours. I can only sleep about four, four and a half hours a night, and I'm in constant pain. I do not take medication for it.
>
> Q. Let me ask you a few questions about those items you've just covered. When you talk about pain in your low back, is there any way that you can describe or characterize that pain for me, as to where it's at or what it feels like?
>
> A. Well, it's in the lower back, and it's just a constant pain, just feels like -- I don't know -- a rod or pins, and they're constantly just hurting all the time.
>
> Q. You talk about pain in your legs, what kind of pain do you have in your legs?
>
> A. Well, it gets to -- about the same. It feels just -- just constant pain, and there's numbness there.
>
> Q. Is the numbness distributed over both legs, over the entire leg, or are there areas of numbness?
>
> A. It's on both legs, and usually from the knees on down to my ankles.
>
> Q. It is the type of numbness that is a kind of prickly pinprick-type sensation, or is it just an absence of any feeling?
>
> A. Absence of any feeling at all.
>
> Q. You described for me difficulty in sitting for any period of time. What happens if you sit?
>
> A. I get hurting real bad. When I get up, I'm wobbly when I try to walk.
>
> Q. Where do you get hurting real bad?
>
> A. Across the small of the back. It's got a tendency to make my legs feel number, and it takes me awhile to get to motivating again.
>
> Q. You described a history of falling; what did you mean by that?
>
> A. I can be starting down the stairs and fall down stairs, and I have a hard time going up stairs.
>
> ....

756

Q. I noticed when you walked in, at times you were using two canes. How long have you been using the two canes?

A. Two years.

Q. Was there ever a period when you used just one cane?

A. No, sir.

Q. Are the canes at any medical practitioner's advice?

A. Yes, sir, Dr. Cooper's.

(Claimant's Deposition, pp. 20-22)

Defendants' exhibit A is a medical letter report from the Shealy Pain & Health Rehabilitation Institute (by C. Norman Shealy, M.D., Ph.D) to the defendant insurance company dated October 27, 1982. It states in part:

> From the beginning, Mr. Walters stated that he was not enthusiastic about being here and had very low interest in what we had to offer and did not expect to be helped while here. We felt that his attitude toward the program totally prevented any possibility of his improving. As I pointed out, we would have actually sent him home on Friday if we had not felt that we needed to review x-rays and some other reports that were not yet available to us, including the consultation with Doctor Wurst. I have reviewed the x-rays and he does have degenerative changes in the joints, especially at L4-5 and L5 S1, narrowing of the disc spaces in both of those areas and he has a congenital spina bifida occulta, which would certainly be of no consequence as far as pain is concerned since it is present in about 5% of people who are asymptomatic. The degenerative changes are quite long standing and preceded on the onset of his current problem and, again, are not likely to be involved as a cause of his pain.
>
> Thus, we come to the same conclusion as all other physicians that we cannot find a physical cause compatible with the degree of pain and incapacity that Mr. Walters has. He, at the present time, is not interested in working physically, nutritionally, or psychologically to bring these problems under control. We think the kind of problem that he has is amenable to improvement if the patient is willing to put effort into it. But, since he has stated his disinterest in this, I feel that it is a waste of money and time to proceed with further therapy. (emphasis added)

The institute's final diagnosis was post-traumatic, chronic pain syndrome with severe psychophysiological distress.

Defendants' exhibit B is a letter report from Frank I. Russo, M.D., S.C., dated July 31, 1980. Dr. Russo saw the claimant in April and May of 1978. Dr. Russo also saw the claimant on July 31, 1980. The letter provides in part:

> Mr. Walters, at the same time, complains of decreased function. He states that he frequently falls down the stairs of his apartment, is able to walk only about a block. He states that he is in constant pain with pain radiating into the left lower extremity. The symptoms are exacerbated by prolonged sitting, standing or ambulation, or by any sort of lifting.
>
> ....
>
> IMPRESSION: Chronic low back pain with possible underlying lumbar stenosis not documented either on radiographic studies or electrodiagnostic studies in the past with a very strong suggestion that this gentleman is in a chronic pain behavior pattern and functionally displays much more disability than there is a physical basis for.
>
> RECOMMENDATIONS: At the present time I certainly see no basis for this gentleman to be rated as a 100% disability. I, in fact, think that it is absolutely impossible to make an accurate rating of this gentleman's physical abilities on the basis of his examination because I don't think he is cooperative with the exam. I am not certain how much of this behavior is conscious and how much is unconscious. I very strongly suggest that this gentleman undergo psychological evaluation, possible

involvement in a longterm pain clinic. There is a possibility this gentleman may have a lumbar stenosis. This could be documented relatively easily by the use of a computerized tomography scan. If this were the case, this gentleman might be a candidate for epidural steroid injection and at any rate should probably undergo some longterm pain management in an appropriate setting. As I stated, quite frankly, I virtually think it is impossible to come up with an accurate functional impairment of this gentleman on the basis of purely his physical findings at this time. If, in fact, he is severely disabled, I think this gentleman is causing a major part of this as a psychological reaction to whatever physical disability he does have. (emphasis added)

Defendants' exhibit E is results of an EMG and an NCV tests. The date of the report is May 26, 1978 and states:

> EMG: Electromyographic examination was performed on this gentleman's left lower extremity and left lumbar paraspinal musculature testing muscles representing myotomes L2 through S2 and lumbar paraspinal musculature testing muscles representing myotomes L3 through S1. All muscles tested revealed normal insertional activity. There was no evidence of increased muscle membrane irritability. No positive waves or fibrillations were noted. Activated motor unit potentials were of normal amplitude and duration. Recruitment was full in all of the muscles tested.
>
> NCV: Nerve conduction velocity studies were performed on the left lower extremity which revealed normal evoked motor responses, normal distal latencies and normal conduction velocity. (emphasis added)

Claimant's exhibit 1 is a letter from Phillip E. George dated April 13, 1983. It stated in part, "In reference to our letter dated April 29, 1982, we feel that this condition, as so stated, is of a permanent, anatomical change."

Claimant's exhibit 2 is a letter with an attached letter dated April 9, 1983 authored by Gerald J. Cooper, D.O.

Claimant's exhibit 3 is a collection of medical records of Davenport Osteopathic Hospital reflective of claimant's stay there from September 1, 1983 to September 9, 1983. It provides in part.

> EMG STUDY: Both lower extremities were screened. Myotomes from L2 through S1 were examined. The findings were normal. There was no membrane instability or any fasciculations. The motor units were normal. Recruitment pattern was normal. Paraspinals from L1 through S1 were also normal.
>
> Nerve conduction studies in the right lower extremity - The sural latency was prolonged at 4.5 msec. with 3.7 being the upper limit of normal. Posterior tibial conduction was slow at 37 meters per second. In the left leg the sural latency was unobtainable. The posterior tibial conduction was slowed at 39 meters per second.
>
> IMPRESSION:
>
> 1. Normal EMG findings. At this time there is no EMG evidence of a radiculopathy, peripheral denervating process or of a myopathy, however considering the patient's increased back pain and leg pain with the knee extension I feel he would be a candidate for a CT scan of his lumbar spine from L3 to S1 in order to investigate further for a radiculopathy in order to rule this out. However, based on the above evaluation I find nothing specific to indicate this.
>
> 2. NCV evidence compatible with a generalized peripheral neuropathy secondary to the diabetes mellitus.
>
> ....
>
> LUMBAR SPINE:
>
> Anteropostorior, lateral and oblique views reveal no fracture or dislocation. There is considerable narrowing at the L5-S1 disc space with hypertrophic lipping anteriorly and posteriorly. There is also osteoarthritis involving the apophyseal joints or facets at this level. There is also a transitional S1 segment with a rudimentary disc between S1 and S2. This transitional segment has large batwing types of transverse processes, and there is a pseudo-articulation on the left between the transverse process and the sacrum. A spina bifida occulta is also present at S1.

IMPRESSION: 1) Degenerative disc disease at L5-S1 with considerable osteophytic formation posteriorly (osteoarthritis).

2) The first sacral segment is transitional with bilateral batwing deformities.

(emphasis added)

Claimant's exhibit 4 is a disability certificate from Dr. Cooper dated November 12, 1983 indicating that he has recommended a walker for the claimant.

A report from Dr. Russo dated May 26, 1978 provides in part:

IMPRESSION: 1. Normal electomyographic findings of muscles tested in the left lower extremity and lumbar paraspinal musculature bilaterally.

2. Normal nerve conduction studies.

RECOMMENDATIONS: This gentleman's normal EMG suggests that his continued complaints are primarily on a mechanical basis and in view of the lack of any significant EMG abnormalities to suggest weakness and this gentleman's continued use of a cane, etc., I cannot help but feel that some of his symptomatology is either secondary to severe emotional overlay or perhaps some amount of outright malingering superimposed on some amount of legitimate discomfort.

A report dated June 9, 1980 by Dr. Lehmann of University Hospitals provides in part:

Mr. Walters returns today, however, he did not bring the myelogram or EMG reports with him. He states that as far as Dr. Cooper knows he has never had a myelogram performed. However, he knows what a myelogram is, he can describe the procedure and feels that he might have had one somewhere along the line. He said that he didn't realize we wanted to see the EMG reports.

....

Our impression is that he may very well have lumbar spinal stenosis at the level of his L5-S1 causing the referral of pain into his left lower extremity from his back. However, we feel that the patient is a chronic pain patient, and that surgery would probably not be warranted in his case. We therefore feel that a myelogram and further diagnostic work-ups at the present time is not indicated. We would be happy to see the patient back again if his symptoms should become more severe or if he has strong feelings that a further work-up should be performed. The patient does appear to be 100% disabled by his impairment at this time. We would like to see him back on a PRN basis.

A deposition of Norman Shealy, M.D., was taken on September 13, 1983. Dr. Shealy holds a Ph.D. in psychology. He saw the claimant while he was being evaluated at the Sheely Pain Clinic. The following discussion occurred:

A. ...But his score was only 58. 58 on the Zung Test for Depression is not bad. It is considered presence of minimal to mild depression. If the depression is no worse than that, you cannot state that the depression is, I think, responsible for his inertia. And, therefore, treating the depression will not help. And, so, again, it is some psychological reaction that seems to be of a personal nature to Mr. Walters.

Q. What does the term "of a personal nature" mean? . ..

A. It is of the nature that is sometimes called a Workers' Compensation neurosis....

....

A. Yes. It's not a diagnosis which I feel capable of making, but certainly would fit within what is generally called that.

....

Q. Doctor, if a person has secondary gain, particularly in the form of a monetary gain, can that influence a person's ability to recover from a back disorder?

A. Can and does.

....

Q. Doctor, if Mr. Walters more or less continues as he has been in the past, would it be your opinion that his disability or perceived disability due to pain and general malaise will become, in effect, a self-fulfilling prophecy?

A. Absolutely.

(Shealy Deposition, pp. 44-45)

A deposition of Richard T. Beaty, D.O., taken on May 4, 1983 reveals that he saw the claimant on April 1, 1983. He ordered a CT scan done. The impression of the CT scan was minimal bony prominence and minimal bulging of the disc between L-4 and L-5 vertebral. Dr. Beaty's opinion was that the patient has been completely evaluated to the extent that he could say that the bulging disc is causing the pain in the claimant.

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.34(1) provides:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Iowa Code section 85.39 provides in part:

> After an injury, the employee, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employee; but if the employee requests, he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination....The refusal of the employee to submit to such examination shall deprive him of the right to any compensation for the period of such refusal. When a right of compensation is thus suspended, no compensation shall be payable for the period of suspension.
>
> Whenever an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, he shall, upon application to the commissioner and at the same time delivery of a copy to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of his own choice, and reasonably necessary transportation expenses incurred for such examination.

An appeal decision by this agency held:

> That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond that point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition.

Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982).

The Iowa Court of Appeals has recently stated: "It is only at the point at which a disability can be determined that the disability award can be made. Until such time, healing benefits are awarded the injured worker." Thomas v. Knudson, 349 N.W.2d 124, 126 (Iowa App. 1984).

At the onset an impairment rating is not required to end healing period benefits in all cases. For instance maintenance care, a return to substantially similar work, or a plateau in a claimant's condition will, if proved, warrant an end to healing period. Undue influence may be placed on the impairment rating to the extent that some would delay acquiring an impairment rating to extend healing period benefits.

In the present case the claimant has not returned to work. However the evidence shows that the claimant's condition has reached a plateau where no improvement is expected for the forseeable future. This results in maintenance care, merely staving off any worsening and trying to maintain a status quo in claimant's day to day condition. This is borne out by the claimant's own testimony. Such a condition is better served by permanent partial disability payments (if proved) and does not fall within the idea of "healing period."

The medical evidence pertaining to the claimant's condition has remained substantially unchanged since approximately 1978. In fact the prevailing theme behind the majority of the medical evidence is as Dr. Shealy stated: "Thus, we come to the same conclusion as all other physicians that we cannot find a physical cause compatible with the degree of pain and incapacity that Mr. Walters has."

That the claimant continues to feel badly with no future expected improvement is not a reason to maintain healing period benefits. As was stated earlier, such a condition is better served by permanency (if proved). "Healing period" and "permanency," side by side, are easily distinguishable. The claimant suffered an injury or aggravation--no treatment has helped nor (due to various other factors) is expected to help.

We come now to drawing the line at where the ongoing benefits cease. On July 30, 1980 the claimant was deposed. His relation of his symptoms were substantially the same as they were on December 13, 1983 the date of the second review-reopening decision. The medical evidence also has remained unchanged. The healing period/temporary total benefits will be found to have ceased on July 30, 1980.

We now turn to the question of permanency.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 3, 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).

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.

In the record before this agency there is no basis for finding of permanency. This is due to several factors. One is the fact that the objective medical evidence supporting the claimant's complaints is not of a preponderate nature. The medical evidence equivocates when the issue of permanency arises due to the paucity of objective findings and the actions and behavior of claimant. Some of the evidence points to the fact that the claimant may be a malingerer. Other evidence shows that workers' compensation neurosis may be involved. What we have in this case is a man who has persistent, consistent complaints together with practically consistent, similar medical evidence that falters when the issue of permanency is raised. This is based on; first, a scarcity of objective findings and; second, on claimant whose attitude, cooperation, and actions make the permanency issue elusive. Elusive evidence of permanency will not satisfy burden of proof requirements.

Collaterally, the question (although not raised) of psychological injury would be governed by Newman v. John Deere Ottumwa Works, 372 N.W.2d 199 (Iowa 1985) where the court stated: "We find no cases which permit recovery when employment merely provided a stage for the nervous injury. See Albertson's Inc. v. Workers' Compensation Appeals Board of California, 131 Cal. App.3d 308, 316, 182 Cal.Rptr. 304, 309 (1982)."

FINDINGS OF FACT

1. Claimant suffered an injury on February 3, 1978.

2. Claimant had a preexisting lumbar abnormality of a degenerative nature.

3. Claimant's symptoms have remained unchanged since 1978.

4. Medical evidence based upon examination of claimant have remained unchanged.

5. Medical evidence equivocates as to permanency and is not of a preponderate nature.

6. Such lack of findings of permanency is based on lack of objective findings and claimant's behavior patterns.

7. The evidence does not support a finding that claimant has suffered any psychological injury from the February 3, 1978 incident.

8. Claimant's testimony regarding his condition was substantially the same on July 30, 1980 and on December 13, 1983.

9. Based upon medical evidence and the claimant's evidence his entitlement to temporary total benefits ceased on July 30, 1980.

10. Claimant has not suffered any permanent partial disability as a result of the injury of February 3, 1978.

CONCLUSIONS OF LAW

Claimant's entitlement to temporary total benefits ceased on July 30, 1980.

Claimant has not established that any permanent disability resulting from the injury of February 3, 1978.

The decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That the claimant take nothing further from these proceedings.

That a final report be filed within 20 days.

That the costs of this proceeding are taxed to the defendants.

Signed and filed this 5 day of November, 1985.

Robert C. Landess

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
OCT 3 1985
IOWA INDUSTRIAL COMMISSIONER

KELVIN J. WELLMAN,	:	
Claimant,	:	File No. 776802
vs.	:	A R B I T R A T I O N
F & F CONSTRUCTION, INC.,	:	D E C I S I O N
Employer, Defendant.	:	

This is a proceeding in arbitration brought by Kelvin J. Wellman, claimant, against F & F Construction, Inc., his uninsured employer. The case was heard at Council Bluffs, Iowa on June 17, 1985 and was fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the claimant's testimony and claimant's exhibits 1,2,3 and 4. Official notice was taken of the stipulation filed December 6, 1984. The parties waived the requirement of a shorthand reporter in accordance with section 17A.10(2) of the Code.

ISSUES

The issues presented by the parties are a determination of claimant's rate of compensation, his entitlement to temporary total disability compensation, and his entitlement to section 85.27 benefits. It was stipulated by the parties that an employer-employee relationship existed between claimant and the employer; that claimant did sustain an injury on June 1, 1984 which arose out of and in the course of his employment; that a causal relationship exists between the injury and the medical expenses submitted by claimant; that the expenses incurred were fair and reasonable in relation to the services; that claimant was off work from June 1 until June 29, 1984 and that claimant's earnings with the employer were computed at the rate of $5.00 per hour. Claimant specifically stated that no claim was being made for permanent partial disability.

SUMMARY OF EVIDENCE

Claimant testified that he was performing construction work, putting a roof on a house using a power nailer. He lost his balance, the nailer struck his left knee, and a nail was driven into the knee.

Claimant testified that exhibits 1 and 2 are copies of his payroll checks. He stated that the first check in the amount of $122.50 represented three days of work, and the second check in the amount of $100.00 represented one and one-half days of work.

Claimant testified that when he was employed he expected to work 40 hours per week and had worked eight hour days up to the time he was injured.

Exhibit 3 contains a copy of the certificate of incorporation of F & F Construction, Inc., and of its articles of incorporation showing the same to have been incorporated since March 12, 1976.

Claimant's exhibit 4 is a collection of claimant's medical expenses incurred for treatment of his knee injury as follows:

DATE 1984	PROVIDER	AMOUNT
June 1-8	Jennie Edmundson Hospital	$3,306.12
June 9-29	Jennie Edmundson Hospital	506.05
June 1-4	Medical Anesthesia Associates, P.C.	276.00
June 1-8	Samuel Rosa, M.D., P.C.	345.00
June 1-29	Ronald K. Miller, M.D., P.C.	766.00
	TOTAL	$5,199.17

Exhibit 4 also contains a report from Ronald K. Miller, M.D., which indicates that claimant was admitted to Jennie Edmundson Hospital on June 1, 1984, that surgery was performed, and that claimant was dismissed from the hospital on June 8, 1984. The report also reflects follow-up care. It makes no mention of permanent impairment.

APPLICABLE LAW AND ANALYSIS

The stipulation of the parties made at hearing and claimant's uncontradicted testimony clearly establishs that he did sustain an injury which arose out of and in the course of his employment on June 1, 1984. Exhibit 4 shows claimant to have been under medical care from the time of injury through June 29, 1984. Claimant was also off work during that same span, according to the stipulation made by the parties. The record does not show a released return to work but claimant's return to work on June 30, 1984, after he was last seen by Dr. Miller, marks the end of his entitlement to compensation for temporary total disability. The disability extended beyond the fourteenth day. Claimant's entitlement therefore runs from June 2 through June 29, 1984, a span of four weeks.

The paychecks, exhibits 1 and 2, are greater than the amount of earnings which claimant would have received if he had been working eight hour days at $5.00 per hour. The excess is unexplained and could easily be some type of voluntary payment made by the employer to claimant as a result of the injury. There is no showing that the excess was in any way intended to be a partial payment of the employer's workers' compensation liability or a payment under a group plan. Claimant testified that he was paid $5.00 per hour, worked eight hours per day, and expected to work 40 hours per week. His rate of compensation should therefore be fixed under Code section 85.36(7). Such would make his earnings $200.00 per week and his rate of compensation, as an unmarried individual with only himself as a dependent, is $127.90 per week.

The medical expenses contained in exhibit 4 appear to have been reasonable and necessary treatment for the injury. They total $5,199.17 and are the responsibility of the defendants under Code section 85.27

FINDINGS OF FACT

1. Claimant injured his left knee when a power nailer drove a nail into it on June 1, 1984 while claimant was engaged in the duties of his employment with F & F Construction, Inc.

2. 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 1, 1984 through June 29, 1984. Claimant returned to work on June 30, 1984 with another employer.

3. Claimant is a credible witness.

4. At the time of injury claimant was unmarried and had no dependents.

5. Claimant had been employed by the employer less than thirteen calendar weeks before the injury occurred and if he had been so employed during the full thirteen preceding calendar weeks, he would have earned an average of $200.00 per week.

6. Claimant incurred medical expenses in the total amount of $5,199.17 in obtaining reasonable and necessary treatment for the injury. The amount of the charges is fair and reasonable.

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 June 1, 1984 arose out of and in the course of his employment with F & F Construction, Inc.

Claimant is entitled to four weeks of compensation for temporary total disability at the rate of $127.90 per week payable commencing June 2, 1984.

Defendant is liable for the expenses of claimant's medical care in the total amount of $5,199.17.

ORDER

IT IS THEREFORE ORDERED:

That defendant pay claimant four (4) weeks of compensation for temporary total disability at the rate of one hundred twenty-seven and 90/100 dollars ($127.90) per week commencing June 2, 1984. The entire amount thereof is past due and owing and defendant shall also pay interest pursuant to section 85.30 from the date each payment came due.

IT IS FURTHER ORDERED that defendant pay claimant five thousand one hundred ninety-nine and 17/100 dollars ($5,199.17) for his medical expenses incurred in obtaining treatment for the injury.

IT IS FURTHER ORDERED that defendant pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.3.

IT IS FURTHER ORDERED that defendant file a first report of injury and that it also file claim activity reports as requested by this agency pursuant to Industrial Commissioner Rule 500-3.1.

Signed and filed this 3rd day of October, 1985.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Tower Publications, Inc.
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BENNETT WEST, Claimant, vs. HEINZ, USA, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 706594 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 13 1985 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Bennett West, claimant, against Heinz, USA, employer, hereinafter referred to as Heinz, and Liberty Mutual Insurance Company, insurance carrier, defendants, for the recovery of further benefits as a result of an injury on June 23, 1982 to claimant's back. A prior final arbitration decision of this agency concerning this injury was issued and filed on May 17, 1983 subsequent to an evidentiary hearing on February 3, 1983. Claimant is basing his claim in this proceeding upon both an alleged physical and nonphysical change of condition caused by the work injury since the last arbitration proceeding. On October 29, 1985 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a pre-hearing report of contested issues and stipulations pertaining to this case which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received at the hearing from claimant and Glen Kurz. The exhibits received into the evidence at the hearing are listed in the pre-hearing report. According to the pre-hearing report, the parties have stipulated to the following matters:

1. Claimant is entitled to healing period benefits from June 24, 1982 through July 15, 1982 which have been paid to claimant pursuant to an award in the prior final agency decision;

2. In the event of an award of benefits from these proceedings, claimant's rate of weekly compensation shall be $184.67 per week and the commencement date for any award of permanent disability benefits in this proceeding shall be July 1, 1984; and,

3. Claimant has been paid 100 weeks of permanent partial disability benefits pursuant to the award in the prior final agency decision.

ISSUES

As set forth in the hearing assignment order and the parties' pre-hearing report, the parties submit the following issues for determination in these proceedings:

I. Whether there is a causal relationship between the work injury and the claimed disability; and,

II. The extent of additional permanent disability benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed in this summary. Whether or not specifically referred to in this narrative, all of the evidence received at the hearing was considered in arriving at this decision.

On June 23, 1982 claimant was injured during his employment with Heinz while attempting to lift some bottles. According to claimant's treating physician, William Catalona, M.D., an orthopedic surgeon, the incident aggravated a prior existing weakened condition of claimant's back, known as retrolithesis. Following the injury, claimant underwent conservative treatment from Dr. Catalona which consisted of at least two hospitalizations for bedrest and physical therapy. Soon after the injury, Heinz attempted to terminate claimant from its employ in July 1982 for failing to report back to work as recommended by Dr. Catalona. Apparently, there was a misunderstanding between the doctor and management personnel at Heinz as to when claimant was able to return to work. As a result of a grievance filed by

765

claimant under the union-management bargining agreement, claimant was reinstated in August 1982 by Heinz. However, according to the agreement between the union and Heinz, claimant would not be allowed to return to work until Dr. Catalona released him to regular duties. Dr. Catalona did not release claimant to return to regular duties and opined in the prior proceeding before this agency that claimant suffered a five percent permanent partial impairment to the body as a whole as the result of the June 1982 work incident.

Following an evidentiary hearing on February 3, 1983, a review-reopening decision of this agency which later became a final agency decision was issued and filed in May 1983 upon claimant's claim for workers' compensation benefits as a result of the June 1982 work injury. In this decision, the following is noted:

> He [claimant] appears to have been involved in laboring-type work for his entire working life. Even though his ability to work has been hampered, it appears that claimant's ability or rather, lack of ability, to work is related more to the underlying congenital condition than any aggravation thereof. Claimant would be well advised to seek retraining in an occupation which is sedentary. (Review-reopenin Decision, filed May 17, 1983, last unnumbered paragraph of p. 4)

It was ultimately found in this decision that claimant suffered a twenty percent industrial disability as a result of the June 1982 work injury and claimant was awarded permanent partial disability benefits accordingly.

During the evidentiary hearing in February 1983, claimant testified that he could not twist, bend, lift or stretch his arms out over his head; nor could he stand or sit for long periods of time. Claimant testified further that even slightly bending in a standing position as one would do while washing dishes was not possible for him. Claimant complained of pain extending up his entire back and neck, numbness in his legs, and "real bad" headaches. Claimant also reported that he used a back brace during physical activity and regularly used a cane while walking. Claimant testified that the cane was necessary due to a constant limp and instability while walking. Claimant stated that he was taking pain medication and Amitriptyline, an emotional and muscle relaxant, according to Dr. Catalona in his deposition labeled as exhibit 13 in this case. Finally, claimant admitted in prior proceedings that he could not return to his former work at Heinz and needed retraining to find employment more suited to his physical abilities.

On August 5, 1984, Heinz again attempted to terminate claimant due to his inability to return to regular duty. Claimant then filed another grievance under the labor-management bargining agreement and arbitration was ultimately utilized to resolve the grievance dispute. Pursuant to the grievance arbitration proceeding, the arbitrator held in September 1984 that the termination of claimant by Heinz in August 1984 was improper under the bargining agreement and the arbitrator reinstated claimant. However, the arbitrator noted that claimant had not as yet furnished Heinz with a release for work in any capacity. The arbitration award stated that if claimant provided Heinz with a doctor's release for light duty work but was unable to meet the qualifications for light duty job openings at Heinz within an eleven month period following the arbitration decision, Heinz was authorized to consider claimant as terminated from its employ.

In a report to Heinz dated September 24, 1984, Dr. Catalona stated that he could not release claimant for work that would require more than minimal standing, walking, stair climbing, and "certainly no bending, stooping, pushing, lifting, or overhead reaching." It was the doctor's opinion that claimant was limited to desk work with minimal standing. In light of this report, the personnel manager, Glen Kurz, testified at the hearing in this proceeding that claimant did not qualify for any union jobs under the restrictions imposed by Dr. Catalona. However, Kurz indicated that Heinz management did not consider claimant for office work outside the bargining unit.

At the hearing in this proceeding, claimant testified that he has not worked since the date of the 1982 work injury despite a considerable effort to return to Heinz and to secure employment elsewhere. Claimant stated that his physical condition has worsened since the review-reopening proceeding before this agency. Claimant claimed that his headaches are now more severe and that his neck pain is constant. Claimant described a loss of feeling in his left leg and that he is effected emotionally by the pain resulting in high blood pressure and an ulcer. No medical reports were submitted with reference to the claim of elevated blood pressure or ulcer problems.

In his deposition, exhibit 13, Dr. Catalona testified that claimant's physical condition has not changed since his last deposition in December 1982. The work restrictions he specifically imposed in September 1984 are the same restrictions he would have imposed in the fall of 1982. The doctor's permanent partial impairment rating of five percent remained unchanged and the medications the doctor has prescribed for claimant's treatment likewise has remained unchanged. The doctor finally indicates that claimant's physical limitations and restrictions have not increased since 1982. The doctor last seen claimant in March of 1985.

APPLICABLE LAW AND ANALYSIS

In a review-reopening proceeding, claimant has the burden of establishing by a preponderance of the evidence that he suffered a change of condition as a proximate result of his original injury, subsequent to the date of the award or agreement for compensation under review, which entitles him to additional compensation. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969). Such a change of condition is not limited to a physical change. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition under Iowa Code section 85.26(2) and 86.14(2). See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). In the case of a preexisting condition, 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).

In the case sub judice, claimant is contending that he has suffered a worsening of both his nonphysical and physical conditions. The claimant's nonphysical change of condition is based upon a change of his job status at Heinz as a result of the grievance arbitration decision and his subsequent termination from employment by Heinz. However, the preponderance of the evidence rather clearly demonstrates that nothing has changed since the last review-reopening proceeding before this agency.

At the time of the last review-reopening proceeding in February 1983, claimant was only able to return to work if he were able to resume his regular duties. Claimant was not at that time considered for office work at Heinz. Claimant admitted at the time that he was not physically able to resume his regular duties. It was quite apparent at the time to the deputy industrial commissioner who issued the review-reopening decision in May 1983 that claimant would not return to work at Heinz in any capacity and an award was made accordingly. The award was apparently lowered to a certain extent because the deputy commissioner at the time felt that a large part of claimant's disability was attributable to his congenital problems and not his work injury. The only effect of the grievance procedure subsequent to May 1983 and the arbitration award in September 1984 was to give claimant an opportunity to improve his non-physical condition by allowing him to return to light duty work during a specified period of time if he was medically able to do so. However, claimant was not returned to work due to Dr. Catalona's work restrictions of September 1984 and the refusal of Heinz management to consider claimant for office work. Therefore, claimant has only established in this proceeding that he still cannot return to work at Heinz.

With reference to claimant's claim of a worsened physical condition, the only evidence offered by claimant in support of his position is his own testimony that his back pain, leg numbness, headaches, and emotional symptoms are now worse. However, after comparison of claimant's former testimony in February 1983 with his testimony in this proceeding, claimant has few, if any, additional complaints. Claimant painted a very bleak picture in 1983 of his physical problems and his testimony of a worsened condition in this proceeding cannot be given much weight in light of contradictory medical evidence. Claimant's contentions that his high blood pressure and ulcer are caused by the 1982 work injury are likewise not verified by the medical evidence presented in this case. It is also apparent that claimant had sufficient emotional problems in 1982 to warrant a prescription for Amitriptyline, an emotional relaxant, according to Dr. Catalona. To the extent that clamant does suffer additional pain, there is no evidence that such pain is any more disabling or is a cause of additional impairment than the pain he experienced in 1982. Claimant failed to identify any new physical limitations on his activity or any change in his ability to bend, reach, stoop, twist, lift, walk, stand, or sit.

FINDINGS OF FACT

1. Pursuant to the parties' stipulation, claimant has been paid all healing period and permanent partial disability benefits awarded to him pursuant to the final agency decision dated May 17, 1983.

2. At the time of the prior hearing before this agency in February 1983, claimant could not return to work at Heinz until he was physically able to resume his regular duties.

3. At the time of the prior hearing in February 1983, claimant was unable to return to his regular duties at Heinz and Heinz had at that time made no accommodation for claimant to allow him to return to work in any light duty status, including office work, compatible with his physical limitations.

4. As a result of an award of an arbitrator in September 1984 pursuant to a grievance procedure under a bargining agreement in existence at Heinz, claimant was given a brief opportunity to return to work at Heinz subsequent to the review-reopening decision of this agency in May 1983 if he was physically able to do so according to his physician.

5. In August 1985, claimant was terminated by Heinz for an inability to place claimant in a bargining unit position under the September 1984 arbitration decision due to work restrictions imposed by claimant's physician and Heinz's refusal to consider claimant for office work outside the bargining unit.

6. At the present time, claimant cannot return to work at Heinz due to his physical problems and Heinz's lack of accommodation to allow claimant to return to work in any light duty status, including office work, compatible with his physical limitations.

7. The extent of claimant's difficulties in bending, reaching, stooping, twisting, lifting, walking, standing, or sitting have remained unchanged since 1982.

CONCLUSION OF LAW

Claimant has not established by a preponderance of the evidence that he suffered a physical or nonphysical change of condition as a result of a work injury of June 23, 1982 since the time of the last review-reopening proceedings before this agency in February 1983.

ORDER

Accordingly, the following is ordered:

1. Claimant shall take nothing from these proceedings.

2. Claimant shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 13th day of December, 1985.

Larry P. Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER