IAWC

DECISIONS OF THE IOWA INDUSTRIAL COMMISSIONER

July 1, 1988 through June 30, 1989

David E. Linquist
Iowa Industrial Commissioner

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This volume of decisions by the Iowa Industrial Commissioner for the period July 1, 1988 through June 30, 1989 is presented by the Iowa Association of Workers' Compensation Lawyers, Inc., for the use of its members, and it is not a publication of the State of Iowa.

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Dear fellow members:

On behalf of the IAWC Board of Governors I am pleased to enclose this complimentary volume of selected decisions of the Iowa Industrial Commissioner covering the period of July 1988 through June 1989.

The Industrial Commissioner ceased publication of its much used Annual Report with selected, indexed cases covering the year July 1983 to June 1984. Tower Publications, Inc., followed by reproducing decisions for two years through mid-1986. As you can recall, there was a substantial lag-time between the filing of decisions and the receipt of their publication and then for some reason Tower ceased publishing the decisions. For awhile, your Board of Governors volunteered their time to prepare synopses of decisions which were distributed to our members. Although better than nothing, this approach lacked uniformity and indexing. As it became apparent the agency decisions were not going to be published elsewhere, our Board concluded to commission the scrutinizing of the then most recent year for decisions of precedential value together with indexing.

Obviously, two years of the prior gap still remains (mid-1986 to 1988) and meanwhile yet another year (mid-1989 to 1990) has elapsed without the leak being plugged. Should we now concentrate on the prior years, or the current year, or both, or neither? Any suggestions you may have would be appreciated and should be sent to our Executive Director and they will be forwarded to our Special Committee on Research/Access to Agency Decisions.

Richard R. Winga

Richard R. Winga, President

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DARLENE ALBERTSON (BYRNES)	:	
	:	
Claimant,	:	File No. 729018
	:	
vs.	:	
	:	A P P E A L
DONALDSON, INC.,	:	
	:	D E C I S I O N
Employer,	:	
	:	
and	:	
	:	
TRAVELERS INSURANCE COMPANY,	:	
	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceedings; claimant's exhibits 1, 2 and 4 through 13. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

Whether claimant suffered permanent disability as a result of her injury which impairs her future usefulness and earnings in her occupation at the time of receiving the injury, and if claimant suffers a permanent disability, the extent thereof.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein. In addition, it is also noted that claimant testified that she suffers a slight lisp as a result of her scar above her lip, and the following testimony of Dr. Jackson is also noted: "In addition to this, she has some indrawing of her nostril and slight nasal blockage." (Joint Exhibit 10) "She complains about her left airway being blocked....Examination shows some narrowing of the nostril, but intranasally, there are no abnormalities

to be seen....[S]ince I do not know the cause of her nasal blockage, this must be considered to be permanent in nature." (Jt. Ex. 4)

APPLICABLE LAW

Section 85.34(2)(t), Code of Iowa, 1981, provides:

> [F]or all cases of permanent partial disability such compensation shall be paid as follows:
>
> ....
>
> For permanent disfigurement of the face or head which shall impair the future usefulness and earnings of the employee in his occupation at the time of receiving the injury, weekly compensation, for such period as may be determined by the industrial commissioner according to the severity of the disfigurement, but not to exceed one hundred fifty weeks.

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).

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

ANALYSIS

Claimant has established that she has suffered a disfigurement of her face as a result of a work injury. Permanent disfigurement of the face or head is compensable under section 85.34(2)(t). Claimant also states she now suffers from nasal blockage and a lisp. A lisp is not corroborated by any of the medical evidence in the case. Dr. Jackson noted the nasal blockage in two reports. In Exhibit 4, he states he observed no abnormalities intranasally. Nevertheless, he did note some narrowing of the nostril. The nostril is defined as "either of the external openings of the nose." Webster's New World Dictionary of the American Language. Thus, a narrowing of the nostril would constitute disfigurement and would not extend claimant's injury beyond the scheduled injury contemplated by section 85.34(2)(t). In that no evidence of internal damage to claimant's nasal passage was found,

claimant has not shown that her injury extends beyond the scheduled loss of disfigurement. It is also noted that the parties stipulated that the injury "if it did produce permanent disability it is a scheduled member, that being disfigurement." (Tr., p. 3)

Section 85.34(2)(t) limits compensation for disfigurement which "shall impair the future usefulness and earnings of the employee in the employee's occupation at the time of receiving the injury...." (Emphasis added) This section makes it clear that the focus of the section is on the effect claimant's disfigurement will have on the occupation at the time of the injury, not future or hypothetical occupations where disfigurement might play a greater or lesser role.

In that the injury in this case is limited to disfigurement under section 85.34(2)(t), a determination must be made as to the extent that the disfigurement will impair the future usefulness and earnings of the claimant in her occupation. In this respect, claimant's evidence on her future plans to enter the real estate field are not relevant. Similarly, the effect of claimant's disfigurement on future attempts to obtain other employment is not within the purview of section 85.34(2)(t). Finally, although claimant stated that heat, cold and sunlight affect her scar, the record shows claimant stipulated that her injury is limited to the scheduled injury of disfigurement and, therefore, does not extend to the body as a whole.

Claimant's occupation at the time of her injury was as a factory worker. Claimant was not required to come into contact with the public in connection with this work. Claimant's appearance does not affect her abilities to perform her duties as a factory worker. Claimant's disfigurement is not severe in terms of area affected or discoloration. The deputy commissioner in his decision overemphasized the severity of claimant's disfigurement, and underemphasized the analysis of the effect of the disfigurement on claimant's future earnings and usefulness in her occupation at the time of the injury as required by the statute. There is no evidence showing that claimant's disfigurement will affect her future earnings or usefulness in her occupation. Claimant has not lost earnings as a result of her disfigurement.

It is readily apparent that the claimant has suffered a tragic disfigurement. Anyone observing claimant's disfigurement would be moved to sympathy. But sympathy is not a proper basis for a compensation award. Although claimant's disfigurement might well affect her ability to obtain or hold other occupations, this case is limited by the statutory parameters of section 85.34(2)(t).

Section 85.34(2)(t) differs from section 85.34(2)(u) in the important respect that 85.34(2)(t) specifically limits compensation to impairment of the future usefulness and earnings of the employee in the employee's occupation at the time of the injury. Section 85.34(2)(u) is not so limited. The legislature has clearly differentiated section 85.34(2)(t) by inserting the language limiting any award to the effect of the disfigurement on the claimant's occupation at the time of the injury.

It is easy to understand why the deputy commissioner awarded claimant benefits, in view of the natural emotional sympathy for claimant involved. However, although the result may seem harsh, the determination must be made according to the statute. In that claimant has failed to show that her disfigurement will impair her future usefulness or earnings as an employee in her occupation as a factory worker, claimant has failed to show that she is entitled to any benefits under section 85.34(2)(t).

FINDINGS OF FACT

1. On March 17, 1983, claimant received an injury to her face arising out of and in the course of her employment.

2. As a result of claimant's injury, she suffered permanent disfigurement to her face.

3. Claimant's injury is limited to disfigurement.

4. Claimant's occupation at the time of her injury was as a factory worker.

5. Claimant's rate of compensation is $231.25.

6. Claimant's occupation does not involve meeting or working with the public.

7. Claimant's disfigurement does not affect her present or future ability to perform the duties of her occupation.

8. Claimant's disfigurement is not severe.

9. Claimant has not lost earnings as a result of her disfigurement and is not likely to lose earnings as a result of her disfigurement in the future.

10. Claimant incurred mileage expenses for medical treatment in the amount of $490.08.

CONCLUSIONS OF LAW

Claimant's injury is limited to disfigurement.

Claimant is not entitled to benefits under Iowa Code section 85.34(2)(t).

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

Claimant shall take nothing from these proceedings.

Claimant is to pay the costs of this action including the costs of the transcription of the hearing proceeding.

Signed and filed this 30th day of September, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRUCE A. ANDERSEN, Claimant, vs. FARMLAND FOODS, Employer, and AETNA CASUALTY & SURETY CO., Insurance Carrier, Defendants.	:	File No. 795220 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant 62.5 weeks of permanent partial disability and an approval of 50 weeks of vocational rehabilitation benefits.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits A through J. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are whether the deputy erred in approvi 50 weeks of vocational rehabilitation benefits and the extent of the disability of claimant's right upper extremity.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The first issue to be resolved is whether the approval of 50 weeks of vocational rehabilitation benefits was correct. The deputy making the arbitration decision correctly noted

a lack of jurisdiction to change another deputy's decision. The resolution of this issue is now proper in this appeal decision. The defendants argue that they should have been granted a hearing on entitlement to the benefits and the award of benefits exceeds the maximum allowed by statute. Claimant concedes in his appeal brief that he is only due 26 weeks. Defendants and claimant are correct that the maximum allowable benefits is 26 weeks. See Iowa Code section 85.70.

Division of Industrial Services Rule 343-4.4(86) provides: "A hearing shall not be held in proceedings under 4.1(8), (9), (10), (11), (12), unless requested in writing by the petitioner in the original notice or petition or by the respondent within ten days following the time allowed by these rules for appearance." Division of Industrial Services Rule 343-4.1(8) refers to contested case proceedings for vocational rehabilitation benefits. The record in this matter reveals claimant's application for rehabilitation benefits filed July 29, 1987 was resisted by defendant employer. The record does not reveal that defendants ever complied with rule 4.4 by requesting a hearing in writing on entitlement to benefits. Defendants' failure to do so is now fatal to its appeal on this issue. Defendants did not request a hearing and there is no evidence that they can now rely upon to refute the deputy's award of benefits. The extent of the benefits cannot, however, exceed the maximum of 26 weeks allowed by the statute. There is evidence that claimant has been enrolled in a tool and die course of study for at least two quarters of a seven quarter program.

The next issue to be resolved is the extent of the disability of claimant's right upper extremity. Horst G. Blume, M.D., who examined claimant on March 31, 1986 gave an impairment rating "to the right hand and right lower arm of approximately 25%." (Joint Exhibit A, page 10) Thomas P. Ferlic, M.D., the treating physician and the doctor who performed the surgeries on claimant, gave claimant two different impairment ratings of the upper extremity. The first rating on March 4, 1987 was 20 percent of the hand which converts to 18 percent of the upper extremity. The second rating was given after he had performed surgery to release the joint capsule dorsally and lengthen the collateral ligaments, both medially and laterally, of the metacarpophalangeal joint, fifth finger. When Dr. Ferlic rated the impairment after the surgery which was performed on April 7, 1987, he indicated that "the patient's impairment rating has lowered. I feel that the impairment is 15% of his hand." (Jt. Ex. A, p. 2) Dr. Ferlic rated claimant at 14 percent of the upper extremity. The surgery was apparently only somewhat successful as Dr. Ferlic's impairment rating had been lowered only slightly after the surgery. The evaluations of impairments are guides for evaluations of impairment. It is the duty of this agency to determine the extent of claimant's permanent partial disability. It is undisputed that the medical evidence in the case gives claimant ratings of impairment between

14 and 25 percent. Claimant testified to the problems he has with his arm. The deputy made personal observations of claimant. The deputy's conclusion, which was based in part on observation, was consistent with and corroborated by the medical evidence. The deputy correctly concluded that claimant had a permanent disability of 25 percent of the right upper extremity.

One other matter should be discussed. In a letter filed December 29, 1987, counsel for the claimant indicated that additional permanent partial disability benefits should commence September 16, 1986. Claimant's counsel indicated that the stipulation on the prehearing report and order had, through a typographical error, erroneously referred to another date and that defendants' counsel agreed the date should be corrected. That letter was received after the arbitration decision and there is no record of defendants' objection to substitution of the September 16, 1986 date. The stipulated date should have read September 16, 1986 and that date will be used in making the award.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment May 24, 1985, when a hind foot saw almost severed his right arm between the wrist and elbow.

2. Claimant was hospitalized and underwent three surgical procedures, including two for the release of joint contracture, small finger, right hand.

3. Claimant has limited wrist movement in all directions, cannot open his hand completely, has an extended fifth finger of the right hand.

4. Claimant continues to suffer pain and swelling at the situs of the injury.

5. Claimant has a permanent impairment to his upper right extremity as a result of his injury.

6. Claimant has been rated from 14 to 25 percent impairment of the right upper extremity by treating and evaluation physicians.

7. Claimant has a 25 percent permanent partial disability to his upper right extremity.

8. Claimant discontinued employment with Farmland Foods on the advice of his physician and because of his injury.

9. Claimant is currently attending Iowa Western Community College taking a course of study in tool and die making.

10. Claimant's application for section 85.70 vocational rehabilitation supplemental benefits was approved August 5, 1987 by a deputy other than the deputy who made the arbitration decision.

11. Claimant is entitled to 26 weeks of vocational rehabilitation benefits.

12. Claimant has been paid 38.149 weeks of permanent partial disability benefits.

CONCLUSIONS OF LAW

Claimant has proved by the greater weight of evidence that he is entitled to 26 weeks of vocational rehabilitation benefits.

Claimant has proved by the greater weight of evidence that the injury sustained on May 24, 1985 was the cause of 25 percent disability of the right upper extremity.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant sixty-two point five (62.5) weeks of permanent partial disability benefits at a rate of two hundred twenty-seven and 79/100 dollars ($227.79) per week commencing September 16, 1986.

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

That defendants receive credit for all permanent partial disability benefits previously paid.

That defendants pay claimant twenty-six (26) weeks of vocational rehabilitation benefits.

That a final report shall be filed upon payment of these awards.

That all costs of this action including costs of transcribing the arbitration hearing are assessed against the defendants pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 30th day of December, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEO ANDERSON,	:	
	:	
Claimant,	:	File No. 818237
	:	
vs.	:	
	:	
JOHN MORRELL & COMPANY,	:	A P P E A L
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding permanent partial disability benefits based on a binaural hearing loss of 13.2 percent and the cost of hearing aids.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits A through G; and defendant's exhibit 1 through 3. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant incurred an occupational hearing loss that arose out of and in the course of employment. More specifically stated, the issue is whether the deputy erred in choosing one audiogram over another for calculating the occupational hearing loss.

REVIEW OF THE EVIDENCE

Claimant began work for defendant in April 1963. He worked various jobs for defendant until the plant closed in April 1985. Claimant testified that he worked in the pork plant beginning in August 1983 and he worked in the kill area for a year and a half. He further testified that he was 10 feet from the dehairer and that his normal work day was eight hours or more. Claimant's exhibit B gives a decibel level of 98 to 99 for the stunner, shackle, and dehairer, and claimant's exhibit C gives a decibel level of 92 for the dehairer. Prior to the time the plant closed claimant saw the plant nurse to have his hearing tested.

R. David Nelson, M.A., audiologist, conducted an audiological evaluation at Nelson's office on May 5, 1986. In a letter dated May 7, 1986, Nelson described "essentially normal hearing in the low frequencies and a mild to moderate hearing loss

in the high frequencies." The test frequencies in H_z (Claimant's Exhibit D) were:

	500	1k	2k	3k
R	10	5	40	50
L	10	20	40	60

Claimant was examined by C. B. Carignan, Jr., M.D., on October 10, 1986. Dr. Carignan reviewed the audiogram performed by Nelson and in a letter dated December 15, 1986 Dr. Carignan indicated that the audiogram showed a 1.9 percent monaural hearing impairment of the right ear and an 11.2 percent monaural hearing impairment of the left ear, equivalent to a 3.4 percent binaural hearing impairment. Dr. Carignan opined in that same letter that claimant's hearing impairment was caused by and occurred as a result of exposure to high noise levels at his work place with defendant.

Daniel Jorgensen, M.D, otolaryngologist, examined claimant on January 7, 1987. As a part of that examination, Jean Rudkin, M.S., audiologist, conducted an audiogram using a soundproof booth and an audiometer. The pure tone threshold audiogram frequencies in H_z and decibels ANSI 1969 were:

	500	1000	2000	3000
R	10	10	50	65
L	10	25	35	60

The file in this matter shows the following: The original notice and petition was filed May 9, 1986 and the affidavit of mailing notice states that the original notice and petition was served on May 8, 1986.

APPLICABLE LAW

Iowa Code chapter 85B provides benefits for occupational hearing loss. Iowa Code section 85B.4 (1985) provides:

> 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.

Iowa Code section 85B.5 (1985) provides that an excessive noise level is sound which exceeds duration and sound levels given in a table in that section.

Excessive noise levels are those which are capable of producing occupational hearing loss. The table in section 85B.5 lists levels 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. Noise levels less than those in the tables may produce an occupational hearing loss. Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

Iowa Code section 85B.9 (1985) provides:

> Pure tone air conduction audiometric instruments, properly calibrated according to accepted national standards used to define occupational hearing loss shall be used for measuring hearing levels, and the audiograms shall be taken and the tests given in an environment as prescribed by accepted national standards. If more than one audiogram is taken following notice of an occupational hearing loss claim, the audiogram having the lowest threshold shall be used to calculate occupational hearing loss. If the measured levels of hearing average less than those levels that constitute an occupational hearing loss, the losses of hearing are not a compensable hearing disability....Audiometric examinations shall be made by a person who is certified by the council of accreditation in occupational hearing conservation or by persons trained by formal course work in air conduction audiometry at an accredited educational institution or licensed as audiologists under chapter 147, as physicians under chapter 148, as osteopathic physicians under chapter 150, or as osteopathic physicians and surgeons under chapter 150A if such licensed persons are trained in air conduction audiometry. The interpretation of the audiometric examination shall be by the employer's regular or consulting physician who is trained and has had experience with such interpretation, or by a licensed audiologist. If the employee disputes the interpretation, the employee may select a physician similarly trained and experienced or a licensed audiologist to give an interpretation of the audiometric examination. This section is applicable in the event of partial permanent or total permanent occupational hearing loss in one or both ears. (Emphasis added)

ANALYSIS

If a claimant proves that he was exposed to a noise level for a duration specified in section 85B.5, he has established the presumption that his hearing loss is an occupational hearing loss. The claimant has established that burden as he has shown he worked a normal eight hour workday in an area where the noise level was from 92 - 99 decibels. In addition, Dr. Carignan opined that claimant's hearing loss was the result of exposure to high noise levels at his work place with defendant. There is no evidence in the record that would rebut the presumption that claimant has established.

Defendant argues on appeal that the lower threshold of the two audiograms (the one taken by Nelson) which showed a 3.4 percent binaural hearing loss should be the one used. Claimant responds that the deputy correctly used the second audiogram (the one taken by Jorgensen) which showed a higher binaural hearing loss. Claimant argues that the deputy was correct because he had discretion to accept or reject evidence he deems appropriate.

Defendant's argument is not persuasive. The reason that the Jorgensen audiogram should be used is that it is the only one taken subsequent to the filing of notice of occupational hearing loss claim and consequently it is the lowest one conducted after the notice of the claim. The file in this case indicates that the notice of an occupational hearing loss claim would be the original notice and petition which was served on May 8, 1986 and was filed on May 9, 1986. The audiogram taken by Nelson was on May 5, 1986 and the audiogram taken by Jorgensen was on January 7, 1986. Only the lowest threshold audiogram taken subsequent to the filing of notice of occupational hearing loss claim can be used to determine the extent of claimant's hearing loss. Weyant v. John Deere Dubuque Works of Deere and Company, (Appeal Decision, February 22, 1988) and Furry v. John Deere Dubuque Works of Deere and Company, (Appeal Decision, November 12, 1986).

It should be noted that defendant has not demonstrated and does not argue that the audiogram taken by Jorgensen does not comply with the requirements of section 85B.9. Defendant merely argues that there was no showing in the record to support the deputy's conclusion that Nelson's test result was inaccurate. In light of the above discussion it is not necessary to determine if Nelson's test result was inaccurate.

One other matter should be discussed. The deputy concluded that the binaural hearing loss obtained from Dr. Jorgensen's office was 13.2 percent. However, the proper calculation of the binaural hearing loss based on the thresholds from the audiogram taken by Dr. Jorgensen is 11.56 percent. That figure is the same figure calculated by claimant and attached to his

brief filed before the deputy on February 17, 1987. It is unclear how the deputy arrived at the 13.2 percent figure other than a possible erroneous use of the figure by both counsel at one time or another. The 13.2 percent does not appear to be supported by the evidence and the proper calculation of the hearing loss pursuant to section 85B.9 is 11.56 percent.

FINDINGS OF FACT

1. Claimant started working for defendant in 1963.

2. Beginning in about August 1983 claimant worked for a year and a half in the kill area at defendant's pork plant.

3. Claimant's normal work day was eight hours.

4. The noise level in the kill area was 92 - 99 decibels.

5. Claimant worked 10 feet from the dehairer where the noise level was 92 decibels.

6. Claimant's original notice and petition alleging an occupational hearing loss was filed on May 9, 1986.

7. The only audiogram after May 9, 1986 was taken by Dr. Jorgensen on January 7, 1987.

8. The audiogram taken by Dr. Jorgensen had a higher threshold than the audiogram taken by R. David Nelson.

9. Based on the calculation provided in section 85B.9, claimant has a hearing loss in excess of 25 decibels.

10. Claimant has a binaural hearing loss of 11.56 percent.

11. Claimant's stipulated weekly rate of compensation is $224.08.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that he incurred an occupational hearing loss while working for defendant.

Claimant has established by a preponderance of the evidence entitlement to 20.23 weeks (11.56 percent times 175 weeks) of permanent partial disability benefits commencing on April 27, 1985 at a rate of $224.08.

Claimant is entitled to the cost of the least expensive hearing aid or aids.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant twenty point twenty-three (20.23) weeks of permanent partial disability benefits commencing on April 27, 1985 at a rate of two hundred twenty-four and 08/100 dollars ($224.08) per week.

That defendant pay the cost of the least expensive hearing aid or aids.

That defendant pay accrued benefits in a lump sum and pay interest pursuant to section 85.30, The Code.

That defendant pay the costs including the costs of transcript of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

That defendant shall file claim activity reports, pursuant to Industrial Services Rule 343-3.1 as requested by the agency.

Signed and filed this 25th day of August, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHELLIE ANDERSON,

Claimant,

vs.

J. I. CASE COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 673655

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying permanent partial disability benefits as the result of an alleged injury on June 22, 1981.

The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1 through 36; and defendant's exhibits A through TT. Claimant filed a brief on appeal.

ISSUE

Claimant states the following issue on appeal: "Whether or not the deputy erred in finding that the claimant-appellant failed to show any unanticipated material change in his earning capacity or in his physical condition subsequent to May 17th, 1984."

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant entered into an agreement of settlement on May 17, 1984, for a back injury occurring on June 22, 1981. The agreement for settlement provided for 20 percent permanent partial disability, and was approved by this agency on May 29, 1984.

Claimant was 44 years old at the time of the hearing. Claimant's original injury occurred when he fell from a forklift he was operating. Claimant was not employed after October of 1981. Claimant testified he presently has pain in his low back and his legs, and that this pain increases with activity.

Claimant testified that at the time of the settlement in 1984, he had a lifting restriction of 20 pounds, as well as a restriction on bending and stooping. Claimant revealed that his present treating physician, John E. Sinning, Jr., M.D., has modified his lifting restriction to 50 pounds. Because of this change in his restrictions, claimant presented himself for work at J. I. Case. However, the employer has not rehired claimant.

Prior medical examinations had revealed that on April 6, 1982, claimant was found to have a herniated disc at the L5-S1 level; on October 11, 1982, a herniated disc at the L4-5 level; on May 29, 1984, a bulging disc at the L4-5 level, as well as a possible herniated disc on the right side of the L5-S1 level.

On June 2, 1983, Richard T. Beaty, D.O., assigned claimant a 5-10 percent permanent partial "disability" rating, and stated that claimant's condition would not substantially deteriorate unless claimant was reinjured. John T. Johnson, D.O., opined claimant had degenerative osteoarthritis. Claimant underwent a physical training program and was able to lift 50 pounds.

After the agreement for settlement, on October 30, 1984, a CT scan showed abnormalities at the L4-5 and L5-S1 levels. Claimant testified that his back condition is the same as it was at the time of the settlement and that the problems he is having with his back now are the same as he experienced in May of 1984.

In December of 1985, F. Dale Wilson, M.D., examined claimant and concluded that claimant's condition was causally related to his June 22, 1981, injury, and that lifting 50 pounds was "too much" for claimant's condition. He also recommended a 25 to 30 pound weight lifting limit.

Dr. Johnson opined that claimant was totally "disabled" on June 6, 1985, and imposed a weight restriction of 10 pounds.

On June 16, 1986, Dr. Sinning examined claimant and claimant's prior CT and myelogram results, and concluded that "expected changes have taken place. All this is part of the expected evolution of degenerative disc disease." (Defendant's Exhibit PP) Dr. Sinning also noted that the bulge at L4-5 was less bulging than it was in 1984, and the obliteration of the right S1 nerve root was similar to what it was in 1984. The L5-S1 showed a vacuum sign, "a further sign of progression of degeneration." (Def. Ex. PP) In addition, Dr. Sinning stated that, "[t]hese same changes occur in the majority of our population as we age from age 20 through the 50's." (Def. Ex. PP) A lack of sensation in claimant's legs that developed subsequent to the settlement was attributed to claimant's diabetes by

Dr. Sinning. Dr. Sinning concluded that, "[r]egarding Mr. Anderson's impairment it is certainly no greater than it was in 1982," and reassigned claimant a five percent body as a whole impairment rating. Based on claimant's experience in his rehabilitation program, Dr. Sinning assigned a lifting restriction of 50 pounds.

In his deposition, Dr. Sinning stated that during the 1986 examination, claimant had told him nothing had changed since 1984. Dr. Sinning again stated that at the time of his 1986 examination of claimant, there was no change in the L5-S1 disc from 1984, and the L4-5 disc bulge had, "during those two years shrunk to a point of being considered normal." (Sinning Deposition, page 28, lines 14-15) Dr. Sinning also opined that his tests showed that claimant was exaggerating his pain symptoms.

Dr. Beaty re-examined claimant on August 6, 1986, and opined that claimant was showing symptoms of S1 radiculopathy, and again rated claimant has having a 5-10 percent permanent partial disability and imposed a 25-30 pound lifting restriction, stating:

> I tend to feel however that, even though he is able to lift 50-1bs. in a controlled situation, that he would be unable to return to 50-1b. lifting type activity.
>
> I do believe, however, that he has demonstrated an ability to work within the restrictions of 25-30 lbs. lifting; no repetitive bending or twisting and no prolonged periods of standing or sitting, in the past.

(Claimant's Ex. 16)

Dr. Beaty did note an "apparent increase in size of the disc herniation." (Cl. Ex. 16)

APPLICABLE LAW

Upon review-reopening, claimant has the burden to show that he has suffered a change in his condition since the original award was made. Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury would not be sufficient to justify a different determination on a petition for review-reopening. Rather, such a finding must be based on a worsening or deterioration of the claimant's condition not contemplated at the time of the first award. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent originally

anticipated may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 279 N.W.2d 24 (Iowa App. 1978).

ANALYSIS

Claimant seeks further benefits under review-reopening. Claimant bears the burden of showing that he has suffered a change of condition subsequent to the settlement in this case that would justify an increase in benefits.

Claimant, at the time of the settlement, had a rating of permanent partial impairment of five percent of the body as a whole. His rating of impairment now is unchanged. Dr. Beaty noted an enlargement of claimant's disc herniation, but nevertheless Dr. Beaty did not change claimant's rating of impairment or restrictions. Dr. Sinning also stated that claimant's physical condition has not worsened. Indeed, one of claimant's disc conditions at the time of the settlement has improved.

The only alleged physical change in claimant's condition concerns claimant's lifting restrictions. At the time of the settlement, claimant was restricted from lifting weights over 25 pounds. Dr. Sinning has now altered that restriction to 50 pounds. However, the other physicians who have examined claimant have retained the original lifting restriction.

The greater weight of the medical evidence indicates that claimant's lifting restriction has not changed. Even if Dr. Sinning's view on the lifting restriction were adopted, this is but one facet of claimant's physical condition. Overall, claimant's physical condition has not changed since the settlement in 1984, except to the extent it has improved. Claimant himself described his physical condition as the same as it was at the time of the settlement. Claimant has not suffered a physical change of conditions.

Claimant may also be entitled to further benefits for a non-physical change of conditions. The non-physical change of conditions urged by claimant is the failure of the employer to rehire claimant even though Dr. Sinning has raised claimant's lifting restriction. Claimant, prior to the new lifting restriction by Dr. Sinning, was not eligible to work for J. I. Case due to his lifting restriction. The evidence indicates there was hostility between claimant and his employer. The reason the former employer declined to rehire claimant is not contained in the record. In addition, if claimant's lifting restriction has in fact been raised, it opens up to claimant the opportunity to work at a greater number of other jobs with other employers, and is thus indicative of a greater, rather than lesser, earning capacity.

The agreement for settlement acknowledged claimant's condition as degenerative osteoarthritis. The degenerative nature of that condition implies further deterioration. Even if claimant had shown a worsening of his physical condition, the agreement for settlement seems to contemplate degeneration.

Claimant has failed to show either a physical or non-physical change of conditions not contemplated by the agreement for settlement.

FINDINGS OF FACT

1. Claimant received a back injury which arose out of and was in the course of his employment with defendant on June 22, 1981.

2. Claimant and defendant entered into an approved agreement for settlement for 20 percent industrial disability in May of 1984.

3. At the time of the settlement, claimant had been given a rating of impairment of five percent of the body as a whole and a 20-25 pound lifting restriction due to disc herniations at the L4-5 and L5-S1 levels.

4. At the time of the hearing in this case, claimant retained a rating of impairment of five percent of the body as a whole, and two of claimant's doctors imposed a lifting restriction of 20 pounds, and one doctor a lifting restriction of 50 pounds.

5. Claimant's physical condition has not changed since the 1984 settlement except that one of claimant's disc herniations had improved.

6. Claimant does not have any increased loss of earning capacity subsequent to the 1984 settlement.

CONCLUSIONS OF LAW

Claimant has failed to show a physical or non-physical change of conditions not contemplated by the agreement for settlement.

Claimant is not entitled to further benefits.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the costs of this proceeding.

Signed and filed this 27th day of January, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE ARMSTRONG, Claimant, vs. DEPARTMENT OF BUILDINGS & GROUNDS, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 515778 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision awarding benefits for temporary total disability but denying further benefits for permanent partial disability.

The record on appeal consists of the transcript of the review-reopening hearing; claimant's exhibits 1 through 4; and defendants' exhibits 1 through 8. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal: "The issues in this case are whether Mr. Armstrong is entitled to additional industrial disability benefits and whether he is an 'odd lot' employee."

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law contained in the review-reopening decision are appropriate to the issues and evidence.

ANALYSIS

The deputy's analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant sustained an injury July 26, 1978 which arose out of and in the course of his employment and for which claimant underwent hernia repair surgery.

2. In the appeal decision filed July 15, 1981 claimant was found to have a low level anxiety for which he was awarded 10 percent permanent partial disability.

3. Claimant underwent recurrent hernia repair surgery on or about March 28, 1986 which surgery related to his original 1978 injury.

4. Dr. From assigned claimant a permanent partial impairment to the body as a whole following such surgery and imposed a 25 pound lifting restriction on claimant.

5. Claimant's recovery period following the repair surgery lasted fourteen weeks.

6. Claimant's actual activity restrictions have remained substantially similar since his July 1978 injury.

7. Claimant suffers from numerous medical conditions other than his work-related recurrent hernia including past bladder tumors, leg circulation surgery, prostrate surgery, and bypass surgery.

8. Claimant had a severe heart attack in 1982. As a result, he must be much more careful and cannot get excited as he suffers if he makes a strenuous effort.

9. Claimant was 70 years old at the time of the hearing.

10. Any change in claimant's permanent earning capacity since the initial hearing in this matter is not proximately caused by his 1978 injury.

CONCLUSIONS OF LAW

Claimant has established a temporary change in his condition since the initial hearing in this matter which is related to the July 26, 1978 work injury.

Claimant is entitled to 14 weeks of temporary total disability benefits commencing on March 28, 1986.

Claimant has not established a permanent change in his condition which is causally related to the July 26, 1978 work injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant fourteen (14) weeks of temporary total disability at the rate of ninety-nine and 04/100 dollars ($99.04) commencing on March 28, 1986.

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to section 85.30.

That defendants pay costs of the hearing proceeding and claimant pay the costs of the appeal including the cost of the transcription of the hearing proceeding.

That defendants are to file an activity report upon payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 23rd day of August, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BONNIE BAKALAR, Claimant, vs. WOODWARD STATE HOSPITAL-SCHOOL, Employer, and STATE OF Iowa, Insurance Carrier, Defendants.	File No. 756871 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from a decision by a deputy industrial commissioner that the deputy had no authority to determine the "finality" of an arbitration decision.

REVIEW OF THE EVIDENCE

Claimant was injured on January 23, 1984. A petition in arbitration was filed on July 19, 1984. Claimant began to receive long-term disability benefits from her employer at this time. On October 21, 1986, a hearing assignment order was issued in the case. A hearing on the petition was held on December 22, 1986. In an arbitration decision filed May 22, 1987, claimant was awarded permanent partial disability benefits. The deputy declined to rule on what credit, if any, defendant employer was entitled to for the long-term disability benefits paid. Neither party filed an appeal of this decision.

Thereafter, claimant made demand on the employer for payment of the benefits awarded. The employer responded that it was taking a credit for the long-term disability benefits paid, and that the credit exceeded the benefits awarded.

On April 26, 1988, the employer filed a motion to determine the "finality" of the deputy's decision. On May 19, 1988, the deputy overruled the motion, with a determination that he lacked the authority to consider the motion. The employer then filed this appeal to the commissioner on May 27, 1988.

On June 13, 1988, the claimant filed an action in the Iowa District Court for Polk County for specific enforcement of the deputy's decision pursuant to Iowa Code section 86.42. The employer filed a resistance to this action, urging that the District Court lacked jurisdiction to determine the matter. On July 7, 1988, the employer filed a petition for declaratory "judgment", which was treated as an action for a declaratory ruling, to determine the "finality" of the deputy's decision.

On August 23, 1988, an Order by the Industrial Commissioner was filed, declining to issue a declaratory ruling. On October 31, 1988, the District Court determined it had jurisdiction to enforce the deputy's decision and consider the matter of credit. The employer filed a motion for reconsideration, and the district court reviewed and reaffirmed its ruling on November 18, 1988.

ISSUES

Defendant failed to set forth specific issues in its appeal. The appeal will be considered generally and without regard to specific issues.

APPLICABLE LAW

Iowa Code section 86.42 provides:

> Any party in interest may present a certified copy of an order or decision of the commissioner, from which a timely petition for judical review has not been filed or if judicial review has been filed, which has not had execution or enforcement stayed as provided in section 17A.19, subsection 5, or an order or decision of a deputy commissioner from which a timely appeal has not been taken within the agency and which has become final by the passage of time as provided by rule and section 17A.15, or an agreement for settlement approved by the commissioner, and all papers in connection therewith, to the district court where judicial review of the agency action may be commenced. The court shall render a decree or judgment and cause the clerk to notify the parties. The decree or judgment, in the absence of a petition for judicial review or if judicial review has been commenced, in the absence of a stay of execution or enforcement of the decision or order of the industrial commissioner, or in the absence of an act of any party which prevents a decision of a deputy industrial commissioner from becoming final, has the same effect and in all proceedings in relation thereto is the same as though rendered in a suit duly heard and determined by the court.

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.

ANALYSIS

This appeal concerns the ruling of the deputy determining that he lacked authority to further rule on this case. An arbitration decision had been filed, and the time for appeal elapsed without an appeal by either party. The defendant now appeals that ruling.

Section 85.38(2), Code of Iowa, provides a credit for benefits paid under group plans. A defendant may unilaterally establish the amount of that credit. If the claimant determines that the amount of the credit is inaccurate or unfair, the claimant can seek a ruling by the industrial commissioner. See Olson v. Department of Transportation, Appeal Decision, October 30, 1986. Claimant should seek such a determination by a separate petition, rather than by motion in the prior case. Such a petition can be filed without payment of a filing fee. This agency retains jurisdiction at all times to determine the proper amount of credit under section 85.38(2). Many times this issue does not come to light until late in the proceedings, or even after all applicable times for review or appeal are expired.

The deputy properly ruled that he lacked authority to rule on the credit issue or the "finality" of his arbitration decision. Claimant's proper remedy was to institute a new contested case proceeding with this agency on the credit issue.

CONCLUSIONS OF LAW

The deputy properly overruled defendant's motion.

WHEREFORE, the decision of the deputy is affirmed.

Signed and filed this 16th day of June, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHET BALLENGER, Claimant, vs. LITHCOTE COMPANY, Employer, Self-Insured, Defendant.	:	File No. 755986 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding healing period benefits and permanent partial disability benefits based upon an industrial disability of 30 percent from an injury on January 16, 1984. The arbitration decision also ordered that the defendant pay the costs of the action.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 15, 18, 19 and 20; and claimant's exhibits 21 through 26. Both parties filed briefs on appeal.

ISSUES

Defendant states the issues on appeal are:

I. The deputy erred in finding that the claimant sustained damage to both the L4-5 and L5-S1 intervertebral lumbar discs as a result of an injury on January 16, 1984.

II. The deputy erred in finding that the claimant's healing period lasted from January 19, 1984 to August 25, 1985.

III. The deputy's award of 30% industrial disability is excessive under the facts in law in this case.

IV. The deputy erred in assessing the cost of Dr. Beck's and Dr. Heiman's evaluations to the employer, since the claimant did not apply to the division of industrial services as required under section 85.39.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant is a 29-year-old married man whose formal education is limited to the eighth grade. Since quitting school he has engaged in a number of occupations including commercial fishing, clamming, carpentry, painting, masonry work, plumbing, electrical work and bartending. Many of his work activities required a great degree of physical strength, particularly clamming and commercial fishing, where he would perform repetitive lifting of weights of as much as 80-100 pounds and occasional lifting of up to 200 pounds.

Claimant commenced employment with Lithcote Company on April 14, 1983. Claimant testified that on January 16, 1984 he was grinding with a 10-14 pound grinder working overhead and fell. Claimant consulted Mark O'Dell, M.D., on January 19, 1984. Dr. O'Dell noted complaints of pain in claimant's back and left gluteal area and numbness in his calf and left foot. Upon examination, Dr. O'Dell found claimant's left Achilles reflex to be absent, the straight leg raising test to be positive and tenderness at the right sciatic notch. A follow-up examination on January 25, 1984 showed that no significant improvement had occurred and claimant was referred to David C. Naden, M.D. Dr. Naden's initial diagnosis was that claimant had a probable herniated nucleosis pulposis at either the L4-5 or L5-S1 level and also with either a free fragment from the above level or a large free fragment at the L5-S1 level compromising the first sacral nerve root on the left. A myelogram was performed on January 27, 1984 which was interpreted as showing:

> [A] moderately large extradural defect at the L4-5 disc space level anteriorally. Bilateral nerve compression at that level ... (nerve roots of L5) and unilateral L5 nerve root sheath amputation on the left side.... An additional large extradural defect was present at the mid L5 vertebral body level on the left side ... resulting in compression with the left nerve of S1.

(Joint Exhibit 1, page 24)

Richard Kundel, M.D., who interpreted the myelogram, concluded that it showed a herniated intervertebral disc at the L4-5 level with probable free fragment with nerve root compression. Dr. Naden suggested chemonucleolysis which was performed at the L4-5 level on February 21, 1984. The chymopapain was

injected without any apparent abnormal reaction or leakage. Claimant thereafter went through an extended period of recuperation and was evaluated by several doctors.

Dr. Naden indicated that claimant had attained the maximum improvement that he would attain without surgery on July 23, 1984. He went on to state, however, that there was some additional improvement in claimant's condition subsequent to July 31, 1984 and up to April of 1985 when claimant actually returned to work. He indicated that he did not release claimant to return to work until April of 1985.

Claimant testified he returned to work on April 29, 1985 and worked for four and a half days before discontinuing work because the work hurt his back. Claimant returned to Dr. Naden on May 28, 1985. A myelogram was again performed on June 4, 1985 which indicated: "There is nerve root amputation on the left side at the L4-5 level and pressure effect on the nerve root on the right side at this level. In addition there appears to be nerve root amputation on the left at the L5-S1 level." It was interpreted by Dr. Kundel as showing probable disc herniation on the left side at the L4-5 and L5-S1 levels.

Claimant was again hospitalized and a laminectomy was performed at the L4-5 and L5-S1 levels with extraction of a herniated disc and intradiscal material. Thereafter, claimant experienced a relatively unremarkable recovery, was released to return to work and did so on August 26, 1985.

Dr. Naden indicated that the L5-S1 level of claimant's spine was normal at the time of the 1984 myelogram and he could not say when or why the problem at that level developed. He indicated that the claimant's L4-5 disc problem was related to his work, but declined to make such a causal connection with regard to the L5-S1 level. Dr. Naden indicated that, during surgery, he observed a difference between the discs at the L4-5 and L5-S1 level which indicated that the L4-5 injury had existed longer than the L5-S1.

David W. Beck, M.D., a board certified neurosurgeon, examined claimant on May 20, 1986. Dr. Beck expressed the opinion that claimant injured both the L4-5 and L5-S1 discs in the fall that occurred on January 16, 1984. Dr. Beck explained that chymopapain is contraindicated for a free disc fragment, but that it is used for treating bulging discs. He rated claimant as having a 30 percent impairment. Dr. Beck recommended that claimant follow a 20-25 pound lifting limit, use very limited motion and avoid doing a job if it aggravates his back.

Richard F. Neiman, M.D., a board certified neurologist, testified by deposition and also in person at hearing. Dr. Neiman felt that at the time the chymopapain injection was

performed, there was some indication of a free fragment as well as L4-5 herniation. He stated that there has to be a tear in the annulus fibrosus of a disc for there to be a free fragment. He stated that chymopapain is not indicated if there is a free fragment because if chymopapain escapes from the disc into the spinal canal it damages nerves and surrounding soft tissues. Dr. Neiman noted that the chymopapain operation report by Dr. Naden showed that there was no tear in the L4-5 disc from which a free fragment could have resulted. Dr. Neiman expressed the opinion that the L5-S1 disc was injured in claimant's fall together with the L4-5 disc. Dr. Neiman felt that claimant had a 25 percent permanent partial impairment of the whole person and recommended that he restrict his lifting to 15-20 pounds and avoid excessive extension, flexion and lateral rotation.

Dr. Neiman attributed the different appearances of the L4-5 and L5-S1 discs to the fact that chymopapain had been injected into the L4-5 disc. Dr. Beck also felt that the difference between the L4-5 disc and L5-S1 disc was due to the chymopapain injection.

Claimant currently earns more than $8.00 per hour. He stated that all other people with more seniority have jobs that require heavy work and provide higher pay than his current job as a stenciler. He stated that there is no one with more seniority who has a lower paying job and could bump him out of his current position. Claimant testified that, if he had kept working at his prior position without injury, he would now be an inspector earning the same rate of pay as he currently earns.

Dena R. Garvin who worked with the personnel and payroll of the defendant testified that claimant currently earns $8.43 per hour and that, if he were currently working as a helper, the position he held at time of injury, he would be earning only $7.33 per hour. She stated that jobs are bid by seniority and that there is no one in the plant with less seniority than claimant who has a higher rate of pay than claimant, with the possible exception of the third shift lead worker.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The first issue to be resolved is whether there is a causal connection between claimant's work injury of January 16, 1984 and damage at both the L4-5 and L5-S1 vertebrae. There is no disagreement that the damage at the L4-5 vertebrae was causally connected to the work injury. The medical opinions are uncontroverted that the damage at the L4-5 vertebrae was the result

of the work injury and the defendant does not argue otherwise on appeal. The question to be resolved is whether the damage at the L5-S1 vertebrae is the result of the work injury.

The defendant argues that initial impressions by medical personnel and Dr. Naden's opinion should be accepted that the L5-S1 herniation occurred subsequent to the L4-5 herniation. The defendant argues that Dr. Beck's and Dr. Neiman's opinions that the two herniations occurred at the same time should be rejected. While there is conflicting opinions from the physicians in this case, there is general agreement that after the work injury there were two abnormalities in the L4-5 and L5-S1 area. The disagreement lies in whether one of these abnormalities was a free fragment or a bulging disc at L5-S1. Dr. Naden's post-operative diagnosis changed after the laminectomy. The 1985 myelogram and the laminectomy itself revealed a bulging L5-S1 disc and neither revealed a free fragment. Dr. Naden's reluctance to causally connect the work injury to the L5-S1 disc herniation appears to be based upon the difference in the discs he observed during the laminectomy. Dr. Beck and Dr. Neiman both explained that the difference in the discs would be attributed to the fact that chymopapain had been injected into the L4-5 disc but not into the L5-S1 disc. Their explanation in this regard appears to be undisputed. Dr. O'Dell's observation on January 19, 1984 which was three days after the work injury was that the left Achilles reflex was absent. Drs. Beck and Neiman indicated that the Achilles reflex impairment is highly specific for an S1 nerve root problem. Both the 1984 and the 1985 myelograms show an abnormality at the level of the S1 nerve root. Drs. Beck and Neiman offered opinions and explanations consistent with objective evidence in this case. Also, their explanations as to the diagnosis and possible confusion of early diagnosis is more descriptive and is reasonable. Their opinions are adopted as correct. Claimant has proved that the work injury resulted in a disc herniation at both L4-5 and L5-S1.

The second issue to be resolved is the length of the healing period. In discussing this question the deputy stated:

> A substantial question exists regarding the termination of claimant's healing period. Under the findings previously made, even if terminated in 1984, further healing period would have been warranted commencing with the hospitalization in 1985 and running until the return to work on August 26, 1985. It appears from the evidence that Dr. Naden did, in fact, waiver regarding his recommendations to claimant. The records indicate that, at times, he recommended surgery and that, at other times, he indicated claimant's condition would not be improved by surgery. Early on, he expressed the expectation that a laminectomy would be necessary, but it was not until April of 1985 that he discharged

> claimant from his care or authorized claimant to return to work in any capacity. During the summer of 1984, Dr. Naden indicated that claimant had reached the maximum medical improvement that he would attain without further surgery, but at no point was the surgery specifically declined. Rather, claimant continued to seek other opinions on what is certainly a serious matter. He did so with the consent of Dr. Naden. In fact, Dr. Naden indicated in his deposition that claimant continued to improve, albeit minimally, following the time in July, 1984 when an impairment rating was assigned. It was only the physicians at the University of Iowa Hospitals and Clinics who recommended that claimant seek retraining and enter a different occupation. All the others that were consulted concurred with claimant's desire for continued conservative treatment with hopes of improvement.

The defendant argues that the deputy erred and the healing period ended on July 23, 1984 when Dr. Naden concluded that claimant had reached maximum medical improvement. Defendant also argues that support for that date is found in the fact that Dr. Naden's permanent impairment ratings prior to and subsequent to the laminectomy were the same. As the deputy correctly discussed, Dr. Naden waivered regarding claimant's reaching maximum medical improvement and whether claimant should have the laminectomy. It should be noted that Dr. Naden gave impairment ratings in 1984 which were contingent upon a laminectomy. Dr. Naden in a letter dated April 10, 1984 wrote:

> My own feeling is that he is going to need to have a laminectomy to remove this free fragment that is still in his spinal canal before this young man can resume his previous work activities. I do feel, however, that this fragment can be removed with a minimum of surgery so that he will end up with a good result here and that he should be able to return to his previous employment somewhere around six to eight weeks after his laminectomy.
>
> His PPD rating will be somewhere probably around 15-20% of the whole body.

(Joint Exhibit 1, page 34)

In a letter dated July 31, 1984 he wrote:

> This young man came in the week of July 23 stating that he could not return to work in the condition he was in and that he wanted to see a good back surgeon. Apparently Dr. Jersild and I don't fit his criteria.
>
> ....

> As of July 23, 1984, I feel that he has obtained a maximum amount of recovery and declare his situation status-quo, reaching the maximum benefit.
>
> As a result of this affliction, I would reward him a 15% PPD rating of the whole body. This includes the free fragment in the spinal canal as well as the bulging disc and chymopapain injection.

(Jt. Ex. 1, p. 37)

It should also be remembered that in July 1984 Dr. Naden was giving his opinions on maximum medical improvement and impairment ratings based upon a diagnosis that he changed after he had performed the laminectomy. It is not possible to tell from Dr. Naden's opinion when claimant reached maximum medical improvement. It is however possible to tell when claimant returned to work. Claimant returned to work on April 29, 1985 after he was released to return to work by Dr. Naden on April 23, 1985. Claimant returned to work for four and one-half days when he sought further medical treatment that resulted in the laminectomy on June 5, 1985. He returned to work on August 16, 1985 following the laminectomy. Claimant's healing period was from January 19, 1984 through August 26, 1985 except for the five days he had returned to work.

The third issue to be resolved is the extent of claimant's industrial disability. Defendant argues on appeal that the deputy's award of 30 percent industrial disability is excessive when all factors are taken into account. The factors the defendant cites are claimant's ability to return to work for the same employer at a substantially higher wage, secure employment future and ability to obtain employment in other fields. In discussing claimant's industrial disability the deputy made the following comments:

> Claimant has a very limited education. This is often an indication of limited intellectual capacity. There is some indication in the record that his use of the book for stenciling railroad cars in his current employment may indicate intellectual functioning of a level higher than his eighth grade education. Nevertheless, the record does not show any evidence upon which to determine that claimant has the aptitude for academic pursuits. His prior work history is devoid of any indication that he used substantial intellectual exertion. Claimant has had surgery at two levels of his spine. The impairment ratings assigned by physicians range from 15% to 30%. The physical restrictions are less divergent in that those who have assigned a weight limit have generally indicated that it should be in the range of 20-25

pounds and those who have spoken to the issue have indicated that claimant should avoid repetitive bending, stooping, twisting and other activities which typically aggravate a spinal condition. He is clearly developing degenerative arthritis at the injured spinal levels. When all the factors of industrial disability are considered, it is clear that claimant is seriously impaired in his ability to be gainfully employed. A relatively high disability award would be appropriate in this case were it not for the fact that claimant has suffered no actual loss of earnings. While actual earnings are only one element to be considered in determining loss of earning capacity, they are most certainly a very substantial element. Anthes v. Anthes, 258 Iowa 260, 139 N.W.2d 201 (1965). Raney v. Honeywell, Inc. 540 F.2d 932 (C.A. Iowa 1976). The evidence indicates that claimant's employment with Lithcote Company is reasonably secure and can be expected to continue without interruption due to business closing or lack of work within his physical capabilities. Should such occur in the near future, the remedy of review-reopening would be available. In assessing the disability in this case, however, it is recognized that there is no guarantee that Lithcote Company will continue to employ claimant indefinitely in the future throughout his working life. When all the material factors of industrial disability are considered, it is determined that claimant has a 30% permanent partial disability.

The deputy correctly considered the factors necessary in determining industrial disability. He based his determination upon current factors and did not improperly speculate that claimant may not indefinitely be employed by the defendant. When all factors of industrial disability are considered claimant has an industrial disability of 30 percent.

The last issue to be resolved is whether the deputy correctly assessed the costs of Dr. Beck's and Dr. Neiman's evaluation to the employer. Defendant argues that it was improper to do so because claimant had not filed an application for an independent medical examination pursuant to Iowa Code section 85.39. For purposes of this discussion it is assumed that defendant objects to the request by the claimant filed on November 6, 1987 to be awarded costs for Dr. Neiman ($450) and Dr. Beck ($150) pursuant to Division of Industrial Services Rule 343-4.33(6). Rule 4.33 provides in relevant parts:

> Costs taxed by the industrial commissioner or a deputy commissioner shall be ... (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports.... Costs are to be assessed at the discretion of the deputy commissioner or industrial commissioner

hearing the cast unless otherwise required by the rules of civil procedure governing discovery.

Iowa Code section 85.39 provides in relevant part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

The bills for claimant's costs indicate that Dr. Neiman billed for services performed on June 11, 1986. The report of Dr. Neiman dated June 11, 1986 was exhibit 24. In that report Dr. Neiman gave opinions of causal connection and a "disability" rating. It appears that the bill for Dr. Neiman was for services other than merely preparation of the report. The bills for claimant's costs also indicate that Dr. Beck requested payment for services on April 16, 1986. A report of Dr. Beck dated April 16, 1986 was exhibit 22. In that report Dr. Beck gave his opinion of causal connection but gave no impairment rating. Claimant argues in his brief that assessment of the costs was appropriate because the reports were for the purpose of establishing a causal connection. Claimant's point is well taken. The real dispute in this matter has been whether there was a causal connection between the work injury and damage at the L5-S1 vertebrae. Claimant sought medical opinions on this issue. Claimant did not seek the medical opinions merely for purposes of evaluating permanent disability. Defendant's reliance upon section 85.39 is misplaced. Defendant argues that the arbitration decision's award of costs would allow an injured employee "to retain the services of as many physicians as he pleases for the purpose of obtaining favorable permanent impairment ratings." This argument is not convincing. Subrule 4.33(6) under which the costs were assessed allows for the costs of only two reports. It should be noted that the hearing assignment order in this matter dated September 26, 1986 indicate that an issue was whether claimant received an injury that arose out of and in the course of his employment. As stated above the $450 cost for Dr. Neiman appears to include services other than for preparation of a report. The cost would be allowable under Iowa Code section 85.27.

However, claimant seeks costs for both preparation of a report by Dr. Beck and for the deposition of Dr. Beck. Cost

may be taxed for either the report or the expert witness fee but not both because to tax both as costs would be taxing for cumulative evidence. See Jones v. R. M. Boggs Company, Inc. Appeal Decision, June 29, 1988. In this case the total cost to be taxed for Dr. Beck will be $150.

FINDINGS OF FACT

1. On January 16, 1984, claimant was a resident of the state of Iowa, employed by Lithcote Company at Muscatine, Iowa.

2. Claimant was injured on January 16, 1984 when he fell while grinding in a railroad car as part of his job duties at the employer's place of business.

3. The injuries sustained in the fall included damage to claimant's L4-5 intervertebral lumbar disc and also to the L5-S1 intervertebral lumbar disc. The injury produced bulging of both intervertebral discs which encroached upon nerve roots in claimant's spine.

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 19, 1984 until August 26, 1985 when claimant returned to work, except for an interruption of five days running from April 29, 1985 through May 3, 1985 when he made an unsuccessful attempt to return to work.

5. Following the injury, claimant continued to improve throughout the time that elapsed until his eventual return to work in August 1985 even though in July 1984, it was indicated that his treating physician did not expect further substantial improvement without additional surgery.

6. The fall that occurred on January 16, 1984 was a substantial factor in producing the bulging discs found in claimant's lumbar spine and also of the surgery and other medical procedures performed in treatment of the bulging discs.

7. Claimant is a 29-year-old married man who dropped out of school during the ninth grade and has no further formal education. His entire work history is devoid of any employment that utilized substantial intellectual capabilities and he has no demonstrated aptitude for successfully completing academic or intellectual pursuits.

8. Claimant presently has approximately a 20 percent functional impairment of the body as a whole due to the condition of his spine that resulted from the fall on January 16, 1984 and the condition of the spine renders his physical capabilities such that he is medically advised to avoid lifting more than

25 pounds and to avoid physical activities which require flexion, twisting or extension of the spine.

9. Claimant is well motivated to be gainfully employed.

10. The assessment of claimant's medical case as determined by Drs. Beck and Neiman is correct as opposed to the assessments made by other physicians who have expressed opinions contrary to those expressed by Beck and Neiman.

11. Claimant has sustained a 30 percent permanent impairment of his earning capacity.

CONCLUSIONS OF LAW

Claimant has proved by the greater weight of the evidence that his work injury of January 16, 1984 resulted in damage to the L4-5 and the L5-S1 intervertebral discs.

Claimant has proved by the greater weight of evidence that his healing period commenced January 19, 1984 and continued until August 26, 1985 except for the five days from April 29, 1985 through May 3, 1985.

Claimant has proved by the greater weight of evidence that he has suffered an industrial disability of 30 percent as a result of the work injury on January 16, 1984.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That the employer pay claimant eighty-three point five seven one (83.571) weeks of compensation for healing period at the stipulated rate of one hundred seventy-seven and 88/100 dollars ($177.88) per week commencing January 19, 1984 and interrupted by five (5) days commencing April 29, 1985.

That the employer pay claimant one hundred fifty (150) weeks of compensation for permanent partial disability at the stipulated rate of one hundred seventy-seven and 88/100 dollars ($177.88) per week commencing August 26, 1985.

That the employer shall pay interest on all past due, unpaid amounts in accordance with Iowa Code section 85.30.

That the employer pay the costs of this action including the costs of transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33. However, the total Dr. Beck costs is one hundred fifty dollars ($150).

That the employer shall file claim activity reports as required by the agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 30th day of December, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH D. BASCOM,

Claimant,

vs.

LEONARD FEED & GRAIN, INC.,

Employer,

and

GREAT WEST CASUALTY CO.,

Insurance Carrier,
Defendants.

File No. 735545

A P P E A L

D E C I S I O N

FILED

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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

By order of the industrial commissioner filed April 25, 1988, the undersigned deputy industrial commissioner has been appointed under the provisions of Iowa Code section 86.3 to issue a final agency decision in this matter.

Claimant appeals and defendants cross-appeal from an arbitration decision awarding healing period benefits; permanent partial disability benefits for industrial diasbility of 20 percent; medical expenses; and travel expenses.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 36, inclusive; defendants' exhibits 1 through 4, inclusive; and defendants' rebuttal exhibits A, B and C.

ISSUES

The issues on appeal are whether the deputy correctly ruled on admission of testimony and evidence; the extent of claimant's industrial disability; and whether the deputy correctly determined healing period benefits.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant testified he was injured on May 31, 1983 while unloading empty beer bottles and beer kegs at a brewery in Memphis, Tennessee when a stack of kegs on pallets fell knocking him to the floor, and landing on his back. He returned to Iowa the following day and, when he and defendant employer could not agree on which doctor he should visit, he saw what was described as a "neutral" doctor, Yang Ahn, M.D.

Dr. Ahn examined claimant on June 1, 1983 and reported that claimant sustained a contusion and sprain of the lumbar area and left leg from a falling keg at work. He took claimant off work and treated him with rest, muscle relaxers, analgesics, and acupuncture and released him to return to work on June 21, 1983 which claimant did and thereafter made several trips.

Claimant indicated to defendant employer on August 4, 1983 that he was no longer able to drive. When he picked up his paycheck, he found a report that he had voluntarily quit his job. On August 9, 1983, he called Dr. Ahn and reported his back pain was worse. Dr. Ahn referred claimant to Earl H. Bickel, M.D., an orthopedic surgeon.

Dr. Bickel saw claimant on August 11, 1983 and reported that his clinical impression was degenerative disc disease with acute lumbosacral strain. Claimant was hospitalized from August 12, 1983 to August 20, 1983 and had a discharge diagnosis of chronic lumbosacral strain. Claimant returned to see Dr. Bickel September 21, 1983 and was diagnosed as discogenic disease with possible early facet changes and spondylolisthesis at L5-S1. On October 27, 1983, Dr. Bickel reiterated his chronic strain diagnosis and reported that claimant had probably reached a point of maximum recovery.

Claimant was seen by Warren N. Verdeck, M.D., on December 22, 1983 who diagnosed claimant as having a low back strain, possible radiculopathy on the left side. He did not think he had reached maximum recovery and wanted to wait another two to three months.

Claimant was seen by James R. LaMorgese, M.D., on December 15, 1983 and his impression was "[c]hronic back pain in the thoracic and lumbar regions with intermittent numbness in the left leg after work-related injury without major neurologic findings."

In a letter dated February 10, 1984, Dr. Bickel stated that claimant had probably reached his period of maximum recovery and doubted whether claimant could return to his job as a trucker. He also stated that claimant has a discogenic type of injury with soft tissue injury to his back which is the equivalent to 15 percent permanent partial "disability" of the lumbosacral spine. On July 1, 1984, Dr. Bickel admitted claimant to the

hospital for a myelogram and reported his impression of discogenic disease with possible early facet changes and spondylolisthesis at L-5,S1 with psychosomatic overlay. Dr. Bickel described the myelogram as essentially negative and claimant was discharged from the hospital on July 4, 1984. Claimant thereafter requested additional consultation at the Mayo Clinic.

The records of the Mayo Clinic show that claimant was seen there in September, October and November 1984 by W. R. Marsh, M.D., who concurred with Dr. Bickel's diagnosis of L-5 radiculopathy. Claimant had exploratory surgery at L5 and L6 spaces on November 26, 1984 and on December 10, 1984, Dr. Marsh indicated that claimant did not feel that his pain symptoms were much improved after surgery. Dr. Marsh gave claimant a "disability" rating of 15-20 percent of the person because of persistent pain and mild weakness in the left L5 myotome and thereafter stated that there was no question that claimant's permanent partial disability is wholly related to the injuries sustained in May 1983 and that the period of temporary total disability would be six months from the surgery on November 26, 1984. In a letter dated January 3, 1986, Dr. Marsh stated it was reasonable to conclude that claimant had reached maximum medical improvement with regard to his lumbar spine.

Claimant was examined on one occasion by Peter D. Wirtz, M.D., who, in a letter dated May 1, 1985, reported his opinion that claimant had suffered a lumbosacral strain or musculoskeletal strain to the lumbar area, and that "[t]his condition would clear over a 6-12 week period of time."

G. Brian Paprocki, M.S., a vocational consultant retained by claimant, opined that claimant had sustained a 70 percent industrial disability and would not be able to reenter the labor market without vocational assistance. Carma A. Mitchell, M.S., a vocational consultant, issued a report stating that claimant was employable and listing 14 job titles that claimant could perform. John Hughes, a counselor for the State of Iowa Rehabilitation Evaluation and Services Branch, reported that he was closing claimant's file because of the severity of claimant's disability in relation to the unpredictability of claimant's back affecting his ability to stand and walk in an employment situation.

Claimant testified that he completed one job application at a trucking company on February 15, 1984, but that he did not get a job there, and that he made inquiries at three or four other trucking companies but did not make out applications. Claimant offered that he cannot sit or stand more than 15 to 20 minutes at one one time; that his arms and legs still go numb; that he believes he can lift no more than 20 pounds; that he sleeps only about three hours a night; and that he cannot operate a truck over the road because of the vibration, bouncing and heavy

lifting.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

Before any attempt is made to address the substantive issues involved in this case, it is necessary to resolve the somewhat acrimonious allegations of both parties that the deputy erred, following a myriad of prehearing and hearing motions, responses and objections, in allowing or disallowing certain evidence into the record.

It must first be noted that claimant filed his original notice and petition on March 28, 1984 and on July 15, 1985 a prehearing order was filed advising the parties that all exams and depositions were to be scheduled by September 6, 1985 with discovery completed by December 6, 1985, almost 21 months after the petition was filed and 31 months after the alleged injury occurred. The assignment order filed December 16, 1985 advised all parties they were to exchange witness lists by January 27, 1986. On December 30, 1985, defendants requested a continuation of the hearing on the basis that witnesses had been identified. No request was made to extend the deadline listed in the July 15, 1985 or December 16, 1985 orders. On January 27, 1986, defendants submitted a witness list and filed such a motion to extend time. The deputy commissioner correctly denied defendants' motion. More than adequate time was allowed for discovery in this case. On December 30, defendants indicated they had identified the witnesses they needed to call. The record fails to establish any good cause to extend the deadlines set. An administrative proceeding is not bound by all of the rules of an action brought in the district court; however, even an administrative proceeding must be governed by some limitations. More than adequate time for discovery was allowed in this case. No error is found in the ruling of the deputy. Defendants cannot hold others responsible for their own lack of due diligence.

Claimant assigns as error the deputy's actions in allowing the testimony of Kate Benson, Eris Leonard and Dr. Wirtz while defendants assign error to the exclusion of the dispositions of Roland Miller and David Shreeve and the testimony of Josephine Schwabbe and Michael May.

Defendants' witness list, served January 27, 1986, will control. Although claimant objects this list was not received until January 28, common sense dictates the list was timely. Therefore, those witnesses on the list were properly permitted to testify including Eris Leonard and Dr. Peter Wirtz. Kate

Benson was not on this list and her testimony was to act as a substitute for Carma Mitchell who had been listed. Absent a showing of emergency or other compelling reason, substitutions of witnesses should not be permitted. No such showing was made in this case. Reference was made to some medical condition or problem (Transcript, Page 211) which is insufficient to establish a compelling reason. Therefore, the testimony of Kate Benson should not have been permitted.

The depositions of Roland Miller and David Shreeve (Def. Ex. 5 and 6) should not be admitted as these depositions failed to comply with the Iowa Rules of Civil Procedure, particularly Rule 147(a). Division of Industrial Services Rule 343-4.35 dictates that the rules of civil procedure shall govern the contested case proceedings unless the provisions are in conflict or obviously inapplicable. Rule 147(a) is obviously applicable and not in conflict. No error is found in the deputy's ruling to exclude this testimony. In addition, the depositions on interrogatories of Miller and Shreeve (Def. Ex. 8 and 9) were also properly excluded as not timely. These exhibits were produced just days prior to hearing and clearly exceeded the deadlines established by the prehearing orders and claimant was clearly denied the opportunity to cross-examine. No error is found in the deputy's ruling to exclude this evidence.

The testimony of Josephine Schwabbe and Michael May was properly excluded as their names did not appear on a timely witness list.

Summarily reviewing the objections to various exhibits, it is accepted exhibits A, B and C were properly admitted as impeachment; exhibit 3 was properly admitted as it goes to creaibility; and the evidence of claimant's felony convictions also goes to credibility and may be admitted for its probative value. See Iowa Code section 17A.14.

The second issue to be resolved is the extent of claimant's industrial disability. Claimant argues that he has met his burden of establishing a prima facie showing to place him in the odd-lot category. A review of the evidence establishes claimant has not met his burden in this regard. Claimant's only evidence is that he applied for one job, did not get it, and inquired about three others; that he receives social security disability payments; and that a vocational rehabilitation office declined him services. This evidence falls far short of that needed to establish a prima facie showing that he is unemployable in the sense contemplated in Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). Even if claimant had made a prima facie showing, the defendants presented sufficient evidence to overcome claimant's prima facie showing. Claimant is not unemployable merely because he can no longer drive a truck.

In determining industrial disability, the deputy concluded:

> It was stated by several authorities that the claimant will not be able to return to the job of an over-the-road truck driver. However, claimant has indicated that he would like to try to see if he could do it. Nevertheless, he will probably need rehabilitation services in order to find a job other than driving a truck. The claimant did make one job application and a few other inquiries but otherwise has not made a serious or sustained attempt to find employment within the trucking industry. He has made virtually no attempt to find employment outside of trucking.
>
> ....
>
> Dr. Bickel found that the claimant had a 15 percent permanent partial impairment of the lumbosacral spine. Dr. Marsh determined that the claimant had a 15 to 20 percent rating based upon the Workman's Compensation Guidelines published by the Minnesota Medical Association. No medical evidence was introduced to explain the comparison between the Minnesota standard and the Iowa standard of determining or evaluating impairment. All we know is that Dr. Bickel's number and Dr. Marsh's number are approximately the same numerically for whatever that is worth. Dr. Wirtz thought that the claimant's lumbosacral strain should have resolved itself in six to 12 weeks.

When all factors of industrial disability are considered including claimant's functional disability, age, education, qualifications, experience, and ability to engage in employment for which he is fitted, the deputy was correct in determining that claimant had sustained a permanent partial disability of 20 percent for industrial purposes.

The third and final issue to be resolved is healing period benefits. Claimant initially returned to work but was later unable to do his job, and Dr. Bickel indicated that claimant had reached maximum recuperation by October 27, 1983. Dr. Bickel later wrote on February 10, 1984 that claimant had reached maximum recovery. There is no explanation as to why Dr. Bickel may have changed his impression. More importantly, there is no indication that claimant's condition improved between October 27, 1983 and February 10, 1984 or any other later date. It is therefore accepted that claimant had reached maximum recovery on October 27, 1983.

Claimant, however, had two other surgical procedures related to pain for his work-related injury. While hospitalized for the

surgeries and reasonable recovery time thereafter, claimant would be eligible for temporary total disability benefits. Therefore, claimant was admitted to the hospital on July 1, 1984 through July 4, 1984 (the dates of the myelogram) and from November 26, 1984 to May 26, 1985 (the date of the exploratory surgery at Mayo Clinic and six months for recovery from surgery that Dr. Marsh said would be appropriate). It should be noted that Dr. Marsh's letter of January 3, 1986 did not extend the recovery time from the surgery, but merely indicated that claimant would have reached maximum medical improvement by that time. Accordingly, the deputy's decision is modified to treat the benefits for these surgeries as temporary total disability and to include the dates of the surgery for the myelogram.

FINDINGS OF FACT

1. Claimant was employed by defendants as a truck driver on May 31, 1983 and, while unloading empty beer kegs by stacking them on pallets, one or more of the kegs struck claimant in the back and legs.

2. Claimant immediately suffered low back pain, leg numbness and pain and urinated blood.

3. Claimant reported this injury to his wife and his employer within a few hours after the injury and went to see Yang Ahn, M.D., the following day on June 1, 1983.

4. Dr. Ahn reported that claimant suffered a contusion, spasm of the lumbar area and hematuria and treated claimant from June 1, 1983 with bed rest, medications and acupuncture, releasing him to return to work on June 21, 1983.

5. Claimant worked again and performed his job as a truck driver from approximately June 25, 1983 to August 4, 1983.

6. On August 5, 1983, a dispute arose between the employee and the employer and as a result of the dispute claimant's employment was terminated.

7. Claimant's separation from employment was not related to his work injury.

8. On the day claimant learned that his employment was terminated, he began medical treatment again for his injury by returning to Dr. Ahn who referred claimant to Earl H. Bickel, M.D.

9. Dr. Bickel determined claimant had degenerative disc disease and lumbosacral strain and later determined that a disc was injured but not ruptured or compressed and phrased his diagnosis as discogenic disease stating that claimant had a congenital anomoly or spondylosis, early facet changes and a

strong psychosomatic overlay.

10. Even though the phrasing of the diagnosing changed, claimant's symptoms, complaints and condition neither changed nor improved.

11. The injury it May 31, 1983 was the cause of claimant's back and leg condition.

12. Claimant reached his maximum medical improvement on October 27, 1983.

13. Although claimant continued to see many doctors and even underwent exploratory surgery at the Mayo Clinic largely due to his own insistance, he never demonstrated any significant improvement of his condition.

14. Claimant had surgery at Mayo Clinic on November 26, 1984, and his healing period ended May 25, 1985.

15. Claimant was hospitalized for a myelogram from July 1, 1984 through July 4, 1984.

16. Claimant sustained a permanent partial impairment as a result of the injury of May 31, 1983.

17. Claimant had not shown that he is unemployable.

18. Claimant has not made a serious or sustained effort to find employment.

19. Claimant incurred the medical expenses and mileage as shown on the attachments to paragraph eight and paragraph D of the prehearing order.

20. Claimant did not submit proof of payment of his itemized list of costs.

21. Claimant, currently 50 years old, with a fifth grade education, has sustained a permanent partial disability of 20 percent for industrial purposes.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on May 31, 1983.

The injury is the cause of both temporary and permanent disability.

Claimant is entitled to healing period benefits for the period from June 1, 1983 through June 20, 1983 and again from

August 10, 1983 through October 27, 1983.

Claimant is entitled to temporary total disability benefits for the periods July 1, 1984 through July 4, 1984 and November 26, 1984 through May 25, 1985.

Claimant is entitled to permanent partial disability benefits for industrial disability of 20 percent of the body as a whole for a total of 100 weeks (.20 x 500).

Claimant is entitled to medical expenses and mileage expenses as shown on the itemization referred to as attachments to paragraph 8 of the prehearing report in the amount of $9,885.36 and a total of 3,688 miles.

Claimant is entitled to the costs of this action, but the exact amount cannot be determined because no proof of payment has been submitted.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants pay healing period benefits to claimant for the period June 1, 1983 through June 20, 1983, which is two point eight-five-seven (2.857) weeks, at the rate of two hundred sixty-nine and 18/100 dollars ($269.18) per week for a total payment of seven hundred sixty-nine and 05/100 dollars ($769.05).

That defendants pay healing period benefits to claimant for the period August 10, 1983 through October 27, 1983, which is eleven point two-eight-six (11.286) weeks, at the rate of two hundred sixty-nine and 18/100 dollars ($269.18) per week for a total payment of three thousand thirty-seven and 97/100 dollars ($3,037.97).

That defendants pay temporary total disability benefits to claimant for the periods July 1, 1984 through July 4, 1984 and November 26, 1984 through May 25, 1985, which is twenty-six point four-two-eight (26.428) weeks, at the rate of two hundred sixty-nine and 18/100 dollars ($269.18) per week for a total payment of seven thousand one hundred thirteen and 89/100 dollars ($7,113.89).

That defendants pay to claimant one hundred (100) weeks (.20 x 500) of permanent partial disability benefits for industrial disability beginning on October 28, 1983 at the rate of two hundred sixty-nine and 18/100 dollars ($269.18) per week for a total payment of twenty-six thousand nine hundred eighteen

dollars and 00/100 dollars ($26,918.00).

That defendants pay claimant's medical expenses in the amount of nine thousand eight hundred eighty-five and 36/100 dollars ($9,885.36) as shown on the attachment to paragraph eight of the prehearing report.

That defendants pay claimant three thousand six hundred eighty-eight (3,688) miles of travel expense at the rate of twenty-four cents ($.24) per mile for a total payment of eight hundred eighty-five and 12/100 dollars ($885.12).

That defendants are entitled to credit for any benefits previously paid.

That defendants pay the accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That defendants will pay the costs of the arbitration proceeding in accordance with Division of Industrial Services Rule 343-4.33.

That both parties equally share the costs of this appeal including the costs of transcription of the arbitration hearing.

That defendants file activity reports pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 17th day of August, 1988.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY J. BEARCE,	:	
Claimant,	:	File No. 782809
vs.	:	
FMC CORPORATION,	:	A P P E A L
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on August 31, 1984. Defendant cross-appeals.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 11; claimant's exhibits A, B, and C; and defendant's exhibits 1 and 2. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the following issues on appeal:

I. The Deputy erred in reducing the claimant's industrial disability by use of apportionment relating to a pre-existing condition.

II. The Deputy was in error in establishing the claimant's industrial disability at ten percent.

III. Application of the Odd-Lot Doctrine.

Defendant states the following additional issue on cross-appeal:

I. Did the deputy err in awarding healing period benefits to October 22, 1986 when Claimant's treating doctor released him from treatment on May 22, 1985 and issued a disability rating?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant worked for defendant FMC from 1968 until October 1984, in various capacities, including overhead crane operator and lathe operator. Claimant's duties required him to perform repetitive lifting, bending, twisting, stooping, and prolonged standing. In 1977 claimant was involved in a car accident which resulted in physician imposed restrictions, but these restrictions were later removed.

Claimant experienced low back pain, neck, and shoulder pain following his prior car accident, in which he was struck from the rear. As a result of that accident, claimant was referred by his family doctor to William J. Robb, M.D., an orthopedic surgeon, and Earl Y. Bickel, M.D. Claimant underwent a myelogram in December 1978, by Eugene E. Herzberger, M.D., which revealed mild problems at the L4-5 level. When claimant continued to be unable to return to work, he was referred to a low back institute and was treated by Alexander Lifson, M.D., an orthopedic surgeon.

Claimant then underwent a decompression laminectomy in the low back in May of 1980. Dr. Lifson rated claimant's permanent physical impairment after the surgery as 20 percent to the lumbar spine as a result of the automobile accident. Claimant was also given permanent restrictions of only occasional bending, squatting, crawling, climbing, reaching above the shoulder, kneeling, and lifting not more than 25 pounds.

Claimant was also diagnosed in 1981 as having chronic pain syndrome following a MMPI psychological test. In March of 1981, claimant was placed on light duty work at FMC. In March of 1982, claimant struck his head on a gear box at work and injured his neck. Claimant was treated for cervical strain by James R. LaMorgese, M.D.

Claimant's position was eliminated and claimant was laid off in June of 1982. Claimant testified that he worked on improving his physical condition and received a release from his family doctor stating "all previous weight lifting restrictions have been discontinued. His activities are at his discretion." Claimant thereafter returned to his former job as drill press operator and worked for approximately 11 months before the injury of August 31, 1984.

On August 31, 1984, claimant was working as a drill press operator. Claimant was walking backwards and tripped on a skid, falling backwards. Claimant caught himself by grasping the control box he was operating. Claimant testified he twisted his back in doing so, and felt an immediate onset of low back pain that persisted through the weekend, which was Labor Day weekend. Upon returning to work, claimant again experienced pain and reported this to the plant nurse. Claimant stated

that two supervisors witnessed the incident. However, the record showed that one of the supervisors denied witnessing the incident and the other characterized the incident as minor.

Claimant also operated his own monument business, and on the Monday holiday following the Friday injury, claimant used a pry bar to lift a monument and placed planks weighing 50 to 60 pounds to unload a small skid loader. Claimant stated in his deposition that he did not have any pain while working on the monument, but later stated in his deposition that he had a burning sensation all through the weekend.

Claimant was treated by William R. Basler, M.D., on September 4, 1984. Dr. Basler diagnosed muscle strain, and referred claimant to James R. LaMorgese, M.D., a neurosurgeon, who had previously treated claimant for low back and neck pain. Claimant reported low back pain radiating into his legs and feet to Dr. LaMorgese. Claimant also told Dr. LaMorgese that he did not have pain over the Labor Day weekend. Dr. LaMorgese placed claimant on light duty, and claimant performed light duty for FMC for five weeks until being laid off because of the lack of light duty work.

Claimant was referred to Martin Roach, M.D. Dr. Roach recommended that claimant not return to repetitive work. Dr. LaMorgese also referred claimant to Dr. Lifson again, and Dr. Lifson performed surgery on claimant. Claimant's complaints at this time were headaches, neck pain, mid-back pain and lower back pain. CT scans revealed no new developments since 1980. Claimant also utilized a TENS unit. On May 22, 1985, Dr. Lifson opined that claimant's condition remained unchanged.

In August of 1985, claimant consulted John R. Walker, M.D., an orthopedic surgeon. Dr. Walker opined that claimant's low back condition was caused by scarring from his previous injury, and from the August 31, 1984 back strain at work. Dr. Walker recommended fusion surgery.

Claimant then sought a second opinion from Earl Bickel, M.D., who recommended that a back brace be attempted prior to surgery. Claimant underwent surgery by Dr. Walker in August, 1985. Claimant testified that the surgery reduced his lower back pain but did not eliminate it. Dr. Walker stated that claimant reached maximum healing from the surgery on October 22, 1986. However, Dr. Walker felt that claimant still had signs of disc rupture at the C-5 level and that claimant probably could not return to work as a machinist. In March of 1987, Dr. Walker stated that claimant had improved in the low back and his leg pain had decreased, but claimant's cervical condition was still failing to improve. A myelogram showed cervical disc problems and claimant underwent fusion surgery in May of 1987.

In April of 1986, Dr. Lifson expressed disagreement with Dr. Walker's opinion on the need for surgery, stating that although claimant was probably a candidate for surgery, he would have conducted additional tests first. However, Dr. Lifson acknowledged that claimant's surgery by Dr. Walker had improved his condition.

Dr. Walker stated that claimant reached maximum healing from the surgery on October 22, 1986, but continued to experience low back pain and signs of rupture at the C-5 level. Dr. Walker felt that claimant could not return to work as a machinist.

In March of 1987, Dr. Walker felt claimant was doing better but still failed to improve in the cervical area. A myelogram showed continuing neck problems, and Dr. Walker performed fusion surgery on claimant's neck in May of 1987.

Claimant stated that he has difficulty standing for prolonged periods of time due to hip and lower back pain; he cannot sit for longer than 20 to 30 minutes due to leg pain; cannot lift more than 20 pounds without pain; cannot walk more than two blocks without pain; and has a physician-imposed restriction not to bend, stoop or twist. Claimant states he is never pain free, and must lie on the floor two to three times per day. Claimant states he can no longer work in his farm or monument business as he did before, and cannot climb a ladder or return to his prior work as an overhead crane operator.

Dr. Lifson assigned claimant a permanent partial impairment rating of 20 percent of the body as a whole, with 5 percent as a result of his August 31, 1984 injury. After the surgery by Dr. Walker, Dr. Lifson raised claimant's 20 percent rating of impairment to 30 percent. Dr. Lifson did not rate claimant's neck condition. Dr. Walker assigned claimant's neck condition a permanent partial impairment rating of 6 percent of the body as a whole, and claimant's lumbar spine condition 24 percent of the body as a whole, 10 percent of which pre-existed the August 31, 1984 injury. All of claimant's doctors restrict claimant to light duty work.

Dr. Walker opined that claimant's surgery was necessary due to additional scarring from the August 31, 1984 injury even though the fall on that date was minor and even though claimant had previous scarring and prior surgery.

Claimant's past employment history consisted of trucking, which involved heavy lifting and prolonged sitting, and as a machinist at FMC, which required heavy lifting, repetitive bending, stooping and prolonged standing. Claimant's earnings at the time of the August 31, 1984 injury were $12.00 per hour.

Claimant testified that after his 1977 auto accident, he left the heavy labor of his farming operation to other family

members, and that the heavy labor of his monument business is done by family members since his August 1984 injury.

Claimant was 48 years of age at the time of the hearing, and had a high school education. Claimant has not applied for work since leaving FMC. Richard Bliss of Illinois Job Service stated in February 1987, that claimant is not employable, and cannot be retrained due to his chronic pain. However, Bliss did not perform any testing of claimant but instead relied upon a brief interview. Allen Vikdal, rehabilitation consultant, testified that claimant has transferable skills such as machine operation, trucking, management and planning, and supervisory skills, especially if claimant would complete a pain management program he was enrolled in. Vikdal acknowledged that claimant would have to commute to find employment.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

On appeal, claimant urges that the deputy's determination of 10 percent industrial disability for his back condition is inadequate. The deputy's determination that claimant failed to show a causal connection between his alleged neck condition and his injury of August 31, 1984, is not raised as an issue on appeal.

Claimant has ratings of permanent partial impairment based on his present back condition of 24 percent of the body as a whole by Dr. Walker, and 30 percent of the body as a whole by Dr. Lifson. Subsequent to his injury of August 31, 1984, claimant has restrictions against repetitive work and against bending, stooping or twisting. Claimant stated he cannot stand for prolonged periods of time, sit more than one-half hour, or lift more than 20 pounds without pain. Claimant has also undergone surgery to his back subsequent to his injury of August 31, 1984. Claimant is restricted to light duty work.

Claimant's physical impairment is only one of many factors used to determine industrial disability. Claimant is 48 years old with a high school education. His work experience is limited to physical labor. Vocational rehabilitation testimony on claimant's employability is conflicting, but shows that claimant may have some transferable skills within his restrictions. Claimant has experienced a loss of earnings as a result of his August 31, 1984, injury.

Claimant's motivation is also a relevant factor. Claimant has not sought substitute employment. Claimant argues that he was unable to seek employment because claimant was still

healing from his neck injury even at the time of hearing. However, there is no showing by way of medical evidence that claimant's neck condition prevented him from seeking employment.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 35 percent.

Claimant also urges that the deputy's apportionment of a portion of claimant's present disability due to his prior 1977 car accident was improper. Claimant clearly had significant restrictions after his 1977 automobile accident. Although the lifting restrictions were later removed by his family doctor, Dr. Lifson, an orthopedic surgeon, did not alter his original restrictions on claimant imposed in March of 1981. The fact that claimant was able to return to work and perform the duties of his job is relevant to a determination of what his disability was prior to the present injury, but it is not in and of itself determinative of that question.

It is also noted that claimant had undergone back surgery prior to his injury of August 31, 1984. Regardless of claimant's ability to return to work after that surgery, his prior back surgery undoubtedly caused some degree of permanent physical impairment.

Prior to his August 31, 1984 work injury, Dr. Lifson had assigned claimant a rating of permanent physical impairment of 20 percent to the lumbar spine as a result of the automobile accident and imposed a lifting restriction of not more than 25 pounds. Subsequent to the August 31, 1984 work injury, Dr. Lifson rated claimant's permanent physical impairment as 20 percent of the body as a whole, with 5 percent as a result of claimant's August 31, 1984 work injury. On April 1, 1986, Dr. Lifson revised this rating to 30 percent of the body as a whole, due to the subsequent surgery performed by Dr. Walker.

Dr. Walker rated claimant's condition as 24 percent of the body as a whole, with 10 percent preexisting claimant's August 31, 1984 injury. Claimant thus has medical ratings of permanent physical impairment of 5 percent and 10 percent of the body as a whole for his back condition prior to his August 31, 1984 work injury. Dr. Lifson did not rate claimant's neck condition and Dr. Walker rated claimant's neck condition separately, and thus no apportionment for that condition need be made from the 35 percent industrial disability previously determined.

Claimant's preexisting back condition, however, does need to be apportioned from his present industrial disability. Claimant was able to perform the duties of his job, but nevertheless had prior ratings of 5-10 percent of the body as a whole permanent physical impairment and a prior back surgery. Claimant

also had prior restrictions which were later removed by one of his doctors but not by another. It is determined that claimant had a preexisting industrial disability of 25 percent.

As a third issue on appeal, claimant urges that he falls under the odd-lot category. However, as noted above claimant did not establish the threshold requirement of showing that he had sought employment in the job market. Claimant justifies this by stating that he was unable to apply for work due to the alleged fact that he is still recovering from his neck condition.

However, even if it is assumed that claimant should not be required to show an attempt to find employment, it is also noted that the greater weight of the vocational rehabilitation evidence shows that there are some jobs claimant could perform in the job market. Claimant is not an odd-lot employee.

Finally, defendants on appeal urge that the deputy improperly determined the end of the healing period. Defendants' argument is premised on a rejection of Dr. Walker's conclusion that further surgery was needed. Dr. Walker clearly establishes claimant's maximum healing as occurring on October 22, 1986. Dr. Walker's determination that surgery was necessary is undisputed in the record and has been shown to have improved claimant's condition. Claimant's healing period ended October 22, 1986.

FINDINGS OF FACT

1. Claimant was an employee of defendant employer on August 31, 1984.

2. On August 31, 1984, claimant received an injury arising out of and in the course of his employment with defendant.

3. Claimant injured his back in an automobile accident in 1977.

4. As a result of the automobile accident, claimant underwent back surgery and received a permanent physical impairment rating of 20 percent of the body as a whole, as well as restrictions on lifting, bending, stooping and twisting by Dr. Lifson, an orthopedic surgeon.

5. Claimant's lifting restriction was later removed by claimant's family doctor.

6. Subsequent to his injury, claimant again underwent back surgery, and received a rating of permanent physical impairment of 24 percent of the body as a whole with 10 percent attributable to the 1977 car accident from Dr. Walker; and a rating of permanent physical impairment of 30 percent of the body as a whole, with 5 percent attributable to the 1977 car accident, by Dr. Lifson.

7. Claimant's surgery by Dr. Walker subsequent to his August 31, 1984 injury was to correct scarring and aggravation of claimant's back condition as a result of his August 31, 1984 fall.

8. Claimant reached maximum healing on October 22, 1986.

9. Claimant was 47 years old at the time of the hearing and had a high school education, with work experience limited to physical labor.

10. Subsequent to his injury of August 31, 1984, claimant has a loss of earning capacity of 35 percent.

11. Prior to his injury of August 31, 1984, claimant had a loss of earning capacity of 25 percent.

12. Claimant is not an odd-lot employee.

CONCLUSIONS OF LAW

Subsequent to his injury of August 31, 1984, claimant has an industrial disability of 35 percent.

Prior to his injury of August 31, 1984, claimant had an industrial disability of 25 percent.

As a result of his injury of August 31, 1984, claimant has an industrial disability of 10 percent.

Claimant is not an odd-lot employee.

Claimant's healing period ended October 22, 1986.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendant is to pay unto claimant healing period benefits from October 15, 1984 until October 22, 1986, at the rate of three hundred twenty-one and 10/100 dollars ($321.10) per week.

That defendant is to pay unto claimant fifty (50) weeks of permanent partial disability benefits at a rate of three hundred twenty-one and 10/100 dollars ($321.10) per week from October 23, 1986.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant is to be given credit for benefits previously paid.

That the costs of the appeal are to be shared equally.

That defendant shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 17th day of March, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY BELLIS, Claimant, vs. FIRESTONE TIRE & RUBBER COMPANY, Employer, and CIGNA/INA, Insurance Carrier, Defendants.	File No. 706072 A P P E A L D E C I S I O N FILED SEP 26 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding benefits based on a 25 percent industrial disability.

The record on appeal consists of the transcript of the review-reopening hearing and defendants' exhibits A through K. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is the extent of claimant's industrial disability.

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Briefly stated, claimant testified that he had graduated from high school and served a four-year sheet metal apprenticeship and received his journeyman's card. Prior to the time he worked for the defendant employer (hereinafter the employer) he worked as a sheet metal worker for ten years. He worked from 1972 to January 1982 as a sheet metal worker for the employer. That job required claimant to stand for periods of time and to sometimes lift metal weighing as much as 235 pounds. In 1982, the employer went to a multicraft system and claimant began working as a machinery repairman. He testified the machine repairman job was lighter work than the sheet metal work. The machine repair work involved making minor adjustments on

machinery and replacing broken bearings, belts and chains.

On June 16, 1982, claimant was struck by a fork truck at work. He hurt his left leg, left hip and back as a result of the accident. He was off work approximately two weeks and returned to light duty work until he was laid off in January 1983. After being laid off for approximately three months claimant returned to work for the employer in production. He went back to work in the maintenance department in September 1983.

Claimant was treated by Kent M. Patrick, M.D., and he had surgery on his hip on May 5, 1984. Claimant returned to work with the employer on September 17, 1984 as a machine repairma. Claimant testified that his work is different after the surgery in that he is unable to do a lot of the heavy work and climbing that is sometimes required. He also testified that he gets another man or a hoist or fork truck to help him lift if an item is too heavy. Claimant also testified that in 1985 there was a general wage reduction in an agreement between the union and the employer. He further testified that he intends to continue his present job and his restrictions are a 30 pound weight limit, no bending, and a limited amount of twisting.

A note from Dr. Patrick's office dated October 17, 1983 states: "I feel the majority of Mr. Bellis' problems are referrab [sic] to his left greater trochanteric bursitis." (Defendants' Exhibit H) A note from Dr. Patrick's office dated September 12, 1984 states: "I am letting him return to work on Monday, September 17. He should avoid any repetitive bending, stooping, twisting, lifting, pushing, or pulling. He is not to lift more than 25 pounds. If he is doing well after a couple of weeks, we may be able to liberalize his restrictions." (Def. Ex. H) Subsequent office notes indicate that claimant continued to have pain in his back and in a letter dated January 25, 1985, Dr. Patrick wrote: "Based on Mr. Bellis' low back and hip complaints, as well as his left hip surgery, I feel Mr. Bellis warrants a permanent partial impairment rating of 10% of the body as a whole. This encompasses both his hip and back disease."

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and evidence.

ANALYSIS

The dispute on appeal is the extent of claimant's industrial disability. Defendants argue that the deputy placed too much emphasis on the unsubstantiated loss of speculative employment and too little emphasis on the fact that claimant has continued to be employed by the employer on a full-time basis in essentially the same job and with no loss of earnings. Claimant counters

by arguing that claimant's earning capacity has been reduced because of his work injury.

Claimant has suffered little, if any, loss of earnings as a result of his injury of June 16, 1982. Claimant now has a lifting restriction of 25 to 30 pounds and a restriction on repetitive bending, stooping, twisting, lifting, pushing or pulling. He has a 10 percent permanent impairment rating of the body as a whole. Although that impairment rating appears to include a preexisting back disease, there is no indication that claimant was unable to do his assigned work prior to his work injury. He has returned to his old job, but only with accommodations including assistance from his fellow workers. Even though he has not experienced a loss of earnings as a result of the injury of June 16, 1982, claimant has experienced a loss of earning capacity. Claimant's work history is confined to manual labor jobs. He has lost a portion of his ability to perform those jobs, both his current job and his former job as a sheet metal worker. Nevertheless, claimant was able to return to work on a production job and was working the same job he had prior to the injury albeit with restrictions. Claimant was 47 years old at the time of the hearing and had a high school education. Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 25 percent.

FINDINGS OF FACT

1. Claimant was born on October 16, 1939 and was 47 years old at time of the hearing.

2. Claimant graduated from high school in 1958.

3. Claimant was a sheet metal apprentice from 1958 through 1962.

4. Claimant obtained his journeyman card in 1962.

5. Subsequent to 1962, claimant worked as a sheet metal worker.

6. In 1972, claimant went to work for the employer as a sheet metal worker.

7. In 1982, claimant lost his title as sheet metal worker and was reclassified as a repairman.

8. Claimant is not currently able to do his "consolidated job" without the assistance of a coworker.

9. Claimant currently has pain in his back, leg and hip.

10. Claimant has had hip surgery.

11. Claimant is not currently able to do his trade of sheet metal worker without assistance because of the physical impairment resulting from his work-related injury of June 16, 1982.

12. Claimant's work-related injury of June 16, 1982 caused a whole body permanent partial impairment of about 10 percent.

13. There is a causal connection between claimant's work-relat injury of June 16, 1982 and his approximate 10 percent whole body impairment.

14. Claimant's industrial disability because of the work injury of June 16, 1982 is 25 percent.

CONCLUSION OF LAW

Claimant has proved by the greater weight of evidence that he has an industrial disability of 25 percent as a result of his work injury of June 16, 1982.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at a weekly rate of two hundred ninety-two and 07/100 dollars ($292.07) commencing on September 17, 1984.

That defendants pay accrued benefits in a lump sum, and pay interest pursuant to section 85.30, The Code.

That defendants be given credit for benefits already paid.

That defendants pay the costs of this action including transcription of the review-reopening hearing pursuant to Division of Industrial Services Rule 343-4.33.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 26th day of September, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRENDA BENSON	:	
Claimant,	:	File No. 765734
vs.	:	
GOOD SAMARITAN CENTER,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
ZURICH-AMERICAN INS. COS.,	:	FILED
Insurance Carrier, Defendants.	:	OCT 26 1988

STATEMENT OF THE CASE INDUSTRIAL COMMISSIONER

Defendants appeal from an arbitration decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits A through E; and claimant's exhibits 1, 2, 3 and 6. Claimant's exhibits 4 and 5, which were excluded from the record at the hearing, were not considered on appeal. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

A. Whether or not Brenda Benson sustained a personal injury arising out of and in the course of her employment on May 6, 1984 with Good Samaritan Center.

B. Whether or not Brenda Benson suffered any permanent disability as a result of an alleged injury occurring on May 6, 1984 while employed by Good Samaritan Center.

C. Whether or not interest commences to accrue at the time the award is made or at the last date of payment of compensation.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects

the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant was employed as a nurse's aide in a nursing home. Her duties involved the lifting and handling of patients. On May 6, 1984, claimant felt a pain in her back after lifting two patients. Later the same night, claimant was unable to find any fellow employees to help her lift a patient so she lifted the patient herself and in the process felt a pull in her back. Claimant went home and later that night experienced sharp pain in her back.

Claimant testified she reported the injury before her shift ended. Two employees of defendant employer testified there was no record of this report.

Claimant did not return to work. Six days later claimant sought medical treatment from Susan Urbatsch, M.D. Claimant was unable to lie down for an x-ray because of pain in her back, both upper and lower and extending to her shoulders. Dr. Urbatsch diagnosed back strain and prescribed rest, medication and exercise.

Claimant also received an orthopedic examination by John W. Hayden, M.D., two weeks after her injury. Dr. Hayden aiso diagnosed muscle strain.

Claimant was next examined by W.D. Bigler, D.C., who took x-rays of claimant's spine. Claimant's x-rays showed no abnormaliti

Claimant reached maximum healing on October 25, 1984 and was discharged by Dr. Hayden. Dr. Hayden noted that claimant still had some stiffness in her back, but he felt this would clear up. Claimant did not return to her work at Good Samaritan because of the lifting requirements. Claimant attempted to work as a waitress for a former employer, but the former employer testified that claimant could no longer perform the bending or lifting duties of the waitress job that she had performed in the past. Claimant also worked as a cashier and clerk in a department store, but experienced pain after lifting a box. Claimant did not miss any scheduled time from work as a result of this incident, but claimant was not scheduled to work for the two days after the incident. Claimant filed a separate action for medical benefits as a result of this incident.

Claimant next worked as a motel maid, where her pain was so severe she made beds on her hands and knees. Claimant stated she had difficulty lifting over 20 pounds.

In April 1986, claimant experienced continued low and upper back pain and difficulty in bending, lifting, and standing or sitting for prolonged periods. Claimant returned to Dr. Hayden. Dr. Hayden opined that claimant's condition could

be related to her May 1984 injury.

Claimant was then referred to Susan K. Halter, M.D., for rehabilitation. Dr. Halter diagnosed myofascial pain syndrome, and attributed this condition to claimant's work injury. Dr. Halter stated that claimant would continue to experience pain and assigned a rating of five percent permanent impairment to the body as a whole.

Claimant previously was involved in a car accident in 1962 when she was 12 years old which injured her cervical spine and broke her nose. However, x-rays of the cervical spine after the accident revealed no abnormalities. Claimant testified she had no previous history of back problems prior to her work injury in May 1984.

In February 1987, claimant was examined by C.H. Strutt, D.C., who concluded that claimant had permanent impairment due to the work injury in May 1984. Dr. Strutt also opined that claimant had some preexisting disability from her 1962 car accident, and opined that claimant had a one percent impairment of the body as a whole as a result of the car accident. Dr. Strutt also assigned a rating of impairment of nine percent of the body as a whole for the injury to claimant's lumbopelvic area in 1984. Dr. Strutt recommended that claimant not lift over 20 pounds or bend forward, do rotational activities or stand for prolonged periods of time.

Claimant was 36 years of age at the time of the hearing, and had a high school education. The parties stipulated that claimant was not seeking temporary total disability or healing period benefits, that the medical expenses were fair and reasonable and causally connected to claimant's present condition, and that claimant's rate of compensation was $71.84 per week.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on May 6, 1984 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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.

Apportionment is limited to those situations where a prior injury or illness independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment-related aggravation. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

Section 85.30, Code of Iowa, provides:

> Compensation payments shall be made each week beginning on the eleventh day after the injury, and each week thereafter during the period for which compensation is payable, and if not paid when due, there shall be added to the weekly compensation payments, interest at the rate provided in section 535.3 for court judgments and decrees.

In Teel v. McCord, 394 N.W.2d 405, 407 (Iowa 1986), the Iowa Supreme Court stated:

> [T]he time when an employee's healing period is terminated is the time when disability payments become due....Thus, the legislature could conclude that when the extent of a disability is unknown until after treatment, the employer should pay interest for the period between the termination of the healing period and the award. After all, the employer in effect is holding the employee's money, and presumably earning interest on it. By paying this amount back the employer is only returning money it does not rightfully own. (Emphasis in original.)

In Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 180 (Iowa 1979), the Iowa Supreme Court said: "Section 85.30 expresses legislative intent that interest on unpaid compensation be computed from the date each payment comes due, starting with the eleventh day after the injury....Interest is therefore payable on such installment from that due date, and similarly with the following weekly payments." (Emphasis added.)

ANALYSIS

Defendants' first issue on appeal is whether or not claimant sustained an injury arising out of and in the course of her employment on May 6, 1984. Claimant's duties for Good Samaritan included lifting residents from their wheelchairs. Claimant alleges she was injured on the premises of her employer while lifting a patient. There is no question that claimant was in the course of her duties when she lifted the resident from his wheelchair on May 6, 1984. Claimant's testimony regarding the injury stands uncontroverted.

Claimant experienced back pain immediately thereafter. Her pain became worse during the night. She was unable to return to work. Lifting or catching a heavy weight such as a person is a recognized common source of back strain. Her initial medical examinations, within a few days of the injury, confirmed back strain. Claimant testified she did not have a prior history of back problems. It is thus concluded that claimant's injury arose out of her employment on May 6, 1984.

Claimant must also show a causal connection between her present disability and her work injury. Dr. Hayden testified that claimant's present back condition could have been caused by her May 6, 1984 injury. A possibility is insufficient to carry claimant's burden of proof. A probability is necessary. Dr. Halter testified with certainty that claimant's myofascial syndrome was caused by her May 6, 1984 injury. This opinion was corroborated by Dr. Strutt.

Defendants appear to argue that an incident of pain experienced by claimant on May 22, 1985 is an intervening cause of claimant's present condition. It is noted that prior to May 22, 1985 claimant was seen by several doctors, two of which diagnosed back strain. The incident of back pain after lifting a box while employed as a clerk at the department store did not result in any lost time from work, although claimant was not scheduled to work the two days following that incident. Claimant's description of the incident suggests that the incident was an episode of pain as a result of her previously diagnosed back strain, similar to incidents she described occurring at her home. The greater weight of the evidence indicates that the incident of May 22, 1985 did not result in any permanent disability. It is thus concluded that claimant's present disability is causally related to her injury of May 6, 1984.

Dr. Halter failed to causally relate claimant's urological complaints to the May 6, 1984 injury, and the deputy did not rely on these complaints in the award of benefits. The urological complaints have not been shown to be causally related to the May 6, 1984 injury.

Defendants' next issue on appeal is whether claimant suffered any permanent disability as a result of her May 6, 1984 injury. The record shows that claimant's condition as a result of her May 6, 1984 injury is permanent. Dr. Halter assigned claimant a permanent rating of impairment of five percent of the body as a whole. Dr. Strutt assigned a permanent rating of impairment of nine percent of the body as a whole. Dr. Hayden originally thought claimant's condition would improve, but later acknowledged it had not.

The record contains a reference to a 1962 car accident when claimant was 12 years old. The evidence in that regard shows that claimant's injury in that accident was to her cervical spine, and not to her lumbar spine. In addition, x-rays at the time showed no abnormalities from the accident. It is likely that any lower back effects from the accident would have made themselves known in that period of time. Dr. Strutt did assign a one percent body as a whole impairment rating to this injury, but also separately assigned a nine percent body as a whole impairment rating to the May 6, 1984 injury.

Claimant has physical impairment ratings of five percent and nine percent of the body as a whole. However, physical impairment is only one of the factors in determining industrial disability. Claimant has a 20 pound lifting restriction, and is no longer able to perform her duties as a nurse's aide due to her back condition. Claimant was 36 years old at the time of the hearing and had a high school education. Claimant is motivated to return to work, as evidenced by her attempts to perform other jobs such as a motel maid, even though her back condition made such work difficult for her. Based on these and all other appropriate factors for determining industrial disability, claimant has an industrial disability of 15 percent.

Defendants' final issue on appeal is when the interest on the award begins to accrue. Defendants argue that interest on the award should not accrue until the date of the award, especially since defendants allegedly acted in "good faith."

Interest begins to accrue as each unpaid compensation payment becomes due. In this case, claimant was considered by Dr. Hayden to have reached maximum healing on October 25, 1984. Under Iowa Code section 85.34(1), claimant's healing period ended at that time. Interest on any unpaid portion of claimant's award for permanent partial disability began to accrue as of that date, and shall be calculated according to the due date of each unpaid compensation payment as it became due thereafter.

FINDINGS OF FACT

1. Claimant was employed by defendant Good Samaritan Center as a nurse's aide.

2. Part of claimant's duties included lifting residents of the Center from their wheelchairs.

3. On May 6, 1984, claimant injured her back while lifting a resident.

4. Claimant was diagnosed as suffering back strain and myofascial pain syndrome as a result of the injury on May 6, 1984.

5. Claimant was unable to return to her work at Good Samaritan Center due to her back condition.

6. Claimant attempted various other jobs but found she could not lift over 20 pounds without pain, and could not stand or sit for prolonged periods of time.

7. Claimant was given medical ratings of permanent impairment of five percent of the body as a whole and nine percent of the body as a whole as a result of her injury of May 6, 1984.

8. Claimant was given a lifting restriction of 20 pounds as a result of her injury of May 6, 1984.

9. Claimant's incident of back pain on May 22, 1985 did not result in any permanent disability.

10. Claimant's prior car accident injury in 1962 did not involve her lumbar area.

11. Claimant did not experience any back problems which affected her work prior to May 6, 1984

12. Claimant's injury of May 6, 1984 arose out of and in the course of her employment.

13. Claimant's healing period ended on October 25, 1984.

14. Claimant's wages before and after her injury were at or near minimum wage.

15. Claimant has a loss of earning capacity of 15 percent as a result of her injury of May 6, 1984.

CONCLUSIONS OF LAW

Claimant's injury of May 6, 1984 arose out of and in the course of her employment with defendant Good Samaritan Center.

Claimant's present disability was causally related to her injury of May 6, 1984.

Claimant has an industrial disability of 15 percent as a result of her May 6, 1984 injury.

Interest on any unpaid benefits accrues from October 25, 1984 as each payment becomes due.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at a rate of seventy-one and 84/100 dollars ($71.84) per week from October 25, 1984.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30 from October 25, 1984.

That defendants are to pay the costs of this action including the cost of the transcription of the hearing proceeding.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 26th day of October, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD F. BERTLSHOFER,

Claimant,

vs.

FRUEHAUF CORPORATION,

Employer,

and

CNA INSURANCE COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File Nos. 764496
742752

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendant employer/insurance carrier appeal from an arbitration decision awarding healing period and permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 50; defendants' exhibits A and B; and Second Injury Fund of Iowa's exhibit 1. Both defendant employer/insurance carrier (hereinafter defendants) and claimant filed briefs.

ISSUE

Defendants state the following issue on appeal:

The deputy erred in finding as a fact that claimant's intermittent healing period included the period from October 13, 1984 to July 1, 1985, a period of general plant layoff, and further erred in finding as a conclusion of law that claimant's healing period included those dates.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects

the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant was 39 years old at the time of hearing. Claimant worked as an assembler for defendant Fruehauf Corporation. On August 19, 1983, claimant cut his left forearm on a metal band. Claimant's arm was treated by Donald MacKenzie, M.D., and claimant was off work from August 20, 1983 to September 25, 1983, or five weeks and four days, before returning to light duty. However, after working for two days (September 26 and 27, 1983) claimant began to experience swelling, discoloration, and numbness with his left arm. Dr. MacKenzie advised claimant he had returned to work prematurely, and operated to release claimant's ulnar nerve in November 1983. Claimant was off work from September 28, 1983 through January 22, 1984, or 16 weeks and five days.

Claimant then worked from January 23, 1984 to February 9, 1984. Claimant was off work due to sickness unrelated to his injury from February 10, 1984 to February 14, 1984. Claimant worked again from February 15, 1984 to April 1, 1984.

Claimant was then referred to Barbara J. Campbell, M.D., and William F. Blair, M.D., of the University of Iowa Hospitals and Clinics. Dr. Campbell examined claimant on March 7, 1984, and also examined the records and x-rays for claimant's left arm injury. Dr. Campbell concluded that claimant developed a neuroma in some of the cutaneous nerves near the laceration and that further ulnar release was necessary. Surgery was again performed on April 2, 1984. Claimant missed work from April 2, 1984 to May 20, 1984, (seven weeks).

Dr. Campbell also diagnosed chronic tendonitis of the right arm. Dr. Campbell opined that claimant's right arm problem was a result of claimant's work, and that it was possible that the right arm problem developed from the overcompensation for the left arm. Dr. Campbell also opined that claimant had a permanent impairment to the left arm, but a rating could not yet be given.

Claimant worked from May 21, 1984 to June 12, 1984. He was off work from June 13, 1984 to July 1, 1984, or two weeks and five days as a result of problems with his arms.

Claimant was examined by Dr. Campbell on July 18, 1984. Dr. C later denied that claimant had reached maximum recovery at the time of this examination.

Claimant was released to return to light duty work on July 2, 1984 and worked until August 20, 1984. Claimant was then off work again from August 21, 1984 until September 9, 1984, or two weeks and six days. Claimant worked from September 10, 1984 until October 12, 1984.

Claimant alleged that he suffered an injury to his right arm on September 26, 1984, due to overuse of the arm to compensate for the injury to the left arm.

On December 19, 1984, Dr. Campbell stated: "In response to your letter of October 17, we feel that it is too early to give a permanent impairment rating on this patient. He probably will not reach maximum medical improvement for at least one year post-operatively, which will be May, 1985." (Second Injury Fund Exhibit 1, page 38)

Dr. Campbell also stated an inability to opine whether claimant's right arm was permanently impaired. Claimant was released by Dr. Campbell for light duty work on May 2, 1984.

Claimant was laid off work as part of a general economic layoff from October 13, 1984 through July 1, 1985. Claimant returned to work July 2, 1985 with a restriction of his left arm. Claimant was assigned to do paneling work which required the use of both his arms. Claimant testified that he relied more on his right arm for this work because of the prior problems with his left arm. Claimant began to experience problems with his right arm and was referred to the company doctor, Miles Archibald, M.D. Claimant did not miss any time off work after visiting Dr. Archibald.

Claimant was also seen by his personal physician, J. S. Kaboli, M.D., on September 25, 1985. Dr. Kaboli treated claimant for his right arm injury only, and diagnosed tennis elbow due to abuse and overuse of the hand. Dr. Kaboli stated that claimant's problem would go away if the arm were rested and treated with medication, but that heavy labor would aggravate the condition. Dr. Kaboli stated he could not assign a rating of impairment to claimant's right arm.

William F. Blair, M.D., in a letter dated July 18, 1985, requested the opportunity to examine claimant's range of motion and other factors before giving a rating of permanent impairment for the left arm.

In a letter dated August 14, 1985, Dr. Blair stated:

In your letter of July 8, 1985, you had requested an impairment rating. At this time, Mr. Bertlshofer has reached his maximum medical recovery. A copy of our last clinic note, obtained July 30, 1985 is enclosed. Our impression states that Mr. Bertlshofer has a chronic pain syndrome, involving the left upper extremity. This pain syndrome has 3 components:

(1) Mild medial epicondylitis,
(2) Post cubial tunnel syndrome neuropathy,
(3) A neuroma of the medial antebrachial cutaneous nerve.

These problems are equivalent to an impairment of the upper extremity as follows:

Medial epicondylitis 2%, ulnar neuropathy 5%, neuroma 3%.

These impairment [sic] total a 10% impairment of the left upper extremity.

I hope these comments are helpful to you in the care of your client.

(SIF Ex. 1, p. 40)

On September 18, 1985, Dr. Blair opined that claimant did not have any permanent impairment of his right arm. (SIF Ex. 1, p. 41)

Claimant's last day of employment with defendant Fruehauf was September 29, 1985. Claimant quit when he was told defendant Fruehauf had no light duty work for him.

On January 7, 1986, claimant was seen by Dr. MacKenzie, and it was found that both his right and left arms were stable.

Claimant's absences from work were summarized in exhibits 50 as follows:

8/19/83 Accident
Off work 8/20/83 through 9/25/83 5 weeks, 4 days
Worked 9/26/83 and 9/27/83
Off work 9/28/83 through 1/22/84 16 weeks, 5 days
Worked 1/23/84 through 2/09/84
Off work 2/10/84 through 2/14/84 (sick, not accident connected)
Worked 2/15/84 through 4/01/84
Off work 4/02/84 though 5/20/84 7 weeks
Worked 5/21/84 through 6/12/84
Off work 6/13/84 through 7/01/84 2 weeks, 5 days
Worked 7/02/84 through 8/20/84
Off work 8/21/84 through 9/09/84 2 weeks, 6 days
Worked 9/10/84 through 10/12/84
General layoff 10/13/84 through 7/01/85
Worked 7/02/85 through 9/29/85
Off work 10/01/85 through 7/25/86 9 months, 25 days

(Jt. Ex. 50)

The parties stipulated that claimant's injury of August 19, 1983 arose out of and in the course of his employment; that claimant was paid 34 weeks of healing period benefits, and weekly benefits for 10 percent permanent partial disablity for the left arm; that claimant's rate was $229.34; that claimant's time off was accurately reflected in exhibit 50; and that all medical expenses were paid by the employer and were fair and reasonable.

APPLICABLE LAW

Iowa Code section 85.34(1) states:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of 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.

Healing period benefits may be characterized as that period during which there is a reasonable expectation of improvement of a disabling condition, and ends when maximum medical improvement is reached. Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981).

It is only at the point at which a disability can be determined that a workers' compensation disability award can be made. Until such time, healing period benefits are to be awarded the insured worker. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124 (Iowa App. 1984).

A healing period may be intermittent, and may be interrupted by a return to work followed by another absence from work due to the disability. Willis v. Lehigh Portland Cement Company, I Industrial Commissioner Decisions 485 (1985).

A return to light duty work does not prohibit the reinstitution of the healing period if the employee is again to compelled to leave work because of his injury. Steele v. Holtze Construction Co., Review-reopening Decision filed June 27, 1986.

ANALYSIS

The sole question on appeal is whether claimant's healing

period should include the period from October 13, 1984 through July 1, 1985, the period during which claimant was laid off. Section 85.34(1), of the Code, states that claimant's healing period commences with the date of injury and continues until the earliest of three occurrences.

The first occurrence contemplated by section 85.34(1) is a return to work. Claimant did attempt to return to work several times. On his first attempt, claimant discovered after two days that he had tried to do so prematurely. On the other attempts, claimant was only released for light duty work. Claimant's attempts to return to work resulted in further pain and discomfort and more time off work on each occasion.

The second occurrence contemplated by section 85.34(1) is a determination that the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury. There is no indication in the record that claimant is capable of returning to the same or substantially similar employment. Instead, he now suffers a permanent impairment rating of 10 percent of the left upper extremity, a lifting restriction, and there is testimony that he is incapable of engaging in the type of manual labor he performed before the injury of August 19, 1983. Claimant is restricted to light duty work. Claimant is not medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of the injury of August 19, 1983.

The third occurrence contemplated by section 85.34(1) is when it is medically indicated that significant improvement from the injury is not anticipated. When asked if claimant had reached maximum recovery at the time of the July 18, 1984 examination, Dr. Campbell denied that claimant had reached maximum recovery at that point. In addition, Dr. Campbell opined that claimant would not reach maximum recovery until one year from his surgery, or May 1985. A rating of impairment was not given until August 14, 1985. On that date, Dr. Blair indicated that "at this time, Mr. Bertlshofer has reached his maximum medical recovery..." (SIF Ex. 1, p. 40) This letter referred to claimant's last examination, which occurred on July 30, 1985.

Therefore, the period from October 13, 1984 through July 1, 1985, the period of time in which claimant was laid off work, is a part of claimant's healing period.

As only the extent of claimant's healing period has been raised as an issue on appeal, the remainder of the arbitration decision will be affirmed.

FINDINGS OF FACT

1. On August 19, 1983 claimant suffered an injury to his left arm while at work.

2. As a result of his injury, claimant suffered a permanent partial impairment to the left arm equal to 10 percent.

3. As a result of his injury, claimant underwent an intermittent healing period over the following periods of time:

August 20 through September 25, 1983	5 weeks, 4 days
September 28 through January 22, 1984	16 weeks, 5 days
April 2 through May 20, 1984	7 weeks
June 13 through July 1, 1984	2 weeks, 5 days
August 21 through September 9, 1984	2 weeks, 6 days
October 13, 1984 through July 1, 1985	37 weeks, 3 days
TOTAL	72 weeks, 2 days

4. Claimant achieved maximum medical recovery from his left arm injury on July 31, 1985; he returned to work on July 2, 1985.

5. In September 1983 claimant began to experience pain in his right arm.

6. The pain in claimant's right arm was the result of repetitive or cumulative trauma at work.

7. Claimant gave notice pursuant to section 85.23, The Code, of his injury to his right arm on or about July 27, 1984.

8. Claimant has missed no time off work because of the injury to his right arm.

9. All medical expenses concerning both of claimant's arms have been paid.

10. Claimant has suffered no permanent impairment to his right arm.

11. Claimant's rate of compensation is $229.34.

12. Claimant has been paid 34 weeks of healing period and 25 weeks of permanent partial disability benefits.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that

on August 19, 1983 he received an injury to his left arm arising out of and in the course of his employment.

Claimant has proven by a preponderance of the evidence that there is a causal relationship between his injury and the disability upon which this claim is based.

Claimant has proven by a preponderance of the evidence that as a result of his injury he is entitled to 72.286 weeks of healing period benefits and 25 weeks of permanent partial disability benefits.

Claimant has proven by a preponderance of the evidence that commencing about September 1983 he began to develop a cumulative injury to his right arm which arose out of and in the course of his employment.

Defendants have proven by a preponderance of the evidence that claimant failed to give notice of his injury to his right arm until July 27, 1984 and thus claimant is barred from recovering for injuries to his right arm prior to April 30, 1984.

Claimant has failed to prove by a preponderance of the evidence that he suffered temporary total or permanent partial disability to his right arm.

Claimant has failed to prove by a preponderance of the evidence that he is entitled to recover benefits against the Second Injury Fund of Iowa.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That as a result of the injury of August 19, 1983, defendants shall pay unto claimant additional healing period benefits equal to thirty-eight point two eight six (38.286) weeks at the rate of two hundred twenty-nine and 34/100 dollars ($229.34). All accrued payments are to be made in a lump sum together with statutory interest.

That claimant take nothing as a result of his injury to his right arm.

That claimant take nothing from the second injury fund of Iowa.

That the costs of this action are taxed to the employer.

That the employer shall file a claim activity report in thirty (30) days.

Signed and filed this 14th day of April, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT A. BIRD,

Claimant,

vs.

T.H.I COMMAND HYDRAULICS,

Employer,

and

UNITED STATES FIDELITY & GUARANTY,

Insurance Carrier,
Defendants.

File No. 692179

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding permanent total disability benefits as a result of an injury on January 18, 1982..

The record on appeal consists of the transcript of the review-reopening hearing and the exhibits listed in the prehearing report. Both parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are whether:

1. The claimant sustained his burden of proving a substantial change of condition subsequent to the agreement for settlement approved by the Iowa Industrial Commissioner on July 26, 1983; and

2. The claimant sustained his burden of proof that he is permanently and totally disabled as a result of the injury of January 18, 1982.

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and evidence. In addition, Iowa Code section 85.34(3) (1981) provides in relevant part: "Permanent total disability ... said weekly compensation shall be payable during the period of the employee's disability."

ANALYSIS

The first issue to be resolved is whether claimant suffered a change of condition or a failure to improve as medically anticipated subsequent to the settlement agreement. In this case the claimant has not only suffered a change of condition but he has also failed to improve as anticipated. Claimant was released to full duty without restrictions in June 1983 by an associate of his primary treating physician at the time. Claimant testified that he was feeling good and that he expected to return to work as a welder. Claimant attempted to work as a welder but found that he was not able to do so. Claimant now has difficulty with prolonged sitting and standing. Robert E. McCoy, M.D., who has been a treating physician, now finds claimant to be 20 percent permanently impaired and prior to the July 1983 agreement he rated claimant's impairment at 10 percent in March of 1983. As late as December 17, 1982 Dr. McCoy did not expect the impairment to be severe. Furthermore, it appears that Dr. McCoy thought that claimant would benefit from treatment at the Sister Kinney Institute. While Dr. McCoy did not think that there had been a deterioration of claimant's condition which was not contemplated, he expected claimant to improve. Either claimant's condition is worse than it was prior to the settlement or claimant failed to medically improve as anticipated. Either situation demonstrates a change of condition which means that Dr. McCoy rates claimant as 10 percent more impaired than before the settlement. Dr. McCoy's opinion as a treating physician will be given the greater weight. The opinion of A. J. Wolbrink, M.D., cannot be given more weight than Dr. McCoy's. Dr. Wolbrink examined claimant for evaluation purposes only. Also, Dr. Wolbrink's statement in 1987 that the claimant had "not had any significant change in his problem over the past few years" is unclear what time period he was referencing. It is not known whether or not Dr. Wolbrink thought claimant's condition had changed subsequent to the July 1983 settlement. Claimant has demonstrated a substantial change of condition.

The next issue to be resolved is the extent of claimant's permanent disability. Defendants argue on appeal that the deputy erred in finding that claimant was an "odd-lot" employee and in determining that claimant was permanently and totally disabled.

Claimant demonstrated that he has an impairment of 20

percent of the body as a whole due to a back injury; that he was 30 years old at the time of the injury; that his work experience has been manual labor; and that he has no formal schooling or training beyond the eighth grade. The vocational rehabilitation counselor, Kathryn Schrott, testifying on behalf of claimant, indicated that claimant's intelligence is at the low end of the dull normal range and that he has below average visual motor coordination. She stated that she was familiar with the local labor market and that she thought claimant would have difficulty retraining. She opined that claimant is not employable. Claimant submitted a list of potential employers where he had unsuccessfully sought employment since July 1983. It is claimant's uncontradicted testimony that he had contacted numerous potential employers who were hiring and he was unable to gain employment. Claimant has established a prima facie case that he is an "odd-lot" employee.

It must be determined if defendants have presented sufficient evidence to overcome claimant's prima facie showing that he is an "odd-lot" employee. Defendants rely on the testimony of the vocational rehabilitation counselor, Pricilla Waitek, they retained. Waitek disagreed with Schrott's determination that claimant was not employable. Waitek described jobs that she thought claimant could perform and that are "from time to time" available. Waitek worked with claimant from May 1987 until the hearing in December 1987. During that time claimant had completed two of the five parts necessary to obtain a GED and claimant had applied for employment. The primary disagreement between the parties is whether jobs are available that claimant can perform. Despite the fact that claimant had worked with the vocational rehabilitation counselor retained by defendants for six months, he had not completed his GED, he had not been offered employment, he had not demonstrated any good possibility of retraining, and there had been no openings for jobs he could perform. If defendants' efforts in assisting claimant are successful so that claimant sometime in the future becomes employable, the defendants can then-seek modification of this decision by filing a review-reopening petition. Defendants have not demonstrated that claimant is employable. It is uncontested that claimant has low intelligence, little formal education, below average visual motor coordination, and an impairment of the lower back. He has a work history limited to manual labor and has unsuccessfully sought employment. There has been no showing that jobs are available in the area that claimant is capable of performing. Claimant has met his burden of proving that he has suffered a total loss of earning capacity.

FINDINGS OF FACT

1. Claimant was born June 16, 1951 and was 30 years of age when he suffered an injury to his back on January 18, 1982.

2. On July 26, 1983 the work injury of January 18, 1982 was a cause of 10 percent permanent partial impairment to the body as a whole.

3. Since July 26, 1983 claimant's physical condition has deteriorated and improvement of physical condition did not occur as anticipated.

4. Claimant's work injury of January 18, 1982 is now a cause of 20 percent permanent partial impairment to the body as a whole.

5. Claimant has suffered a change of condition subsequent to July 26, 1983.

6. Claimant's work experience has been manual labor.

7. Claimant has no formal schooling or training beyond the eighth grade.

8. Claimant has below average visual motor coordination.

9. Claimant's intelligence is at the low end of the dull normal range.

10. Claimant would have difficulty retraining.

11. Claimant has unsuccessfully sought employment.

12. There has been no showing that there are jobs available that claimant could perform.

13. Claimant is unemployable.

14. Claimant has suffered a total loss of earning capacity.

CONCLUSION OF LAW

Claimant is permanently and totally disabled.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant weekly benefits for permanent total disability during the period of his disability at the rate of one hundred forty-three and 28/100 dollars ($143.28) per week beginning on February 15, 1985 (the date the last payment for permanent partial disability benefits were to be paid under the settlement agreement approved by this agency on July 26, 1983).

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30 and applicable case law.

That defendants shall pay the costs of this action including costs of transcription of the review-reopening hearing pursuant to Division of Industrial Services Rule 343-4.33 and specifically defendants shall be taxed the sum of eighty-five and 00/100 dollars ($85.00) in favor of claimant for the reports of Dr. McCoy as set forth in the prehearing report.

That defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of March, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUSAN (LITTLE) LENZ BLUME, Claimant, vs. FARMLAND FOODS, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	:	File Nos. 719256 & 653710 A P P E A L D E C I S I O N FILED DEC 27 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal and claimant cross-appeals from an arbitration and review-reopening decision awarding permanent partial disability benefits as the result of alleged injuries on November 1, 1980 and October 12, 1982.

The record on appeal consists of the transcript of the arbitration and review-reopening proceeding; and claimant's exhibits A, B and C. Both parties filed briefs on appeal.

ISSUES

Both defendants' issue on appeal and claimant's issue on cross-appeal address the nature and extent of claimant's disability.

REVIEW OF THE EVIDENCE

The arbitration and review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant worked for Farmland Foods since 1977. Her duties consisted of work on a meat packing line, where she used an electric "wizard" knife during 1980 and 1981. Claimant's work involved the repetitive use of her hands, arms and shoulders.

In September of 1980, claimant sought treatment for pain in her right upper forearm. James Flood, M.D., the company doctor, placed claimant on light duty for one week. On November 16, 1980, claimant's right ring finger became locked in one position. Claimant visited Dr. Flood again and was referred to Timothy C. Fitzgibbons, M.D., an orthopedic surgeon.

Dr. Fitzgibbons diagnosed stenosing tenosynovitis. Claimant underwent surgery to release the locked finger and after the surgery claimant experienced pain in her right shoulder and swelling and numbness of the right hand. Claimant was also found to have a nerve entrapment of the right hand and wrist, resulting in numbness.

Claimant was released back to light duty on January 26, 1981. In February 1981, claimant was discharged by Dr. Fitzgibbons. Dr. Fitzgibbons noted at that time that claimant might have to seek alternative work if her symptoms persisted.

In May of 1981, claimant returned to Dr. Fitzgibbons with pain in the right hand, wrist and forearm. Dr. Fitzgibbons removed claimant from work, particularly from working with a wizard knife.

In August of 1981, claimant again returned to Dr. Fitzgibbons with a recurrence of her symptoms. Dr. Fitzgibbons diagnosed deQuervain's tenosynovitis, administered steroid injections, and took claimant off work. A second release surgery was performed in August of 1981 as well. When this surgery failed to relieve claimant's symptoms, Dr. Fitzgibbons indicated he could help claimant no further and released her to light duty on November 2, 1981 for six weeks to be followed by regular duty.

In October of 1982, claimant experienced pain in her right shoulder. Claimant was treated by Dr. Flood and also by Clifford M. Danneel, M.D., and William R. Hamsa, Jr., M.D., with a diagnosis of right shoulder bursitis and placed on light duty for one month.

On March 8, 1983, claimant continued to experience symptoms and returned to Dr. Fitzgibbons. Dr. Fitzgibbons opined that claimant's right wrist, right forearm, and right shoulder pain and right shoulder bursitis were exacerbations of claimant's earlier problem, stemming from repetitive overuse of her hands, arms and shoulders during her work at Farmland. Dr. Fitzgibbons assigned claimant a seven percent permanent partial impairment of the right upper extremity and returned claimant to light duty work on March 27, 1983.

Claimant next treated with Thomas P. Ferlic, M.D., in June 1983. Dr. Ferlic diagnosed scarring of the radial nerve and stenosing tenosynovitis of the right wrist and performed

surgery in August of 1983. In September 1983, Dr. Ferlic opined that claimant would not have any permanent impairment after her third surgery. Later, Dr. Ferlic stated that claimant had returned to her status prior to the third surgery and that "no permanent disability should result as a result of the surgery." Defendants' exhibit A, page 21.

In May 1987, claimant was examined by a neurosurgeon, Horst Blume, M.D., who assigned claimant a 13 percent permanent partial impairment of the right hand.

The record showed that claimant was compelled to leave work temporarily because of her pain on November 16, 1980; May 5, 1981; August 31, 1981; November 17, 1982; March 8, 1983; and August 29, 1983. Claimant continues to work at her employment with Farmland Foods.

The parties stipulated that claimant received injuries on November 1, 1980 and October 12, 1982 that arose out of and were in the course of her employment with Farmland Foods; claimant is not seeking any further temporary total disability or healing period benefits; claimant's rate is $217.37 per week for the November 1, 1980 injury and $225.78 per week for the October 12, 1982 injury; the fees of Dr. Horst G. Blume are fair and reasonable and causally connected to the work injury.

APPLICABLE LAW

Iowa Code section 85.34(2)(m) states: "The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks."

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).

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 Iowa 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).

The "cumulative injury rule" may apply when disability develops over a period of time. The compensable injury is held to occur at the later time. For time limitation purposes, the injury in such cases occurs when, because of pain or physical disability, the claimant can no longer work. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

ANALYSIS

On appeal, both claimant and defendants raise the issue of the extent of claimant's disability. The medical testimony of Dr. Ferlic consisted of a prediction of no "disability" following claimant's third and final surgery. The reports from Dr. Ferlic are unclear as to whether he is referring to a lack of impairment altogether, or, as stated in his report, a lack of impairment as a result of the third surgery. Dr. Ferlic stated he expected claimant to return to her pre-operative state following the surgery. The record clearly shows that claimant's pre-operative state prior to the third surgery did involve impairment of claimant's right hand.

Claimant's testimony establishes that she does continue to experience pain in her right hand. The testimony of Dr. Blume, who examined claimant subsequent to Dr. Ferlic, confirms an ongoing disability. Dr. Cotton's examination of claimant was for headaches and did not address the right upper extremity. Dr. Fitzgibbons, who first examined claimant, assigned a permanent impairment rating of seven percent of the upper right extremity. Dr. Fitzgibbons examined claimant at a point in time much prior to her treatment by Dr. Ferlic and her examination by Dr. Blume. In addition, Dr. Fitzgibbons did not examine claimant after her third surgery.

Claimant clearly has a loss of function of her right hand. This loss of function affects her ability to perform her work. However, claimant is able to continue with her job at Farmland Foods. Claimant is determined to have a permanent physical impairment of seven percent of the right arm. The opinion of Dr. Fitzgibbons, although giving a corresponding result of seven percent impairment, is given limited weight in light of the remoteness in time of that opinion in relation to claimant's present condition. The conclusion that claimant has seven percent permanent impairment of the right arm is reached after analysis of all of the evidence in the record.

That portion of the deputy's decision that set claimant's rate at $217.37 per week, established a cumulative injury date of August 31, 1981, and ordered defendants to pay the costs of the medical examination of Dr. Blume were not raised as issues on appeal. Therefore, the deputy's decision in regard to those matters stands affirmed.

FINDINGS OF FACT

1. Claimant worked for defendant Farmland Foods on a meat packing line.

2. Claimant's duties involved the repetitive use of her hands and arms and the use of a "wizard knife."

3. Claimant experienced pain and numbness in her right hand and the "locking" of her right ring finger after using the wizard knife.

4. Claimant was diagnosed as suffering deQuervain's teno-synovitis of the right hand.

5. Claimant's condition was limited to the right upper extremity and did not extend beyond the shoulder joint.

6. Claimant's condition was first diagnosed as permanent in November of 1981.

7. Claimant's date of injury is August 31, 1981.

8. Claimant received medical ratings of permanent partial impairment of seven percent of the right upper extremity and 13 percent of the right hand.

9. Claimant underwent three surgeries to relieve her right hand and arm condition.

10. Claimant remained employed at Farmland Foods at the time of the hearing and continued to experience pain and a lack of full movement in her right hand and arm.

11. Claimant's rate is $217.37 per week.

CONCLUSIONS OF LAW

Claimant suffered a cumulative injury on August 31, 1981 that arose out of and was in the course of her employment with defendant Farmland Foods.

Claimant has an impairment of seven percent of the right arm as a result of her work injury of August 31, 1981.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

1. That defendants shall pay to claimant seventeen point five (17.5) weeks of permanent partial disability benefits at a rate of two hundred seventeen and 37/100 dollars ($217.37) per week from November 2, 1981.

2. That defendants shall pay claimant the total sum of two hundred and no/100 dollars ($200.00) as reimbursement for the evaluation by Dr. Blume.

3. That defendants shall pay accrued weekly benefits in a lump sum.

4. That defendants shall pay interest on weekly benefits awarded herein from November 2, 1981.

5. That defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

6. That defendants shall file an activity report upon payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 27th day of December, 1988.

DAVID E LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRRIAL COMMISSIONER

STEVEN L. BOATMAN,

Claimant,

vs.

GRIFFIN WHEEL COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 772267

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening proceeding granting healing period benefits.

The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1 through 15; and defendant's exhibits B and C. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. Claimant is entitled to Temporary Total Disability Payments.

2. Claimant is entitled to additional Industrial Disability beyond the 25% originally given from the arbitration hearing of August 19, 1986, as a result of the Review-Reopening hearing and the proof and facts presented there.

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the law in conjunction with the law is

adopted. Claimant, however, should be awarded temporary total disability benefits instead of the healing period benefits which the deputy ordered, because of the fact that claimant had fully recuperated from his lower back injury of August 13, 1984 when he sustained an apparent temporary aggravation or recurrence of this back condition from August 20, 1986 to September 21, 1986. Further, it is agreed that claimant was taking 18 hours per semester as a full-time student instead of 18 hours a day as the deputy indicated in his decision. However, this fact does not change the decision; claimant is entitled to temporary total disability benefits from August 20, 1986 to September 21, 1986.

Claimant has failed to meet his burden to show that he is entitled to additional industrial disability.

FINDINGS OF FACT

1. The claimant was suffering from the residuals of a herniated disc and its corrective surgery at the time of the hearing on August 19, 1986 and was suffering from the same condition at the time of the hearing on August 3, 1987.

2. The claimant did have an apparent temporary aggravation or recurrence of this back condition from August 20, 1986 to September 21, 1986 which rendered him unable to work during that period of time.

3. The claimant did not prove facts that show a change in impairment, diagnosis, prognosis, limitations or restrictions that occurred after the hearing on August 19, 1986.

4. The claimant did not prove facts that show a change in nonmedical or economic condition after the hearing on August 19, 1986.

CONCLUSIONS OF LAW

Claimant did sustain the burden of proof by a preponderance of the evidence that the recurrence of his back condition caused a temporary inability to work from August 20, 1986 through September 21, 1986.

Claimant is entitled to temporary total benefits from August 20, 1986 through September 21, 1986.

Claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained a change of condition which caused any additional disability after the hearing of August 19, 1986.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant four point seven one four (4.714) weeks of temporary total disability benefits for the period from August 20, 1986 through September 21, 1986 at the rate of two hundred seventy-six and 38/100 dollars ($276.38) per week for a total sum of one thousand three hundred two and 86/100 dollars ($1,302.86).

That defendant pay accrued weekly benefits in a lump sum.

That defendant pay interest on weekly benefits pursuant to Iowa Code section 85.30.

That defendant be given credit for benefits previously paid.

That defendant pay the costs of this proceeding pursuant to Division of Industrial Services Rule 343-3.3. Claimant shall pay the costs of the transcription of the hearing proceeding.

That defendant file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 9th day of November, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD K. BOLANDER, JR.,	:	
Claimant,	:	File No. 839535
Vs.	:	
PEOPLES DRUG STORES, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
CIGNA INSURANCE COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	SEP 27 1988

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a ruling granting defendants' motion for summary judgment.

REVIEW OF THE EVIDENCE

Claimant has filed a petition in arbitration, alleging an injury to his eye. Defendants have filed a motion for summary judgment alleging that no justiciable controversy exists. Claimant is currently receiving healing period benefits and medical benefits. Defendants have acknowledged in their answer that claimant has suffered an injury arising out of and in the course of his employment, but deny causation and dispute the nature and extent of disability. No rating of impairment has been issued. Claimant has acknowledged in his appeal brief that his condition is still unstable. In claimant's resistance to motion for summary judgment, claimant acknowledges that his healing period is not yet completed. Claimant's medical evidence shows that claimant is "legally blind" in his left eye. Claimant has amended his petition to raise the issues of 86.13 penalty and the applicability of the odd-lot doctrine.

APPLICABLE LAW

Industrial Services Rule 343-4.35 states:

> The rules of civil procedure shall govern the contested case proceedings before the industrial

commissioner unless the provisions are in conflict with these rules and Iowa Code chapters 85, 85A, 85B, 86, 87 and 17A, or obviously inapplicable to the industrial commissioner. In those circumstances, these rules or the appropriate Iowa Code section shall govern. Where appropriate, reference to the word "court" shall be deemed reference to the "industrial commissioner."

Iowa Code section 85.34(1) states:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of 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.

Iowa Rule of Civil Procedure 237 provides:

> Summary judgment may be had under the following conditions and circumstances:
>
> ....
>
> (b) <u>For defending party</u>. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c)...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.

The purpose of a summary judgment is to allow a judgment to be obtained promptly without the time and expense of a trial. The entire record, including the pleadings, admissions, depositions,

answers to interrogatories and affidavits, must be read in the light most favorable to the party opposing the motion to determine if there is any genuine issue of material fact. Drainage District No. 119 v. Incorporated City of Spencer, 268 N.W.2d 493, 499 (Iowa 1978). Keener v.Den Tal Ez Manufacturing Co., III Iowa Indus. Comm. Report 152 (1983).

ANALYSIS

Defendants have moved for summary judgment, alleging there is no genuine issue of materiai fact. Iowa Rule of Civil Procedure 237, dealing with motions for summary judgment, is incorporated into these proceedings by Industrial Services Rule 343-4.35.

In the instant case, claimant has not reached maximum recovery. Claimant admits this. Even if claimant's assertion that the medical opinion that claimant is "legally blind" is equivalent to a finding of permanency, the extent of the disability cannot be ascertained while claimant's condition is still changing. Claimant himself describes his condition in his pleadings as "unstable." Therefore, it cannot be determined at this point in time what the nature and extent of claimant's permanent disability, if any, will be. There being no genuine issue of material fact upon which relief can be granted, defendants' motion for summary judgment should be granted. The issues raised in claimant's amendment to the petition, applicability of the odd-lot doctrine and 86.13 penalty, are not ripe for adjudication.

FINDINGS OF FACT

1. Claimant has not reached maximum recovery.

2. Genuine issues of material fact do not exist in this case.

3. Defendants are entitled to a summary judgment.

CONCLUSIONS OF LAW

Defendants' motion for summary judgment should be granted.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants' motion for summary judgment is granted.

That claimant is to pay the costs of this action.

Signed and filed this 27th day of September, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DUAINE A. BRADEN, Claimant, vs. BIG "W" WELDING SERVICE, Employer, and UNDERWRITERS ADJUSTING CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 785744 A P P E A L D E C I S I O N FILED OCT 28 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on January 17, 1985.

The record on appeal consists of the transcript of the proceeding; claimant's exhibits A, B and C; and defendant Second Injury Fund of Iowa's exhibits 1 and 2.

Both parties filed briefs on appeal. Defendant Second Injury Fund of Iowa filed a response to claimant's brief.

ISSUES

Defendant Second Injury Fund of Iowa states the following issues on appeal:

1. The deputy erred by failing to find that claimant was not a credible witness.

2. The deputy erred in finding that the second injury fund was liable to the claimant.

3. The deputy erred in awarding a lump sum with statutory interest from April 11, 1987.

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

In addition, the Second Injury Fund of Iowa has raised as an issue on appeal whether the second injury fund can be ordered to pay interest on unpaid compensation payments. An employer may be ordered to pay interest on unpaid compensation pursuant to Iowa Code section 85.30. Sections 85.63 through 85.69 are titled "Second Injury Compensation Act." Those sections do not specifically authorize interest on unpaid compensation from the second injury fund.

In addition, the second injury fund stands in a position different from an employer in a workers' compensation case. An employer has knowledge of the injury fairly soon after it occurs, whereas the second injury fund may not know of the claimant's injury until a substantial period of time has elapsed. The employer is in a position to investigate the injury and ascertain, at an early point in time, the compensability of the injury. The second injury fund is not able to conduct such an investigation. An employer has some degree of control over the length of time the case takes to be resolved, whereas the second injury fund has less control over the proceedings. Section 85.66 of the Code states that money from the second injury fund cannot be disbursed except upon written order of the industrial commissioner. Thus, whereas an employer has the capacity to settle a claim before a contested case proceeding is instituted, the second injury fund is not able to resolve a case without involvement of the industrial commissioner after a petition has been filed. This necessarily contemplates a time lapse which would unfairly subject the fund to interest on compensation it could not have paid earlier. The second injury fund will not be ordered to pay interest on the unpaid compensation, but will be required to pay any amounts past due in a lump sum.

FINDINGS OF FACT

1. Claimant sustained a work injury on October 13, 1980 to his left knee resulting in a 20 percent impairment to the lower left extremity for which claimant was paid 44 weeks of benefits.

2. Claimant, subsequent to this injury, was able to return to work in his usual occupation although he favored his left

leg and relied on his right leg for additional support.

3. Claimant continues to have difficulty with his left knee.

4. Claimant sustained a work injury January 17, 1985, to his right knee resulting in a 20 percent impairment to the lower right extremity for which he was paid 44 weeks of permanent partial disability benefits.

5. Claimant has worked for the past 22 years as a millwright which requires physical exertion including climbing, lifting, bending, stooping, squatting, walking, working an entire shift on his feet, and additional manual labor.

6. Claimant's work restrictions preclude him from engaging in his usual occupation as a result of his injuries.

7. Claimant has limited ability to stand, walk, climb, lift, and his knees are stiff, sore, painful, weak and cause him to fall down.

8. Claimant is 45 years old with a ninth grade education and has not yet acquired a GED.

9. Claimant has been unsuccessful in his attempts to secure work and has not worked since his last injury on January 17, 1985.

10. Claimant is currently enrolled at Indian Hills Community College and is working toward employment as a parole officer.

11. Serious questions exist as to whether or not claimant has the capability of reaching his goal.

12. Claimant's capacity to earn has been hampered as a result of the combined effects of the injuries of 1980 and 1985.

13. Claimant has sustained an industrial disability as a result of the combined effects of the two injuries.

14. The present condition of the claimant as a result of the combined permanent partial disabilities to the right and left lower extremities results in a loss of earning capacity of 60 percent to the body as a whole.

CONCLUSIONS OF LAW

The compensable value of the permanent injury to the left lower extremity is 44 weeks.

The compensable value of the permanent injury to the right lower extremity is 44 weeks.

Claimant has established an overall industrial disability as a result of the combined effects of both permanent injuries as 60 percent or 300 weeks of permanent partial disability benefits.

The obligation of the second injury fund is 212 weeks of permanent partial disability benefits.

The obligation of the second injury fund commences April 11, 1987.

The second injury fund is not required to pay interest on unpaid compensation.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That the Second Injury Fund of Iowa pay to claimant two hundred twelve (212) weeks of permanent partial disability benefits commencing April 11, 1987 at the stipulated rate of two hundred sixty-eight and 83/100 dollars ($268.83).

That accrued payments are to be paid in a lump sum.

That the Second Injury Fund of Iowa pay the costs of this action, including the costs of the transcription of the hearing proceeding.

Signed and filed this 5th day of October, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JANET BRAGG, Claimant, vs. RALSTON PURINA COMPANY, Employer, and AETNA CASUALTY & SURETY, Insurance Carrier, Defendants.	File No. 720285 A P P E A L D E C I S I O N FILED OCT 27 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying permanent partial disability benefits as the result of an alleged injury on November 24, 1982.

The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits A and B; and defendants' exhibits 1 through 5.

Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. Did the Deputy Industrial Commissioner err in finding that there was no causal relationship between her November 24, 1982 injury and her present claim to permanent partial disability.

2. If the Claimant has sustained an injury resulting in permanent partial disability, what is the disability's percentage as to the whole body and the benefits to be paid in accordance therewith?

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Drs. D'Angelo, Sinning and Goettsch all felt, by late 1983 or early 1984, that claimant should not have a permanent partial impairment on account of her November 24, 1982 injury, but might have occasional symptoms as she resumed full activity.

2. As of early October 1983, Drs. D'Angelo and Sinning released claimant for full duty, including return to work.

3. As of September 29, 1983, claimant had full range of motion of the neck, upper back and shoulders and did not have muscle irritability or spasm. Strength was adequate and appropriate for claimant's size and musculature and no neurological abnormalities were present.

4. As of September 29, 1983, x-rays of that date showed no change as a result of trauma when compared with x-rays taken in December 1982.

5. As of September 29, 1983, claimant tended to tighten her neck and upper back muscles and hold her head and neck in a rigid position making relaxation difficult.

6. As of April 1, 1984, claimant had complaints of neck pain and Dr. Davis diagnosed her condition as myofibrosis.

7. Six months of neck guarding would be sufficient for myofibrosis or muscle foreshortening to develop.

8. Dr. Sinning prescribed gentle stretching of claimant's neck and active range of motion as a means of combating her tightening of her neck muscles.

9. Claimant chose not to continue that program.

10. Constant tightening of neck muscles could possibly induce near-chronic or permanent neck soreness.

11. Claimant has had symptoms consistent with ear, nose and throat disorders which could account for her headaches.

12. Claimant has had diagnoses of possible temporamandibular joint syndrome and hypoglycemia.

13. Temporomandibular joint syndrome may account for headaches.

14. Hypoglycemia is a systematic and not a traumatic disorder.

15. Claimant has had a diagnosis of mild residual radiculopathy in the C8-T1 intervertebral space.

16. Claimant has had a diagnosis and treatment for carpal tunnel syndrome.

17. Claimant has a drug intolerance which has made it difficult to ascertain to which drugs claimant might positively respond and thereby diagnose her condition.

CONCLUSION OF LAW

Claimant has not established a causal relationship between her November 24, 1982 injury and her current disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

Claimant take nothing from these proceedings.

Claimant and defendants shall bear equally the costs of this action, but claimant is to pay for the transcription of the hearing proceeding.

Signed and filed this 27th day of October, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELDON BRITTAIN, Claimant, vs. FISHER CONTROLS, Employer, and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	: : : : : : : : : : : : : : :	File No. 669180 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding permanent partial disability benefits as the result of an alleged injury on May 6, 1981.

The record on appeal consists of the transcript of the review-reopening proceeding; joint exhibit 1; and defendants' exhibit A. Both parties filed briefs on appeal.

ISSUE

Defendants state the following issue on appeal: "Whether or not claimant is entitled to industrial disability greater than 5 percent as a result of the injury of May 6, 1981?"

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant worked for defendant Fisher Controls as a welder, and later a plumber, since 1963. Claimant's previous work experience was as a welder and aviation mechanic. Claimant's duties as a plumber required him to lift weights of up to 60 pounds. Claimant's job description indicated claimant was required to bend and stoop, and that mechanical assistance was provided for weights over 75 pounds.

On May 6, 1981, claimant fell 12 feet from a ladder onto a concrete floor, landing on his buttocks and injuring his neck and low back. Claimant was hospitalized, and x-rays showed a compression fracture at the L-1 level. Claimant remained hospitalized until May 17, 1981.

Claimant had previously undergone a cervical fusion of the L5-6 vertebra in March of 1977. Claimant testified that he returned to work following the surgery and did not experience any difficulty until his fall in May of 1981. After he fell, claimant experienced pain in the neck and low back, and was treated by E. L. Keyser, M.D. Claimant returned to his job in August of 1981, but continued to experience pain in the same area of his low back as his fractured vertebra. Claimant reported low back pain to the company physician on January 5, 1982, and again on November 3, 1982.

On October 5, 1981, Dr. Keyser rated claimant's lumbar spine injury as a five percent permanent impairment of the whole body, but stated he was unable to rate claimant's "other complaints referable to his neck due to an old injury possibly aggravated by this."

On October 30, 1984, claimant felt a snap in his back, and when reporting this to the company medical department, claimant again reported that his back had not "been right" since May of 1981. Claimant also, at that time, expressed the view that although he wished to retire at age 65, he feared that continuing to work that long might cause further back problems.

Claimant retired in February of 1985. Claimant testified that this was two years earlier than he planed to retire, and that he did so due to the pain in his low back and neck. Claimant also testified that retiring early cost him a loss of wages over a two year period as well as a $50 per month reduction in retirement benefits.

An x-ray report from B. F. Peters, radiologist, to Dr. Keyser dated November 1, 1984, showed "[t]he degenerative change at the T-12 L-1 level has increased since a previous examination in our office in June of 1981." (Defendants' Exhibit A-5)

On June 24, 1985, claimant was seen by Robert A. Hayne, M.D., a neurosurgeon. Dr. Hayne, who had previously performed claimant's fusion surgery in 1977, opined that claimant's neck pain was due to degenerative changes in his cervical spine region which were aggravated by the fall from the ladder sustained on May 6, 1981, and that claimant's L-1 fracture was also a result of that fall. Dr. Hayne assigned claimant a permanent impairment rating of 13-14 percent of the body as a whole, with 4 percent as a result of the May 6, 1981 fall, and 8-9 percent attributable to the prior cervical fusion.

However, on March 19, 1986, Dr. Hayne assigned a six percent impairment of the body as a whole to the May 6, 1981 fall, due to irritation and aggravation of claimant's degenerative arthritis condition by the May 6, 1981 fall and subsequent symptomatology. Dr. Hayne also imposed a lifting restriction of "around forty to fifty pounds." Dr. Hayne did not utilize a medical rating guide in arriving at his conclusions. In his deposition, Dr. Hayne also stated that claimant's fall of May 6, 1981, probably accelerated claimant's degenerative arthritis on a temporary basis.

Claimant was also examined by Jerome G. Bashara, M.D., an orthopedic surgeon, in October of 1986. Dr. Bashara opined that claimant has a 25 percent permanent partial impairment to the body as a whole as a result of his neck condition, with five percent due to a preexisting condition of spondylosis, and ten percent attributable to the herniated cervical disc repaired in 1977 by Dr. Hayne, and the remaining ten percent attributable to claimant's May 6, 1981 fall.

Dr. Bashara also opined that claimant sustained a 15 percent permanent partial impairment of the body as a whole due to his compression fracture in the lower back suffered in the May 6, 1981 fall. Dr. Bashara imposed restrictions on the tipping or rotating of claimant's neck, and recommended that he not operate a motor vehicle due to his restrictions on claimant's back. Dr. Bashara assigned zero percent impairment to claimant's lumbar strain occurring in 1984.

Claimant continues to experience pain in the base of his head, lower back, right side, hips, and in his right shoulder; headaches; and numbness of the arm. Claimant has not sought other employment, and acknowledges he is not totally disabled. Claimant stated he is no longer able, due to his back pain, to work as a mechanic on motorcycles as he once did, but claimant does still ride a three-wheeled motorcycle over long distances but needs to stop and rest his back frequently.

Claimant was 65 years old at the time of the hearing, and had an eighth grade education. The parties stipulated that on May 6, 1981, claimant received an injury which arose out of and was in the course of his employment with defendant Fisher Controls; claimant's rate of weekly compensation in the event of an award is $226.72; claimant was not seeking any healing period benefits; and that defendants have paid all medical benefits due.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 6, 1981 is causally

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

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 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 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).

In a review-reopening proceeding where it was apparent during the course of the proceedings that claimant would have some degree of permanent disability, defendants are liable for interest on unpaid permanent disability compensation payments after the end of the healing period as each payment became due. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

ANALYSIS

Defendants have listed only one issue, the nature and extent of claimant's disability, in their appeal brief. However, defendants' appeal brief addresses two additional issues as well: (1) whether claimant's present disability is causally connected to his May 6, 1981 injury; and (2) if an award is made, when interest on the unpaid portion of the award shall commence to accrue.

In regards to the causal connection issue, Dr. Hayne at one point describes claimant's May 6, 1981 fall as only temporarily aggravating claimant's degenerative arthritis. However, in 1985 Dr. Hayne attributes a significant portion of claimant's impairment at that point in time to the effects of the May 6, 1981 fall. Dr. Bashara's testimony does clearly causally connect claimant's present condition to his May 6, 1981 injury. Taken as a whole, the medical testimony in the record establishes that at least a portion of claimant's present condition is causally connected to his May 6, 1981 injury.

Defendants also allege on appeal that the review-reopening decision improperly assesses the nature and extent of claimant's disability. Since claimant's injury is an injury to the body as a whole, claimant's disability is to be determined industrially.

Claimant's physical impairment as a result of his fall on May 6, 1981 is one factor utilized in determining industrial disability. Claimant has a lifting restriction of 40-50 pounds. Claimant has received ratings of impairment for his lumbar back, as a result of the May 6, 1981 fall, of five percent and fifteen percent of the body as a whole, and ten percent of the body as a whole for his neck as a result of the May 6, 1981 fall. Claimant also received a rating of six percent of the body as a whole for the combined lumbar and neck injuries as a result of the May 6, 1981 fall. Claimant was also given ratings of impairment of eight to nine percent and ten percent

of the body as a whole for his prior cervical fusion, and five percent of the body as a whole for a prior spondylosis.

Claimant's age was 65 at the time of the hearing. Claimant's proximity to normal retirement age is a relevant consideration. Although claimant has clearly lost earning capacity as a result of his injury, his loss of earning capacity is not as great as that of someone injured earlier in life. Claimant's education is limited to the eighth grade. This, along with his age, makes retraining or vocational rehabilitation impractical. His work experience is limited to heavy labor, which he can no longer perform as a result of his injury. Claimant cannot return to his old job, and cannot work at any other physical labor jobs where lifting is involved.

Claimant has lost earnings as a result of his injury. He is no longer employed. Defendants argue that claimant's retirement was voluntary, and not a disability retirement. Claimant urges that he has suffered economic loss because he planned to retire at age 65, two years later, and that he now receives less retirement income than he would have if he had worked until age 65.

Claimant's subjective plans on when he would retire carry little weight. Although his testimony in this regard is lent some credibility by the fact that he made statements about his plans to third persons during his medical treatment, nevertheless his statements are self-serving and unverifiable. However, claimant's testimony that he quit work because of the pain he was experiencing as a result of his injury is relevant, and it is determined that claimant has lost earnings due to his injury.

Claimant's motivation is also a proper factor. Claimant has made no efforts to find alternative employment. Claimant admits he is not totally disabled. It is also noted that the employer apparently made no effort to find light duty work for claimant.

Based on these and all other appropriate factors for determining industrial disability, it is determined that claimant has an industrial disability of 35 percent.

Claimant did suffer a cervical fusion prior to his fall on May 6, 1981. Claimant also had a preexisting spondylosis. Dr. Bashara attributed ten percent impairment of the body as a whole to claimant's cervical fusion, and five percent impairment of the body as a whole to claimant's spondylosis. Claimant is determined to have had a prior industrial disability of ten percent of the body as a whole.

The final issue is when interest on unpaid portions of the award should commence. Defendants have already paid claimant

the equivalent of a five percent industrial disability. It was apparent that claimant would have some degree of permanent disability. Interest on the remaining portion of the award will accrue as each payment became due following the end of claimant's healing period, which the parties stipulated was August 17, 1981. Interest therefore accrues from the point at which the disability payments would have become due.

FINDINGS OF FACT

1. Claimant was employed by defendant employer as a plumber.

2. Claimant's duties included heavy physical labor, including lifting weights up to 60 pounds.

3. On May 6, 1981, claimant received an injury which arose out of and was in the course of his employment when he fell off a 12 foot ladder injuring his neck and lower back.

4. Claimant began to experience pain in his back and neck when he returned to work.

5. Claimant received permanent partial impairment ratings of five percent and fifteen percent of the body as a whole for his back condition, ten percent of the body as a whole for his neck condition, and six percent of the body as a whole for both his neck and back conditions as a result of his fall on May 6, 1981.

6. Claimant was given medical restrictions against lifting weights over 40-50 pounds.

7. Claimant left work due to his medical condition in February 1985.

8. Subsequent to the injury of May 6, 1981, claimant cannot perform the duties of his prior job, or lift, drive a vehicle, or perform heavy labor.

9. Claimant's work experience is limited to welding, plumbing and heavy labor.

10. Claimant's age at the time of the hearing was 65 years old.

11. Claimant had an eighth grade education.

13. Claimant's weekly rate is $226.72.

14. Claimant has a 35 percent loss of earning capacity at the time of hearing.

15. Claimant had a loss of earning capacity of ten percent prior to his injury of May 6, 1981.

CONCLUSIONS OF LAW

Claimant's present neck and back conditions are causally connected to his work injury of May 6, 1981.

Claimant has an industrial disability of 35 percent as a result of his work injury of May 6, 1981

Claimant had an industrial disability of ten percent prior to his work injury of May 6, 1981.

Interest on the unpaid portions of this award shall accrue as each payment became due.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at a rate of two hundred twenty-six and 72/100 dollars ($226.72) per week from August 17, 1981.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants are to pay the costs of this action.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 28th day of February, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELDON BRITTAIN,

Claimant,

vs.

FISHER CONTROLS,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 669180

O R D E R

G R A N T I N G

R E H E A R I N G

The defendants have filed an application for rehearing of the appeal decision in this case pursuant to Iowa Code section 17A.16(2). The application for rehearing is limited to the interest issue.

THEREFORE, it is ordered:

A rehearing limited to the interest issue is granted.

The parties shall have twenty (20) days from the date of this order in which to file briefs on the interest issue.

Signed and filed this 17th day of March, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELDON BRITTAIN, Claimant, vs. FISHER CONTROLS, Employer, and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 669180 R U L I N G O N R E H E A R I N G

STATEMENT OF THE CASE

Defendants have requested a rehearing limited to the question of when the obligation to pay interest on the award of benefits to claimant shall begin. The rehearing request was granted.

ISSUES

The sole issue on rehearing is when defendants' obligation to pay interest on claimant's permanent partial disability award begins.

REVIEW OF THE EVIDENCE

Claimant was injured on May 6, 1981. Claimant was paid healing period benefits by defendants and returned to work in August 1981. Claimant retired in February 1985.

On February 12, 1985, claimant filed his petition. It was not until June 24, 1985 that claimant obtained a rating of permanent physical impairment. The deputy's arbitration decision determined that claimant's healing period ended August 16, 1981 and claimant's entitlement to permanent partial disability benefits began on that date. The arbitration decision awarded claimant 125 weeks of permanent partial disability benefits from August 17, 1981. Defendants appealed. The appeal decision affirmed the review-reopening decision and ordered defendants to pay interest on any unpaid benefits from August 17, 1981. Defendants' rehearing is limited to the interest question.

APPLICABLE LAW

Section 85.30, Code of Iowa, provides:

Compensation payments shall be made each week beginning on the eleventh day after the injury, and each week thereafter during the period for which compensation is payable, and if not paid when due, there shall be added to the weekly compensation payments, interest at the rate provided in section 535.3 for court judgments and decrees. (Emphasis added.)

ANALYSIS

Defendants request application of the approach adopted for review-reopening cases in Dickenson v. John Deere Products Engineering, 395 N.W.2d 644, 648 (Iowa App. 1986). Dickenson was decided by the Iowa Court of Appeals on June 25, 1986. The court held that interest on claimant's permanent partial disability award should have commenced on the date when the claimant commenced his action for review-reopening of his claim. In reaching this conclusion, the court of appeals considered Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1954).

In Bousfield, the supreme court held that a claimant awarded additional benefits upon review-reopening was entitled to interest only from the date of the decision awarding further benefits. However, in Dickenson the court noted that Bousfield was decided prior to amendments of both section 85.30 and 535.3, Code of Iowa. The court therefore found Bousfield not controlling.

In Dickenson, the court of appeals rejected the employer's argument that interest should only begin on the date of the industrial commissioner's decision. However, the court of appeals also rejected Dickenson's argument that interest should accrue from the end of the healing period.

The court of appeals concluded by stating: "We find the better rule in review-reopening proceedings is to begin interest payments on the date the claimant files the petition for review-reopening." Dickenson, at 649.

Four months later, on October 15, 1986, the Supreme Court of Iowa decided Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Teel was injured in 1974. The extent of his disability was not known, however, until after his last surgery in 1980. He returned to work in February of 1981.

Teel filed a claim in review-reopening. After Teel was awarded permanent partial disability benefits, the defendants sought a declaratory judgment as to the date the interest was to accrue. Both the deputy industrial commissioner and the commissioner ruled that interest accrued from the date of the

award, but this ruling was reversed on appeal to the supreme court, which held that interest accrued from the end of the healing period.

The case sub judice and Teel are factually similar. In Teel, defendants promptly paid claimant all benefits that were known at the time. In the present case, defendants promptly paid claimant all benefits that were known at the time. In Teel, claimant was off work for a period of time and then returned to work. In the present case, claimant was off work for a period of time and then returned to work.

The supreme court noted in Teel that under section 85.34(1), an employee's healing period terminates when he returns to work, and permanent disability compensation payments became "due" at that point, and accordingly the interest on Teel's award began to accrue when he returned to work. The supreme court stated: "Thus, the time when an employee's healing period is terminated is the time when disability payments become due.... Accordingly, the interest on this employee's award for permanent partial disability became due when he returned to work...." Teel, at 407.

After reaching this conclusion, the supreme court then went on to say:

> Moreover, there is no question the employee in this case suffered some disability as a result of his injuries. The problem occurred in determining how much it was. Had the medical community been able to answer that question without further treatment, he clearly would have been entitled to compensation when he first returned to work. Thus, the legislature could conclude that when the extent of a disability is unknown until after treatment, the employer should pay interest for the period between the termination of the healing period and the award. After all, the employer in effect is holding the employee's money, and presumably earning interest on it. By paying this amount back the employer is only returning money it does not rightfully own.

Teel, at 407. (Emphasis in original.)

Review-reopening cases exist in two forms. A review-reopening case may be based on a change of condition occurring subsequent to a prior award or agreement of settlement. Additionally, a review-reopening may be based on a prior memorandum of agreement if the injury occurred before July 1, 1982. Both Teel and Dickenson were review-reopening cases based on prior memorandums of agreement. The case sub judice is also a review-reopening based on a memorandum of agreement. Teel was decided by the Iowa Supreme Court four months later than Dickenson. However,

Teel does not expressly overrule Dickenson. Dickenson lays down a specific holding that "We find the better rule in review-reopening proceedings is to begin interest payments on the date the claimant files the petition for review-reopening." Dickenson, at 649. Yet Teel, also a review-reopening case, applies a different approach and awards interest from the end of the healing period.

Defendants urge that Teel does not overrule Dickenson, but rather supplements it. Defendants would maintain that Teel establishes an exception to the rule of Dickenson. Defendants urge that Dickenson requires interest only from the date of the petition, except where the defendants knew or should have known at an earlier point in time that permanency had resulted (Teel). Defendants then conclude that since they had no notice of permanency, they fall under Dickenson and not Teel. Defendants place emphasis on the following:

> Moreover, there is no question the employee in this case suffered some disability as a result of his injuries.... Thus, the legislature could conclude that when the extent of a disability is unknown until after the treatment, the employer should pay interest for the period between the termination of the healing period and the award. (Emphasis in original.)

Teel, at 407.

Defendants argue that the converse of this statement is as follows: when an employer has no indication of permanent disability, the employer is not liable for interest between the healing period and the award. However, this is an incorrect reading of the quoted passage. Teel refers not to a lack of knowledge of permanency on the part of the employer, but on the part of the medical profession. This is confirmed by the third sentence of the paragraph in question: "Had the medical community been able to answer that question (the extent of permanent disability) without further treatment, he clearly would have been entitled to compensation when he first returned to work." (Emphasis added.) Teel, at 407. The supreme court recognized that Teel's actual medical condition was not determinable until a later point in time. When his permanent disability was finally determined, interest was awarded from its onset (the end of the healing period).

Section 85.30 states that if compensation benefits are not paid "when due," interest thereon shall be paid. Section 85.30 does not by its language limit itself to that point in time when defendants are put on notice that permanent compensation will be due and owing, but rather states that the obligation to pay interest begins to accrue when compensation owing is not paid "when due."

In arguing that defendants acted in good faith, defendants misinterpret the nature of the duty to pay interest under section 85.30. Interest is not a penalty, such as the penalty contemplated in section 86.13 for unreasonable delay in the payment of benefits. Defendants are not being assessed interest because they unreasonabl delayed payment of permanent partial disability benefits to claimant. Defendants are being assessed interest because from the date of claimant's permanent disability (the end of his healing period) until the compensation is paid, defendants had the beneficial use of the compensation funds claimant became entitled to at the end of his healing period.

Thus, the fact that defendants acted in good faith and reasonably did not realize that an obligation for permanent disability compensation was accruing is not relevant. Claimant's compensation for his loss of earning capacity during this period of his life was in defendants' hands earning money for defendants instead of for claimant. There is no allegation that defendants unreasonably withheld these funds. If such an allegation were made and proven, then a penalty under section 86.13 might be appropriate. Defendants commendably paid the obligations known at the time promptly. But while doing so may protect defendants from a claim for penalty under section 86.13, it does not entitle them to the interest they earned on claimant's money during the time claimant's permanency existed but was as yet undetermined. Claimant's permanent disability did not begin on the date he filed his petition, or when he received his rating of permanency. Claimant's permanent disability was found to have begun earlier, on August 16, 1981, at the end of his healing period, and both compensation payments and the interest thereon began to accrue at that time. To find that claimant's permanent loss of earning capacity and compensation therefor became "due" on August 16, 1981, but that interest on that compensation is not owing until a later point in time would directly contradict the plain language of section 85.30.

Finally, it is noted that the primary purpose of workers' compensation laws are to benefit working persons and should be liberally construed in favor of injured employees. Doerfer Division of CCA v. Nichols, 359 N.W.2d 428, at 432 (Iowa 1984). Although the result is not wholly satisfactory in light of the substantial period of time elapsed between claimant's return to work and the filing of the claim, it is nevertheless concluded that under section 85.30 and Teel, claimant is entitled to interest on his permanent partial disability award from August 16, 1981, the date on which his healing period ended and his permanent partial disability began.

It is also noted that this case is a review-reopening based on a memorandum of agreement. A review-reopening based on a change of condition subsequent to an award or settlement may require a different analysis.

CONCLUSION OF LAW

Claimant is entitled to interest on the award of permanent partial disability benefits from the end of the healing period (August 16, 1981).

ORDER

THEREFORE, it is ordered:

That defendants shall pay interest on unpaid portions of the award of permanent partial disability benefits from August 16, 1981.

Signed and filed this 20th day of November, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL BRUNS,

Claimant,

vs.

TWO GUYS PLUMBINS & HEATING,

Employer,

and

USF&G FIRE & CASUALTY,

Insurance Carrier,
Defendants.

File No. 811654

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying permanent partial disability benefits as a result of an alleged injury on November 3, 1985.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 15; and defendants' exhibits A and B.

Claimant did not timely file an appeal brief. Defendants' brief on appeal and claimant's reply brief were considered on appeal.

ISSUES

As claimant did not file an appeal brief, the appeal will be considered generally and without regard to specified errors to determine its compliance with the law.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant stored pipe in the barn on his property for the benefit of the employer.

2. On November 3, 1985, while attempting to retrieve pipe to be used in the employer's shop, claimant lifted a baler causing pain in his back and groin.

3. Claimant, who had been treated by a chiropractor periodically since 1980 for low back pain, returned to see the chiropractor November 5, 1985 and was unable to work from November 4 through December 15, 1985.

4. Claimant received his regular wages of $275 per week while he was unable to work from November 4, 1985 through December 15, 1985.

5. Claimant returned to light duty work December 16, 1985 but continued to experience pain.

6. Claimant was referred to an orthopedic surgeon and was treated with an injection of cortisone and bed rest.

7. Claimant was unable to work from December 18, 1985 through January 5, 1986.

8. Claimant received his regular wages of $275 per week while he was unable to work from December 18, 1985 through January 5, 1986.

9. Claimant was released to return to work without restriction effective January 6, 1986.

10. Claimant returned to work and was able to perform all the responsibilities of his regular job by January 27, 1986.

11. Claimant has since changed jobs and began working at another plumbing and heating company with essentially the same responsibilities as he had for defendant employer.

12. Claimant has been able to perform all the responsibilities of his new job, has missed no work as a result of his back problem, and has neither sought nor received medical treatment for any back problem since his release to return to work January 6, 1986.

13. Claimant, who farmed 40 acres at the time of the injury, is still able to continue in that endeavor and now farms approximately 100 acres.

14. Medical treatment which claimant received was as a result of the injury of November 3, 1985.

15. Claimant has not established any permanent restrictions, permanent limitations in his work activity, or permanent impairment as a result of the injury.

16. Claimant incurred medical expenses in the following amounts for the treatment of his injury:

Parkersburg Chiropractic Clinic	$183.00
Garry Teigland, D.O.	23.00
Jitu Kothari, M.D.	307.00
Parkersburg Pharmacy (Prescriptions)	27.83

CONCLUSIONS OF LAW

Claimant sustained an injury arising out of and in the course of his employment November 3, 1985.

Claimant has established that the work injury was the cause of his disability.

Claimant has failed to establish he sustained any permanent partial disability as a result of the work injury.

Claimant has established his entitlement to temporary total disability benefits for the periods from November 4 through November 21, 1985, and December 18, 1985 through January 5, 1986, and defendants are entitled to a week-for-week credit for the wages paid to claimant during these periods.

Claimant has established his entitlement to medical expenses under Iowa Code section 85.27 for the treatment of his work injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant is entitled to no further weekly benefits as a result of this proceeding.

That defendants shall reimburse claimant for the following medical expenses:

Parkersburg Chiropractic Clinic	$183.00
Garry Teigland, D.O.	23.00
Jitu Kothari, M.D.	307.00
Parkersburg Pharmacy (Prescriptions)	27.83

That defendants are to pay the costs of this action, but claimant is to pay the costs of the transcription of the hearing proceeding.

Signed and filed this 31st day of October, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOYCE BURKHEAD, Claimant, vs. DR. KEN HENRICHSEN d/b/a WINTERSET VETERINARY CLINIC, Employer, and UNITED FIRE & CASUALTY COMPANY, Insurance Carrier, Defendants.	:	FILE OCT 31 198 File No. 728496 IOWA INDUSTRIAL COMM A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability and medical benefits.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 12; and defendants' exhibit A. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. The arbitration decision is in error in its finding that on April 23, 1983, Joyce Burkhead suffered disablement as the result of an occupational disease which arose out of and in the course of her employment at the Winterset Veterinary Clinic.

2. The arbitration decision is in error in its finding that all of the symptoms and alleged disability of Joyce Burkhead at the time of the hearing are correctly related to an occupational disease and adequately demonstrated to have sufficient nexus to her chemical exposure as determined by her attending physicians.

3. The arbitration decision is in error in its finding that Joyce Burkhead has a physical impairment rating of 25% to 30% directly related to her chemical exposure at Winterset Veterinary Clinic.

4. The arbitration decision is in error in its finding that Joyce Burkhead has sustained an industrial disability rating of 45% related directly to her chemical exposure while employed at the Winterset Veterinary Clinic.

5. The arbitration decision is in error in its finding that Joyce Burkhead is entitled to temporary total disability benefits for the period September, 1983 through June, 1984.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Claimant worked from September 1981 until April 1983 as a secretary and mixer of feed additives for defendant Winterset Veterinary Clinic (hereinafter defendant). Claimant was required to mix liquid and dry chemicals in a large garbage can, which resulted in chemical dust in the air and on surfaces where claimant worked. Claimant initially was required to work without protection, but later was issued gloves and masks. Claimant and a coworker testified that claimant was regularly exposed to physical contact with the dust on her hands, face, eyes, nose, mouth, hair, and also breathed the chemical dust. The dust contained such chemicals as copper sulfate, arsonilic acid, and F.O.A. 290. Claimant testified she was not exposed to these chemicals at any location other than her employment with defendant, and has not been exposed to those chemicals since leaving her employment there.

Prior to 1980, claimant worked for another veterinary clinic where she mixed antibiotics. Claimant experienced an allergic rash on the face in the earlier employment due to exposure to Glytassin and Oxytetracycline powder. Claimant was diagnosed by Robert T. Schulze, M.D., a dermatologist, as having contact dermatitis at that time.

Approximately three months after beginning employment with defendant in September 1981, claimant experienced headaches, watering eyes, post nasal drainage and nasal congestion. Claimant testified that these symptoms became worse during the times she was required to mix chemicals.

In January 1983, claimant experienced a rash on her face and edema of the eyelids. Claimant saw Dr. Schulze again and was treated with steroid injections, eyedrops and skin ointments. Between January 1983 and March 1983, claimant experienced watery eyes and nasal congestion, post nasal drainage, headaches and

fatigue. Claimant experienced these symptoms as soon as she began work in the morning, with the symptoms decreasing after she went home.

Claimant was referred by her employer to Roger I. Ceilley, M.D., a dermatologist. After conducting patch tests, Dr. Ceilley found that claimant was highly sensitive to copper sulfate, and also sensitive to arsonilic acid, F.O.A. 290, and quaternium-15

On March 15, 1983, claimant mixed a bag of feed additive. That evening, her eyes began to water and swell. Claimant reported to work the next day with one eye swollen nearly shut. Her employer, Dr. Henrichsen, noticed her condition and commented that it was probably due to the chemicals she had mixed the day before. Claimant again saw Dr. Ceilley with complaints of nausea and muscle aches as well, and was hospitalized. Claimant was diagnosed as having a hypersensitive reaction to the chemicals at her place of employment. Claimant returned to work, but after three or four days again developed headaches, watery eyes, and nasal congestion. On April 24, 1983, claimant discontinued her employment with defendant pursuant to medical advice.

Claimant was referred by Dr. Ceilley to John A. Caffrey, M.D., for immunotherapy in May of 1983. Claimant reported eye difficulties, severe diarrhea, head congestion, dizziness, headaches and muscle cramps to Dr. Caffrey. Further patch testing revealed that claimant was allergic to 28 different items, including house dust, cement, leathers, cats and tobacco. Claimant is a smoker. Claimant testified that prior to working for Dr. Henrichsen, she did not experience any reactions to tobacco, cats or the other items she has been diagnosed as being sensitive to. Dr. Caffrey concluded that claimant is suffering from a perennial allergic rhinitis and conjunctivitis as a result of an occupational exposure to chemicals, and that claimant's symptoms, including headaches, muscle cramps, tiredness, and dizziness were attributable to claimant's exposure to copper sulfate.

Claimant testified she would be able to avoid exposure to copper sulfate, F.O.A. 290 and arsonilic acid if she did not work in a veterinary clinic. However, Dr. Caffrey testified as follows:

> Q. Doctor, depending on whether or not her symptoms are related back to that, if she was not to come in contact at all from this day forward with any copper sulfate or FOA 290 or Spectinomycin, would she in the future have any condition that would be related back to that exposure?
>
> A. You know, if you read this from the health admin-

istration about copper and mists and so forth -- I haven't read that recently; but, in essence, the long-term effects would -- she would not get over them, in other words. In other words, she probably had breathed this stuff into her lungs to the point where she wouldn't get well if she avoided all this stuff. In other words, she has a -- what should I say -- a permanent-type problem from breathing this copper mist.

(Caffrey Deposition, pages 32-33)

Part of exhibit 1, titled "Occupational Health Guideline for Copper Dusts and Mists," relied on by Dr. Caffrey, lists the effects of short-term exposure to copper sulfate dust or mist as "a feeling of illness similar to the common cold with sensations of chills and stuffiness of the head. Small copper particles may enter the eye and cause irritation, discoloration, and damage." That document also states, "On ingestion, copper salts act as irritants and cause nausea, vomiting, abdominal pain, hemorrhagic gastritis, and diarrhea. Copper salts splashed in the eye caused conjunctivitis...." Other symptoms included a metallic taste. One of claimant's fellow workers testified that the chemical dust claimant was exposed to produced a metallic taste as well.

Following termination of her employment at the veterinary clinic, claimant was given another job by defendant in another of defendant's businesses, Tempe Manufacturing, from May 1983 until September 1983 when claimant was laid off for economic reasons. Claimant then sought other employment but was out of work for approximately eight or nine months. Claimant eventually obtained employment as a waitress with a former employer at $3.50 - $3.95 per hour, as opposed to the $5.00 per hour she was earning at the veterinary clinic. Claimant stated that she worked at this job even though she continued to experience digestive tract symptoms because it was financially necessary for her to work. Claimant testified that her friendship with the employer played a role in obtaining this position. Claimant later obtained work as a waitress with another employer. Claimant testified that if she had continued to work for defendant, she would presently be earning $8.00 per hour.

Mark T. Thoman, M.D., a clinical toxicologist, opined that much of the damage suffered by claimant was due to inhalation of the chemicals as opposed to claimant's earlier contact exposure with a prior veterinary employer. Dr. Thoman attributed claimant's present condition to both continuous exposure and a one-day intense exposure. Dr. Thoman assigned claimant an impairment rating of 15 percent, but in October of 1986 Dr. Thoman changed that rating to 25 - 30 percent of the body as a whole when expected improvement did not occur: "It is my opinion that Joyce Burkhead has a permanent whole body disability of 25-30%.

...this impairment rating is directly causally connected to her employment at the Winterset Veterinary Clinic and exposure to chemicals there...." (Claimant's Exhibit 1)

Dr. Thoman stated that claimant's condition was permanent, and that claimant's exposure had affected tissue in such a way as to make claimant hypersensitive to many chemicals and substances she would not have reacted to before. Dr. Thoman described claimant as being more susceptible to infection as a result of her exposure to the chemicals at the veterinary clinic, and stated that claimant could not work in environments that contained various other chemicals, such as formaldehyde in a clothing store.

Dr. Thoman also testified that claimant's allergy to cats and tobacco would not be the cause of her present condition, although claimant may react more to these substances after her exposure at the veterinary clinic. Dr. Thoman stated that claimant's preexisting allergic rhinitis was not a part of his rating of 25 - 30 percent impairment of the body as a whole, in that claimant's prior exposure was contact dermatitis, and claimant's present condition stemmed from inhalation of the chemicals. Dr. Thoman stated that the 25 - 30 percent impairment rating of the body as a whole was completely attributable to claimant's exposure while in defendant's employment, and that claimant had suffered a 25 - 30 percent impairment of the body as a whole above and beyond any preexisting condition or other allergy. The rating of impairment was based on claimant's hypersensitivity to metals, resulting in chronic infections, fatigue, digestive tract problems, chronic eye problems, and muscle cramps.

Dr. Thoman referred claimant to Steven Zorn, M.D., a specialist in pulmonary medicine. Dr. Zorn opined:

> ...the patient appears to have developed a hypersensitivity reaction to various agents (F.O.A. #290, arsonilic acid, copper sulfate) in the work place. These hypersensitivity reactions are likely to have secondarily obstructed drainage passages from the frontal and maxillary sinuses and resulted in a frontal and maxillary sinusitis which is presently ongoing in nature.

(Cl. Ex. 1)

Dr. Zorn testified that he was in agreement with Dr. Thoman as to the causal connection between claimant's present condition and her work exposure to chemicals, and as to the extent of her present impairment. Dr. Zorn felt that claimant's condition was due to multiple exposures. Dr. Zorn did not feel that claimant's smoking contributed to her condition, as claimant smoked before the exposure without reaction. Dr. Zorn did

conclude that claimant's chronic sinusitis was bacterial in nature, but secondary to the blockage caused by the chemical exposure.

Robert Updegraff, M.D., an otolaryngologist employed by defendant, opined that claimant's present condition was the result of various allergies, including tobacco, and a "mild moderate" deviated septum. Dr. Updegraff stated that the deviated septum "could...possibly" contribute to claimant's nasal congestion.

Thomas B. Summers, M.D., a neurologist, opined that claimant was experiencing a psychophysiologic reaction and depression.

Claimant testified that she continues to experience headaches, nausea, watery eyes, muscle cramps, and daily diarrhea. Claimant was 46 years old at the time of the hearing and did not have a high school diploma.

The parties stipulated that claimant was off work from September 1, 1983 until June 1, 1984; if claimant has a permanent disability, it is an industrial disability; claimant's rate of compensation is $132.82 per week.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 15, 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).

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

Section 85A.4, (1981) Code of Iowa, states:

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.

Section 85A.5, (1981) Code of Iowa, states:

All employees subject to the provisions of this chapter who shall become disabled from injurious exposure to an occupational disease herein designated and defined within the conditions, limitations and requirements provided herein, shall receive compensation, reasonable surgical, medical, osteopathic, chiropractic, physical rehabilitation, nursing and hospital services and supplies therefor, and burial expenses as provided in the workers' compensation law of Iowa except as otherwise provided in this chapter.

If, however, an employee incurs an occupational disease for which he would be entitled to receive compensation if he were disabled as provided herein, but is able to continue in employment and requires medical treatment for said disease, then he shall receive reasonable medical services therefor.

Section 85A.8, (1981) Code of Iowa, states:

Occupational diseases shall be only those diseases which arise out of and in the course of the employee's employment. Such diseases shall have a direct causal connection with the employment and must have followed as a natural incident thereto from injurious exposure occasioned by the nature of the employment. Such disease must be incidental to the character of the business, occupation or process in which the employee was employed and not independent of the employment. Such disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have resulted from that source as an incident and rational consequence. A disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease.

Section 85A.10, (1981) Code of Iowa, states:

Where compensation is payable for an occupational disease, the employer in whose employment the employee

was last injuriously exposed to the hazards of such disease, shall be liable therefor. The notice of injury and claim for compensation as hereinafter required shall be given and made to such employer, provided, that in case of pneumoconiosis, the only employer liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of not less than sixty days.

Section 85A.7(4), (1981) Code of Iowa, states:

Where such occupational disease is aggravated by any other disease or infirmity not of itself compensable, or where disability or death results from any other cause not of itself compensable but is aggravated, prolonged or accelerated by such an occupational disease, and disability results such as to be compensable under the provisions of this chapter, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease was the sole cause of the disability or death, as such occupational disease bears to all the causes of such disability or death. Such reduction or limitation in compensation shall be effected by reducing either the number of weekly payments or the amount of such payments as the industrial commissioner may determine is for the best interests of the claimant or claimants.

To prove causation of an occupational disease, "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." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 190 (Iowa 1980).

Where an employee is injuriously exposed to hazardous conditions producing occupational disease while employed by several different employers, the employer where he was last injuriously exposed would be liable for the total disability. Doerfer v. Nicol, 359 N.W.2d 428 (Iowa 1984).

To be compensable, an aggravation of an occupational disease must be more than a temporary one curable by removal from the exposure. McNeil v. Grove Feed Mill, II Iowa Industrial Commissioner Report 261 (Appeal Decision 1981).

Section 85.34(1), (1981) Code of Iowa, states:

Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in

> subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

ANALYSIS

Claimant has alleged that her present condition is the result of a compensable work injury or, in the alternative, that her present condition is caused by an occupational disease. Under either chapter 85 or chapter 85A, claimant must show that her injury or occupational disease arose out of and was in the course of her employment. It is clear that claimant has had an allergic reaction to chemicals which the defendant-employer utilizes. Claimant experienced the onset of symptoms the same day as the intense exposure, and her employer attributed her symptoms to the previous days activities which involved mixing the chemicals. Claimant also had symptoms prior to that incident, and noticed that her symptoms increased while at work and decreased when away from work. The record clearly establishes that claimant was exposed to the chemicals copper sulfate, F.O.A. 290 and arsonilic acid in the course of her work, and that her allergic reactions to those chemicals arose out of her employment with defendant. Claimant has met her burden under chapter 85A to show that during her employment with defendant, she suffered an occupational disease arising out of and in the course of her employment with defendant.

Under both chapters 85 and 85A, claimant is also required to prove a causal connection between her injury or occupational exposure and her present condition. All of claimant's symptoms, with the exception of sinusitis, have been causally connected with her exposure to copper sulfate, F.O.A. 290 and arsonilic acid while employed by defendant by Dr. Ceilley, Dr. Caffrey, Dr. Thoman and Dr. Zorn. Dr. Updegraff's report notes a septum deviation that was not noted by other physicians. Dr. Updegraff states that claimant's septum deviation could contribute to claimant's nasal stuffiness and congestion. Dr. Zorn indicates that claimant's sinusitis may be caused by bacteriological infection. Those medical opinions are given as possibilities rather than probabilities. It is concluded that claimant has established that her headaches, muscle cramps, diarrhea, nausea, dizziness, watery eyes, fatigue, sinusitis and allergic reactions to copper sulfate, F.O.A. 290 and arsonilic acid are causally related to her chemical exposure while employed by defendant.

Claimant was exposed to the chemicals copper sulfate, F.O.A. 290 and arsonilic acid in large quantities as part of her work in the veterinarian's office. These were chemicals regularly used in the employer's business and were incidental

to it. As an employee of defendant, claimant was exposed to these substances to a much greater degree than other persons in the general public would be exposed to them. Claimant has proven by a preponderance of the evidence that she suffers from an occupational disease as a result of her employment with defendant. Although a traumatic exposure incident is present, the medical testimony shows that claimant's present condition is caused by her long term exposure to the chemicals.

Claimant is also required to prove under chapter 85A that the chemical exposure has resulted in disablement. The medical testimony of Dr. Thoman and Dr. Zorn shows that claimant now has a permanent sensitivity to copper sulfate, F.O.A. 290 and arsonilic acid. Claimant cannot work in environments with those chemicals without experiencing an allergic reaction. In addition, claimant's exposure to these chemicals has resulted in sensitivity to other substances as well. The testimony of Dr. Thoman establishes that claimant is now more sensitive to metals and other substances, as well as being more sensitive to substances she was previously allergic to.

Claimant is clearly disabled from returning to her work for defendant, or working for any veterinarian. Claimant cannot work in any industrial environment where copper sulfate, F.O.A. 290, or arsonilic acid are present. It appears that claimant would need to avoid employment where metals and other substances are utilized. Claimant is disabled from returning to the type of work she was performing at the time of her chemical exposure, and thus satisfies the first prong of the two-part disablement test under section 85A.4.

Claimant is also disabled from obtaining other suitable work as well. Claimant was unable to find employment for several months after she was required to leave her employment with Tempe Manufacturing. However, claimant has now obtained work as a waitress, but does not earn as much money as she did while working for defendant. Claimant has experienced a loss of earnings as a result of her need to change occupations. Claimant has satisfied her burden under the second prong of the two-part test under section 85A.4 to show that she is incapacitated from working in other suitable employment where she can earn wages equal to those she was earning at the time of her chemical exposure. Claimant's date of disablement is the date she left her employment with Tempe Manufacturing in September 1983.

Under section 85A.5, second unnumbered paragraph, a claimant who is able to "continue in employment" after incurring an occupational disease is entitled to medical services but is not entitled to compensation while so employed. However, in the instant case, although claimant is now employed, claimant was not able to "continue in employment." Claimant was unable

to return to her work at the veterinary clinic because of her occupational disease. Claimant's inability to work around the chemicals at the veterinary clinic is permanent. Her work as a waitress is of a different nature than her work at the veterinary clinic and does not expose claimant to chemicals. Claimant was out of work for several months. Claimant has not continued in employment and is therefore eligible for compensation benefits under section 85A.5.

The extent of claimant's disablement must be determined. Dr. Thoman assigned claimant an impairment rating of 25 - 30 percent of the body as a whole. Claimant cannot return to the work she previously held, and in addition cannot work in other occupations where several substances are present. However, claimant can work in several occupations where chemical exposure can be avoided. Claimant has suffered a loss of earnings. Claimant was 46 years old at the time of the hearing, and lacked a high school education. Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 30 percent.

Claimant had some symptoms of allergies prior to her employme with defendant. The earlier incident while claimant was employed by another veterinarian, however, does not appear to have caused any permanent disability. Claimant's testimony that she did not suffer any ill effects as a result of smoking or being around a cat prior to her employment with defendant is unrebutted. Dr. Thoman assigned claimant an impairment rating of 25 - 30 percent of the body as a whole, based exclusively on the effects of the chemical exposure while in defendants' employ and apart from any prior allergies. Claimant's present condition is attributable to claimant's chemical exposure in defendant's employ and apportionment under section 85A.7(4) is not appropriate.

Defendants on appeal assert as an issue: "The arbitration decision is in error in its finding that Joyce Burkhead is entitled to temporary total disability benefits for the period September, 1983 through June, 1984."

However, the arbitration decision does not award temporary total disability benefits. Healing period benefits are awarded from September 1, 1983 through April 24, 1984. It is presumed that defendant seeks review of that portion of the arbitration order providing for healing period benefits.

Section 85.34(1), (1981) Code of Iowa, applicable to an occupational disease under section 85A.16, states that healing period benefits are payable from the date of injury until the employee has returned to work or until competent medical evidence indicates that recuperation has been accomplished, whichever occurs first. In the instant case, claimant was last injuriously exposed to the chemicals when she left her employment at the veterinary clinic on April 24, 1983. Claimant was then rehired

by defendant to work at Tempe Manufacturing, another of defendant's business ventures, in May of 1983. Claimant thus returned to work, and under section 85.34(1), her healing period ended at that time.

FINDINGS OF FACT

1. Claimant worked from September 1981 until April 1983 as a secretary and mixer of feed additives for defendant veterinary clinic.

2. Claimant was regularly exposed to copper sulfate, arsonilic acid, and F.O.A. 290 as part of her duties.

3. Approximately three months after beginning employment with defendant in September 1981, claimant experienced headaches, watering eyes, post nasal drainage and nasal congestion, and fatigue.

4. Claimant was diagnosed as being highly sensitive to copper sulfate, and also sensitive to arsonilic acid, F.O.A. 290, and quaternium-15.

5. On March 15, 1983, claimant mixed a bag of feed additive containing copper sulfate, F.O.A. 290 and arsonilic acid. Claimant experienced nausea and muscle aches. Claimant was diagnosed as having a hypersensitive reaction to the chemicals at her place of employment.

6. On April 24, 1983 claimant discontinued her employment with defendant pursuant to medical advice.

7. Patch testing revealed that claimant was allergic to 28 different items, including house dust, cement, leathers, cats and tobacco. Claimant is a smoker.

8. Claimant was also diagnosed as suffering from a perennial allergic rhinitis and conjunctivitis as a result of an occupational exposure to chemicals.

9. Claimant worked for defendant in another capacity from May 1983 until September 1, 1983.

10. Claimant was last exposed to copper sulfate, F.O.A. 290 and arsonilic acid on April 24, 1983.

11. Claimant has experienced a loss of earnings as a result of her chemical exposure.

12. Claimant was given a rating of physical impairment of 25 - 30 percent of the body as a whole.

13. Claimant continues to experience headaches, nausea,

watery eyes, sinusitis, muscle cramps, and diarrhea.

14. Claimant was 46 years old at the time of the hearing and did not have a high school diploma.

15. Claimant's chemical exposure while employed by defendant was an occupational disease that arose out of and was in the course of her employment with defendant.

16. Claimant's perennial rhinitis and hypersensitivity is causally related to her exposure to copper sulfate, F.O.A. 290 and arsonilic acid throughout her employment with defendant.

17. Claimant's chemical exposure to copper sulfate, F.O.A. 290, and arsonilic acid was incidental to the business of her employer and was a hazard members of the general public would not be exposed to.

18. Claimant cannot return to her work for defendant.

19. Claimant cannot obtain work paying wages similar to what she earned at the time of her chemical exposure.

20. Claimant has a loss of earning capacity of 30 percent.

21. Claimant's date of disablement is September 1, 1983.

22. Claimant's prior contact dermatitis, other allergies and depression do not cause any portion of claimant's present disability.

23. Claimant's rate of compensation is $132.82 per week.

CONCLUSIONS OF LAW

Claimant's perennial rhinitis and hypersensitivity is an occupational disease that arose out of and was in the course of her employment with defendant.

Claimant's perennial rhinitis and hypersensitivity are causally connected to her exposure to copper sulfate, F.O.A. 290, and arsonilic acid throughout her employment with defendant.

Claimant has an industrial disability of 30 percent.

Claimant's healing period is from April 24, 1983 until May 1983.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at a rate of one hundred thirty-two and 82/100 dollars ($132.82) per week from September 1, 1983.

That defendants shall pay claimant healing period benefits from April 24, 1983 to May 1983 at the rate of one hundred thirty-two and 82/100 dollars ($132.82) per week.

That defendants shall pay claimant the sum of nine thousand four hundred and 33/100 dollars ($9,400.33) as reimbursement for medical expenses listed in exhibit 5 found in the attachment to the prehearing report filed in this matter.

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

That defendants shall receive credit for previous payments of benefits of weekly and medical benefits under a nonoccupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2).

That defendants shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

That defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of October, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWIN E. CARUTH, Claimant, vs. TENNECO/CASE POWER & EQUIPMENT CO., Employer, and TRAVELERS INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 793512 A P P E A L D E C I S I O N FILED OCT 31 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal and claimant cross-appeals from an arbitratio decision awarding claimant healing period benefits, medical expenses and mileage, and permanent partial disability benefits based on an industrial disability of 50 percent resulting from an injury on April 24, 1985. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 26 and 29 through 36; and defendants' exhibit A. Exhibit 5 is part of exhibit 21. Both parties filed briefs on appeal. There were two motions to dismiss and an application for immediate hearing filed by claimant that have not been previously ruled on, but these have been withdrawn by claimant on June 22, 1988 and need not be considered further. Both parties filed applications for extension of time to file briefs. Those applications are now moot as the briefs have been filed and are considered in this appeal.

ISSUE

The issue on appeal is the extent of claimant's disability, including whether claimant is an odd-lot employee.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriat

to the issue and evidence.

ANALYSIS

The analysis of the deputy in conjunction with the issue and evidence presented is adopted.

FINDINGS OF FACT

1. On April 24, 1985, Edwin E. Caruth was a resident of the state of Iowa employed by Case Power & Equipment Company, also known as Tenneco, in the state of Iowa.

2. Claimant was injured on that date when the semi he was driving for the employer struck a pile of gravel.

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 the date of injury until September 1, 1986 when he reached the point it was medically indicated that further significant improvement from the injury was not anticipated.

4. Claimant is a 48-year-old married man with one minor dependent child. At the time of injury, he was earning approximately $8.00 per hour.

5. All the medical care which claimant has received at hospitals or from licensed physicians is reasonable care and was provided in treatment of the injuries he sustained on April 24, 1985.

6. The reflexology treatments claimant received from Linda Bruno are not shown to be reasonable care for the injury, even though they have provided some relief of his symptoms.

7. Claimant is not physically capable of engaging in farming on a full-time basis or of working as an automotive or farm implement mechanic. He is restricted in his ability to bend, stoop, lift or engage in standing or sitting for extended periods.

8. Claimant is a high school graduate, but his entire work history has been primarily in the area of automotive or farm implement mechanics.

9. Claimant is reasonably motivated to be gainfully employed.

10. Claimant has a four percent permanent impairment of the body as a whole as a result of the injury.

11. Claimant has suffered a 50% loss of his earning capacity as a result of the injury he sustained on April 24, 1985.

12. Claimant was not offered treatment at a pain center or any work hardening program.

13. Claimant did not unreasonably fail to cooperate with the rehabilitation consultant.

14. Claimant has not made bona fide efforts to obtain gainful employment.

CONCLUSIONS OF LAW

Claimant sustained an injury on April 24, 1985 which arose out of and in the course of his employment with Case Power & Equipment Company, also known as Tenneco.

Claimant has a 50% permanent partial disability in industrial terms as a result of that injury.

Claimant is entitled to recover medical expenses in the amount of $131.00 and mileage expenses in the amount of $317.70.

Defendants have failed to introduce sufficient evidence to establish, by a preponderance of the evidence, that claimant failed to cooperate with his treating physicians or with the vocational consultant.

Defendants should offer claimant treatment at a pain clinic and such other treatment as may be recommended by the authorizing treating physicians.

Claimant has not established by a preponderance of the evidence that he is entitled to permanent total disability benefits as an odd-lot employee.

Central Iowa Orthopaedics and Semler Mecical, P.C., should be designated as authorized treating physicians.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant seventy and five-sevenths (70 5/7) weeks of compensation for healing period at the stipulated rate of two hundred ten and 98/100 dollars ($210.98) per week commencing April 24, 1985.

That defendants pay claimant two hundred fifty (250) weeks of compensation for permanent partial disability at the stipulated rate of two hundred ten and 98/100 dollars ($210.98) per week commencing September 1, 1986.

That defendants receive credit in the amount of sixteen thousand forty-two and 32/100 dollars ($16,042.32) for payments that have been previously paid and shall pay the past due, accrued compensation 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.

That Central Iowa Orthopaedics and Semler Medical, P.C., are designated as authorized treating physicians for treatment of claimant's injuries sustained on April 24, 1985.

That defendants make pain clinic treatment available to claimant if the same remains recommended by the authorized treating physicians.

That defendants make a work hardening program available to claimant if the same remains recommended by the authorized treating physicians.

That defendants pay claimant's medical expenses in the amount of seventy-six dollars ($76.00) with McFarland Clinic and John McKee, M.D., and fifty-five dollars ($55.00) with Thomas W. Bower.

That defendants pay claimant's transportation expenses in the amount of three hundred seventeen and 70/100 dollars ($317.70).

That defendants pay the costs of the arbitration proceeding pursuant to Division of Industrial Services Rule 343-4.33 in the amount of five hundred sixty-nine and 96/100 dollars ($569.96).

That defendants pay the costs of this appeal, and one-half the costs of the transcription of the arbitration hearing.

That claimant pay one-half the costs of the transcription of the arbitration hearing.

That defendants file claim activity reports as requested by this agency pursuant to Division of Industrial Services rule 343-3.1.

Signed and filed this 31st day of October, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CALVIN CLOUSING, Claimant, vs. ROSENBOOM MACHINE & TOOL, Employer, and ALLIED GROUP INSURANCE, Insurance Carrier, Defendants.	:	File No. 818236 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying permanent partial disability benefits as the result of an alleged injury in August of 1985.

The record on appeal consists of the transcript of the arbitration hearing; and claimant's exhibits 1 through 18. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

A. The Deputy Industrial Commissioner's Ruling at hearing limiting the testimony, exhibits and evidence that Claimant could present was error.

B. Claimant should not be denied relief due to counsel's misinterpretation of provision included in Hearing Assignment Order.

C. Employer and Insurance Carrier suffered no prejudice or disadvantage due to Claimant counsel's failure to serve witness and exhibit list.

D. Procedural Rules must be interpreted to accomplish the spirit and intent of workers' compensation law, not to work undue hardship upon Claimant.

E. The random enforcement of some procedural rules and not others constitutes error and denial of due process and equal protection.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

Division of Industrial Services Rule 343-4.20 states in part:

A deputy commissioner or the industrial commissioner may order parties in the case to either appear before the commissioner or a deputy commissioner for a conference, or communicate with the commissioner or a deputy commissioner and with each other in any manner as may be prescribed to consider, so far as applicable to the particular case:

....

4.20(7) Specifying all proposed exhibits and proof thereof;

....

4.20(9) Specifying all witnesses expected to testify;

Division of Industrial Services Rule 343-4.36 states:

If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.

Testimony of witnesses will be excluded where the party offering the witnesses failed to comply with a pretrial order requiring the filing of a witness list prior to the hearing. The burden is on the non-complying party to show a good reason why the order was not complied with. Klass v. Commercial - Services, Inc., IV Iowa Industrial Commissioner Report 205 (Appeal Decision, June 29, 1984).

ANALYSIS

On May 16, 1988, a prehearing was held which resulted in a hearing assignment order being filed on May 17, 1988. The purpose of the prehearing was to narrow the issues set out in Division of Industrial Services Rule 343-4.20. The hearing assignment order included an instruction to exchange witness lists and exhibit lists. See Division of Industrial Services Rules 343-4.20(9) and 4.20(7). At hearing, the deputy determined that claimant had failed to comply with the order and excluded that portion of claimant's evidence pursuant to Rule 4.36.

Counsel for claimant argues that it is his inexperience in workers' compensation procedure which caused the noncompliance with the order. Yet a review of the hearing assignment order which counsel claims he read clearly requires the exchange of witness lists and exhibit lists. Claimant's counsel could have inquired of the agency as to this requirement if he was unsure of it's meaning.

The bounds of discovery are much broader than the matters which might be deemed admissible at the time of the hearing. The witness lists and the exhibit lists limit the areas of inquiry so that both sides can prepare their cases without surprises. Such rules and orders encourage settlement and make hearings simpler. The exchange of exhibit lists and witness lists eliminates the element of surprise by an opposing party. Such rules benefit claimants as well as defendants.

The deputy had discretion on what sanctions would be imposed. The deputy could have dismissed the action but instead imposed the sanction of closing the record to the evidence which was not in compliance with the prior order. The hearing deputy did not have authority to change the pre-hearing order of another deputy industrial commissioner or, in this case, the industrial commissioner. The question before the hearing deputy was whether claimant had complied with the prehearing order.

Claimant argues that the parties failed to comply with another portion of the hearing assignment order, and that since no sanctions were imposed, sanctions should not be imposed against claimant regarding witness lists and exhibit lists. This argument is untenable. What type of sanctions would have been appropriate? What sanction would have affected both parties equally? Should a sanction have been entered against defendant and not claimant when it was both of them that failed to comply with the order? If defendants had failed to exchange witness lists or exhibit lists the same sanction would have been imposed on them.

No sanction was imposed because no sanction would have affected the parties equally. If all evidence from both parties

had been excluded, claimant would lose because of his failure to meet his burden of proof. If the case had been dismissed, claimant would be unable to recover. When both sides fail to comply with an order, an appropriate sanction is almost impossible.

It is not uncommon to find in the administration of workers' compensation cases that the attorney for one or both of the parties fails to read an order issued in the case and mailed to the attorney, or reads only a portion of the order. This practice shows complete disregard for the order and for the authority of the deputy who issued it.

The hearing deputy was correct in excluding witnesses and exhibits which were not included in a list set out in the hearing assignment order. The decision of the deputy based on the evidence which was received is affirmed.

FINDINGS OF FACT

1. Claimant failed to comply with the pre-hearing order requiring the exchange of witness lists and exhibit lists.

2. Claimant failed to show that he sustained a back injury in August of 1985 which arose out of and in the course of his employment.

CONCLUSIONS OF LAW

The deputy properly excluded witnesses and exhibits claimant failed to list as required by the hearing assignment order.

Claimant failed to show an injury arising out of and in the course of his employment

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That costs of this action are assessed against claimant pursuant to the Division of Industrial Services Rule 343-4.33.

Signed and dated this 15th day of May, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES Q. COLE, Claimant, vs. CONTINENTIAL BAKING COMPANY, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	:	File No. 823600 A P P E A L R U L I N G

On November 2, 1988, defendants filed their notice of appeal and a certificate of ordering transcript. On November 15, 1988, claimant filed what was purported to be notice of a cross-appeal and on December 7, 1988, claimant filed a brief in support of cross-appeal. The transcript was filed on May 8, 1989. On May 9, 1989, defendants filed a letter indicating that the transcript had not been prepared but would be. On May 10, 1989, claimant filed a motion to dismiss appeal stating the appeal should be dismissed for failure to file a transcript within 30 days after notice of appeal. Claimant's motion requested as an alternative that the record be closed to further activity by defendants. On May 22, 1989, defendants filed a motion for additional time to respond to pleading. Defendants requested an extension to May 25, 1989. Because that time has expired and defendants have filed nothing further that motion is moot and will not be considered further. The motion for dismissal is now considered.

Division of Industrial Services Rule 343-2.1 provides: "For good cause the industrial commissioner or the commissioner's designee may modify the time to comply with any rule."

Division of Industrial Services Rule 343-4.30 provides:

> When an appeal to or review on motion of the commissioner is taken pursuant to 4.27(86,17A) or 4.29(86,17A), a transcript of the proceedings before the industrial commissioner shall be filed with the industrial commissioner within thirty days after the notice of the appeal

> is filed with the industrial commissioner. The appealing party shall bear the initial cost of transcription on appeal and shall pay the certified shorthand reporter or service for the transcript. In the event there is a cross-appeal, the appellant and cross-appellant shall share the cost of the transcript. In the event the cost of the transcript has been initially borne by a nonappealing party prior to appeal, the appealing party or parties within thirty days after notice of appeal or cross-appeal shall reimburse the cost of the transcript to the nonappealing party and if not so reimbursed the appeal shall be dismissed.

In this matter the transcript has already been filed and claimant has filed his brief on cross-appeal. There is conflicting evidence in the record when a transcript was ordered by defendants. The claimant attempted to file a cross-appeal but apparently did not initiate steps to prepare or share the costs of the transcript. Good cause exists to extend the time for filing the transcript until May 8, 1989, the date which the transcript was filed.

Division of Industrial Services Rule 343-4.36 provides:

> If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.

Claimant requests in the alternative that the record be closed to further activity by defendants. Failure to comply with rule 4.30, supra, and failure to file the transcript in a timely manner has the effect of delaying the time in which to file briefs. The delay in this instance is a delay of approximately six months. Claimant attempted to file a cross-appeal. Until this ruling which will hold that the cross-appeal was untimely, both parties could have reasonably assumed that the costs of the transcript were to be shared as provided in rule 4.30. There is no indication that claimant paid for half the costs of the transcript nor any indication that claimant had taken steps to see that the transcript was filed. Had this been a situation where the delay in filing the transcript was clearly caused solely by the defendants, sanctions might be appropriate. However, this is a situation where both parties should have shared the responsibility of preparation of the transcript. The facts of this case do not warrant sanctions against the

defendants. The defendants should serve their appeal brief within twenty (20) days of the date of this order. Subsequent briefs by the parties shall be as provided in Division Industrial Services Rule 343-4.28(1).

Claimant filed an untimely notice of cross-appeal. That cross-appeal will not be considered. However, claimant's brief, as much as is relevant, will be considered.

WHEREFORE, claimant's motion to dismiss defendants' appeal is overruled in its entirety.

Signed and filed this 2nd day of June, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY KAY WILLITS COLLINS, Claimant, vs. FRIENDSHIP VILLAGE, INC., d/b/a FRIENDSHIP VILLAGE RETIREMENT CENTER, Employer, and GREAT AMERICAN INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 679258 A P P E A L D E C I S I O N FILED OCT 31 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding permanent total disability benefits from a work injury on August 13, 1981.

The record on appeal consists of the transcript of the review-reopening hearing and joint exhibits 1 through 30. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is the extent of claimant's disability.

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant, who was born on February 1, 1948, injured herself while working as a nurse's aide at the defendant employer Friendship Village Retirement Center. She attempted to prevent a patient from falling and fell to the floor hitting her back and buttocks on August 13, 1981. She was treated by James Crouse, M.D., a board certified orthopedic surgeon. An L5 disc excision was performed on September 11, 1981. On December 1,

1981 claimant had re-exploration of the L5 disc, a laminectomy at L5-S1 including complete curettage and rongeuring of the L5 disc space. Claimant was released with restrictions to return to work on February 8, 1982 as a nurse's aide but was unable to do the work because of the lifting and bending required. She was released to return to work on April 8, 1982 as a ward clerk but was unable to do the work because of low back problems on bending, leg problems while walking, and headaches. On October 20, 1982 Dr. Crouse performed a decompression of L4, L5 on the left with bilateral, lateral fusion at L4 through the sacrum.

Claimant testified that she completed ninth grade and as of December 19, 1986 had enrolled in a program towards obtaining her GED. Claimant obtained a nurse's aide certificate in 1979 after completing a three month course. She had been employed as a nurse's aide at various nursing homes prior to her employment at Friendship Village. Claimant has also worked as a homemaker, as a clearing house coupon counter, as a waitress, and as a barmaid. She reported that she had not looked for work because she was familiar with the Waterloo economy and felt that with three back surgeries she would not be hired there. Claimant had not looked into retraining.

Dr. Crouse testified by way of his deposition. He estimated that her permanent impairment would be approximately 25 percent of the body as a whole under the Manual for Orthopedic Surgeons. He opined that claimant could occasionally lift from 10 to 20 pounds and could frequently lift very light weights. He also opined she could not do prolonged sitting, but could sit six hours total daily with a break after a couple of hours. He reported that she could stand ten to fifteen minutes at a time up to a couple of hours during the day. He characterized, bending and stooping activities as quite limited and reported that she should not be climbing. He indicated claimant was able to drive but would need occasional breaks from the sitting involved. He reported claimant had no permanent restrictions concerning reading, but should change positions and move about occasionally while doing so to avoid prolonged sitting. He further opined that claimant's restrictions would prevent her from working as a nurse's aide, as a ward clerk in an unrestricted capacity, as a waitress, and as a cashier in an unrestricted capacity. The doctor opined, however, that a number of sedentary activities claimant could perform on a full-time basis were within the restrictions outlined by him.

Thomas W. Magner, who is employed full time as a vocational rehabilitation counselor with the state of Iowa, and who also does private vocational consulting, testified that claimant's counsel retained him to assess claimant's employability. Magner reported that he took a work history for claimant, examined her educational background and reviewed the medical information from Dr. Crouse including her impairment rating and his restrictions

on claimant's activities as well as Crouse's deposition. Magner indicated that he reviewed the Dictionary of Occupational Titles and the Iowa State Occupational Coordinating Handbook as well as considered the local job market. He opined that claimant could not do nurse's aide work, ward clerking, babysitting, telephone answering, housecleaning, or telemarketing. He stated that most sedentary jobs require sitting and that with restrictions aginst prolonged standing and sitting, claimant could not handle such jobs.

Judy Steenhoek indicated that she has a Masters Degree in job placement and job development and has worked as a rehabilitation specialist with Intracorp for approximately five years. Steenhoek indicated that great American Insurance Company initially asked her in the Fall 1984 to evaluate and make recommendations as to claimant's employability. Steenhoek took an employment history and reviewed her medical records and restrictions. Steenhoek opined that there were jobs within the Waterloo labor market which claimant could perform. She reported that she had contacted employers in telemarketing, home shopping, and at Casey's Store, but had not advised those prospective employers as to claimant's permanent partial impairment rating or her restrictions. Steenhoek opined that claimant could do sales work, clerking, cashiering, telemarketing, light weight fast food delivery, order clerking, motel desk clerk, ticket sales, and receptionist work as well as bartending in very specific settings.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and evidence. The following additional citations of law are relevant.

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) cited with approval a decision of the industrial commissioner for the following proposition:

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

Functional 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.

ANALYSIS

The issue to be resolved is the extent of claimant's disability and whether claimant is an odd-lot worker and therefore entitled to permanent total disability benefits.

On appeal defendants argue that the deputy erred in reaching certain conclusions and erred in determining that claimant is an odd-lot employee. Claimant counters by arguing that the deputy's conclusions were correct and that claimant is an odd-lot employee.

The evidence shows that claimant had limited education, limited skills, limited work experience, and a back impairment that has resulted in three surgeries and that causes her discomfort which is not likely to diminish. A vocational expert for claimant indicated that her employment is not likely. Dr. Crouse also stated that he thought claimant had limited employment opportunity. Dr. Crouse was not shown to be a vocational expert and is not qualified to give an opinion on employment opportunities. Defendants counter with the opinion of their vocational expert that claimant is employable. The question is did claimant produce sufficient evidence to make a prima facie showing that she is unemployable. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985) the court made the following relevant observations about the record:

> Guyton is a black man approximately 40 years old who does not know his age. He grew up in Mississippi where he had about one month of formal education. He cannot read or write or make change. The evidence included results of psychological tests administered for social security disability purposes. The tests showed Guyton to be mildly retarded. Considering his retardation with his lack of education and illiteracy, the examiner concluded Guyton "will be limited in competitive employment to jobs of an unskilled, repetitive nature requiring no literacy."
>
> ....
>
> The record contains substantial evidence of Guyton's efforts since his injury to find employment. He applied for work with the assistance of a friend at numerous places in the Waterloo area and up to 150 miles away. He had not found employment in this period of more than four years. He subsisted by earning small amounts through his junking activities and through social security disability

compensation. There was no evidence that jobs were available to persons with his combination of impairments.

There are significant differences between the facts of Guyton and the facts of this case. Claimant has more education and is intellectually more capable than Guyton. Claimant has not sought other employment and Guyton made numerous attempts to find employment. Merely because claimant can no longer do her prior job as a nurse's aide does not mean she is unemployable. This claimant cannot make a prima facie showing that she is unemployable when she has not sought employment. Claimant has not made a prima facie showing that she is unemployable.

It is necessary to determine claimant's industrial disability. Claimant was 38 years of age at the time of the hearing and has a ninth grade education. Her work history consists of unskilled, manual labor. She is reasonably motivated to work. She has had three surgeries on her back. She has lifting restrictions of 10 to 20 pounds. She cannot bend, stoop, climb, or twist and cannot sit or stand for prolonged periods of time. She has a permanent impairment rating of 25 percent. While claimant has not shown she is unemployable, she had shown that her impairment and the pain she suffers have a significant impact on her earning capacity. When all things are considered claimant has an industrial disability of 70 percent.

FINDINGS OF FACT

1. Claimant, a nurse's aide, was injured on August 13, 1981 when she fell to the floor hitting her buttocks and back while attempting to prevent a confused patient from falling from her bed.

2. Claimant had an L5 disc protrusion on the left. Dr. Crouse performed an L5 disc excision on September 11, 1981.

3. Claimant initially did well but developed recurrent left leg pain.

4. Dr. Crouse re-explored the L5 disc and performed a laminectomy at L5-S1 on December 1, 1981.

5. Claimant attempted to return to work as a nurse's aide on February 8, 1982 but could only work two and one-half hours.

6. Claimant attempted to work four hours per day as a ward clerk in April 1982, but was unable to continue after two or three days.

7. Claimant has not otherwise been released to work.

8. Claimant's low back and leg pain returned.

9. On October 20, 1982, Dr. Crouse performed a decompression of L4, L5 on the left with bilateral, lateral fusion at L4 through the sacrum.

10. Claimant improved initially but had a subsequent return of low back and left leg pain.

11. Claimant has developed adhesions as a complication of her back surgeries.

12. Claimant will continue to have left leg and intermittent low back symptoms.

13. Claimant can frequently lift very light weights; can occasionally lift from ten to twenty pounds; cannot bend, stoop, climb, twist; and cannot sit or stand for prolonged periods.

14. Claimant has an impairment of 25 percent of the body of the whole.

15. Claimant has received only minimal vocational rehabilitative assistance.

16. Claimant's work experience is primarily as a nurse's aide; she has also done coupon counting, waitressing, bartending and like manual labor.

17. Claimant cannot return to those employments or other manual labor requiring physical maneuvers from which she is restricted.

18. Claimant has not actively sought employment since her August 13, 1981 injury.

19. Claimant is not an odd-lot worker.

20. Claimant was 38 years old at the time of the hearing and has completed ninth grade.

21. Claimant enrolled in a GED program after being encouraged and assisted in doing so.

22. Claimant's motivation to work is reasonable given her physical condition, her current work skills, and her education level.

23. The work injury of August 13, 1981 was the cause of claimant's industrial disability of 70 percent.

CONCLUSIONS OF LAW

Claimant has not established by a preponderance of evidence that she is an odd-lot employee.

Claimant has established by a preponderance of evidence that her August 13, 1981 work injury is the cause of her industrial disability of 70 percent.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant three hundred fifty (350) weeks of permanent partial disability benefits at the rate of ninety-three and 82/100 dollars ($93.82) per week from April 20, 1983.

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to section 85.30.

That defendants pay the costs of this proceeding including the costs of transcription of the review-reopening hearing.

That defendants file claim activity reports pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 31st day of October, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLEO COLLINSON, Claimant, vs. DES MOINES REGISTER, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 787601 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying permanent partial disability benefits as the result of an alleged injury on February 5, 1985.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits A through H, L through N, P, R through II, and KK through OO; and defendants' exhibits 1 through 3. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: "Did the deputy industrial commissioner err in determining that claimant's work injuries were only temporary in nature and did not justify an award of industrial disability benefits?"

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 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 section 555(17)a.

ANALYSIS

On appeal, claimant urges that the evidence shows he did sustain permanent disability as a result of his February 5, 1985 work injury. The medical evidence sharply conflicts. Both William R. Boulden, M.D., and Walter B. Eidbo, M.D., agree that claimant had a preexisting degenerative back condition. Both Dr. Boulden and Dr. Eidbo agree that claimant's work aggravated that condition. The conflict in the medical testimony hinges on whether that aggravation produced temporary or permanent disability.

Dr. Eidbo stated that claimant had no prior disability concerning his back stemming from the 1963 lumbar laminectomy, and bases this opinion in part on claimant's related history of not having any problems with his back from 1963 until the work injury of February 5, 1985. However, it was brought out on cross-examination that claimant did have further problems with his back after the 1963 surgery, including being off work for one month in 1967 due to back pain, and being off work again for one month in 1976 due to back pain. In addition, Dr. Boulden testified that under the AMA Guidelines, a lumbar laminectomy is an intrusive surgery which would result in a minimum of five percent impairment regardless of the completeness of the patient's recovery.

Dr. Boulden is an orthopedic surgeon, whereas Dr. Eidbo is not. Dr. Boulden treated claimant, whereas Dr. Eidbo did not. Dr. Boulden saw claimant and received claimant's version of the events at a point in time closer to the February 5, 1985 injury than did Dr. Eidbo. Dr. Eidbo saw claimant after the incidents of pain claimant experienced in the shower at home, and after claimant carried heavy concrete blocks. Either of these incidents could have contributed to claimant's back condition to an equal or greater extent as the February 5, 1985 incident.

Dr. Boulden testified that claimant did not suffer any permanent effects of the February 5, 1985 work injury. Dr. Boulden attributed the incident of pain on February 5, 1985, to claimant's preexisting degenerative arthritis. Dr. Boulden also stated that claimant's degenerative arthritis would be expected to produce incidents of pain such as claimant experienced on February 5, 1985.

The testimony of Dr. Boulden will be given the greater weight. The greater weight of the medical evidence indicates that claimant's February 5, 1985 injury did not result in any permanent impairment or disability.

FINDINGS OF FACT

1. Claimant was employed by defendant Des Moines Register on February 5, 1985.

2. Claimant had a degenerative arthritic condition of his back prior to his employment with defendant.

3. Claimant underwent a lumbar laminectomy in 1963.

4. Claimant was off work for one month due to back pain in 1967.

5. Claimant was off work for one month due to back pain in 1976.

6. Claimant experienced back pain on February 5, 1985.

7. Claimant's incident of back pain on February 5, 1985, resulted in temporary disability only.

8. Claimant has been compensated for his temporary total disability as a result of his February 5, 1985 injury.

CONCLUSIONS OF LAW

Claimant's work injury of February 5, 1985, resulted in temporary total disability.

Claimant's work injury of February 5, 1985 did not result in permanent disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing further from these proceedings.

That claimant is to pay the costs of this action.

Signed and filed this 31st day of March, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA CONRAD, Claimant, vs. MATT PARROTT & SONS, Employer, and BITUMINOUS INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 827150 A P P E A L D E C I S I O N FILED OCT 28 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant Bituminous Insurance Company appeals from an arbitration decision awarding temporary total disability benefits as a result of an alleged injury on May 23, 1985. Claimant cross-appeals.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A through M; defendant employer's exhibit 1; and defendant insurance carrier's exhibits 2 and 3.

Claimant and Bituminous Insurance Company filed briefs on appeal, and Bituminous Insurance Company also filed a reply brief.

ISSUES

Defendant insurance carrier states the following issues on appeal:

1. Did the deputy industrial commissioner err in not applying the McKeever case to the present cause of action and in the ultimate finding that the insurance carrier, Bituminous Insurance Company, was liable for the 1986 injury to claimant, Patricia Conrad?

2. Did the deputy commissioner err in awarding the claimant penalty benefits against the insurance carrier, Bituminous Insurance Company?

3. Did the deputy commissioner err in allowing Dr. Phelps' medical conclusions to determine the legal issue in this matter?

4. In the event that the industrial commissioner reverses the deputy commissioner's decision regarding liability, the employer, Matt Parrott & Sons, Inc., should be responsible for costs.

Claimant states the following issues on cross-appeal:

1. Whether the Claimant is entitled to Section 86.13 penalty damages in the amount of 50% based upon the unreasonable delay and denial in making payment of benefits for the periods of May 23, 1985 - May 27, 1985, June 12, 1985 - July 15, 1985, and June 25, 1986 - September 2, 1986.

2. Whether the Claimant has sustained disability as defined by Section 85.34(2)(m) for which she is entitled to reimbursement in the form of permanent-partial disability benefits.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant began working for defendant employer in May 1974 in the bindery operating a shrink wrap machine which required repeated use of her arm as well as lifting.

2. Claimant sought medical treatment May 23, 1985 for right elbow pain which she had been experiencing for some six to seven months.

3. Claimant was diagnosed as having tendonitis or medial epicondylitis and was treated with physical therapy, long arm cast, cortisone injection, and told to wear a tennis elbow splint which claimant did wear for approximately one year.

4. Claimant's condition was caused by her employment.

5. Claimant was unable to work as a result of her injury from May 23 through May 27, 1985, inclusive, and again from June 12, 1985 through July 15, 1985, inclusive.

6. Claimant continued to experience pain despite the treatment she had received.

7. Claimant returned to see her physician in June 1986, and on June 25, 1986 an excision of the medial epicondyle and release of her flexors was done.

8. Claimant's surgery of June 25, 1986 was as a result of the May 23, 1985 injury.

9. Claimant was unable to work as a result of her injury from June 25, 1986 through September 1, 1986.

10. Claimant has no permanent impairment as a result of her injury.

11. Defendants delayed commencement of benefits without reasonable or probable cause or excuse.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of her employment May 23, 1985, which resulted in surgery occurring June 25, 1986.

Claimant has not established her entitlement to any permanent partial disability benefits.

Claimant has established entitlement to temporary total disability benefits for periods from May 23 through May 27, 1985, June 12 through July 15, 1985, and June 25 through September 1, 1986, inclusive.

Claimant has established entitlement to Iowa Code section 86.13 penalty benefits.

Claimant has established entitlement to medical benefits pursuant to Iowa Code section 85.27.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant five point five seven one (5.571) weeks of temporary total disability benefits for the period from May 23 through May 27, 1985 and June 12 through

July 15, 1985, inclusive, at the stipulated rate of one hundred thirty-seven and 88/100 dollars ($137.88) per week.

That defendants pay unto claimant nine point eight five seven (9.857) weeks of temporary total disability benefits for the period from June 25, 1986 through September 1, 1986, inclusive, at the stipulated rate of one hundred thirty-eight and 85/100 dollars ($138.85) per week.

That defendants pay unto claimant the additional sum of five hundred twenty-seven and 62/100 dollars ($527.62) or thirty-five percent (35%) of those benefits which were unreasonably denied claimant specifically for the week of July 9 through July 15, 1985 and the period from June 25, 1986 through September 1, 1986.

Defendants shall pay all disputed medical expenses as follows:

Dr. Dale H. Phelps	$750.00
Allen Memorial Hospital 5/24/ 26, 29, 31/85	72.00
Allen Memorial Hospital 6/3, 4, 6, 8	90.00
Radiological Associates, 6/23/86	17.50
Waterloo Internal Medicine Associates, P.C., 6/25/86	12.00
John Glascock, M.D., P.C., 6/25/86	240.00
Allen Memorial Hospital, 6/25/86	589.64
Dr. James D. Collins, Jr.	25.00
Evansdale Pharmacy (Prescriptions)	4.88

That defendants shall receive full credit for all disability benefits previously paid.

That weekly benefits which have accrued shall be paid in a lump sum together with statutory interest thereon pursuant to Iowa Code section 85.30.

That defendants pay the costs including the costs of the transcription of the hearing proceeding.

That defendants file claim activity reports as required by Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 28th day of October, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSION

LYLE R. CORNWELL, Claimant, vs. GRIFFIN WHEEL COMPANY, Employer, Self-Insured, Defendant.	:	File No. 841129 A P P E A L D E C I S I O N

FILED

JUN 16 1989

INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying further permanent partial disability benefits as the result of an alleged injury on December 12, 1986.

The record on appeal consists of the transcript of the arbitration hearing and claimant's exhibits 1 through 6. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issue on appeal: Should claimant have been entitled to weekly benefits for permanent disability?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

On appeal claimant urges that the deputy improperly denied further permanent partial disability benefits. The thrust of claimant's argument is that since claimant has now had more of his medial meniscus removed, he has suffered further impairment.

Claimant's own doctor testified that claimant's rating of impairment of 10 percent of the left leg has not changed as a result of the additional surgery that resulted in more of the medial meniscus being removed. A surgical procedure, even one resulting in removal of a body part, does not necessarily result in further impairment. Removal of a portion of the medial meniscus followed by removal of another portion may result in no additional loss of function. Don K. Gilchrist, M.D.'s deposition answers confirm this.

Claimant's subjective description of a change in symptoms, accompanied by his father's testimony of a change in physical performance by claimant, has been considered. Contrary to claimant's assertion, the testimony of claimant's father was considered by the deputy and specifically mentioned in the arbitration decision. Claimant's injury involves a scheduled member only and does not extend to the body as a whole. Industrial disability factors are not relevant, as claimant's entitlement to benefits is determined by his functional impairment as a result of his injury. Functional impairment is primarily the subject of medical testimony. Claimant's own doctor has testified that claimant's permanent physical impairment after the second surgery did not increase. This evidence is not controverted by any other medical testimony. Claimant bears the burden of proving his entitlement to further benefits. Claimant has failed to carry that burden.

FINDINGS OF FACT

1. On December 12, 1986, claimant suffered an injury to his left leg which arose out of and in the course of employment consisting of a torn cartilage or medial meniscus in the left knee.

2. The work injury of December 12, 1986, was a cause of a temporary period of total disability from work.

3. As a result of a prior work injury in 1976 consisting of a torn medial meniscus, claimant suffered a 10 percent permanent partial impairment to the left leg.

4. Claimant presently has a 10 percent impairment of the left leg.

5. Claimant has not suffered an increase in impairment as a result of his injury of December 12, 1986.

CONCLUSIONS OF LAW

Claimant has failed to establish by a preponderance of the evidence entitlement to additional permanent partial disability benefits.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall take no additional permanent disability benefits from this proceeding.

That claimant shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 16th day of June, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH L. CROUSE, Claimant, vs. S & H TRANSPORTATION, Employer, and CNA INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 844402 A P P E A L D E C I S I O N

FILED
JAN 26 1989
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding benefits based upon a rate of compensation of $564.00.

The record on appeal consists of the transcript of the arbitration hearing and the exhibits received into evidence at the hearing listed in the prehearing report. Both parties filed briefs on appeal.

ISSUE

The sole issue on appeal is the rate of compensation.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

A previous appeal decision by this agency stated:

> The issue of appropriate rate of compensation for owner/operator truck drivers is an issue that has perplexed decision makers in this agency as well as courts from other jurisdictions. A recent appeal decision by this agency offers guidance in resolving the issue. In Dale A. Christensen v. Hagen, Inc., File No. 643433, March 26, 1985, it was determined that the method of determining the appropriate weekly

earnings of independent truck operators was to divide by three the net revenue of their truck. It was also determined that the fuel surcharge was not included in the net revenue of the truck and the average weekly salary of the husband and wife as co-drivers was equal. The general method used in Christensen will also be used in the instant case. Because of the facts of the instant case certain modifications in making the calculation of the weekly earnings is appropriate to arrive at the revenue generated from the operation of the truck and to arrive at the decedent's weekly earnings. The revenue generated from the operation of the truck will be referred to as the revenue of the truck and will be the basis for calculating the rate in this case.

Tuttle v. The Mickow Corporation, Appeal Decision, December 20, 1988. The Tuttle decision also discussed that a method of determining rate based upon what might be described as net income or profit of operation should not be used because it could result in absurd or impractical results.

ANALYSIS

The determination of claimant's rate of compensation should, in this case, like Tuttle, use the revenue of the truck in the thirteen weeks preceding claimant's injury. One-third of the revenue of the truck is claimant's gross weekly earnings. Claimant was paid by his output and pursuant to Iowa Code section 85.36(6) the thirteen week period prior to the injury should be used in determining the basis of compensation. In the time period April 12, 1986 through July 5, 1986 claimant's revenue from the truck was $24,519.04. See claimant's exhibit 7. (There is no evidence in the record to indicate that the adjustment made in Tuttle need be made to the total of $24,519.04 in this case to arrive at the revenue of the truck.) One-third of the revenue of the truck represents claimant's gross weekly earnings for the thirteen weeks preceding his injury. While claimant testified that persons who drive for him full time receive 30 percent of the gross weekly payment, it is appropriate that claimant's weekly earnings should be based on one-third of the revenue of the truck. Claimant's testimony indicates that his payment to persons who work full time for him based on 30 percent was an attempt to treat those persons fairly. His testimony is not taken to mean that the 30 percent is the amount an owner-operator should consider as the gross weekly earnings for the owner-operator. There is a distinction between an individual who merely drives a truck and one who drives a truck as an owner-operator.

Claimant's gross weekly earnings is $628.69 [1/3 of ($24,519.0 divided by 13)]. Claimant's rate of compensation is $366.49.

FINDINGS OF FACT

1. On July 8, 1986 claimant received an injury at work.

2. At the time of the injury claimant was married and entitled to two exemptions.

3. Claimant's gross weekly earnings in the thirteen weeks prior to his injury was $628.69.

4. Claimant's rate of compensation is $366.49.

CONCLUSION OF LAW

Claimant has proved by the greater weight of evidence that his rate of compensation is $366.49.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant twenty-two (22) weeks of permanent partial disability benefits at the rate of three hundred sixty-six and 49/100 dollars ($366.49) per week from July 8, 1986.

That defendants shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants shall pay the costs of this action including costs of transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

That defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 26th day of January, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY CURRENT, Claimant, vs. MIDWEST MOVING & STORAGE, Employer, and COMMERCIAL UNION INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 797000 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal and claimant cross-appeals from an arbitration decision awarding 71 3/7 weeks of healing period benefits and permanent partial disability benefits based upon 25 percent industrial disability as a result of a work injury on June 22, 1983.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 13; and defendants' exhibits A through C. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are: Whether there is a causal connection between claimant's work injury and a permanent disability; the nature and extent of claimant's disability including length of healing period; and the rate of compensation.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriat to the issues and evidence.

ANALYSIS

The first issue to be resolved is whether there is a causal connection between claimant's work injury on June 22, 1983 and his alleged permanent disability. John Sinning, M.D., who was claimant's treating physician beginning in 1985, opined that it was probable that claimant's herniated disc at L5-S1 was caused by the claimant's work injury. Dr. Sinning also opined that the condition was permanent and that claimant had an impairment of seven percent of the body as a whole. An office note by Dr. Sinning dated May 9, 1985 indicated that there was no doubt that claimant's condition was related to his accident. Defendants, in arguing that there is no causal connection, rely upon a physical examination of driver form completed by Dr. Beckman. That form was dated April 3, 1984 and indicated a history of no head or spinal injuries. There is no explanation in the record why Dr. Beckman completed the form in the manner he did. Claimant provided the medical opinion by Dr. Sinning that there is a causal connection between his work injury and his permanent impairment. That opinion is uncontroverted by any other opinion in the record. Claimant has proved that the work injury on June 22, 1983 resulted in a permanent disability.

The second general issue to be resolved is the nature and extent of claimant's disability. As noted above claimant has a permanent disability as a result of the work injury. Claimant is entitled to healing period benefits during the time when he was not medically capable of returning to substantially similar employment. The parties disagree on both when the healing period started and when it ended. When claimant felt he could no longer continue performing his work he stopped working and sought medical treatment. He first saw Dr. Sinning on April 12, 1985. An office note of Dr. Sinning dated June 19, 1985 indicates that he submitted a disability report to Aetna. Defendants argue that the healing period should not begin until claimant had surgery in December 1985. However, there is no evidence to contradict claimant's testimony that he could no longer stand to work because of the pain from his back condition and the indication by Dr. Sinning that as of June 19, 1985 claimant was unable to work. From that date on claimant was off work and sought treatment from Dr. Sinning which eventually improved his condition.

The healing period ends when an employee returns to work, or it is medically indicated that significant improvement is not anticipated, or until the employee is medically capable of returning to substantially similar employment. Claimant has not returned to work as a moving van driver and it appears he is not capable of returning to this type of employment. Previous appeal decisions by this agency have 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.

Stevens v. Ideal Ready Mix Co., Inc., Volume I, No. 4, Iowa Industrial Commissioner Decisions 1082, 1087 (1985) and Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982). The Iowa Court of Appeals has 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. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). The healing period in this case ends at the point at which claimant's disability can be determined. Claimant's disability could be determined when Dr. Sinning, the treating physician, gave claimant an impairment rating and placed restrictions upon claimant. Dr. Sinning's report dated October 31, 1986 indicated the impairment rating and the restrictions. The healing period ended on October 31, 1986.

It is also necessary to determine claimant's industrial disability. On appeal defendants argue that the deputy's determination of 25 percent industrial disability is too high. Claimant counters on cross-appeal by arguing that it is too low. In discussing this issue the deputy wrote:

> Claimant has not been able to return to his prior occupation of truck driver. He has a seven percent impairment rating and significant lifting restrictions. When the foregoing are considered in light of claimant's limited education and limited academic skills, it is clear that he has sustained a significant degree of disability. The record provides little guidance as to claimant's occupational activities since he ceased driving the truck. The absence of any showing with regard to attempts to obtain employment or what employment has been obtained makes assessment of the degree of disability more difficult. Nevertheless, the record clearly shows a loss of access to 21% of the jobs which claimant was formerly capable of performing. It shows lifting and activity restrictions which limit him to work with exertion requirements which are classified as no more than medium. Claimant is no longer qualified for many truck driver positions which, according to exhibits B and C, pay wages which average in the range of $12.50 per hour. When all the applicable factors of industrial disability are

> considered, it is found and concluded that Jerry Current has a 25% permanent partial disability in industrial terms as a result of the June 22, 1983 injury.

When all factors are considered, including claimant's age of 31 at the time of the hearing, the deputy correctly concluded that claimant has an industrial disability of 25 percent as a result of the June 22, 1983 injury.

The final issue to be resolved is the rate of compensation. A previous appeal decision by this agency stated:

> The issue of appropriate rate of compensation for owner/operator truck drivers is an issue that has perplexed decision makers in this agency as well as courts from other jurisdictions. A recent appeal decision by this agency offers guidance in resolving the issue. In Dale A. Christensen v. Hagen, Inc., File No. 643433, March 26, 1985, it was determined that the method of determining the appropriate weekly earnings of independent truck operators was to divide by three the net revenue of their truck. It was also determined that the fuel surcharge was not included in the net revenue of the truck and the average weekly salary of the husband and wife as co-drivers was equal. The general method used in Christensen will also be used in the instant case. Because of the facts of the instant case certain modifications in making the calculation of the weekly earnings is appropriate to arrive at the revenue generated from the operation of the truck and to arrive at the decedent's weekly earnings. The revenue generated from the operation of the truck will be referred to as the revenue of the truck and will be the basis for calculating the rate in this case.

Tuttle v. The Mickow Corporation, Appeal Decision, December 20, 1988. The Tuttle decision also discussed that a method of determining rate based upon what might be described as net income or profit of operation such as the deputy attempted to use in the instant case should not be used because it could result in absurd or impractical results. The determination of claimant's rate of compensation should, in this case, like Tuttle, use the revenue of the truck in the thirteen weeks preceding claimant's injury. One-third of the revenue of the truck is claimant's gross weekly earnings. Claimant was paid by this output and pursuant to Iowa Code section 85.36(6) the thirteen week period prior to the injury should be used in determining the basis of compensation. In the time period April 26, 1983 through June 23, 1983 claimant's revenue from the truck was $16,353.39. See Claimant's Exhibit 13. (There is no evidence in the record to indicate that the adjustments

made in Tuttle need be made in this case to arrive at revenue of the truck.) One-third of the revenue of the truck represents claimant's gross weekly earnings for the thirteen weeks preceding his injury. Claimant's gross weekly earnings is $419.32 (1/3 of [($6,551.64 + $2,455.23 + $3,288.39 + $4,058.13) divided by 13]. Claimant is married and entitled to two exemptions for purposes of determining rate of compensation.

FINDINGS OF FACT

1. Claimant was born on December 16, 1955 and was married and was 31 years old at the time of the arbitration hearing.

2. Claimant was injured on June 22, 1983 while unloading cement blocks in his job as a moving van driver.

3. Following the injury, claimant continued to work but experienced pain and discomfort.

4. On June 19, 1985 claimant became medically incapable of performing his job as a moving van driver.

5. Claimant's herniated disc at L5-S1 was caused by the work injury on June 22, 1983.

6. Claimant's back condition caused by the work injury is permanent and claimant has an impairment of seven percent of the body as a whole. Claimant has lifting restrictions of lifting up to 25 pounds and occasionally lifting 75 pounds.

7. Claimant has not returned to work as a moving van driver.

8. Claimant's disability could be determined on October 31, 1986.

9. Claimant has limited education and limited academic skills.

10. It is unclear what claimant's occupational activities have been since he ceased driving his truck.

11. Claimant has had a loss of access to 21 percent of the jobs which claimant was capable of performing prior to the work injury of June 22, 1983.

12. Claimant has an industrial disability of 25 percent as a result of the injury on June 22, 1983.

13. Claimant's gross weekly earnings was $419.32 and his corresponding rate of compensation is $255.23.

CONCLUSIONS OF LAW

Claimant has proved by the greater weight of evidence that there is a causal connection between his work injury of June 22, 1983 and his permanent disability.

Claimant has proved by the greater weight of evidence that he is 25 percent permanently partially disabled as a result of his work injury on June 22, 1983.

Claimant has proved by the greater weight of evidence that his healing period began on June 19, 1985 and ended October 31, 1986.

Claimant has proved by the greater weight of evidence that his rate of compensation is $255.23.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant seventy-one and three-sevenths (71 3/7) weeks of compensation for healing period at the rate of two hundred fifty-five and 23/100 dollars ($255.23) per week payable commencing June 19, 1985.

That defendants pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the rate of two hundred fifty-five and 23/100 dollars ($255.23) per week payable commencing November 1, 1986.

That defendants pay all past due amounts in a lump sum together with interest pursuant to section 85.30 from the date each payment came due.

That defendants pay claimant the sum of seven thousand five hundred seventy-six and 49/100 dollars ($7,576.49) under the provisions of section 85.27 of the Code.

That the costs of the arbitration proceeding is assessed against defendants and the costs of the appeal including the costs of the transcription of the hearing proceeding is to be divided equally.

That defendants file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of January, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LESLIE DE HEER, Claimant, vs. CLARKLIFT OF DES MOINES, Employer, and CIGNA, Insurance Carrier, Defendants.	File No. 804325 A P P E A L D E C I S I O N

FILED

MAY 12 1989

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on September 9, 1985. Claimant cross-appeals.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits A through K, and M through W; claimant's exhibit 1; and commissioner's exhibits 1 and 2. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. The Deputy erred in awarding benefits on the theory of cumulative injury.

2. The Deputy erred in finding that the claimant sustained a personal injury on September 9, 1985 that arose out of his employment.

3. The Deputy erred in relying on a physician to determine the issue of credibility.

4. The Deputy erred in awarding healing period benefits beyond the date stipulated by the parties.

5. The Deputy erred in awarding industrial disability on the basis of 70 percent of the body as a whole.

Claimant states the following issues on cross-appeal:

1. Whether or not Claimant met the requirements of the Odd-Lot Doctrine.

2. If Claimant did not meet the Odd-Lot Doctrine, whether Claimant's disability is greater than 70%.

REVIEW OF THE EVIDENCE

The following is a brief statement of the evidence pertinent to this decision.

Claimant, 50 years old at the time of the hearing, testified that he commenced working for Clarklift of Des Moines (hereinafter Clarklift) as a forklift mechanic in September 1972. Claimant's work involved overhauling motors and hydraulic lifts, and involved the lifting of heavy equipment, repetitive bending, stooping, lifting, twisting and prolonged standing. In September of 1985 claimant was earning $11.15 per hour.

Claimant alleges he was injured on September 9, 1985 while in the act of transporting a "saddle" to a wash area. Claimant, in his deposition, testified that the pain did not develop until after he began to carry the saddle, weighing 20 pounds or less, and after taking only a few steps. In the history claimant provided to his initial treating physician and shortly thereafter to an insurance representative, he stated that the pain began while he was in the act of lifting. Claimant testified that, while lifting the "saddle" weighing approximately 25-30 pounds, he felt a pop in his back. Claimant stated that the pain started in his lower back and radiated down into his left leg compelling him to fall. Claimant then returned to his work station, but the pain became worse and claimant eventually informed the foreman that he could no longer work.

Claimant's supervisor, Donald Bryant, testified that the saddle claimant was carrying actually weighed 14 pounds and that the claimant, prior to the time of his work injury, stated that he was going to a chiropractor to "pop joints."

On September 9 the claimant sought treatment from the Mater Clinic, P.C. Bernard C. Hillyer, M.D., admitted claimant to the hospital for traction, medication, physical therapy and bedrest. Eventually, Dr. Hillyer diagnosed claimant as suffering from an aggravation of a prior spondylolisthesis condition and referred claimant to Jerome G. Bashara, M.D., a board certified orthopedic surgeon. Claimant remained in the hospital for three to four days before returning to work for approximately one week on a trial basis. Claimant continued to feel pain and as a result was readmitted to the hospital for testing and surgery. Dr. Bashara performed a gill laminectomy and fusion at the L5-S1 level of claimant's spine in November

1985. Claimant underwent recovery until July 3, 1986, approximately eight months later when, according to Dr. Bashara, claimant's recovery had "reached a plateau," and claimant was ready to return to light duty work activities with permanent restrictions of no lifting over 20 pounds; no excessive bending, stooping or twisting of the lumbosacral spine.

Claimant admitted that he had back problems before September 1985, but indicated these problems were in the upper back and shoulders for which he received chiropractic treatment. Jeffrey Meyer, D.C., indicated that claimant had treatment for both upper and lower back difficulties since 1982, but the treatment was mainly for the upper back. Claimant's earliest low back complaints occurred in June 1983, brought on by his coughing. In histories given to other physicians, claimant stated that he had back problems all of his life which have become worse over the past few years.

Dr. Bashara rates claimant's impairment as consisting of a 25 percent permanent partial impairment to the body as a whole but that five percent of this is due to prior existing low back difficulty. Dr. Bashara attributes the remaining 20 percent impairment to the work injury in September 1985. In his deposition Dr. Bashara opined that the work incident described by claimant induced the spondylolisthesis condition and the resultant impairment and also opined that it was likely that claimant's heavy work at Clarklift over the 13 years was a likely cause of the spondylolisthesis condition. Dr. Bashara stated that even if he were to assume that the spondylolisthesis condition preexisted the alleged work injury or claimant's work at Clarklift, such an assumption would not change his opinion that the surgery and impairment were work related. Dr. Bashara stated in his deposition that it was not unusual for the onset of symptoms to occur several minutes after the injury and the fact that claimant had been carrying the saddle rather than lifting the saddle at the time of the onset of pain did not change his causal connection opinions.

At the request of defendants, claimant was evaluated by William R. Boulden, M.D., another board certified orthopedic surgeon, in May 1986. Initially, Dr. Boulden rated the claimant as suffering from a 25 percent permanent partial impairment to the body as a whole, 15 percent of which constituted the preexisting spondylolisthesis condition. In his deposition, Dr. Boulden changed his causal connection opinion after reading the testimony given by claimant in his deposition that the pain did not begin until after he began to carry the saddle. Such an act of carrying the saddle did not, in the opinion of Dr. Boulden, consist of traumatic event sufficient to cause the onset of pain and the resultant surgery. Dr. Boulden felt that the onset in such case would be the natural course of events in any spondylolisthesis condition.

Dr. Hillyer, the general practitioner physician at the Mater Clinic who initially treated claimant, opines that claimant's low back difficulties were work related either due to the heavy work at Clarklift over the years or due to the September 1985 incident. Dr. Hillyer testified it is not unusual for orthopedic patients to blur the events and be unable to precisely indicate or describe an orthopedic injury or when pain begins.

After his release by Dr. Bashara, claimant returned to Clarklift to inquire as to returning to work and was told that there was no job available within his physical restrictions imposed by Dr. Bashara. Claimant has made two applications for employment in the Knoxville area and states that he monitors ads for available jobs in local newspapers. Claimant has not as yet found suitable replacement employment. Claimant began to receive vocational rehabilitation counseling from Intercorp, a rehabilitation service retained by defendants in the summer of 1986. A part of this counseling consisted of an evaluation of claimant's abilities by the state of Iowa rehabilitation facilities located in Des Moines. To date, claimant has not located suitable employment from any vocational rehabilitation activity.

Claimant has an eighth grade education and a GED and was able to demonstrate in the state tests a vocabulary equivalency at the 12.7 grade level, reading comprehension at the 9.9 grade level, general reading performance at the 11.4 grade level and math skills at grade level 10. Claimant demonstrated an ability to keep accurate bookkeeping records but had difficulty with understanding the concepts of double entry bookkeeping. At the state rehabilitation facility claimant expressed a desire for training in gunsmithing and small engine repair. The state evaluation found that claimant had sufficient knowledge and transferable skills to pursue vocational training in gunsmithing and small engine repair but the counselors question the viability of these goals due to claimant's physical limitations. The state rehabilitation testing also indicated some aptitude for low grade clerical, bookkeeping or office type of employment but this was not pursued with any vigor as claimant did not express an interest in such employment.

Richard Rattray, a state vocational rehabilitation counselor, testified at the hearing that it is unlikely that claimant will be able to obtain light industrial employment due to his physical intolerance for activity and an inability to work eight hours a day. Rattray further testified that he felt that claimant was not a good candidate for retraining due to the constant back pain which would affect his thought processes. Finally, Rattray did not believe that gunsmithing was a viable vocational goal within this area.

Mary Kathleen Schauwecker of Intercorp testified that claimant can be employed as he possesses considerable transferable

skills in the area of mechanics and that he possesses a good work record. She believes that suitable employment can be found with proper vocational counseling including a program to improve job seeking skills, assistance in contacting employers and a proper identification of job goals. She identified various light duty positions which fall into claimant's work abilities such as gunsmithing, retail and sporting goods, inspection, shipping and receiving, small engine repair and supervision of auto and truck mechanics.

Claimant testified that his past employment primarily consisted of carpentry, work as a glass cutter and assembler, farming, and a truck driver/mechanic.

Claimant currently works without pay as the treasurer and bookkeeper of the Eagles Club in Knoxville for several hours each day.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on September 9, 1985, which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979); McClure, 188 N.W.2d 283; Musselman, 261 Iowa 352, 154 N.W.2d 128.

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 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 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 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).

Iowa Code section 85.34(1) states:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of 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 "cumulative injury rule" may apply when disability develops over a period of time. The compensable injury is held to occur at the later time. For time limitation purposes, the injury in such cases occurs when, because of pain or physical disability, the claimant can no longer work. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

ANALYSIS

Defendants' first issue on appeal concerns the finding by the deputy that claimant suffered a cumulative injury. Defendants urge that claimant is required to specifically plead a cumulative injury theory in order to be awarded disability benefits based on such a theory of injury.

Claimant is not required to assert a theory of injury in his pleadings. The finder of fact is entitled to draw from the evidence presented any finding of fact supported by the evidence. If the evidence presented indicates that claimant's present condition is the result of a cumulative injury, claimant is entitled to a finding of fact that a cumulative injury has occurred regardless of whether that theory of recovery is contained in the pleadings. In addition, in this case defendants cannot claim surprise or lack of notice when the depositions of the doctors taken prior to the hearing discussed claimant's condition as being the result of cumulative or repetitive trauma. The record shows that claimant's work did involve repetitive bending, lifting and stooping. The medical evidence attributes his present condition to this repetitive activity. Claimant has suffered a cumulative injury.

Defendants also urge that claimant's injury did not arise out of his employment. Defendants note claimant's alleged

prior condition of spondylolisthesis, and that claimant's onset of pain may have occurred when claimant was carrying an item weighing 14 pounds rather than when claimant was lifting the item. The mere fact that claimant may have had a preexisting back condition does not preclude recovery by him if an injury has aggravated that condition. Claimant is entitled to recover benefits for the extent the injury has induced a new condition or aggravated a preexisting condition. Similarly, although a discrepancy may exist in the record as to just when claimant's onset of pain occurred, it is noted that the difference in time between claimant lifting the item and carrying it was at most only a few seconds.

Claimant's injury, whether a cumulative injury from repetitive trauma or from a single incident of lifting or carrying, clearly arose out of his employment. It would appear from defendants' arguments that the real issue raised is one of causal connection between claimant's present condition and his injury, rather than a causal connection between claimant's work and his injury. Dr. Hillyer and Dr. Bashara causally connected claimant's present condition to his work injury of September 9, 1985. Dr. Boulden originally made the same causal connection, but then retracted this opinion when asked if the fact that claimant was not lifting at the time of the onset of pain would alter his view.

As noted above, the time gap between claimant's lifting of the saddle and carrying it was negligible. In addition, it is noted that claimant's description of the injury given closest in time to the injury did describe it as occurring while lifting the saddle. Finally, taken as a whole the medical evidence does establish by the greater weight of evidence that claimant's present condition was at least in part caused by claimant's injury of September 9, 1985. Claimant's work injury either induced spondylolisthesis or aggravated an existing case of spondylolisthesis. Claimant's present low back condition is causally related to his work injury.

Defendants next argue that the deputy improperly relied on Dr. Hillyer to determine claimant's credibility. The deputy did note Dr. Hillyer's statement that it was not unusual for a claimant's memory of the exact onset of pain to "blur." However, Dr. Hillyer did not express an opinion on claimant's credibility, but merely offered a medical explanation for claimant's allegedly inconsistent statements. Dr. Hillyer did not offer an opinion as to claimant's truthfulness, and there is nothing in the record to indicate that the deputy did not make his own independent determination of claimant's credibility.

Defendants' fourth issue states that the deputy awarded a healing period greater than that stipulated to by the parties. A deputy is not bound by a matter that is not contested by the parties, where the record indicates that the stipulation is incorrect. The deputy awarded healing period benefits through

25% = 60

July 3, 1986, when the medical evidence indicates claimant reached a "plateau." The parties stipulated to healing period benefits "at least" through June 15, 1986. The deputy was within his authority to find a different end date for claimant's healing period from the evidence.

As a final issue on appeal, defendants urge that the award of 70 percent industrial disability is not warranted by the evidence. Claimant also raises the extent of disability as an issue on appeal. Industrial disability is determined by several factors. Claimant has physical impairment ratings of 25 percent of the body as a whole from two of his physicians. Claimant also has restrictions against repetitive lifting, bending and stooping.

Claimant's educational background consists of an 8th grade education plus GED. Claimant has scored higher than 8th grade level on several standardized tests. Claimant has undergone vocational rehabilitation assessments, one of which indicates claimant could perform certain light duty jobs. Another evaluation was based on the premise that claimant could not work eight hours per day, but none of the medical evidence imposes such a restriction. Claimant's prior work experience has involved physical labor. Claimant was 50 years old at the time of the hearing. Claimant's age makes it difficult for him to retrain, but also indicates claimant would normally have several years of his working life ahead of him. Claimant is presently working on a volunteer basis for a social club, doing book work that consumes several hours each day. It would therefore appear claimant could be employed in a record-keeping position.

Claimant's motivation is also a factor. Claimant has limited his job search to watching newspaper ads and only a few job applications. Claimant's lack of efforts to find replacement work indicates he is not an odd-lot employee.

Claimant is unable to return to his old job because of his physical condition. Claimant has lost earnings as a result of his injury, as claimant was making $11.15 per hour prior to his injury. The vocational rehabilitation evidence indicates that claimant, if he were to find employment, would earn wages in the range of $3.35 to $5.00 per hour.

It is therefore concluded that as a result of his injury, claimant has an industrial disability of 60 percent. It cannot be determined from the record what portions, if any, of claimant's present disability may have preceded claimant's initial employment with defendant in 1972. An apportionment is not appropriate.

FINDINGS OF FACT

1. On September 9, 1985, claimant suffered an injury to the low back which arose out of and in the course of employment with Clarklift.

2. Claimant's work injury of September 9, 1985, was either the result of lifting or carrying on September 9, 1985, or was the result of repetitive trauma over the course of his employment.

3. As a result of his injury, claimant underwent fusion surgery at the L5-S1 level of his spine.

4. The work injury of September 9, 1985, was a cause of a period of total disability during recovery from the injury and surgery beginning on September 24, 1985 and ending on July 3, 1986, at which time claimant reached maximum healing.

5. The work injury of September 9, 1985, was a cause of 15 to 20 percent permanent partial impairment to the body as a whole and permanent restrictions upon claimant's physical activity consisting of no lifting over 20 pounds; no repetitive lifting, bending, stooping, or twisting; and no prolonged sitting or standing. Claimant had no permanent restrictions before September 9, 1985.

6. Claimant's employment history is limited to heavy labor occupations.

7. Claimant was 50 years old at the time of the hearing.

8. Claimant's formal education is limited to the eighth grade. Claimant has a GED.

9. Claimant is able to perform light duty, clerical, or sedentary tasks.

10. Claimant has suffered a loss of earnings as a result of his injury of September 9, 1985.

11. Claimant has made few attempts to find employment subsequent to his injury.

12. As a result of his injury of September 9, 1985, claimant has a loss of earning capacity of 60 percent.

CONCLUSIONS OF LAW

On September 9, 1985, claimant suffered an injury arising out of and in the course of his employment with defendant Clarklift.

Claimant is entitled to healing period benefits from September 24, 1985 through July 3, 1986.

As a result of his injury of September 9, 1985, claimant has an industrial disability of 60 percent.

Claimant is not an odd-lot employee.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant three hundred (300) weeks of permanent partial disability benefits at the rate of two hundred seventy-three and 86/100 dollars ($273.86) per week.

That defendants shall pay to claimant healing period benefits from September 24, 1985 through July 3, 1986 at the rate of two hundred seventy-three and 86/100 dollars ($273.86) per week.

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

That defendants shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants and claimant shall each pay one-half the costs of this action pursuant to Division of Industrial Services Rule 343-4.33. Defendants shall be specifically taxed the sum of two hundred seventy-four and 59/100 dollars ($274.59) for reporting costs in the depositions of Dr. Hillyer and Dr. Bashara and the sum of one hundred fifty and 00/100 dollars ($150.00) each for witness fees of Dr. Hillyer and Dr. Bashara.

That defendants shall file activity reports upon payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 12th day of May, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROSALIE J. DESGRANGES, Claimant, vs. DEPARTMENT OF HUMAN SERVICES, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 760747 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying temporary total disability benefits, healing period benefits, permanent disability benefits, and medical expenses.

The record on appeal consists of the transcript of the arbitration hearing and the exhibits listed in the prehearing report except those described in the arbitration decision as missing from the package of exhibits. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are: Whether the deputy erred in making certain findings of fact; whether claimant received injuries arising out of and in the course of her employment; whether the deputy erred in limiting claimant's presentation of her case; and whether the deputy erred in assessing the costs of the arbitration proceeding to the claimant.

REVIEW OF THE EVIDENCE

The review of evidence will be discussed generally in three parts to facilitate the understanding of the large volume of evidence and testimony in this matter. The first part of the discussion will relate to the reliability of claimant's testimony. The second part will relate to claimant's alleged fall and back injury. The third part will relate to claimant's alleged mental disability.

Claimant testified that on the afternoon of December 6, 1983 she fell as she was ascending steps where she worked. She stated she limped and favored her back at the office. She also testified that she had not initiated contact with an attorney who represented Bonnie Bolander Davies, who was involved in a hearing with the Department of Human Services (hereinafter department) regarding termination of Davies' parental rights. The only aspect of these events supported by other testimony was testimony by Bonnie Davies that she had seen claimant fall. The other aspects of claimant's testimony described were directly contradicted by testimony of other witnesses.

Claimant disclosed during her testimony that she was confused in October 1982 and in February 1984. She also indicated that she was having trouble concentrating during her testimony and stated that she rambled a lot when she talked.

Bonnie Davies testified that she was nervous during the court hearing and revealed that she went to the bathroom and was leaving the courthouse when she saw claimant fall on the stairs. Bonnie Davies' account of the events of December 6, 1983 did not include a confrontation with a judge which was described in the testimony of her attorney.

The second evidentiary matter to be reviewed relates to claimant's alleged fall and back injury. In addition to the evidence described above, the following evidence is also described. Claimant testified that she fell on December 6, 1983 and had continuing pain until the last day she worked, February 10, 1984, and after that date. Claimant stated that she complained a lot about the pain to individuals (Teresa Hill, Cindy Sands, Joe Torres, and Sue Hallock) with whom she worked. She further testified that Dr. Egger in January 1984 and St. Paul Hospital on February 23, 1984 were aware of the pain but explained that the lack of medical notes concerning her pain until April 1984 was because they did not make a note of the pain.

Sue Hallock testified that claimant never told her that she had fallen and hurt her back. Teresa Hill and Cindy Sands both generally testified that they did not notice claimant limping or favoring her back or arm. Joe Torres did not testify.

A note from the progress records of St. Paul Hospital in Dallas, Texas, dated February 23, 1984, reported: "Pt. complained today of numbness & tingling of left arm. On questioning stated it had been bothering her for 2 months." Claimant contacted The Hillcrest Institute in Dallas, Texas on February 14, 1984 regarding treatment and possible hospitalization. In a letter dated March 23, 1984, D. F. Martinez, M.D., psychiatrist, gave a diagnosis of claimant's psychological problems only. In a letter dated April 29, 1985, which was cosigned by Dr. Martinez, he related:

> In February, 1984, Ms. Desgranges came to our office for evaluation and treatment. She was placed in St. Paul Hospital and given Triavil 4-25 three times a day, for depression. X-rays were also performed on her neck and left shoulder but the results were negative. She continued to complain of pain on the left side and it was recommended that she see a neurologist. Ms. Desgranges returned to Council Bluffs and was seen by Dr. Miller, an orthopedic surgeon, who conducted additional tests and X-rays that were also reportedly negative. Dr. Miller referred her to Dr. Gooding, a neurologist.

(Joint Exhibit 83)

R. Schuyler Gooding, M.D., a neurosurgeon, first saw claimant on April 17, 1984. In a letter dated March 14, 1985, Dr. Gooding reported:

> She was referred to me by Dr. Ronald Miller, the Council Bluffs Orthopedic Surgeon, and she was originally seen by me in my office on April 17, 1984.
>
> She is a thirty-nine year old, Left-handed caucasian female, who, on the 6th of December 1983, fell at work while carrying a load of mail, landing hard on her buttock, bruising her Right buttock, and since that time, she has had variable numbness and tingling of the Left arm, and to a slightly lesser extent the Left leg. She also describes some stiffness and discomfort in her lower back, and to a slightly lesser extent, in her neck....
>
> Further and detailed evaluation by myself revealed normal cervical spine X-rays, but X-rays of the lumbar spine revealed a slight L5 anterior on S1 listhesis. EMG studies of the Left-sided extremities were normal. A total Amipaque Myelogram revealed a ventral C6-C7 defect seen in the lateral projection as a double density, felt to be consistent with a disc herniation. A Cervical Discogram, did not add any additional information to this noted abnormality. In the lumbar region, the Myelogram revealed a moderate ventral L5-S1 defect with bilateral amputation of the S1 nerve roots. This abnormality was felt to reflect, at least in part, her spondylolisthesis, with a contribution by a ruptured disc at that level, also being considered.

....

The overall impression, is that this patient has a ruptured disc at the C6-C7 level, which is contributing to her discomfort and paresthesiae involving the Left upper extremity. The problems of her Left lower extremity, are no doubt related to the abnormality described at the L5-S1 level.

The history, as related to me, is that this patient had none of these problems prior to the fall, and therefore, I would directly relate the symptomatic picture involving the Left-sided extremities as being definitely related to the afore-mentioned [sic] fall, in that the under-lying [sic] abnormalities, if not absolutely and totally caused by the fall, (spondylolisthesis is most likely congenital in orgin [sic]), at least they were brought into symptomatic relief by the super-imposed [sic] trauma of the fall.

(Jt. Ex. 82)

Dr. Gooding further reported in a letter dated April 24, 1986:

[M]y impression continues to be of a patient who has some documentable problems with both her cervical and lumbar spine, interwoven with a series of falls, and with the patient appearing to have progressively more symptoms, as time goes on, and as the falls begin to add up.

It even crosses my mind that perhaps her subsequent falls are increasingly the product of her problem, rather than the cause of it.

Certainly, all of the history of trauma that this patient has experienced during this period that she has had problems with her spine, is most important.

But it is also important to recognize that we may be dealing with a progressive situation initiated by the fall in December of 1983, rather than a series of isolated traumatic incidents, all of which are relatively independent of one another.

(Jt. Ex. 82)

Claimant was admitted to Jennie Edmundson Memorial Hospital on October 22, 1984 where a myelogram and cervical discogram

were performed on October 22, 1984 and October 23, 1984, respective
The findings of the myelogram procedure were:

> In the lumbar region, there was a moderate ventricle L5-S1 defect with the S1 nerve roots amputated bilaterally. (The patient does have a first degree spondylolithesis.) In the thoracic region, no significant abnormalities were noted. In the cervical region, there was a ventral C6-7 defect seen in the lateral projection as a double density. It was felt that this latter defect may represent a ruptured disc.

(Jt. Ex. 82)

George W. Warton, M.D., noted on December 4, 1984: "I think we badly need any old medical records from this patient's previous treatment. Her history is quite uncertain and it is difficult to make any sense of the story which is available." (Jt. Ex. 87)

An office note made by Dr. Martinez dated August 13, 1984 reported that claimant "fell at sisters bruised [right] arm, [right] leg & both knees. [Left] leg seemed give way - tingles up to hip. Low back pain." (Jt. Ex. 83)

The third evidentiary matter to be reviewed relates to claimant's alleged mental disability. Claimant began working for the department at its Mills County office in December 1980. In March 1982, the department reorganized its office structure and claimant's former supervisor, Ray Buell, was replaced by Sue Hallock. Sue Hallock supervised the social workers in Mills and Fremont counties and claimant was the secretary for Sue Hallock and the social workers in the Mills County office. The record is in dispute as to whether or not Sue Hallock had a critical and berating attitude.

Michael L. Egger, M.D., a psychiatrist, treated claimant in August 1982 when he saw her approximately six times and then saw her again in January and February 1984. Claimant had sought Dr. Egger's care after a misunderstanding between her and Hallock regarding whether claimant's request for time off was to be treated as "comp time" or vacation time. Dr. Egger's office note dated August 11, 1982 indicates that claimant was treated by Dr. Mount in Texas sometime between 1975 and 1978.

Claimant again sought treatment in 1984. Claimant had received a written reprimand at work in December 1983. Joseph H. Lindsay, M.D., psychiatrist, gave an impression when claimant was admitted to St. Paul Hospital on February 20, 1984 of "Paranoid personality. Rule out paranoid schizophrenia." His impression when claimant was admitted on May 7, 1984 was "(1)

Depression. (2) Emotionally unstable personality."

D. F. Martinez, M.D., psychiatrist, is the medical director at the Hillcrest Institute in Dallas, Texas where claimant was treated. A letter dated April 29, 1985 cosigned by Dr. Martinez reads in relevant part:

> Ms. Desgranges is still under our care as a result of her work-related injuries of both a physical and psychological nature....
>
> ....
>
> In January, 1984, Ms. Desgranges saw Dr. Egger in Council Bluffs as she continued to have pain and numbness from her earlier injury as well as depression as a result of this continuing pain as well as job-related stress aggravated by stringent supervision at work. Dr. Egger recommended that Ms. Desgranges terminate her employment, but she was unable to follow this recommendation given her financial condition. Therefore, she was forced to continue working under adverse conditions that contributed to her present state of being disabled.

(Jt. Ex. 83)

George Mount, Ph.D., is the psychology director at the Hillcrest Institute. He testified that his first contact with claimant was on February 22, 1984 and she had been in the office approximately 60 times for about 50 minutes each session. His final diagnosis was Axis I: generalize anxiety disorder with some depression and Axis II: avoidant personality disorder. He opined that the cause of claimant's disorders were related to stress in claimant's work environment.

Robert E. Smith, M.D., psychiatrist, saw claimant pursuant to defendants' request for about one hour on August 8, 1985 and her husband for about half an hour and reviewed materials relating to her. He testified that his diagnosis for Axis I is dysphoria, chronic and there was no evidence for a major depressive disorder which is a more severe dysphoria. His diagnosis for Axis II was borderline personality disorder. Dr. Smith testified in depositions on cross-examination:

> Q. You would agree that Doctor Mount and Doctor Martinez have had a better opportunity than you to observe her conditions of health, functional viability and everyday life more than you have?
>
> A. No, I disagree with that. Doctor Mount and Doctor Martinez have seen her during two exacerbations

of a long-term process. And we have no records of what their diagnosis or treatment was in 1976, but we do have records of the 1984.

They are focusing purely on the major complaints that the patient has; depression, anxiety. They have failed to look at what is the context in which these symptoms are arising from, what is the basis of this personality of this person as an individual. And that's where they're at conflict with the doctor in their own clinic who has made the diagnosis the same as the one I'm making.

....

Q. Okay. Now, could those perceived stressful events have in actuality been stressful events, not just being perceived stressful events.

A. In my experience, in dealing with her employers and dealing with her work environment, there is always a significant component of one misconception and a significant component of their behavior actually feeding into a negative situation; the removal of support, the removal of an environment in which they feel comfortable. They contribute to the downfall --

Q. I understand that.

A. -- because of the nature of their disorder.

....

Does the job stress contribute to the aggravation or the lighting up of that condition?

A. Minimum.

Q. But it does contribute to it?

A. Minimum.

[Jt. Ex. 105(1)]

He opined that claimant's work environment did not cause her borderline personality disorder, that it was present prior to working for the department, and that it was exacerbated and came to flourish in the work setting because of her feeding into it. He indicated that the increase in pressure on the job was contributed to by her interpersonal behavior with individuals in the work setting.

APPLICABLE LAW

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 her 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 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 therein.

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 Services Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In cases involving alleged mental injuries which are not the result of physical trauma, the required showing to establish a compensable mental injury arising out of employment vary from state to state. See Sersland, Mental Disability Caused by Mental Stress: Standards of Proof in Workers' Compensation Cases, 33 Drake L.Rev. 751 (1984). The Iowa Supreme Court has not as yet decided what rule applies in this state. The court has only stated that claimant's employment must provide more than a "stage for the nervous injury." Newman v. John Deere

Ottumwa Works, 372 N.W.2d 199 (Iowa 1985). On one occasion in the past this agency has indicated preference for the so-called "objective" or "Wisconsin" rule which was first expressed in School District #1 v. Department of Industry, L. & H.R., 62 Wis.2d 370, 215 N.W.2d 373 (1974) and later in Swiss Colony v. Dept. of ILAR, 72 Wis.2d 46, 240 N.W.2d 128 (1976). See Schreckengast v. Hammermills, Inc., IV Iowa Industrial Commissioner Report 305 (Appeal Decision 1983). However, this agency's decision in Schreckengast was appealed to the Iowa Supreme Court which affirmed the agency on other grounds. Whether or not the ruling from this agency in Schreckengast is binding in this case, the Wisconsin rule appears to be the best approach and is favored by Professor Larson in his treatise on workers' compensation law. See Larson, The Law of Workmen's Compensation, Vol. 1B, p. 7-637 et. seq., section 42.23(b). The rule insures that the claimed emotional difficulty is truly work related given the difficulties surrounding proof of the existence and nature of emotional harm. Furthermore, the rule is consistent with the concept in personal injury cases long recognized in Iowa that damages are more difficult to recover in a case involving only an emotional injury than a case involving a physical injury. Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981), negligent infliction of emotional harm; Barnett v. Collection Service Co., 214 Iowa 1303, 1312, 242 N.W. 25, 28 (1932), intentional infliction of emotional harm.

Under the Wisconsin rule, a nontraumatically caused mental injury is compensable only when the injury "resulted from a situation of greater dimensions than the day-to-day mental stresses and tensions which all employees must experience." Swiss Colony, 240 N.W.2d at 130. In other words, there are two issues which must be resolved before finding an injury arising out of employment--medical and legal causation. The medical causation issue is strictly an examination into the cause and effect relationship between the stresses and tensions at work and the mental difficulties. If the medical causation issue is resolved in favor of the claimant, legal causation is next examined. This determination concerns the issue of whether the work stresses and tensions (viewed objectively, not as perceived by claimant) were "out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury." School District #1, 215 N.W.2d at 377.

ANALYSIS

The first matter to be considered is the reliability of claimant's testimony. The deputy found that claimant was not a credible witness. Claimant argues on appeal that this finding was erroneous because claimant's testimony was corroborated by other witnesses. While some of claimant's testimony is corroborated by other witnesses, other testimony is contradicted. It

should be noted that a material aspect of claimant's testimony regarding the occurrence of her alleged fall is corroborated by Davies who was herself under duress on the day of the fall and the credibility of Davies' testimony would be suspect. Furthermore, Davies' testimony would be suspect because her account of her activities on the day of the fall excluded her confrontation with the judge. A sufficient amount of the testimony is contradicted, confused, and implausible so that it is impossible to rely on claimant's testimony. Claimant's own testimony was that she was confused during the time she worked for the department and at the time of the hearing. Claimant's confusion and the contradictions in her testimony as well as Davies' testimony leave enough information in doubt as to conclude that the testimony of neither the claimant nor Davies is reliable.

The second matter to be considered is whether claimant suffered a mental injury that arose out of and in the course of her employment. As will be discussed below, claimant has not established that she had a back injury that arose out of and in the course of her employment. It should be noted that claimant's treatment for her mental condition in August 1982 predated her alleged fall in December 1983. Therefore, the alleged mental injury would not be the result of a physical trauma. In discussing whether claimant's employment was the cause in fact of claimant's mental condition, the deputy stated:

> There was dispute among the medical experts testifying in this case as to the exact diagnosis of claimant's mental problems. Claimant's treating psychiatrist, D. F. Martinez, M.D., and treating psychologist, George R. Mount, Ph.D., diagnosed claimant as suffering from only "avoidant personality disorder," a lesser degree of personality disorder than [borderline personality disorder]. Drs. Martinez and Mount state that this condition made claimant susceptible to severe and disabling depression and anxiety caused by various stressors in her work environment. However, the views of the expert retained by defendants, Robert E. Smith, M.D., a board certified psychiatrist, were given the greater weight....Although Dr. Mount is an extremely able psychologist and Dr. Martinez has not been shown to lack in credentials, Dr. Smith's academic credentials along with his teaching and clinical experience as an instructor at a major medical school and teaching hospital were impressive despite Dr. Martinez's and Dr. Mount's longer clinical experience with claimant. Also, Dr. Smith's portrayal of a typical person suffering from "borderline personality disorder" was more descriptive of claimant's behavior in this case.

According to Dr. Smith, persons who have a borderline personality disorder suffer from recurrent episodes of depression which require hospitalization. Such persons encounter difficulty with interpersonal relationships and exhibit mood instability. Borderlines generally seek to control their environment. They do not easily take criticism. Such persons seek recognition from others and sometimes attempt to manipulate their environment to achieve recognition of being good or better than others. Also, borderlines tend to blame others for their difficulties rather than examine their own possible capability for their problems. Finally, the depression experienced by borderlines unlike endogenous or biochemical induced depression generally improves very quickly upon hospitalization and medication therapy. However, Dr. Smith also states that because of their desire to control, borderlines do not tend to follow through with follow-up treatment after depression episodes and they likewise are not likely to continue taking prescribed medication. For these reasons, borderlines are difficult to treat and their prognosis is generally not good.

Only two other psychiatrists were involved in this case. Michael L. Egger, M.D., who treated claimant in 1982 and Joseph H. Lindsay, M.D., an associate of Drs. Martinez and Mount who initially admitted claimant to the hospital in 1984. Dr. Smith testified that these physicians agree with his diagnosis from his review of their reports. Except for the fact that Dr. Mount stated that Dr. Lindsay only briefly dealt with claimant, he did not dispute Dr. Smith's assessment of their views.

The deputy correctly concluded that claimant suffered from a psychiatric condition termed a borderline personality disorder prior to her employment with defendant employer. Not only did Dr. Smith's portrayal of a typical person suffering from borderline personality disorder describe claimant's behavior in this case, but his explanation as to why his diagnosis differed from Dr. Mount's was convincing. While Dr. Smith may have had less contact with claimant, he based his diagnosis on the general picture of claimant's condition and not merely components or symptoms of claimant's condition or complaints by claimant.

Although Dr. Smith did indicate that job stress may have aggravated claimant's condition, he emphasized that it was a minimum contribution. It was also his opinion that the increase in the pressure on the job experienced by claimant was contributed to by claimant's interpersonal behavior with individuals in the

work setting. It is impossible to tell the extent that job stress contributed to the aggravation of claimant's condition. There is insufficient medical evidence in the record to determine at any one point in time how much of claimant's condition was due to her underlying condition and how much was due to the aggravation of the condition. There were apparently other factors that also contributed to the aggravation and it is impossible to determine how much of the aggravation could be attributed to job stress and how much was attributed to the other factors.

Those doctors who opine that claimant's condition in 1984 or thereafter was a result of the work environment do not specify what, if any, aspects of the work environment were the contributing factors. It is impossible to tell at any time if claimant's condition was due to the work environment or the normal progress of claimant's mental condition. Dr. Smith indicated that claimant's condition was exacerbated in the work setting because of her own interpersonal behavior. It is not clear whether it was Dr. Smith's opinion, which is the most reliable, that the work setting aggravated claimant's condition or the aggravation was the result of claimant's own interpersonal behavior.

A work connected injury which more than slightly aggravates a preexisting condition can be the cause of a compensable injury. In this case claimant has not demonstrated that her work environment developed a pattern of stress over a significant period of time. She first sought care for her mental condition only a matter of several months after the office reorganization. The misunderstanding regarding whether claimant was to have time off charged as "comp time" or vacation time was certainly not part of any pattern. That misunderstanding was not an out of the ordinary work stress. It cannot be said that this misunderstanding was an actual precipitating factor for claimant's condition at that time. Claimant has not proved that that misunderstanding or any other work activity aggravated her condition beyond the normal progression of her condition. Claimant has not proved that her work environment, in fact, caused her mental condition nor has she proved that it aggravated her preexisting mental condition. This is especially true since claimant is not credible and the physicians were basing their opinions on claimant's statements as to history and complaints.

The third matter to be considered is whether claimant received a physical injury that arose out of and in the course of her employment. In discussing this issue, the deputy stated:

> Drs. Mount and Martinez also opine that claimant's difficulties beginning in February 1984 were also significantly aggravated by claimant's back problems caused by the alleged fall experienced by claimant at work on December 6, 1983. This opinion is based

upon the history that claimant provided them of this fall and that all of her back problems began at that time. Dr. Smith agrees that a borderline personality individual will have more difficulty dealing with physical problems than a normal person. Claimant was diagnosed in October 1984 as suffering from a herniated disc in her cervical spine and spondylolisthesis in her lower spine resulting in upper and lower back pain and numbness in the left upper and lower extremities.

However, due to a lack of credible evidence, no finding can be made that claimant actually suffered a fall at work on December 6, 1983 or at any other time. Claimant contends that she had no back problem before a fall she experienced in the Mills County courthouse on the day of the juvenile court proceeding in which she testified on behalf of Davis [sic]. At that time, toward the end of the day, claimant testified that she fell on her buttocks while attempting to climb the stairs near her office. Interestingly, the only person to verify her story was Davis [sic] herself. Claimant stated that her back pain and numbness started at that time and that she experienced continuous severe pain since that time. Claimant said that she reported the fall to Hallock but that Hallock ignored her because Hallock was upset over claimant's testimony that day. Hallock denies that claimant ever mentioned the fall at any time prior to leaving work in February 1984.

Aside from the fact that claimant generally is not credible, claimant's story regarding the fall is not plausible. She did not seek immediate medical attention despite a complaint of an immediate onset of continuous back pain that she supposedly had never before experienced. Although claimant apparently complained of neuritis symptoms during the February 1984 hospitalization and x-rays were taken of her back at that time, no such fall was mentioned in any of the histories reported by her physicians in Texas until October 1984. After the February 1984 hospitalization, claimant did not seek further treatment of her back until April 1984 and then again no further treatment was received until October 1984. The only mention of any fall prior to October 1984 in any of claimant's medical records concerned a fall at her sister's house in Texas in August 1984 after which she complained of low backache and numbness in her left leg. Furthermore, if claimant had thought she orally notified

Hallock on the day of the fall, why did she feel it necessary to retain an attorney to file a first report of injury in March 1984, three months after the alleged fall, before Hallock or anyone else knew claimant was filing a workers' compensation claim in this matter. Hallock simply had no opportunity to deny the oral notice of injury prior to the first report of injury.

Furthermore, Davis' [sic] verification of claimant's fall is not credible. Her testimony in her deposition submitted into the evidence contained numerous inconsistencies and conflicts with other credible evidence in this case. Davis [sic] at first denied talking with claimant especially about her work and her problems with Hallock-before the-juvenile hearing but later on upon further questioning she admitted to prior discussions with claimant on at least two occasions, once in her home. Davis [sic] also said that claimant was limping around the Mills County office after this fall but no other person in the Mills County office observed such symptoms. Also, Davis' [sic] testimony was not impressive for the reason that she claimed that human services had been unfair to her. She also professed a real interest in her children in her testimony. However, her attorney testified that he was forced to withdraw as her attorney after the December 1983 hearing because she did not keep him informed of her whereabouts and did not attend subsequent court hearings.

Admittedly, two credible witnesses, Roland York and Esabelle Garrison, the court bailiff, who testified by way of deposition, stated that claimant told them of a fall she experienced on the courthouse stairs. However, neither of these witnesss could state when this occurred except that York stated that it was during her employment with human services. It is unclear from York's testimony whether he meant before the last day of work in February 1984 or her termination in June 1984. It is completely therefore possible that claimant could have mentioned this fall when she returned from Texas in March 1984 after her lawyer filed the first report of injury. It is also possible that he could have been referring to a fall at a much earlier time then [sic] December 1983. Unfortunately, the testimony of these witnesses were insufficient, given claimant's lack of credibility, to establish that claimant suffered the fall in question or that the fall was the beginning of her back difficulties.

The deputy correctly determined that claimant had not proved she had fallen at work on December 6, 1983. Claimant admitted she was confused during this time. The alleged fall coincided with the testimony at the court hearing at which she was upset. She perceived that her coworkers and supervisor were upset about the testimony and this further upset her. The doctors who state that her physical condition was a result of the fall base their opinion upon a history that is not reliable and somewhat inconsistent. Claimant related different symptoms at various times. She stated that she limped and was in considerable pain at work but also complained of neck and arm problems and later only reported arm problems and still later reported neck and lower back problems. The evidence is too inconsistent and unreliable to conclude that claimant met her burden of proving a back injury that arose out of and in the course of her employment with defendants on December 6, 1983.

Claimant raises two other matters on appeal that can be dealt with summarily. First, claimant argues that the deputy erred in limiting claimant's presentation of her case. That argument is at odds with the circumstances of this case. Much of the testimony was given by means of deposition and claimant was represented when those depositions were taken. In addition, the Analysis of Status/Certificate of Readiness for Pre-Hearing Conference dated October 1, 1984 which was signed by claimant's representative stated that the hearing would be three to four hours. The hearing lasted from 8:30 a.m. until 4:20 p.m. on May 22, 1986 and it was continued until June 27, 1986 when it commenced at 8:30 a.m. and concluded at 5:00 p.m. Ten of the thirteen witnesses testifying at the two days of hearing were called by claimant to testify. Claimant's argument that the deputy erred in limiting presentation of her case is simply not persuasive.

Claimant also argues that the deputy erred in assessing the costs of the proceedings to her. In support of the argument, claimant points out that three-fourths of the costs incurred were for the discovery depositions taken by defendants. Division of Industrial Services Rule 343-4.33 provides in relevant part: "Costs are to be assessed at the discretion of the deputy commissioner or industrial commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery." While the costs of the proceeding may be in part due to the depositions taken by defendants, there is no indication that the discovery by defendants is excessive. Claimant's own actions, her credibility and her candor, and the nature of this case are all factors that contribute to the costs of this case. As ordered below, claimant takes nothing from these proceedings. The deputy did not abuse his discretion in assessing costs to the claimant in this case.

FINDINGS OF FACT

1. The testimony of claimant was unreliable.

2. Claimant was employed by defendants in Mills County, Iowa, from December 8, 1980 to June 17, 1984, initially as a Clerk II and later as a Secretary I.

3. Claimant's employment history consists mainly of secretarial and clerical work prior to December 1980.

4. Prior to her employment with defendants, claimant suffered from a psychiatric condition, a borderline personality disorder. That condition is one in which environmental influences or interpersonal conflict perceived by claimant as stressful precipitates recurrent or chronic severe depression, anxiety, and anger.

5. Prior to claimant's hospitalization for emotional difficulites in 1982 and 1984 and prior to her employment with defendants, she was hospitalized for emotional difficulties on one occasion in December 1976 while she was living in Texas following the burning of her house.

6. The defendant department underwent a reorganization in March 1982 and the Mills County office where claimant worked was relocated shortly thereafter.

7. After the office was relocated, the office space was small and cramped for all the employees in the office.

8. There was tension in the office when it was supervised by Hallock. The tension was experienced by several employees including claimant.

9. The mental work stresses and tensions claimant experienced during her employment with defendant between March 1982 and February 1984 did not aggravate her preexisting mental condition.

10. Claimant did not suffer a back injury as a result of a fall at work on December 6, 1983.

11. Claimant's mental condition is not the result of a physical trauma.

12. Claimant's job was not unusually stressful.

CONCLUSIONS OF LAW

Claimant has failed to prove by a preponderance of the evidence that she suffered a mental injury that arose out of and in the course of her employment.

Claimant has failed to prove by a preponderance of the

evidence that she suffered a physical injury on December 6, 1983 that arose out of and in the course of her employment.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay all costs of this action including the costs of the appeal and transcription of the arbitration hearing.

Signed and filed this 19th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK E. DORPINGHAUS,

Claimant,

vs.

UNIVERSITY OF IOWA HOSPITALS AND CLINICS,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

File No. 771007

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying any benefits as a result of an injury on May 24, 1984.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibit 1; and claimant's exhibits 2 and 3. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether there is a causal relationship between the alleged injury and the claimed disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

Claimant has the burden of proving that his alleged injury on May 24, 1984 is causally related to his claimed disability. Claimant argues on appeal that he has established sufficient evidence to establish the causal connection. The claimant

evidence that she suffered a physical injury on December 6, 1983 that arose out of and in the course of her employment.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay all costs of this action including the costs of the appeal and transcription of the arbitration hearing.

Signed and filed this 19th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK E. DORPINGHAUS, Claimant, vs. UNIVERSITY OF IOWA HOSPITALS AND CLINICS, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 771007 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying any benefits as a result of an injury on May 24, 1984.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibit 1; and claimant's exhibits 2 and 3. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether there is a causal relationship between the alleged injury and the claimed disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

Claimant has the burden of proving that his alleged injury on May 24, 1984 is causally related to his claimed disability. Claimant argues on appeal that he has established sufficient evidence to establish the causal connection. The claimant

relies upon the fact that claimant experienced pain shortly after the fall. However, claimant acknowledges that no medical personnel have causally related claimant's condition with the incident on May 24, 1984 (hereinafter sometimes referred to as the fall).

After the fall claimant was examined by Edward A. Dykstra, M.D.; examined and treated by Michael M. Durkee, M.D.; and examined by James B. Worrell, M.D. None of these doctors indicated that the fall was the probable cause of any disability to claimant. Likewise, none of these doctors indicated that the fall aggravated claimant's prior shoulder problems.

Not only is there no medical evidence to support a causal connection between the fall and claimant's alleged disability but, claimant's own statements and testimony indicate that his current condition is the result of shoulder problems that predated the fall by three years. Claimant testified that he had a recovery of 89-90 percent after the surgery in 1981. He did not deny that Dr. Durkee advised him that his limitation of motion was due to the prior surgeries. He also testified that he indicated to his supervisor that his limitation of motion was for a short period of time following the surgery after the fall. He returned to his same job. The office note of Dr. Durkee indicates that claimant told the doctor that he was 100 percent better than before his surgery following the fall. The statements made by the claimant do not demonstrate that his fall was the cause of any disability, either temporary or permanent.

Claimant has provided neither medical evidence nor any other evidence that shows that his fall was the cause of any disability. The chronological proximity between the fall and the onset of pain may be evidence of an injury but it is not evidence of a disability. Claimant has clearly not met his burden of proving that the fall of May 24, 1984 was the cause of a disability, either temporary or permanent.

FINDINGS OF FACT

1. Claimant was employed by the University of Iowa Hospitals and Clinics as a nursing assistant I, Department of Pediatrics, Division of Developmental Disabilities on May 24, 1984.

2. Claimant's work shift began at 6:30 a.m. and ended at 3:30 p.m.

3. Claimant was assigned a parking space in the University-owned parking lot.

4. The main entrance of the Department of Pediatrics hospital school building was not open until 8:00 a.m.

5. Claimant used a side entrance to the Department of Pediatrics hospital school building to enter to begin his work shift.

6. The route from the assigned parking lot to the ancillary entrance which claimant normally used required a walk downhill through a grass-seeded area where construction was taking place.

7. It had rained throughout the night into the morning of May 24, 1984.

8. Claimant fell enroute to the hospital school building on the morning of May 24, 1984 approximately 50 yards from the hospital school building and approximately 100 yards from the entrance claimant customarily used.

9. Claimant had had numbness and tingling involving his hands and fingers as of May 27, 1981.

10. Claimant had fallen down stairs injuring his shoulders in approximately 1979.

11. On July 9, 1981 claimant had a Du Toit stapling of the right glenohumeral joint for recurrent anterior subluxation of the right humeral joint.

12. On October 1, 1981 claimant had a superior staple removed from the right glanoid.

13. Claimant had had limitation of right shoulder motion prior to May 24, 1984.

14. As of May 24, 1984 claimant had mild tenderness of the shoulder with limitation of motion.

15. X-rays of May 24, 1984 showed no evidence of dislocation, but did reveal a staple extremely close to the anterior aspect of claimant's glenohumeral joint.

16. Right shoulder arthroscopy of June 22, 1984 revealed recurring dislocation and marked degenerative changes in the (glenohumeral) joint.

17. Bristow Repair of the shoulder and removal of the staple in the glenohumeral joint was performed on July 15, 1984.

18. Electromyographic studies of June 12, 1986 revealed no nerve conduction abnormalities.

19. Claimant's permanent partial impairment is five percent of the arm or approximately three percent of the body as a whole.

20. Any industrial disability arising from claimant's injury, had such been found, would have been minimal.

CONCLUSIONS OF LAW

Claimant has established a work incident of May 24, 1984, which incident did arise out of and in the course of his employment.

Claimant has not established that that incident resulted in an injury which was causally related to claimed disability.

Claimant has not established any entitlement to healing period, temporary total disability or permanent partial disability benefits as a result of the incident of May 24, 1984.

Claimant has not established medical costs which are compensable under section 85.27 as related to a compensable injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the costs of this proceeding including costs of transcription of the arbitration hearing.

Signed and filed this 21st day of February, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CURTIS DUFFIE, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	File No. 806044 A P P E A L D E C I S I O N FILED

MAY 12 1989

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying permanent partial disability benefits as the result of an alleged injury on July 2, 1985.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 22. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the following issues on appeal:

1. The deputy commissioner incorrectly determined that the claimant failed to prove that his injuries arose out of and in the course of his employment.

2. The deputy commissioner should have determined the permanent partial disability rating of 50 percent.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. On July 2, 1985, Curtis Duffie was a resident of Dubuque, Iowa employed at the John Deere Dubuque Works of Deere & Company in Dubuque, Iowa.

2. Claimant's duties and activities of his employment were not shown to be a substantial factor in producing the carpal tunnel syndrome and ulnar nerve entrapment which he has experienced.

CONCLUSIONS OF LAW

Claimant has failed to prove, by a preponderance of the evidence, that he sustained an injury to his hands or arms which arose out of and in the course of his employment with John Deere Dubuque Works of Deere & Company.

Claimant has failed to prove, by a preponderance of the evidence, that any of the problems and disability that he has experienced in his upper extremities were proximately caused by any of the duties or activities he performed as part of his employment with John Deere Dubuque Works of Deere & Company.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That the costs of this action are assessed against the claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 12th day of May, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLARD DUFFIELD, Claimant, vs. IOWA STATE PENITENTIARY, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 771083 A P P E A L D E C I S I O N

FILED
SEP 21 1988
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent total disability benefits and medical expenses.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 28.

ISSUES

The issues on appeal are whether claimant suffered an injury that arose out of and in the course of his employment; whether there is a causal connection between claimant's injury and his alleged disability; the extent of claimant's alleged disability; and whether the medical expenses are related to the injury.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Briefly stated, claimant began work for defendants in 1977 as an electrical and refrigeration maintenance engineer. Prior to that time he had done automotive, electrical, and refrigeration work. Claimant has a high school education and attended a trade school for about one year. In 1980, he was diagnosed to have significant coronary artery disease. In October 1980, he underwent angiography and bypass surgery after which he returned to work full time.

Sometime prior to April 1984 claimant's employer, Iowa State Penitentiary (hereinafter prison), began an internal investigation of employees as a result of allegations of wrongdoing. Prior investigations by prison officers and authorities had resulted in what the claimant characterizd as employees being "locked out." The investigation in 1984 eventually involved the department in which claimant worked and he was the last employee to be interviewed.

Claimant testified on April 5, 1984 he was told by Major Harry Grabowski who was in charge of the internal investigative section of the prison to report for an interview. Claimant's union steward accompanied claimant at claimant's request. Claimant stated that he was bothered by the presence of the four investigators and that he thought they were going to try to take his job away. Claimant informed the investigative team that he had heart problems and that he did not feel he should have to go through the interrogation. Claimant was requested to make a statement to that effect and the interview was postponed. Claimant further testified he told a personnel officer for the prison that he was scared and he "felt like a sick rabbit with four hound dogs after [him]." Claimant was requested to get a statement from his doctor. He obtained a statement from his doctor, Artemio Santiago, M.D., dated April 6, 1984, which stated that claimant "may return to his maintenance work at Iowa State Prison as stress does not, or will not, prevent him from doing his normal duties, or any extra duties that may be required of him." (Joint Exhibit 23)

On May 3, 1984 while claimant was eating at work, he was called by Grabowski to report to his office. Claimant again had the union steward accompany him. Grabowski and one other investigator were there. The interview started and claimant testified that he was shook up, started getting arm pain and some chest pain, and he felt his blood pressure was terrible. Claimant informed the investigators that he felt bad and the interview was stopped. The transcription of the recording of the interview indicated that the interview lasted two minutes. Claimant stated he had not had chest and arm pain since his prior bypass surgery. Claimant went to the prison hospital where his blood pressure was checked. He then went to see Dr. Santiago and went home. Claimant stated that he started having chest pains and he took four "nitros" but still had chest pains. He called Dr. Santiago and Dr. Santiago told him to go to the hospital.

Claimant was admitted to the Fort Madison Community Hospital on May 3, 1984 at 1:55 p.m. He was discharged on May 15, 1984 and the final diagnosis stated: "Acute inferior wall myocardial infarction. Complete heart block. Temporary pacemaker, resolved." (Jt. Ex. 10) The discharge summary states in part: "After several hours in the SCU patient went into 3rd degree AV block,

ventricular rate dropped to 30. Patient was brought down to fluroscopy for pacemaker placement." (Jt. Ex. 10)

Claimant had frequent angina and was seen by the Cardiology Clinic at the University of Iowa Hospitals on June 6, 1984. J. L. Ehrenhaft, M.D., Professor and Chairman, Division of Thoracic and Cardiovascular Surgery, University of Iowa Hospitals, described the care claimant received in a letter dated June 16, 1984 which reads in relevant parts:

> He has had recurrent angina which was rather incapacitating and was not manageable by medication alone. For this reason the patient underwent coronary arteriography again on June 11, 1984. At that time it was found that the patient's vein graft to the circumflex system had clotted. The left anterior descending graft was still open, and the graft which had been placed previously into the right coronary artery also had clotted. There was progression of the native vessel disease as well. From previous exploration of this patient we knew that there were no further vessels to be grafted over the posterior surface of the heart. The left anterior descending coronary artery was still open and functioning and it was decided after some discussion to reoperate upon the patient and possibly place a graft into a branch of the right coronary artery or possibly the posterior descending coronary vessel. We reexplored this patient on June 15, 1984 and were able to place one vein bypass graft into a very small posterior descending artery branch of the right coronary vessel....I do not know but I am hopeful that the single vein bypass graft will be of some benefit to the patient. Obviously this is a situation where we cannot promise lengthy relief of symptoms.

(Jt. Ex. 8)

Claimant and his wife testified that before claimant's condition in May 1984 he did not have physical limitations but after that time he was unable to do activities such as carrying groceries or firewood, lifting or repairing things, walking, climbing a ladder, hunting, running a vacuum cleaner, operating a garden tiller or lawnmower, chopping or splitting firewood, hoeing in the garden, raking the yard, or digging with a shovel or spade. Claimant admitted that he had not investigated the possibility of a job other than at the prison nor of being re-educated for another type of job. He also admitted he never contacted the prison for light duty work or vocational training.

Dr. Santiago testified:

A. After the hospitalization he persist [sic] to have chest pain. The activity was very limited and so eventually he was referred to University of Iowa and was seen at the Cardiology Department, and let's see -- And finally a by-pass was done on June 15th, 1984.

Q. And after the by-pass, did you also follow up with him?

A. Uh-huh.

Q. And could you explain to us what that follow-up consisted of then?

A. Well, he -- I'd been seeing him quite regularly in the office and -- all this time. He -- In spite of the --

He improved for a while, and then the condition gradually worsens again to the point that even mild activity or just being nervous or upset will bring on chest pain. So to the point that he became disabled.

....

Q. Okay. Doctor, do you have an opinion, within a reasonable degree of medical certainty, as to whether or not Mr. Duffield has a permanent impairment?

A. Yes, it is my opinion that he is permanently disabled because of the disability of his heart condition.

Q. And by that do you mean totally disabled?

A. Totally disabled.

....

Q. Do you have an opinion, within a reasonable degree of medical certainty, as to whether or not the stress that he had related he had on the job would have aggravated that pre-existing condition? In other words whether or not it is -- his disability today is causally connected to that incident or stress in terms of aggravating the previous condition to cause that?

A. The time factor is there, you know. Usually there's always something that will bring on a chest

pain or bring on a heart attack. In this particular case I think the time factor is there, you know. He was under a lot of stress.

Q. So is it your opinion then that it would have aggravated that condition or been caused from it?

A. Yeah, stress will definitely aggravate or bring on heart attack.

(Santiago Deposition, pp. 6-8; Jt. Ex. 16)

Claimant was evaluated by Craig Blaine Rypma, who had a doctoral degree in clinical psychology. Dr. Rypma described claimant as a dependent individual who tended to become very easily attached to other individuals and experiences extreme anxiety at the possibility of losing or being rejected by those relationships he has developed. He opined that claimant would be extremely anxious about being involved in the internal investigation. He stated that individuals with personalities like claimant's are seen as denying physical symptomatology and that his advice to medical personnel would be to pay extremely close attention to complaints of physical ailments because when claimant complains physical symptomatology is obviously there and is bothering him.

Claimant was evaluated by Randolph R. Rough, M.D., and Dr. Rough opined in a letter dated September 16, 1985 that claimant was "quite disabled by angina pectoris."

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The first issue to be discussed is whether claimant suffered an injury that arose out of and in the course of his employment. The record discloses that claimant was concerned about the internal investigation and that he thought he might lose his job. Claimant had the type of personality that would perceive his situation as threatening and stressful. Claimant had been able to work with no restrictions for over three years following his first bypass operation. His myocardial infarction occurred when he experienced stress relating to the internal investigation. For the claimant the stress of the internal investigation was greater than his regular employment or his nonemployment life. Claimant has suffered an injury that arose out of and in the course of his employment.

The second issue to be discussed is whether there is a

causal connection between claimant's injury and his alleged disability. Dr. Santiago was of the opinion that there was a relationship between the stress claimant experienced and his injury. It was also Dr. Santiago's opinion that the stress and the heart attack resulted in claimant being totally "disabled." While the doctor is not qualified to make a determination of disability, it is obvious that the doctor viewed claimant's impaired condition as permanent. Claimant has had recurrent angina pain severe enough that he is unable to do physical activities. It should also be noted that the myocardial infarction occurred within a matter of hours after the attempted interview with the investigation team on May 3, 1984. As discussed in Exhibit 14 "the development of myocardial infarction rarely occurs as a result of physical effort alone." (Ex. 14, p. 314) and "[t]he shorter the time interval between the exposure to a potentially noxious stimulus and the appearance of clinical or pathologic evidence of new heart disease or dysfunction, the more likely is there to be a causal relationship. Conversely, the farther apart they are in time, the less likely is a cause and effect relationship." (Ex. 14, p. 316) Claimant has proved that there is a causal relationship between his work injury and his disability.

The next issue to be discussed is the extent of claimant's disability. Claimant argues that claimant is totally disabled and agrees with the deputy's conclusion that claimant made a prima facie case of total disability under the "odd-lot" doctrine. Defendants seem to argue that claimant cannot be totally disabled because he is 59 years old and has retired. Age is merely one factor in determining industrial disability. In the instant case claimant has demonstrated that he is an older worker, he has limited education and training, his prior work history is manual or physical labor, and he cannot perform physical activities without angina pain. Dr. Santiago opined that claimant was totally "disabled." Even though the doctor used the term disabled, it is apparent that it was his opinion that claimant was significantly impaired by his heart condition. After his myocardial infarction claimant's angina pain was caused by both nervousness and mild physical activity. There has been no medical evidence nor other evidence that contradicts claimant's evidence of his inability to perform even mild physical activity without the angina pain. In fact, there has been no showing that claimant has been offered any employment, including light duty work, by defendants. Claimant does not need to prove that his physical impairment is 100 percent to prove he is permanently totally disabled. See Diederich v. Tri-City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935). When all factors and evidence are considered claimant has proved by the greater weight of evidence that he is permanently and totally disabled. Because claimant has proved that he is permanently and totally disabled, it not necessary to consider whether claimant is an "odd-lot" employee.

The last issue to be resolved is whether medical expenses are related to the injury. Defendants argue that there is no causal connection between claimant's injury and treatment after he was released from the Fort Madison Community Hospital on May 15, 1984. The evidence in this case indicates that claimant had angina pain as a result of his myocardial infarction. The majority of the medical expenses defendants dispute is for the treatment by the University of Iowa Hospitals after claimant's discharge from the Fort Madison Community Hospital. The coronary bypass operation performed there and follow-up care was an attempt to alleviate claimant's pain which was caused by his work injury. The remaining medical expense includes medications and doctor office visits reasonably related to treatment of claimant's angina pain.

FINDINGS OF FACT

1. Claimant was born on July 10, 1927 and was 59 years of age at the time of the arbitration hearing.

2. Claimant has a high school education and has had one year of trade school.

3. Prior to working for the prison, claimant had done physical type work such as automotive, electrical and refrigeration work.

4. Claimant was employed as an electrical and refrigeration maintenance engineer by the prison from May 3, 1977 until October 19, 1984 at which time he retired.

5. Sometime prior to April 1984 the prison began an internal investigation into wrongdoing by the employees of the prison.

6. Claimant was one of the employees who was to be interviewed as part of the internal investigation.

7. On May 3, 1984, claimant was to be interviewed but the interview was not conducted because claimant complained of arm and chest pain.

8. Claimant perceived the investigation as possibly resulting in his loss of employment with the prison.

9. Claimant experienced stress at work relating to the internal investigation that was greater than stress in his regular employment or his nonemployment life.

10. Claimant suffered a myocardial infarction within several hours after his interview was called off.

11. Claimant had had bypass surgery in December 1980 but

had returned to work without any restrictions after that surgery.

12. Claimant underwent hospital and surgical treatment to relieve angina pain, but he continues to have angina pain.

13. The angina pain is a permanent condition.

14. Claimant can no longer do physical activities because of the angina pain. Nervousness can also cause claimant's angina pain.

15. On May 3, 1984, claimant suffered an injury that arose out of and in the course of his employment with the prison.

16. The work injury of May 3, 1984 is a cause of permanent physical impairment.

17. The work injury of May 3, 1984 is a cause of claimant's current permanent and total loss of earning capacity.

18. Claimant has incurred reasonable medical expenses for the treatment of his work injury in the amount of $42,528.11 as listed in the list of medical expenses attached to the prehearing report filed in this case.

CONCLUSIONS OF LAW

Claimant has proved by the greater weight of evidence that on May 3, 1984 he suffered an injury that arose out of and in the course of his employment.

Claimant has proved by the greater weight of evidence that there is a causal connection between his injury and his permanent disability.

Claimant has proved by the greater weight of evidence that he is permanently and totally disabled.

Claimant has proved by the greater weight of evidence that he is entitled to reasonable and necessary medical treatment for his injury.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant permanent total disability benefits during the period of his disability at the rate of two hundred fifteen and 72/100 dollars ($215.72) per week from May

3, 1984.

That defendants pay claimant the medical expenses to the provider and in the amounts listed in the attachment to the prehearing report.

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

That defendants receive credit for previous payments of benefits under a nonoccupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2).

That defendants pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants pay costs of this action including the costs of the appeal and transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

That defendants file activity reports on the payment of this award as requested by this agency pursuant to the Division of Industrial Services Rule 343-3.1.

Signed and filed this 21st day of September, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HOWARD C. ENGELHART, Claimant, vs. MID-AMERICA TANNING CO., INC., Employer, and ROCKWOOD INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 803205 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying all compensation because he failed to establish that he sustained an injury, that the alleged injury resulted in any disability, or that he gave his employer notice of an injury pursuant to Iowa Code section 85.23.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 6. No briefs were filed on appeal.

ISSUES

As appellant filed no brief on appeal, this appeal will be considered generally without specified errors to determine its compliance with the law.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The deputy's analysis of the issues in conjunction with

law and evidence presented is adopted.

FINDINGS OF FACT

1. Claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained an injury on January 17, 1985 by slipping on the ice and twisting his back on that date.

2. There were no eye witnesses to the incident.

3. Claimant did not report the injury at the time it occurred to Shelton, the office, or any other supervisor.

4. Claimant did not report the injury to the plant manager, Rohen, whom he saw everyday in the office and who directly supervised his work.

5. Claimant's testimony that he reported the accident to Shelton and Fuehrer was not credible.

6. Claimant did not seek medical treatment for the alleged injury of January 17, 1985 until March 5, 1985.

7. Claimant did not follow the admonition of Dr. McCarthy to get approval from the company medical doctor for further care.

8. Neither Dr. McCarthy nor Dr. Cotton found that the alleged injury of January 17, 1984 was the cause of either temporary or permanent disability or impairment.

9. No doctor recommended that claimant quit his job.

10. Claimant voluntarily quit his job on March 28, 1987.

CONCLUSIONS OF LAW

Claimant failed to establish by the greater weight of evidence that he sustained an injury on January 17, 1985.

Claimant failed to establish by the greater weight of evidence that the alleged injury was the cause of any temporary or permanent disability.

Claimant did not establish his entitlement to either compensation benefits or medical benefits.

Defendants established by the greater weight of evidence that claimant did not give notice as provided by Iowa code section 85.23 and that they did not have actual knowledge of the alleged injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That no amounts are due from defendants to claimant for compensation benefits or medical benefits.

That the costs of this action including the cost of the transcript on appeal are taxed to claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 19th day of August, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WARREN EVANS,	:	
	:	
Claimant,	:	
	:	File No. 811414
vs.	:	
	:	
JOHN MORRELL & COMPANY,	:	A P P E A L
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

FILED

AUG 25 1988

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding permanent partial disability benefits based on a binaural hearing loss of 5.9 percent and the cost of hearing aids.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits A through F; and defendant's exhibit 1. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant incurred an occupational hearing loss that arose out of and in the course of employment. More specifically stated, the issue is whether the deputy erred in choosing one audiogram over another for calculating the occupational hearing loss.

REVIEW OF THE EVIDENCE

Claimant began work for defendant in 1964. He worked various jobs for defendant until the plant closed in April 1985. Prior to the time the plant closed claimant saw the plant nurse to have his hearing tested.

R. David Nelson, M.A., audiologist, conducted an audiological evaluation at Nelson's office on May 5, 1986. In a letter dated May 6, 1986, Nelson described the results of the air-conduction sensitivity in both ears at "borderline levels between normal range and mild hearing impairment. His high frequencies, 3000 H_z through 8000 H_z, show more hearing loss." The test frequencies in H_z (Claimant's Exhibit E) were:

	500	1k	2k	3k
R	30	20	25	45
L	25	20	20	50

Daniel Jorgensen, M.D., otolaryngologist, examined claimant on October 28, 1986. As a part of that examination, Jean Rudkin, M.S., audiologist, conducted an audiogram using a soundproof booth and an audiometer. The pure tone threshold audiogram frequencies in H_z and decibels ANSI 1969 were:

	500	1000	2000	3000
R	20	15	15	30
L	25	20	15	40

The file in this matter shows the following: The original notice and petition was filed May 9, 1986 and the affidavit of mailing notice states that the original notice and petition was served on May 8, 1986.

APPLICABLE LAW

Iowa Code subsection 85B.4(1) (1985) provides in relevant part:

> 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.

Iowa Code section 85B.9 (1985) provides:

> Pure tone air conduction audiometric instruments, properly calibrated according to accepted national standards used to define occupational hearing loss shall be used for measuring hearing levels, and the audiograms shall be taken and the tests given in an environment as prescribed by accepted national standards. If more than one audiogram is taken following notice of an occupational hearing loss claim, the audiogram having the lowest threshold shall be used to calculate occupational hearing loss. If the measured levels of hearing average less than those levels that constitute an occupational hearing loss, the losses of hearing are not a compensable hearing disability....Audiometric examinations shall be made by a person who is certified by the council of accreditation in occupational hearing conservation or by persons trained by formal course work in air conduction audiometry at an accredited educational institution or licensed as audiologists under chapter 147, as physicians under chapter 148, as osteopathic physicians under chapter 150, or as osteopathic physicians and surgeons under chapter 150A if such licensed persons are trained in air conduction audiometry. The interpretation of the audiometric examination shall be by the employer's

> regular or consulting physician who is trained and has had experience with such interpretation, or by a licensed audiologist. If the employee disputes the interpretation, the employee may select a physician similarly trained and experienced or a licensed audiologist to give an interpretation of the audiometric examination. This section is applicable in the event of partial permanent or total permanent occupational hearing loss in one or both ears. (Emphasis added)

The Iowa Supreme Court has applied general rules of statutory construction. One of those rules is that where language is clear and plain, there is no room for construction. See American Home Products v. Iowa State Board of Tax Review, 302 N.W.2d 140 (Iowa 1981). A court in searching for legislative intent looks at what the legislature said, not what it might or should have said. See Dolezal v. City of Cedar Rapids, 326 N.W.2d 355 (Iowa 1982).

ANALYSIS

Defendant argues on appeal that the lower threshold of the two audiograms (the one taken by Jorgensen) which showed no compensable loss should be the one used. Claimant responds that the deputy correctly used the second audiogram (the one taken by Nelson) which showed a compensable loss. Claimant argues that the deputy was correct because he had discretion to accept or reject evidence he deems appropriate. Claimant further argues that legislative history is contrary to defendant's interpretation.

Defendant's argument is persuasive for two reasons. The first reason is that the language in section 85B.9 supra, is clear and there is no room for construction. The unambiguous language of the statute is that the audiogram having the lowest threshold taken following the notice of a claim shall be used to calculate occupational hearing loss. The audiogram taken by Joregnsen has the lower threshold of the two and it should be used to calculate the hearing loss. If this audiogram is used there is no compensable hearing disability when the calculation provided for in Iowa Code section 85B.9 (1985) is performed.

The second reason that the Jorgensen audiogram should be used is that it is the only one taken subsequent to the filing of notice of occupational hearing loss claim and consequently it is the lowest one conducted after the notice of the claim. The file in this case indicates that the notice of an occupational hearing loss claim would be the original notice and petition which was served on May 8, 1986 and was filed on May 9, 1986. The audiogram taken by Nelson was on May 5, 1986 and the audiogram taken by Jorgensen was on October 28, 1986. Only the lowest threshold audiogram taken subsequent

to the filing of notice of occupational hearing loss claim can be used to determine the extent of claimant's hearing loss. Weyant v. John Deere Dubuque Works of Deere and Company, (Appeal Decision, February 22, 1988) and Furry v. John Deere Dubuque Works of Deere and Company, (Appeal Decision, November 12, 1986).

It should be noted that claimant has not demonstrated and does not argue that the audiogram taken by Jorgensen does not comply with the requirements of section 85B.9. It should also be noted that for the applicable frequencies of 500, 1000, 2000, and 3000 Hertz, the two audiograms show generally the same patterns, namely, that the thresholds for the right and left ears at each frequency are within five decibels of one another and the decibel thresholds are higher at the upper and lower frequency than they are at the middle frequency. There is nothing indicated which would lead to the conclusion that the audiogram taken by Jorgensen is erroneous. The audiogram taken by Jorgensen complies with the requirements of section 85B.9.

FINDINGS OF FACT

1. Claimant started working for defendant in 1964.

2. Claimant's original notice and petition alleging an occupational hearing loss was filed on May 9, 1986.

3. The only audiogram after May 9, 1986 was taken by Dr. Jorgensen on October 28, 1986.

4. The audiogram taken by Dr. Jorgensen had a lower threshold than the audiogram taken by R. David Nelson.

5. Based on the calculation provided in section 85B.9, claimant has no hearing loss in excess of 25 decibels.

6. Claimant has no compensable hearing disability.

CONCLUSION OF LAW

Claimant has not proved by the greater weight of evidence that he incurred a compensable occupational hearing loss that arose out of and in the course of his employment with defendant.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That defendant pay the costs including the costs of transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 25th day of August, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES FERRELL,	:	
	:	
Claimant,	:	File No. 830446
	:	
vs.	:	A P P E A L
	:	
J. I. CASE COMPANY,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying permanent partial disability and temporary total disability benefits as the result of an alleged injury on April 16, 1985.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 7. Claimant filed a brief on appeal.

ISSUES

Claimant states the following issue on appeal: "Did Claimant's work accident of April 16, 1985 cause a period of temporary total disability and did it cause any permanent disability to Claimant."

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant worked for defendant J. I. Case Company (hereinafter Case) as a welder. Claimant was off work for back problems for three months in October of 1977; for 11 days in November of 1978; and for one week in 1979 after a snow shoveling injury. The record also shows he complained of back pain in January 1978; May 1978; November 1978; September 1981; and September 1984. Claimant underwent ongoing treatment from T. J. Kennedy, D.C., for these complaints.

In 1978, claimant was in an auto accident which resulted in a neck injury and chiropractic treatment. In October of 1980, claimant was involved in an auto accident which resulted in upper back and neck strain. On July 26, 1982, claimant

was knocked to the ground when a wagon wheel ran over his foot. On September 10, 1982, claimant fell in the shower. On October 16, 1982, claimant fell down some stairs. On January 24, 1984, claimant slipped and fell on ice. In June 1984, claimant was diagnosed as suffering from acute low back strain after a volley-ball injury. Claimant testified that after each of these incidents, he was able to recover and return to work without restrictions.

On December 28, 1984, claimant injured his upper and lower back in a third auto accident. Claimant treated for this injury with Dr. Reinwein, and on April 15, 1985, the day before the onset of pain at Case, claimant had seen Dr. Reinwein, who ordered a CT scan in connection with his diagnosis of lumbar radiculopathy. Dr. Reinwein's April 15, 1985 examination indicated claimant was suffering from low back pain radiating into the left leg. However, claimant testified that he did not have leg pain prior to the April 16, 1985 incident.

On April 16, 1985, claimant bent over to pick up a 30-40 pound door when he felt a "pop" in his back and felt the onset of pain, as well as losing control of his legs for a short time. The next day claimant sought medical treatment from William D. Reinwein, M.D., a board-certified orthopedic surgeon.

Dr. Reinwein again examined claimant on April 27, 1985, and noted a marked amount of spasm indicative of a recent injury to the low back. Claimant's CT scans, which were conducted on April 19, 1985, revealed a herniated disc at the L5-S1 level with some bulging at the L4 and L4 levels. A second CT scan in June of 1985 revealed a possible extrusion of disc material into the canal.

Claimant underwent diskectomy surgery by Dr. Reinwein in July 1985, consisting of a diskectomy and laminectomy of the L4-L5 and L5-S1 discs. Dr. Reinwein reported that claimant's leg pain abated after the surgery. Claimant returned to work at Case on October 21, 1985. Claimant testified he was given a 30 pound lifting restriction but chose not to report this to his employer for fear of losing his job.

Claimant testified he now has continuing pain in his low back, especially after repetitive lifting of 40-50 pounds and repetitive bending at the waist, a limited range of motion of the torso, and experiences pain after prolonged standing, sitting, or walking. Claimant continues to work for defendant Case, although he stated there are some job tasks he cannot perform due to these symptoms.

Dr. Reinwein assigned claimant a 15 percent permanent partial impairment to the body as a whole, and causally connected this impairment to both the December 1984 auto accident and

the April 16, 1985 work incident, without apportionment. Dr. Reinwein's medical records do not reflect claimant's prior back problems other than his December 28, 1984 auto accident.

Claimant was examined by F. Dale Wilson, M.D., in June of 1987. Dr. Wilson reported that claimant related to him a history of occasional backaches for three or four years prior to the 1984 auto accident, but claimant did not relate his two prior car accidents or other back injuries or incidents of back pain. Dr. Wilson gave claimant a 29 percent permanent partial impairment of the body as a whole as a result of the April 1985 incident. After being informed of claimant's prior back complaints, Dr. Wilson stated he would need further information before continuing with his earlier opinion as to causal connection.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 16, 1985 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 essentiall within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravat 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).

ANALYSIS

Claimant has appealed the deputy's determination that claimant has failed to show that his present condition is causally connected to an alleged work injury of April 16, 1985.

Claimant's medical evidence contains the opinions of Dr. Reinwein and Dr. Wilson. Dr. Wilson modified his opinion upon learning of claimant's prior injuries. Dr. Wilson's original opinion was based upon an incomplete history, and has now been repudiated. This opinion is therefore given no weight. The record does not show a revised opinion by Dr. Wilson causally connecting claimant's present condition with his alleged work injury of April 16, 1985.

The only remaining medical opinion on the issue of causation is that of Dr. Reinwein. Dr. Reinwein attributed claimant's present condition to two factors, the April 16, 1985 incident and claimant's 1984 car accident. Dr. Reinwein did not distinguish to what degree either event caused claimant's present condition. In addition, Dr. Reinwein was not aware of claimant's other back injuries and incidents of back pain. Although causal connection is essentially within the domain of expert testimony, an expert's opinion on causal connection is greatly affected by the history provided to the expert. Claimant is not required to show that the April 16, 1985 incident was the sole cause of his present condition. However, claimant does bear the burden of proof to show that his present condition was caused to some degree by the April 16, 1985 work incident. As only one expert opinion provides that causal connection, and that opinion is tainted by omission of a significant portion of claimant's medical history, it will be given little weight.

Claimant argues on appeal that his prior injuries did not prevent him from returning to work and performing his duties. However, this argument goes to the degree to which claimant's present disability might ultimately be apportioned between his injuries prior to April 16, 1985 and the April 16, 1985 incident. It does not rectify the absence of reliable evidence causally connecting any portion of claimant's disability to the April 16, 1985 incident. Any of claimant's prior car accidents or other back injuries are as likely a cause of his present back condition as his injury of April 16, 1985.

Claimant has failed to carry his burden to show that his present condition is causally connected to his alleged April 16, 1985 work injury.

FINDINGS OF FACT

1. Claimant worked for defendant Case as a welder.

2. Claimant experienced severe back pain while holding a door he was welding on April 16, 1985.

3. Claimant was diagnosed as suffering from a herniated disc and a bulging disc.

4. Prior to April 16, 1985, claimant had suffered several back injuries, including an injury during a volleyball game, a fall down stairs, and three automobile accidents resulting in injury to the neck or back.

5. Dr. Wilson's opinion on causal connection was based on an incomplete history that omitted references to claimant's back injuries occurring prior to April 16, 1985.

6. Dr. Reinwein's opinion on causal connection attributed claimant's present condition to his 1984 auto accident and his April 16, 1985 work incident, but was based on an incomplete history omitting references to claimant's back injuries prior to April 16, 1985 other than his 1984 auto accident.

7. Claimant's testimony that he did not suffer leg pain prior to April 16, 1985 was contradicted by the written report of Dr. Reinwein.

8. Claimant's car accidents and other back injuries prior to April 16, 1985 may have caused all or part of claimant's present back condition.

CONCLUSION OF LAW

Claimant has failed to show by a preponderance of the evidence that his present condition is caused by the alleged work injury of April 16, 1985.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

That claimant shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 31st day of January, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

SEP 21 1988

IOWA INDUSTRIAL COMMISSIO

DENNIS FITZPATRICK, Claimant, vs. HUPP ELECTRIC MOTORS, INC., Employer, and TRAVELERS INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 813668 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a death benefits decision awarding death benefits and burial expenses.

The record on appeal consists of the transcript of the death benefits proceeding; joint exhibit 1; and defendants' exhibits A through G. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

Did the injury and death of claimant's spouse, Terra Fitzpatrick occur in the course of her employment?

Did the injury and death of Terra Fitzpatrick arise out of her employment?

REVIEW OF THE EVIDENCE

The death benefits decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the death benefits decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Dennis Fitzpatrick is the surviving spouse of Terra Fitzpatrick (decedent).

2. Terra Fitzpatrick was an employee of Hupp Electric Motors, Inc., on January 10, 1986.

3. Terra Fitzpatrick was an outside salesperson for Hupp Electric Motors, Inc.

4. Terra Fitzpatrick was required to travel throughout eastern Iowa and within the city of Cedar Rapids in furthering her employer's business.

5. The employer provided Terra Fitzpatrick with a vehicle to use in her employment.

6. Terra Fitzpatrick drove the employer-provided vehicle to and from her employment and used the vehicle to further her employer's business throughout her employment day, as well as using the vehicle for some personal trips.

7. Terra Fitzpatrick did not have personal transportation other than the employer-provided vehicle available to her through out her employment day and arrangement for other transportation would likely have been impractical.

8. It was reasonably contemplatable under all the circumstances that Terra Fitzpatrick would use the employer-provided vehicle to travel to lunch or to travel on personal errands during permitted breaks in her employment day.

9. Terra Fitzpatrick was injured in a car accident on January 10, 1986 while traveling from the employer's place of business to her home for lunch and to care for her dog. A causal connection exists between Terra Fitzpatrick's need to use employer-provided transportation to further her employer's business throughout her work day and her injury.

10. Terra Fitzpatrick's injury of January 10, 1986 resulted in her death on January 12, 1986.

11. Terra Fitzpatrick had been employed by Hupp Electric Motors, Inc. less than thirteen calendar weeks immediately preceding her injury.

12. Decedent would have earned $5,000.06 had she worked the full thirteen weeks.

CONCLUSIONS OF LAW

Claimant has established that his decedent's January 10, 1986 injury arose out of and was in the course of decedent's employment and resulted in her death on January 12, 1986.

Claimant has established he is entitled to benefits on account of his decedent's death as provided in section 85.31(1)(a) and to burial expenses not to exceed one thousand dollars as provided in section 85.28.

Claimant has established that decedent's weekly rate of compensation is $240.40.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant benefits as provided in section 85.31(1)(a) at the rate of two hundred forty and 40/100 dollars ($240.40) per week.

That defendants pay claimant burial expenses not to exceed one thousand dollars ($1,000) as provided in section 85.28.

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to section 85.30.

That defendants pay costs including the transcription of the hearing proceeding pursuant to Division of Industrial Services Rule 343-4.33.

That defendants file claim activity reports as required by this agency.

Signed and filed this 21st day of September, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANK FUCHES,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	File Nos. 797701/834046
KOHLES & BACH, INC.,	:	
	:	A P P E A L
Employer,	:	
	:	D E C I S I O N
and	:	
	:	F I L E D
ROYAL INDEMNITY COMPANY,	:	
	:	
Insurance Carrier,	:	APR 28 1989
Defendants.	:	

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding future reasonable and necessary medical expenses as well as temporary total benefits and any permanent partial disability benefits. It should be noted that file no. 824085, in which the insurance carrier is not a defendant, involved an alleged injury of May 7, 1986 and was part of the arbitration decision. An apparent attempted appeal of the referenced file numbers by defendant employer was later withdrawn. File no. 824085 which alleged an injury of May 7, 1986 has not been appealed. Those portions of the arbitration decision relating only to file no. 824085 are now final and will not be part of the determinations in this appeal decision.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1(1-9) and 2. Both the attorney for the claimant and attorney for the employer and insurer filed briefs on appeal.

ISSUE

The issue on appeal is whether there is a causal connection between the alleged work injury of June 22, 1985, and claimant's claimed disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted.

FINDINGS OF FACT

1. In January 1981 claimant sustained an injury to his right shoulder while participating in a "Tough Man Contest."

2. Claimant reinjured his shoulder in November 1981 when he slipped on ice at his home.

3. Neither of the injuries in 1981 were work related.

4. Claimant began work for defendant employer in June 1983 and finally terminated this employment in July 1986.

5. There is no evidence that claimant missed work because of his right shoulder condition from June 1983 until June 22, 1985.

6. On June 22, 1985, claimant injured his right shoulder when he fell when scaffolding collapsed while he was working for defendant employer.

7. On November 12, 1985, claimant injured his right shoulder when he slipped on an icy bumper of a pick-up truck while unloading inventory for defendant employer.

8. Claimant missed four or five days of work after the injury on June 22, 1985 and was released to return to work on June 28, 1985.

9. Claimant was treated by Robert Breedlove, M.D., for right shoulder instability.

10. The work injury of June 22, 1985, was the cause of claimant's present problem of global instability and recurrent dislocations.

11. The work injury of June 22, 1985, was the cause of a permanent impairment of claimant's right shoulder.

12. As a result of the June 22, 1985 injury, claimant is entitled to the reimbursement of reasonable medical expenses which he has incurred.

13. Claimant has incurred the following expenses which are reasonable and necessary:

Dr. Robert Breedlove, M.D.	$ 60.00
Mayo Clinic	113.00
Total	$173.00

14. As a result of the June 22, 1985 injury, claimant may incur further medical expenses, including surgery on his shoulder.

15. The greater weight of the evidence shows that claimant has not reached maximum recovery and that as a result of the June 22, 1985 accident, any permanent partial disability cannot be established at this time.

CONCLUSIONS OF LAW

Claimant has proved a causal connection between a work injury on June 22, 1985, and a disability at the time of the hearing.

Claimant has proved he is entitled to reimbursement for medical expenses and that he is entitled to reasonable and necessary future medical expenses, including the costs of surgery, as a result of the work injury on June 22, 1985.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendant, Royal Indemnity Company, reimburse claimant the amount of one hundred seventy-three and 00/100 dollars ($173.00) for medical expenses.

That defendant, Royal Indemnity Company, pay future reasonable and necessary medical expenses related to the claimant's right shoulder including, but not limited to, the costs of surgery.

That defendant, Royal Indemnity Company, pay appropriate healing period and disability benefits which may later be shown to be causally connected to the June 22, 1985 injury.

That defendants pay the costs of this proceeding including the costs of transcription of the arbitration hearing.

That defendants file claim activity reports pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 28th day of April, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIOLA FUGARINO, Claimant, vs. IOWA CITY COMMUNITY SCHOOLS, Employer, and EMPLOYERS MUTUAL COMPANIES, Insurance Carrier, Defendants.	:	File No. 754230 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding and Joint Exhibits 1 through 25. Both parties filed briefs on appeal, and claimant filed a reply brief.

ISSUE

Claimant states the following issue on appeal:

Whether the claimant's depressive condition is causally connected to her work injury on October 20, 1983.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

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

If 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."

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's medical evidence establishes that claimant suffers from myofascial syndrome and depression. Several of claimant's physicians pointed out that claimant was depressed and needed a psychiatric evaluation. The testimony of claimant and her husband regarding claimant's lack of depression prior to her injury is unrebutted. Thus, there is little dispute in the record that claimant suffered from depression subsequent to her injury of October 20, 1983.

Claimant has the burden to show that her condition was caused by the injury of October 20, 1983. Dr. Carlstrom opined that claimant's myofascial syndrome is causally related to her injury. Dr. Carlstrom did not differentiate between claimant's physical and mental conditions in his statement of causal connection to the work injury.

Claimant alleges that her mental condition causes a portion of her present disability. Claimant bears the burden of proving that her present mental condition is causally related to her injury. Although the testimony of claimant and her husband that claimant did not suffer depression prior to her injury is significant, causal connection must be established by competent medical testimony.

Claimant underwent a psychological examination by Richard

Dill, but no findings were made as to a causal connection with claimant's injury. The only medical evidence causally connecting claimant's present mental condition to her injury is the statement by Dr. Carlstrom that claimant's overall condition is caused by her injury. Even if Dr. Carlstrom's statement is interpreted as causally linking claimant's present mental condition to her injury, it is noted that Dr. Carlstrom's area of medical specialty is neurology. Dr. Carlstrom is not a psychiatrist or a psychologist. Dr. Carlstrom's testimony is given little weight because it only vaguely refers to claimant's mental condition.

Claimant was advised by numerous physicians to obtain the services of a psychiatrist, but claimant refused such treatment. Because no psychiatric or psychological evidence causally connecting claimant's depression with her work injury appears in the record, claimant has failed to carry her burden of proof to causally connect her present depression to her work injury.

Claimant's industrial disability must be determined. Claimant was 39 years old at the time of the hearing, with a GED diploma. She has worked only approximately four of her twenty years of married life. Her past positions have involved light duty work such as clerk or clerical duties. Although claimant states she is unable to perform any of these duties at this time, she has no medical restrictions. The vocational rehabilitation nurse was able to find two positions claimant could perform, cosmetics clerk and receptionist. Claimant has a permanent impairment rating of 1-2 percent of the body as a whole. Claimant still suffers from pain, headaches and mild tremors. Claimant's test results show she is able to perform the routine math skills most likely involved in the kind of positions claimant would qualify for. Claimant does suffer some memory loss and continues to suffer from depression. Claimant rejected the services of a pain center. Claimant initially declined to avail herself of psychiatric services which several doctors recommended she undertake. Claimant has not sought any employment.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 10 percent.

FINDINGS OF FACT

1. Claimant suffered an injury that arose out of and in the course of her employment on October 20, 1983.

2. Claimant's injury consisted of a backward fall after she was tripped by a student she was supervising.

3. Claimant experienced pain throughout her body as well as nausea, loss of memory, headaches, and body tremors subsequent to her injury.

4. Claimant has experienced depression subsequent to her injury.

5. Claimant had rejected suggested psychiatric treatment from her injury until time of hearing.

6. Claimant has a myofascial injury.

7. Claimant was 39 years old at time of hearing.

8. Claimant has completed the eleventh grade and has obtained a GED.

9. Claimant has past work experience as a factory assembly worker, a check processor, a computer operator, a lingerie sales clerk, and a school bus driver and education aide for profoundly and severely handicapped children.

10. Claimant has not sought employment since her injury.

11. Claimant has no physician imposed work restrictions, but has a permanent physical impairment rating of 1-2 percent of the body as a whole.

12. Claimant has a loss of earning capacity of 10 percent.

CONCLUSIONS OF LAW

Claimant has established that her injury of October 20, 1983 is the cause of the permanent partial disability on which she now bases her claim. Claimant has failed to establish that her present mental condition is causally connected to her work injury of October 20, 1983.

Claimant has an industrial disability of 10 percent as a result of her injury of October 20, 1983.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant temporary total disability benefits at a rate of one hundred sixteen and 15/100 dollars ($116.15) per week from November 7, 1983 to June 23, 1985.

That defendants pay unto claimant permanent partial disability benefits for fifty (50) weeks at the rate of one hundred sixteen and 15/100 dollars ($116.15) from June 24, 1985.

That defendants be given credit for benefits previously paid.

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to section 85.30.

That defendants pay costs pursuant to Division of Industrial Services Rule 343-4.33. Claimant shall pay the costs of the transcription of the hearing proceeding.

That defendants file claim activity reports as required by the agency.

Signed and filed this 30th day of September, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN D. GRIFFIN, Claimant, vs. FIRESTONE TIRE & RUBBER COMPANY, Employer, and CIGNA/INA, Insurance Carrier, Defendants.	:	File No. 699642 A P P E A L D E C I S I O N FILED DEC 20 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding permanent partial disability benefits based on an industrial disability of 20 percent as the result of a work injury on August 24, 1981.

The record on appeal consists of the transcript of the review-reopening hearing and the exhibits listed in the pre-hearing report. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether there is a causal relationship between the work injury and the alleged permanent disability.

REVIEW OF THE EVIDENCE

Claimant began work for defendant employer in April 1971 and held various jobs in the plant. In July 1980, a hiatal herniorrhaphy was performed on claimant by William E. Stanley, D.O. In October 1980, claimant developed pain in the abdominal wall and Bryce Wilson, M.D., performed exploratory surgery and removed a fatty tumor. Dr. Wilson wrote:

> [W]e examined on September 24, 1980.
>
> At the time of Mr. Griffin's examination in our clinic, he stated he had lifted a heavy tire ten days prior and then reported to his supervisor that he had pain underneath the left ribs. There was

a bulge there that was present when he was standing up, but would disappear when he would lay down.

You may not be familiar, but he had a hiatal hernia repair some time previous to that....

....

It would be difficult for us to relate this entirely to lifting. Mr. Griffin stated the bulge had not been there prior to the lifting, and it is not inconceivable that it could be the result of trauma. I think we would be hard pressed to make an absolute clinical decision that this was worked-related [sic] rather than just a regular occurrence.

(Joint Exhibit 1, page 33)

In a letter dated March 21, 1983, Dr. Stanley wrote:

The patient has a history of having had a hiatal herniorraphy [sic] performed in July of 1980 for a hiatal hernia with reflux esophagitis. The patient had improvement in his symptoms following the hiatal herniorraphy [sic]; however, in October of 1980, the patient developed pain in the abdominal wall in the upper left quandrant [sic]. This necessitated a surgical procedure in October of 1980 for apparently a fatty tumor. The patient had continuation of pain in the left upper abdominal wall which necessitated a reoperation for an apparent hernia of the abdominal wall in November of 1981. The patient has had some chronic pain in the region of the abdominal surgery apparently since that time interfering with his employment.

I have examined the patient on March 21, 1983 in regard to his left upper quandrant [sic] abdominal pain....I feel the patient's symptoms at the present time are secondary to his problem in the abdominal wall of the left upper quandrant [sic] and are not related to his hiatal hernia.

(Jt. Ex. 1, p. 14)

In a letter dated March 25, 1983, Dr. Stanley wrote:

I do not feel that the hiatal hernia is a work related injury. In regard to his problem with the left anterior abdominal wall, however, it is possible that strenuous activity following removal of his

> fatty tumor could have resulted in a small ventral hernia.

(Jt. Ex. 1, p. 15)

The parties stipulated that claimant received an injury on August 24, 1981 which arose out of and in the course of his employment. Claimant was seen by Louis D. Rodgers on September 8, 1981 and on November 5, 1981 Dr. Rodgers performed surgery to repair weakness of the anterior rectus fascia. In March 1982, Dr. Rodgers released claimant to return to work with no restrictions.

Claimant returned to work and did well until he changed work in November 1982 which required heavier lifting and effort. He was seen by Tom D. Throckmorton, M.D., who wrote in a letter dated March 30, 1983 that there was no underlying weakness nor hernia. Also in that letter Dr. Throckmorton wrote that he had explained to claimant that when an area of the abdominal wall is incised and repaired that it does not heal beyond 85 percent of its former strength. He further wrote that if claimant's lifting or exertion is confined between 30 and 50 pounds claimant would not be symptomatic.

Claimant testified that he continued to work with a 30 pound restriction placed on him by the company doctor. Claimant further testified he was sore but did not complain. He worked until November 1985 when he opted to be paid severance and retire from work at defendant employer. Claimant's original notice and petition in this matter was filed on January 8, 1986.

Claimant was seen by Robert B. Stickler, M.D., on April 1, 1986. In a letter dated May 14, 1986, Dr. Stickler wrote that no weakness or defect or incisional hernia could be demonstrated, that there was no evidence to permanent disability, and that claimant first had his discomfort in September 1980 and claimant described the same discomfort in April 1986.

Claimant was seen by the University of Iowa Hospitals and Clinics on August 25, 1986 which gave an impression of unknown etiology for chronic pain and no recurrent hernia. Claimant was seen by John Zittergruen, D.O., who wrote in an office note dated September 12, 1986:

> ABD. PAIN PROBABLY INCISIONAL IN NATURE, BUT NO DEFINITE EVIDENCE OF INCISIONAL HERNIA AT THIS TIME.
>
> Think this is probably secondary to adhesions from his previous 2 surgeries.

(Jt. Ex. 1, p. 3)

Claimant was also seen on March 17, 1987 by Walter J. Riley, M.D. In a letter dated the next day, Dr. Riley wrote that claimant felt a spontaneous hernia while lifting at work in 1980 and that it appeared again at work in 1986.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 24, 1981 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L.O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

The opinions of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). An opinion of an expert based upon an incomplete history is not binding upon the commissioner, but must be weighed together with the other disclosed facts and circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867 (1965). The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Burt, 247 Iowa 691, 73 N.W.2d 732 (1955). In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. Sondag, 220 N.W.2d 903 (1974).

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

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

ANALYSIS

The claimant has the burden of proving that his alleged permanent disability is causally related to his work injury

of August 24, 1981. The question of causal connection is essentially within the domain of expert testimony.

Claimant had surgery in his left upper quadrant to repair a hiatal hernia in July 1980. Dr. Stanley who performed the surgery did not feel the hiatal hernia was work related. Dr. Stanley's opinion as a treating physician should be given weight. That opinion is uncontradicted by any medical evidence in the record. Also, the surgery for the hiatal hernia was performed more than a year prior to the date of injury. Claimant's hiatal hernia and surgery for it were not work related.

Claimant developed pain and again had surgery in October 1980 in which the fatty tumor was removed during exploratory surgery. Dr. Wilson, who performed the surgery, indicated that this was not work related. Dr. Wilson's opinion as a treating physician should be given weight. That opinion is uncontradicted by any medical evidence in the record. Also, the exploratory surgery, which resulted in removal of the fatty tumor, was performed approximately ten months prior to the date of injury. Claimant's fatty tumor and surgery for its removal was not work related.

It appears from Dr. Stanley's letter of March 21, 1983 that claimant had a continuation of pain from October 1980 until March 1983. That pain resulted in a third surgery performed on November 5, 1981. That surgery was to repair weakness in the anterior rectus fascia and was performed by Dr. Rodgers. Dr. Rodgers opined that the incision from this surgery solidly healed and that claimant should be able to do regular work with no restrictions. There is no consensus amongst the doctors as to what claimant's condition is or whether the condition is permanent. Dr. Stickler, who examined claimant once in 1986, found no weakness nor incisional hernia nor any evidence of permanent disability. Dr. Stickler described an incisional hernia as a hernia which is developed where an incision had been made in the abdominal wall. He testified that 90 percent of incisional hernias occur within the first 12 to 24 months after the repair is done. He indicated that repair of the incisional hernia would not result in any permanency. He also testified that the records at University of Iowa Hospitals and Clinics were consistent with his judgment. Those records show an unknown etiology for chronic pain and no recurrent hernia. It also appears from the medical evidence from Dr. Stickler that claimant's problems after the November 1981 surgery are the same as they were in September 1980.

Dr. Zittergruen is the only physician to opine that claimant had an incisional hernia which is directly related to the work injury and which is a permanent impairment to the body. His opinion will be given less weight in deciding this matter for a variety of reasons. One reason is that he did not treat claimant at the time of his injury. Another reason is that

his opinion is inconsistent with another later examining physician, Dr. Stickler, whose opinion is supported by the University of Iowa Hospitals and Clinics. A further reason is that Dr. Zittergruen inexplicably changed from an opinion of no definite evidence of an incisional hernia and a problem secondary to adhesions from previous surgeries to an opinion of a work-related incisional hernia. It is unclear whether claimant's alleged permanent condition is due to adhesions from surgeries or an incisional hernia. This lack of clarity is apparent in the deputy's decision. At one point in the decision it was found that claimant's injury consisted of an incisional hernia but at another point it was found that claimant's chronic problems are probably due to adhesions. Another reason that Dr. Zittergruen's opinion should be given less weight is because it appears that it was based on an erroneous history. In 1986, he based his opinion on claimant's previous two surgeries when in fact claimant had had three surgeries. It is entirely possible that the two surgeries Dr. Zittergruen was referring to were the two surgeries prior to the work injury. Those surgeries were for problems that, based upon uncontroverted medical opinion, were not work related. Dr. Zittergruen's opinion is either based upon an inaccurate history or it cannot be helpful because it is impossible to tell which of the claimant's two surgeries he was referencing.

Dr. Stickler's opinions were based upon a complete medical history, were logical in explaining claimant's problems and treatments, and is consistent with the other medical evidence with the exception of Dr. Zittergruen. Dr. Stickler's opinion will be given greater weight than Dr. Zittergruen. Claimant's physicians in 1983 must also be given weight as they were treating physicians who performed the surgeries. However, none of these doctors, Stanley, Wilson, or Rodgers gave an opinion or stated that there was a probability that claimant had a permanent condition that was causally related to his work injury on August 24, 1981. Dr. Riley's opinion will be given no weight because it refers to a work injury in 1986 and claimant retired from defendant employer in November 1985. Claimant has not proved by the greater weight of evidence that there is a causal relationship between the work injury of August 24, 1981 and his alleged permanent condition.

FINDINGS OF FACT

1. Claimant began work for defendant employer in 1971 and worked various jobs as a laborer and a machine operator in the production of automobile and truck tires.

2. In July 1980, a hiatal herniorrhaphy was performed on claimant.

3. The hiatal hernia was not the result of a work-related injury on August 24, 1981.

4. In October 1980, exploratory surgery was performed on claimant and a fatty tumor was removed.

5. The fatty tumor was not the result of a work-related injury on August 24, 1981.

6. On August 24, 1981, claimant suffered an injury that arose out of and in the course of his employment.

7. On November 5, 1981, surgery was performed on claimant to repair weakness of the anterior rectus fascia.

8. The surgeries in July 1980, October 1980, and November 1981 were all in the left upper quadrant.

9. Claimant's current condition is not the result of a work injury on August 24, 1981.

CONCLUSIONS OF LAW

Claimant has not proved by the greater weight of evidence that there is a causal relationship between a work injury on August 24, 1981 and his alleged permanent disability.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That defendants pay all the costs of this action including the costs of the transcription of the hearing proceeding.

Signed and filed this 20th day of December, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRYAN HAINLINE, Claimant, vs. GLENN REED, JR. d/b/a R & R FARMS AND DISPOSAL, Employer, Defendant.	:	File No. 818223 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding permanent partial benefits, healing period benefits, medical expense, and medical mileage.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 6; and defendant's exhibits A through D. Both parties filed briefs on appeal.

ISSUES

Defendant did not make a statement of the issues on appeal, however it appears from a review of the brief that the issues are as follows: 1. Whether claimant was an independent contractor at the time of the alleged injury. 2. Is claimant entitled to a different rate of compensation than awarded by the deputy?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the deputy in conjunction with the issues and evidence presented is adopted.

Claimant sustained the burden of proof by a preponderance of the evidence that an employer-employee relationship existed

at the time of the injury. The defendant however, did not sustain the burden of proof by a preponderance of the evidence that claimant was an independent contractor. The defendant also failed to prove that a separate independent business existed in the name of Bryan's Diesel Service. In fact, the checks introduced into evidence as defendant's exhibits A and C show with a certainty that indeed, an employer-employee relationship existed between claimant and defendant, instead of an independent contractor relationship which the defendant alleged. The pay checks were clearly made out in the name of the claimant indicating such employer-employee relationship.

FINDINGS OF FACT

1. Claimant was hired by defendant to service and repair trucks.

2. Defendant paid claimant compensation for this work.

3. Defendant could terminate the work arrangement at any time.

4. Defendant told claimant when there was work he could do and when he could come to work.

5. Defendant designated what units (trucks) claimant was to work on and whether they were to be serviced, repaired, rebuilt or overhauled.

6. Claimant was to work on Saturday and Sunday. Claimant was to work in the evenings on an "as needed" basis.

7. Within these guidelines claimant could work whatever hours he chose.

8. Defendant owned the trucks which were serviced, repaired, rebuild, or overhauled.

9. Defendant owned and operated a grain hauling business in which these 12 - 15 trucks were used to haul grain.

10. On January 12, 1986 claimant lost portions of his right index and middle finger between the first and second joints when his hand was sucked into the air intake of a truck that went into high r.p.m.s.

11. Claimant was working on defendant's truck in defendant's garage at the time of the injury.

12. Claimant worked on defendant's trucks at defendant's place of business.

13. Claimant did not have a separate business address, a separate place of business, a business telephone, a business checking account, letterhead invoices or stationary, and did not prepare or submit itemized bills for his services performed for defendant.

14. Claimant did not have an employer identification number.

15. Defendant normally acquired or paid for the parts that were used on the trucks.

16. Both parties supplied tools to perform the work that was performed on the trucks.

17. Claimant had a full-time job as an employee at Sam's Riverside Auto Parts and earned $22,217.64 in 1985.

18. Claimant worked part time for R & R Farms and Disposal and earned $5,245.00 from July to December 1985 as reported on the 1099-MISC.

19. Claimant was married and had two dependent children at the time of the injury.

CONCLUSIONS OF LAW

Claimant sustained the burden of proof by a preponderance of the evidence and made out a prima facie case that an employer-employee relationship existed at the time of the injury.

Defendant did not sustain the burden of proof by a preponderance of the evidence that claimant was an independent contractor or even that he maintained a separate independent business as a diesel mechanic.

Claimant did sustain an injury on January 12, 1986 which arose out of and in the course of his employment with employer.

The injury was the cause of both temporary disability during a period of recovery and also the cause of permanent disability.

Claimant is entitled to healing period benefits from January 12, 1986 to March 10, 1986.

Claimant is entitled to 65 weeks of permanent partial disability benefits commencing on March 10, 1986 as scheduled member benefits.

Claimant is entitled to $6,600.00 in medical expenses and $7.50 for reasonable and necessary medical mileage.

The proper rate of weekly compensation is $333.90 per week.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant eight point two six six (8.266) weeks of healing period benefits for the period January 12, 1986 to March 10, 1986 at the rate of three hundred thirty-three and 90/100 dollars ($333.90) per week in the total amount of two thousand seven hundred sixty and 02/100 dollars ($2,760.02).

That defendant pay to claimant sixty-five (65) weeks of permanent partial disability benefits at the rate of three hundred thirty-three and 90/100 dollars ($333.90) per week in the total amount of twenty-one thousand seven hundred three and 50/100 dollars ($21,703.50) commencing on March 10, 1986.

That all accrued benefits be paid in one lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That defendant pay claimant six thousand six hundred dollars ($6,600.00) in medical expenses and an additional seven and 20/100 dollars ($7.20) in medical mileage.

That the costs of this action are charged to defendant.

That defendant file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 21st day of February, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBRA L. HANSON, Claimant, vs. MERCY HOSPITAL MEDICAL CENTER, Employer, and AETNA CASUALTY AND SURETY COMPANY, Insurance Carrier, Defendants.	:	File No. 709232 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying compensation because she failed to establish a causal connection between her work injury and her present condition.

The record on appeal consists of the transcript of the review-reopening hearing and joint exhibits A through Y. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant has established that her herniated disc is causally related to her work injury of July 18, 1982.

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law contained in the review-reopening decision are appropriate to the issues and evidence.

ANALYSIS

The deputy's analysis of the evidence in conjunction with the evidence is adopted.

Although claimant has presented evidence that would allow one to conclude a causal connection exists between her back problem and her work injury on July 18, 1982, the deputy's decision quite adequately explains why he found otherwise. Thomas A. Carlstrom, M.D., opined that the herniated disc is not related to the work injury and testified as to his reasons: 1) that the herniated disc did not appear on the myelogram taken on October 5, 1982; 2) that claimant's low back and right leg problem had resolved when he saw her in February 1983; and 3) that a herniated disc is not indicated by intermittent symptoms such as claimant described to him. Dr. Carlstrom's opinion is adopted because the greater weight of evidence presented is more consistent with his opinion.

FINDINGS OF FACT

1. Claimant testified that the condition of her low back and right leg worsened in August 1984.

2. Claimant was first diagnosed as having a "fairly large herniated lumbar disc, L5-S1" in January 1985 by Dr. Bashara.

3. Claimant underwent a lumbar myelogram on October 5, 1982 which revealed no abnormalities.

4. Claimant's low back and right leg problems had resolved when Dr. Carlstrom examined her in February 1983.

5. A herniated disc is not indicated by intermittent symptoms.

6. Claimant's herniated disc, L5-S1 is not related to her July 18, 1982 work injury.

CONCLUSION OF LAW

Claimant failed to establish a causal connection between her herniated disc and her work injury of July 18, 1982.

Claimant failed to prove a change in her physical condition which was causally connected to her work injury of July 18, 1982.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from this proceeding.

That claimant pay the costs of this appeal including the costs of the transcription of the hearing proceeding and each party pay their own costs of the hearing proceeding with the defendants paying the costs of the certified shorthand reporter at the time of hearing all pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 17th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUDY HARRIS,	:	
	:	
Claimant,	:	File Nos. 688326
	:	808328
vs.	:	
	:	
WILSON FOODS CORPORATION,	:	A P P E A L
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
	:	FILED
and	:	
	:	DEC 22 1988
SECOND INJURY FUND,	:	
	:	IOWA INDUSTRIAL COMMISSIONER
Defendants.	:	

STATEMENT OF THE CASE

Defendants Wilson Foods and the Second Injury Fund appeal from an arbitration decision awarding permanent partial disability benefits based upon a six percent impairment to the right upper extremity from an injury on December 17, 1981, a three percent impairment to the left upper extremity from an injury on October 5, 1983, and a 20 percent industrial disability.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibit 1; and defendants' exhibits A through F. All parties filed briefs on appeal.

ISSUES

Defendant Wilson Foods Corporation states the following issues on appeal:

1. Whether the evidence supports the finding of 6% permanent partial impairment to the right upper extremity and 3% permanent partial impairment to the left upper extremity.

2. Whether the finding of industrial disability in the amount of 20% is supported by the evidence.

3. Whether the Deputy Commissioner correctly determined the injury dates as a matter of law under McKeever Custom Cabinets v. Smith.

Defendant Second Injury Fund states the following issues on appeal:

> The deputy erred in finding a "second injury" in November 1985 and April of 1986.
>
> The deputy industrial commissioner erred in finding there was a second injury at Wilson Foods Corporation.
>
> The deputy industrial commissioner erred in finding that the fund has liability because claimant suffered her alleged injuries, if any, by the same employer.
>
> Fund benefits are unavailable to claimant because there is no evidence of any industrial disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant started working for defendant employer on September 8, 1980 on a job "splitting heads." Her job required gripping and pulling. Claimant performed other jobs for defendant employer all of which involved repetitive gripping and pulling. An October 15, 1981 entry in claimant's employee medical department records reveal's that claimant was experiencing bilateral hand pain and numbness. See Defendants' Exhibit D, page 11. Claimant continued to experience pain in both hands and eventually sought treatment from Warren N. Verdeck, M.D., on November 24, 1981. In his initial examination notes, Dr. Verdeck states:

> 11-24-81: This is a 37 year old woman who works down at Wilsons, currently in the ruffling department. Comes in for complaints of aching pain in both hands and wrists associated with numbness and tingling. This has been going on now for about two months. She had been laid off, returned to work shortly before the onset of her symptoms a couple of months ago. Since then she's continued to have the above complaints. They are not particularly relieved by being off work or a change of her particular job duties. She complains of well localized numbness and tingling to the radial three and a half digits of both hands especially noticable [sic] on the right. They frequently awaken her at night. She shakes them, rubs them, tries to get them to wake up. She's also had a lump on the dorsum of the right wrist now for a year or so.

This had been a little more symptomatic lately, has been more swollen the past couple of weeks.

EXAMINATION: Reveals full range of motion of both wrists. There is some crepitation, however, over the dorsum of the right wrist and a palpable mass approximately one centimeter in diameter which is minimally tender. She has good distal pulses, no atrophy is noted. Full range of motion of the neck and she has no neck or upper arm complaints. She has a negative Tinel's but quite positive Phelan's bilaterally and decreased sensation to the radial three and a half digits of both hands.

X-ray of the right wrist reveals no bony abnormalities or calcifications.

She appears to have a pretty classic carpal tunnel syndrome bilaterally, more symptomatic on the right.

We'll schedule her for an EMG and would expect we'll end up having to do a bilateral carpal tunnel release. Also we may be able to excise the ganglion on the dorsum of the right wrist at that time. We'll see her following the EMG.

(Defendants' Exhibit B, page 5)

The EMG analysis was performed on the same day by B. R. Nichols, M.D. Dr. Nichols opines in his report:

ASSESSMENT:

1. Severe right carpal tunnel syndrome by electrophysiologic analysis.

2. No clearcut [sic] evidence for left carpal tunnel syndrome electrophysiologically, although it, of course, is very likely that she is brewing the same thing in left side but has not damaged the median nerve yet.

(Def. Ex. A, p. 3)

Dr. Verdeck reports in his following note of December 4, 1981:

12/4/81 Judy returns for follow up. Her EMG revealed severe right carpal tunnel syndrome, the left side was OK. She would like to go ahead and

have this taken care of. Also, she has a ganglion over the dorsum of the right wrist so we will go ahead and do that at the same time. She would like to hold off having anything done on the left side for the time being and she seems to be getting along fairly well with this. I think we can wait. Will schedule her for right carpal tunnel release and excision of ganglion over the dorsum of the right wrist.

(Def. Ex. B, p. 5)

Claimant underwent surgery on December 17, 1981 for carpal tunnel release and excision of ganglion on the right wrist. Claimant returned to work without any restrictions on January 8, 1982. Numerous entries in claimant's employee medical records disclose that in 1982 and 1983 she continued to experience bilateral hand pain and numbness more severe on the left. Claimant was off work in the summer of 1983 during a strike. Claimant went to see L.C. Strathman, M.D., after her return to work from the strike. Dr. Strathman states in an October 5, 1983 clinical note:

> 10-5-83: She 's getting increasing symptoms of median nerve compression on the left. It's troublesome after work and troublesome at night, numbness and tingling are a problem.
>
> She doesn't show any thenar atrophy. She's had good results with the procedure on the right side.
>
> We'll schedule her for median nerve release on the left as an outpatient.

(Def. Ex. B, p. 6)

Dr. Strathman released claimant for return to work with no restrictions on November 17, 1983. With respect to impairment, Dr. Strathman opines in a February 13, 1985 letter:

> As we have stated in previous correspondence, this lady's findings are essentially negative although she continues to complain of difficulty opening fruit jars, etc. We repeated her EMGs in November, 1984 and they were reported as normal. Her wound is well healed and there is no restriction of motion about the wrist.

> As you see from the above there is no objective evidence of permanent impairment except for the scar associated with the volar carpal ligament release. The complaints are subjective and at this time I do not feel that numerical impairment rating is indicated.

(Def. Ex. B, p. 1)

With respect to whether claimant had bilateral carpal tunnel syndrome in 1981, Dr. Verdeck opines in a June 23, 1986 letter:

> I have reviewed the chart on Judy Harris. I had seen her back in November and December, 1981. At that time, I felt that she had a classic carpal tunnel syndrome, bilateral, more symptomatic on the right. Her EMG, however, was positive only on the right side.
>
> She apparently had increasing symptoms of medical nerve compression on the left after that, and in 1983 had the left side released.
>
> I feel that she had a bilateral carpal tunnel syndrome when I saw her in 1981 and that this had worsened to the point that surgery was required in 1983. This was likely not a new injury.

(Def. Ex. B, p. 20)

Claimant was examined by John R. Walker, M.D., on October 12, 1984. Dr. Walker opines regarding the extent of impairment claimant suffers in a March 25, 1985 letter:

> OPINION: I believe that this patient still has some impairment of the right, upper extremity. This would amount to a 12% impairment of the right, upper extremity. As far as the left, upper extremity is concerned, it is my opinion that she has a permanent, partial impairment of 6% of the left, upper extremity.
>
> At this point I have no further suggestions for treatment except for her to avoid heavy strain and also to use hot soaks on a PRN basis.

(Claimant's Exhibit 1, page 1)

In a subsequent letter, Dr. Walker relates claimant's bilateral carpal tunnel syndrome to her employment:

> The answer to number one: It is my opinion that this patients [sic] bilateral carpal tunnel and/or tenosynovitis [sic] problems were aggravated by Mrs. Harris's working in the ruffling department at Wilson Foods, Inc.

(Cl. Ex. 1, p. 2)

Apparently, the ownership of the packing plant where claimant worked changed from Wilson Foods Corporation to Farmstead Foods on July 2, 1984. Claimant has continued to experience problems with her hands since the carpal tunnel surgeries through the present time. Dr. Walker describes claimant's present condition and opines as to causal connection in a July 30, 1986 note:

> This patient is going to end up really a cripple as far as work is concerned. I have seen this before and she is going to have extreme problems. I have tried to warn them at Farmstead to get her on something she can handle and not to push it. At the present time she has the following diagnoses:
>
> 1.) Recurrent ganglion, right wrist.
>
> 2.) Tenosynovitis of both forearm flexor musculature, particularly on the right.
>
> 3.) Trigger fingers, involving the right third and fourth digits.
>
> 4.) Trigger fingers, involving the left third and fourth digits.
>
> 5.) Probable, bilateral recurrence of carpal tunnel syndrome, involving the median nerve of both hands.
>
> 6.) Probable early ulnar nerve entrapment syndrome of both wrists.
>
> All of the above are due to the repetitive work that this patient is doing at Farmstead now.

(Cl. Ex. 1, p. 11)

Claimant has been treated for the conditions described by Dr. Walker by Walter J. Hales, M.D. Dr. Hales opines that these problems are not related to the earlier carpal tunnel surgeries:

I have been asked, as a recently treating physician for Mrs. Harris, if the present ongoing hand problem that she has been having is related to previous carpal tunnel releases done while she was in the employ of Wilson Foods. It is my professional opinion that her present problems are not related to her previous carpal tunnel releases and would not expect them to be. She on one occasion complained of some symptoms that would have been consistent possibly, with a carpal tunnel syndrome but these have not been recent complaints and not her ongoing complaints at present.

(Def. Ex. C, p. 1)

APPLICABLE LAW

The "cumulative injury rule" may apply when disability develops over a period of time. The compensable injury is held to occur at the later time. For time limitation purposes, the injury in such cases occurs when, because of pain or physical disability, the claimant can no longer work. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The manifestation of one injury on two occasions does not necessarily qualify a worker for second injury fund benefits under section 85.64, Code of Iowa. McMurrin v. Quaker Oats Company, 1 Iowa Industrial Commissioner Report 222 (Appeal Decision, April 28, 1981).

Iowa Code section 85.64 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 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 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).

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, 332 N.W.2d 886, 887.

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).

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 Iowa Code section 85.34(2). Barton, 253 Iowa 285, 110 N.W.2d 660.

"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).

The claimant has the burden of proving by a preponderance of the evidence that the injuries of December 17, 1981 and October 7, 1983 are causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L.O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

ANALYSIS

The first general issue to be resolved is when the injuries in this matter occurred. In McKeever, the supreme court adopted the "cumulative injury" rule for Iowa, and determined that liability could exist for disability which gradually came about over a period of time. The injury occurs when, because of pain or physical disability, the claimant can no longer work. In the instant case one reason that claimant missed work was for her complaints of her right hand. The 1981 EMG test revealed

that she had severe right carpal tunnel syndrome and no clear-cut evidence for left carpal tunnel syndrome. While Dr. Verdeck's opinion was that claimant had bilateral carpal tunnel syndrome more symptomatic on the right in 1981, he acknowledged that her EMG was positive only on the right side. The EMG confirms Dr. Verdeck's opinion that claimant had carpal tunnel syndrome on the right side. However, the EMG showed that there was no clear-cut condition on the left side. The injury that claimant suffered in 1981 was carpal tunnel syndrome on the right side and the date of injury was December 17, 1981 when claimant underwent surgery to relieve problems in her right hand.

After claimant returned to work following the surgery on her right hand, she experienced increased problems in her left hand. In contrast to the EMG in 1981, the EMG on September 9, 1983 showed no evidence of neuropathology in the right arm and evidence of a "very minimal carpal tunnel syndrome" on the left and a "slight deterioration when compared with the 1981 study." Claimant's problems were severe enough that Dr. Strathman performed a median nerve release on claimant's left side. The surgery on the left was done one month after the EMG showing carpal tunnel syndrome and two years after the prior EMG and surgery on the right. The injury that claimant suffered in 1983 was carpal tunnel syndrome on the left side and the date of injury was October 7, 1983 when claimant underwent surgery to relieve problems in her left hand.

In the arbitration decision the deputy discussed injuries that allegedly occurred in 1985 and 1986. Defendant Second Injury Fund of Iowa argues that it was error to find injuries in 1985 and 1986 because these injuries were not pleaded at any time and that the issue was not tried by consent. Claimant counters by arguing that even though these specific injuries were not pleaded, the nature of gradual injuries does not admit any great precision in determining injury dates. The record in this matter shows that the injury dates alleged in the recasted amended original notice and petition filed December 18, 1985 were September 14, 1981 and October 7, 1983. While claimant is correct in noting that a cumulative injury may not lend itself to ease in identifying a specific injury date, the argument by Second Injury Fund is well taken. Dates of injury after 1983 were not pleaded and the alleged injuries occurred after the surgeries for the injuries in 1981 and 1983. In addition, injuries in 1985 and 1986, if any, would have been while claimant was employed by defendant employer's successor. This case is about alleged injuries that occurred in 1981 and 1983 and the liability of defendant employer and the Second Injury Fund. Injuries that may have occurred in 1985 and 1986 should not be considered in this matter. The conclusion is supported

by Dr. Hall's opinion that claimant's later problems were not related to the earlier carpal tunnel surgeries.

The second general issue to be resolved is the nature and extent of claimant's disability. Claimant has the burden of establishing that she now suffers disability as a result of her carpal tunnel syndrome on the right and left. No opinion is presented in the record from Dr. Verdeck as to the extent of claimant's permanent impairment. Dr. Strathman opines that claimant suffers no permanent impairment as a result of the carpal tunnel surgeries and that he could find no objective evidence of permanent impairment. Dr. Walker, on the other hand, finds permanent impairment but does not specifically state on what he bases this finding. Review of Dr. Walker's report reveals that he bases his opinion on claimant's subjective complaints of pain. However, subjective complaints of pain without objective evidence of impairment have been held an insufficient basis to support an award of permanent disability. See Waller v. Chamberlain Manufacturing, II Iowa Industrial Commissioner Report 419, 425 (1981). Furthermore, it is not readily apparent whether Dr. Walker's findings were based upon the injuries that occurred in 1981 and 1983 or some other events after those injuries. Therefore, the opinions of Dr. Strathman will be accepted over those of Dr. Walker. Claimant has not proved by the greater weight of evidence she sustained permanent disability as a result of the carpal tunnel syndromes.

Claimant did miss work as a result of the two carpal tunnel surgeries. She is entitled to temporary total disability benefits for those periods (December 17, 1981 through January 8, 1982 and October 7, 1983 through October 24, 1983). Claimant is not entitled to temporary total disability for the times she was off work in 1985 and 1986 as those were not found to be causally connected and as discussed above injuries in 1985 and 1986 were not pleaded and should not be considered in this matter.

Claimant seeks disability benefits from the Second Injury Fund. In order to establish Second Injury Fund liability the claimant must show that there is a permanent loss or loss of use of one hand, arm, foot, leg or eye and that there must be a permanent loss or loss of use of another such member or organ through a compensable subsequent injury. Because claimant failed to prove the two injuries involved here are permanent, claimant has not established second injury fund liability.

FINDINGS OF FACT

1. Claimant was experiencing bilateral hand pain in September, October and November 1981.

2. On December 17, 1981, claimant underwent surgery to relieve problems in her right hand.

3. On December 17, 1981, claimant sustained an injury arising out of and in the course of her employment.

4. Claimant's injury on December 17, 1981 was in the nature of carpal tunnel syndrome of her right wrist. On that date she did not have carpal tunnel syndrome in her left wrist.

5. Claimant's injury on October 7, 1983 was in the nature of carpal tunnel syndrome of her left wrist. Her condition in her left wrist deteriorated between November 24, 1981 and September 9, 1983.

6. On October 7, 1983, claimant underwent surgery to relieve problems in her left hand.

7. On October 7, 1983, claimant sustained an injury arising out of and in the course of her employment.

8. Claimant was off work as a result of the December 17, 1981 injury from December 17, 1981 through January 8, 1982 and from October 7, 1983 through October 27, 1983.

9. Claimant suffers no permanent disability as a result of the December 17, 1981 work injury.

10. Claimant suffers no permanent disability as a result of the October 7, 1983 work injury.

11. Claimant's rate of compensation was stipulated to be $326.80.

CONCLUSIONS OF LAW

Claimant sustained an injury arising out of and in the course of her employment on December 17, 1981 resulting in carpal tunnel syndrome in her right wrist.

Claimant sustained an injury arising out of and in the course of her employment on October 7, 1983 resulting in carpal tunnel syndrome in her left wrist.

Claimant established that she sustained temporary total disability as a result of her work injuries on December 17, 1981 and October 7, 1983.

Claimant has not established that she sustained any permanent disability as a result of her work injuries on December 17, 1981 and October 7, 1983.

Claimant has not established that she is entitled to benefits from the Second Injury Fund as a result of her work injuries on December 17, 1981 and October 7, 1983.

WHEREFORE, the decision of the deputy is affirmed and reversed.

ORDER

THEREFORE, it is ordered:

That defendant Wilson Foods Corporation pay claimant temporary total disability benefits for the periods December 17, 1981 through January 8, 1982 and October 8, 1983 through October 24, 1983 at the rate of three hundred twenty-six and 80/100 dollars ($326.80) per week.

That defendant Wilson Foods Corporation pay accrued amounts in a lump sum together with interest pursuant to Iowa Code section 85.30.

That defendant Wilson Foods Corporation is entitled to credit for benefits previously paid.

That defendants, Wilson Foods Corporation and Second Injury Fund of Iowa, pay equally the costs of this action including the costs of the transcription of the hearing proceeding.

That defendant Wilson Foods Corporation file activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 22nd day of December, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHIRLEY HEATON, Claimant, vs. SWIFT INDEPENDENT PACKING COMPANY, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 794672 A P P E A L D E C I S I O N FILED JAN 31 1989 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision granting temporary total disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits A through M. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: "Did the deputy industrial commissioner err in determining that claimant's injuries of April 4, 1985, were temporary in nature and did not justify an award of industrial disability benefits."

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropria to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law

is adopted. Peter D. Wirtz, M.D., opined that claimant has a degenerative disc disease. Dr. Wirtz further opined that claimant's injury of April 4, 1985 was an aggravation of preexisting problems, that the aggravation was temporary in nature, and would not result in any permanent impairment. Walter B. Eidbo, M.D., on the other hand characterized claimant's back condition as permanent even though he conceded that he could not say that claimant's back condition was totally related to the injury of April 4, 1985, because of the fact that claimant's back condition could possibly have been there prior to the injury at work. The testimony of Dr. Wirtz will be given greater weight. The claimant has failed to meet her burden to show that her permanent disability is related to her injury of April 4, 1985.

FINDINGS OF FACT

1. Claimant experienced the onset of low back pain on April 4, 1985 while working the reject line using a hook to remove chuck from combo on a chest-high conveyor line while in a bent over position.

2. Claimant was unable to give a specific time or reason for her complaints of severe pain as of that date.

3. Claimant received hot pack treatments at the nurse's station following her pain complaints, but did not seek physician treatment until May 1, 1985.

4. Claimant was off work from May 1, 1985 until May 6, 1985.

5. Claimant received physical therapy and was returned to work on May 6, 1985 with restrictions on bending, twisting, and lifting.

6. Claimant fell at work on June 18, 1985.

7. The June 18, 1985 work incident was a new injury, severe enough to warrant extensive medical care.

8. Claimant had degenerative disc disease as revealed by narrowing of the L4-L5 interspace shown on an x-ray of May 2, 1985.

9. Claimant's degenerative disc disease predated the April 4, 1985 onset of complaints of back pain at work.

10. The incident of April 4, 1985 was an aggravation of claimant's preexisting back problems which aggravation was temporary in nature and did not result in permanent impairment.

11. Claimant will continue to have temporary aggravations of her permanent nonwork-related degenerative disc disease.

12. As of April 23, 1986, claimant's condition had not worsened from her original April 4, 1985 injury.

13. Claimant apparently also experienced lower back pain while performing bending and twisting activities while working at Payless Shoes after leaving Swift's employ.

14. Claimant was off work from May 1, 1985 through May 6, 1985 on account of the April 4, 1985 temporary aggravation of her preexisting degenerative disc disease.

15. Claimant was off work from June 27, 1985 through June 30, 1985 and from September 6, 1985 through November 24, 1985, but it cannot be ascertained whether such related to the April 4, 1985 work incident or to the subsequent new injury of June 18, 1985.

16. Claimant received physical therapy related to the April 4, 1985 work incident prior to June 18, 1985.

17. Claimant received physical therapy subsequent to June 18, 1985 which likely related to the new injury of that date.

CONCLUSIONS OF LAW

Claimant has established an injury which arose out of and in the course of her employment on April 4, 1985.

Claimant has established that the April 4, 1985 injury was causally related to temporary total disability on which she bases her claim.

Claimant has not established that the April 4, 1985 injury is causally related to permanent partial disability on which she bases her claim.

Claimant is entitled to payment of medical costs related to physical therapy rendered prior to June 18, 1985.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant temporary total disability benefits at the rate of one hundred ninety-four and 78/100 dollars ($194.78) from May 1, 1985 through May 6, 1985. Defendants receive credit for benefits previously paid.

That defendants pay claimant the costs of physical therapy rendered from May 1, 1985 to June 18, 1985. Defendants receive credit for payments previously made for physical therapy.

That claimant pay the costs of this action.

That defendants file a claim activity report as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of January, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILMA HINGTGEN,	:	
Claimant,	:	
vs.	:	File No. 737771
MARY GOODMANN,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
ECONOMY FIRE & CASUALTY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals and defendants cross-appeal from an arbitration decision awarding permanent partial disability benefits based upon a 30 percent industrial disability to the body as a whole and healing period benefits from April 12, 1983 through November 10, 1983 at the rate of $64.91 per week.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 15 and A, B and D; and defendants' exhibits AA, BB, CC, and DD. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are the extent of claimant's permanent disability and whether claimant is an odd-lot employee, when healing period benefits end, and the rate of compensation.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant was born January 3, 1924 and was 63 years of age at the time of the arbitration hearing. Claimant has a tenth grade education and she has completed a 12 hour course to become certified as a nurse's aide. Prior to the time she started work for her employer, Mary Goodmann, claimant had work experience as

a nurse's aide and as an unskilled production worker in manufacturing plants.

Claimant started to work in November or December 1982 for Goodmann. On April 12, 1983, claimant was pulling Goodmann in a wheelchair up the incline in Goodmann's yard when she slipped and fell. Claimant fell on her "seat" and was taken to the hospital by ambulance.

Claimant testified that she was hospitalized in 1979 when she hurt her back when she slipped and fell on the ice and that she also hurt her back in 1981 when she was lifting her quadriplegic son. She stated she went back to work after those incidents and never had any other difficulty with her back after that. She also testified that as a result of the fall at Goodmann's she had a compression fracture in her vertebra. She stated that doing activities such as washing windows or sitting or standing very long will result in back spasms. She also stated that she was unable to work as a nurse's aide because too much lifting would be involved. She testified that she did not think she could do a regular job and that she did not know whether there would be anyone that would hire her. Claimant was unemployed at the time of the arbitration hearing. No evidence was presented that claimant had sought either employment or retraining.

Claimant also testified that she was paid $3.35 per hour for working four hours a day, five days a week for Goodmann. She stated that she thought she was paid mainly by cash but was also paid by check. She further testified that Goodmann provided food for claimant's lunch and she estimated the value of a lunch at $2.50 each.

Claimant was admitted to Mercy Health Center on April 12, 1983 and was discharged on April 24, 1983 but readmitted on April 25, 1983 and discharged on April 27, 1983. She was treated by James A. Pearson, M.D., an orthopaedic surgeon. Dr. Pearson's office note dated November 10, 1983 reads:

> The patient still has inability to work. She is complaining of discomfort from the upper thoracic area down to the lumbar area. Examination reveals the thoracic kyphosis. Tenderness is noted in this area, also tenderness is noted in the lumbosacral area, mainly on the right side. She has good strength on toe and heel walking. Straight leg raising is negative bilaterally.
>
> ....
>
> Recommendation: The patient is unable to work because of her discomfort and has inability to

> carry out even her routine housework. (Emphasis in original.)

(Claimant's Exhibit 3)

In a letter dated November 10, 1983 he wrote:

> X-rays taken on June 21, 1983 showed a compression of 50% to the normal height of the thoracic vertebra involved which was the 11th thoracic vertebra.
>
> The patient, on her most recent visit today, is still having severe pain in her back with inability to carry out even routine housework. She is totally disabled from resuming work and I feel this will probably be a permanent nature because of her age.

(Cl. Ex. A)

In a letter dated April 19, 1984 he wrote:

> The patient, I feel, is totally disabled from work because of the complaints that she has in her back and the findings of the marked compression fracture of the 11th thoracic vertebra....
>
> ....
>
> The patient has been off work now for over one year. I do not anticipate any particular change in her status in the succeeding years to follow,...

(Cl. Ex. B)

In a letter dated August 21, 1984 he stated no permanent disability rate could be given at that time and in a letter dated September 11, 1984 he stated a disability rating could be provided in two months from that date. His office note dated December 13, 1984 states: "...I think the patient is totally disabled from work because of the injury secondary to pain...."

In a letter dated May 2, 1985 he wrote:

> As you know, the above patient was injured in her thoracic spine secondary to a fall which produced a marked compression fracture of T11. When she was evaluated on April 19, 1984, the patient was still totally disabled from working and when I saw her on December 6, 1984, the patient was still felt to be totally disabled from work due to pain and marked aggravation on any attempts on any

bending or lifting which is required in any type of work the patient will do. X-rays of her spine on December 6, 1984 showed what appeared to be some posterior subluxation of T11. A CT scan showed the fracture to be well healed. It is for this reason that I feel the condition this patient is in is static and would anticipate no further improvement regarding the patient's function abilities. In spite of the fact that the patient is able to use her hands, any effort at lifting or sitting with any length of endurance required, still will aggravate the patient's condition and make her ineffective for any secondary occupation as well.

(Cl. Ex. 7)

Dr. Pearson testified in his deposition:

Q. Are there any frequent guidelines that you follow in giving impairment ratings?

A. Yes, I use the -- I start with the Manual of Orthopedic Surgeons For Rating Physical Impairment, which correlates with the American Medical Association guidelines. It's confined mainly to orthopedic problems.

Q. Are those guidelines standardized within orthopedic surgeons?

A. They are, but I tend to modify them according to where they stop. For example, the guidelines for compression fractures go from a compression fracture of twenty-five percent is given as a certain percentage, and then a compression fracture of fifty percent, and then no further, it doesn't say seventy-five percent compression. So one has to either extrapolate upwards or downwards based on those two values.

Q. What is your impairment rating of her at this time?

A. Based on these guidelines I have estimated her at thirty-five percent.

Q. Do you think that accurately reflects her impairment?

A. I think it does because I think the fracture is more than a fifty-percent compression fracture, and there aren't any signs of -- she has had no surgery

and there is no neurological findings, it's just a problem of persistent pain.

....

Q. Has there been any change in her condition between December of 1984 and July 17th of 1986?

A. No.

....

Q. Specifically in Mrs. Hingtgen, when did you find that she was not going to have any significant improvement?

A. I will put it this way, on July 19th, 1983, I advised her to return to full activity as much as possible, which was over three months from the time of the injury. And on September 8th, 1983, I was again encouraging her to increase her activities.

By November 10th, 1983, she was unable to work because of pain, and at that point I felt that she is not going to make any better progress at that point.

Q. Did she, in fact, make any further progress after that point?

A. No, I don't think so.

....

Q. When were you first able to do a disability rating on her?

A. Well, I'm not certain when I actually made an actual disability. Possibly it was in April of 1984. My statement in March of 1984 was that she may require a disability letter when she returns. I may have done one then, I don't know.

I made a letter on November 10th, 1983, that she was totally disabled from resuming work at that time. That's probably the first one.

....

Q. Your impairment rating for her then would be thirty-five percent?

A. Yes, sir.

Q. Would she be able to do, say, a secretarial type job full time?

A. No, I don't think she can. Well, if she is restricted to a period of time sitting of ten to fifteen minutes, they will allow her to get up and move around every so often, which I don't know of many jobs that allow you to do that, but then I think she could do that.

....

Q. How much do you think she can lift at this point on a regular basis?

A. Oh, repetitive lifting, I think she would be hard pressed to anything more than ten or fifteen pounds with her arms out in front of her. She could possibly lift fifty pounds bending her knees to do it, but in nursing you don't lift that way, you lift with your back bent forwards, a mechanically unstable position to be in.

....

Q. I understood you to say on direct examination that it was on the November 10, 1983, visit that you felt she would not get any better; in other words, you did not anticipate any significant improvement from the injury in the future; is that correct?

A. That is right. In fact, my impression was that she had chronic instability of her thoracic lumbar spine, the chronic meaning that it is probably going to be unchanged.

....

Q. There was no neurological involvement?

A. No.

Q. There was no damage to the hands or the legs? She has full use of her hands and legs?

A. She certainly does.

(Cl. Ex. 12, pages 14-33)

Claimant was also seen by David S. Field, M.D. In a letter dated November 29, 1983 he wrote:

> Based on the degree of injury that she has experienced, people do experience long-term pain in this region following a compression fracture. It is not unusual that the back pain will be aggravated by bending, lifting, and stooping and etc. and thus if her job involves daily bending, stooping, and etc. she would have to avoid this until her back becomes asymptomatic. This probably would require another two to three months minimum.

(Cl. Ex. 10)

In a letter dated July 1, 1985 he wrote:

> I do feel that she has a well healed compression fracture, greater than fifty percent compression of the T12 vertebral body which remains still symptomatic.
>
> This would equal approximately at 20% whole body permanent disability based on this injury and present findings.

(Cl. Ex. 11)

Dr. Field testified in his deposition:

Q. Doctor, perhaps you mentioned it but can you tell us when you conducted that examination?

A. November 1st, 1983.

Q. You indicated there was no spasm. What are you referring to when you indicate spasm?

A. I'm referring to spasm in the muscle that supports the spine.

Q. Was there any evidence of any type of a neurological loss or any deficit in the lower extremities or the hands or arms that you found?

A. No.

....

Q. Doctor, did you assess Mrs. Hingtgen after that second examination for a disability rating?

A. Yes, we did.

Q. Can you tell us what that disability rating was that you gave her at that time?

A. We gave her a twenty-percent whole body impairment or disability rating on that injury.

Q. Can you tell us generally what that disability was based upon.

A. We base it on factors which are related in this situation to the extent of the injury that she sustained to the vertebral body, and to the fact that there is a formula that we use in terms of compression fractures in vertebral bodies.

The fact was that she did not have -- she had persistent pain in her back, which is often correlated with this type of injury, and the type of injury she had correlated with the findings we had at our examination. And the guidelines would be relative to the extent of injury she sustained in her history and findings.

Q. So in assessing twenty-percent disability you took into account her subjective complaints of pain?

A. Correct.

Q. Is this twenty-percent disability rating based upon the AMA guides?

A. Yes, it's based on the AMA guide and also the American Academy of Orthopedic Surgeons guide as well.

....

Q. Well, what was the percentage of loss in the vertebrae?

A. Any vertebra greater than fifty-percent compression has a certain degree of disability rating.

Q. Did she have a loss greater or less than fifty percent?

A. It would be over fifty percent, yes.

....

Q. Have you had occasion to review Dr. Pearson's evaluation of Mrs. Hingtgen?

A. No, I have not.

....

Q. Now, specifically the twenty-percent disability impairment that you gave to Mrs. Hingtgen, did you use specifically the AMA guidelines or the orthopedic guidelines?

A. This particular one I referred to the orthopedic guideline.

....

Q. And your disability rating of twenty percent did take into account those feelings or findings of pain?

A. I took that into account but in this particular situation the major degree of the rating comes from the fact she clearly had a fracture, and that's primarily what her rating is gained from.

(Cl. Ex. 13, pp. 7-17)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 12, 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. 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The opinion of the supreme court in Olson v. Goodyear

Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) cited with approval a decision of the industrial commissioner for the following proposition:

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

Functional 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.

Claimant claims to be an odd-lot employee and entitled to permanent total disability benefits under the odd-lot theory expressed in Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). A worker becomes an "odd-lot" employee when an injury makes the worker incapable of obtaining employment in any well known branch of the labor market. Id. An odd-lot worker can only perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. Id. In Guyton at page 105 the supreme court quoted the following language from an Arizona case, Employers Mutual Life Ins. Co. v. Industrial Commission, 25 Ariz. App. 117, 119, 541 P.2d 580, 582 (1975):

> It is normally incumbent on an injured [worker], at a hearing to determine loss of earning capacity, to demonstrate a reasonable effort to secure employment in the area of ... residence. Where testimony discloses that a reasonable effort was made, the burden of going forward with evidence to show the availability of suitable employment is on the employer and carrier.

The Guyton court ultimately held that when a worker makes a prima facie case of total disability by producing substantial evidence that worker was not employable in the competitive labor market, the burden to produce evidence shifts to the employer; if the employer fails to produce such evidence and the trier of fact finds that the worker does fall into the odd-lot category, the worker is entitled to a finding of total disability. Id. at 106.

The basis of compensation is the weekly earnings of the

injured employee at the time of the injury. Iowa Code section 85.36. Weekly earnings is defined in Iowa Code section 85.36:

> Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed,....

Section 85.36 also provides various methods of computing weekly earnings depending upon the type of earnings and employment. If an employee is paid on a weekly basis, the weekly gross earnings shall be the basis of the compensation. Section 85.36(1), Code of Iowa. If an employee is paid on a daily basis or hourly basis or by output, the weekly earnings are computed by dividing by thirteen the earnings over the thirteen week period prior to the work injury. Section 85.36(6), Code of Iowa.

ANALYSIS

The first issue to be decided is the extent of claimant's industrial disability. Claimant argues on appeal that the deputy's rating which was 30 percent was too low and that claimant is an odd-lot employee. Claimant has proved that she has an impairment which the doctors agree is a permanent impairment Claimant has not returned to work and she has restrictions on her physical capacity due in part to the pain she states she suffers. However, as Drs. Pearson and Field agree, claimant does not have neurological involvement and she has full use of her hands and legs. The fact that claimant may suffer pain does not in and of itself mean that she is totally disabled.

Claimant argues that the deputy failed to properly consider the odd-lot doctrine in the instant case because the deputy centered solely on claimant's failure to find suitable replacement employment. Under the odd-lot doctrine it is incumbent upon claimant to make a prima facie showing that claimant is unemployable. Claimant cites her age, education and training, lack of experience in anything other than manual labor and pain as reasons why she is unemployable. Claimant has not sought other employment and there is no evidence that she has attempted retraining. Claimant has not made a prima facie showing that she is unemployable.

In describing claimant's industrial disability the deputy stated:

> As a result of her functional impairment and, more importantly from an industrial disability standpoint, physician imposed physical restrictions, claimant is unable to return to the work she was

performing at the time of the work injury and most other jobs she has held in the past. Claimant's past employment primarily consists of unskilled or semiskilled physical labor jobs such as factory work or nurse's aide positions which require either heavy lifting or repetitive lifting, bending, twisting, and stooping, prolonged sitting and prolonged standing. Claimant and Dr. Pearson testified that claimant would not be able to remain either standing or sitting for more than ten minutes at any one period of time. Dr. Pearson, however, felt that if claimant were allowed to move about or change positions periodically she could tolerate clerical type work.

Claimant has suffered a significant loss in actual earnings from employment due to a work injury but again this is in part the result of her lack of effort to seek suitable work.

Claimant is sixty-three years of age (fifty-nine years of age at the time of the injury). Given her age, claimant's loss of earning capacity is not as great as that of a younger person.

Claimant has only a tenth grade education and exhibited average intelligence at the hearing. However, her limited formal education and age indicates that she has low potential for successful vocational rehabilitation.

When all factors are considered the deputy correctly concluded that claimant has an industrial disability of 30 percent.

The next issue to be considered is when healing period ended. On discussing this issue the deputy stated:

> Claimant has not returned to work in any capacity since April 12, 1983. Despite some ambiguous verbage in his clinical notes, Dr. Pearson clearly states in his deposition testimony, exhibit 12, that he did not expect claimant to improve medically after his examination of claimant on November 10, 1983 and he gave his first "disability" rating at that time.

Claimant argues that the deputy erred. Claimant relies upon the case of Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124 (Iowa Ct. App. 1984) and argues that the healing period did not end until May 2, 1985 because that is the date a rating of disability could be made. Claimant's argument that the healing period did not end until May 2, 1985 is clearly not persuasive.

Claimant seems to admit in her appeal brief that a rating of "disability" was made by Dr. Pearson as early as his letter of September 11, 1984. Furthermore, Dr. Pearson clearly indicated that there was no change in claimant's condition between December 1984 and July 17, 1986.

Two points should be made about Thomas, 349 N.W.2d 124. The first point is that it is at the point at which a disability can be determined that the disability award can be made. Until that time healing period benefits are awarded the injured worker. Id. at 126. The second point is that under Thomas there must be some medical evidence from which the commissioner could find or infer that no further improvement was anticipated. Id. at 126. In the instant case Dr. Pearson specifically testified that claimant's condition was going to be "unchanged" after November 10, 1983 and that claimant's disability was permanent. It was at that time that no significant improvement for claimant was anticipated and that her disability could be determined. Merely because it was Dr. Pearson's custom not to give a rating until some later date does not mean that claimant did not reach maximum improvement on November 10, 1983. There is ample evidence in the record to find that the healing period ended November 10, 1983.

The last issue to be discussed is the rate of compensation. Defendants argue in their cross-appeal that the deputy erred in not using the method of calculation found in Iowa Code section 85.36(10). That subsection provides:

> If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fifieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

Defendants argue that that subsection is applicable because a letter dated July 21, 1983 from the industrial commissioner's office stated that it appeared from the information provided that the claimant earned less than the usual weekly earnings of the regular full-time adult laborer in that line of industry in that locality. Defendants also argue that the deputy's decision places an undue burden on the employer to demonstrate that the requirements of section 85.36(10) have been met. Neither of defendants' arguments are persuasive. The letter defendants rely upon clearly stated that the conclusion reached was based upon the information supplied (the employer's first report of injury) and it was couched in indefinite terms. Furthermore, the only information upon which that indefinite conclusion was apparently based was a statement that claimant worked 25-30

hours per week. While the letter was a legitimate attempt to determine the proper rate based upon the limited information available, the conclusion contained in that letter is not dispositive of the issue involved in this appeal.

The deputy discussed that because defendants assert section 85.36(10) is applicable they have the burden of proving that the requirements of the subsection have been met. Defendants assert on appeal that this places an undue burden on them. The only evidence in this case as to whether claimant's earnings are the usual earnings of a regular full-time adult laborer in her line of industry in her locality is claimant's earnings. In the absence of any proof to the contrary it must be concluded that claimant's earnings were the usual earnings of an adult engaged in in-home nurse's aide work. It is not unreasonable, in this case, to conclude that claimant's work of 20 hours per week was the "usual" hours of the industry and that she earned the "usual" amount of her industry in her locality. The deputy correctly concluded that section 85.36(10) was not applicable in this case.

Defendants also argue on cross-appeal that the deputy erred in including the value of the meals furnished to claimant by Goodmann in calculation of the rate. The evidence is uncontroverted that Goodmann furnished claimant lunch and the value of a lunch was $2.50. Defendants offer no persuasive argument why the value of the lunch claimant received should not be included in the computation of claimant's gross weekly earnings. The deputy correctly relied upon the reasoning of Hoth v. Eilors, I Iowa Industrial Commissioner Report 156 (Appeal Decision 1980) and correctly concluded that the value of the meals furnished by the employer are to be included in the computation of gross weekly earnings.

FINDINGS OF FACT

1. Claimant was born January 3, 1924 and was 63 years of age at the time of the arbitration hearing.

2. Claimant has a tenth grade education and has completed a 12 hour course to be certified as a nurse's aide.

3. Prior to the time claimant began work for her employer (Goodmann) she had worked as a nurse's aide and as an unskilled production worker in manufacturing plants.

4. In November or December of 1982 claimant began employment for Goodmann as a domestic helper and aide.

5. Claimant was paid $3.35 per hour for four hours per day five days a week and was furnished lunch valued at $12.50 per week by Goodmann.

6. On April 12, 1983 claimant slipped and fell while moving Goodmann in a wheelchair at Goodman's home. Claimant suffered an injury that arose out of and in the course of her employment.

7. As a result of the injury on April 12, 1983, claimant had a compression fracture of the eleventh thoracic vertebra.

8. The work injury of April 12, 1983 caused claimant to miss work.

9. Dr. Pearson indicated that on November 10, 1983 significant improvement from claimant's injury was not anticipated.

10. The work injury of April 12, 1983 was a cause of permanent partial impairment to claimant's body as a whole.

11. Claimant does not have neurological involvement because the April 12, 1983 injury. Claimant has full use of her hands and legs.

12. Claimant is unable to sit for more than 10 to 15 minutes without experiencing pain. Claimant can possibly lift 50 pounds by bending her knees to do it. Claimant cannot lift more than 10 to 15 pounds with her arms out in front of her.

13. Claimant has sought neither employment nor retraining since her April 12, 1983 injury.

14. The work injury of April 12, 1983 was a cause of claimant's industrial disability of 30 percent.

15. On April 12, 1983 claimant's gross rate of weekly earnings was $79.50 per week and she was single and had no dependents.

16. Claimant's rate of compensation is $64.91.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of evidence that there is a causal connection between her work related injury of April 12, 1983 and her permanent disability.

Claimant has not established by a preponderance of evidence that she is entitled to permanent total disability benefits as an odd-lot employee.

Claimant has established by a preponderance of evidence that her industrial disability is 30 percent.

Claimant has established by a preponderance of evidence that

as a result of her injury she is entitled to healing period benefits from April 12, 1983 through November 10, 1983 and 150 weeks of permanent partial disability benefits commencing on November 11, 1983.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of sixty-four and 91/100 dollars ($64.91) per week from November 11, 1983.

That defendants pay to claimant healing period benefits from April 12, 1983 through November 10, 1983 at the rate of sixty-four and 91/100 dollars ($64.91) per week.

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

That defendants pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants pay the costs of this action including the costs of transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

That defendants file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 30th day of September, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM J. HODGINS,

Claimant,

vs.

FLOYD VALLEY PACKING CO.,

Employer,

and

NORTHWESTERN NATIONAL INSURANCE - CHUBB GROUP OF INSURANCE COMPANIES,

Insurance Carriers,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 798203

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendant Second Injury Fund of Iowa appeals from an arbitration decision awarding permanent partial disability benefits. Claimant cross-appeals.

The record on appeal consists of the transcript of the arbitration proceeding, and joint exhibit 1. Joint exhibit 2 was not admitted into evidence and was not considered in this appeal decision. Both parties filed briefs on appeal.

ISSUES

Defendant second injury fund states the following issues on appeal:

I. Whether the deputy industrial commissioner erred as a matter of law in concluding that the Second Injury Fund of Iowa was obligated to Claimant in the amount of approximately $14,000.

II. Whether the deputy industrial commissioner erred in concluding that Claimant's alleged loss of earning capacity of twenty percent (20%) was the

result of the combined effects of Claimant's first and second injuries.

Claimant states the following issues on cross-appeal:

I. Did the Deputy Industrial Commissioner correctly apply the law in concluding that the Second Injury Fund of Iowa was obligated to pay the industrial disability?

II. Should the industrial disability be greater than 20% of the body?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropria to the issues and the evidence.

ANLYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant injured his right hand in May 1980 and underwent a release of the right dorsal compartment on July 21, 1980.

2. Claimant was able to return to his loin wrapping job shortly after his dorsal compartment release.

3. Claimant continues to have clamming in his right hand in cold conditions and after working for prolonged periods.

4. Claimant had a carpal tunnel release of the left hand October 4, 1985.

5. Claimant worked one-handed with his right hand for six weeks following that release.

6. Claimant then returned to his loin wrapping job and continued working that job until Floyd Valley closed in Spring 1986.

7. Claimant has secured other employment at a lesser wage and with less employee benefits and security than he had at Floyd Valley.

8. Claimant has past experience as a janitor and could continue to work as a janitor.

9. Claimant has limited literacy skills but had functioned adequately in both prior and present employment despite that limitation.

10. Claimant's limited literacy skills would make retraining for less physically demanding work more difficult.

11. Claimant was 46 years old at the time of the hearing and a high school graduate.

12. Claimant has a 11 percent scheduled member permanent disability to the right hand; claimant has a 10 percent scheduled member permanent disability to the left hand.

13. Claimant is competing with noninjured workers for jobs in a limited job market.

14. Claimant has a loss of earning capacity of 20 percent of the body as a whole as a result of the combined effects of his first and second injuries.

CONCLUSIONS OF LAW

Claimant's loss of use of his left hand and his loss of use of his right hand result in a total industrial disability of 20 percent permanent partial impairment of the body as a whole.

The compensable value of claimant's loss of use of his right hand is 20.9 weeks; the compensable value of claimant's loss of use of his left hand is 19 weeks.

The obligation of the Second Injury Fund of Iowa is 60.1 weeks at the rate of $223.96 due after Floyd Valley Packing Co. has paid claimant its obligation as to the loss of use of the left hand and the expiration of 20.9 weeks thereafter.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That the Second Injury Fund of Iowa pay claimant permanent partial disability benefits for sixty point one (60.1) weeks at the rate of two hundred twenty-three and 96/100 dollars ($223.96) with those payments to commence as set forth in the above conclusions.

That the Second Injury Fund of Iowa pay any accrued benefits

in a lump sum together with interest pursuant to section 85.30.

That the Second Injury Fund of Iowa pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

That Defendants file claim activity reports as requested by the agency.

Signed and filed this 23rd day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM J. HODGINS, Claimant, vs. FLOYD VALLEY PACKING CO., Employer, and NORTHWESTERN NATIONAL INSURANCE - CHUBB GROUP OF INSURANCE COMPANIES, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 798203 R U L I N G O N A P P L I C A T I O N F O R R E H E A R I N G

FILED

SEP 19 1988

IOWA INDUSTRIAL COMMISSIONER

An appeal decision in this case was filed on August 23, 1988, affirming the decision of the deputy industrial commissioner. Defendant Second Injury Fund of Iowa has requested a rehearing and oral argument. Specifically, defendant Second Injury Fund of Iowa has requested a ruling on each of the arguments raised in its appeal brief. Claimant has filed a resistance to the application for rehearing and request for oral argument.

The Second Injury Fund of Iowa requests a determination on appeal that section 85.64 requires an "intervening hiring" before second injury fund liability can be established, and that claimant in this action is not entitled to benefits from the second injury fund since both of his injuries occurred while employed by the same employer. However, the language of section 85.64 does not require that the two injuries occur while employed by different employers. No authorities are cited in support of the Fund's interpretation of section 85.64. The second injury fund's argument that section 85.64 requires an "intervening hiring" is determined to be without merit.

The Second Injury Fund of Iowa also argues that claimant has not suffered a "handicap" from his first injury because he returned to work and later accepted an allegedly more demanding job. Initially, it is noted that section 85.64 does not use

the term "handicap." Rather, that section refers to a claimant who has "lost the use of" enumerated members, and later suffers permanent "disability" from a compensable injury. "Disability" and "handicap" are not synonymous. The second injury fund argues that since claimant returned to work after his initial injury and was later reassigned to what may have been more physically demanding work, claimant has not suffered a prior "handicap or preexisting disability." Depending on the nature and extent of the disability, a claimant could quite conceivably suffer an injury and resulting loss of earning capacity and still be able to return to the work he was performing at the time of the injury, or later engage in more strenuous physical activity. The record in this case shows that claimant did suffer a preexisting disability or loss of earning capacity from his earlier injury but nevertheless was able to continue working for his employer. Defendant Second Injury Fund of Iowa's argument in this regard is also found to be without merit.

The Second Injury Fund of Iowa's argument that the decision of the deputy commissioner should be reversed because "there was no permanent industrial disability" is contradicted by the record. Claimant was given a permanent partial impairment rating for both hand injuries. Claimant is unable to work in various occupations as a result of those impairments. Claimant has suffered an industrial disability.

The Second Injury Fund of Iowa asserts that claimant's loss of earning capacity was caused by a layoff and not by claimant's injuries. "Loss of earning capacity" is not synonymous with "loss of earnings." An actual loss of earnings is but one indication of a loss of earning capacity. Claimant's loss of earnings may very well be caused in whole or in part by the plant layoff. Claimant's loss of earning capacity is what is compensated under section 85.64. Claimant's loss of earning capacity is caused by his injuries and not by a subsequent plant layoff.

THEREFORE, defendant Second Injury Fund of Iowa's application for rehearing and request for oral argument is denied.

Signed and filed this 19th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN L. HOFFMANN,

Claimant,

vs.

NATIONAL FARMERS ORGANIZATION,

Employer,

and

CIGNA INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 760418

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an order dismissing his petition for benefits as the result of an alleged injury on April 20, 1982.

The record on appeal consists of the order of dismissal and all filings of the parties. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: "Should Claimant's case be dismissed based upon an alleged failure to proceed with his case in a timely fashion?"

Defendants state the following issues on appeal: "(1) whether or not dismissal of claimant's action by Deputy McSweeney on November 20, 1987, was appropriate; and, (2) whether Deputy McSweeney's denial of rehearing on December 15, 1987, was appropriate."

REVIEW OF THE EVIDENCE

This appeal is based on rulings by the deputy industrial commissioner dismissing claimant's petition and denying rehearing on the dismissal. Claimant filed his original notice and petition on April 18, 1984.

A prehearing conference was held on April 7, 1986. At that time, claimant's attorney indicated he was having difficulty

in obtaining claimant's cooperation. As a result of that conference, a prehearing order was issued requiring claimant to file a statement within 30 days indicating he intended to pursue the case, and to answer defendants' interrogatories within 30 days. Claimant did comply with this order. Another prehearing conference was held on December 19, 1986. A prehearing order was issued on December 31, 1986, continuing the case for completion of discovery. A third prehearing conference was held on October 29, 1987. A prehearing order filed October 30, 1987 recited that defendants would be moving to dismiss the case.

On November 2, 1987, defendants filed a motion to dismiss under Iowa Division of Industrial Services Rules 343-4.34 and 343-4.36, alleging that three and one-half years had elapsed since the filing of the petition, and claimant had failed to prosecute his case.

On December 7, 1987, claimant filed a combination notice of appeal and request for "reconsideration" of the dismissal. Claimant amended this document on December 10, 1987, by filing a copy of a physicians' report. Defendants filed a resistance to the motion for reconsideration, reciting that claimant had not shown any good cause for his failure to prosecute the case. On December 15, 1987, the deputy treated claimant's motion for reconsideration as a motion for rehearing, and overruled the motion. On December 21, 1987, claimant filed a new notice of appeal.

APPLICABLE LAW

Division of Industrial Services Rule 343-4.34 states in part:

> Dismissal for lack of prosecution. It is the declared policy that in the exercise of reasonable diligence, all contested cases before the industrial commissioner, except under unusual circumstances, shall be brought to issue and heard at the earliest possible time. To accomplish such purpose the industrial commissioner may take the following action:
>
> 4.34(1) Any contested case, where the original notice and petition is on file in excess of two years, may be subject to dismissal after the notice in 4.34(2) is sent to all parties and after the time as provided for in the notice.
>
> 4.34(2) After the circumstances provided in 4.34(1) occur, all parties to the action, or their attorneys, shall be sent notice from the division of industrial services by certified mail containing the following:
>
> a. The names of the parties;

b. The date or dates of injury involved in the contested case or appeal proceeding;

c. Counsel appearing;

d. Date of filing of the petition or appeal;

e. That the contested case proceeding will be dismissed without prejudice on the thirtieth day following the date of the notice unless good cause is shown why the contested case proceeding should not be dismissed.

Division of Industrial Services Rule 343-4.36 states:

If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.

ANALYSIS

The record clearly establishes that subsequent to the filing of claimant's petition, little action was taken by claimant to pursue this case. Even after the motion to dismiss was filed, claimant failed to file a resistance to the motion, but instead waited until after the motion to dismiss was granted before filing a motion to reconsider. Claimant's motion to reconsider failed to show good cause for the failure to prosecute, but rather merely submitted a doctor's report. No explanation for the failure to prosecute the case was given.

It is impossible to determine from the deputy's order what conclusions he relied on in determining that claimant's petition should be dismissed. The deputy's order also failed to state what rule or authority he relied on in dismissing the petition. The deputy merely concludes that defendants' motion was "persuasive," without explanation of why the petition should be dismissed.

A perusal of the file does not indicate that any rule or order of this agency was not complied with by claimant and thus the order of dismissal would not appear to be predicated on Rule 343-4.36.

Rule 4.34 enunciates a public policy that workers' compensation cases be handled expeditiously. The effectiveness of the workers' compensation adjudication system depends on a timely and orderly processing of contested cases. Claimant's lack of reason or excuse for letting this case pend more than three years subverts that public policy goal.

However, although the merits of this case certainly justify the deputy's dismissal, procedurally rule 4.34 was not complied with. Rule 4.34 contemplates a notice to the parties that the case has been pending more than two years, and that the case is subject to dismissal for lack of prosecution. The file indicates that such a notice was not issued to the parties in this case. For that reason, the deputy's dismissal of the action was premature.

FINDINGS OF FACT

1. Claimant's petition was filed April 18, 1984.

2. Claimant's petition was dismissed on November 20, 1987.

3. Claimant did not receive a notice pursuant to Division of Industrial Services Rule 4.34 that his petition was subject to dismissal for lack of prosecution.

CONCLUSION OF LAW

The dismissal of claimant's petition was improper.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, claimant's petition is hereby reinstated.

The costs of the appeal are charged to defendants.

Signed and filed this 31st day of January, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE V. HOLLIDAY, Claimant, vs. SPENCER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier Defendants.	File No. 711863 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant permanent total disability benefits as long as claimant remains totally disabled as a result of an alleged injury sustained on July 26, 1982.

The record on appeal consists of the transcript of the arbitration decision and joint exhibits 1 through 13. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

I. Claimant has failed to establish a causal connection between the injuries of 1982 and his present condition.

II. Claimant is not permanently and totally disabled based on a work related injury.

III. The work of a tuck pointer is seasonal and the applicable rate should be calculated pursuant to § 85.36(9) (The Code, 1987).

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Wayne Holliday was an employee of Spencer Company on April 1, 1982, and on July 26, 1982, when he sustained injuries which arose out of and in the course of his employment. The injury on April 1, 1982, occurred when a compressor unit fell upon him across his chest. The injury of July 26, 1982, occurred while he was using a rope to pull a lookout to the top of a building.

2. At the time of injury, claimant was working as a tuck pointer.

3. Following the injury of April 1, 1982, claimant was off work for a period of time which has not been precisely determined from the record made, but which appears to have been approximately 11 days.

4. Following the injury of April 1, 1982, claimant was able to resume the duties of employment, but he experienced some difficulties in doing so.

5. Following the injury of July 26, 1982, claimant has not returned to any gainful employment of any type.

6. The precise physiological damage or injury which claimant sustained in either of the two incidents that occurred in 1982 has not been determined. Claimant experiences pain and numbness in his right arm. He has suffered a severe loss of the ability to use his right hand. Claimant also has pain in his right shoulder region and a sensory impairment on the right upper portion of the trunk of his body.

7. It is found to be probable that there is some undiagnosed physiological condition in the anatomical region of claimant's cervical spine, brachial plexus and right shoulder which is responsible for the symptoms that he experiences in his right arm.

8. It is further found that the injuries claimant sustained on April 1, 1982, and/or July 26, 1982, were substantial factors in producing that physiological injury.

9. It is likely that there is some emotional component to claimant's current physical condition.

10. The injuries sustained in either of the incidents in 1982 are not probable source of the problems of which claimant complains regarding his lower extremities except to the extent that the problems may be psychologically induced.

11. Since the injury of July 26, 1982, Wayne Holliday has not returned to gainful employment and has not been medically capable of returning to gainful employment substantially similar to that in which he was engaged at the time of injury.

12. Claimant is found to have reached the point that it was medically indicated that further significant improvement from the injury was not anticipated on August 10, 1983, the date he completed his evaluation at the Mercy Hospital Medical Occupational Evaluation Center. Subsequent to that date, he has not been under any active recuperative treatment.

13. Claimant does not have sufficient residual capacity to be self-supporting.

14. Claimant does not have sufficient physical capacity to enable him to be employed in any well-known branch of the labor market in the geographic region of his residence, or elsewhere.

15. At the time of hearing claimant was 45 years old and married.

16. During the 13 weeks prior to July 26, 1982, claimant earned $4,966.50.

17. The medical care claimant has received from Darwin B. Jack, M.D., is reasonable treatment for the injuries he sustained on July 26, 1982, and the charges made are fair and reasonable.

18. Wayne Holliday has a restricted range of motion in his cervical spine and severely limited use of his right upper extremity which have resulted from the injuries sustained on July 26, 1982. He is in constant pain which is of a level that is mentally distracting.

19. Claimant dropped out of high school during the twelfth grade and has no further formal education.

20. Claimant's entire work experience has involved moderate or heavy physical labor and proficient use of both upper extremities.

21. Claimant is reasonable intelligent and a highly-motivated individual who would prefer to be gainfully employed rather than afflicated with his present state of disability. Claimant is emotionally stable, but there may be some psychological component to his present condition which has arisen from the physical injuries that he sustained.

22. As between the incidents of April 1, 1982, and July 26, 1982, the latter is found to be the primary source of the disability with which claimant is currently afflicated.

23. The occupation of tuck pointer is not exclusively seasonal.

CONCLUSIONS OF LAW

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

The injuries claimant sustained on April 1, 1982, and July 26, 1982, arose out of and in the course of his employment with Spencer Company.

Wayne Holliday is permanently and totally disabled within the meaning of section 85.34(3) of the Code.

The injuries claimant sustained on April 1, 1982, and July 26, 1982, are a proximate cause of his current permanent and total disability.

Claimant's rate of compensation is determined under section 85.36(6) and is found to be $235.70 per week.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant weekly compensation for permanent total disability at the rate of two hundred thirty-five and 70/100 dollars ($235.70) per week commencing July 26, 1982, and continuing thereafter, for so long as claimant remains totally disabled.

That defendants pay claimant's expenses with Darwin B. Jack, M.D., in the amount of one hundred fifty and 00/100 dollars ($150.00).

That defendants pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

That defendants file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 10th day of May, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBIN HOOTMAN,	:	
	:	
Claimant,	:	File Nos. 604512
	:	652333
vs.	:	700301
	:	
WEYERHAEUSER COMPANY,	:	R E M A N D
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
	:	
and	:	
	:	
SECOND INJURY OF IOWA,	:	
	:	
Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding on remand that comes as a result of the following history. An arbitration and review-reopening decision dated December 31, 1984 concluded that claimant had injured both her wrists on October 13, 1980; that claimant had five percent impairment of each upper extremity; that claimant did not injure her wrists in November 1981 or January 1982; and that claimant was not entitled to any benefits from the second injury fund. Claimant appealed and the employer cross-appealed that decision to the commissioner, and in an appeal decision dated October 4, 1985 a deputy appointed by the commissioner concluded that claimant had failed to establish entitlement to second injury fund benefits.

Claimant appealed the appeal decision to the district court in Linn County. In a ruling dated March 6,1986, the district court held that the injuries to the right and left hand occurred on separate occasions. The district court reversed the appeal decision as to the second injury fund and remanded the case to the industrial commissioner to determine an industrial disability percentage for the claimant's injuries. The second injury fund appealed the district court decision. The Iowa court of appeals in a decision dated March 31, 1987 affirmed the district court. The court of appeals' decision is an unpublished opinion as reported at 409 N.W.2d 715, 716.. The commissioner retained jurisdiction of the matter at the appeal level.

The record on remand consists of the transcript of the hearing; claimant's exhibits 1 through 13 and 15 through 19; and defendants' exhibits A through D.

ISSUE

The issue on remand is the liability of the second injury fund. In order to determine the liability, it is necessary to determine the extent of claimant's industrial disability.

REVIEW OF THE EVIDENCE

The discussion of the review of evidence will be limited to facts relevant to claimant's industrial disability and determination of the second injury fund liability. Those findings of fact that were made by the courts on judicial review will be accepted as correct for purposes of this remand decision. The findings of fact of the prior appeal decision that were not reversed on judicial review and that are not inconsistent with findings herein are also accepted as correct.

Claimant is married and was 34 years old at the time of the hearing. She has three children and has 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 testified that since November 1981 she has made and sold toys and dolls for children. She estimated she made about $15 a week on the sales. She also testified that she had applied for jobs as clerks in stores, in factories, and as a receptionist. She stated she wanted to work.

Based upon the court of appeals' decision, claimant has an injury to the right hand and wrist as a result of a work injury on October 13, 1980 and an injury to her left hand as a result of a work injury in November 1981. Based upon the arbitration and review-reopening decision, claimant has permanent impairments of five percent of each upper extremity which translate to six percent of the body as a whole.

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.

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 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.

Claimant's spouse indicated that claimant goes out each week to look for work and that she has been unsuccessful in

obtaining any.

Loy Gibbs, production superintendent for defendant employer, 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 20 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.

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. There was no 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.

Claimant was seen by William R. Blair, M.D. He seemingly reviewed claimant's restrictions on November 16, 1982 and determined the restrictions should remain in force until she became asymptomatic. On March 9, 1983, claimant was sent a letter from the employer based on a letter from Dr. Blair reversing her dismissal and telling her that she could return to full duty as soon as her light duty restriction was lifted.

John R. Huey, M.D., orthopedic surgeon, first saw claimant on November 29, 1982. He had the impression that claimant 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 15 pounds and not more than 20 repetitive motions a minute.

Leland G. Hawkins, M.D., board certified orthopedic surgeon, first saw claimant in 1979. He examined claimant in January 1983. At the time of this examination claimant had no restriction of motion, but she did report pain with excessive activity.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injuries of October 1980 and November 1981 are causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L.O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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).

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, 125 N.W.2d 251 (1963) at 1121, ___, cited with approval a decision of the industrial commissioner for the following proposition:

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

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121 125 N.W.2d 251, 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.

Agency interpretation of Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1979) has held that assessment of industrial disability to the employer at the time of the second injury is appropriate only when the second injury extends to the body as a whole as in the Mich Coal case. That interpretation has recently been affirmed. See Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989). If the second injury is limited to a scheduled member then the employer's liability is limited to the schedule. Simbro v. Delany's Sportswear, 332 N.W.2d 886 (Iowa 1983). Accordingly, the second injury fund is charged with the excess industrial disability over the combined scheduled losses of the first and second injury. Second Injury Fund, 436 N.W.2d 355.

Iowa Code section 85.36 provides in relevant parts:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
>
> ....
>
> 6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

ANALYSIS

The first question to be addressed is the extent of claimant's industrial disability. Claimant is 34 years of age and has a GED. Her work experience has been manual labor in which she used her hands to perform work. She has a five percent impairment of each of the upper extremities. Although Dr. Hawkins indicates that she has no restriction in her range of motion, Dr. Huey has placed restrictions on her of 15 pounds and not more than 20 repetitive motions a minute. Claimant experienced pain and swelling in her wrists when she attempted to perform tasks after her injuries. There does not appear

to be any work available within claimant's restrictions at the defendant employer. Claimant has attempted to find other work and is motivated to do so. She has not attempted retraining, but has the intellectual capacity to seek further formal training. Her physical impairment is six percent of the body as a whole. She is at an age that further education or retraining would limit her loss of earnings capacity. When all things are considered, claimant has an industrial disability of 40 percent.

The next question to be decided is the second injury fund liability. The second injury fund is liable for the excess industrial disability over the combined scheduled losses of the first and second injury. Claimant's industrial disability is 40 percent or 200 weeks. The scheduled loss of the first injury is five percent of the right upper extremity or 12 1/2 weeks. The scheduled loss of the second injury is five percent of the left upper extremity or 12 1/2 weeks. The second injury fund is liable for 175 weeks of compensation.

In order to determine the monetary liability of the second injury fund it is necessary to determine claimant's rate of compensation. Claimant's rate of compensation at the time of the first injury can be taken from the arbitration and review-reopening decision and the facts given. The rate of compensation for claimant's industrial disability and her second injury has not been previously determined. Determination of the rate is complicated by the facts that the parties did not stipulate to the rate; the settlement agreement between the employer and claimant has not been submitted for approval as directed in the appeal decision; and evidence on the rate at the time of the second injury is somewhat incomplete. The failure of the parties to file the settlement agreement has obviously caused problems in determining claimant's proper rate. Claimant's hourly wage applicable in November 1981 was $7.67. It appears from claimant's exhibit 10 that claimant worked 13 weeks prior to her November 1981 injury. It also appears from claimant's exhibit 10 that she usually worked 40 hours per week in 1979 and 1980. There is nothing in the record to indicate that she did not work 40 hours per week in the 13 weeks prior to her November 1981 injury. She apparently took a vacation the week of August 3, 1981. There was a holiday taken on September 7, 1981. There are some other notations on the absentee calendar for 1981 found in claimant's exhibit 10. However, it is impossible to tell from the information given how many hours more or less than the usual 40 hours claimant would have worked. While the record is not clear, it is reasonable to conclude that claimant worked 40 hours per week for 13 weeks prior to her injury at an hourly rate of $7.67. Claimant's gross weekly wages were $306.80. Claimant's rate for her industrial disability is $196.24.

FINDINGS OF FACT

1. Claimant was 34 years of age at the time of the arbitration and review-reopening hearing and had a GED.

2. Claimant is married and has three dependent children.

3. As a result of a work injury on October 13, 1980, claimant suffered a five percent impairment of the right upper extremity.

4. As a result of a work injury in November 1981, claimant suffered a five percent impairment of the left upper extremity.

5. Claimant had a six percent impairment of the body as a whole as a result of the October 1980 and November 1981 injuries.

6. Claimant is restricted to lifting not more than 15 pounds and to not more than 20 repetitive motions a minute.

7. Claimant's work experience is manual labor.

8. Claimant is unable to do the same job she was doing when she was injured.

9. Claimant has the intellectual capacity to seek further education or retraining.

10. Claimant is motivated to be gainfully employed.

11. Claimant reached maximum recovery on February 23, 1982.

12. Claimant's rate of compensation at the time of the November 1981 injury is $196.24.

CONCLUSIONS OF LAW

Claimant has established she has an industrial disability of 40 percent as a result of the October 1980 and November 1981 work injuries.

Claimant has established that she is entitled to benefits from the second injury fund.

ORDER

THEREFORE, it is ordered:

That the second injury fund pay claimant permanent partial disability benefits for one hundred seventy-five (175) weeks

[two hundred (200) weeks minus the sum of twelve point five (12.5) weeks and twelve point five (12.5) weeks] at the weekly rate of one hundred ninety-six and 24/100 dollars ($196.24).

That the second injury fund payment of benefits commence on February 24, 1982.

That credit be given for any benefits previously paid by the second injury fund.

That accrued payments are to be paid in a lump sum.

That the second injury fund pay all costs of this remand decision; the arbitration and review reopening; and the appeal.

Signed and filed this 7th day of June, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD HOSCH, Claimant, vs. BORK TRANSPORT, INC., Employer, and GREAT WEST CASUALTY COMPANY, Insurance Carrier, Defendants.	:	File No. 804991 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals and defendants cross-appeal from an arbitration decision denying any benefits from an alleged work injury on September 15, 1985.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 13; joint exhibits 14 through 36; and defendants' exhibits A through L. Both parties filed briefs on appeal.

ISSUES

Claimant states the issue on appeal is whether there is a causal relationship between claimant's alleged work injury and his claimed disability.

Defendants state the issues on cross-appeal are: whether the claimant received an injury that arose out of and in the course of his employment; whether claimant's claim is barred by his intoxication pursuant to Iowa Code section 85.16(2); and whether claimant's claim is barred as a result of his alleged misrepresentations to defendant employer at the time claimant obtained employment.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted.

FINDINGS OF FACT

1. On the morning of September 15, 1985, the Bork Transport (defendant employer) dispatcher instructed claimant to take a semi load for Bork Transport from Maquoketa, Iowa to Wauwatosa, Wisconsin for 8 a.m. September 16, 1985, delivery.

2. Claimant and his spouse bowled the first night of mixed doubles league on the night of September 15, 1985.

3. Claimant and his spouse arrived at the bowling alley at about 7:15 p.m.

4. Bowling commenced by approximately 7:45 p.m. and lasted at least two hours, but not more than two and one-half hours.

5. Claimant bowled three games of ten frames consisting of two balls each.

6. Claimant called Bob Gillespie from the bowling alley early in the evening of September 15, 1985.

7. Claimant discussed a letter dated August 20, 1985, he had received from Bork notifying him of a percentage wage cut.

8. Claimant stated he could not work for that percentage; he did not expressly quit or refuse to take the assigned load.

9. Claimant's demeanor, as perceived over the telephone, was more forceful than that to which Gillespie was accustomed at times when claimant was not drinking.

10. Claimant has a reputation for excessive drinking, both in his work and his nonwork community.

11. Other persons in the bowling alley on the evening of September 15, 1985, variously reported claimant as either drinking alcohol or not drinking alcohol on that evening.

12. No one perceived claimant as "roaring drunk" that evening.

13. Claimant and his spouse left the bowling alley by at least 10:00 p.m.

14. Claimant could have departed on the run as late as 2:00 a.m., but chose to leave directly after bowling.

15. Claimant had received numerous reprimands for tardiness on startups and deliveries.

16. Claimant had received a written reprimand for tardiness in August 1985 stating that any further tardiness would result in his termination.

17. Claimant and his spouse returned home driving east through Maquoketa, picked up claimant's suitcase and drove back west through Maquoketa to the truck stop where claimant's semi was parked.

18. Claimant's spouse was driving. She observed the 20 mile-per-hour speed limit and observed any of three potential red traffic lights.

19. After leaving the truck, after starting and inspecting it, to say goodbye to his wife, claimant fell a distance of not more than three feet while attempting to reenter the truck.

20. Claimant and his wife went to the hospital emergency room.

21. Claimant reported a fall from his truck to emergency room personnel.

22. Claimant's wife called Bob Gillespie and advised Gillespie that claimant had fallen from his truck and would be unable to take the dispatched load.

23. Bob Gillespie had advised a second driver to take the load as claimant would not be taking the load since claimant was in a tavern drinking.

24. Claimant advised his treating and examining physicians of his fall from the truck.

25. Richard Kreiter, M.D., directed claimant to complete bedrest on September 25, 1985. Claimant bowled three games of ten frames, two balls each on September 29, 1985.

26. Claimant had a herniated disc at L4-5 and L5-S1. He had chemonucleosis injection in October 1985 for the L5-S1 disc and a laminectomy for the L4-5 disc in May 1986.

27. Claimant had had back pain with radiation into his right leg in 1974 and 1975. He sought chiropractic care for such.

28. Claimant had intermittent back symptoms to 1985.

29. Claimant sought chiropractic back care in 1983 on two occasions.

30. Claimant had no nonconservative care from 1975 until after September 15, 1985.

31. Claimant had passed required DOT physicals from 1975 to 1985.

32. Bowling is more likely to aggravate a preexisting back condition than a three-foot or less fall.

33. Bowling on September 29, 1985, would indicate that any condition from September 15, 1985, was resolving quickly.

34. An activity can aggravate a back condition without immediate onset of pain and stiffness or other symptoms.

35. Claimant's bowling of September 15, 1985, and his fall from his truck were in very close chronological proximity.

36. Claimant's injury and claimed disability are not directly traceable to his September 15, 1985 fall.

CONCLUSIONS OF LAW

Claimant has established an employee-employer relationship between claimant and defendant employer.

Claimant has established an incident on September 15, 1985, which incident arose out of and in the course of his employment.

Claimant's claim is not barred on account of his intoxication as provided for in Iowa Code section 85.16(2).

Claimant's claim is not barred as a result of misrepresentations to the employer on the job application and elsewhere.

Claimant has not established an injury which arose out of and in the course of his employment on September 15, 1985, and has not established a causal relationship between any work-related injury and his claimed disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That claimant and defendants share equally the costs of these proceedings including the costs of transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 28th day of April, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA ELLEN HUFFMAN, Claimant, vs. KEOKUK AREA HOSPITAL, Employer, and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File Nos. 713207/724360 A P P E A L D E C I S I O N FILED AUG 25 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an order granting defendants' motion for summary judgment.

ISSUE

Claimant states the following issue on appeal:

Whether the deputy industrial commissioner erred when he ruled that the employer was entitled to a summary judgment for the reason there was no genuine issue of material fact in existence as to change in circumstances.

REVIEW OF THE EVIDENCE

The evidence consists of the exhibits attached to the defendants' motion for summary judgment, and the affidavit attached to claimant's resistance to the motion for summary judgment. Defendants' exhibit A consists of the agreement for settlement entered into by the parties, approved by the industrial commissioner, and filed April 2, 1985. The agreement of settlement awards claimant benefits equivalent to 14 percent industrial disability. The agreement also recites that "claimant would have to show a change of physical condition from the date of this agreement for settlement in order to support reopening an award."

Defendants' exhibit B is a letter from claimant's attorney to defendants' attorney, which acknowledges that claimant has

not suffered a physical change of condition since the agreement of settlement.

Defendants' exhibit C is claimant's letter of resignation from her position with defendant Keokuk Area Hospital dated November 30, 1984. Exhibit C does not state a reason for claimant resignation.

Defendants' exhibit D is a termination notice that recites that claimant voluntarily terminated her employment to go into self-employment, signed by claimant.

Defendants' exhibit E is claimant's answers to interrogatories and exhibit F consists of medical reports.

Claimant's affidavit attached to the resistance for summary judgment is signed by claimant, and states in part"...I was denied employment to different positions for advancement at Keokuk Area Hospital based upon my inability to perform such work and my injury."

Pursuant to Iowa Rule of Civil Procedure 237(c), the pleadings depositions, answers to interrogatories, admissions and affidavits in this case were also considered in this decision.

APPLICABLE LAW

The citations of law in the ruling on motion for summary judgment are appropriate to the issues and the evidence. In addition, the following authorities are noted:

Section 86.14(2) states: "In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon."

Division of Industrial Services Rule 343-4.35 states:

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

Iowa Rule of Civil Procedure 237(e), states, in part:

When a motion for summary judgment is made and

supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

ANALYSIS

Claimant has the burden to show that a change of condition not contemplated by the agreement of settlement has occurred. The exhibits supporting defendants' motion for summary judgment indicate that a physical change of condition has not occurred. Claimant does not dispute this. Defendants point out that the agreement of settlement requires a physical change in condition before a reopening award. However, claimant may be entitled to re-open an award if a non-physical change of condition has occurred. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (Iowa 1980). An agreement between the parties that is contrary to the law is a nullity. Claimant is not required to show a physical change of condition.

Claimant alleges a non-physical change of condition in the form of loss of earnings. Claimant voluntarily quit her employment with defendant. There is no indication, other than claimant's unsubstantiated allegation, that her injury had any bearing on her decision to terminate her employment to go into private business.

Even if claimant's assertion that she was unable to advance at Keokuk Area Hospital due to her injury is taken as true, there is no indication that that circumstance was not contemplated at the time of the agreement of settlement. In order to establish a change of condition, claimant must do more than merely show that she has lost earnings subsequent to the agreement of settlement. Claimant would need to show that that loss of earnings was not contemplated by the settlement award of 14 percent industrial disability.

The fact that claimant subsequently did experience difficulty in obtaining certain jobs merely confirms that she did in fact have an industrial disability. Even when viewed in the light most favorable to claimant, her affidavit and pleadings merely recite factual circumstances--change of employment, loss of earnings, inability to advance--that may very well have been contemplated by the award of 14 percent industrial disability. Claimant does not anywhere in her pleadings or affidavit allege that a loss of earnings beyond that envisioned by the settlement has occurred. Pursuant to Rule of Civil Procedure 237(e), claimant cannot rest upon mere allegations. Rather, specific facts must be brought forth showing a genuine issue for trial.

Defendants have shown that a genuine issue of fact does not exist as to whether claimant has experienced a change of condition, physical or non-physical, not contemplated by the settlement agreement.

FINDING OF FACT

Claimant has failed to show that any evidence exists to support her contention that there has been a material change of condition that has occurred subsequent to the April 2, 1984 settlement for which the injury in question was a proximate cause.

CONCLUSION OF LAW

Claimant has failed to show that any material issue of fact exists with regard to whether there has been a change of condition not contemplated by the agreement of settlement and proximately caused by the original injuries.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants' motion for summary judgment is sustained.

That claimant take nothing from this proceeding.

That costs of this proceeding are assessed against claimant.

Signed and filed this 25th day of August, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY M. JOHNSON,	:	
Claimant,	:	
vs.	:	File Nos. 782796,792733
GEORGE A. HORMEL & CO.,	:	
Employer,	:	ORDER
and	:	NUNC
LIBERTY MUTUAL INS. COMPANY,	:	PRO
Insurance Carrier,	:	TUNC
and	:	
SECOND INJURY FUND OF IOWA,	:	
Defendants.	:	

Both parties have requested an order nunc pro tunc to settle a question of whether defendants should receive credit against the award of permanent partial disability benefits for 32.429 weeks of healing period benefits previously paid.

A review of the file indicates that prior to the arbitration hearing, the parties entered into a pre-hearing report that stated "Last day worked in any capacity on 8/26/85. Absent from work continuously since 8/27/85. Claimant is not claiming add'l (sic) ttd or hp benefits prior to 8/26/85." These notes were made under section 4 of the Pre-Hearing Report form, which deals with temporary total disability or healing period benefit entitlement. The designation "hp" is read to refer to healing period benefits.

The deputy's arbitration decision stated that claimant had stipulated that he had been paid his entitlement to healing period benefits up until August 26, 1985, and that the evidence showed that claimant had returned to work and reached maximum healing by August 27, 1985. Claimant failed to show entitlement to healing period benefits subsequent to August 27, 1985. Neither claimant nor defendants raised as an issue on appeal to the commissioner the question of healing period benefits. Claimant states in the application for an order nunc pro tunc:

> Claimant did not appeal the original decision because he believed he would receive 125 weeks of

benefits under that decision, and he did not appeal the Industrial Commissioner's decision because he would obtain 105 weeks of benefits under that decision. He assumed that his claim for healing period benefits had been refused.

The deputy's decision awarded 105 weeks of permanent partial disability benefits, commencing August 27, 1985. Claimant had previously been paid his healing period benefits for the period up until August 27, 1985. Defendants are entitled to a credit for healing period benefits previously paid against any healing period benefits ordered in the arbitration decision. However, as entitlement to healing period benefits was not established at the arbitration hearing, no healing period benefits were ordered. Permanent partial disability benefits were ordered, and defendants are entitled to receive credit for any permanent partial disability benefits previously paid. Defendants would also be entitled to a credit against permanent partial disability benefits for any overpaid healing period benefits. There is no claim by the parties nor evidence in the record to indicate that claimant was overpaid healing period benefits. To hold that defendants are entitled to a credit for healing period benefits paid against permanent partial disability benefits due would, in effect, reduce the permanent partial disability award by 32.429 weeks.

THEREFORE, it is ordered:

That defendants George A. Hormel & Co., and Liberty Mutual Insurance Company shall pay unto claimant thirty-two point four two nine (32.429) weeks of healing period benefits at the rate of two hundred seventy-seven and 64/100 dollars ($277.64) per week.

That defendants George A. Hormel & Co., and Liberty Mutual Insurance Company are to be given credit for healing period benefits previously paid.

That defendants George A. Hormel & Co., and Liberty Mutual Insurance Company shall pay unto claimant one hundred five (105) weeks of permanent partial disability benefits at a rate of two hundred seventy-seven and 64/100 dollars ($277.64) per week from August 27, 1985.

That defendants George A. Hormel & Co., and Liberty Mutual Insurance Company are to be given credit for permanent partial disability benefits previously paid, if any.

Signed and filed this 27th day of January, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY A. JONES	:	
	:	
Claimant,	:	
	:	File No. 768299
vs.	:	
	:	A P P E A L
H & W MOTOR EXPRESS,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying permanent partial disability benefits as the result of an alleged injury on April 6, 1984.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits A through Q, and S; and defendant's exhibits 1 through 19. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. That the Deputy Industrial Commissioner erred in concluding that there was only "an equipoise" of evidence on the issues of causal connection and arising out of and in the course of employment.

2. That the Deputy Industrial Commissioner erred in failing to assess the credibility of any of the witnesses who testified, either live or by deposition.

3. The Deputy Industrial Commissioner erred in denying the Claimant's Motion to Strike Defendant's Supplemental Answers to Interrogatories.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant was born on January 15, 1934.

2. Claimant had a truck accident in 1969.

3. Claimant's truck accident produced permanent numbness in the calf of his left leg.

4. Claimant had a torn left knee cartilage in 1977; a twisted right knee for which he underwent surgery in 1979.

5. Claimant was treated for low back strain and low back pain in 1971 and 1978.

6. Claimant treated periodically with chiropractic care for back pain through the course of his trucking career.

7. On April 6, 1984, claimant slipped on an unraveled carpet roll and fell forward on his stomach.

8. Claimant worked the balance of the day unloading freight without difficulty.

9. Claimant had no pain at the time of the April 6, 1984, incident.

10. Claimant rested, self-treated and saw his chiropractic physician during the weekend following the Friday, April 6, 1984, incident

10. On the following Monday, claimant had symptoms in his right leg, his low back, and in his left side.

11. Claimant first left work on approximately April 13, 1984.

12. Claimant saw William Basler, M.D., on April 16, 1984.

13. Claimant treated with L. C. Strathman, M.D., and Warren N. Verdeck, M.D., orthopaedists.

14. Claimant underwent plain x-rays and a CT scan in early May 1984.

15. The plain x-rays showed degenerative disc disease at L5-S1 with vacuum disc phenomenon.

16. The CT scan showed significant spurring and arthritic changes.

17. Vacuum disc phenomenon is associated with degenerative disc disease of years' duration and would not have occurred in three or four weeks.

18. A myelogram had revealed nerve root entrapment and spinal stenosis.

19. The spinal stenosis represented arthritic changes in the back with spurring of the facet joints and narrowing of the "little holes" where nerves exit.

20. Such change occurs over a long time and would clearly predate an injury of less than a month earlier.

21. A laminectomy was performed on September 25, 1984.

22. A calcified or old herniated disc was found at the time of the laminectomy.

23. Claimant had a long history of gout in the left ankle.

24. Gout can produce aching and stiffness as well as episodic severe swelling and redness during an acute attack.

25. Gout also involves the small joints of the back and can "help" those to become arthritic.

26. Claimant had only worked intermittently in the years immediately prior to 1984.

27. Claimant did not aggravate or accelerate his underlying condition in his April 6, 1984 fall.

28. Claimant had a worsening of symptoms which had been intermittent and episodic for some time.

CONCLUSIONS OF LAW

Claimant has established a work incident of April 6, 1984.

Claimant has not established a work injury on April 6, 1984, which arose out of and in the course of his employment and which injury is causally related to claimed disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That claimant is to pay the costs of this action, and more specifically, claimant is to pay the costs of the deposition of Scott Neff, D.O., but not in excess of one hundred fifty dollars ($150); claimant is to pay the court reporting services for the deposition of Dr. Neff in the amount of one hundred forty-one and 85/100 dollars ($141.85); the medical report by William John Robb, M.D. in the amount of twenty-three dollars ($23.00); and the charges for the court reporter at the hearing in the amount of one hundred forty dollars ($140.00). Defendant shall pay the costs of the evaluation by Dr. Robb pursuant to Iowa Code section 85.39. Defendant shall pay the costs for the partial transcription of the hearing in the amount of fifty-eight and 50/100 ($58.50); the charges of Lewis Vierling in the amount of one thousand four hundred twenty-four and 56/100 ($1,424.56); and one hundred twenty-seven and 50/100 dollars ($127.50) for a court reporter at the deposition of Gary Jones. Claimant is to pay for the costs of the appeal.

Signed and filed this 28th day of April, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EUGENE K. KANOUR,

Claimant,

vs.

FISHER CONTROLS,

Employer,

and

CIGNA,

Insurance Carrier,
Defendants.

File No. 808320

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying all compensation. The record on appeal consists of the transcript of the arbitration hearing and joint exhibits A through D. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are whether claimant sustained an injury arising out of and in the course of his employment and whether claimant gave timely notice of his injury under Iowa Code section 85.23.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The deputy's analysis of the evidence in conjunction with the law is adopted. Even assuming that claimant had given timely notice of his injury pursuant to section 85.23 and that he had established an injury arising out of and in the course of his employment, he has presented no medical evidence that

he suffers any permanent disability. In short, claimant has not met his burden on any of the issues presented.

The findings of fact, conclusions of law and order of the deputy are adopted herein.

FINDINGS OF FACT

1. Claimant did not give a history of a December 1983 work incident to Dr. Terrill when he visited the doctor on January 4, 1984.

2. Claimant saw Dr. Terrill for respiratory infection-like symptoms and as he was leaving mentioned that he had right inguinal hernia pain on coughing.

3. Dr. Terrill then examined claimant and discovered his right inguinal hernia.

4. Claimant's individual medical record with Fisher Controls does not record claimant reporting experience of either pain or pulling sensation on picking up a unit to assemble in December 1983. The individual medical record does report a minor electrical unit incident in December 1983.

5. Claimant first reported the alleged work lifting incident to Drs. Mandsager and Foley in October 1984.

6. Claimant told Camilla Smith, R.N., the Fisher industrial nurse, of his hernia condition on January 9, 1984 and on November 1, 1984 but did not indicate that the hernia was work related.

7. Claimant denied that his disability resulted from his employment on disability application forms which he completed in order to receive health benefits and disability benefits while hospitalized and disabled on account of repair of his hernia.

8. Claimant was smoking up to three packs of cigarettes per day in January 1984.

9. Claimant had worked as a stock car mechanic for fifteen years and was working as a stock car mechanic in 1983.

10. Excessive smoking or coughing related to a respiratory infection could have produced an inguinal hernia.

11. The physical maneuvers and lifting required of a stock car mechanic are not significantly different from the physical maneuvers and lifting required in claimant's job as an electric hydraulic assembler at Fisher Controls. Claimant would likely be using similar tools with twisting and pulling maneuvers in both activities.

12. Claimant was not a credible witness.

13. Camilla Smith, R.N., was a credible witness.

CONCLUSION OF LAW

Claimant has not established an injury discovered on January 4, 1984, arose out of and in the course of his employment.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That claimant pay the costs of the arbitration proceeding and the appeal including the costs of the transcription of the hearing proceeding.

Signed and filed this 19th day of August, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JON KERNS,	:	
	:	
Claimant,	:	File No. 786482
	:	
vs.	:	A P P E A L
	:	
IBP, INC.,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED
AUG 11 1988
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding claimant benefits based upon ten percent permanent partial disability to the left hand. The deputy taxed the costs of the arbitration proceeding to claimant.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 11. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal: "I. Was an award of 10% P.P.D. inadequate for the left hand since it was the dominant hand of claimant? II. Did the deputy abuse his discretion in awarding costs to a losing defendant and against a prevailing claimant?"

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

Iowa Code section 86.40 provides: "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner."

Division of Industrial Services Rule 343-4.33 was intended to implement section 86.40 and provides:

> Costs taxed by the industrial commissioner or a deputy commissioner shall be (1) attendance of a

certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code section 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the industrial commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or industrial commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery.

This rule is intended to implement Iowa Code section 86.40 and 1988 Iowa Acts, House File 2444.

ANALYSIS

The deputy's analysis of the evidence concerning the extent of claimant's disability to the left hand and the law is adopted.

The other issue claimant presents is whether the deputy abused his discretion in assessing costs to claimant. In his brief claimant cites Iowa Code section 625.1 and Eller v. Needham, 247 Iowa 565, 73 N.W.2d 31 (1956), for the proposition that costs must be taxed against the losing party, this statute and precedent is not applicable to this agency. See section 86.40. Therefore, consideration of this issue will be limited to whether the deputy abused his discretion.

In the conclusion of his brief claimant states:

But also importantly, the Industrial Commissioner should re-think an apparent recent change in policy

of the Industrial Commissioner in assessing costs to claimant, often in close cases where the claimant is apparently destitute.

This counsel has been serving workers' compensation clients for over 40 years and it has only been in the last year or two that insensitive deputies have been assessing costs to obviously indigent claimant's simply because of company doctors who routinely make it difficult to establish burden of proof for damages for often obvious industrial accidents.

There has been no recent change in policy of the agency regarding assessing of costs. Many times, even though a defendant wins a case, they are assessed costs. Counsel should inform their respective clients that there may be costs involved with bringing or defending a claim and then informed decisions on bringing an action and defending an action need to be made.

Deputies are not insensitive to workers who are destitute but are sensitive to all parties to an action. Some cases should not be defended but settled. Some actions should not be brought. In other cases the actions of an attorney has been the factor which greatly increased the costs of the proceeding. The deputy must consider all the variables in making his determination on who should pay such costs.

Review of the record reveals no evidence which suggests that the deputy abused his discretion in assessing costs to claimant. Therefore, the deputy's assessment of the costs of the arbitration hearing will be adopted.

FINDINGS OF FACT

1. Claimant sustained an injury to his left hand arising out of and in the course of his employment on February 4, 1985.

2. As a result of the work injury claimant suffers a ten percent permanent impairment to his left hand.

3. Claimant's healing period ended on July 16, 1985.

CONCLUSION OF LAW

Claimant has established that he is entitled to permanent partial disability benefits based upon a 10 percent permanent impairment to his left hand.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant nineteen (19) weeks of permanent partial disability benefits commencing on July 17, 1985 at the rate of one hundred seventy-four and 81/100 dollars ($174.81) per week.

That defendant pay accrued amounts in lump sum together with interest pursuant to Iowa Code section 85.30.

That defendant be given credit for benefits previously paid to claimant.

That claimant pay costs of the arbitration hearing and this appeal pursuant to Division of Industrial Services Rule 343-4.33.

That defendant shall file activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 1th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY KNIGHT, Claimant, vs. PRINCE MANUFACTURING COMPANY, Employer, and NORTHWESTERN NATIONAL INSURANCE, Insurance Carrier, Defendants.	:	File No. 733994 A P P E A L D E C I S I O N FILED JUN 2 1989 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on May 23, 1983. The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 37. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the following issues on appeal:

I. Did the deputy industrial commissioner err in finding that claimant's May 23, 1983 injury caused his industrial disability?

II. Did the deputy industrial commissioner err in finding that claimant sustained a twenty-five percent (25%) loss of earning capacity due to his May 23, 1983 injury?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence. The following additional

authority is noted: An award of industrial disability may not be based on speculation on what may occur to claimant in the future, as such is mere speculation. Rather, an award must be based on claimant's present condition. Umphress v. Armstrong Rubber Company, Appeal Decision, August 27, 1987.

ANALYSIS

On appeal, defendants urge that claimant has failed to show a causal connection between his present back condition and his work injury. Defendants point to the reports of Mark E. Wheeler, M.D., which stated in 1985 that claimant's injury did not produce any permanent impairment. This report is contradicted by the testimony of claimant, who testified that Dr. Wheeler imposed a lifting restriction of not over 25 pounds. The record is unclear whether this restriction was temporary or permanent. Defendants urge that no weight be given claimant's statement as to a lifting restriction, as it is self-serving and not corroborated by Dr. Wheeler's report. Defendants also urge that claimant's statement be disregarded in that it is hearsay. This objection is without merit in a workers' compensation proceeding. Claimant's statement is not corroborated, but neither is it controverted in the record.

The deputy chose to give greater weight to John Walker, M.D. Dr. Walker rated claimant's condition as eight percent permanent partial impairment to the body as a whole. The testimony of Horst G. Blume, M.D., tends to support Dr. Walker's conclusions. If Dr. Wheeler did impose a lifting restriction for claimant, it is inconsistent with a statement of no permanency. The nature of the lifting restriction and the date it was imposed cannot be reconciled in the record. The greater weight will be given to the testimony of Dr. Walker.

Claimant had incidents of back pain after his May 23, 1983 injury. Defendants characterized these as new and subsequent injuries. Claimant characterized these as flareups of back pain from the original injury. The medical reports corroborate claimant's interpretation, and relate the incidents to claimant's original injury on May 23, 1983. However, the September 1985 incident would appear to be an incident of new trauma. Dr. Wheeler's reports indicate that this incident did not result in permanency.

It is concluded that claimant's present back condition is causally related to his work injury of May 23, 1983.

Defendants also urge that the proper date of injury is May 27, 1987, in that this is claimant's most recent absence from work due to a cumulative injury. Defendants argue that claimant's prior May 23, 1983 injury date and absence from work are superseded by a later absence from work.

The record indicates that claimant's May 27, 1987 absence from work was due to a flare-up of his 1983 injury, and the need to be off work for treatment of that condition with epidural floods. Subsequent to his May 23, 1983 injury, claimant was removed from the assembly line work, where the repetitive trauma occurred, and returned to his forklift work. It does not appear, therefore, that the May 27, 1987 absence from work was the result of a new cumulative injury. Claimant's date of injury remains May 23, 1983. It is noted that even if the record showed a second cumulative injury process resulting in an absence from work on May 27, 1987, that date of injury would be a second cumulative injury in addition to the May 23, 1983 injury rather than a superseding injury date.

As a second issue on appeal, defendants urge that claimant has not shown entitlement to 25 percent industrial disability. Defendants point out that claimant has not lost any earnings as a result of his injury. The employer accommodated claimant by returning him to the forklift job. It is uncertain whether claimant actually has any permanent lifting restrictions.

Claimant does have a permanent partial impairment rating of eight percent of the body as a whole. The employer's action in putting claimant back at his forklift job, if it was for accommodation reasons, is commendable. Claimant appears motivated to work. Claimant was 46 years old at the time of the hearing, and had a ninth grade education. Although relied on by the deputy, the relative stability or instability of the company claimant presently works for is not a relevant factor in the determination of industrial disability. It is apparent that many companies may remain in business for years in an unstable condition, yet the employees of the company continue to work and suffer no loss of income as a result of that instability. Basing an award on such future events would improperly rely on speculation. Claimant's award must be based on his present condition.

Based on these and all other appropriate factors in the determination of industrial disability, claimant is determined to have an industrial disability of 20 percent.

FINDINGS OF FACT

1. Claimant was in the employ of Prince in May 1983 and remains in the employ of Prince at the present time as a forklift operator.

2. On May 23, 1983, claimant suffered a gradual or cumulative injury to the low back which arose out of and in the course of his employment at Prince. Over a two week period while performing a new assembly job requiring repetitive lifting and bending of heavy objects, claimant developed chronic low back and leg pain precipitated by nerve root irritations in

the joints of the low back. On May 23, 1983, claimant was compelled by his low back pain to leave work and seek medical treatment. Claimant has not returned to that job since that time.

3. The work injury of May 23, 1983, was a cause of a period of temporary disability from work beginning on May 23, 1983 and ending on July 25, 1983. Claimant returned to work on July 27, 1983 and reached maximum healing at that time. Claimant's treatment after July 25, 1983, appears to be only maintenance in nature to take care of occasional flare-ups.

4. The work injury of May 23, 1983, was a cause of an eight percent permanent partial impairment to the body as a whole.

5. Claimant is 46 years of age and only has a ninth grade education.

6. Claimant is unable to return to heavy repetitive physical labor work as a result of the work injury.

7. Claimant's only significant past work history has been heavy physical labor in a packing plant.

8. Claimant has not suffered a loss of income as a result of the work injury.

9. The work injury of May 23, 1983, and the resulting permanent partial impairment is a cause of a 20 percent loss of earning capacity

10. The medical expenses listed in the prehearing report totalling $591.10 are causally connected to the work injury of May 23, 1983 and were incurred by claimant for reasonable and necessary treatment of a work injury. The epidural flood treatments in 1987 appear to be treatments of aggravations of a preexisting condition.

CONCLUSIONS OF LAW

Claimant's present back condition is causally connected to his work injury of May 23, 1983.

Claimant has an industrial disability of 20 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant one hundred (100)

weeks of permanent partial disability benefits at the rate of two hundred twenty-five and 50/100 dollars ($225.50) per week from July 25, 1983.

That defendants shall pay to claimant healing period benefits from May 23, 1983 through July 25, 1983, at the rate of two hundred twenty-five and 50/100 dollars ($225.50) per week.

That defendants shall pay claimant the sum of five hundred ninety-one and 10/100 dollars ($591.10) as reimbursement for medical expenses.

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

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

That defendants shall pay costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

That defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 2nd day of June, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KAY E. KONZ, Claimant, vs. UNIVERSITY OF IOWA, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 730221 A P P E A L D E C I S I O N

FILED
JAN 31
IOWA INDUSTRIAL COMM

STATEMENT OF THE CASE

Claimant has appealed a denial of a motion to reconsider an order by a deputy which had dismissed this matter for failure to respond to a show cause order. Both parties filed appeal briefs. Claimant has also filed an application for reinstatement. A resistance to which was filed by defendant employer. Claimant filed a reply to employer's resistance. The record on appeal consists of the agency's file in this matter.

ISSUE

The real issue on appeal is whether the deputy correctly dismissed this matter because claimant failed to respond to a show cause order.

REVIEW OF RECORD

The record includes the following:

March 20, 1985 - Claimant's original notice and petition filed which alleged an injury date of March 21, 1983.

June 25, 1985 - Claimant requested a continuance of the prehearing conference because claimant's attorney would be out of the country on the date set for the prehearing conference.

August 20, 1985 - Claimant was ordered to show cause why the matter should not be dismissed for failure to file a certificate of readiness for prehearing conference as directed.

June 11, 1986 - Claimant's attorney was not present for scheduled prehearing conference.

August 21, 1986 - The pretrial conference notes indicate that both parties needed to complete discovery.

July 9, 1987 - Claimant requested that the prehearing conference scheduled for August 7, 1987 be continued for six months.

February 9, 1988 - The agency issued a notice of automatic dismissal for lack of prosecution. The notice stated that the matter would be dismissed in thirty days unless good cause was shown why it should not be dismissed.

March 3, 1988 - Claimant filed a response to the notice of automatic dismissal.

July 18, 1988 - Claimant's counsel was not present for the scheduled prehearing conference.

July 28, 1988 - A deputy industrial commissioner issued an order to show cause in which the parties were given twenty days to show cause why sanctions should not be imposed.

August 15, 1988 - An entry of appearance as attorney was filed on behalf of claimant.

September 7, 1988 - A deputy issued on order dismissing this matter without prejudice because there was no response to the show cause order.

September 15, 1988 - Claimant filed a motion for reconsideration of the order dated September 7, 1988.

September 23, 1988 - The deputy denied the motion for reconsideration.

October 7, 1988 - Claimant filed a notice of appeal.

December 7, 1988 - Claimant filed an application for reinstatement.

December 28, 1988 - Defendant employer filed a resistance to the application for reinstatement.

January 10, 1989 - Claimant filed a reply to defendant employer's resistance to claimant's application for reinstatement.

APPLICABLE LAW

Division of Industrial Services Rule 343-4.36 provides:

> If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.

ANALYSIS

Claimant generally argues on appeal that there was good cause for failure to respond to the show cause order and this matter should have been allowed to proceed. Defendant employer generally argues that there was no error in dismissing this matter. Division of Industrial Services Rule 343-4.36 allows this agency to require that parties prosecute contested cases within the jurisdiction of the agency in a timely and orderly manner. In this case, it is clear from the record that this matter was not being timely pursued. The matter was continued several times because claimant's counsel did not appear at scheduled pretrial conferences. On February 9, 1988 the agency went so far as to inform the parties that this matter would be automatically dismissed unless good cause was shown why it should not be dismissed. On July 28, 1988 approximately only seven months after the prior similar order, the parties were ordered to show cause why this matter should not be dismissed. There was no response to that show cause order. The matter was then dismissed. Claimant's current counsel argues that there was good cause for failure to respond to the show cause order. Claimant's prior counsel took no action on the order and he failed to deliver it in a timely manner to claimant's current counsel. It is clear that the deputy's dismissal and motion denying reconsideration were correct. The record is fraught with evidence of inactivity and failure to prosecute. There was no timely response to the second warning within a seven month period that this matter would be dismissed unless good cause was shown otherwise. Claimant did not, after the fact, demonstrate that there was good cause why this matter should not be dismissed. Therefore, claimant clearly did not show the deputy erred in dismissing this matter. The deputy dismissed this matter because claimant failed to respond to

the show cause order. The record also clearly indicates that claimant did not respond timely to the show cause order.

The discussion above disposes of the matter on appeal. However, it should be noted that this decision should not be considered support for the parties' argument that a dismissal pursuant to Division of Industrial Services Rule 343-4.36 is analogous to a default judgment pursuant to Iowa Rule of Civil Procedure 236.

Claimant also seeks a reinstatement pursuant to Division of Industrial Services Rule 343-4.34(3). The subrule provides:

> The action or actions dismissed may at the discretion of the industrial commissioner and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, be reinstated. Applications for such reinstatement, setting forth the grounds, shall be filed within three months from the date of dismissal.

Claimant's application for reinstatement was filed in timely compliance with that subrule.

Claimant asserts in support of the application for reinstatement that there was good cause for her failure to respond to a show cause order which led to the dismissal of this matter. Claimant argues that good cause existed because of problems of transferring the case from one attorney to another necessitated by the prior attorney assuming the position of mayor of Omaha.

The record in this matter shows that claimant's current counsel entered an appearance approximately two weeks after the show cause order was issued and approximately three weeks before the dismissal was ordered. The record also contains an affidavit of claimant's prior counsel dated September 14, 1988 and filed September 15, 1988 which states in relevant parts:

> 3. During the pendency of this case, I became mayor of the city of Omaha, upon the death of the former mayor.
>
> ....
>
> 6. During the time period in which I was trying to complete the turnover of my law practice, an Order to Show Cause (dated July 28, 1988) in this case was issued to my Red Oak, Iowa law office.
>
> 7. The confusion and pace of my different duties led to my inadvertently not taking any action on the Show Cause Order, and also led to the order not

being delivered to attorney David G. Hicks for him to take action upon.

The argument at page 4 of claimant's application that claimant's prior counsel did not have knowledge of the show cause order appears to be inconsistent with the affidavit. Assuming for the sake of argument that claimant's current counsel did not know of the order, there is no reasonable cause given why this matter should be reinstated. The information in this case reflects that the show cause order was not heeded, first, because claimant's prior counsel took no action on it and second, because he failed to deliver it to claimant's current counsel. There is no good explanation for these failures. Furthermore, there is insufficient information in the record to conclude that the alleged good cause for failure to respond to the show cause order, namely prior counsel becoming mayor, was concurrent or otherwise related in time to the show cause hearing. It should also be noted that claimant's current application contains arguments very similar to those rejected by a deputy industrial commissioner in the ruling on motion to reconsider dated September 23, 1988. That ruling was appealed to the undersigned and the appeal was disposed of above. It is appropriate that under all the circumstances of this case that the undersigned exercise discretion and not reinstate this action.

It has been determined that this matter should not be reinstated pursuant to Division of Industrial Services Rule 343-4.34(3). Because this determination has been made it is unnecessary to rule on arguments made by the parties whether the application for reinstatement would be barred by the statute of limitations.

FINDINGS OF FACT

1. On February 9, 1988 the agency issued a notice of automatic dismissal for lack of prosecution. The notice stated that the matter would be dismissed in thirty days unless good cause was shown why it should not be dismissed.

2. On July 28, 1988 a deputy industrial commissioner issued an order to show cause in which the parties were given twenty days to show why sanctions should not be imposed.

3. Neither party responded to the July 28, 1988 agency order.

4. On September 7, 1988 the deputy industrial commissioner issued an order dismissing this matter without prejudice.

5. The claimant failed to comply with an order of a deputy industrial commissioner.

CONCLUSIONS OF LAW

This matter should be dismissed without prejudice because claimant failed to comply with an order of a deputy industrial commissioner.

WHEREFORE, the decision of the deputy is affirmed.

THEREFORE, it is ordered:

That this matter is dismissed without prejudice.

That claimant's application for reinstatement is denied.

That claimant pay all costs of this proceeding.

Signed and filed this 31st day of January, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

OSVALDO CARLOS KOCK, Claimant, vs. FORT DODGE COUNTRY CLUB, Employer, and GENERAL CASUALTY INSURANCE, Insurance Carrier, Defendants.	File No. 751783 A P P E A L D E C I S I O N FILED DEC 22 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding temporary total disability and transportation expenses.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 14 and defendants' exhibits A through L. No briefs were filed on appeal.

ISSUES

As appellant filed no brief on appeal, this appeal will be considered generally without specified errors to determine its compliance with the law.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the deputy in conjunction with the issues and evidence presented is adopted.

The deputy correctly excluded exhibits 9 and 12. Claimant's petition was filed on March 22, 1984. On May 1, 1985, a prehearing was held but claimant indicated he needed further discovery. On November 26, 1985, a second prehearing was held but claimant's attorney indicated he was not ready to proceed because of further discovery and claimant's presence in Brazil. On November 11, 1986, a third prehearing was held which set this matter down for hearing and set specific time perimeters. It is quite apparent that claimant's actions caused the delays in this proceeding. To allow claimant at such a late date to introduce such reports would have been prejudicial to defendants and in violation of the prior order.

Furthermore, the doctor's report of January 23, 1987 would have little weight in that he was opining as to disability, not impairment.

FINDINGS OF FACT

1. Claimant fell at work on December 9, 1983 and received a contusion of the arm, cervical strain and persistent headaches.

2. Claimant already had several spinal problems that predated this injury which Dr. Carlstrom said could have been either traumatic injuries or congenital defects.

3. Dr. Carlstrom found that the injury that claimant sustained in the fall on December 9, 1983 was simply myofascial strain or muscle strain.

4. Claimant did not require any permanent restrictions as a result of this injury.

5. Claimant attained maximum medical improvements on August 2, 1984 and could work without restrictions on and after that date.

6. Claimant has no permanent impairment.

7. Claimant has no permanent disability.

8. Claimant was able to perform work as a graduate student from September 1984, until his graduation in May of 1985 when he obtained a Master's degree in finance with a 3.5 grade point average.

9. After graduation from postgraduate school claimant worked as a financial analyst for $24,000 per year from June of 1985 until September of 1986.

10. Claimant has been employed as an accounting supervisor since November of 1986 at a salary of $30,000 per year.

11. Claimant did not seek any employment from the date of the injury on December 9, 1983 until after his graduation in May of 1985.

12. Claimant incurred reasonably necessary transportation expenses in the amount of $1,566.78.

CONCLUSIONS OF LAW

Claimant did not sustain the burden of proof by a preponderance of the evidence that the injury was the cause of any permanent disability.

Claimant is not entitled to any additional temporary total disability benefits.

Claimant is not entitled to any permanent partial disability benefits.

Claimant did not make a prima facie showing of permanent total disability.

Claimant is entitled to $1,566.78 in transportation expenses as enumerated above.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant in lump sum one thousand five hundred sixty-six and 78/100 dollars ($1,566.78) in medical expenses for reasonable and necessary transportation and miscellaneous expenses under Iowa Code section 85.27.

That no other amounts are due from defendants to claimant for either temporary or permanent disability benefits.

That claimant pay the costs of this appeal pursuant to Division of Industrial Services Rule 343-4.33.

That the defendants file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 22nd day of December, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROY ALLEN KRAMER,	:	
Claimant,	:	File Nos. 801734 801735
vs.	:	
JOHN MORRELL & COMPANY,	:	A P P E A L
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding occupational hearing loss benefits but denying permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 12 and A through F; and defendant's exhibits A, B, C and 1 and 2.

Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal in file number 801734:

1. The preponderance or weight of the evidence supports the finding in favor of the workman for workers' compensation benefits.

2. The record establishes a finding of aggravation of a preexisting condition as contemplated within the McKeever case.

3. The evidence is without conflict that the workman sustained a compensable injury arising out of and in the course of his employment.

4. The record supports a finding of Industrial Disability for the workman.

Claimant states the following issues on appeal in file number 801735:

1. The record supports a finding of additional hearing impairment as measured by the audiologist

considering all of the evidence in this case.

2. The affirmative defense alleging naturally occurring disease processes as a causative factor of hearing impairment fails for lack of sufficient evidence in this record.

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein. An error on page 3 of the decision is hereby corrected to show that claimant received a pre-employment physical examination on February 15, 1977.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted. In addition, claimant on appeal has advanced an argument that claimant's condition is the result of a cumulative injury pursuant to McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). Claimant did not raise this issue in his original notice and petition, or at the time of the prehearing report, or at the arbitration hearing itself. Claimant cannot raise an issue for the first time on appeal. In addition, the record fails to show the type of repetitive trauma contemplated by McKeever. Rather, claimant's evidence showed a traumatic injury in the form of a fall from a ladder on April 11, 1985. Claimant did not prove by a preponderance of the evidence that his present condition was caused by a cumulative injury.

It is also noted that claimant's second issue on appeal in file number 801735, claimant's occupational hearing loss case, is moot in that the arbitration decision ruled that the affirmative defense of naturally occurring disease failed. Defendant has not appealed that ruling. The ruling sought by claimant on this issue on appeal has already been rendered in the arbitration decision.

FINDINGS OF FACT

1. Claimant was employed by employer from February 15, 1977 to April 27, 1985.

2. Claimant sustained an injury to his neck that arose out of and in the course of his employment when he slipped on a ladder on April 11, 1985.

3. Claimant did not suffer any permanent disability as a result of his injury of April 11, 1985.

4. Claimant did not sustain an injury to his lower spine on April 11, 1985.

5. Claimant's lumbar spine problem began in 1979 when he was hit with a hog carcass and claimant has experienced spine symptoms since that time.

6. Claimant lost no time from work due to the injury to his neck on April 11, 1985.

7. Nineteen days after this injury claimant was able to canoe down a river for six hours.

8. Claimant was exposed to high levels of noise during his eight years of employment with employer.

9. Claimant's hearing loss was consistent with prolonged exposure to high noise levels.

10. Defendant had actual knowledge of claimant's hearing loss.

11. Claimant terminated his employment on April 27, 1985 when the plant closed.

12. Claimant has sustained a five percent binaural hearing loss.

13. Claimant would benefit from a hearing aid.

CONCLUSIONS OF LAW

Claimant did sustain the burden of proof by a preponderance of the evidence that he sustained an injury to his neck on April 11, 1985.

Claimant did not prove that his neck injury was the cause of any temporary or permanent disability.

Claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained an injury to his lumbar spine on April 11, 1985.

Claimant is not an odd-lot employee.

Claimant did not prove entitlement to the medical bills for Dr. Carnignan's charges in the amount of $72.

Claimant sustained a five percent occupational hearing loss as defined in Chapter 85B, Code of Iowa, which arose out of and in the course of his employment with the employer.

The hearing loss was caused by claimant's employment with the employer.

Claimant is entitled to five percent of 175 weeks of occupational hearing loss compensation.

The date of hearing injury is April 27, 1985 when claimant terminated his employment with employer.

Claimant's action was timely commenced.

Claimant's compensable hearing loss entitles claimant to a hearing aid.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant eight point seven-five (8.75) weeks (.05 x 175) of occupational hearing loss compensation at the rate of two hundred two and 67/100 dollars ($202.67) per week in the total amount of one thousand seven hundred seventy-three and 36/100 dollars ($1,773.36) (8.75 x $202.67) commencing on April 27, 1985.

That these benefits are to be paid in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That defendant provide claimant with a binaural hearing aid at a cost of between nine hundred dollars ($900) to one thousand dollars ($1,000).

That pursuant to Division of Industrial Services Rule 343-4.33, the costs of both parties for the alleged injury of April 11, 1985 are taxed to claimant.

That the costs of both parties for the occupational hearing loss of April 27,1985 are taxed to defendant.

That the costs of the attendance of the certified shorthand reporter at the hearing are taxed to defendant and the cost of the transcription of the hearing proceeding taxed to claimant.

That defendant will remain liable for future medical expenses as a result of the occupational hearing loss.

That defendant shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 21st day of September, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD LOWE, Claimant, vs. IOWA STATE PENITENTIARY, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	: : : : : : : : : : : : : :	File Nos. 776977/673326 805718 A P P E A L D E C I S I O N FILED DEC 16 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals and defendants cross-appeal from an arbitration decision awarding healing period benefits, permanent partial disability based upon an industrial disability of 40 percent, and allowing defendants credit for amounts paid under the State of Iowa Long Term Disability Plan.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 25 except the portion of exhibit 24 excluded by oral ruling of the deputy; and defendants' exhibits A through F. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are whether there is a causal connection between a work injury suffered by claimant and his alleged disability; the nature and extent of claimant's alleged disability; whether the deputy correctly ordered that medical benefits be paid; whether deputy correctly determined that he had jurisdiction to decide whether credit should be allowed for amounts paid under a long term disability plan; and whether deputy correctly assessed costs.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant was 41 years old at the time of the hearing. He is a high school graduate who worked as a drill press operator, stock man, oiler on a crane, farmhand, feed salesman, grain buyer, truck driver, street sweeper operator, and factory worker from 1963 to 1979. He began work for defendants in January 1979 as an exercise officer who escorted inmates between a cellhouse and an exercise area.

On June 11, 1981 claimant was kicked in the groin by an inmate. He was treated with rest and medication and returned to work without restriction approximately 30 days later. On October 3, 1984 claimant slipped on steps at work and strained himself. Exploratory surgery was performed on December 11, 1984 and a bulging weakness diagnosed as evidence of an inguinal hernia was repaired. A second surgery was performed on February 18, 1985 and claimant's left testicle was removed. Subsequent examination of the testicle found no abnormalities. Claimant recovered from the surgeries and returned to work on April 22, 1985. On September 26, 1985 claimant was again kicked in the groin by an inmate. He again sought treatment from Vasant F. Pawar, M.D., who had treated claimant for the prior two injuries. Dr. Pawar treated claimant with rest, cold compresses, and pain medication which were unsuccessful in relieving claimant's pain. Claimant was referred to a pain clinic where a left-sided ilioinguinal nerve block was performed. The results of the evaluation of claimant at the pain clinic on January 17, 1986 were interpreted as consistent with denervation in the distribution of either the genitofemoral or ilioinguinal nerves on the left and it was suggested that the claimant be considered for genitofemoral neurectomy. In a letter dated February 17, 1986 Dr. Pawar wrote: "Donald Lowe still has severe pain which is disabling. He cannot walk or stand for a long period of time. He is therefore totally disabled."

Pursuant to Dr. Pawar's suggestion claimant was seen by the Mayo Clinic between April 3-11, 1986. Doctors there found a tender, localized area in the area of the adductor tendon insertions, but found no clinical evidence for ilioinguinal or genitofemoral neuropathy or a lumbar radiculopathy. Ian D. Hay, M.D., Associate Professor of Medicine at the Mayo Clinic thought that claimant would respond to treatment of deep heat and ultrasound as well as appropriate range of motion exercises for the left hip.

Dr. Pawar testified by way of deposition taken May 28, 1986. He testified that claimant had an 80 percent "disability" of the body because of pain. He opined that the claimant's condition was directly related to the injury of September 26, 1985. Dr. Pawar also testified that he continued the therapy suggested by Mayo Clinic until May 27, 1986 which was claimant's last visit prior to the deposition but that claimant had had no relief. Dr. Pawar stated that claimant was not permanently partially disabled, there was no dysfunction of his body, and

he could perform his job after the injuries in 1981 and 1984. He further testified:

Q. And do you have an opinion as to what permanent impairment that would be to the body as a whole?

A. Body as a whole--

Q. Doctor, when I describe that--

A. What I'm trying to say, see if--

Q. Because it's not an arm or leg, and that is an extremity.

A. See, the thing is, assess impairment, Number One, he's in pain all the time; very sharp, piercing, severe pain. He'll not be able to do his job, what he's doing now. He's able to care for himself and he gets around with pain.

I was just wondering whether he'll be able to do any alternative work, and he can't sit for a long time because of pain so I almost feel that he probably will--

As a total percent of the body, he'll have at least almost like an 80 percent disability.

....

Q. And then as I understand it, in the middle of September, 1985, he was kicked again?

A. Yeah.

....

Q. But tendonitis is usually not a permanent injury, is it?

A. Some are. Some tennis elbow.

Q. Except they quit playing tennis?

A. Yes, except that it's the injury that affects this.

Q. And it can be injured?

A. It can be injured but can be very severe an injury too.

....

Q. And isn't it in fact true that sometimes tendons, after they're rested and the inflammation goes down, that they are then 100 percent okay; isn't that right?

A. I just mentioned--said before, it's not always-- Many times it does go away but sometimes it becomes a permanent problem.

Q. And how long does it take a tendon to get enough rest before it's healed itself, in your experience?

A. Well, in my experience, good about four to six weeks.

....

....

Q. --that's restricted, what percentage of the left hip movement is restricted? What's the limits on his range of motion in degrees on the left hip?

A. Degrees reduction about-- Adduction goes to-- almost to a 40 degrees and abduction should almost go like a 70 to 80 degrees.

Q. And what's his range?

A. His, about, adduction is about 10 degrees and abduction is about 50 degrees, 50 or 60 degrees.

Q. And so what, using those figures, what is the percentage of reduction in his range of motion?

A. Range of motion, percentage-wise, is about 75 percent.

....

....

Q. How long would you expect Mr. Lowe to have to wait to see any improvement in his situation, if it is the tendonitis?

A. Yeah, if-- I would say-- I would like to wait at least about six to eight weeks.

....

Q. Well, what kinds of things, under those circumstances, would be worth trying to see whether or not he could improve his situation?

A. Well, as I said, I would really like to give

him a good try, maybe only takes eight - ten weeks of this therapy, this a conservative route, you know, and he's, you know, he wants to get well....if we can give it a good try, 10 - 12 weeks, that's long enough to wait and see if he gets any better.

Q. So in 12 weeks his whole condition could be totally different than what it is?

A. It's worthwhile waiting. No way of telling for sure.

....

Q. Oh, by the way, can a person get tendonitis from being kicked?

A. Yes.

Q. Is that the usual way?

A. Not the usual way but it can.

Q. Kick would be more of a compression injury rather than a stretching; isn't that right?

A. Yeah, but if severe enough--See, the spot he was kicked is where the tendon is attached so it can-- It's a direct injury.

See, when you get tendonitis from pulling indirect--I mean, pulling on the tendon so the tendon-- The main thing I explained to you, tendonitis occurs at the point where the tendon is inserted or attached to the bone. So by constant repetitive or sudden pulling can cause tendonitis.

At the same time, some direct injury, direct on the spot where the tendon is attached, can cause the same effect.

....

Q. So in fact, Doctor, it's almost too early, in your opinion, then, to give him a rating as to disability that would be set for the rest of his life; isn't that correct?

A. Well, I've been in this business for a long time. I won't say it's too early. Only reason I say, it's a simple approach, give it a try. Not too early, because it's what, September of '85, that's three;

and this is what, almost five; eight months. you know, eight months not too early.

(Claimant's Exhibit 23)

In a letter dated August 15, 1986 Narayana Ambati, M.D., wrote:

I received all the medical records of Mr. Donald L. Lowe, even though I don't remember any thing specific regarding this patient, according to the records, he was seen by me once in 1984 for the second injury.

....

I am of the opinion that Mr. Lowe should not have lost his testis for the kind of injuries he sustained. If at all, if he is disabled, the disability should be temporary, recovery should be permanent.

(Defendants' Exhibit B)

In a letter dated September 8, 1986 Dr. Hay wrote:

Neither Dr. L. T. Wood of our Department of Physical Medicine and Rehabilitation nor myself are in a position to offer an impairment rating on Mr. Lowe since a diagnosis was made at Mayo but a treatment program not commenced while in Rochester. Because of the expected change in status of the patient, we feel that we would be unable to provide an opinion regarding Mr. Lowe's degree of disability, whether temporary, permanent, industrial, partial, or total.

(Def. Ex. A)

Claimant was also seen once by John P. Allen, M.D., who wrote in a letter dated November 11, 1986:

I would appreciate, in the future, receiving a letter of introduction with questions and appropriate medical data prior to seeing the patient.

....

His present diagnosis is subjective complaints of pain in the left groin. His prognosis is guarded for any improvement in that condition.

....

Based on my examination, I see no compelling evidence

that he would be limited in sitting, standing, lifting, stooping or bending or use of his lower extremities. He was able to walk in to the room, sit down, dress and undress with little difficulty.

I feel that Mr. Lowe is capable of performing an occupation for which he reasonably fitted by education, training and experience on a full time basis. In all probability, because of his complaints of pain, I suspect that a light duty classification would be most appropriate. I see no compelling evidence to place him in a sedentary or totally disabled position.

(Def. Ex. F)

Claimant testified that he began using a cane in April 1986 pursuant to instruction from a doctor in Mayo Clinic. He further testified that he unsuccessfully attempted to get employment at a gas station, a factory, a sheriff's department, and an auction service. He stated that he did not think his condition had improved from the time Dr. Pawar's deposition was taken in May 1986 and the hearing which was held January 8, 1987. He indicated that he is unable to do physical activities and the only place he is comfortable is in a recliner where he watches television 13 to 17 hours a day. He admitted that he choose not to attempt to block a nerve at Mayo Clinic in April 1986 because it was a painful experience and that he wanted to return to his home. He also admitted that he could mow grass and that he drove to and from Mayo Clinic. The trip was 300 miles one way and he drove that distance in one day.

Claimant was evaluated by Marian S. Jacobs, a vocational consultant, whose report stated in relevant parts:

> Today, in my opinion, Mr. Lowe's employment options and earning capacity are limited <u>at best</u>.
>
> He must seek a job with limited walking, standing, pushing and pulling and one that allows him to walk with the aid of a cane.
>
> ....
>
> On the other hand, Mr. Lowe's unremitting pain may preclude <u>any</u> employment if he must spend extended periods each day in a reclining position with his feet elevated. His treating physician has stated that Mr. Lowe's pain is totally disabling. (Emphasis in original)

(Cl. Ex. 24)

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

Claimant sustained injuries that arose out of and in the course of his employment on June 11, 1981, October 3, 1984 and September 26, 1985. The parties raise no issue with the deputy's statement that no claim is made for temporary total disability or healing period benefits with regard to the 1981 and 1984 injuries.

The first issue to be resolved is whether there is a causal connection between a work injury suffered by claimant and his alleged permanent disability. The record is uncontroverted that following each of the injuries in 1981 and 1984 claimant returned to work at his job with defendants. There is no indication that his work was restricted when he returned. Although claimant may have had a physical impairment after those two injuries, he did not have a reduction of earning capacity. Therefore, neither the work injury of June 11, 1981 nor the work injury of October 3, 1984 resulted in any permanent disability.

It remains to be decided if the work injury of September 26, 1985 is causally connected to a permanent disability. The evidence is uncontroverted that claimant was kicked in the groin by an inmate on that date. Claimant's complaints of pain and subsequent medical treatment are consistent with an injury to the groin. Claimant has suffered continuing pain. Dr. Pawar, claimant's treating physician, has indicated that he agreed with a Mayo Clinic's diagnosis of adductor tendonitis and that tendonitis can be a permanent problem. Dr. Pawar thought that inflamed tendons which healed themselves through rest would be so healed in four to six weeks. Claimant experienced pain from September 1985 until at least April 1986 when he was evaluated and diagnosed by the Mayo Clinic. Dr. Ambati saw claimant only once and then only for the 1984 injury and he concluded that claimant should not be permanently disabled for the 1984 injury. Dr. Hay from the Mayo Clinic was unable to offer any opinion whether claimant's disability was temporary, permanent, industrial, partial, or total. Dr. Allen made his opinion without what he termed "appropriate medical data." Although Dr. Allen saw no compelling evidence claimant would be limited in certain activities he nonetheless thought light duty classification would be most appropriate for claimant. Claimant has established a causal connection between his work injury of September 26, 1984 and permanent disability.

The second issue to be resolved is the extent of claimant's disability. Claimant argues on appeal that he is totally disabl

and that he is an odd-lot employee. Dr. Pawar testified that claimant was 80 percent "disabled" and earlier opined in writing that claimant was totally "disabled." He based his opinion upon the fact of claimant's subjective complaints of pain. Marian Jacobs also indicated that claimant's pain was a limiting factor in claimant's employment options. Dr. Pawar gave the only indication of physical impairment other than the pain. He was asked what was the reduction of range of motion but it appears that his response was the range of motion. It appears that it was his testimony that claimant had a 75 percent range of motion of his hip. Claimant's disability then is based upon his impairment which is subjective complaints of pain and a reduction of motion of his hip. Claimant asserts that he suffers pain that prevents him from doing physical activity and only allows him to be in a recliner 13 to 17 hours per day. However, he did admit that he could mow his grass. He also drove 300 miles in one day to Mayo Clinic and did the same to return to his home. It was suggested that he undergo a nerve block to relieve his pain but he declined to do so. He apparently discontinued the therapy recommended by the Mayo Clinic and did not enter into any active course of medical treatment. Claimant asserts that he suffers from pain that totally disables him. However, he does not seek treatment that is designed to relieve his pain. Claimant's failure to actively cooperate in attempts to relieve the pain may indicate that claimant's pain is not as severe as he asserts.

Claimant was 41 years old at the time of the hearing, has a high school education and has a history of manual labor type jobs. His employment opportunity is limited. The medical diagnoses of claimant's condition are genitofemoral neuropathy or adductor tendonitis. Jacobs' opinion is unrebutted and indicates that claimant's employment options are limited. That opinion is based in part on Dr. Pawar's "disability" rating which in turn is based on claimant's pain. There is a lack of evidence from defendants regarding medical evidence to rebut claimant's evidence of impairment and vocational rehabilitation evidence to rebut claimant's evidence. However, claimant has shown a lack of motivation. While he has sought employment, discontinuing treatment to relieve his pain and spending 13 to 17 hours per day in a recliner watching television do not show that claimant is highly motivated. When all the factors of disability are considered it is found that claimant has a 40 percent permanent partial disability when evaluated industrially.

Claimant also alleges that he is an odd-lot employee. Claimant must make a prima facie showing that he is not employable. Claimant has unsuccessfully sought employment. Jacobs' opinion that claimant's employment opportunity is limited is based upon claimant's subjective claims of pain which as discussed above are not as severe as his assertions. Furthermore, Jacobs' and Dr. Allen's opinions were that claimant could be

employed. Also, Dr. Pawar gave his later rating of "disability" of 80 percent. It should be noted that the doctor is not qualified to make a determination of disability but is only qualified to rate impairment. Claimant has not made a prima facie showing that he is unemployable.

It is also necessary to determine claimant's entitlement to healing period benefits relating to the injury of September 26, 1985. Defendants' assertion that healing period benefits should end on November 14, 1984 is clearly erroneous. As stated above the parties did not raise an issue with the deputy's statement that no claim is made for temporary total disability or healing period benefits with regard to the 1981 and 1984 injuries. Also, without specifically ruling on the issue herein claimant's temporary total disability following the 1984 injury would not end until after his surgeries and when he returned to work in April 1985. Obviously, claimant's healing period for the injury in 1985 could not end in November 1984. Dr. Pawar who was the treating physician was vague as to when the claimant could reach maximum recovery. He first indicated that it might be within six weeks of when his deposition was taken on May 28, 1986 and he later said within 12 weeks. More importantly claimant testified that he was no better at the time of the hearing than he was in May 1986.

Although Dr. Pawar was vague about when claimant would reach maximum recovery, he gave claimant a total "disability" rating on February 17, 1986. Previous appeal decisions by this agency have 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.

Stevens v. Ideal Ready Mix Co., Inc., Volume I, No. 4, Iowa Industrial Commissioner Decisions 1082, 1087 (1985) and Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982). The Iowa Court of Appeals has 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). Dr. Pawar's general statements that claimant's pain had been fairly consistent during his treatment, claimant's statement that he had not improved, and the fact that treatment did not improve claimant's condition, all indicate that when Dr. Pawar gave his first "disability" rating, claimant's healing period had ended. Claimant's healing period ended February 17, 1986.

The deputy in his decision determined that the healing period benefits should commence on December 6, 1985. It is not readily apparent how the deputy made that determination. It appears that the deputy gave the defendants credit either for ten weeks (400 hours) of sick leave pay or for weekly benefits previously paid. (Transcript, page 14, lines 1-8) The time period for sick leave was apparently arrived at from a statement made by claimant (Transcript, page 102, line 13) that he had used 400 hours of sick leave. However, claimant testified that the sick leave of 400 hours was used after the 1984 injury. If defendants are to be given credit against healing period benefits in this case for sick leave, they must show affirmatively what the credit should be. Defendants have not demonstrated entitlement to any such credit for sick leave. The defendants are entitled to credit for weekly workers' compensation benefits previously paid and the credit is ordered below.

Defendants apparently raise several other issues on appeal by making the same arguments in the appeal brief that were made in the post hearing brief. Defendants' method of raising the issues makes it unclear as to the errors alleged to have been committed by the deputy. These issues will be dealt with summarily. The medical costs claimed by claimant were causally related to his 1985 injury and should be paid by defendants.

The deputy did allow credit for the stipulated amounts paid under the State of Iowa Long Term Disability Plan. It appears that defendants continue the argument that the deputy does not have subject matter jurisdiction on this issue despite the fact that the deputy ordered credit be given. The deputy correctly concluded that this agency has subject matter jurisdiction over the provisions of Iowa Code section 85.38. It is not readily apparent what relief defendants seek on this issue on appeal.

Lastly, the deputy, pursuant to Division of Industrial Services Rule 343-4.33, has discretion to assess costs. Those costs include the costs of attendance of a certified shorthand reporter and transcription of doctors' deposition testimony. The deputy did not err in assessing the costs for reporting and transcribing the deposition of Dr. Pawar.

FINDINGS OF FACT

1. Claimant was injured on June 11, 1981 when he was kicked in the groin by an inmate.

2. Claimant returned to work approximately 30 days after the June 11, 1981 injury.

3. Claimant sustained no permanent disability as a result of the June 11, 1981 injury.

4. Claimant slipped at work on October 3, 1984 and experienced pain in the groin injury.

5. On April 22, 1985 claimant was released to return to work following the injury on October 3, 1984.

6. Claimant sustained no permanent industrial disability as a result of the October 3, 1984 injury.

7. Claimant was injured on September 26, 1985 when he was kicked in the groin by an inmate.

8. Following the injury claimant was incapable of performing work in employment substantially similar to the work he performed at the time of the September 26, 1985 injury.

9. The physiological source of claimant's pain has not been specifically identified. The source has been identified as either genitofemoral neuropathy or adductor tendonitis.

10. Claimant has a 75 percent range of motion of the hip.

11. Claimant's condition is permanent.

12. Claimant's pain is not as disabling as claimant asserts.

13. There is a causal connection between claimant's work injury of September 26, 1985 and his permanent disability.

14. Claimant's medical expenses in the amount of $2,919.09 have been incurred for treatment of the September 26, 1985 injury.

15. Claimant's disability could be determined on February 17, 1986.

16. Claimant was 41 years old at the time of the hearing and has a high school education.

17. Claimant's work experience is primarily manual labor.

18. Claimant is employable.

19. Claimant is not an odd-lot employee.

20. The work injury of September 26, 1985 was the cause of claimant's industrial disability of 40 percent.

CONCLUSIONS OF LAW

Claimant has not proved by the greater weight of evidence that the injuries sustained on June 11, 1981 and October 3, 1984 were the cause of any permanent industrial disability.

Claimant has proved by the greater weight of evidence that the work injury on September 26, 1985 was the cause of permanent industrial disability.

Claimant has proved by the greater weight of evidence that he is entitled to healing period benefits from September 26, 1985 until February 17, 1986.

Claimant has proved by the greater weight of evidence he has an industrial disability of 40 percent as a result of the injury of September 26, 1985.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant healing period benefits from September 26, 1985 through February 17, 1986 at the stipulated rate of two hundred twenty-two and 64/100 dollars ($222.64) per week.

That defendants pay claimant two hundred (200) weeks of compensation for permanent partial disability at the stipulated rate of two hundred twenty-two and 64/100 dollars ($222.64) per week commencing February 18, 1986.

That defendants receive credit for amounts paid under the State of Iowa Long Term Disability Plan in the stipulated amount and credit for all amounts subsequently paid under such plan. The credit is to be applied on a week by week basis to the healing period and permanent partial disability awarded in this decision.

That any amounts remaining past due, after application of the credits provided herein, shall be paid in a lump sum together with interest pursuant to section 85.30 and defendants receive credit against this award for all weekly benefits previously paid.

That defendants pay the claimant for the following medical expenses:

Mayo Clinic	$1,938.40
Memorial Hospital	631.65
Memorial Hospital	5.00
Springfield Clinic	30.00
Memorial Medical Center	314.04
Total	$2,919.09

That costs of this proceeding are assessed against defendant including the costs of transcription of the arbitration hearing and court reporter fees for Cherly Newman Liles in the amount of two hundred eighty-seven dollars ($287.00).

That defendants file claim activity reports pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 16th day of December, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHERRY L. LUNDQUIST, Claimant, vs. FIRESTONE TIRE & RUBBER COMPANY, Employer, and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File Nos. 792729/798238 298239 A P P E A L D E C I S I O N FILED MAR 31 1989 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits based on an industrial disability of 40 percent; medical benefits; and healing period benefits resulting from a work injury on April 22, 1985.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 3; and defendants' exhibits A through C. Both parties filed briefs on appeal.

ISSUE

Defendants state the issue on appeal is whether the deputy erred in finding that the claimant sustained permanent industrial disability or loss of earning capacity in this case.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

In order to facilitate resolution of this appeal it is necessary to summarize the deputy's findings in the arbitration decision. The deputy found that there was no permanency from injuries in 1983 and 1984; that there was no permanent impairment to any part of claimant's body other than her back; and that claimant suffered a permanent disability as a result of her injury on April 22, 1985. It is this last finding that defendants appeal and is the subject of this appeal.

Kent Patrick, M.D., was claimant's treating physician and his opinions will be relied upon to resolve this matter. Dr. Patrick testified in his deposition on April 4, 1986:

> Q. (By Mr. Henderson) Doctor, was the reason you decided to perform a fusion surgery on Sherry's back based upon the pain that she was experiencing from her spondylolisthesis condition?
>
> A. Yes--
>
> ....
>
> A. The indication for surgery in a patient with spondylolisthesis includes pain that is unresponsive to nonoperative treatment. Her complaints of pain are the reason that fusion was carried out.
>
> ....
>
> Q. ...Do you have an opinion within a reasonable degree of medical certainty as to the amount of permanent physical impairment which Sherry Lundquist may expect as a result of the fusion surgery which she had in January of 1986?
>
> ....
>
> A. Yes.
>
> Q. ...What is that opinion?
>
> ....
>
> A. A typical patient with a lumbar fusion, this problem, using the Guidelines of the American Academy of Orthopedic Surgeons, warrants a permanent partial impairment rating of 20 percent of the body as a whole.
>
> ....

Q. On the basis of those films and on the basis of your examination, has Mrs. Lundquist's condition of spondylolisthesis ever changed?

A. No. She has been a Grade I spondylolisthesis from the beginning, and she remains a Grade I spondylolisthesis. This is based on how far one vertebra slips forward on the other.

Q. So, Doctor, is it safe for me to assume that there is nothing in your care and treatment of Mrs. Lundquist that leads you to believe that the work she was doing at Firestone worsened her condition? Is that a fair statement?

....

A. Her diagnosis is unchanged from February of '84 through the present. Her diagnosis is Grade I spondylolisthesis, L5 on S1.

....

Q. Were you, at any time in the course of your care and treatment of Mrs. Lundquist, convinced she had a herniated disc?

A. She at no time showed physical findings of history of a herniated disc.

....

Q. But it's obviously a defect that was formed prior to the time you saw Mrs. Lundquist?

A. Much, much prior to my seeing Mrs. Lundquist.

Q. And as time passed, the work that she was doing at Firestone, I take it, you feel made her symptomatic, is that correct?

A. That is correct.

....

Q. Now, Doctor, and I think you told Mr. Henderson that you believe then that the work Mrs. Lundquist did at Firestone aggravated the symptoms of this condition of spondylolisthesis; is that a fair statement?

A. Yes.

> Q. Now, Doctor, considering the facts of the hypothetical question in your care and treatment of Mrs. Lundquist, is it safe to say that the work that Mrs. Lundquist did at Firestone and is described to you in that question did not aggravate or precipitate or cause the condition that she has of spondylolisthesis?
>
> ....
>
> A. Her spondylolisthesis predated her employment at Firestone Tire and Rubber Company, if that answers your question.
>
> Q. (By Mr. Giovannetti) But I guess my question is, Doctor, you have--in our discussion here, you have not indicated that any of the work that she did at Firestone altered that condition; it that a fair statement?
>
> ....
>
> A. Anatomically, her spondylolisthesis predated her employment. Through the course of her employment and injuries, her spondylolisthesis did not change on an anatomical basis. By that I mean, it did not proceed to further slippage or further instability of the lower back.

(Claimant's Exhibit 1, VI, a, Patrick Deposition, Pages 25-38)

Dr. Patrick's opinion that claimant did not have a herniated disc will be given more weight than the opinion of Dennis Rolek, D.O. Dr. Patrick treated claimant for her back condition while Dr. Rolek admitted that he treated claimant for abdominal pain. Dr. Patrick is an orthopedic surgeon and Dr. Rolek is a general practitioner. Dr. Rolek's initial impression of a probable herniated disc appears to have been formed before testing other than an examination. Dr. Rolek agreed that the examination by Dr. Winston while claimant was in Mercy Hospital did not result in a diagnosis of a herniated disc. Dr. Rolek also admitted that a herniated disc was a suspicion that was not a confirmed diagnosis. The greater weight of evidence demonstrates that claimant did not have a herniated disc.

Dr. Patrick's opinion, who was a treating physician and an orthopedic surgeon, will be given greater weight than the opinion of Donald Baldwin, D.C. Dr. Baldwin's records were the only medical evidence that characterized claimant's spondylolisthesis as Grade II. The greater weight of evidence demonstrates that claimant had a Grade I spondylolisthesis.

Claimant's lumbar condition, Grade I spondylolisthesis, predated her employment with defendant employer. Claimant's

employment with defendant employer did not change that condition. However, her employment did aggravate her pain which was a symptom of her condition. Claimant at no time showed physical findings or history of a herniated disc. Claimant's permanent impairment is the result of the lumbar fusion. The lumbar fusion was performed to correct a condition that predated her employment. Claimant's work injury which manifested itself as pain was a temporary aggravation of her preexisting condition. The work injury on April 22, 1985 did not result in any permanent change in claimant's condition. When claimant's pain was treated and claimant could work without the pain caused by the work injury, her work-related disability ended. Claimant, however, was unable to work for a period of time as a result of the temporary aggravation of her condition. Claimant did not work from April 23, 1985 until May 16 when she unsuccessfully attempted to work for two days. Claimant has not since returned to employment with defendant employer. As the deputy noted there is an unexplained period beginning July 8, 1985 when claimant apparently was not seeking medical care, was not working, and did not explain her activities. Claimant has not proved that her temporary disability extended beyond July 8, 1985 when she ceased medical care. Accordingly, medical expenses incurred for treatment of claimant's condition that predated her employment were not incurred as a result of her work injury. Claimant did, however, incur medical expenses to treat the pain which was a result of her work injury.

Claimant has made application to assess costs as follows:

$150 for the deposition testimony of Dr. Kent Patrick
$61 for the testimony of vocational expert Roger Marquardt
$75 for the medical report of Dr. Dennis F. Rolek

The costs as requested by claimant are costs and amounts that are allowable under Division of Industrial Services Rule 343-4.33. Those costs will be taxed to defendants.

FINDINGS OF FACT

1. Claimant sustained an injury in the nature of an aggravation of a preexisting condition which produced no permanent disability in November 1983 and on November 2, 1984.

2. Sherry L. Lundquist sustained an injury in the nature of a temporary aggravation of a preexisting condition on April 22, 1985, which injury occurred while she was pushing a bale in the course of her employment at the Firestone Plant in Des Moines, Iowa.

3. Following the injury, claimant was medically incapable of returning to work in employment substantially similar to

that in which she was engaged at the time of the injury. Claimant attempted to resume working on May 16 and 17, 1985, but was unsuccessful.

4. From July 9, 1985 through January 19, 1986, claimant did not actively seek medical care, did not work and was not recovering from the injury.

5. The assessment of the cause of claimant's condition and symptoms as provided by Dr. Patrick is correct.

6. Claimant's lumbar condition predated her employment with defendant employer.

7. Claimant's employment with defendant employer did not change her lumbar condition.

8. Claimant did not have a herniated disc.

9. The lumbar fusion was performed to correct a condition that predated claimant's employment with defendant employer.

10. Claimant's permanent impairment is the result of the lumbar fusion.

11. Claimant's permanent impairment is not the result of a work injury with defendant employer in November 1983, on November 2, 1984 or on April 22, 1985.

12. In the last 13 completed weeks during which claimant worked prior to the injury, she earned a total of $6,803.94.

13. Claimant failed to introduce any evidence showing that she sustained any permanent impairment or permanent disability to any part of her body as a result of any of the injuries for which claim is made in this action.

14. Claimant incurred medical expenses in treatment of the work injury on April 22, 1985 which were reasonable as follows:

Neuro-Associates, P.C.	$ 230.00
Orthopedics Limited, P.C. (2/15/84 - 1/20/86)	1,069.00
Mercy Hospital (4/22/85)	132.00
Mercy Hospital (5/8/85)	724.00
Total	$2,155.00

CONCLUSIONS OF LAW

Claimant has proved that an injury sustained to her back on April 22, 1985 arose out of and in the course of her employment

with defendant employer.

Claimant has proved that the injury sustained on April 22, 1985 was the cause of temporary total disability from that date until July 8, 1985 with a two day interruption for May 16 and 17, 1985.

Claimant has not proved that work injuries in November 1983, on November 2, 1984, and April 22, 1985 were the cause of a permanent disability.

Claimant's rate of compensation is $320.59 per week.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant temporary total disability benefits at a rate of three hundred twenty and 59/100 dollars ($320.59) per week from April 23, 1985 through July 8, 1985 with a two day interruption for May 16 and 17, 1985.

That defendants pay claimant two thousand one hundred fifty-five dollars ($2155) in section 85.27 benefits.

That defendants pay all past due weekly compensation in a lump sum together with interest pursuant to Iowa Code section 85.30 from the date each payment came due until the date of actual payment.

That defendants pay the costs of this action including costs of transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

That the costs that defendants pay specifically includes the following:

$150 for the deposition testimony of Dr. Kent Patrick
$61 for the testimony of vocational expert Roger Marquardt
$75 for the medical report of Dr. Dennis F. Rolek

That file number 798239, which deals with the injury of April 22, 1985 be assigned for prehearing conference on the remaining section 86.13 claim.

That defendants file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of March, 1989.

DAVID E. LUNQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN W. MAHLBERG,

Claimant,

vs.

MEEK DRYWALL COMPANY, INC.,

Employer,
Defendant.

File No. 745455

A P P E A L

D E C I S I O N

FILED

SEP 9 1987

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying all compensation because he failed to establish that he was an employee of Meek Drywall Company, Inc., at the time he was injured.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 7; defendant's exhibit A; and joint exhibit B. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant was an employee of Meek Drywall Company, Inc., at the time he was injured.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant sustained an injury to the left shoulder on September 12, 1983 resulting in a 12 percent permanent partial impairment to his left arm. At the time of the injury claimant was installing drywall in a house (referred to as the Heckerman house by the parties) near Council Bluffs, Iowa.

James Mings, owner of K & M Contracting, Inc. (K & M) testified that K & M was the general contractor for the Heckerman house where claimant was installing drywall. Mings also stated that he subcontracted the drywall installation to Byron Meek.

John Woolridge, owner of Council Bluffs Drywall Sales, Inc. (Council Bluffs Drywall), testified that Council Bluffs Drywall

supplied the drywall material for the Heckerman house. Woolridge also indicated that claimant and some Council Bluffs Drywall employees drove a company truck to the Heckerman house drywall job on the day claimant was injured and that Byron Meek was working on another house for Council Bluffs Drywall.

Byron Meek, owner of Meek Drywall Company, Inc. (hereinafter Meek Drywall) states that claimant was an employee of Council Bluffs Drywall at the time he was injured. Meek asserts that he and Woolridge had an agreement under which Council Bluffs Drywall would supply labor and materials to Meek Drywall and would bill Meek Drywall. Meek claims this agreement was used because Meek Drywall did not have workers' compensation insurance and that this agreement was, in effect, beginning with the job just prior to the one on which claimant was injured (referred to as the Traynor house by the parties).

APPLICABLE LAW

The citations of law in the arbitration decision are appropri to the issues and evidence.

ANALYSIS

Contrary to claimant's argument, the finding in the prior arbitration decision that claimant was not an employee of Council Bluffs Drywall when injured does not compel a finding in this proceeding that claimant was an employee of Meek Drywall at the time of the injury. In this proceeding claimant must establish that there was an employer-employee relationship between himself and Meek Drywall at the time he was injured. Claimant has not established this relationship by a preponderance of the evidence presented. The deputy poignantly explains claimant's situation:

> It is noted that the evidence presented in this proceeding differs substantially from that found in the review of the evidence in Mahlberg vs. Council Bluffs Drywall, Inc., filed October 23, 1984. We are held to the evidence presented in this record. On this record it cannot be found that claimant was an employee of Meek Drywall when injured.

(Arbitration Decision, November 18, 1985, page 9)

The deputy then analyzes the evidence presented; that analysis is correct and will not be expanded upon.

It was incorrect, however, for the deputy to find that claimant was an employee of Council Bluffs Drywall since Council Bluffs Drywall was not a party in this proceeding. This is correctly pointed out in claimant's appeal brief. (Note:

Review of the industrial commissioner's file in this matter reveals that the caption of the hearing assignment order and post-hearing order as well as the first sentence of the introduction of the arbitration decision filed November 18, 1985 indicate that Council Bluffs Drywall is the defendant in this proceeding. This is merely a clerical error. The petition filed October 29, 1984 which commenced this proceeding names Meek Drywall as the only defendant. No amendment was made to this petition. At the hearing claimant's attorney stated that this action was against Meek Drywall (Transcript, p. 5). The conduct and filings of the parties in this matter clearly indicate that Council Bluffs Drywall was at no time a party to this proceeding.) Even if Council Bluffs Drywall had been a party to this proceeding, the deputy chould not have made a finding that claimant was an employee of Council Bluffs Drywall because the 1984 arbitration decision is binding on the issue of whether claimant was an employee of Council Bluffs Drywall at the time of the injury alleged herein.

The combined results of this decision and the 1984 arbitration decision may seem unfair. However, claimant chose his course of action in this matter. Claimant could have appealed the 1984 arbitration decision. Claimant could also have named both Meek Drywall and Council Bluffs Drywall as defendants on his first petition. See Iowa R.Civ.P. 24 and Division of Industrial Services Rule 343-4.35 (86).

FINDINGS OF FACT

1. Council Bluffs Drywall employees including claimant and Byron Meek reported to Council Bluffs Drywall before beginning and leaving work each day.

2. Woolridge, for Council Bluffs Drywall, selected the Council Bluffs Drywall employees who worked on the Heckerman house project and could at will terminate their work on that project.

3. Claimant, as a Council Bluffs Drywall foreman, supervised drywalling at the Heckerman house.

4. Woolridge had appeared at the Heckerman house to supervise stocking work.

5. Claimant and a fellow Council Bluffs Drywall employee traveled to and from the Heckerman house in a Council Bluffs Drywall truck.

6. Woolridge and Meek entered into an agreement under which Council Bluffs Drywall would supply labor and materials and would bill Meek Drywall. This agreement covered the Traynor house and Heckerman house projects.

7. Local drywallers believed claimant to be a Council Bluffs Drywall employee.

8. Council Bluffs Drywall was responsible for claimant's wages on the Heckerman house project, controlled his work on the project and was the authority identified as in charge of claimant's work.

CONCLUSION OF LAW

Claimant has failed to establish an employer-employee relationship between himself and Meek Drywall on September 12, 1983.

WHEREFORE, the decision of the deputy is affirmed and modified

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That defendants pay the costs of the arbitration proceeding and claimant pay the costs of the appeal including the transcription of the hearing proceeding.

Signed and filed this 9th day of September, 1987.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BEVERLY MARLOWE, Claimant, vs. AMERICAN HONDA MOTOR CO., Employer, and CNA INSURANCE COMPANIES, Insurance Carrier, Defendants.	: : : : : : : : : : : : : : :	File No. 803238 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying all compensation because no causal connection was found between claimant's alleged disability and her work injury.

The record on appeal consists of the transcript of the arbitration hearing, claimant's exhibit 1 and joint exhibits A through K. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. Whether there is a causal relationship between Claimant's work related injury of January 3, 1984 and her asserted disability;

2. The nature and extent of disability and date when permanent partial disability would commence; and

2. Whether Defendants owe three medical bills submitted as Exhibit 1.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects

the pertinent evidence and it will not be totally reiterated herein.

Claimant injured her back when she fell down some stairs at her home during Easter 1983 and as a result of this incident missed 30 days of work. Four days after she returned to work following the Easter injury, claimant reinjured her back at work and was off work from May 27, 1983 through August 21, 1983. Claimant did not file a petition or claim for workers' compensation benefits for the May 1983 injury.

Claimant hurt her back at work on January 3, 1984 when she was stacking boxes of floor mats. She had to be taken from work in an ambulance to the hospital where she remained for nine days. Claimant has not returned to work since the January 1984 work injury.

Joint exhibit G contains the results of a CT scan taken on June 14, 1983 which reveals: "IMPRESSION: 1) Probable herniation of L5-S1 with a less likely problem at L4-5."

Claimant was examined by Eugene Collins, M.D., on August 26, 1983. Dr. Collins reports in an August 29, 1983 letter:

> On pertinent neurological examination the patient stands about 5'5" and weighs approximately 150 pounds. There is a mild decreased range of motion of the back especially in flexion and extension with a mild hyperlordosis. There is some point tenderness about L5. There is no signficant [sic] spasm. The patient can balance on either leg. Gait is satisfactory on heels, toes and tandem. Straight leg raising is negative in the sitting and lying positions. No focal weakness including dorsi and plantar flexors of the feet. No atrophy or fasciculations. Reflexes show ankle jerks and knee jerks 2+ and equal. Plantars flexor. Sensation intact to pin, touch and position throughout.
>
> This patient has a grossly unremarkable neurological exam at present. Her main complaint is low back pain per se and not radiculopathy type pattern. She may indeed have some bulging discs confirmed on CT scan. I have discussed the option of chemonucleolysis and surgery with her and have stressed to her that these in general do not improve back pain alone. Since her radiculopathy pain is significantly improved I do not think the above mentioned procedures are indicated for her "back pain" at this time. I told her that I feel this should improve in time but I

> cannot give an exact estimate. I have explained to her the various conservative treatments for such.

(Joint Exhibit H)

John Sunderbruch, M.D., was claimant's treating physician for claimant's period of hospitalization for the January 1984 work injury. Dr. Sunderbruch opines in the discharge report:

> Final Diagnosis:
>
> This patient was admitted from the Emergency Room where she had been brought from American Honda where she had been working and fell injuring her back. I saw her shortly thereafter in bed. She did demonstrate some spasm of the lumbar spiny mass, her pain was all radiating down the left side of her back and questionable radiation in the sciatic region. It was not like her previous injury that involved the right side. Lumbosacral X rays were within normal limits. The CT scan showed the bulging in the L5-S1 area as on the previous exam on June 14, 1983 but did not show any other abnormalities. Conservative treatment was utilized in the way of ultrasound, exercises and Hubbard bath and Motrin orally and Darvocet N p.r.n. Finally Dr. Irey was called in consultation, he agreed with the treatment and continued as we had been. We gradually increased her activity and now she is taking exercises and she decided this evening that she would like to go home because she felt she was doing well enough. I gave her a series of exercises and gave her Motrin and Darvocet N prescriptions. Will follow her in the home.
>
> Her condition is improved. She will be followed regularly and encouraged to continue her exercises. Her prognosis is good.

(Jt. Ex. A1)

Dr. Sunderbruch continued to see claimant and opines in a June 20, 1984 letter that his efforts to evaluate claimant for full duty has been a "real problem" and that he does not expect claimant to return to work for an extended period of time." See Joint Exhibit B3.

Claimant was also seen by John C. Van Gilder, M.D., Professor of Neurosurgery at Univeristy of Iowa Hospitals, on October 30, 1984. Dr. Van Gilder opines in an October 31, 1984 letter:

Review of her lumbar spine films is unremarkable in my interpretation. A CT scan in 1983 and 1984 demonstrates no evidence of root impringement and I cannot clearly see a disc. A myelogram from 1983 which is of excellent quality demonstrates no abnormality to suggest a herniated disc in my interpretation.

In summary, I can see no evidence of neurological deficit. I think her pain is principally muscular in origin. Because of her intractability to conservative measures, I have suggested Feldene, 10 mg. b.i.d. which has been helpful in the past. I have also recommended swimming, 20 minutes on a daily basis which I think would be effective for physical therapy. She is also to continue her low back exercises which are in essence the Williams exercise program. Thirdly, I have suggested she lose approximately 20-25 pounds of excess weight which I think would be helpful.

I think if the patient initiated these rehabilitation suggestions, she should be able to return to work in approximately two months. I feel there is no indication for surgery based on her examination and review of her studies.

(Jt. Ex. C2)

Dr. Van Gilder released claimant for return to work with a 40 pound lifting restriction on July 17, 1985.

John E. Sinning, M.D., examined claimant on September 19, 1984. Dr. Sinning begins his report with the history of claimant's back problem: "I went over the history in some detail, both as reported by Mrs. Marlowe and as recorded in our record. Her problem began in the spring of 1983 when she fell down the stairs at home." See Joint Exhibit E. In conclusion, Dr. Sinning opines:

> It is my conclusion that Mrs. Marlowe has no impairment of function. There are no physical findings to justify her remaining on a "healing status" on workmens [sic] compensation. If she is unable to return to work because of a continued pain problem, then psychiatric evaluation of that pain problem is an essential part of her evaluation.

(Jt. Ex. E)

Stephen C. Rasmus, M.D., examined claimant on October

29, 1985. Dr. Rasmus states his impression in an October 31, 1985 letter:

> IMPRESSION: The neurological examination is objectively unremarkable. The sensory exam showed decreased pinprick on the right side of the foot which would coincide with an S1 level. The straight leg raising was fairly unimpressive. We talked about the approach at this time. She basically wants somebody to tell her why she has pain and what to do to to get rid of it. I doubt that I am going to be able to satisfy that. The Ct scans were reviewed. The last one is almost two years old, but her symptoms have not changed much. What I have decided, at this point, is to get my records from the previous time that I saw her, and she was scheduled for an EMG. If there is evidence of denervation on the EMG, we could consider repeating a CT scan.

(Jt. Ex. F2)

The EMG to which Dr. Rasmus referred was normal, and he recommended no further studies. See Joint Exhibit F4.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 3, 1984 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).

Expert testimony that a condition could be caused by a given injury coupled with additional, non-expert testimony that claimant was not afflicted with the same condition prior to the injury was sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966).

ANALYSIS

Claimant tried to establish by the greater weight of evidence that she suffers a permanent disability as a result of her injury on January 3, 1984. Claimant has not done so on this record. Although claimant presents some medical evidence that she has a herniated disc, Dr. Van Gilder opines that he does not find any abnormality to suggest a herniated disc, Dr. Sinning opines that claimant suffers no impairment of function, and Dr. Rasmus states that neurological examination is objectively unremarkable. The greater weight of evidence indicates that claimant's condition after her injury is similar to what it was prior to her injury.

That medical evidence which suggests that claimant should not return to full duty does not causally connect claimant's condition to the January 3, 1984 work injury. Dr. Collins in his deposition testimony was not able to causally connect claimant's condition to any one of the three back injuries alleged. See Joint Exhibit I, pages 13-14. Although Dr. Van Gilder released claimant for return to work with a 40 pound lifting restriction, he offered no opinion as to causal connection. Finally, Dr. Sunderbruch's reports suggest that claimant's complaints are subjective and should be treated psychiatrically or through a pain clinic. See Joint Exhibit B5.

Claimant may have sustained some temporary disability as a result of the January 3, 1984 work injury, but it is impossible to determine the extent of this disability on this record as no medical testimony was able to causally connect claimant's back condition to the January 3, 1984 injury.

This is not a case in which apportionment of a disability as suggested by claimant need be considered. This case involves the question of whether claimant had any permanent disability which was causally connected to her January 3, 1984 work injury.

Claimant has not established by the greater weight of evidence that she suffers any permanent disability as the result of the January 3, 1984 work injury.

FINDINGS OF FACT

1. Claimant sustained an injury to her back at home during

Easter 1983.

2. Claimant sustained an injury at work in May 1983.

3. Claimant sustained an injury at work on January 3, 1984.

4. Claimant suffered no permanent disability as a result of the January 3, 1984 work injury.

CONCLUSIONS OF LAW

Claimant failed to establish that she was entitled to any further healing period benefits as a result of the January 3, 1984 injury.

Claimant failed to establish that she sustained any permanent disability as a result of the January 3, 1984 injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That claimant pay the costs of this proceeding including the cost of the transcription on appeal.

Signed and filed this 20th day of September, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES E. MC BIRNIE,	:	
	:	
Claimant,	:	File Nos. 692457, 700671
	:	756245, 756247
vs.	:	
	:	A P P E A L
OSCAR MAYER & COMPANY,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision awarding him 25 weeks of permanent partial disability benefits for his right arm and 25 weeks of permanent partial disability for his left arm but denying benefits for a back condition either from a specific injury of March 1983 or from a cumulative injury during August - September 1983. The record on appeal consists of the transcript of the review-reopening hearing and joint exhibits 1 through 26. Neither party filed a brief on appeal.

ISSUES

This appeal will be considered generally without specified errors.

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the deputy in conjunction with the issues and evidence presented is adopted.

The findings of fact, conclusions of law and order of the deputy in the review-reopening decision dated March 31, 1988 are adopted herein.

FINDINGS OF FACT

1. Claimant's conditions in his upper extremities are the result of cumulative traumatic injury and are not disease processes.

2. Claimant had a decompression of the right carpal and ulnar tunnels and of the ulnar nerve at the right elbow on January 18, 1982. Claimant had decompression of the median and ulnar nerves of the left wrist and of the ulnar nerve at the left elbow on March 10, 1982. Claimant had a lateral epicondylitis surgery on April 25, 1983.

3. Claimant performed repetitive movement of his upper extremities on his job; such repetitive movement culminated in his carpal, cubital and ulnar conditions.

4. Claimant's conditions in his upper extremities are evaluated under the schedule and not industrially.

5. Drs. Wirtz, Walker and Grundberg are all respected, board-certified orthopaedic surgeons.

6. Dr. Grundberg is a member of the American Society for Surgery of the Hand.

7. Dr. Grundberg was claimant's treating physician for claimant's extremity problems and performed claimant's right and left surgical releases and his epicondylitis surgery.

8. Drs. Wirtz and Walker examined claimant only and lack additional expertise in hand conditions.

9. Claimant is moderately restricted as to reaching out with one or both arms and as to grasping, holding, turning or handling an object with the fingers.

10. Claimant sought treatment for back spasm on various occasions from 1968 onward.

11. Claimant began work at Oscar Mayer in 1969.

12. It is unclear whether claimant had a specific work incident on March 2, 1983 or experienced pain while performing his regular work duties.

13. Claimant had physical therapy at Dallas County Hospital for a period beginning March 14, 1983 to relieve his back condition.

14. Claimant was off work from April 25, 1983 to August 1, 1983 following his epicondylitis surgery.

15. Claimant's back continued to ache while he was off

work.

16. Claimant did exercises and used hot soaks to relieve his condition while he was off work.

17. Claimant returned to work on August 1, 1983.

18. Claimant worked on the Boston butt boning line.

19. Claimant boned butts with weights of from 7 3/4 pounds to 15 pounds.

20. Workers were expected to bone 42 butts per hour.

21. Coworkers assisted claimant in making his production quotas following his extremity surgeries. Claimant was boning approximately 30 percent of quota after claimant's August 1, 1983 work return.

22. The boning area floor has a one-fourth inch per foot slope to the drain.

23. Federal regulations require a one-eighth inch to one-fou inch slope in meat packing facilities.

24. With proper back use, a one-fourth inch floor slope should not produce back problems.

25. Claimant last worked for Oscar Mayer on Friday, Septembe 9, 1983.

26. Claimant was off work Monday and Tuesday, September 12 and 13, 1983 on account of a sore throat.

27. On Monday, September 12, 1983, claimant was ready to return to work as regards his back.

28. On Tuesday, September 13, 1983, in the afternoon while sitting on his sofa at home, claimant experienced severe back spasm for which he was subsequently hospitalized.

29. Claimant's back spasm at home on September 13, 1983 was remote in time from his work at Oscar Mayer.

30. Dr. Rouse was unfamiliar with claimant's work conditions as claimant described those conditions.

31. At hearing, claimant appeared to exaggerate the difficul in his work conditions.

32. The hypothetical question placed to Dr. Boulden was inconsistent with claimant's actual job duties and claimant's actual job performance.

CONCLUSIONS OF LAW

Claimant is entitled to permanent partial disability resulting from his upper extremities conditions of ten percent of the right arm and ten percent of the left arm.

Claimant has not established a back condition which arose out of and in the course of his employment, either by way of a specific work injury of March 1983 or by way of a cumulative injury during August - September, 1983.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant permanent partial disability benefits for twenty-five (25) weeks on account of his right arm and for twenty-five (25) weeks on account of his left arm at the rate of two hundred fifty-six and 58/100 dollars ($256.58) per week with those benefits to commence August 1, 1983.

That defendant pay accrued amounts in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30.

That defendant pay the costs for the review-reopening proceedings in file numbers 692457 and 700671 pursuant to Division of Industrial Services Rule 343-4.33.

That claimant take nothing from proceedings in file numbers 756245 and 756247.

That claimant pay the costs for the review-reopening proceedings in file numbers 756245 and 756247 pursuant to Division of Industrial Services Rule 343-4.33.

That claimant pay the costs of the appeal including costs of transcription of the review-reopening proceedings.

That defendant file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 26th day of October, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NANCY L. McCONNELL, Claimant, vs. CITY OF CLIVE, Employer, and ARGONAUT INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 773872 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying any benefits to claimant.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 9; claimant's exhibits 10 and 11; and defendants' exhibits A through E and I. Both parties filed briefs on appeal.

ISSUES

The issue on appeal is whether claimant received an injury that arose out of and in the course of her employment.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Briefly stated, in 1977 claimant began working for the police department of the City of Clive, Iowa as a dispatcher. She worked there until September 3, 1984. She alleges that there was stress in her employment caused by sex discrimination and sexual harassment. Claimant testified at the arbitration hearing and admitted that she had emotional turmoil in her life outside the workplace in 1983 and 1984. That emotional turmoil included her stepfather having a myocardial infarction in 1984.

The consensus of the physicians who dealt with claimant is that she is afflicted by Raynaud's phenomenon. It was also the consensus of the physicians who testified that the cause of claimant's affliction was idiopathic, i.e., unknown or uncertain. The ailment was described in the Merck Manual, 14th Edition, which was given in exhibit 6 (deposition exhibit 3) as follows:

RAYNAUD'S PHENOMENON AND DISEASE

Spasm of arterioles, especially in the digits (and occasionally other acral parts such as the nose and tongue), with intermittent pallor or cyanosis of the skin.

Etiology

Raynaud's phenomenon may be idiopathic (Raynaud's disease) or secondary to conditions such as connective tissue disorders (e.g., scleroderma, RA, SLE), neurogenic lesions (including the thoracic outlet syndromes), drug intoxications (ergot and methysergide), dysproteinemias, myxedema, primary pulmonary, hypertension, and trauma. Idiopathic Raynaud's disease is most common in young women.

Pathology and Pathophysiology

Attacks of vasospasm of the digital arteries may last for minutes to hours, but are rarely severe enough to cause gross tissue loss....

Symptoms, Signs, and Diagnosis

Intermittent attacks of blanching or cyanosis of the digits is precipitated by exposure to cold or by emotional upsets. The color changes may be triphasic, pallor, cyanosis, redness (reactive hyperemia); or biphasic: cyanosis, then reactive hyperemia. Normal color and sensation are restored by rewarming the hands. Color changes are not present proximal to the metacarpophalangeal joints and rarely involve the thumb. Pain is uncommon, but paresthesias consisting of numbness, tingling, or burning are frequent during the attack.

Idiopathic Raynaud's disease is differentiated from secondary Raynaud's phenomenon by bilateral involvement and a history of symptoms for at least 2 yrs with no progression of the symptoms and no evidence of an underlying cause. In idiopathic Raynaud's disease, trophic skin changes and gangrene are either absent or present only in minimal cutaneous areas. The symptoms and signs of the underlying disease

usually become manifest within 2 yr, occasionally longer....

Treatment

Therapy of the secondary forms depends on recognition and treatment of the underlying disturbance. Mild cases of idiopathic Raynaud's disease may be controlled by protecting the body and extremities from cold and by using mild sedatives (e.g., phenobarbital 15 to 30 mg orally t.i.d. or q.i.d.). The patient must stop smoking since nicotine is a vascoconstrictor.

John H. Ghrist, M.D., saw claimant on May 18, 1984 and testified that part of her history was that she had been a smoker of approximately one pack a day for approximately ten years. He testified that he instructed claimant to discontinue all smoking as it would directly exacerbate her problems with cyanosis of the extremities. He opined that at times moderate to severe stress may cause very temporary exacerbation of Raynaud disease as may many other factors particularly temperature. He also opined that smoking was a contributing but not the sole cause of claimant's cyanosis. He further testified that at the time of his evaluation of claimant her Raynaud's disease was not found to be exacerbated by emotional distress and at that time no severe history of emotional distress was obtained.

Theodore W. Rooney, D.O., first saw claimant on February 23, 1985. He testified that symptoms of Raynaud's phenomenon can be caused by exposure to cold temperatures, emotional or physical stress, certain medications, or smoking. He stated that cold was the most common precipitating factor. He also saw claimant on January 29, 1986 and he testified that claimant related she had had frequent attacks especially with the colder weather. He also testified that a series of repetitive events whether it be emotional or physical could precipitate the symptom He indicated that claimant was a smoker and that smoking is one of the most potential stimulus or exacerbating factors of vasospasm of small blood vessels.

David E. Swieskowski, M.D., treated claimant for the first time on July 31, 1985. He testified that stress, distress, fatigue and medications can exacerbate Raynaud's phenomenon. He further testified that he agreed that smoking is a major aggravating cause in Raynaud's phenomenon and that in some patients smoking itself can cause spasm of the blood vessels. He indicated that it would be conjecture on his part that alleged occurrences at work were a possible aggravation to claimant's condition. He stated that it was his opinion that events that occurred three or four years prior to his testimony would not cause Raynaud's phenomenon at the time of his testimony.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

On appeal claimant concedes that her employment did not cause Raynaud's phenomenon but argues that her employment aggravated her condition. Claimant's concession on the cause of her condition is well advised because it is the consensus of the medical experts in this case that the cause of her condition is unknown.

Claimant must prove that the probable cause of the aggravation of her condition is her employment. Claimant has clearly not met her burden of proof. On page 28 of her brief claimant refers to the principle that a cause need not be the only cause of a problem to make a condition compensable. This is well recognized. Where claimant's argument falls short is in her proof that employment stress was a cause in the aggravation of her condition. None of the doctors who testified could state that the probable aggravating cause was her employment. Dr. Rooney thought that stress could be a cause but he included emotional and physical stress as possible precipitating factors. There is no evidence that claimant experienced physical stress on the job that would aggravate her condition. If claimant's condition were aggravated by stress it may have also been emotional or physical stress outside her employment. Claimant admitted to being subject to emotional turmoil outside the work place in 1983 and 1984 and her condition was apparently aggravated during that time.

The three doctors who saw and treated claimant for her condition all agreed that smoking could be an exacerbating factor. Claimant was a smoker during her employment with the defendant employer. Also, when claimant saw Dr. Rooney in January 1986 she had had frequent attacks of her condition. These attacks continued more than a year after she was last employed by the defendant employer and they occurred during cold weather. The continuation of claimant's attacks after termination of her employment indicates that employment factors played little, if any, role in her condition. Thus, it cannot be said that claimant's employment was the probable cause of the aggravation of her condition. The other possible causes such as smoking and exposure to the cold would be probable causes. Especially, since claimant continued to have problems after leaving her employment, the greater weight of evidence clearly fails to causally connect claimant's later problems to her job stress.

Two other points are worth noting. First, the symptoms of claimant's attacks last only a few hours. The aggravation

of her condition, whatever the cause, is only temporary. Second, there is no apparent correlation between the alleged emotional stressors on the job and the onset of the aggravation of claimant condition. It is not clear from the record when the stressors on the job occurred and when claimant's condition was aggravated.

FINDINGS OF FACT

1. From 1977 to September 3, 1984 claimant was employed as a secretary and dispatcher for the Clive, Iowa, Police Depart

2. Claimant is afflicted with a condition known as Raynaud's phenomenon.

3. Claimant's Raynaud's phenomenon is idiopathic in nature, and the reason why she is afflicted with the ailment is unknown.

4. During the time claimant was employed by defendant employer and after her employment with defendant, she had attacks of the type which are characteristic of persons with Raynaud's phenomenon.

5. Attacks may be precipitated by use of nicotine, stress, cold and the other factors.

6. Claimant smokes and has also experienced problems in cold weather.

7. Claimant has had stress in and outside of her employment with defendant.

8. Claimant's Raynaud's phenomenon was not aggravated, accelerated, worsened or lighted up by her employment with defendant employer.

CONCLUSION OF LAW

Claimant has failed to prove by the greater weight of evidence that suffered an injury that arose out of and in the course of her employment or was caused by the stress of her employment.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the costs of this proceeding including the costs of transcription of the arbitration hearing.

Signed and filed this 25th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARTHA MCCOY, Claimant, vs. DONALDSON COMPANY, INC., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	:	Files Nos. 752670/805200 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendant Second Injury Fund of Iowa (hereinafter the Fund) appeals from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on September 1, 1982, and June 25, 1984. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits A through Q; and defendant's exhibits 1 through 6. The deputy reserved ruling on claimant's exhibit I.

Both claimant and the Fund filed briefs on appeal.

ISSUES

Defendant Fund states the following issues on appeal:

1. Deputy Walshire erred by raising sua sponte, the issue of cumulative trauma into the case.

2. Assuming cumulative trauma was a proper issue in the case, Deputy Walshire erred by finding that claimant had sustained cumulative trauma.

3. Deputy Walshire erred in finding that the second injury fund was liable to claimant.

4. Deputy Walshire erred in awarding interest against the second injury fund.

5. Deputy Walshire erred in finding claimant's gross wages on September 10, 1984, were $402.91.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

In Parr v. Nash Finch Co., (Appeal Decision, October 31, 1980) the industrial commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

An injury may occur over a period of time. For time limitation purposes, the injury in such cases occurs when, because of pain or physical disability, the claimant is compelled to leave work. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Iowa Code section 85.64 states:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In

addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Any benefits received by any such employee, or to which the employee may be entitled, by reason of such increased disability from any state or federal fund or agency, to which said employee has not directly contributed, shall be regarded as a credit to any award made against said second injury fund as aforesaid.

ANALYSIS

On appeal, the Fund urges that claimant is prohibited from receiving an award based on a cumulative injury where the claimant did not plead a cumulative injury theory, or advance a cumulative injury theory at the time of prehearing or at the hearing.

In Johnson v. George A. Hormel & Company, an appeal decision filed June 21, 1988, it was held that a claimant who pled a traumatic injury was not prohibited from an award of benefits based on cumulative injury where the evidence clearly showed a cumulative injury had occurred. Restricting a decision to the particular theory of injury pled by the claimant would allow a claimant and defendant to make a mutual agreement to the detriment of a third party, such as the Fund. An award of benefits will be based on the evidence presented and will not turn on the technicalities of pleading.

In addition, the Fund cannot claim undue surprise under this approach. Claimant's physicians diagnosed carpal tunnel problems and attributed these problems to repetitive work activity in 1981, 1983, and again in 1984. The Fund was aware of these medical reports. Claimant's exhibits Q1 and Q2 are first reports of injury which refer to "repetitive use" and "repeated motion" as causes of claimant's injury. There was no undue surprise to the Fund when the deputy assessed the evidence and concluded that a cumulative injury had taken place. The Fund had adequate opportunity to meet and rebut evidence of cumulative injury.

The Fund cites the case of Short v. Roadway Express, (Appeal Decision, December 31, 1987). That case is distinguishable on its facts, in that the evidence in the Short case clearly involved a traumatic injury from a single incident.

The Fund next urges that even if the deputy properly considered a cumulative injury theory, claimant's injury was not cumulative. However, as pointed out above, at least three medical evaluations attributed claimant's carpal tunnel conditions to her repetitive work. This is contrary to the Fund's assertion that the only evidence of cumulative trauma comes from claimant herself. Claimant has suffered cumulative injuries.

The Fund also urges on appeal that there is no second injury fund liability, and offers seven arguments in support.

The first argument advanced by the Fund is that claimant failed to show any permanent impairment of the left hand. However, the record contains the report of Thomas B. Summers, M.D., that claimant has a two percent permanent physical impairment of the left hand. Scott Neff, D.O., did not receive any complaint from claimant about her left arm, so Dr. Neff treated the right arm only. Dr. Neff eventually rated claimant's left hand as zero percent "disability". Dr. Neff, of course, is not qualified to make a determination of disability. Medical evidence is necessarily limited to physical impairment.

Bruce Sprague, M.D., did examine claimant's left arm, and concluded that claimant had a good result from her release surgery. This is not equivalent to a finding of no impairment of the left hand. Although the Fund recited that a report of Carl O. Lester, M.D., pertaining to claimant's left hand that was not offered into evidence at the hearing was attached to the Fund's brief, no such attachment appears in the file. In addition, such a report could not be considered part of the record unless it was properly admitted into evidence at the hearing, or admitted pursuant to Division of Industrial Services Rule 343-4.28 after the hearing.

Dr. Summers did assign a two percent permanent impairment of the left upper extremity. Claimant clearly has permanent restrictions on the use of her left hand. A zero percent rating of impairment in light of permanent physical restrictions is inconsistent. Taken as a whole, the medical evidence indicates that claimant does have a two percent functional loss of her left arm.

The Fund next argues that claimant failed to show a functional loss in the right hand, and relies on a deposition statement by Dr. Neff in support of the argument. Although Dr. Neff's statement does qualify his rating of five percent by stating that he was giving claimant "the benefit of the doubt," he nevertheless maintained the rating in light of claimant's prior release surgery. Claimant has shown an impairment to her right hand.

The Fund also argues that claimant's right and left carpal tunnel conditions developed simultaneously, and therefore the Fund is not liable to claimant. However, the medical evidence shows that although claimant had pain in both hands in 1980, her condition was evaluated and found to be a carpal tunnel syndrome of the right hand, and a carpal tunnel release was performed on the right hand only in 1980. Subsequent to the release, claimant had restrictions on the use of her right hand only.

It was not until two years later, in 1982, that claimant began to experience serious problems with her left hand. Claimant later received the same restrictions for her left hand that had been previously imposed on her right hand, and eventually underwent release surgery on her left hand in December of 1983. Dr. Summers opined that claimant's left hand condition developed as a result of compensation for claimant's right hand condition. It is concluded that claimant's right hand condition and left hand condition did not develop simultaneously.

The Fund argues that under Irish v. McCreary Sawmill, 175 N.W.2d 364 (Iowa 1970), claimant is required to show at least a 90 percent "functional disability" to the first scheduled loss to trigger Fund liability. This is a misreading of Irish. No reasonable construction of the decision in Irish supports the Fund's interpretation. In addition, the statutory provisions outlining the second injury fund do not support this interpretation.

The next argument urged by the Fund is that the Second Injury Compensation Act does not give rise to liability on the part of the Fund to a claimant who has suffered both injuries while employed by the same employer. In this regard, the Fund argues that since the Fund was set up to remove any disincentive on the part of employers to hire the handicapped, an intervening change of employers must take place before the Fund is liable. In other words, the Fund asserts the act protects workers being hired but not employees who are merely retained.

Although the Fund correctly recites the purpose of the Second Injury Compensation Act, there is no such limitation in the language of the statutes. The Second Injury Fund Act contemplates a prior injury. There is no requirement that the prior injury be compensable. It follows that there is no requirement that the prior injury be incurred while employed by a different employer. The Fund's argument in this regard is rejected as contrary to the statute.

The Fund next argues that even if claimant's injuries are not simultaneous, claimant has not suffered any industrial

disability. The Fund points to statements by claimant as to various household tasks she performs, such as washing walls. It is noted that claimant described performing this task in the context of activities that produced pain.

The medical evidence shows that claimant has various permanent restrictions that prevent her from returning to repetitive work, as well as a lifting restriction. Claimant has also received ratings of permanent physical impairment of five percent and two percent of the right upper extremity, and two percent and zero percent of the left upper extremity.

Claimant's physical impairment is only one factor in the determination of industrial disability. Claimant has lost earnings as a result of her condition. **Donaldson Company refused to rehire claimant to a position consistent with her impairment.** In this case, claimant was laid off in a general economic layoff. However, the record indicates that when the layoff was over, claimant was not rehired due to her physical restrictions.

Claimant was 44 years old at the time of the hearing. This places claimant at a point in her life when she is perhaps at her maximum earning potential, yet her age makes retraining for a new occupation difficult. Claimant has many years of her work life ahead of her yet. **Claimant's work experience is limited to work as a waitress, a clerk, and her work for Donaldsons.** Claimant has a high school education and is of average intelligence. Claimant's motivation to find substitute employment is less than exemplary, as shown by her minimal efforts to seek another job. However, claimant is now self-employed as a babysitter.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability **of 40 percent.**

The Fund's next two arguments on appeal have been resolved by cases decided subsequent to the Fund's brief. The Fund argues that this agency's decision in Fulton v. Jimmy Dean Meat Company, (Appeal Decision, July 2, 1986) should be reversed. That decision has now been affirmed by the Iowa Supreme Court. Second Injury Fund of Iowa v. Fulton, decided February 22, 1989.

Similarly, the Fund's argument that the second injury fund should not be assessed interest is now resolved in the Fund's favor by this agency's ruling in Braden v. Big "W" Welding Service, (Appeal Decision, October 28, 1988). The Fund is not required to pay interest.

The Fund's final issue concerns the proper rate. The Fund argues that since the deputy found a cumulative injury, a different injury date than contemplated by the parties resulted

in no reliable evidence as to a proper rate for that date. The parties had stipulated to rates for the two injury dates pled. Claimant testified that her hourly wage for 1984 was $9.37 per hour, for 40 regular hours plus 3 hours extra for meeting production quotas. The deputy utilized this testimony to produce a rate of $253.73. Claimant's testimony is unrebutted. Claimant's exhibits Q2-Q5 indicate her wages for 1982 and 1983, and are not controlling for injury dates in 1984. However, those exhibits show claimant's hourly wage rising each year until reaching a level of $9.04 in 1983. This tends to corroborate claimant's testimony that her wages in 1984 were $9.37. The deputy's determination as to claimant's rate is adopted.

FINDINGS OF FACT

1. Claimant was employed by Donaldson Company, Inc., as a general laborer and assembly operator.

2. Claimant's duties involved repetitive work with her hands.

3. On April 30, 1984, claimant suffered an injury to her left arm arising out of and in the course of her employment with Donaldson in the form of a cumulative injury resulting in carpal tunnel syndrome.

4. As the result of the April 30, 1984, injury claimant has a two percent permanent partial impairment of her left upper extremity.

5. On September 10, 1984, claimant suffered an injury to her right arm arising out of and in the course of her employment with Donaldson in the form of a cumulative injury resulting in carpal tunnel syndrome and ulnar nerve irritation.

6. As the result of the September 10, 1984, injury, claimant has a five percent permanent partial impairment of her right upper extremity.

7. Defendant Donaldson failed to rehire claimant to a position within her medical restrictions.

8. Claimant was 44 years of age at the time of the hearing and had a high school education.

9. Claimant's work experience is limited to factory labor, waitressing and as a store clerk.

10. Claimant has lost wages as a result of her injuries.

11. Claimant cannot return to her work for Donaldson due to her injuries. Donaldson Company failed to provide claimant with a job within her restrictions.

12. Claimant currently works as a self-employed babysitter.

13. Claimant made only minimal efforts to seek alternative work.

14. Claimant's gross weekly earnings at Donaldson during 1984 was $402.91.

15. Defendants, Donaldson and Second Injury Fund of Iowa, were on notice prior to the arbitration hearing that claimant may have suffered a cumulative injury.

16. As a result of her injuries on April 30, 1984, and September 10, 1984, claimant has a loss of earning capacity of 40 percent.

CONCLUSIONS OF LAW

Claimant's failure to plead a cumulative injury does not bar a finding of cumulative injury.

Claimant suffered cumulative injuries arising out of and in the course of her employment with Donaldson on April 30, 1984, and September 10, 1984.

As a result of her injuries, claimant has a two percent permanent partial impairment of the left upper extremity, and a five percent permanent partial impairment of the right upper extremity.

Claimant's rate of compensation for her April 30, 1984 injury and her September 10, 1984 injury is $253.73.

As a result of her injuries, claimant has an overall industrial disability of 40 percent.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendant Donaldson shall pay to claimant five (5) weeks of permanent partial disability benefits at the rate of two hundred fifty-three and 73/100 dollars ($253.73) per week from April 30, 1984 and twelve point five (12.5) weeks of permanent partial disability benefits at the rate of two hundred fifty-three and 73/100 dollars ($253.73) per week from September 10, 1984.

That defendant Second Injury Fund of Iowa shall pay to claimant one hundred eighty-two point five (182.5) weeks of permanent partial disability benefits at the rate of two hundred fifty-three and 73/100 dollars ($253.73) per week beginning seventeen point five (17.5) weeks after September 10, 1984.

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

That defendant Donaldson shall pay interest on benefits it is ordered to pay herein as set forth in Iowa Code section 85.30.

That defendants, Donaldson and second injury fund, shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33. As defendant Donaldson voluntarily paid twelve point five (12.5) weeks of permanent partial disabilit benefits before the hearing in this case, it shall pay only two percent (2%) of these costs and defendant second injury fund shall pay the balance. The second injury fund shall pay the costs of the appeal.

That all defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 28th day of April, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY McDONALD,	:	
Claimant,	:	File No. 753275
vs.	:	
NASH FINCH COMPANY,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
FARMERS INSURANCE GROUP CO.,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant permanent partial disability benefits based on a 40 percent industrial disability.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 28. Both parties filed briefs on appeal.

ISSUE

The issue for consideration on appeal is the extent of claimant's industrial disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

On December 12, 1983, claimant sustained a work injury to his back when he slipped and fell getting out of the truck he was driving for defendant employer. Claimant sought treatment for this injury from Warren N. Verdeck, M.D., on December 16, 1983 after consulting with his family physician, O. E. Senft, M.D. In February 1984, Dr. Verdeck admitted claimant to the hospital for a myelogram which revealed "very minimal bulging at L5-S1." Dr. Verdeck consulted with James R. LaMorgese, M.D., and reached a final diagnosis:

1. Low back and left leg pain, possible radiculopathy.
2. Status-post laminectomy right L5-S1.

(Joint Exhibit 21)

Dr. LaMorgese recommended and performed an epidural steroid injection on claimant on March 2, 1984. Claimant improved until April 24, 1984 when he began experiencing pain and was placed on a TENS unit. Dr. Verdeck subsequently released claimant for return to work on May 17, 1984 with work restrictions of no lifting over ten pounds, no bending and no climbing.

Claimant testified that defendant employer refused to return him to work within those restrictions. Claimant opined that defendant employer had such jobs available. Claimant stated that he returned to Dr. Verdeck to see if he could get his restrictions lessened. Dr. Verdeck refused to reduce claimant's restrictions.

On July 27, 1984, Dr. Verdeck referred claimant to the Mayo Clinic and Burton M. Onofrio, M.D.:

> Mr. Larry McDonald underwent a partial hemilaminectomy for removal of an L5 extruded disk on the left on August 3, 1984. He returned on November 1, 1984 for re-examination. At that time, he was walking well on his heels and toes. The range of motion of his low back was somewhat diminished, but otherwise he was free of the leg pain which prompted his operation. I feel that Mr. McDonald may return to his previous job as a driver with a permanent weight lifting restriction of twenty pounds.

(Jt. Ex. 24)

Claimant was examined by Dr. Verdeck again on December 4, 1984. At that time, Dr. Verdeck agreed with Dr. Onofrio's work restriction and opined that claimant could return to work. In a December 14, 1984 letter, Dr. Verdeck opined that claimant has a six percent permanent disability.

Claimant testified concerning a prior back injury he sustained in 1980 while unloading a truck. Claimant was also treated by Dr. Verdeck for this injury. On July 25, 1980, Dr. Verdeck performed a hemilaminectomy and discectomy on the right at the L-5, S-1 level. Dr. Verdeck released claimant with his work restrictions on January 2, 1981.

In a January 8, 1981 clinical note, Dr. Verdeck opines: "1/8/81 NOTE: Estimated permanent partial disability of 10%." (Jt. Ex. 12, p. 3)

Claimant testified that after Dr. Onofrio released him for work with a 20 pound lifting restriction, he went to defendant employer and was again refused return-to-work within his restrictions. Claimant opined that he was willing to accept any work within his lifting restrictions.

On December 24, 1984, claimant met with Norman Allen, division personnel manager for defendant employer, to discuss returning to work. Claimant testified that he was once again refused work. Joint exhibit 28 is a company memo referring to claimant dated December 21, 1984 which states: "It is 'likely' we will be terminating Larry, as he has been on LOA 1 year as of 12/13/84. (12/13/83 to 12/13/84) We dont [sic] see any jobs here were [sic] we can ever reasonably accomodate [sic] this restriction. Hope to make a final decision next few days."

In January 1985, claimant received a letter from defendant employer confirming that his medical leave would not be extended:

> It is with reluctance that we find we must follow up our personal discussion of December 24th, with confirmation that we will be unable to extend your medical Leave of Absence which began December 13, 1983, and must therefore terminate your employment effective December 31, 1984.
>
> We sincerely appreciate your past service to Nash Finch Company and hope you will be able to resume your life in a rather normal manner even though you will no longer be able to do heavy lifting and related activities. We regret that the nature of our business is so physical in nature and that you were unable to continue with us.

(Jt. Ex. 27)

After claimant received this letter he began applying for other jobs. Joint exhibit 1 is a list of 97 jobs for which claimant applied. Thirty-three of these jobs were electrical related; 28 were agricultural or sales related; and the balance were for truck driving. Claimant testified that when he was called for an interview he was turned down when the interviewer learned of his 20 pound lifting restriction.

Claimant eventually was able to obtain work in April 1985 as a truck driver with West Side Transport after he agreed to sign a waiver stating that he would not hold them liable for his back. Claimant left this job to work for another trucking company for higher pay. Claimant quit that job August 22, 1986 because of the long hours and a dispute over an accident.

Claimant is currently working as a truck driver for his

brother-in-law's logging company. Claimant testified concerning the nature of his work for his brother-in law:

> Q. What type of duties do you have to perform for Chapman Logging?
>
> A. I'm a driver. He has four trailers up there and what he does is loads them with grade lumber or logs and my job is simply to come in, I throw log chains over the loads or tarp straps over the loads and chain them down or strap them down and I go. I get wherever I'm going, I loosen up the chains or the straps and from there somebody else unloads it, and when they're done I'm free to go.
>
> Q. Okay. Do you have to lift in excess of 20 pounds?
>
> A. I try not to.
>
> Q. Okay. And do you find that you have to?
>
> A. Occasionally, yes. Well, whenever you're throwing chains -- what you do is you roll the chain up and so you can get it in one hand. You hold the other end and you throw it over the trailer, and I have gotten it down to where I only take like two loops of the chain and throw it and then go around the other side, climb up on the trailer and pull the chain down so I don't have to -- I don't have to throw as much, because twisting off balance like that throwing a log chain does -- you know, it could really hurt you, so I don't do it.

(Transcript, pages 85-86)

Claimant stated that he is paid $.20 per mile working for his brother-in-law. Claimant estimated that his annual earnings would be $20,000. Claimant testified that his job with his brother-in-law is subject to the amount of work available each week and that he is not guaranteed any amount of money each week.

Claimant stated that at the time of his injury in 1983, he was earning $34,547 a year. In 1982 his income was $33,010; in 1981, $28,669; and in 1980, $14,114.

Claimant has an Associate of Arts degree with honors in agricultural business. He served three and one-half years in the air force and completed a six month aerospace ground equipment training program. This work involved mechanical and electrical trouble-shooting. Claimant worked as a lab technician at

Collins Radio and completed an eight year apprenticeship program to become a lineman. Claimant is 40 years old.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issue and the evidence.

ANALYSIS

The record reveals that defendants have refused to return claimant to work within his restrictions. Allen maintained that defendant employer has work within claimant's restrictions, but in his memo and letter he clearly states that defendant employer cannot accommodate claimant's work restrictions. Allen discussed the dispatcher job and seemed to indicate that claimant was not hired because he was not willing to relocate.

Through his own motivation and effort claimant has been able to secure employment within his 20 pound lifting restriction but not without difficulty. Claimant was turned down many times before he was able to secure employment as a truck driver. When he did obtain employment he had to sign a waiver of claim for his back problem. Claimant is currently working for his brother-in-law on an at-will basis with no guarantee as to the amount of the work he will have each week. Claimant opined that he expects to earn about $20,000 per year in his current job.

Taking all the factors of industrial disability into account, it is determined that claimant suffers a 40 percent reduction in earning capacity as a result of the December 13, 1983 work injury.

FINDINGS OF FACT

1. Claimant is 40 years old.

2. Claimant is a high school graduate and has an associate of arts degree with honors in agricultural business/sales.

3. Claimant served in the U.S. Air Force and has specialized training in aerospace ground equipment maintenance and repair.

4. Claimant was unable to use that training in the commercial labor market.

5. Claimant completed an eight year program to become an electrical service company lineman.

6. Claimant operated a small business in which he performed services as a nonlicensed electrician.

7. All of these employments involve lifting substantial amounts of weights as well as bending, pushing and pulling maneuvers on occasion.

8. Claimant began work with Nash Finch Company as a trucker in September 1978.

9. Nash Finch is a grocery wholesaler and claimant was required to load and unload semi-trucks of grocery items weighing from five to 110 pounds.

10. Claimant functioned adequately at this job until he sustained a back injury while unloading his truck in May 1980.

11. Claimant subsequently underwent a laminectomy at L5-S1 on the right which laminectomy resulted in a permanent partial impairment of 10 percent of the body as a whole.

12. Claimant was released to light duty work on November 17, 1980 and to full duty work on January 6 or 7, 1981.

13. Following his full duty work release, claimant was able to handle all aspects of his job as adequately as he had done prior to the 1980 back injury.

14. On December 12, 1983, claimant injured himself in the course of his employment when he stepped in the company parking lot in a frozen wheel rut and fell down.

15. On August 2, 1984, claimant underwent a secondary laminectomy and discectomy at L5-S1 on the left.

16. Claimant has not returned to work for Nash Finch since his December 12, 1983 injury and Nash Finch terminated claimant on December 31, 1984.

17. Claimant had earned $34,547.86 at Nash Finch prior to his injury in 1983.

18. Claimant now has a 20 pound weight lifting restriction and a mild physical impairment attributable to his December 12, 1983 work injury.

19. Nash Finch did not make even minimal efforts to accommodate claimant or to attempt to rehabilitate him.

20. Claimant is well motivated and extensively sought work following his termination by Nash Finch.

21. Claimant was able to secure employment only by taking lower pay and less secure positions which also offered lesser benefits.

22. Claimant has remained in the trucking industry.

23. Claimant now works for his brother-in-law as an at-will employee whose income and employment is a function of the level of business that his brother-in-law's company carries on.

24. Claimant's earnings annually with his brother-in-law's business will be slightly more than one-half of those he would have enjoyed at Nash Finch had he been able to complete the work year in 1983 without injury.

25. Claimant has sustained a loss of earning capacity of 40 percent.

CONCLUSIONS OF LAW

Claimant is entitled to permanent partial disability benefits resulting from his injury of December 12, 1983 of 40 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant permanent partial disability benefits for two hundred (200) weeks at the weekly rate of three hundred ninety-nine and 55/100 dollars ($399.55).

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants receive credit for amounts previously paid.

That defendants pay costs including the costs of the transcription of the hearing proceeding.

That defendants file claim activity reports as required by the agency.

Signed and filed this 25th day of August, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL S. McKEAG, a Minor, by GLORIA J. McKEAG, Guardian/Conservator, Claimant, vs. MAHASKA BOTTLING COMPANY, Employer, and GREAT AMERICAN INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 771096 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision captioned a decision on death benefits denying any benefits.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 10; and defendants' exhibits A, and C through K.

ISSUE

The issue on appeal is whether claimant's decedent received an injury which arose out of and in the course of his employment.

REVIEW OF THE EVIDENCE

The decision of the deputy adequately and accurately reflects the pertinent evidence and it will not be reiteratd herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropri to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted.

In addition to the deputy's analysis it is noted that the deputy correctly determined that the decedent did not have private use rights of the aircraft. The majority of the personal uses by decedent was for picking up his son for visitation. Those flights were on Friday evenings when the flight was not likely to be known to any other employees; the flight originated from an airport twelve miles from the employer's plant; the fuel for the flights was paid for in cash; and there was no logging of the flight. The employer's aircraft mechanic testified that on the day of the fatal flight he was in Northern Iowa and not at the hangar at the Oskaloosa airport where he worked on aircraft. The mechanic was unaware of decedent's flights to pick up his son.

Claimant has not established that decedent's injury arose out of and in the course of decedent's employment. Claimant is not entitled to death benefits.

FINDINGS OF FACT

1. Decedent was an employee of the employer from spring 1981 until August 17, 1984.

2. Decedent's designated title with the employer was Director of Avaiation.

3. Pursuant to decedent's job description, decedent was responsible for communicating with corporate officers for authorization of nonbusiness use, including nonbusiness passengers, of aircraft by anyone.

4. Decedent on occasion flew corporate aircraft with nonbusiness passengers for his own purposes.

5. Decedent did not log any personal flights in his flight logs.

6. Decedent paid for avaiation gas used for personal flights with cash and not with a credit card of the employer.

7. The employer's aircraft were hangared at the Oskaloosa Airport some twelve miles from Oskaloosa.

8. Employer's plant was located in the city of Oskaloosa.

9. Decedent's private use flights often occurred in the

evening when other employees of the employer were not at the hangar.

10. Decedent's private use flights often were in the immedi vicinity of the Oskaloosa Airport or were away from the Oskaloos environs.

11. Decedent's private use flights were often quite brief.

12. Decedent's private use flights generally did not invo passengers who would or could readily communicate decedent's use of corporate aircraft to decedent's employer.

13. Aircraft, including smaller aircraft such as the Cessna 170B, are costly to operate.

14. The Cessna 170B was the employer's oldest corporate plane and had been the first plane which the employer's president had purchased.

15. The employer's president was surprised on August 17, 1984 when informed of decedent's accident and then stated decedent did not have permission to fly the Cessna 170B.

16. Decedent had no private use rights in the Cessna 170B or in other corporate aircraft.

17. Officials of the employer did not authorize decedent to fly the Cessna 170B on the afternoon of August 17, 1984.

18. Decedent's flight of that afternoon was a prohibited act.

19. The employer's aircraft mechanic who worked where the aircraft were hangared was not aware of any of decedent's personal flights.

20. The employer's aircraft mechanic was not at the airport the afternoon of August 17, 1984.

21. On August 17, 1984, decedent flew the Cessna 170B with a private passenger to search for a model airplane the passenger had lost.

22. The employer had no direct interest in the model airplan

23. The passenger was a member of the general public.

24. The passenger's son was a local florist from whom the employer occasionally purchased arrangements.

25. The passenger and his acquaintances might have been induced to drink the employer's products through the August 17, 1984 flight.

26. The passenger's son might have been induced to deal more fairly with the employer in his business dealings with the company through the August 17, 1984 flight.

27. The employer had not otherwise permitted use of company planes for the private purposes of the general public.

28. Any benefit conferred on the employer by the August 17, 1984 flight was minimal and not sufficient to override the costs of the flight.

29. Decedent had no authority to undertake the August 17, 1984 flight on the employer's behalf.

30. The Cessna 170B was a well maintained aircraft.

31. Decedent's proficiency in flying maneuvers required of him in the Cessna 170B was sufficient and decedent never complained of needing more flight time in order to increase his proficiency.

32. Decedent's low and slow flight of August 17, 1984 in 95 degree weather in a strong wind potentially neither increased his proficiency nor decreased plane maintenance.

33. The employer received no benefit by way of increased pilot proficiency or decreased plane maintenance sufficient to override the fact that the flight was nonauthorized and, therefore, a prohibited act in violation of the employer's expressed rules.

34. It is not established that decedent washed the plane on August 17, 1984.

35. Flying a plane to dry it after washing is not standard practice.

36. Flying the plane to dry it after washing was a prohibited act.

37. Other plane maintenance was neither scheduled nor authorized on August 17, 1984.

38. Decedent was not within the period of his employment at a place where decedent could reasonably be performing his

duties, and while performing those duties or something incidental to them while flying the Cessna 170B with a nonbusiness passenger on August 17, 1984.

39. The cause or source of decedent's August 17, 1984 fatal crash was decedent's personal act of assisting a member of the general public without his employer's authorization and in express violation of his employer's rule regarding nonbusiness use of corporate aircraft.

CONCLUSION OF LAW

Claimant has not established by the greater weight of evidence that decedent's August 17, 1984 injury arose out of and in the course of decedent's employment.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay all costs of this proceeding including the costs of transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 25th day of August, 1988.

David E. Linquist
DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT A. MEIER, Claimant, vs. JOHN KIRBY, INC., Employer, and FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 826937 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on November 3, 1985. The record on appeal consists of the transcript of the arbitration hearing; and joint exhibits 1 through 35. Both parties filed briefs on appeal.

ISSUE

Defendants state the following issue on appeal: "Whether the award of permanent partial disability benefits equal to 75% of the body as a whole is excessive, contrary to law and not supported by the evidence."

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

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 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 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

The sole issue on appeal is the extent of claimant's industrial disability. Industrial disability is determined by consideration of several factors. Claimant's physical impairment subsequent to his injury is one of these factors.

Claimant has been given a permanent physical impairment rating of 15 percent of the body as a whole. This rating is

uncontroverted on the record. Robert J. Chesser, M.D., has recommended against claimant returning to truck driving.

Claimant's past work experience is also a factor. Claimant's work experience is limited to over the road truck driving. Although claimant has a small amount of skill in woodworking and typing, these are not seen as viable employment options for him.

Claimant is reasonably intelligent. He has obtained a GED. Claimant is 42 years old, which places him at an age where he would normally be the most productive in his work life. Claimant's age makes retraining or further education possible in his case.

The evidence on claimant's motivation to return to work varies. Claimant has not sought alternative work since his injury. However, the vocational rehabilitation counselors found claimant to be cooperative. They nevertheless predict that claimant would be resistive to a work-hardening program that required claimant to endure pain.

Claimant has lost earnings as a result of his injury. Claimant was earning approximately $27,000 before his injury. Claimant now only works at a tavern busing tables and serving coffee without compensation. This demonstrates that claimant could perform the same or similar work for compensation and raises a question as to why claimant is not doing so.

The claimant's present potential for rehabilitation is a relevant factor in determining claimant's industrial disability. Claimant's impairment and aptitudes indicate that certain sedentary jobs would be available to him, such as welding, assembling, or accounting. It is also noted, however, that claimant has no present skills in these areas and would need to be trained. Claimant's enrollment in a community college program designed to lead to a position of accountant's assistant is indicative of claimant's motivation, but it would be speculative to predict claimant's future earnings as an accountant's assistant upon graduation in the future. Claimant's present industrial disability must be determined on the various factors utilized in determining industrial disability as they presently exist.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 50 percent.

FINDINGS OF FACT

1. On November 3, 1985, claimant suffered an injury to the low back and hip which arose out of and in the course of his employment with Kirby.

2. The work injury of November 3, 1985 was a cause of a period of disability from work beginning on November 3, 1985 and ending on November 3, 1986, at which time claimant reached maximum healing.

3. The work injury of November 3, 1985 was a cause of a 15 percent permanent partial physical impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no heavy lifting, pushing, pulling; no repetitive lifting, bending, stooping or climbing; or prolonged sitting or standing.

4. Claimant is 42 years of age with a GED.

5. Claimant is unable to return to his job as a truck driver.

6. Claimant's work experience is limited to truck driving.

7. Claimant currently works as a part-time bartender/waiter for which he receives no compensation.

8. Claimant is able to perform sedentary work as a low grade clerical person, restaurant or bar worker, or some type of light bench work.

9. Claimant has a 50 percent loss of earning capacity as a result of his work injury of November 3, 1985.

CONCLUSION OF LAW

Claimant has an industrial disability of 50 percent as a result of his work injury of November 3, 1985.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of two hundred seventy-eight and 37/100 dollars ($278.37) per week from November 4, 1986.

That defendants shall pay to claimant healing period benefits from November 3, 1985 through November 3, 1986 at the rate of two hundred seventy-eight and 37/100 dollars ($278.37) per week.

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

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

That defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

That defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of March, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JANICE A. MENDEZ, Claimant, vs. MERCY HOSPITAL MEDICAL CENTER, Employer, and THE AETNA CASUALTY AND SURETY COMPANY, Insurance Carrier, Defendants.	:	File No. 795862 A P P E A L D E C I S I O N FILED DEC 30 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding healing period benefits and permanent partial disability benefits based upon an industrial disability of 25 percent resulting from injuries on April 26, 1985 and May 16, 1985.

The record on appeal consists of the transcript of the arbitration hearing and the exhibits listed in the prehearing report. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are whether claimant received an injury that arose out of and in the course of her employment and the nature and extent of claimant's alleged disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant testified that she was born February 28, 1959 and was 28 years old at the time of the arbitration hearing. She stated that she had prior work experience as a housekeeper, a waitress and a nursing assistant. She had completed training as a nursing assistant and a nursing program at a community college. She began work in June 1982, at Des Moines General Hospital in a full-time position as a registered nurse. Her

work included moving patients from a cart to their bed, the bathroom, into the tub and in and out of bed. On March 31, 1983, February 19, 1984 and November 1, 1984 she had back pain while moving patients. (Exhibit 6, pages 153, 156 and 159) Claimant reported each of those incidents to her supervisor on the same day they occurred. The only treatment noted for these events was bed rest for the night following the February 19, 1984 incident. Claimant stated she could not remember missing any work with Des Moines General Hospital because of her back. She ceased employment at Des Moines General Hospital in January 1985.

Claimant testified that she began work as a registered nurse in a part-time position for defendant employer on February 11, 1985. She stated that on April 28, 1985, she was working the 3:00 to 11:00 shift in the progressive cardiac unit. She stated she injured her back while lifting a disoriented patient into bed. She continued to work but went home early because the number of patients in the hospital was down. Claimant did not report this incident to her supervisors on the day it occurred. She continued to work after that day but on May 9, 1985 sought care with Peter D. Wirtz, M.D., because of the "bothersome" condition in her low back. Claimant indicated that on May 16, 1985, when she was getting into her locker to get her uniform, she had a very sharp pain in her low back. She told her supervisors about this episode. She sought treatment in the emergency room where she was referred to Marshall Flapan, M.D. Claimant was eventually seen by William R. Boulden, M.D. Claimant testified that Dr. Boulden did not do the type of examination that Dr. Flapan had.

Claimant did not return to work with defendant employer. She began working at the Blood Center on September 16, 1985. She describes that in this job she carried equipment, set up tables and moves chairs, and does bending, stooping and lifting. She stated that leaning forward or being in a bent over position is the problem in her work.

Nancy DeVore, workers' compensation coordinator for the defendant employer, testified that it was her understanding the incident date on an incident report was changed from April 28, 1985 to April 26, 1985 when it was discovered that claimant worked on April 26 but not April 28.

The admitting form for the emergency room dated May 16, 1985 (Ex. 2, pp. 27 & 28) indicated that the case was not workers' compensation and the nursing assessment was: "c/o lower back pain. Started 2 wks ago seen by Dr. Wirtz for this. severe today while dressing for work causing difficulty standing & walking."

A note made by either Dr. Wirtz or a Dr. Naanep dated May 9, 1985, noted that claimant had had lower back problems

off and on since May 1, 1985 and that the diagnosis was musculo-skeletal strain, lower back. The same medical record (Ex. 1, p. 13) noted that on May 16, 1985 the claimant was spoken to on the phone.

Claimant was treated by Dr. Flapan, an orthopedic surgeon. In a letter dated September 13, 1985, Dr. Flapan wrote:

> [I]t is my opinion that Janice Mendez' current back problems are results of episodes she describes which occurred on April 28, 1985 while at work in the Cardiac Unit at Mercy and subsequent aggravation of her back problems on May 16, 1985. It is my opinion that these episodes were the causative incidents which have resulted in her continuing problems with her back.

(Ex. 1, p.2)

In a letter dated September 15, 1985, Dr. Flapan wrote:

> The injury that Janice sustained has produced a permanent partial physical impairment to her body as a whole in the amount of 10% of the body as a whole.
>
> I would caution Ms. Mendez about bending, lifting and straining while at work. I would put lifting restrictions of 25 lbs. on her activity.

(Ex. 1, p. 1)

Dr. Boulden, an orthopaedic surgeon, examined claimant three times in February and March, 1986. In a letter dated October 7, 1986, Dr. Boulden wrote:

> I had found no objective clinical findings on this patient, and I had found a negative CAT scan. Therefore, I felt that we were dealing with a chronic weak back syndrome, and in my opinion, had not found anything objectively to rate her out with.
>
> I am not sure if anything has been found since my last visit with her in March of 1986, but if nothing else has been found, then I cannot really concur with the fact of the 10% disability rating.
>
> ...
>
> In reference to restrictions, I feel that the patient should not do any bending, stooping, or lifting with her back, or prolonged sitting.

(Ex. 1, p. 11)

A note from Dr. Boulden dated February 27, 1986, indicated that a "CAT scan was completely normal."

APPLICABLE LAW

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 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 claimant must prove by a preponderance of the evidence that her injury arose out of and in the course of her employment. Musselman, 261 Iowa 352, 154 N.W.2d 128.

In the course of employment means that the claimant must prove her injury occurred at a place where she reasonably may be performing her duties. McClure, 188 N.W.2d 283.

Arising out of suggests a causal relationship between the employment and the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The claimant has the burden of proving by a preponderance of the evidence that the injury is causally related to the disability on which she now bases her claim. Bodish v. Fischer,

Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L.O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

As 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 opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963), cited with approval a decision of the industrial commissioner for the following proposition:

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

Functional 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 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

The first issue to be resolved is whether claimant suffered an injury that arose out of and in the course of her employment. The incident, as described by the claimant in which she was lifting a patient, is undisputed. Claimant was performing a task that was common in her job with this employer. It was reasonable to expect that the claimant would be doing what she was doing in the course of her employment.

Defendants, in arguing that claimant did not suffer an injury that arose out of and in the course of her employment, make much of the facts that the date of the original incident may have been incorrectly reported, that the claimant did not immediately inform her supervisors, and that certain reports indicate that the injury was not a workers' compensation injury. While it is somewhat troubling that claimant did not report the April incident to her supervisors as she had done when she had injured herself when working for her former employer, the claimant has nonetheless been consistent in statements made to her physicians and in her testimony as to the particular injurious events. Claimant's failure to immediately report her April injury to her supervisors may well be explained by the fact that her injuries with her former employer did not result in claimant having to miss work or take extended treatment and, therefore, claimant did not immediately report an injury which she did not anticipate would require her to take extended treatment and miss work. Claimant did, however, report the incident in May in which she had more severe pain (Transcript p. 149, line 21 - p. 150, line 5). Merely because some forms that may or may not have been completed from information supplied by claimant indicate that claimant's injuries were not workers' compensation injuries, does not mean that claimant's injuries are not work related. Claimant's testimony on how the incidents happened is undisputed. Claimant sought treatment for and reported to physicians for an injury consistent with claimant's description of the injury and incident. The medical reports are consistent with an injury that would have resulted from the incidents as described by the claimant. Claimant suffered an injury on April 26, 1985 that arose out of and in the course of her employment. That injury was aggravated in a work-related incident on May 16, 1985 when claimant was taking her uniform from her locker. The aggravation caused by the incident on May 16, 1985 was not significant and did not increase the permanency of claimant's condition.

The second issue to be resolved is the extent of claimant's industrial disability. Dr. Flapan opines that claimant has

a ten percent permanent partial impairment. Dr. Boulden did not give a rating of impairment and indicated he did not find any objective evidence of an injury. However, Dr. Boulden did impose certain restrictions on claimant's activity. Claimant has suffered a permanent partial impairment to her back.

In discussing the extent of claimant's industrial disability, the deputy stated:

> Claimant's past employment primarly [sic] consists of nursing work. Claimant has worked her way up the ladder starting as a nurse's aide and eventually completing her training at a community college to qualify as a registered nurse. During all of her previous employment prior to her current job at the blood bank, claimant was required to lift, bend, twist and stoop along with sit and stand for prolonged periods of time in order to perform her nursing duties. Therefore, the evidence demonstrates that as a result of her functional impairment and physician imposed restrictions, claimant is unable to return to the type of nursing work she was performing at the time of the work injury and most other nursing jobs claimant has held in the past. Mercy's workers' compensation coordinator testified at hearing that Mercy has instituted a program since claimant left which is specifically developed to accommodate injured nurses and provide them with light duty work. Although claimant did not return to Mercy after resigning in September, 1985, to take the blood bank job to inquire as to such other light duty nursing jobs, Mercy, on the other hand did not offer employment either. Therefore, claimant has demonstrated a very significant loss of earning capacity as a result of her work related back difficulties.
>
> On the other hand, claimant's rehabilitation is unnecessary because claimant has found suitable replacement employment. Although her back continues to give her problems, she is earning in her current job on a per hour rate close to the same money she was earning at Mercy.
>
> Claimant is 28 years of age, has a post high school education and exhibited above average intelligence at the hearing. Claimant has high potential for successful vocational rehabilitation should she lose her current job at the blood bank.
>
> Claimant is relatively young and is more apt to adjust to a new occupation. Her loss of earning capacity due to disability is less severe than would be the case for an older person without an educational background.

When all factors are considered, the deputy correctly concluded that claimant has suffered an industrial disability of 25 percent.

FINDINGS OF FACT

1. Claimant was born February 28, 1959 and was 28 years old at the time of the arbitration hearing.

2. Claimant has completed high school and a nursing program and is a registered nurse.

3. Claimant has had prior work experience as a housekeeper a waitress and a nursing assistant.

4. Claimant was employed by defendant Mercy Hospital Medical Center as a registered nurse.

5. Part of claimant's duties included lifting patients into and out of bed.

6. On April 26, 1985, claimant injured her back while lifting a patient.

7. Claimant continued to work but sought medical treatment from Dr. Wirtz on May 9, 1985 because of her lower back condition.

8. On May 16, 1985, claimant had sharp pain in her lower back while getting into her locker to get her uniform. This incident aggravated her back injury which had occurred on April 26, 1985. The aggravation on May 16, 1985 was not significant and did not increase the permanency of claimant's condition.

9. Claimant was unable to return to her work with defendant employer due to her back condition.

10. Claimant was given an impairment rating of ten percent of the body as a whole by Dr. Flapan.

11. Claimant was not given an impairment rating by Dr. Boulden but Dr. Boulden placed restrictions on claimant on bending, stooping or lifting with her back or prolonged sitting.

12. Claimant did experience back problems with a former employer but those prior back problems did not cause the claimant to miss work and were not the cause of permanent physical impairm

13. Claimant works for a blood clinic and is able to carry equipment and set up tables and chairs. Being in a bent-ov position causes claimant problems in this job.

14. Claimant's injury of April 26, 1985 arose out of and in the course of her employment.

15. Claimant has a loss of earning capacity of 25 percent as a result of her injury of April 26, 1985.

CONCLUSIONS OF LAW

Claimant's injury of April 26, 1985 arose out of and in the course of her employment with defendant Mercy Hospital Medical Center.

Claimant has an industrial disability of 25 percent as a result of her April 26, 1985 injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of two hundred fourteen and 42/100 dollars ($214.42) per week from September 7, 1985.

That defendants shall pay to claimant healing period benefits from May 16, 1985 through September 6, 1985 at the rate of two hundred fourteen and 42/100 dollars ($214.42) per week.

That defendants shall reimburse claimant the sum of three thousand eight hundred ninety and 96/100 dollars ($3,890.96) for medical expenses caused by the injuries.

That defendants shall pay all accrued weekly benefits in a lump sum.

That 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).

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

That defendants shall pay the cost of this action including the costs of the appeal and transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

That defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

That this matter shall be sent back into assignment for prehearing and hearing on the extent of additional weekly benefits to which claimant may be entitled based upon an alleged unreasonable delay in commencement of payment of benefits pursuant to Iowa Code section 86.13.

Signed and filed this 30th day of December, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE MILBRODT, Claimant, vs. ROBERTS DAIRY, INC., Employer, and NATIONAL UNION FIRE INSURANCE, Insurance Carrier, Defendants.	:	File No. 778256 A P P E A L D E C I S I O N

FILED
OCT 31 1988
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on October 22, 1984.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 22. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

1. Can speculation as to whether the claimant will lose his job with his employer at some time in the future be used as a factor in determining industrial disability?

2. If speculation as to whether the claimant will lose his job with the employer is considered, is there sufficient evidence to support an award of twenty-five percent permanent partial disability to the body as a whole?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appro to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted. Defendants urge on appeal that the deputy industria commissioner based the decision in part on speculation as to claimant's future employment situation.

In making a determination of industrial disability, a distinction must be made between a loss of earnings and a loss of earning capacity. The fact that claimant's present job may be less than secure involves speculation as to a possible future loss of earnings. A determination of industrial disabili must be made based on claimant's condition at the time of the hearing and not on future events.

A determination of industrial disability is based on a loss of earning capacity. in this regard, consideration is properly given to what effect claimant's condition has on jobs he might perform. This is not speculation, as the focus is on the effects of claimant's present condition. Claimant's condition after the injury, as compared to his condition before the injury, is ascertainable at the time of the hearing and does not require speculation. The deputy industrial commissione decision properly considered the effect of claimant's present condition on his earning capacity.

Defendants also urge that the award of 25 percent industrial disability is not supported by the evidence. The deputy industri commissioner's analysis in regard to this issue is adopted.

FINDINGS OF FACT

1. Claimant received an injury on October 20, 1984 arising out of and in the course of his employment when he was crushed in the pelvic area when his truck rolled and he was caught for approximately 40 minutes.

2. Claimant was initially off work from the date of injury to December 2, 1985 and then from March 26, 1986 to May 1, 1986 and then from June 16, 1986 to June 23, 1986 for medical treatment and recuperation on account of his work injury.

3. As a result of the work injury, claimant has a healed fracture of the pelvis, a urethral tear, a bleeding duodenal ulcer and ileus.

4. As a result of the urethral tear, claimant suffers from impotence, incontinence and urethral stricture.

5. As a result of the urethral stricture, claimant needs intermittent dilation of his urethra and will likely require such throughout his lifetime.

6. As a result of his urethral stricture, claimant is likely to be more subject to urinary tract infection than would the general population.

7. As a result of his urethral stricture, claimant has problems with frequency of urination, often needing to urinate as many as 12 to 15 times per day.

8. Claimant was 55 years old at the time of the hearing and a high school graduate.

9. Claimant has no formal education beyond high school and no training other than work experience.

10. Claimant has worked predominantly in the dairy industry, working in jobs ranging from night cleanup to pasteurizing room operator to route and contract salesperson.

11. Claimant worked as a supervisor for approximately one year before leaving such work.

12. Claimant's earnings have increased slightly subsequent to his injury.

13. Claimant returned to work at Roberts Dairy and continued to work after the dairy's reorganization, an event which required him to work longer hours.

14. Claimant has stiffness and fatigue following his longer work hours.

15. Claimant discontinued his part-time job at the greyhound track subsequent to his work injury.

16. Claimant's choice at the time of reorganization was either to accept the larger route or to take a layoff.

17. Claimant's age, work experience and problems related to his work injury decrease his job mobility.

18. Claimant is unlikely to be able to secure or obtain employment at or near his present wage, should his job at Roberts Dairy cease.

19. Claimant has not shown that his impotence is a factor which affects his earning capacity, either physically or psychologically.

20. Claimant has sustained a loss of earning capacity on account of his work injury of 25 percent.

CONCLUSIONS OF LAW

Claimant has established a causal relationship between his work injury of October 20, 1984 and his claimed permanent partial disability.

The arbitration decision filed May 27, 1988, did not improperly rely on speculation.

Claimant has sustained a permanent partial disability of 25 percent on account of his October 20, 1984 work injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits with those benefits to commence on December 2, 1985 and to be paid at the applicable rate of three hundred twenty-five and 40/100 dollars ($325.40). Permanent partial disability benefits shall not be payable during those periods following December 2, 1985 during which claimant received healing period benefits. Permanent partial disability benefits shall again commence on the first date subsequent to each period during which claimant received healing period benefits following December 2, 1985.

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to section 85.30.

That defendants pay the costs of this action including the costs of the transcription of the hearing proceeding.

That defendants file claim activity reports as required by Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of October, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD LEE MILLER, Claimant, vs. CITY OF DAVENPORT, Employer, Self-Insured, Defendant.	:	File No. 750109 A P P E A L D E C I S I O N

FILED
SEP 30 1988
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 12. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: "The evidence, taken as a whole, does not support the deputy's finding of only 5 percent industrial disability."

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issue and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant was a sanitation worker for the city of Davenport on November 10, 1983.

2. Claimant injured his back at work on November 10, 1983 when a refrigerator struck his low back.

3. Claimant aggravated his back in March 1984 in an attempt to return to his work as a sanitation engineer.

4. Claimant had preexisting back complaints but no long-term disability prior to his November 1983 work injury.

5. Claimant now has little or no objective neurological or other medical findings; claimant has moderate subjective findings generally of pain resulting from chronic muscle strain.

6. Claimant has not been assigned a permanent partial impairment rating but physicians agree he cannot return to one hundred percent normal functioning.

7. Claimant was able to perform his duties as a sanitation worker prior to November 10, 1983.

8. Claimant's unwillingness to pursue an aggressive physical fitness program is a significant factor in his continuing problems and demonstrates a lack of motivation to rehabilitate himself.

9. Claimant was 36 years old at the time of the hearing and has a work history as a heavy manual laborer.

10. Claimant completed ninth grade and has obtained a GED.

11. Claimant has no restrictions on walking, standing, or sitting.

12. Claimant has a 35 pound lifting restriction and has restrictions on bending, stooping and carrying.

13. Claimant's employer has retained him in city work and is committed to retaining him in city work.

14. Claimant has not attempted vocational rehabilitation.

15. Claimant has been able to perform job duties assigned him since his injury although he has experienced discomfort on entering and exiting vehicles.

16. Claimant is earning more now than he earned when injured and more than a city sanitation worker with ten years of city employment earns.

17. Claimant has been a city employee for twelve years.

18. Claimant would have less access to non-city jobs than

would a noninjured worker.

CONCLUSIONS OF LAW

Claimant has established a causal relationship between his injury of November 10, 1983 and the permanent partial disability on which he bases his claim.

Claimant has established an entitlement to an industrial disability of five percent on account of his injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant permanent partial disability benefits for twenty-five (25) weeks at the rate of two hundred ten and 83/100 dollars ($210.83). Defendant receive credit in the amount of three thousand one hundred thirty-eight and 40/100 dollars ($3,138.40) as stipulated by the parties.

That defendant pay any accrued amounts in a lump sum.

That defendant pay interest pursuant to section 85.30.

That claimant pay the costs of the appeal including the cost of the transcription of the hearing proceeding.

That defendant file claim activity reports as required by the agency.

Signed and filed this 30th day of September, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HANS R. MINOR, Claimant, vs. SWIFT INDEPENDENT PACKING, Employer, and NATIONAL UNION FIRE, Insurance Carrier, Defendants.	:	File Nos. 719614/686275 A P P E A L D E C I S I O N

FILED

DEC 30

IOWA INDUSTRIAL C

STATEMENT OF THE CASE

Claimant appeals and defendants cross-appeal from an arbitration and review-reopening decision denying permanent disability benefits and medical benefits for a work injury of October 26, 1981 but awarding ten weeks of permanent partial disability from a work injury of October 6, 1982.

The record on appeal consists of the transcript of the arbitration and review-reopening hearing and the exhibits listed in the prehearing report except claimant's exhibit 3. The admission of pages 1A through 1F of exhibit A which were excluded by the deputy will be discussed below. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are whether the deputy properly excluded certain evidence; whether the deputy erred in finding that there was no causal connection between the work injury of October 26, 1981 to claimant's neck and shoulder and a permanent disability; whether the deputy erred in finding that the work injury of October 6, 1982 was a cause of two percent permanent partial disability; and whether the deputy erred in finding that certain medical expenses were not causally connected to a work injury and claimant was not entitled to reimbursement of those expenses.

REVIEW OF THE EVIDENCE

The arbitration and review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant was employed by the defendant employer from February 1971 to October 1983 as a meat cutter. On October 26, 1981 claimant injured his neck and shoulder while at work when he fell from a platform approximately one foot off the floor and landed on his back and shoulder. The parties stipulated that this injury arose out of and in the course of his employment. Claimant also testified that he had lower back problems following a car accident in 1970. He stated that his left shoulder and left side of his jaw were injured in a boating accident in 1973.

Claimant testified that in October 1982 he noticed both of his hands going to sleep. This occurred during the time that he was trimming neck bones using a wizard knife.

Following claimant's fall at work on October 26, 1981 claimant was eventually seen by Albert D. Blenderman, M.D., orthopedic surgeon. Claimant returned to work on January 18, 1982. In October 1982 when claimant developed pain and numbness in his wrists he reported to the company doctor, Michael Jennings, M.D. Dr. Jennings referred claimant to a neurologist, Dennis Nitz, M.D., who in turn referred claimant to Alexander Kleider, M.D. Dr. Kleider performed carpal tunnel surgical decompression on the left wrist in November 1982 and on the right wrist in December 1982. In a letter dated May 2, 1984 Dr. Kleider wrote:

> I think it is quite reasonable to assume that his diagnosis of left carpal tunnel syndrome for which he first consulted me on November 4, 1982, was indeed related to his job. This is certainly something we see quite frequently amongst packing house workers.
>
> I would be extremely surprised if there was any "residuals or permanancy [sic]." I should point out to you, however, that I have not seen this man in a very long time.

[Exhibit A, page 6(a)]

Claimant's symptoms did not subside and he saw John J. Dougherty, M.D. Dr. Dougherty had been the treating doctor when claimant had his auto accident in 1970. An office note by Dr. Dougherty dated February 21, 1985 stated:

> His grip is good. He's got some callouses on his hands, and his hands are kind of dirty. Got a full range of motion of his wrist....
>
> ....
>
> Some pain in the cervical spine radiating into the left shoulder, questionable on one view if he

could have a little bit of narrowing of the C5-6 disc space, not demonstrated on flexion and extension films.

....

In conclusion, I'm not impessed [sic] with his shoulder. I'm not impressed with his neck. I don't think he's entitled to any disability. With reference to his hands, I previously stated he might be entitled to 2% disability with reference to both hands. His hands are dirty, had some callouses. He has been working with his hands, and I'm not impressed with any significant swelling.... I saw him first in May of 1983 with reference to both hands and wrists. At that time, nothing was said about his shoulders or neck. However, in February of 1984, he did complain of a little bit of discomfort in the left shoulder with mild discomfort along the medial border of the left scapula, but this was first noted on 2-21-84.

(Ex. A, pp. 4-5)

In a letter dated February 26, 1985 Dr. Dougherty wrote:

On reviewing my chart on this patient, we did have x-rays of his cervical spine in 1970, did have some straightening of his cervical spine at that time. As I mentioned he never said anything about his shoulder until the last time I saw him, about one year ago. Likewise, in reviewing the chart on the above patient, I dictated a letter to you July 13, 1984, which in my opionion [sic], he was entitled to no disability with reference to his neck and shoulder, and may be entitled to about 2% with reference to both hands. I would feel basically the same way. Certainly, in reviewing all the material sent to me, nothing was much mentioned about his shoulder and neck, although Dr. Blenderman did see him December 3, 1981 with reference to his neck and shoulder and hand. He said he fell at work on 10-26-81. He was last seen at that time by Dr. Blenderman on 1-25. He had been working since 1-18-82, and he dismissed him. I guess basically I feel he's not entitled to any disability with reference to his neck and shoulder girdle. With reference to his hands, I do feel that after a carpal tunnel release, he would be entitled to a little bit of disability with reference to his hand, 1-2% of each upper extremity. I basically saw no swelling in his hands, and I can't understand why he should have any swelling in his hands. His

> hands were also kind of dirty and had some callouses, so obviously he's been doing something.

[Ex. A, pp. 3(a-b)]

Claimant also received treatment at the direction of Horst G. Blume, M.D., a neurosurgeon, in 1985 and 1986. In a letter dated April 1, 1986, Dr. Blume stated:

> This patient was first seen on December 9, 1985 with complaints of neck pain which he described as the area the lower cervical spine, which occurs two or three times a day lasting two or more hours at a time. He also complained of some numbness in the left shoulderblade [sic] especially when his head is in the flexed position.
>
> He is also suffering from pain in both hands at the wrist area, both at the volar and dorsal aspects which he described as being constant....
>
> ....
>
> From the complete physical and neurological examination I came to the conclusion that the patient is suffering from carpal tunnel syndrome on the right side; status post carpal tunnel ligament resection with remaining pain and sensory deficit. The patient is also suffering from cervical ruptured disc with irritation and compression of the lower cervical nerve roots either at the level of C5/6 or C6/7. The only way to determine this is to do a cervical myelogram with or without CT scan in order to determine the extent of the cervical disc pathology.
>
> Both conditions, the carpal tunnel syndrome as well as the lower cervical nerve root irritation and compression signs on the right side are directly related to his injury in October, 1981, but the carpal tunnel condition is due to the years of work at Swift's Independent.
>
> ....
>
> It is my opinion within reasonable medical probability that the permanent partial disability to each hand is 10%.

[Ex. A, pp. 2(a-b)]

Part of Dr. Blume's April 1, 1986 letter was an itemized statement for claimant. That statement for charges from December 9, 1985 through March 10, 1986 totalled $655 and included a $150

charge for an examination and evaluation; 10 charges for therapy to the left cervical shoulder; and 8 charges for ultrasound to the left cervical shoulder. Claimant was examined on June 12, 1987 by Joel T. Cotton, M.D. In a letter dated June 12, 1987 Dr. Cotton wrote:

> This letter is in reference to Hans Minor, who was examined on June 12, 1987, in reference to neck, left shoulder, and bilateral hand symptoms....
>
> ....
>
> Clinical Impression: This patient's neurological examination at this time is normal. With reference to his hands, he has normal strength, normal sensation, and there is no atrophy of the distal median innervated muscles of either hand. He has, in addition, no tenderness over either median nerve at the wrist. There is, in my opinion, no evidence of current neurological damage in the distribution of either median nerve, and carpal tunnel syndrome cannot be substantiated at this time, either active or any residual of a previous carpal tunnel syndrome. In his upper extremities, specifically, his hands, there is no neurological impairment evident at this time; and he is thus, in my opinion, without any disability from a neurological standpoint, with reference to his hands. I am unable to state whether or not there is some element of orthopedic involvement in the hands causing his continued complaint of discomfort. His complaint of pain and numbness, in my opinion, however, is not on a neurological basis; and whatever previous carpal tunnel syndrome was present in the past is no longer evident.
>
> Mr. Minor has, in addition, no evidence of a cervical radiculopathy.... He has, in addition, a full and unrestricted range of motion of the neck, and movement of the neck is not accompanied by any subjective apparent discomfort at the time of this examination. In the presence of an otherwise entirely normal neurological examination, I find no evidence of neurological impairment with reference to the neck and shoulder. He is without any disability, in my opinion, from a neurological standpoint.... I would not see any reason to restrict this individual's physical activity in any way. I would not anticipate any significant additional medical attention will be necessary for the current complaints that this man has of neck pain, shoulder pain, or bilateral hand pain, numbness, and swelling. This individual appears to have achieved a state of permanency, as his symptoms are relatively unchanged for at least a period of one year or more.

[Ex. A, pp. 1(a,c)]

APPLICABLE LAW

The citations of law in the arbitration and review-reopening decision are appropriate to the issues and evidence. In addition, Iowa Code section 85.39 provides in relevant part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer and the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

ANALYSIS

The first matter to be resolved is whether the deputy properly excluded certain evidence, namely a medical report authored by Dr. Cotton (Ex. A, pp. 1A through 1F). The record in this matter reveals the following. The pretrial in this matter was held June 16, 1987 and the hearing was scheduled for July 7, 1987. The hearing assignment order dated June 18, 1987 indicated that medical records would not be admitted as exhibits unless they were timely served on opposing parties and that a list of proposed exhibits should be served no later than fifteen days prior to the date of hearing. The following exchange took place at the hearing on July 7, 1987:

> THE COURT: Again ruling is reserved until time of decision.
>
> MR. PLAZA: Your Honor, could I briefly make a record on that report?
>
> THE COURT: Sure.
>
> MR. PLAZA: I'm sorry to interrupt.
>
> MR. SMITH: It's my motion. Maybe I should make a motion first.
>
> MR. PLAZA: Okay. Sure.
>
> THE COURT: You dealt with it somewhat on your -- Go ahead, Harry.

MR. SMITH: The only thing I say is that I have -- I was placed in exactly the same situation with Dr. Cotton's report as Mr. Plaza was with the -- with the expert. I have the same time problems he has. I think we're just as busy as his office. That's all I've got to say.

MR. PLAZA: I disgaree [sic] that you were put in exactly the same situation. It was true that the examination only took place very recently. I wrote you on June 1st, 1987 telling you of the exam that was set for June 8th of 1987. I got the report -- I can't even think of the date. If the pretrial was held on the 16th, I got the report on the 15th, and drove to Council Bluffs to Dr. Cotton's office, picked it up, brought it back in and had it delivered to your office prior to the pretrial. It was in your office prior to the pretrial and available for review prior to the pretrial. I think that's -- that's -- that's the thing I guess I object to the most. I made an effort to try to get that to you so you could -- you could say if you needed more time. Geez, I need to depose Dr. Cotton. There's no deputy in the world that would have set this thing down for trial and say, "Harry, you've got to try the case." That's what I object to. I made an effort to get that over to you in time for that pretrial. You had the report. You knew he was seeing the man prior to the pretrial, and I think that's a world of difference between the two. That was the time for you to say No, I wasn't given -- ready to go. I wasn't given enough time.

MR. SMITH: I wasn't in town. I didn't get the report.

MR. PLAZA: I understand. I did all I could to get it to you so you had a chance to see it. I don't know what more I could do.

(Transcript, pages 31-33)

Division of Industrial Services Rule 343-4.13(86) provides:

> Method of service. Except as provided in 4.6 and 4.7, service of all documents and papers to be served according to 4.12 and 4.18 or otherwise upon a party represented by an attorney shall be made upon the attorney unless service upon the party is ordered by the industrial commissioner. Service upon the attorney or party shall be made by delivery of a copy to or mailing a copy to the last known address of the attorney or party, or if no address is known, by filing it with the division of industrial services. Delivery of a copy within this rule means:

> Handing it to the attorney or party; leaving it at the office of the attorney or party's office or with the person in charge of the office; or if there is no one in charge of the office, leaving it in a conspicuous place in the office; or if the office is closed or the person to be served has no office, leaving it at the person's dwelling house, or usual place of abode with some person of suitable age and discretion who is residing at the dwelling or abode. Service by mail under this rule is complete upon mailing. No documents or papers referred to in this rule shall be served by the industrial commissioner. (Emphasis added.)

Defendants' counsel's statement was that he delivered a copy of Dr. Cotton's report to claimant's counsel's office the day before the pretrial hearing. Claimant's counsel does not dispute that the report was delivered as defendants' counsel stated but merely asserts that he did not get the report because he was not in town. It is reasonable to conclude that Dr. Cotton's report was delivered within the meaning of rule 343-4.13. The report was served prior to the pretrial hearing and prior to the time required for service under the prehearing order. Dr. Cotton's report should not be excluded from the record and it will be considered in this decision.

The first issue to be resolved is whether the deputy correctly concluded that there was no causal connection between the work injury of October 26, 1981 (neck and shoulder) and a permanent disability. In discussing this issue the deputy stated:

> Although claimant testified that he fully recovered from the two prior injuries before the October, 1981, work injury, the evidence submitted in this case fails to demonstrate a causal connection between the work injury and claimant's continuing left shoulder and cervical spine complaints. First, the existence of the prior injuries requires this agency to rely heavily upon the opinions of experts. Only one physician in this case, Dr. Blume, opines that claimant's current cervical problems are due to the 1981 injury. However, at no time does Dr. Blume mention claimant's prior injuries in the reports he submitted in this case especially the prior left shoulder injury in 1973. Consequently, there is no way of knowing whether Dr. Blume knew of these prior injuries. Furthermore, despite being regularly treated by several orthopedic surgeons between January, 1982, and September, 1983, none of these physicians report that claimant was complaining of continuing neck and shoulder pain until September, 1983. In September, 1983, Dr. Dougherty opined that claimant's problems at that time were the result of "an aggravation of a preexisting condition." What is unclear from this report is what was the

preexisting condition, the auto accident, the boating accident or the work injury of October, 1981.

Finally, even if claimant had established causal connection, the preponderance of the evidence fails to demonstrate that claimant suffers permanent impairment from the neck and back condition. Although Dr. Blume felt that claimant has a herniated disc which requires further evaluation and tests such as a myelogram and a CT scan, two orthopedic surgeons, Dr. Blendermann [sic] and Dr. Dougherty, both do not feel that there is much of anything permanently wrong with claimant's neck and do not recommend further treatment.

The deputy's conclusion is further supported by the report of Dr. Cotton which is now evidence in the record. Dr. Cotton also disputed Dr. Blume's opinion that there was a need for neurosurgical evaluation of claimant's cervical spine. Dr. Blume's opinions are weakened by the fact that he attributed both conditions of the lower cervical and the right side carpal tunnel to an October 1981 work injury. The October 1981 incident involved the fall at work and the carpal tunnel syndrome, both left and right, related to activities in 1982. Dr. Blume's opinions appear to be based upon an inaccurate history and cannot be relied upon. Claimant has not proved that his current cervical problems are related to a work injury on October 26, 1981.

The next issue to be resolved is the nature and extent of disability resulting from the work injury of October 6, 1982 (carpal tunnel syndromes on the right and left). Claimant argues on appeal that the deputy erred because the determination of impairment was too low. Defendants argue on appeal that the deputy erred in making any award because there was no permanency. Dr. Kleider, who performed the surgeries on claimant for the carpal tunnel releases, stated that he would be surprised if there were any "residuals" or permanency. He formed that opinion approximately 18 months after the surgeries but admitted he had not seen claimant for a long time. Dr. Dougherty who treated claimant for the difficulties of the hands opined that claimant had a permanent impairment of one to two percent of the upper extremity. Dr. Blume, whose opinion as discussed above is based upon an apparent inaccurate history, opined that the permanent partial disability to each hand was ten percent. Dr. Cotton who examined claimant one time stated that there was no neurological impairment evident. Dr. Dougherty was a treating physician and he treated claimant for the carpal tunnel syndromes approximately five months after the release surgeries. Dr. Dougherty would be in the best position to know the nature and extent of claimant's disability. Therefore, Dr. Dougherty's opinion will be accepted. Claimant has proved that he suffered a two percent permanent impairment to each of the upper extremities. That impairment converts to a combined value of two percent of the body of a whole using the AMA guides.

The last issue to be resolved is whether claimant is entitled to reimbursement for Dr. Blume's bill. Claimant asserts that part of the bill should be paid as an examination pursuant to Iowa Code section 85.39. Claimant made application for the medical examination and the application was made a part of the contested case proceeding pursuant to a ruling dated July 9, 1985. Iowa Code section 85.39 does not contemplate treatment. The majority of Dr. Blume's bill was for treatment of claimant. Iowa Code section 85.39 contemplates payment of expenses for purposes of obtaining an evaluation of permanent impairment when there is a disagreement as to the extent of impairment. Dr. Blume's bill contains detail that on December 9, 1985 he billed $150 for a complete physical with a neurological examination and evaluation. Following that evaluation, Dr. Blume gave an impairment rating to claimant's hands. Claimant had previously been given an impairment rating of the upper extremity by Dr. Dougherty. Claimant should be reimbursed for the $150 evaluation that led to an impairment rating. However, the claimant should not be totally reimbursed for this bill. It should be noted that treatment and examination also related to claimant's cervical condition in 1985 and 1986 and that the condition was not causally connected to a work injury of October 26, 1981.

FINDINGS OF FACT

1. Claimant was employed by defendant employer from February 1971 to October 1983 as a meat cutter.

2. On October 26, 1981 claimant suffered an injury to his neck and left shoulder when he fell at work. This injury arose out of and in the course of his employment.

3. Claimant had had a boating accident in 1973 which injured his left shoulder and jaw.

4. After the claimant returned to work following the October 26, 1981 work injury he was treated by physicians for complaints of pain and numbness in claimant's hands. None of these physicians reported complaints of neck and shoulder pain until September 1983.

5. Claimant did not suffer any permanent impairment to his neck and shoulder as a result of his October 26, 1981 work injury.

6. Claimant operated a wizard knife, an electrically powered meat cutting tool, in his job with defendant employer during the summer and fall of 1982.

7. On October 6, 1982 claimant suffered injuries to his left and right wrists which arose out of and in the course of his employment.

8. Dr. Kleider performed carpal tunnel surgical decompressi on the left wrist in November 1982 and on the right wrist in December 1982.

9. The injury of October 6, 1982 was a cause of a two percent permanent partial impairment to each of claimant's upper extremities.

10. Dr. Blume's bill of $655 was for evaluation and treatmen of claimant's neck and shoulder problems beginning in 1985. A portion ($150) of the total bill was for purposes of rating an impairment.

CONCLUSIONS OF LAW

Claimant has not proved by the preponderance of the evidence that there is a causal connection between a work injury of October 26, 1981 and a permanent impairment to his neck and shoulder.

Claimant has proved by the preponderance of the evidence that there is a causal connection between a work injury of October 6, 1982 and a permanent impairment of two percent of each of his upper extremities.

Claimant has not proved by the preponderance of the evidence that all of the medical expenses of Dr. Blume should be reimburse Claimant has proved that he should be reimbursed $150.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant ten (10) weeks of permanent partial disability benefits at the rate of two hundred thirty-one and 06/100 dollars ($231.06) per week from January 24, 1983.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for permanent partial disability benefits previously paid, if any.

That defendants shall pay one hundred fifty dollars ($150) for the evaluation by Dr. Blume.

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

That defendants shall pay the costs of the arbitration and review-reopening proceeding along with the costs of the appeal including costs of the transcription of the hearing proceeding pursuant to Division of Industrial Services Rule 343-4.33.

That defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 30th day of December, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CONNIE KAY MITCHELL, Claimant, vs. IOWA MEATS PROCESSING, Employer, and CHUBB GROUP OF INSURANCE COMPANIES, Insurance Carrier, Defendants.	File Nos. 762771/818960 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying benefits from injuries alleged to have occurred March 22, 1984 and January 3, 1986.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 101. Neither party filed a brief on appeal.

ISSUE

This matter will be considered generally without any specified error. The issue of whether claimant suffered injuries that arose out of and in the course of her employment with defendant employer is dispositive of this matter.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted.

FINDINGS OF FACT

1. Claimant began work for Iowa Meats in December 1980.

2. Claimant claims injury through repetitious use of her arm and shoulder as well as complains of neck pain.

3. Claimant complained of burning of the left trapezius on March 23, 1982.

4. Claimant was off work from May 3, 1982 through August 1982 on account of that complaint.

5. Claimant treated for like complaints in spring and summer, 1984.

6. Claimant worked light-duty work during spring and summer, 1984.

7. Claimant complained of right shoulder, thoracic back pain while pulling a loin on January 3, 1986.

8. Claimant complained of neck and shoulder pain since lifting 60-pound boxes on August 21, 1986.

9. Claimant was off work for her neck, shoulder and extremity complaints from February 21, 1986 though April 13, 1986; from May 16, 1986 through May 20, 1986; and from July 9, 1986 through July 14, 1986.

10. Chubb provided Iowa Meats with insurance coverage from December 1, 1983 through February 1, 1986.

11. John Morrell was the successor employer to Iowa Meats. It is unclear when Iowa Meats was sold to John Morrell but it appears the sale took place in February or March 1986.

12. Chubb did not provide insurance coverage for John Morrell.

13. Claimant was terminated from employment with John Morrell on September 29, 1986 for the stated reason that the company could not provide claimant with work within restrictions which Dr. Van Patten imposed.

14. Pain did not prevent claimant from continuing to work at Iowa Meats during the period of coverage of the Chubb Group of Insurance Companies.

15. It is unclear whether pain prevented claimant from continuing to work during the time she was employed by Iowa Meats.

CONCLUSION OF LAW

Claimant has not established an injury which arose out of and in the course of her employment with Iowa Meats during the period of insurance coverage of the Chubb Group of Insurance Companies.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the costs of the appeal including costs of transcription of the arbitration hearing.

That claimant and defendants pay equally the costs of the arbitration proceeding pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 31st day of March, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEVIN J. MOUDRY, Claimant, vs. PROTIVIN FIRE DEPARTMENT, Employer, and IOWA MUTUAL AND TORNADO INSURANCE CO., Insurance Carrier, Defendants.	File No. 753632 A P P E A L D E C I S I O N FILED AUG 16 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

By order of the Industrial Commissioner filed April 25, 1988, the undersigned 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 appealed from an arbitration decision filed November 20, 1986, which found claimant sustained injuries in the nature of burns and a fracture of the scaphoid bone in his left wrist on November 26, 1982, which arose out of and in the course of his employment. The record on appeal consists of the transcript of the hearing; joint exhibits 1 through 10, inclusive; claimant's exhibits 11 through 20, inclusive; and, defendants' exhibit 21 and 22.

ISSUES

Defendants state the following issues on appeal:

1. The deputy industrial commissioners erred in their July 14, 1986 order and the November 20, 1986 arbitration decision in ruling that the defendants not be permitted to raise sections 85.23 or 85.26 issues as to a second injury which the claimant had never plead; and,

2. The deputy industrial commissioner in his order of November 20, 1986 erred by failing to rule that the claimant was barred from recovery from a second injury for failure to give

notice pursuant to section 85.23 or filing timely petition pursuant to 85.26.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be fully set forth herein.

Claimant, a member of the Protivin, Iowa volunteer fire department, was responding to a fire alarm on November 26, 1982, when he slipped and fell while running to the fire station. Claimant felt pain in his left wrist but continued with his duties as a fire fighter, entering a burning corn bin in order to install a sweep auger. While he was handling the auger, it tipped, pinning the fingers of his left hand to the floor causing burns. Claimant was taken by ambulance to the hospital where his burns were treated and where he complained of left wrist pain. It was assumed claimant's wrist pain was a result of the burns and no further inquiry of the pain was made at that time. Approximately five months later claimant was still complaining of left wrist pain. On June 6, 1983, his treating physician took x-rays and discovered a fracture which eventually was treated with a surgical fixation on January 7, 1985.

Claimant filed an original notice and petition January 30, 1984 pleading an injury date of November 27, 1982, that the injury occurred "responding to fire call on a grain bin" and that the left index and middle fingers over the middle phalangeal joints were the body parts affected or disabled. Claimant, obviously, made no specific mention of the wrist fracture and at no time amended his petition to specifically refer to the fracture.

In its answer, defendants admitted the injury date and how the injury occurred while denying the parts of the body affected or disabled. Defendants raised no affirmative defenses in the answer. Prehearings were held in this matter on October 31, 1984, January 9, 1985, August 7, 1985 and May 13, 1986. On May 15, 1986, a hearing assignment order was entered which confined the issues at hearing to whether claimant received an injury which arose out of and in the course of employment; whether there is a causal relationship between the alleged injury and the disability; whether claimant is entitled to temporary total disability or healing period benefits or permanent partial or permanent total disability benefits; and, section 85.27 benefits. On June 23, 1986 defendants filed an amendment to answer (and concomitantly an Application to Modify Hearing Assignment Order) stating:

> 3. The respondent and insurance carrier assert the following affirmative defenses, if, in fact, they represent affirmative defenses.

a) The employer and his representative did not have actual knowledge of the occurrence of an injury received within 90 days from the date of the occurrence of the injury, nor did the employee or someone on his behalf give notice within 90 days of the date of the occurrence of the injury pursuant to Code of Iowa Section 85.23.

b) Employee failed to commence original proceeding for benefits within two years from the date of the occurrence of the injury for which benefits are claimed in violation of Code of Iowa Section 85.26(1).

Defendants argued:

1. Claimant has never plead or amended the original notice and petition filed on 1-27-84 to raise the issue of a fractured wrist to which the respondent/insurance carrier could raise affirmative defenses.

2. The respondent/insurance carrier's amendment to answer represents an attempt to raise the issue of notice if in fact the claimant does attempt to introduce evidence of an injury over and above a burned hand.

3. There is no prejudice to claimant, as the facts have been known and cannot be altered on the issue of notice and what the respondent/insurance carrier is attempting to do by amendment to answer is to raise the issue well enough in advance of hearings so the claimant cannot claim prejudice or surprise at the time of hearing.

On July 14, 1985, then Deputy Industrial Commissioner David E. Linquist ruled:

Defendants have failed to give claimant timely notice that they were going to raise sections 85.23 or 85.26 as issues to be heard at the time of hearing. The undersigned, at the time of pre-hearing, asked the parties if they knew of any other issues. Defendants had over two years to amend their answer but failed to do so.

Furthermore, it is apparent that defendants do not understand that notice and the statute of limitations apply to an injury; not any particular impairment that might result from the injury.

WHEREFORE, defendants' amendment to the answer is not allowed. Defendants' application to modify the hearing assignment order is denied.

At hearing, defendants again raised their objections to any testimony on the wrist fracture stating:

> MR. BURNS: I am going to object to the testimony as to the nonunion. Testimony of the nonunion is irrelevant and immaterial in this case. It goes beyond the claimed injuries in the original petition. The original petition claims injuries for a burn, for left index and middle fingers of the phalangeal joints.
>
> He is claiming injuries from a separate time at a separate place. It is not a claim brought by petition for other injuries, other than the burns, and I object to the testimony.
> (Transcript, page 15)

After some discussion, the hearing deputy ruled:

> THE COURT: This is an administrative proceeding, technical rules of pleading generally don't apply here.
>
> I believe there is a Yeager versus Firestone case that is authority for that proposition, among others.
> (Tr., p. 18)
>
> For that reason I am going to rule the claim for anything dealing with the wrist fracture is properly before me for consideration, even though it is not specifically pleaded.
>
> I find the defense has had knowledge that the claim for the wrist fracture was made since June of '84 and has had adequate time to perform whatever discovery or investigation it deemed appropriate.
>
> For that reason, any and all objections to evidence dealing with the wrist fracture as alleged as far as being relevant and material, objections on that basis, are overruled, have been and will continue to be.
> (Tr., p. 19)
>
> I believe there was a previous attempt to modify the answer to cover the notice defense and statute of limitation defense. I believe that attempt was

overruled at that time and I am not inclined to reconsider or otherwise modify or change a ruling made by another deputy commissioner at an earlier time. So that prior ruling will stand.
(Tr., p. 20)

The deputy held that this case dealt with two separate and distinct injuries which arose out of the same occurrence and concluded defendants were liable for both the burns and the fractured wrist.

APPLICABLE LAW AND ANALYSIS

Division of Industrial Services Rule 343-4.22 dictates that the deputy commissioner or industrial commissioner may enter an order reciting any action taken at the prehearing conference or pursuant to any other procedures prescribed which will control the subsequent course of action relative to matters which it includes, unless modified to prevent manifest injustice. (Emphasis added) The hearing assignment order which was entered in this matter advised the parties that only those issues listed shall be considered at the hearing. Clearly the parties must have been aware that any issue not listed would not be heard. This is not only what the order dictates but has been the policy of the industrial commissioner's, according to rule, for some time. In Joseph Presswood v. Iowa Beef Processors (Appeal Decision filed November 14, 1986), it was held that an issue not noted on the hearing assignment order is an issue waived. The issues, namely Iowa Code sections 85.23 and 85.26, were, without dispute, not raised and were therefore waived.

The above cited rule provides one exception: that of manifest injustice. The question thus turns on whether it was a demonstration of manifest injustice for the deputy to deny claimant's application to modify the hearing assignment order. This question must be answered in the negative.

First, in Mefferd v. Ed Miller & Sons Inc., Thirty-third Biennial Report of the Industrial Commissioner 191 (Appeal Decision 1977), cited in Presswood, supra, it was held that failure to give notice pursuant to Iowa Code section 85.23 is an affirmative defense which therefore must be pled and which is subject to the prehearing process. See also Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941) which sets forth the rule for dealing with affirmative defenses. By not even attempting to amend its answer until after the prehearing process was complete and a hearing assignment order was entered, defendants attempted to obviate the entire process. There can be no abuse of discretion where the deputies who ruled on the matter were following the procedures governing pleadings.

Secondly, defendants clearly had the opportunity to amend

its answer to raise the affirmative defense much sooner in the contested case process and cannot now place the blame for its own failures on alleged manifest injustice. Even accepting defendants contentions that they were not aware claimant was seeking recovery for the wrist fracture until claimant's answers to interrogatories were served on June 1, 1984, this was almost two years before the hearing assignment order was entered and, even more interesting, five months before the first, of four, prehearing conference was held. It cannot be considered manifestly unjust to deny defendants' pleadings when they could have acted for such a considerable period of time and, for reasons not explained, elected not to.

Defendants, therefore, clearly failed to comply with the rule of pleading as found in Mefferd, supra, and pursuant to Division of Industrial Services Rule 343-4.22 and Presswood, supra, waived the issues of Iowa Code sections 85.23 and 85.26 for failing to make them issues by the prehearing process. There was no error in ruling defendants not be permitted to raise the issues.

However, even if defendants had been permitted to raise the defenses of Iowa Code sections 85.23 and 85.26, they would not be entitled to prevail on the issue. The deputy correctly stated that an application for arbitration of a claim for workers' compensation is not a formal pleading and is not to be judged by the technical rules of pleading; nor is the same conformity of proof to allegation necessary as in ordinary cases, citing Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Claimant appropriately brought his action for injuries resulting from "responding" to a fire call in November, 1982, notwithstanding the wrist fracture was not mentioned. Claimant did not limit his pleading to what occurred while he was fighting the fire but sufficiently extended his allegation so as to include his response time, i.e. the period of time it took to arrive at the fire station. The parties went through months, indeed years, of discovery. Claimant cannot be cited for failing to amend his petition when there was no question, if not from the original petition then from the interrogatories, he was claiming benefits for the wrist fracture. Defendants, on the other hand, did not put claimant on any notice they might be claiming 85.23 and/or 85.26 as a defense until the proposed amendment to the answer was filed.

Further, the deputy specifically found claimant to be a credible witness. Claimant testified he fell while running to the fire house with Kenny Fencil, that he told Kenny his hand hurt and that it must have happened from the fall. Claimant further testified no one was "in charge" of the fire scene. Sufficient notice was thus given to the employer. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985).

There being no other errors cited and none being found, the deputy's decision filed November 20, 1986, is affirmed.

FINDINGS OF FACT

1. While responding to a fire call on November 20, 1982, claimant fell fracturing his wrist while he was with another fire fighter.

2. Claimant complained of wrist pain to other volunteers.

3. Claimant later, while fighting the fire, sustained burns to his left hand.

4. Claimant filed an original notice and petition seeking compensation for injuries sustained while responding to the fire call and specifically listed his burn injury.

5. Claimant made known to defendants, at the very latest, in answers to interrogatories his intention to claim benefits for the wrist fracture.

6. A hearing assignment order was filed May 13, 1986, listing arising out of and in the course of employment, etc., as the only issues to be discussed at hearing pursuant to Division of Industrial Services Rule 343-4.22.

7. Defendants, on June 23, 1986, sought to amend its answer and modify the hearing assignment order by adding Iowa Code sections 85.23 and 85.26 as issues.

8. Claimant's motion to amend and application to modify were denied.

9. The hearing deputy denied defendants the opportunity to raise Iowa Code sections 85.23 and 85.26 at the hearing.

CONCLUSIONS OF LAW

1. An issue not raised at the time of prehearing is an issue waived at hearing absent manifest injustice.

2. It cannot constitute manifest injustice to deny defendants the opportunity to amend pleadings after orders are entered where defendants had two years prior to the filing of orders to do so and elected not to.

Wherefore, the decision of the deputy is affirmed.

ORDER

THEREFORE, itis ordered:

That defendants pay claimant one and five-sevenths (1 5/7) weeks of compensation for healing period at the rate of three hundred seventy-nine and 16/100 dollars ($379.16) per week with five-sevenths (5/7) weeks thereof being payable commencing November 26, 1982 and with one (1) week thereof payable commencing January 7, 1985.

That defendants pay claimant twenty point nine (20.9) weeks of compensation for permanent partial disability at the rate of three hundred seventy-nine and 16/100 dollars ($379.16) per week payable commencing January 14, 1985.

That defendants pay all past due amounts in a lump sum together with interest pursuant to section 85.30 for all amounts that were unpaid at the time the same became due.

That defendants pay claimant four thousand four hundred forty-one and 48/100 dollars ($4,441.48) for medical and travel expenses under section 85.27.

That defendants pay the costs of this action including this appeal pursuant to Division of Industrial Services Rule 343-4.33.

That defendants file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 16th day of August, 1988.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD A. MUSTO, Claimant, vs. JOHN MORRELL & CO., Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 843223 A P P E A L D E C I S I O N FILED APR 2 5 1989 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant disability benefits based upon an industrial disability of 50 percent as a result of an alleged injury on February 12, 1987.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 24. Both parties filed briefs on appeal.

ISSUE

The sole issue on appeal is the extent of claimant's permanent disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

Claimant suffered an injury to his back which resulted in a herniated disc at L4-5 level. A laminectomy and fusion

was performed on April 17, 1987. Quentin J. Durward, M.D., who performed the surgery, opined that claimant suffered a 10 percent permanent partial impairment to the body as a whole from the injury. John J. Dougherty, M.D., gave a functional capacity assessment in December 1987. Dr. Dougherty indicated that claimant should never lift or carry over 25 pounds, should only occasionally lift or carry 11 to 24 pounds, and could frequently lift or carry up to 10 pounds. Dr. Dougherty also indicated that claimant should not crawl, climb or reach above his shoulder level and only occasionally push, pull, bend or squat. Dr. Dougherty further indicated that claimant would be able to work over an eight hour day within these restrictions.

Claimant has a non-military work history of heavy labor. At the time of the arbitration hearing claimant had not returned to work with defendant employer. Claimant has restrictions that will limit jobs that are available to him. However, claiman does have above average intelligence. The possibilities of sedentary positions for claimant are better than other persons who do not possess claimant's intelligence and aptitude for such work. Claimant's reluctance to seek retraining is based upon his feeling that he needs to support his family.

Claimant was 39 years old when his work injury occurred. He should be in the most productive working years of his life. The vocational rehabilitation counselor hired by defendants opined that claimant had a loss of earning capacity of 5 to 20 percent.

In discussing whether claimant might be an odd-lot worker the deputy wrote:

> In the case sub judice, claimant made a reasonable effort to find suitable work. However, defendants have gone forward with the evidence and offered an opinion by a vocational rehabilitation expert that claimant is employable The odd-lot doctrine does not change the ultimate burden of proof and claimant has not shown that he is only able to perform services which are so limited in quality, depend- ability or quantity that a reasonable stable market for them does not exist.

The deputy correctly concluded that claimant was not unemplo able. Claimant's work history and his age indicate that he has suffered a significant loss of earning capacity. However, claimant does have the intelligence and the aptitude for sedentar work. When all relevant factors are considered claimant has suffered a loss of earning capacity of 40 percent.

FINDINGS OF FACT

1. Claimant was born September 20, 1947 and was 39 years old when the work injury of February 12, 1987 occurred.

2. The work injury of February 12, 1987, was a cause of a 10 percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no lifting or carrying over 24 pounds, only occasional lifting or carrying of 11 to 24 pounds and only repetitive or frequent lifting up to 10 pounds. Claimant can never crawl, climb or reach above his shoulder level and only occasionally can he push, bend or squat. However, claimant is able to work over an eight hour day within these restrictions.

3. Claimant has a high school education and completed two years training in computer programming in the late 1960's. Claimant's grades in school were poor and he barely got through the computer programming course.

4. Claimant has above average intelligence and aptitudes.

5. Claimant has prior experience in clerical and sedentary work in the U.S. Navy.

6. Claimant's work history has been in heavy physical labor outside of the military service.

7. At the time of the arbitration hearing claimant had not returned to work in any capacity.

8. Claimant is employable in the area of his residence.

9. Claimant has suffered a 40 percent loss of earning capacity as a result of the work injury of February 12, 1987.

CONCLUSIONS OF LAW

Claimant has established he suffered an industrial disability of 40 percent as a result of the work injury of February 12, 1987.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant two hundred (200) weeks of permanent partial disability benefits at the rate of two hundred eighty-nine and 16/100 dollars ($289.16) per week from October 18, 1987.

That defendants pay to claimant healing period benefits from April 16, 1987 through October 17, 1987 at the rate of two hundred eighty-nine and 16/100 dollars ($289.16) per week.

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

That defendants pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants pay the costs of this action including transcription of arbitration hearing pursuant to Division of Industrial Services 343-4.33.

That defendants file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 25th day of April, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEONARD PEARSON, Claimant, vs. IOWA CONCRETE PRODUCTS INC., Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 636855 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits as the result of an injury sustained May 6, 1980.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 20 inclusive.

ISSUES

1. Whether or not claimant could be awarded a healing period for his time off in 1985 and 1986.

2. Whether or not claimant's disability to his right shoulder should be compensated as industrial disability.

3. Whether claimant has serious industrial disability as a result of the 1980 injury.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment May 6, 1980, when he fell off a ladder onto a concrete floor landing on his left arm and shoulder.

2. As a result of the work injury, claimant has had multipl operations on the upper left extremity.

3. Claimant continues to perceive pain, a loss of grip and numbness in his wrist and hand and his left shoulder.

4. Claimant has a permanent partial impairment as a result of the work injury.

5. The residuals of claimant's impairment are centered on the upper left extremity and do not extend to the body as a whole.

6. Claimant has a permanent partial disability of 10 percent of the left arm.

CONCLUSION OF LAW

Claimant has established his work injury is the cause of permanent partial impairment of 10 percent of the left arm entitling him to 25 weeks of permanent partial disability benefits

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated rate of one hundred fifty-seven and 66/100 dollars ($157.66) per week commencing September 21, 1981.

That defendants shall receive full credit for all permanent partial disability benefits previously paid.

That accrued payments shall be paid in a lump sum together with statutory interest thereon pursuant to Iowa Code section 85.30.

That a claim activity report shall be filed upon payment of this award.

That the costs of this action are assessed against the defendants pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 13th day of December, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEONARD PEARSON, Claimant, vs. IOWA CONCRETE PRODUCTS INC., Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 783422 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits as the result of an injury sustained December 13, 1984.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 20 inclusive.

ISSUE

The issue is whether or not the bilateral carpal tunnel syndrome resulted in greater disability than awarded by the deputy.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issue and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

The mathmatical determination is based on converting the scheduled extremities to a body as a whole impairment rating. The hearing deputy followed claimant's trial brief in making the award. Claimant's brief on appeal is correct. It is apparent that claimant is entitled to recovery based on six percent of the body as a whole or 30 weeks of permanent partial disability.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment December 13, 1984 which resulted in bilateral carpal tunnel surgery.

2. Claimant's work injury was caused by his employment.

3. Claimant has a permanent partial impairment of five percent to two major members as a result of the work injury.

4. Claimant's disability is to a scheduled member.

CONCLUSION OF LAW

Claimant has established his work injury is the cause of a permanent impairment of six percent to two major members entitling him to 30 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(s).

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant thirty (30) weeks of permanent partial disability benefits at a rate of one hundred ninety-two and 31/100 dollars per week commencing April 21, 1985.

That defendants shall receive full credit for all permanent partial disability benefits previously paid.

That payments shall be paid in a lump sum together with statutory interest thereon pursuant to Iowa Code section 85.30.

That a claim activity report shall be filed upon payment of this award.

That the costs of this action are assessed against the defendants pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 13th day of December, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEONARD PEARSON, Claimant, vs. IOWA CONCRETE PRODUCTS INC., Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 814511 A P P E A L D E C I S I O

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision regarding an alleged injury on December 5, 1985 which found claimant failed to prove an injury arising out of and in the course of his employment.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 20 inclusive.

ISSUE

The issue on appeal is whether claimant sustained a gradual injury which culminated on or about December 5, 1985.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law contained in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. In May 1980, claimant sustained an injury arising out of and in the course of his employment, injuring his left shoulder.

2. Claimant continues to experience pain in the shoulder and sought additional treatment therefor with Dr. Robb Fulton in November 1985.

3. Dr. Fulton related the pain back to the incident wherein claimant fell off the ladder.

4. Claimant was evaluated by Dr. Jerome Bashara and Dr. Robert Breedlove, both of whom relate claimant's shoulder pain to the fall from the ladder as well as multiple surgical procedures performed on the upper left extremity.

5. Claimant relates his current pain to the 1980 fall.

6. Claimant incurred no new injury December 5, 1985.

CONCLUSION OF LAW

Claimant has failed to sustain his burden of establishing that he sustained an injury on December 5, 1985 which arose out of and in the course of his employment.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That costs of this action are assessed against defendants pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 13th day of December, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD PETERS, Claimant, vs. SWIFT INDEPENDENT PACKING, Employer, and NATIONAL UNION FIRE INSURANCE, Insurance Carrier, Defendants.	:	File No. 699108 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from review-reopening and rehearing decisions awarding payment of $100 of the $200 charge for a medical examination pursuant to Iowa Code section 85.39 and denying a payment of a $40 claim for medical treatment pursuant to Iowa Code section 85.27. Defendants cross-appeals from the review-reopening decision and a rehearing.

The record on appeal consists of the transcript of the review-reopening hearing; claimant's exhibits 1 through 4 and defendants' exhibits A through K together with the filings of the parties on rehearing. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant has established that the medical treatment he received from Mark Wheeler, M.D., on September 4, 1985 is causally connected to his work injury of March 3, 1982.

REVIEW OF THE EVIDENCE

The review-reopening and rehearing decisions adequately and accurately reflect the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

Division of Industrial Services Rule 343-4.22 governs actions taken at the prehearing conference and provides:

> The deputy commissioner or industrial commissioner may enter an order reciting any action taken at the conference or pursuant to any other procedures prescribed which will control the subsequent course of action relative to matters which it includes, unless modified to prevent manifest injustice.

This agency has consistently held that an issue not raised by the parties at the time of prehearing and listed on the hearing assignment order is waived. Presswood v. Iowa Beef Processors, Appeal Decision, November 14, 1986; Chamberlain v. Ralston Purina, Appeal Decision, October 29, 1987; Marcks v. Richman Gordman, Appeal Decision, June 29, 1988.

ANALYSIS

The hearing assignment order filed in this case on April 8, 1987 states one issue which was to be heard: causal connection of medical expenses claimed under Iowa Code section 85.27. No mention is made in the hearing assignment order of any issue involving Iowa Code section 85.39 or any issue involving authorization of treatment. This agency has consistently held that the hearing assignment order controls what issues may be heard at hearing. Therefore, the only issue which will be considered on appeal is whether claimant's medical treatment with Mark Wheeler, M.D., on September 4, 1985 is causally connected to the work injury of March 3, 1982. The deputy analyzes this issue in the ruling on motion for rehearing filed on August 4, 1987:

> The only medical evidence regarding the causal relationship issue was the office notes of Dr. Wheeler and a report of Dr. Wheeler of September 9, 1986. The office notes are ambiguous as they could be describing an ongoing condition of some duration as evidenced by reports of more frequent giving out of the knee with effusions, and that the knee will buckle and cause claimant to go down approximately once a month, or the note could be interpreted as reporting a new injury as evidenced by the statement, "he recently hurt it two or three days ago." In his report of September 9, 1986, Dr. Wheeler stated he could not comment on the original injury and recommended consultation with the original treating physician as regards

such questions. Likewise, lay testimony regarding claimant's knee condition was ambiguous as to whether the complaints related to an ongoing long-term condition or a new, independent injury. We find, that at best, the evidence on the causal relationship issue creates an equipoise. Such cannot carry claimant's burden. See Volk v. International Harvester Company, 252 Iowa 298, 106 N.W.2d 640 (1960).

For the above stated reasons, claimant has failed to establish by the greater weight of evidence that the medical treatment with Dr. Wheeler was causally connected to his work injury.

The decision of the deputy industrial commissioner assessed costs against both parties equally "but for the cost of transcribing these proceedings, which shall be borne wholly by claimant's counsel." Division of Industrial Services Rule 343-4.33, which authorizes the assessment of costs, refers only to parties, and does not authorize assessment of costs against a party's counsel. The costs of this proceeding will be assessed against the parties and not against counsel.

FINDINGS OF FACT

1. Claimant saw Dr. Wheeler on September 4, 1985.

2. Claimant gave a history of having had surgery following a slip and fall down some stairs that was consistent with claimant's work injury.

3. On September 4, 1985, claimant had continued and more frequent giving out of the knee with effusions, but no true locking.

4. Claimant's knee would then buckle and cause him to go down approximately once a month. Examination showed moderate effusion.

5. Claimant had "hurt" the knee two or three days prior to the examination.

6. Dr. Wheeler did not comment on the original injury.

7. Dr. Wheeler recommended that the original treating physician be consulted as regards the original injury.

8. Claimant's complaints could be consistent with a long-term injury or could be consistent with a recent injury.

9. Claimant had had left knee injuries prior to his work injury.

CONCLUSION OF LAW

Claimant has not established that the medical treatment he received from Dr. Wheeler on September 4, 1985 was causally related to his work injury of March 3, 1982.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

That each party pay their own costs of this proceeding and each party shall share equally the costs of the transcription of the review-reopening proceedings and appeal.

Signed and filed this 26th day of October, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHERRY PETERS, Claimant, vs. LAMONI AUTO ASSEMBLIES, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 809203 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding temporary total disability benefits as the result of an alleged injury on October 18, 1985.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 6; and defendants' exhibit A. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

A. Did claimant sustain an occupational disease?

B. Is claimant entitled to permanent partial disability based upon industrial disability?

C. In the alternative, is claimant entitled to a physical impairment?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

In addition, the following authority is noted:

Iowa Code section 85A.14 states: "No compensation shall be payable under this chapter for any condition of physical or mental ill-being, disability, disablement, or death for which compensation is recoverable on account of injury under the workers' compensation law."

ANALYSIS

Section 85A.14 states that claimant cannot be awarded compensation under Iowa Code chapter 85A if benefits would be recoverable under chapter 85. The record indicates that claimant is entitled to temporary total disability benefits under chapter 85 in the amount set forth in the arbitration decision. Claimant is not entitled to compensation benefits under chapter 85A.

The analysis contained in the arbitration decision is adopted in all other respects.

FINDINGS OF FACT

1. Claimant was employed by Lamoni Auto Assemblies, Inc., on October 18, 1985 and performed repetitive work with her hands as a splicer.

2. Claimant developed a carpal tunnel condition to her left hand which required a carpal tunnel release on December 13, 1985.

3. Claimant was unable to work as a result of the surgery from December 13, 1985 until March 3, 1986.

4. The carpal tunnel syndrome and resulting surgery to the left hand did not result in any permanent partial impairment.

5. Claimant also suffered tendonitis in her left foot that was caused by her employment but suffered no impairment from this injury.

6. Claimant incurred $67.20 in medical mileage and $169.00 in medical expense at Mercy Hospital.

7. Claimant also suffered from carpal tunnel syndrome to her right hand which occurred when she was performing duties as a homemaker prior to the time she was employed by employer and that this prior carpal tunnel condition to her right hand required surgery in 1980 or 1981 prior to her employment with employer.

8. Claimant continued to have increasing tendonitis symptoms on the dorsal aspects of her hands several months after she terminated her employment with employer and was removed from that work environment.

CONCLUSIONS OF LAW

Claimant did sustain the burden of proof by a preponderance of the evidence that she sustained an injury to her left hand and left foot which arose out of and in the course of her employment with employer.

The injury to the left hand was the cause of temporary total disability from December 13, 1985 until March 3, 1986.

The injury to the left foot was not the cause of any temporary disability.

Neither the injury to the left hand or the left foot was the cause of any permanent disability.

Claimant is entitled to temporary total disability benefits for the left hand from December 13, 1985 to March 3, 1986.

Claimant is not entitled to any permanent disability benefits.

Claimant is entitled to $67.20 in medical Mileage and $169.00 in medical expenses at Mercy Hospital.

Claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained an occupational disease.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant eleven point four two nine (11.429) weeks of temporary total disability benefits at the rate of one hundred fourteen dollars and 38/100 dollars ($114.38) per week commencing on December 13, 1985.

That defendants are entitled to a credit for fifteen point eight five seven (15.857) weeks of temporary total disability already paid to claimant at the rate of one hundred fourteen and 38/100 dollars ($114.38) per week prior to hearing for the period from December 13, 1985 to April 2, 1986.

That since the credit to which the defendants are entitled is greater than claimant's entitlement to benefits, there is no interest due under Iowa Code section 85.30.

That defendants pay to claimant sixty-seven and 20/100 dollars ($67.20) in medical mileage and one hundred sixty-nine dollars ($169.00) for the charges at Mercy Hospital.

That the costs of this action are charged to claimant pursuant to Division of Industrial Services Rule 343-4.33.

That defendants file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of March, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDOLPH PETERSON, Claimant, vs. WILSON FOODS CORPORATION, Employer, Self-Insured, Defendant.	:	File Nos. 741640/763174 795336 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from an arbitration and review-reopening decision awarding permanent partial disability benefits as the result of an alleged injury on April 23, 1984. The record on appeal consists of the transcript of the arbitration and review-reopening hearing; and joint exhibits 1 through 13, A through E, and G through L. Both parties filed briefs on appeal.

ISSUES

Defendant has failed to set forth the issues on appeal, as required by Division of Industrial Services Rule 4.28(b). Thus, the appeal will be considered generally and without regard to specific issues.

REVIEW OF THE EVIDENCE

The arbitration and review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration and review-reopening decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant did not introduce evidence that would prove either a medical or a nonmedical change of condition due to the stomach injury of September 22, 1980. The claimant's complaints

of pain due to the abdominal scar and adhesions have been generally the same since shortly after his return to work on February 1, 1981, until the time of this hearing.

2. Claimant did not present evidence from which it could be determined that claimant sustained a new injury on December 6, 1983, which arose out of and in the course of his employment with employer. Claimant described a muscle strain for which he did not seek immediate medical attention and from which he lost no time from work.

3. Claimant did introduce evidence from Keith O. Garner, M.D., and Mark E. Wheeler, M.D., that his employment injury was the cause of both temporary and permanent disability. Claimant gave a history of employment injury and the doctors provided claimant with treatment based on this history.

4. Claimant was off work pursuant to the orders of either Dr. Garner or Dr. Wheeler during the following periods of time:

(1)	4-24-84 to	5- 6-84	1.857 weeks
(2)	5- 9-84 to	6-17-84	5.714 weeks
(3)	10- 9-84 to	12- 2-84	7.857 weeks
(4)	4-18-85 to	5-20-85	4.714 weeks
		TOTAL	20.142 weeks

5. That claimant sustained an injury to his right elbow and his right shoulder on April 23, 1984.

6. That Dr. Wheeler awarded a five percent permanent functional impairment rating and Dr. Blume awarded a seven percent permanent functional impairment rating.

7. That claimant is foreclosed from performing jobs which he previously performed in the packing house.

8. That claimant has pursued vocational rehabilitation without any assistance from employer and has completed two years out of a four year college course to become an elementary teacher and coach.

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

CONCLUSIONS OF LAW

Claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained either a medical or a nonmedical change of condition with respect to the injury that occurred on September 22, 1980.

Claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained a new injury on December 6, 1983, which arose out of and in the course of his employment with employer.

Claimant did sustain the burden of proof by a preponderance of the evidence that he sustained both temporary and permanent disability from the injury to his right elbow and right shoulder beginning on April 23, 1984.

Claimant is entitled to 20.142 weeks of healing period benefits for the periods designated in the findings of fact as the times that claimant was off work.

Claimant sustained the burden of proof by a preponderance of the evidence that the injury of April 23, 1983, was an injury to the body as whole.

Claimant sustained an industrial disability of 20 percent of the body as a whole and is entitled to 100 weeks of permanent partial disability benefits.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay to claimant twenty point one four two (20.142) weeks of healing period benefits at the stipulated rate of one hundred ninety-eight and 84/100 dollars ($198.84) per week in the total amount of four thousand five and 04/100 dollars ($4,005.04) for the periods shown in the findings of fact which commence on April 24, 1984.

That defendant pay to claimant one hundred (100) weeks of permanent partial disability benefits at the rate of one hundred ninety-eight and 84/100 dollars ($198.84) per week in the total amount of nineteen thousand eight hundred eighty-four dollars ($19,884) commencing on May 6, 1984, intermittently and as interrupted by the succeeding periods of healing period benefits shown in the findings of fact.

That defendant is entitled to a credit for fifteen point four two nine (15.429) weeks of workers' compensation benefits paid prior to hearing at the rate of one hundred ninety-nine and 88/100 ($199.88) per week in the total amount of three thousand eighty-three and 95/100 dollars ($3,083.95); another eleven point four two nine (11.429) weeks of benefits at the rate of one hundred ninety-eight and 84/100 ($198.84) per week in the total amount of two thousand two hundred seventy-two and 54/100 dollars ($2,272.54); and twelve point seven one

four (12.714) weeks of benefits at the rate of one hundred ninety-eight and 84/100 dollars ($198.84) in the total amount of two thousand five hundred twenty-eight and 05/100 dollars ($2,528.05) for a total credit in the amount of ($3,083.95 + $2,272.54 + $2528.05) seven thousand eight hundred eighty-four and 54/100 dollars ($7,884.54).

That interest will accrue pursuant to Iowa Code section 85.30.

That defendant pay all accrued amounts in a lump sum.

That defendant pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

That defendant file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and file this 28th day of April, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. PHELAN, Claimant, vs. DUBUQUE PACKING CO., Employer, and SENTRY INSURANCE, Insurance Carrier, Defendants.	:	File No. 810124 A P P E A L D E C I S I O N

FILED
JAN 30 1989
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant any disability benefits as a result of a work injury.

The record on appeal consists of the transcript of the arbitration hearing and the exhibits listed in the prehearing report. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether there is a causal relationship between the alleged work injury and the claimed disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant was employed by defendant employer from September 8, 1975 through January 4, 1986. His job during 1984 was to work the graveyard shift. The job on each shift involved loading "offal" using a power lift for an hour and a half, cutting beef carcasses into two parts for approximately four hours, and pushing the carcasses on an overhead rail. The cutting involved use of a saw, overhead reaching, and repetitive use of both hands and shoulders.

Claimant testified that beginning in 1984 he began to experience pain and numbness in his neck, left shoulder and

arm. Claimant sought treatment from Daryl Doorenbos, M.D., and Wayne Meylor, D.C. He further testified that he resigned January 4, 1986 from work with defendant employer due to the neck and shoulder pain which he experienced. After claimant left his employment with defendant employer he eventually acquired employment in Alaska operating farm machinery approximately 100 hours per week.

Claimant revealed that he has seen chiropractor A. D. Krull, off and on since high school. He further revealed that he had been treated for neck pain in 1975 following a fall in the mud in a farm accident. He disclosed that he had received 30 chiropractic therapies in August 1977 following another accident.

An office note from Dr. Doorenbos' office dated June 4, 1984 reads in part:

> Mr. Phelan is 30-years-old, presents with a 6-month history of pain of his left elbow, along with pain of his left shoulder....Most of the pain's exacerbated with exercise and hasn't had much difficulty in sleeping with it; no history of trauma or injury could be elicited.

An office note by Dr. Doorenbos dated December 26, 1985 reads in part:

> Patient's in with pain in his back/left shoulder area; sometimes going down the left shoulder. It's been going on most of the time for the last 2 years. He's seen a number of doctors, and chiropractors, for the problem since that time...and most have related it to the physical activity required in his job, which I think is entirely possible.

A letter by Dr. Meylor dated December 26, 1985 reads in part:

> I have been treating Robert Phelan for a neck, arm, shoulder condition since November 10, 1984.
>
> In my opinion, the patient's neck, arm, shoulder condition is aggrevated [sic] by his employment, and is of a permanant [sic] nature.

APPLICABLE LAW

The citations of law in the arbitration decision are appropri to the issues and evidence.

ANALYSIS

The issue to be resolved in this case for purposes of this appeal is whether claimant has proved a causal connection between his alleged work injury and his claimed disability. Dr. Doorenbos merely indicated that it was possible that physical activity on the job could be the cause of claimant's problems. The office notes from Dr. Doorenbos' office which are 18 months apart indicate that there is no history of trauma or injury but that some doctors and chiropractors relate claimant's problems to physical activity of the job. The opinions of those doctors and chiropractors are absent from the record. Furthermore, these opinions were based upon an apparent assumption that there was a work trauma or injury. The assumption is inconsistent with the office note indicating that there is no history of trauma or injury. These opinions are based upon an inaccurate history and cannot be relied upon. Dr. Doorenbos' opinion which as stated was only a possibility in agreeing with those other opinions cannot be relied upon either.

Dr. Meylor offered an opinion that claimant's condition was aggravated by his employment. While Dr. Meylor thought the condition was aggravated, it is unclear whether Dr. Meylor thought that claimant's condition was permanent and caused by the aggravation of his employment.

These two medical opinions do not demonstrate that the probable cause of claimant's alleged permanent disability was a work injury. There is no medical evidence that can be relied upon that shows a causal connection between claimant's alleged work injury and his claimed disability.

Furthermore, claimant's own testimony indicates that he had had prior injuries to his neck in 1975 and 1977 unrelated to his work with defendant employer. He had had chiropractic treatments on and off since high school. Claimant's testimony and the medical evidence leaves considerable doubt as to whether there is a causal connection between a work injury and an alleged permanent disability. Claimant has not met his burden of proving the causal connection.

FINDINGS OF FACT

1. Claimant was employed by defendant employer from September 8, 1975 through January 4, 1986.

2. Claimant's work involved overhead reaching and the repetitive use of both hands and shoulders in the operation of a saw used to cut beef carcasses into two parts.

3. Beginning in 1984 claimant began to experience pain and numbness in his neck, left shoulder, and left arm.

4. Claimant had injuries to his neck in 1975 and 1977 which were unrelated to his employment with defendant employer.

5. Claimant had received chiropractic treatments for his neck off and on since high school.

6. Dr. Doorenbos thought that it was possible that claimant's condition was related to physical activity of claimant's job with defendant employer.

7. It is unclear whether Dr. Meylor was of the opinion that claimant's neck, arm, and shoulder condition was caused by his employment.

8. There is no causal connection between a work injury during 1984 with defendant employer and claimant's alleged permanent condition.

CONCLUSION OF LAW

Claimant has failed to prove by the preponderance of the evidence that there is a causal connection between his alleged work injury and the claimed disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the costs of this proceeding including the costs of the transcription of the arbitration hearing.

Signed and filed this 30th day of January, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GERALD F. PORTER,	:	
	:	
Claimant,	:	
	:	File Nos. 741973/750408
vs.	:	833246/833247
	:	833248
CROUSE CARTAGE COMPANY,	:	
	:	
Employer,	:	A P P E A L
	:	
and	:	D E C I S I O N
	:	
LIBERTY MUTUAL INSURANCE CO.,	:	F I L E D
	:	
Insurance Carrier,	:	
Defendants.	:	MAY 10 1989

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration and review-reopening decision denying permanent partial disability benefits as the result of an alleged injury on September 23, 1986; October 10, 1986; October 30, 1986; June 14, 1983; and July 14, 1983.

The record on appeal consists of the transcript of the arbitration and review-reopening hearing; claimant's exhibits 1 through 25, and 34; and defendants' exhibits A, B and C. Claimant's exhibits 26 through 30 and 32 were offers of proof only.

ISSUES

Claimant states the following issues on appeal:

1. The deputy industrial commissioner erred when he found that there was no change of circumstances such as to justify a reopening of the earlier award based on the injury of July 14, 1983.

2. The deputy erred when he found that the three incidents at work did not aggravate his preexisting condition and did not cause any additional disability.

3. The deputy erred in failing to find additional industrial disability and in failing to award healing period benefits.

4. The deputy erred in finding that the claimant lacked credibility as a witness.

REVIEW OF THE EVIDENCE

The arbitration and review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant suffered back injuries of June 14, 1983 and July 14, 1983; it has been established by an earlier decision of the industrial commissioner that the second injury resulted in a permanent industrial disability of ten percent.

2. The July 14, 1983, injury was to claimant's lumbar disc at the L4-5 level; the disc was surgically removed.

3. Claimant suffered exacerbations of his preexisting back injury on September 23, October 10 and October 29, 1986.

4. Claimant suffers from prominent narrowing of the neural foramen on the left between L5 and S1 and some narrowing on the right at L3-4; these areas of narrowing are caused by hypertrophied facets.

5. Claimant's hypertrophied facets are themselves osteoarthritic changes resulting from the aging process.

6. Claimant has failed to established any unanticipated worsening of his condition since the earlier decision of the industrial commissioner.

7. Claimant has failed to establish that his three exacerbations of 1986 aggravated his preexisting condition or caused any additional disability.

CONCLUSIONS OF LAW

Claimant has failed to establish a change of circumstances such as to justify a reopening of his earlier award based on the injury of July 14, 1983.

Claimant has failed to establish that his exacerbations of September 23, October 10, and October 29, 1986, are causally connected to permanent disability beyond his disability pre-dating those incidents.

Claimant has failed to establish temporary total disability resulting from the exacerbations of his 1983 injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That the claimant shall take nothing from this proceeding.

That the claimant shall pay the costs of the appeal.

Signed and filed this 10th day of May, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIRGINIA L. RALSTON, Claimant, vs. CIBA-GEIGY CORPORATION, Employer, and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 810125 A P P E A L D E C I S I O N FILED MAY 15 1989 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a ruling sustaining defendants' motion for summary judgment and dismissing claimant's claim on the merits with prejudice.

The record on appeal includes defendants' motion for summary judgment, defendants' statement in support of summary judgment which includes a deposition of the claimant, and claimant's resistance to motion for summary judgment. Both parties filed briefs in support of their position before the deputy but neither party filed a brief on appeal.

ISSUE

Claimant states no specific issue on appeal so this matter will be considered generally without any specified error.

REVIEW OF THE EVIDENCE

Based upon the record the following facts are not subject to any good faith dispute.

Gerald Ralston died on January 13, 1982, as a result of a motor vehicle accident that occurred in the state of Iowa.

Virginia L. Ralston, Gerald Ralston's surviving spouse and claimant, was paid workers' compensation benefits under South Dakota law.

There was no first report of injury, memorandum of agreement or denial of liability filed within the state of Iowa with regard to the death of Gerald Ralston.

The petition in this case was filed on January 8, 1986.

APPLICABLE LAW

Iowa Code section 85.26 (1981) provides in relevant 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.

(Emphasis added.)

Iowa Code section 86.13 (1981) provides in relevant part:

Any failure on the part of the employer or insurance carrier to file such memorandum of agreement with the industrial commissioner within thirty days after the payment of weekly compensation is begun shall stop the running of section 85.26 as of the date of the first such payment.

ANALYSIS

The issue is whether claimant's claim is barred by the statute of limitations found in section 85.26, supra. Defendants argue that this action is barred by subsection 85.26(1).

They also argue that stopping the running of the statute of limitations as provided in section 86.13 contemplates payments of Iowa workers' compensation. Claimant argues in response that defendants' failure to file a memorandum of agreement has the effect of stopping the running of the statute of limitations.

Claimant's injury was January 13, 1982, and the original petition in this proceeding was filed on January 8, 1986. Subsection 85.26(1) clearly bars the filing of an original proceeding because it was not brought within two years of the date of the injury.

No memorandum of agreement had been filed under Iowa law nor had a prior award for workers' compensation been filed in Iowa. Defendants' argument is persuasive that the statute of limitations found in subsection 85.26(2) contemplates an award for Iowa workers' compensation benefits. The benefits allegedly paid in South Dakota were not an award for Iowa benefits. Such payments were obviously not made pursuant to or in contemplation of the Iowa statutes. The payments were not payments contemplated under subsection 85.26(2). The provisions of subsection 85.26(2) are not controlling and therefore the provisions of section 86.13 cited above are not applicable.

If claimant's argument were accepted it would result in an unlimited period of time to commence an action in Iowa when a claimant has been paid compensation in another state pursuant to a decision or settlement. That situation would be an absurd result and contrary to orderly resolution of workers' compensation claims.

Claimant's action is barred by subsection 85.26(1) which is applicable. This conclusion is the same as the conclusion reached in Sawyer v. National Transportation Co.,(Appeal Decision March 11, 1988).

FINDINGS OF FACT

1. Gerald Ralston died on January 13, 1982, as a result of a motor vehicle accident that occurred in the state of Iowa.

2. Virginia L. Ralston, Gerald Ralston's surviving spouse and claimant, was paid workers' compensation benefits under South Dakota law.

3. There was no first report of injury, memorandum of agreement or denial of liability filed within the state of Iowa with regard to the death of Gerald Ralston.

4. The petition in this case was filed on January 8, 1986.

CONCLUSIONS OF LAW

This case is an original proceeding governed by Iowa Code section 85.26(1).

Claimant's claim is barred because the original petition was filed more than two years after the date of injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants' motion for summary judgment is sustained and claimant's claim is dismissed on the merits with prejudice. All costs of this proceeding are assessed against the claimant.

Signed and filed this 15th day of May, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD G. REED, Claimant, vs. VAN GORP CORPORATION, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 826902 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent total disability benefits as the result of an alleged injury on February 8, 1985.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibit 1; claimant's exhibit 1; and defendants' exhibits A, B and C. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. What is the causal relationship between the alleged work injury of February 8, 1985, and the claimed impairments and disabilities rated by Doctors Boulden, Thornton and Neff at 5-10% of the body, and by Dr. McClain at 15%.

2. Was there substantial evidence before the deputy commissioner to support an award of permanent total disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant was employed by defendant Van Gorp Corporation as a welder. Claimant's work involved both sitting and standing while welding. On February 8, 1985, a 600 pound pulley fell over and knocked claimant to the floor where he struck his left lower back and left side. Claimant experienced immediate pain and after a weekend of rest, returned to work but still experienced pain in his back and leg. Claimant testified he had not experienced any back problems prior to this injury.

Claimant visited Kurt Vander Ploeg, M.D., who treated claimant with physical therapy. Claimant attempted to return to work several times, but always experienced pain when he performed his duties. Claimant was referred to Dr. Berg and to William R. Boulden, M.D. A CAT scan by Dr. Boulden in May 1985 revealed a probable herniated disc at the L5-S1 level.

Dr. Boulden diagnosed a bulging rather than a herniated disc and gave claimant a five percent "disability" rating to the body as a whole. Scott B. Neff, D.O., concurred with Dr. Boulden's rating of five percent of the body as a whole and gave claimant permanent restrictions against repetitive bending, stooping or lifting. In October 1985 Dr. Neff recommended claimant consider retirement. Claimant left his employment on October 28, 1985, and did not return.

Claimant received an orthopedic evaluation by Daniel B. McClain, D.O., who opined that claimant suffered a 15 percent permanent partial impairment to the body as a whole as a result of the February 8, 1985 injury. Dr. McClain also imposed restrictions of no repetitive bending, stooping, or lifting with his back. Claimant also received an initial rating of five percent permanent partial impairment of the body as a whole from Donald W. Blair, M.D., which was later modified to ten percent of the body as a whole. However, it appears that Dr. Blair's revised rating of impairment was based in part on the fact that claimant was required to modify his activities, and not based solely on physical impairment. Since July 1986 claimant has been treated by Lawrence Merrick, D.O., who opined that claimant is totally disabled from gainful employment.

Claimant testified that subsequent to the injury he can no longer lift, bend or carry objects without pain. This was confirmed by Dr. Merrick. Claimant stated he cannot grip with his hands, cannot ride in a car for more than 20 miles at a time, has trouble sitting, walking, reaching or extending his arms, and cannot stand for a prolonged period of time. Claimant's prior work experience consisted of welding, heavy labor, heavy work as a foreman, and driving truck. Claimant was 57 years old at the time of the hearing and had an eleventh grade education.

Claimant underwent two evaluations by vocational rehabilitation specialists. Kathryn Bennett, who was retained by defendant

insurance carrier, reported that claimant had transferable skills but could not utilize those skills due to his permanent restrictions. A labor market survey in claimant's area of residence was conducted, and 21 employers were contacted but all were found to be reluctant to hire claimant "in light of his age, physical restrictions, and potential for future difficulti (Joint Exhibit 1, page 2) Bennett concluded that claimant was unemployable.

Bennett testified that claimant had made an unsuccessful search for work in his community. Claimant also testified that he has looked for work in his community, including work as a truck driver or in farming, but has not been able to locate work.

Carma Mitchell, another rehabilitation consultant, concurred with Kathryn Bennett's evaluation and testified that claimant could not return to his old job, could not transfer his skills to another job, and concluded that claimant is not competitively employable at any wage due to his age and restrictions. Mitchell's evaluation also mentioned the economic state in the area of claimant"s residence.

The parties stipulated that claimant received an injury on February 8, 1985, that arose out of and was in the course of his employment with defendant Van Gorp Corporation; claimant's rate is $247.10 per week; claimant's temporary total disability or healing period is limited to 69 days after February 21, 1985; permanency, if any, would commence August 29, 1985; and claimant's medical bills were causally related to claimant's condition, but the causal relationship between that condition and a work injury remained in dispute.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 8, 1985 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 essentiall 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).

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).

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) cited with approval a decision of the industrial commissioner for the following proposition:

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

In Parr v. Nash Finch Co., (Appeal Decision, October 31, 1980) the industrial commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results

in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, 288 N.W.2d 181. Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden, 288 N.W.2d 181.

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, 125 N.W.2d 251. Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not 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 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).

Expert testimony that a condition could be caused by a given injury coupled with additional, non-expert testimony that claimant was not afflicted with the same condition prior to the injury was sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966).

In determining industrial disability, the fact that employment opportunities are temporarily restricted due to a local economic situation is not a factor, in that such conditions affect all workers in the area equally, regardless of claimant's injury. Webb v. Lovejoy Construction Company, II Iowa Indus. Comm'r Rep. 430 (Appeal Decision 1984).

An older worker with a relatively low functional disability, little education, a history of former employment involving physical labor, and restrictions on his present ability to perform similar labor, may be totally disabled. Diederich, 219 Iowa 587, 258 N.W. 899.

The approach of later years when it can be anticipated that under normal circumstances a worker would be retiring is, without some clear indication to the contrary, a factor which can be considered in determining the loss of earning capacity or industrial disability which is causally related to the injury. Becke v. Turner-Busch, Inc., Thirty-fourth Biennial Report of the Iowa Industrial Commissioner 34 (Appeal Decision 1979).

ANALYSIS

Defendants on appeal raise as an issue whether the claimant's present condition is causally related to his work injury of February 8, 1985. Dr. McClain clearly causally connects claimant's present back condition to the February 8, 1985 injury. The reports of Dr. Boulden and Dr. Neff, although not explicitly causally connecting claimant's condition to the February 8, 1985 injury, do describe claimant's injury of that date, then proceed to diagnose claimant's condition. A fair reading of those reports also establishes that both Dr. Neff and Dr. Boulden attributed claimant's present back condition to his February 8, 1985 injury. Claimant testified that prior to February 8, 1985, he did not have back problems. Claimant has shown

by the greater weight of the evidence that his present back condition is causally connected to his work injury of February 8, 1985.

Defendants' second stated issue on appeal is whether claimant has shown his entitlement to benefits by substantial evidence. It is noted that the standard of review of a deputy industrial commissioner's decision by the industrial commissioner is de novo. Substantial evidence is the standard of judicial review of a final decision of this agency by a reviewing court. Iowa Code section 17A.19(8)(f). This issue will therefore be treated as an issue of whether claimant has shown entitlement to benefits by a preponderance of the evidence.

Claimant's injury is to the back and leg, and thus claimant's injury is an injury to the body as a whole. Industrial disability is determined by several factors. Claimant's permanent physical impairment is one such factor.

Both Dr. Merrick and Dr. Boulden described claimant's condition in terms of "disability" rather than impairment. The determination of industrial disability is for the trier of fact, and is not properly the subject of expert medical testimony. The ratings of Dr. Merrick and Dr. Boulden will be given little weight.

The remainder of the medical evidence is consistent in establishing that claimant can no longer perform the duties of the job he was performing on February 8, 1985. Claimant now has permanent restrictions on repetitive bending, stooping, and lifting. Claimant has been given permanent ratings of impairment of five percent of the body as a whole, ten percent of the body as a whole, and fifteen percent of the body as a whole. Claimant continues to have pain and weakness in his back and leg. Claimant has suffered a permanent physical impairment.

Claimant's age and education are also factors. Claimant was 55 years old at the time of the hearing. Claimant's age makes retraining or further education impractical.

Claimant's work experience is limited to heavy labor. He has no skills in occupations that do not require heavy labor. Two vocational rehabilitationists concluded that claimant is not employable. This evidence is uncontroverted. However, the conclusion of Carma Mitchell was based in part on local economic factors and her conclusion will be given less weight because of this factor.

Claimant's motivation appears to be good. He has cooperated with the vocational rehabilitation service providers, and has expressed a desire to return to work. Although claimant apparently requested a given salary level, there is no showing in the record that claimant refused to accept or consider a lesser

paying position. Indeed, the record shows that even jobs paying minimum wage were sought for claimant but without success.

Claimant has lost wages due to his injury by virtue of being unable to return to his prior job. Defendant employer apparently made no effort to provide claimant with light duty work.

Based on these and all other appropriate factors for determining industrial disability, it is determined that claimant is permanently totally disabled. Because of this determination, it is not necessary to determine if claimant had a preexisting disability or to apportion degrees of disability between the injury of February 8, 1985, and claimant's prior injury, if any. Claimant's injury of February 8, 1985, has rendered him permanently and totally disabled. It is, however, noted the record is not adequate to ascertain whether claimant's preexisting hearing and vision impairments or prior back injury caused any disability.

FINDINGS OF FACT

1. Claimant was employed by defendant employer as a welder.

2. Claimant's duties included welding heavy pulleys, and involved lifting, bending, and stooping.

3. On February 8, 1985, claimant received an injury which arose out of and was in the course of his employment when a pulley fell over onto him, injuring his back.

4. Claimant began to experience pain in his back and left leg when working.

5. Claimant received medical treatment from several physicians, and was given ratings of permanent partial impairment of five percent, ten percent and fifteen percent of the body as a whole.

6. Claimant was given permanent medical restrictions against repetitive lifting, bending, and stooping.

7. Claimant left work due to his medical condition on October 28, 1985.

8. Subsequent to his injury of February 8, 1985, claimant cannot lift, bend, or stoop, and experiences difficulty in sitting, standing, and walking.

9. Claimant's work experience is limited to heavy labor, welding, and truck driving.

10. Claimant's age at the time of the hearing was 57 years old.

11. Claimant has an eleventh grade education.

12. Claimant underwent two vocational rehabilitation evaluati both of which showed claimant was unemployable due to his physical restrictions.

13. Claimant's weekly rate is $247.10 per week.

14. Claimant has a permanent and total loss of earning capacity.

CONCLUSION OF LAW

Claimant's back condition is causally connected to his work injury of February 8, 1985.

Claimant has proven by a preponderance of the evidence that he is permanently totally disabled as a result of his injury on February 8, 1985.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant permanent total disability benefits at the rate of two hundred forty-seven and 10/100 dollars ($247.10) during the period of his disability and commencing August 29, 1985.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants are to pay the costs of this action.

That defendants shall file claimant activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 31st day of January, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DIANE RENDER, Claimant, vs. IOWA DEPARTMENT OF HUMAN SERVICES, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 765147 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant any benefits.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 3; and defendants' exhibits A through E. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant sustained an injury arising out of and in the course of her employment.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted.

The following additional comments are made to augment the analysis by the deputy which is adopted. Claimant argues in her appeal brief her hospitalization upon a petition of her supervisor was a physical injury that aggravated her emotional disorder. Claimant's argument is not convincing for several reasons. Claimant cites no authority on point for the argument. The tort law principle that confinement against one's will is actionable has not been extended in Iowa workers' compensation law to mean that such action constitutes a physical injury. There is no indication in the record that claimant was physically injured during the process. Furthermore, there is no indication that the legal procedure for an involuntary hospitalization was not followed in this case. Also, Robert E. Smith, M.D., board certified psychiatrist, testified that the people who sought the commitment acted appropriately. Last, no specific authority need be cited in this decision for the conclusion that merely because a person happens to be hospitalized while at work for a nonwork condition does not mean that the nonwork condition is a result of the employment. Claimant has not proved that she sustained an injury that arose out of and in the course of her employment.

FINDINGS OF FACT

1. During 1982 and 1983, Diane Render, claimant, was a resident of the state of Iowa, employed by the Iowa Department of Human Services within the State of Iowa.

2. Claimant has a long history of psychological problems dating at least as far back as 1974. She was hospitalized at least six different times for emotional problems prior to the commencement of calendar year 1982.

3. Claimant was hospitalized for an emotional disturbance in March 1982, where she was diagnosed as having depression and as having a borderline personality disorder.

4. The March 1982 hospitalization occurred at a time when claimant's employment was relatively harmonious and free from stress.

5. Claimant did not completely recover from the March 1982 episode.

6. The nature of claimant's preexisting, underlying psychological disorder is that it can become symptomatic, based upon stress, regardless of whether the stress is real or perceived.

7. When claimant's underlying psychological disorder becomes symptomatic, she has difficulty with interpersonal relationships.

8. The problems and stress that claimant encountered in her employment in 1982 and 1983 were a result of the manifestation of the symptoms of her underlying psychological disorder.

9. The evidence in the case fails to establish, by a preponderance of the evidence, that stress in claimant's employment was a substantial factor in bringing about the psychological disability which affected her commencing in 1982 and continuing up to the present time.

10. The evidence in the case fails to establish, by a preponderance of the evidence, that the stress to which claimant was subjected in her employment was unusual or was out of the ordinary when compared with the day-to-day stresses which are inherent in being gainfully employed.

11. Claimant's employment merely provided the setting in which claimant's psychological disabilities manifested themselves.

12. The assessment of this case made by Dr. Smith is correct.

CONCLUSIONS OF LAW

Claimant has failed to prove, by a preponderance of the evidence, that she sustained an injury which arose out of and in the course of her employment with the Iowa Department of Human Services.

Claimant has failed to prove that stress to which she was subjected in her employment with the Iowa Department of Human Services was a proximate cause of any emotional or psychological disability with which she has been afflicted during the time period commencing January of 1982 and running up to the present time.

Claimant has failed to prove that stress in her employment aggravated her preexisting condition.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the costs of this appeal including transcription of the arbitration hearing.

That all other costs of this proceeding are assessed against defendants pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 15th day of May, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES J. RICHARDSON,

Claimant,

vs.

JOHN DEERE,

Employer,
Self-Insured,
Defendant.

File No. 804544

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying any further benefits for permanent partial disability.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 35. Both parties filed briefs on appeal. However, defendant objected to claimant's untimely brief and it was previously ruled that claimant's brief would not receive consideration.

ISSUES

This matter will be considered generally without any specified errors. The issue considered by the deputy was the nature and extent of claimant's permanent partial disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment on or about April 4, 1985,

when he injured his back while picking up a box of hardware weighing approximately 150 pounds.

2. Claimant was in a serious motor vehicle accident August 8, 1981, in which he sustained eye damage, a broken neck and pelvis, and head injury and which affected his short term memory, his ability to comprehend recent events, instructions, directions and information, and which impacted his equilibrium.

3. Claimant, as a result of the motor vehicle accident, continues to suffer from impaired memory, comprehension and equilibrium.

4. As a result of the work related injury of April 4, 1985, claimant underwent a three segment laminectomy with transdural microscopic removal of a large extruded disc.

5. Claimant returned to work January 2, 1986, with restrictions not to lift more than 25 to 35 pounds.

6. Claimant returned to work in the same job he held at the time of his injury.

7. Claimant subsequently bid into other jobs and the last job he held was in production tool (crib) which fell within his medical lifting restrictions.

8. Claimant had difficulty performing his job because of the head trauma he sustained and brought these concerns to the attention of defendant.

9. Claimant made no mention that his back presented any problems in his continuing to work.

10. All of the positions which claimant held since his return to work on January 2, 1986, were within his medical restrictions, defendant had positions available that claimant could fill within these medical restrictions and as of the time of the hearing such positions were still available.

11. Claimant left work and accepted long-term disability benefits for a nonoccupational reason effective January 2, 1986.

12. Claimant sustained a permanent partial impairment as a result of the work injury of April 4, 1985.

13. Claimant's capacity to earn has been hampered as a result of the work injury of April 4, 1985.

14. Claimant has sustained a permanent partial disability for industrial purposes of 15 percent as a result of the work injury of April 4, 1985.

CONCLUSIONS OF LAW

Claimant has sustained an injury to the body as a whole as a result of the work injury of April 4, 1985.

Claimant has sustained a permanent partial disability of 15 percent for industrial purposes.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That as claimant has been paid all benefits to which he was entitled, claimant shall take nothing further as a result of these proceedings.

That claimant pay the costs of the appeal including costs of transcription of the arbitration hearing.

That all other costs are assessed against defendant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 15th day of May, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH L. SCHMITZ, Claimant, vs. AHRENS CONSTRUCTION COMPANY, Employer, and FIREMAN'S FUND INSURANCE COS., Insurance Carrier, Defendants.	File No. 834034 A P P E A L D E C I S I O N FILED JUL 21 1989 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying further permanent partial disability benefits as the result of an alleged injury on October 20, 1986. The record on appeal consists of the transcript of the arbitration hearing and claimant's exhibits 1 through 18. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: "Did the deputy industrial commissioner err in not awarding more than 10% permanent partial impairment to the leg as based upon A.M.A. guidelines of the evaluation for permanent partial impairment?"

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issue and the evidence.

ANALYSIS

Claimant, on appeal, argues that the deputy's award based on 10 percent impairment of the leg is inadequate. Basically, claimant argues that the A.M.A. Guides to the Evaluation of Permanent Impairment, which were relied upon by Rouben Mirbegian, M.D.,

do not take into consideration "extenuating circumstances." In this case, Dr. Mirbegian testified that claimant had undergone arthrotomy surgery, which resulted in the removal of claimant's medial meniscus. Dr. Mirbegian rated claimant's permanent partial impairment as 10 percent of the right leg.

Claimant asserts that Dr. Mirbegian testified that he removed claimant's right lateral meniscus as well as the medial meniscus. However, a review of the record indicates that the testimony in question can be read as a hypothetical answer as to claimant's probable impairment if both the medial and lateral meniscus were removed. This reading of the testimony is corroborated by the hospital surgery records. Dr. Mirbegian's testimony in this regard is, at best, confusing. Claimant bears the burden of proof to establish the extent of his disability. Based on the evidence in the record, claimant has only shown that this arthrotomy surgery resulted in the removal of the medial meniscus, and that claimant has demonstrated only a 10 percent present permanent partial impairment of his right leg.

Claimant also elicited testimony from Dr. Mirbegian, however, that indicated that claimant now has a "50/50" chance of developing arthritis in the future. Dr. Mirbegian stated that if claimant did develop arthritis in his knee, his rating of impairment would change to 20 percent.

Claimant argues that Dr. Mirbegian's statements as to the probability of future arthritis should be taken into consideration. However, only claimant's present disability can form the basis of an award of benefits. Basing an award on future possible developments of claimant's present condition would be engaging in speculation. Chapter 85, Code of Iowa, contemplates a review-reopening proceeding should claimant's condition deteriorate in the future.

Claimant notes that Dr. Mirbegian testified that the arthritis condition could develop as late as five to ten years in the future, and that in that event claimant would be foreclosed from pursuing a review-reopening by the statute of limitations. Chapter 85 of the Code of Iowa contemplates awards based on present circumstances. The legislature has designated a statute of limitations to cut off review-reopening claims beyond three years from the last payment of benefits. Although operation of the statute of limitations may seem harsh or arbitrary in some cases, it serves to preclude the re-emergence of cases indefinitely into the future. It is also noted that claimant is not certain to develop arthritis in the future, but rather such a change in condition is merely possible. Granting claimant an award based in part on the future development of arthritis might result in a windfall to claimant if the condition does not develop. For this and other reasons, claimant's award must be limited to his present condition. As the record indicates

a 10 percent present impairment of the right leg, the deputy's award of benefits will be affirmed.

FINDINGS OF FACT

1. The work injury of October 20, 1986, was a cause of a 10 percent permanent partial impairment to the right leg.

2. The medical expenses listed in the prehearing report are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of his work injury as a result of his work injury on October 20, 1986.

3. Defendants have voluntarily paid claimant benefits equivalent to 10 percent impairment of the right leg.

CONCLUSION OF LAW

Claimant has not established by a preponderance of the evidence entitlement to further permanent partial disability benefits.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay directly to Dr. Mirbegian the bill submitted in the prehearing report totaling seventy-five and no/100 dollars ($75.00).

That claimant shall pay the costs of this action.

That defendants shall file activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 2nd day of June, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LUCILLE A. SCHULTZ, Individually and as Executor of the Estate of Edwin A. Schultz,

Claimant,

vs.

DUNHAM-BUSH, INC.

Employer, Self-Insured, Defendant.

File No. 752752

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from an arbitration and death benefits decision awarding claimant death benefits, temporary total disability benefits, medical expenses, and burial expenses from an injury on November 14, 1983. The record on appeal consists of the transcript of the hearing; joint exhibits 1 through 20; claimant's exhibits A and B; and defendant's exhibit I. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether there is a causal connection between the work injury of November 14, 1983 and claimant's decedent's death.

REVIEW OF THE EVIDENCE

The arbitration and death benefits decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration and death benefits decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the deputy in conjunction with the issues and evidence presented is adopted.

The findings of fact, conclusions of law, and order of the deputy in the arbitration and death benefits decision dated November 23, 1987 are adopted herein.

FINDINGS OF FACT

1. Decedent experienced back pain on November 14, 1983 after he had lifted a large impeller in the course of his duties as a machine operator for employer, Dunham-Bush Company.

2. Decedent had prior back complaints and had done Williams exercises on a regular basis since 1971.

3. Decedent sought no medical treatment in the immediate interval following the November 14, 1983 incident.

4. Decedent continued to have difficulties through December 6, 1983 for which decedent's spouse treated him with back rubs. Decedent also continued to do his Williams exercises.

5. Decedent's spouse was a credible witness.

6. An impeller weighs approximately 75-80 pounds and is 14 inches in diameter and three inches thick.

7. On December 6, 1983, decedent changed a chuck on a turret lathe in the morning.

8. A chuck weighs approximately 75 pounds. Lifting is required in changing a chuck.

9. Decedent did not have symptoms immediately following lifting the chuck. Little apparent significance was attached to the lifting of the chuck.

10. Upon rising from a seated position at the end of his work break on the morning of December 6, 1983, decedent experienced leg numbness and foot drop.

11. Decedent subsequently sought medical treatment and was off work from December 15, 1983 through February 13, 1984.

12. Decedent returned to work until his May 3, 1985 retirement without restriction and apparently at the same duties he had held prior to the development of his back and leg condition.

14. Decedent continued to experience numbness and foot drop while myelographic studies and CT scan studies indicated a herniated disc at L4-5.

15. On August 21, 1985, decedent entered the hospital where Dr. Brodersen performed a laminectomy on August 22, 1985.

16. On September 5, 1985, decedent had fever, shortness of breath and complaints of chest pain.

17. On September 7, 1985, decedent died.

18. An autopsy revealed clots in the pulmonary artery with one clot representing a fusion of two smaller clots indicating that the clot was from a small vein, probably in the upper leg or pelvis.

19. Blood clots are known complications of surgery in the leg or pelvic area, especially in older persons.

20. Decedent was born July 30, 1919.

21. Dr. Summers is a board-certified neurologist with long-term expertise in that field as well as experience in orthopaedics.

22. Dr. Brodersen is a board-certified orthopaedic surgeon who has substantially less experience than has Dr. Summers.

23. Decedent's disc herniation was proximately caused by his November 14, 1983 work incident.

24. Decedent's laminectomy was occasioned by his disc herniation.

25. Decedent's death was caused by bilateral pulmonary emboli due to his laminectomy.

26. Decedent was off work and unable to seek other employment on account of his work-related injury from August 21, 1985 until his September 7, 1985 death.

27. Lucille Schultz is the surviving spouse of decedent.

28. Medical expenses to Glendon D. Button, M.D., Mach Ambulance Service, Mary Greeley Medical Center and Marshalltown Medical Center relate to decedent's work-related injury.

29. Decedent's reasonable burial expenses exceeded $1,000.

CONCLUSIONS OF LAW

Decedent received an injury which arose out of and in the course of decedent's employment on November 14, 1983.

The injury of November 14, 1983 was a proximate cause of decedent's disability and his ensuing death.

Decedent's estate is entitled to payment of temporary total disability benefits from August 21, 1985 through September 7, 1985.

Decedent's surviving spouse is entitled to benefits as provided in section 85.31(1)(a).

Decedent's claimant is entitled to payment of medical costs as enumerated in the order below.

Decedent's claimant is entitled to payment of reasonable burial expenses in the amount of $1,000.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant as surviving spouse of decedent Edwin A. Schultz benefits as provided in section 85.31(1)(a) at the rate of two hundred twenty-one and 42/100 dollars ($221.42) per week.

That defendant pay claimant as executor of the estate of Edwin A. Schultz temporary total disability benefits from August 21, 1985 through September 7, 1985 at the rate of two hundred twenty-one and 42/100 dollars ($221.42).

That defendant pay medical expenses as follows:

Glendon D. Button, M.D.	$257.50
Mach Ambulance Service	372.00
Mary Greeley Medical Center	286.00
Marshalltown Medical Center	35.00

That defendant pay claimant reasonable burial expenses in the amount of one thousand dollars ($1,000).

That defendant pay accrued amounts in a lump sum.

That defendant pay interest pursuant to section 85.30 as amended.

That defendant pay costs of this proceeding including the cost of transcription of the hearing pursuant to Division of Industrial Services Rule 343-4.33.

That defendant file claim activity reports as requested by the agency.

Signed and filed this 31st day of October, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL SCOLES, Claimant, vs. A. C. DELLOVADE, Employer, and KEMPER INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 838048 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying any benefits beyond what claimant had already been paid.

The record on appeal consists of the transcript of the arbitration hearing and claimant's exhibits 2 through 28 and 30 through 32. Neither party filed a brief on appeal.

ISSUES

Because neither party filed a brief on appeal this matter will be considered generally without any specified errors. The issues considered by the deputy were:

The extent of claimant's stipulated permanent disability and the commencement date thereof;

Whether claimant's asserted psychiatric/emotional problems are causally related to his injury of October 6, 1986 and, if so, whether defendants are liable for certain medical expenses pursuant to Iowa Code section 85.27;

The length of claimant's temporary total disability-healing period; and

Claimant's rate of compensation.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted.

FINDINGS OF FACT

1. Claimant sustained an injury arising out of and in the course of his employment on October 6, 1986, when an extension cord fell on him.

2. Claimant was treated by Edward R. Farrage, M.D., referred to R. Schuyler Gooding, M.D., who released claimant to return to work November 21, 1986, and who opined claimant would progressively improve with no ongoing disability.

3. Claimant declined to return to work feeling he was not yet ready.

4. Claimant began treating then with Patrick W. Bowman, M.D., who rendered a diagnosis of degenerative disc disease, found claimant to be eight percent permanently partially impaired as a result thereof, and released claimant to return to work on a trial basis March 9, 1987, imposing no specific restrictions.

5. Dr. Bowman opined claimant might incur back trouble if he continued physically demanding work.

6. Claimant declined to return to work and made little effort to find other employment.

7. Claimant sought treatment in May 1987 for emotional problems allegedly stemming from his injury.

8. Claimant's testimony lacks credibility.

9. Claimant has a one percent industrial disability as a result of his injury.

10. Claimant did not improve under the care of Dr. Bowman.

11. Claimant reached maximum medical recovery at the time he was released to return to work November 21, 1986, by Dr. Gooding.

12. Claimant's rate of compensation is $247.06.

13. Claimant has been paid 47 2/7 weeks of compensation at the rate of $271.19 per week totaling $12,283.49.

CONCLUSIONS OF LAW

Claimant has not established his emotional problems are causally connected to his injury of October 6, 1986.

Defendants are not responsible for medical expenses incurred in treating claimant's emotional problems.

Claimant has established a one percent permanent disability for industrial purposes as a result of his injury of October 6, 1986.

Claimant has established his entitlement to healing period benefits for the period from October 6, 1986 to November 21, 1986, inclusive.

Claimant's rate of weekly compensation is $247.06.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That as the prehearing report and order establishes claimant has been paid for more than the amount of this award, claimant shall take nothing further from these proceedings.

That costs of this action including the costs of transcription of the arbitration hearing are assessed against claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 15th day of May, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARVEY R. SMITH,

Claimant,

vs.

FRENCH & HECHT,

Employer,
Self-Insured,
Defendant.

File No. 750419

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding claimant 25 weeks of permanent partial disability benefits for the right arm and 7.5 weeks of permanent partial disability benefits for the left arm.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 30. Both parties filed briefs on appeal.

ISSUES

Defendant states the following issues on appeal:

I. Claimant's claim is barred by the applicable statute of limitations, Iowa Code section 85.26.

II. The deputy industrial commissioner's decision failed to give proper credit to respondent for prior payments made to claimant.

III. Claimant failed to meet his burden of proof that there was a causal connection between his alleged injury and disability.

IV. The deputy industrial commissioner erred in his award of disability of 3% of the left arm and 10% of the right arm.

REVIEW OF THE EVIDENCE

Claimant has worked for defendant employer from 1973 as a salvage grinder. Claimant described this work:

Q. What does a salvage grinder do?

A. Any rim or wheel that comes through inspection station, it is -- if it has a hole in it, it is welded, if it has excess weld on it, either the inside or the outside, it has to be ground down smooth. If there's -- it has to meet company specifications as far as quality so if there's any high welds, we call them high welds where there's tools that didn't actually cut the weld off properly, you grind that down smooth.

(Transcript, page 12)

On January 27, 1977, claimant injured his right hand at work for defendant employer when someone turned on a machine while claimant was using a wrench on that machine. Claimant was treated for this injury by William R. Whitmore, M.D. In his examination note, Dr. Whitmore states:

> 27 January 1977 - This patient seen in the emergency room at Mercy Hospital after an injury sustained at work. He was holding a wrench and it got caught in machinery injuring the lateral border of his right hand. Dr. Chamany examined the patient and obtained an x-ray and showed a severely comminuted but not markedly displaced fracture of the 5th metacarpal. Overlying this was a distally based U shaped laceration and flap over the dorsal ulnar border of the hand with some extension into the hyperthenar muscles. Tendon function was intact both flexion and extension. He does have sensory discrimination on the ulnar border of the little finger.
>
> I recommended admission and exploration of the wound with debridement and closure under general anesthesia and this was carried out about 2 hours later. No digital nerve interruption was found surgically but a considerable amount of grease was taken out of the wound. There was some contusion of the distally based flap and this was debrided.

(Joint Exhibit 1, page 1)

Dr. Whitmore opines in a July 6, 1977 note that claimant has a well healed scar over the ulnar border of the hand with no real limited function or impairment found. Dr. Whitmore reiterates this opinion in a May 8, 1978 letter to defendant employer: "I saw Mr. Smith on 6 July 1977 for final evaluation of his right hand. In my opinion he has no permanent physical impairment or limited physical function to the hand. He does have a scar in

the area which is well healed." (Jt. Ex. 2)

Claimant was also examined with regard to permanency resulting from the 1977 injury by Leo J. Miltner, M.D., on December 7, 1978. Dr. Miltner disagrees with Dr. Whitmore's assessment of claimant's impairment and opines:

> We must remember that this man is a year around worker. In cool or colder weather, he notices coldness and irritable sensitivity on outer side of right hand; this includes the fourth and fifth fingers and bit of the mid finger. It is not possible to have an impairment of this type in part of the hand without involving indirectly the rest or that right hand.
>
> According to my review of this record, there is some minor measurable symptomatic and functional impairment of the hand as a whole as stated. I believe that his subjective and objective complaints are credible.
>
> In view of the conclusions mentioned above, the extent of the disability should read, <u>a minimum of 5 to 10%</u> of the hand as a whole.

(Jt. Ex. 5)

Claimant was paid permanent partial disability benefits based on five percent of the hand ($1,653). Claimant returned to work at his job as a grinder.

In 1981, claimant began experiencing numbness in his right hand which awakened him at night. On May 8, 1978, claimant went to Dr. Whitmore concerning this problem. Dr. Whitmore advised claimant that "this may be something different or something not related to his injury, such as a carpal ulnar tunnel syndrome. Advised him that nerve conduction and EMG studies might be helpful...." (Jt. Ex. 23, p. 2). On follow-up, Dr. Whitmore advised that the nerve conduction studies failed to confirm the diagnosis of carpal tunnel syndrome but felt that it may be too early to show anything on the tests. Claimant continued to have numbness in his right hand and went to the emergency room on June 11, 1982 complaining of numbness. On November 16, 1983, he again returned complaining of numbness:

> 11-16-83 He comes in again today, having continued problems with his right hand. About a month ago he woke up with considerable numbness in his right hand but especially in the long and ring fingers. He saw Dr. Beckman, who first gave him some Motrin and then tried a splint. Since then he

has been waking, maybe 2 dozen times with numbness in his hand. He rubs it, shakes it and it improves.

On exam, he has full grip. He has a well healed scar over his area of injury. He has diminution of sensation of the tips of the index, long and ring finger. Palpably he has some softening and loss of mass of the thenar emminence of the right hand. He has a positive Tinel sign over the median nerve. Acute flexion of the wrist maintained with some force starts the onset of paresthesia in the long and ring finger.

IMPRESSION: Carpal tunnel syndrome, right wrist.

Don't feel that this has anything to do with his old injury. I recommended carpal ligament release, to be done on the 28th of November, St. Luke's Hospital. Probably will explore the ulnar nerve at the same time. This was discussed with him and he agrees to surgery.

(Jt. Ex. 23, p. 3)

Claimant underwent surgery, release of volar carpal ligament right wrist, on November 28, 1983. Claimant was released to return to work without restrictions on January 16, 1984.

On July 11, 1984, claimant returned to the doctor with problems with his left hand:

7-11-84 In for examination in regard to his left hand. It started bothering about one month ago with going to sleep. He was taken off his grinding job and complained of his whole hand being numb and shooting up pains at the arm. Wakes him up at night occasionally but actually he tells me that pain has been significant only one time that lasted for 4 months and possible 3 times a week for shorter periods of time. It does not wake him at night.

He has had occasional short jabs of pain in the palm of his right hand.

On exam shows good motion, the scar in the right wrist is well healed.

Feel we should rule out carpal tunnel syndrome in this man since there seems to be some conflict involved and would recommend objective testing in this manner.

> Advised him today however that I do not think that the symptoms were of sufficient magnitude to warrant any expectation of surgery. Nerve conduction studies arranged and will get in touch with him after those are completed.

(Jt. Ex. 23, p. 5)

Claimant continued to have difficulties with his left hand and on September 26, 1984 he was scheduled for left carpal tunnel release:

> 9-26-84 Mr. Smith has had increasing symptoms of carpal tunnel bilaterally left greater than right. On examination he has good finger range of motion. Two point discrimination is 3-4 mm. throughout. There is no thenar muscle atrophy. Phalen's test and Tinel's test are moderately positive over the median nerve at the wrist. A copy of Dr. Collins' consultation note is included in the chart. He suggested repeat electrodiagnostic studies and these were performed on 9-21-84. These studies still show increased insertional activities in the C8-T1 distribution and in addition the sensory and motor latencies of both median nerves are prolonged with respect to normal and with respect to the electrodiagnostic studies performed on 7-12-84. We are going to proceed with left carpal tunnel release under local anesthesia as an outpatient when convenient with him and at the same time we will inject the right carpal tunnel with Cortisone. He is not having symptoms referrable to the neck region currently and we will defer investigation of this presently.

(Jt. Ex. 23, p. 6)

This surgery was performed on October 4, 1984. Claimant was released to return to work with restrictions of no repetitive lifting or gripping and released without restriction on December 6, 1984. In an October 22, 1984 letter, Richard R. Ripperger, M.D., who offices with Dr. Whitmore and performed claimant's October 1984 carpal tunnel surgery, opines that "Mr. Smith's carpal tunnel syndrome in the left and right wrists is aggravated by his work at French and Hecht." (Jt. Ex. 23, p. 1)

In a December 18, 1985 note Dr. Ripperger opines that claimant has a 10 percent impairment to the right upper extremity and a three percent impairment to the left upper extremity.

In a June 23, 1983 letter to claimant's attorney, Dr. Whitmore clarifies a statement he made in the November 16, 1983 clinical

note:

> On the 16th of November 1983, in my clinical notes, I stated "Don't feel this has anything to do with his old injury". I said nothing about a new injury but felt that the condition he was complaining of at that time was not related to his laceration and fracture in 1977.

(Jt. Ex. 25)

Claimant described the grinding job as requiring him to turn rims weighing up to 175 pounds by himself using his wrists. Claimant opined that he had to grind 300 to 350 rims per day. Claimant also opined that the gripping of the rims gave him the most difficulty. Claimant testified that he is right-handed. Claimant stated that after the 1983 surgery he began using his left hand more than the right and subsequently began having problems with his left hand.

Claimant related that when he was off work from October 4, 1984 through December 10, 1984 he received group insurance benefits totaling $1,302. Claimant currently works for defendant employer as a janitor. Claimant opined that his right hand lacks grip strength and motion and stated that he has numbness in the finger tips of his right hand. Claimant identified the attachment to the prehearing report as accurately reflecting mileage he traveled to and from doctors for treatment of his right or left wrist. Claimant testified that he did not recall marking the box on joint exhibit 22 indicating that his condition was not related to his employment. Claimant stated that his left arm is weak and gets tired easily. Claimant denied that he currently experiences any numbness in his left arm or hand. Claimant could not recall stating in his deposition that he had no left arm or hand problems.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received injuries 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).

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 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.

In McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985), the court affirmed the commissioner's use of the cumulative injury rule to decide the issues of time of injury and liability of the appropriate carrier in factually appropriate cases. Regarding the issue of time of injury, the court states:

> The third subsidiary question relates to the effect of the finding of cumulative injury upon the two-year statute of limitations: when did the "injury" occur for time-limitation purposes? Again we have a legal question.

> Larson cites two rules which have been applied in the gradual injury cases: the injury occurs when pain prevents the employee from continuing to work, or when the pain occasions the need for medical attention. Larson, § 39.50, at 7-350.28.
>
> We incline toward the former of these alternatives; clearly the employee is disabled and injured when, because of pain or physical inability, he can no longer work. (Citations omitted)
>
> Smith's wrist pain finally compelled him to give up his job about May 1, 1981. We hold that he had one compensable injury, that it occurred for time limitation purposes when Smith gave up his job, and that the two-year statute of limitations then began to run. He commenced this compensation proceeding in August 1981, within the limitation period. The proceeding is not barred by section 85.26(1).

Id. at 374-5.

ANALYSIS

Defendant contends that the statute of limitations on claimant's right arm injury began to run in 1981. For support of this contention, defendant cites the following testimony:

> Q. At times when your hand would hurt so bad at night that you would wake up, would you miss work the following day?
>
> A. There's a good chance of it, yes.
>
> Q. So if you were complaining of waking up to the doctor at night in August of 1981, would you have missed some work at that time or prior to that time because of the numbness in your right hand? Is there a good chance of that?
>
> A. Yes.

(Tr., p. 46)

> Q. It was my understanding that you said that if you were being woken up, you probably were missing work as early as what the records show and that would be August of 1981, Exhibit 1, page two.
>
> A. I would believe so.

(Tr., p. 57)

Defendant presents no other evidence to establish the dates when claimant was off work, the length of time claimant was off work or the reason claimant was off work. As the statute of limitations defense is an affirmative defense, defendant has the burden of establishing by the greater weight of evidence that claimant's claim is barred by the statute of limitations in section 85.26. Dart v. Sheller-Globe Corporation, II Industrial Commissioner Report 99, 101 (Appeal Decision 1982). Merely asking claimant if there is a good chance he may have missed some work does not satisfy defendant's burden. In McKeever, the court held that a claimant's injury arises for purposes of application of the cumulative injury rule when because of pain an employee can no longer work. In this case, the record reveals that claimant was no longer able to work because of pain on November 3, 1983 when a Dr. Beckman (no first name in record) restricted claimant's work to no use of the right wrist. Claimant's petition was filed timely on December 15, 1983.

Defendant also argues that claimant's carpal tunnel syndrome in the right arm is not related to repetitive trauma but rather is related to claimant's 1977 injury. In support of this argument, defendant refers to Joint Exhibit 13 in which Dr. Whitmore indicates that claimant's right carpal tunnel syndrome is related to claimant's 1977 injury. This is contrary to Dr. Whitmore's November 16, 1983 clinical note in which he states: "Don't feel that this has anything to do with his old injury." See Joint Exhibit 23, page 3, and Dr. Whitmore's June 25, 1985 letter in which he states: "I said nothing about a new injury but felt that the condition he was complaining of at that time was not related to his laceration and fracture in 1977." See Joint Exhibit 25. Dr. Whitmore's written statements in the 1985 letter and 1983 clinical note are found to be more credible and more consistent with the record as a whole than the statement on the form.

Defendant makes a similar argument with respect to causal connection of claimant's left carpal tunnel syndrome by contending that joint exhibit 22 reveals that claimant's left carpal tunnel syndrome is not related to his employment. Defendant also refers to Dr. Miltner's statement that claimant had problems with his right hand brought on by the use of a hammer at home. Defendant does not suggest how this hammering affects claimant's left carpal tunnel syndrome.

Contrary to defendant's argument, Dr. Ripperger opines in his October 22, 1984 letter that "It is my opinion that Mr. Smith's carpal tunnel syndrome in the left and right wrists is aggravated by his work at French and Hecht." (Jt. Ex. 23) It is a well settled principle that an aggravation of a preexisting condition is compensable. The greater weight of evidence establishes that claimant's left carpal tunnel syndrome is related to claimant's employment with defendant employer.

Defendant claims that the deputy erred in awarding claimant permanent partial disability benefits based on a three percent impairment to the left arm. Defendant maintains that claimant was not truthful in his testimony concerning left arm condition. At his deposition, claimant indicated that he had no problems with his left hand, but at the hearing claimant related that his left arm is weaker and gets tired easier. In his impairment evaluation, Dr. Ripperger states: "He [claimant] states that he is having no problems with his left hand or wrist." (Jt. Ex. 27) This statement reflects that Dr. Ripperger considered in his rating of claimant's left upper extremity impairment that claimant was not experiencing difficulty with his left hand or wrist. Claimant's testimony does not defeat the deputy's finding that claimant has a three percent permanent impairment to the left upper extremity. The greater weight of evidence establishes that claimant suffers a 10 percent permanent impairment to the right upper extremity.

Defendant seeks a credit pursuant to Iowa Code section 85.38(2) for sick leave benefits paid to claimant. This issue was not listed on the hearing assignment order and was not decided by the deputy. Therefore, the issue of credit under section 85.38(2) is not properly before this agency. Moreover, defendant has not made a record sufficient to establish that the sick leave benefits were paid under a qualifying group plan under section 85.38.

Failure to properly raise the issue of 85.38 credit was considered by the Iowa Supreme Court in Krohn v. State, 420 N.W.2d 463 (Iowa 1988)

> Krohn urges that the State should not be permitted to satisfy its obligations for medical and hospital expenses through the credit device outlined in section 85.38(2). This contention is premised on his assertion that the State waived its right to do so by indicating in a prehearing report form that a section 85.38(2) credit was not involved. We do not believe that this circumstance serves to deny the State the benefit of the statutory credit. When an employer's obligation for medical and hospital services under the workers' compensation laws has been established, section 85.38(2) appears to provide a method by which the employer may act unilaterally to satisfy those liabilities.

Id. at 465.

This issue was also considered by the industrial commissioner in Olson v. Department of Transportation, Appeal Decision (filed October 30, 1985):

The final issue claimant presents here is whether the deputy erred in allowing the issue of credit under section 85.38 to be presented at hearing. Claimant argues that this issue was not raised by defendant employer at the time the final prehearing order was filed, and therefore employer waived the right to raise it at the hearing.

The question involved here is analogous to the question raised in cases where employer-overpayment of healing period benefits has occurred. In those cases it has been found that not allowing an employer credit for mistaken overpayment would "unjustly enrich the claimant" without serving a specific policy of the statute. See United Concern For Children v. Caputo, 320 N.W.2d 643, 645 (Iowa App. 1982). To deny the defendants here the right to credit for defendants' failure to raise the issue at prehearing would be unjust and would give claimant an unfair windfall. Therefore, defendant employer is allowed to take whatever credit they believe is appropriate for long term disability payments in accordance with Iowa Code section 85.38(2), and if claimant believes the credit taken is improper, he may petition this agency for relief.

Defendants shall not take a credit in this case because of claimant's use of his vacation entitlement.

Regarding sick leave benefits, defendants may take whatever credit they believe is appropriate and if claimant believes the credit taken is improper he may petition this agency for relief. See Iowa Code section 85.38(3).

Although the issue of credit under section 85.38 is not properly before this agency, defendant will be allowed to take whatever credit they believe is appropriate, and if claimant believes the credit taken is improper, he may petition this agency for relief.

Defendant also seeks a credit for permanent partial disability benefits paid to claimant for the 1977 injury. As the 1977 injury has already been found to be not causally related to claimant's present disability, defendant is not entitled to credit for permanent partial disability benefits paid for claimant's 1977 injury.

FINDINGS OF FACT

1. Claimant was employed by defendant as a salvage grinder which required him to use his wrists to turn up to 350 wheel rims per day, each wheel rim weighing from five to 175 pounds.

2. Claimant operated a hand-held air grinder.

3. Claimant first noticed numbness in his right hand in 1978.

4. On November 3, 1983, claimant was restricted to no work involving repeated pronation and supination of the right wrist.

5. On November 16, 1983, claimant was diagnosed as having carpal tunnel syndrome in the right wrist and on November 28, 1983, surgery was performed to treat the carpal tunnel syndrome.

6. Claimant was off work as a result of the right carpal tunnel surgery from November 28, 1983 through January 16, 1984.

7. As a result of the right carpal tunnel syndrome, claimant suffers a 10 percent permanent impairment to the right upper extremity.

8. Claimant sustained a work injury on November 3, 1983 resulting in right carpal tunnel syndrome.

9. Claimant returned to work as a salvage grinder after the right carpal tunnel surgery and began favoring his left hand.

10. Claimant reported numbness in his left hand on July 11, 1984 and was taken off of his grinding job.

11. On September 26, 1984, claimant was diagnosed as having left carpal tunnel syndrome and on October 4, 1984, surgery was performed to treat the carpal tunnel syndrome.

12. Claimant was off work as a result of the left carpal tunnel surgery from October 4, 1984 through December 10, 1984.

13. As a result of the left carpal tunnel syndrome, claimant suffers a three percent permanent impairment to the left upper extremity.

14. Claimant sustained a work injury on July 11, 1983 resulting in left carpal tunnel syndrome.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that he sustained an injury to his right upper extremity arising out of and in the course of his employment on November 3, 1983.

Claimant has established by a preponderance of the evidence that he suffers a 10 percent permanent impairment to the right upper extremity as a result of the November 3, 1983 injury.

Claimant has established by a preponderance of the evidence that he sustained an injury to his left upper extremity arising out of and in the course of his employment on July 11, 1984.

Claimant has established by a preponderance of the evidence that he suffers a three percent permanent impairment to the left upper extremity as a result of the July 11, 1984 injury.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendant pay to claimant healing period benefits for the periods claimant was off work; November 28, 1983 through January 16, 1984, and October 4, 1984 through December 10, 1984.

That defendant pay to claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of two hundred twenty-six and 50/100 dollars ($226.50) per week commencing January 17, 1984.

That defendant pay to claimant seven point five (7.5) weeks of permanent partial disability benefits at the rate of two hundred twenty-six and 50/100 dollars ($226.50) per week commencing December 11, 1984.

That defendant pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

That defendant pay claimant for medical expenses in the amount of one hundred forty-three and 04/100 dollars ($143.04).

That defendant pay the costs of this action, including the costs of the transcription of the hearing proceeding pursuant to Division of Industrial Services Rule 343-4.33.

That defendant shall file activity reports upon the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

That another file be opened for the July 11, 1984 injury.

That defendant shall file with this agency a first report of injury on each of the two injuries within twenty (20) days of the filing of this decision.

Signed and filed this 13 day of August, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

R. V. SMITH,	:	
Claimant,	:	
vs.	:	File No. 665212
GRALNEK & DUNITZ,	:	
	:	A P P E A L
Employer,	:	
	:	D E C I S I O N
and	:	
CNA INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying benefits.

The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1 through 6; and, defendants' exhibit A. Furthermore, at the requests of both parties at the review-reopening hearing, official notice was taken of the file. Both parties filed briefs on appeal.

ISSUES

The deputy stated in his decision that the issues were:

A. Whether there was a causal relationship between the alleged injury and the disability on which claimant is basing his claim; and,

B. The extent of permanent partial or permanent total disability to which claimant is entitled.

In his appeal, filed October 21, 1986, claimant further argued that Guyton v. Irving Jensen, Co., is applicable to the review-reopening proceeding of February 28, 1986.

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and generally will not be set forth herein. We take note of the following additional evidence presented, however. In the March 2, 1985 report, Dr. Evans assigned claimant a permanent partial impairment rating of

20% of the body as a whole using the following formula:

Range of Motion (ROM) (discounted due to muscle weakness)	15.5%	spine
X-ray findings of : L4-L5 IVD	5.0%	spine
Motor Impairment Rating (MIR) Quadriceps (bilat)	37 %	LE
Sensory Impairment Rating (SIR) (L5-S1 bilat.) .	5 %	LE
Summary	20 %	wp

Dr. Evans reported that he arrived at the impairment rating through use of the Guides to the Evaluation of Permanent Impairment, AMA, 1984. He stated that, after review of his clinical findings, reports, radiographs and other supportive data relative to claimant, he believed that no alternate form of therapy was indicated. He further stated that the recorded facts reflected claimant's complaints as did his own examination findings.

APPLICABLE LAW

Citations of law in the review-reopening decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of evidence in conjunction with the law in the review-reopening decision is adopted. The greater weight of evidence demonstrates that claimant has not had any significant change in his physical condition since the prior hearing. As the deputy noted, the report of Dr. Evans does not show a change in claimant's physical condition as Dr. Evans first saw claimant on March 2, 1985. Dr. Evans, therefore, did not know claimant's condition at any time earlier than Dr. Evans' examination. Further, Dr. Evans stated that his findings at time of examination were consistent with prior findings as reflected on health care records and radiographs he reviewed regarding claimant. Again, as the deputy noted, the fact that Dr. Evans might rate claimant differently than did some other physician, namely, Dr. Bunten, does not mean that Dr. Evans would not have come to the same conclusions at the time of the earlier hearing. In his appeal brief, claimant places great emphasis on the fact that Dr. Bunten reviewed the report of Dr. Evans on or about July 3, 1985 and subsequently issued his own report of July 3, 1985. Claimant notes that, in that report, Dr. Bunten stated that he found Dr. Evans' report consistent with [Dr. Bunten's] impression. Claimant argues that, since Dr. Bunten did not question Dr. Evans' 20% whole person impairment rating but found Dr. Evans' opinions consistent with Dr. Bunten's, one can reasonably infer that Dr. Bunten agreed that claimant now has a 20% permanent physical impairment rating as compared to the 10% rating Dr. Bunten found at the time of the 1983 review-reopening proceeding. We find that claimant asks us to make too great a leap into the sea of potential inferences when he asks us to make the leap proposed by his argument. We believe that, had Dr. Bunten wished to indicate his agreement

with Dr. Evans' subsequent impairment rating for claimant, Dr. Bunten could have expressly so stated. In the absence of such a statement, the statement as to consistent impressions must be and should properly be limited to a statement concerning claimant's physical findings and diagnosed condition and not a statement concerning his impairment rating. [We note that claimant's argument lends itself readily to its converse. Dr. Evans also reported that his review of claimant's previous radiographs and health records was consistent with Dr. Evans' own findings and claimant's complaints. One could equally as well argue from that that Dr. Evans had accepted Dr. Bunten's earlier 10% whole person permanent partial impairment rating.]

Likewise, the greater weight of evidence, as the deputy noted, fails to show a change in the other factors of industrial disability contemplated in the prior review-reopening decision. As the deputy stated in the review-reopening decision of August 14, 1986:

> It is not the undersigned's duty to second guess the deputy who wrote the first decision. If claimant had disagreed with the prior decision, an appeal from that decision should have been taken. The undersigned can only make a determination as to permanent impairment if a change of condition is shown and claimant has failed to show any change in condition.

The deputy's analysis of the question of whether claimant's claim should have been considered under the odd-lot analysis of the Guyton decision is a correct statement of the law as pronounced in Armstrong v. State of Iowa Bldgs., 382 N.W.2d 161 (Iowa 1986) and Klein v. Furnas Elec. Co., 384 N.W.2d 370 (Iowa 1986).

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Dr. Bunten examined claimant prior to his July, 1983 review-reopening hearing.

Dr. Evans did not examine claimant until January 30, 1985.

Dr. Bunten again examined claimant on or about July 3, 1985.

On March 2, 1985, Dr. Evans found that prior health care records and radiographs reflected claimant's complaints as reflected by claimant's statements and as supported by Dr. Evans' examination findings.

On July 3, 1985, Dr. Bunten found Dr. Evans' report consistent with his impression.

Dr. Evans assigned claimant a 20% permanent partial impairment

to the body as a whole on March 2, 1985.

Dr. Bunten assigned claimant a 10% impairment of the body as a whole prior to the 1983 decision.

Dr. Bunten did not change his permanent partial impairment rating for claimant in a July 3, 1985 report.

Claimant's physical condition has not changed since his prior hearing in July, 1983.

Claimant was not working at the time of the prior hearing in July, 1983 and was not working at the time of the review-reopeni now under appeal.

Claimant had not sought other employment nor accepted employment offered him by defendants at the time of the prior hearing in July, 1983 and had not done so at the time of the review-reopening proceeding now under appeal.

Claimant's motivation was questionable at the time of the prior hearing in July, 1983 and remained questionable at the time of the review-reopening proceeding now under appeal.

There has not been a change in the factors which the deputy issuing the decision in the hearing in July, 1983 used in determin claimant's industrial disability.

As claimant has had no change in his condition since the prior hearing, claimant cannot now appropriately argue that he is an odd-lot employee.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established a causal relationship between his injury and the disability upon which his claim is based.

Claimant is not entitled to any further permanent partial disability benefits as a result of his injury on December 29, 1980.

Claimant is not entitled to bring up the odd-lot issue in a review-reopening action when no change of condition has been proven.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from this proceeding.

That claimant is to pay the costs of the original proceeding and the costs of the appeal.

Signed and filed this 31st day of October, 1988.

Helenjean Walleser
HELENJEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CARL SPEER,

Claimant,

vs.

SUPER VALU STORES, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 792171

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on April 11, 1985.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits A through S. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. Is there a causal relationship between the alleged work injury and the claimed disabilities.

2. Was there substantial evidence in the record to support the award made by the deputy commissioner.

3. Did Claimant sustain his burden of establishing entitlement by a preponderance of the evidence.

4. The extent of Claimant's entitlement to benefits for permanent disability, if any.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant was employed by Super Valu as a truck driver for 36 years. His duties included unloading pallets of grocery items with the use of a jack. Claimant was required to use his right hand to operate the jacks.

On April 11, 1985, claimant was unloading in the state of Illinois when he tried to lift a 100-200 pound steel plate and felt a "pop" in his right shoulder and felt pain. Claimant was treated by the company doctor, John C. Trapp, D.O., and referred to Mark Kirkland, D.O., an orthopedic surgeon, who recommended that claimant remain off work. Claimant testified he had no shoulder problems or pain prior to this injury.

Claimant received an arthrogram from Scott B. Neff, D.O., which did not reveal a rotator cuff tear. Dr. Neff recommended a surgical procedure but it was not performed. Claimant was then seen by Peter D. Wirtz, M.D., and was diagnosed as suffering a rotator cuff tendonitis. Both Dr. Wirtz and Dr. Kirkland restricted claimant to light duty work, but claimant remained off work as no light duty work was available at Super Valu.

On October 2, 1985, claimant was considered by Dr. Wirtz to have reached maximum healing. Dr. Wirtz assigned claimant a permanent physical impairment rating of five percent of the right upper extremity or three percent of the body as a whole. Claimant was later seen by Jerome G. Bashara, M.D., an orthopedic surgeon who diagnosed a torn rotator cuff and tendonitis, and on September 19, 1986, Dr. Bashara gave claimant a 19 percent permanent partial physical impairment rating of the body as a whole. Dr. Bashara explained that his rating of impairment was greater than Dr. Wirtz's because his examination occurred later in time and claimant's condition had worsened, in part because he had not undergone recommended surgery.

Claimant returned to Dr. Wirtz in May of 1987 for a reevaluation. Dr. Wirtz disagreed with Dr. Bashara's diagnosis of an incomplete rotator cuff tear, and instead stated that claimant had tendonitis. Dr. Wirtz concluded that claimant exhibited a motive of secondary gain and was resisting attempts to accurately measure his range of motion.

Subsequent to April 1985, claimant experienced two episodes of shoulder pain while doing routine household chores, but the medical evidence indicates that these incidents were merely minor aggravations. Both Dr. Wirtz and Dr. Bashara opined that claimant's condition was permanent. Dr. Bashara stated that claimant is unable to lift above his shoulder or behind his back. Dr. Wirtz testified that claimant is able to drive a truck for six hours per day. Both Dr. Wirtz and Dr. Bashara noted that claimant has a limitation of his range of motion for his right arm, and neither Dr. Wirtz or Dr. Bashara have released claimant to return to his regular work.

Claimant was 63 years old at the time of the hearing, and had a tenth grade education. Claimant's work experience is limited to driving and unloading trucks. Claimant stated he could not presently pass a DOT physical to return to truck driving.

Claimant testified that he requested light duty work from his employer but his request was declined. Claimant also stated that representatives of the insurance carrier suggested he retire early. Rhonda Harris, Super Valu's personnel director, testified that there was no light duty work available for claimant at the time of his injury. H. Shelby Swain, a vocational rehabilitation specialist, testified that claimant would be employable if he could drive a truck, or if a light duty job such as dispatch were available, but claimant was not employable in other occupations due to his age, lack of education, lack of transferable skills, and lack of rehabilitation potential. However, Swain acknowledged that his conclusion was based, in part, on local economic factors. Kathryn Bennett, another vocational rehabilitation specialist, also testified that claimant was unemployable except for possibly part-time, minimum wage jobs.

The parties stipulated that on April 11, 1985, claimant received an injury which arose out of and was in the course of his employment with Super Valu; that claimant is not seeking temporary total disability or healing period benefits and has been paid healing period benefits from April 12, 1985 through October 10, 1985; that the commencement date for permanent partial disability benefits if awarded should be January 7, 1986; and that claimant's rate of compensation is $396.50.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 11, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L.O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and

that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional 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).

In Parr v. Nash Finch Co., (Appeal Decision, October 31, 1980) the industrial commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, 288 N.W.2d 181.

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden, 288 N.W.2d 181.

A worker is totally disabled if the only services the worker can perform are so limited in quality, dependability, or quantity, that a reasonable, stable market for them does not exist. When a combination of industrial disability factors precludes a worker from obtaining regular employment to earn a living, a worker with only a partial functional disability has a total industrial disability. Guyton v. Irving Jensen Company, 373 N.W.2d 101 (Iowa 1985).

The approach of later years when it can be anticipated that under normal circumstances a worker would be retiring

is, without some clear indication to the contrary, a factor which can be considered in determining the loss of earning capacity or industrial disability which is causally related to the injury. Becke v. Turner-Busch, Inc., Thirty-fourth Biennial Report of the Industrial Commissioner 34 (Appeal Decision 1979).

In determining industrial disability, the fact that employment opportunities are temporarily restricted due to a local economic situation is not a factor, in that such conditions affect all workers in the area equally, regardless of claimant's injury. Webb v. Lovejoy Construction Company, II Iowa Industrial Comm'r Report 430 (Appeal Decision 1984).

ANALYSIS

Defendants state as an issue on appeal whether there was "substantial evidence" for an award for permanent partial disability benefits. As claimant correctly points out, on appeal of a decision by a deputy industrial commissioner to the industrial commissioner, the standard of review is de novo rather than whether substantial evidence existed. The substantial evidence standard is the standard of judicial review of a final agency decision. Thus, defendants' appeal issue of substantial evidence will be considered a part of defendants' general issue of whether claimant carried his burden to prove his entitlement to benefits by a preponderance of the evidence.

Defendants allege on appeal that claimant failed to prove that his disability is causally connected to his work injury. The medical evidence shows that the physicians who treated and examined claimant attributed his present right shoulder condition to his work injury of April 11, 1985. Claimant testified that he had no right shoulder problems prior to his injury of April 11, 1985. This testimony is unrebutted in the record. Claimant has shown that his present right shoulder condition is causally connected to his work injury of April 11, 1985.

Defendants also raise as an issue on appeal the extent of claimant's disability. Claimant was given two different ratings of physical impairment. Dr. Wirtz assigned claimant a rating of three percent of the body as a whole. Dr. Bashara assigned claimant a rating of 19 percent of the body as a whole. There was considerable examination of both doctors as to whether claimant's shoulder injury was an injury to the arm or to the body as a whole. Dr. Neff and Dr. Kirkland both described claimant's injury as being to the shoulder. Dr. Bashara testified that claimant's injury did extend beyond the joint to the body. Dr. Wirtz described claimant's injury as an injury to the extremity. Claimant described the pain from his injury as being in his shoulder and extending to the rear of his shoulder to his back. Dr. Wirtz acknowledged that claimant's condition extended to the acromion. Claimant's range of motion tests reveal that

his physical restriction goes not just to the movement of the arm, but to the raising of the arm above shoulder level. The greater weight will be given to the testimony of Dr. Bashara. Claimant has suffered an injury to the body as a whole.

Dr. Wirtz testified that in his opinion, claimant resisted during his range of motion tests in order to enhance the extent of his disability. However, Dr. Wirtz acknowledged on cross-examination that claimant's pain was as likely a cause of the resistance encountered.

Claimant's shoulder injury has rendered him incapable of returning to the type of work he did at the time of the injury, driving a truck. Claimant is able to operate a recreational vehicle, but the record stands unrebutted that he is only able to do so because the recreational vehicle is equipped with power steering, an automatic transmission, and claimant is able to stop to rest when he chooses. A fair reading of the record and the expertise of this agency indicate that these conditions would not be present if claimant were to attempt to return to his old truck driving job or a similar job. Claimant's testimony that he could not presently pass a Department of Transportation physical examination to drive a truck is unrebutted in the record.

A rating of permanent physical impairment is but one factor that is used in determining industrial disability. Claimant's age is also a factor. Claimant's age was such that retraining or further education to rehabilitate him would not be practical. Claimant's proximity to normal retirement age is also a proper consideration. Claimant's stated plans for retirement are highly subjective and potentially self-serving. Similarly, although much of the record was devoted to these matters, claimant's financial situation in regard to his pension and social security income, and the question of whether he chose to retire or was forced to retire by his injury, will be given little weight.

Other factors in determining industrial disability include claimant's **education, work experience,** motivation, and qualifications. **Claimant's education is limited to the tenth grade.** His work experience consists entirely of driving a truck for all of his adult working life. Claimant has no other transferable skills. Claimant did not seek alternative employment.

An employer's failure to provide suitable employment within an employee's restrictions is also a factor in determining an award for industrial disability. In the instant case, the employer failed to provide light duty employment to claimant after his injury. Although a light duty program was later instituted, it was not put into place until shortly before the time of claimant's retirement.

Claimant argues on appeal that he is permanently totally disabled, under either general permanent total disability criteria or under the odd-lot doctrine. Claimant has failed to show that he made appropriate efforts to seek employment after his injury, and therefore cannot rely on the odd-lot doctrine. Claimant is not permanently totally disabled under general permanent total disability principles, in that the vocational rehabilitation evidence indicates that claimant may be capable of performing some light duty tasks. Nonlifting jobs are available to claimant.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 50 percent.

FINDINGS OF FACT

1. Claimant was in the employ of Super Valu on April 11, 1985.

2. Claimant's job on April 11, 1985, consisted of over-the-road truck driving.

3. On April 11, 1985, while performing his work for Super Valu, claimant injured his right shoulder and continued to suffer symptoms from either chronic tendonitis or an incomplete tear of the rotator cuff caused by the injury.

4. Prior to the work injury, claimant had no shoulder problems, no physical impairments or ascertainable disabilities.

5. Prior to the work injury, claimant was able to perform physical tasks involving heavy lifting, repetitive lifting, bending, twisting and stooping along with prolonged sitting.

6. As a result of the work injury, claimant has suffered a permanent partial impairment to his body as a whole and is restricted by his physicians from heavy work and extensive use of his right shoulder and arm.

7. As a result of his functional impairment and physical restrictions, claimant is unable to perform his normal work activity as a truck driver or in any other position for which he is best suited given his education and experience.

8. Claimant's work history consists of regular gainful employment in the type of work he can no longer perform.

9. Claimant has suffered a loss in actual earnings from employment due to his work injury.

10. Claimant is now retired.

11. Claimant was not offered continued employment at Super Valu after the injury as a result of the work injury.

12. Claimant was 63 years of age at the time of the hearing and has only a tenth grade education.

13. Claimant has low potential for successful vocational rehabilitation.

14. Due to his age, claimant's loss of earning capacity is not as great as would be the case for a younger individual.

15. As a result of his work injury, claimant has suffered a loss of earning capacity in the amount of 50 percent.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits for his work injury of April 11, 1985.

Claimant's present right shoulder condition is causally connected to his work injury of April 11, 1985.

As a result of his work injury of April 11, 1985, claimant has an industrial disability of 50 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at a rate of three hundred ninety-six and 50/100 dollars ($396.50) per week from January 7, 1986.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants shall pay the cost of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically defendants are taxed the following costs set forth in the prehearing report: the sum of seventy-two and 00/100 dollars ($72.00) for the Eishen Rehabilitation Services report; one hundred fifty and 00/100 dollars ($150.00) as a fee to Jerome Bashara,

M.D., for his deposition; sum of one hundred four and 40/100 dollars ($104.40) for the court reporter of the deposition of Jerome Bashara; and, forty-nine and 50/100 dollars ($49.50) transcription cost for the deposition of Rhonda Hartley.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 20th day of December, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH L. STOLP, Claimant, vs. GREEN FIELD TRANSPORT COMPANY, INC., Employer, and CARRIERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 782410 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying permanent partial disability benefits but awarding medical benefits as the result of an alleged injury on December 7, 1984.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 15; and defendants' exhibits A through G. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the following issues on appeal:

1. What was the condition of Claimant's right eye vision immediately prior to December 7, 1984?

2. Did Claimant receive a right eye injury arising out of and in the course of his employment on December 7, 1984?

3. Is there a causal connection between the December 7, 1984 work injury and the scheduled member disability to Claimant's right eye upon which he has based his claim?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein. Claimant seeks benefits for an injury to his right eye on December 7, 1984. Previously, on April 28, 1971, this agency approved a full commutation of workers' compensation benefits for 100 percent loss of use of claimant's right eye as the result of an injury while claimant was working as a mechanic on December 19, 1969. Claimant testified that at the time of the commutation, he had complete loss of vision in his right eye.

Claimant and his wife both testified that in 1974, claimant's vision in his right eye began to improve. Claimant stated that in 1975, he noticed he was able to use his right eye in aiming his gun while hunting. Both claimant and his wife testified that the improvement continued over the next several years.

Claimant applied for an Iowa driver's licence in 1979 and passed the required eye examination, although claimant acknowledged that both eyes were tested at once and it was possible to pass the test with only one eye. Claimant also obtained an Illinois driver's license. Claimant obtained a chauffeur's license in 1980 and began work as an over the road truck driver. Claimant acknowledged that it was possible to get a chauffeur's license in both Iowa and Illinois with vision in only one eye. Claimant passed a visual examination required by the Department of Transportation which was conducted on October 7, 1980 by Horace M. Don, D.O.

On May 10, 1983, Yang Ahn, M.D., examined claimant and found 20/20 vision in the right eye with no evidence of prior injury or disease. However, Dr. Ahn also stated that the eye test involved an eye chart and was conducted by a nurse, the form was filled out by the nurse, and the eye chart could have been memorized by claimant. Because of this, Dr. Ahn acknowledged that he would have no personal knowledge whether claimant had vision in his right eye prior to December 7, 1984. Dr. Ahn also stated he was not aware at the 1983 examination that claimant had had an earlier eye injury, and that only the reading of the eye chart was conducted. Dr. Ahn stated that although the form does indicate that no evidence of injury was found, no visual examination of the interior of claimant's eye was conducted.

Gregg Rude, an Iowa State Trooper, stopped claimant for speeding sometime in 1984. The exact date was not brought out at the hearing. Claimant's motion for rehearing subsequent to the arbitration decision sought to establish the date of this incident, but the motion was denied as the information could have been obtained prior to the original hearing. Claimant was arrested for refusal to sign the citation. Trooper Rude

stated that claimant told him he was blind in one eye, and that claimant stated to him that he had been to several doctors for his eye. Trooper Rude contacted the federal Department of Transportation in regard to claimant's chauffeur's license but the result of that investigation, if any, is unknown. Claimant denied telling Trooper Rude he was blind in one eye, and stated that at the time he was stopped by the trooper, he had 100 percent vision in his right eye.

On December 7, 1984, claimant was involved in a motor vehicle accident when his truck slipped off an icy roadway. Claimant was treated for bruised ribs at a hospital, but claimant stated he was unaware he had injured his right eye in the accident and did not report this to the hospital personnel.

Between December 7, 1984, and January 25, 1985, claimant was treated by Dr. Ahn on six occasions. Dr. Ahn testified that claimant made no complaints concerning his vision on any of these visits. Claimant testified that two to three weeks after the accident, he began to notice light sensitivity and double vision. Another DOT examination was conducted on January 25, 1985, by Dr. Ahn, and claimant was found to have 20/100 vision in the right eye. Based on this test, claimant was not issued the necessary medical card to work as a truck driver. Claimant stated that in both the 1983 and 1985 eye examination by Dr. Ahn, he was required to read an eye chart but no visual examination of his eyes was made.

Claimant was referred to Robert Keller, M.D., an eye specialist. Dr. Keller measured claimant's right eye vision as 20/100. Claimant was then referred to James C. Folk, M.D., at the University of Iowa Department of Opthalmology. In March of 1985, Dr. Folk measured claimant's right eye vision as 20/100, and stated, "Certainly this scleral rupture could have occurred during the recent truck accident. This is probably the most likely reasoning, however, we cannot be absolutely sure." (Claimant's Exhibit 6.)

In June of 1985, Dr. Folk again measured claimant's right eye vision as 20/100, and concluded that it was a "certainty" that claimant's loss of vision in his right eye was the result of the December 1984 truck accident. However, Dr. Folk's report also stated that: "The patient also had a history of an intraocular foreign body in the right eye approximately 20 years ago. This foreign body had been removed with retention of good visual acuity in this eye." (Cl. Ex. 11.)

Dr. Folk stated that the scarring that caused the vision loss typically occurs three to four weeks after the trauma, which was consistent with claimant's report of the onset of vision loss. Dr. Folk based his conclusion on claimant's history of "19 years" of 20/20 vision after his original injury and therefore he felt that the fact that claimant had 20/20 vision

in 1983 was "conclusive" evidence that claimant's present vision loss was of recent origin.

Claimant testified that his present vision in his right eye was 21/100 or 22/100, which claimant stated is insufficient vision to drive a truck.

The parties stipulated that claimant's rate of weekly compensation in the event of an award of benefits would be $303.17; claimant is not seeking further healing period or temporary total disability benefits; that if claimant has a disability, it is a scheduled member disability of the right eye; and that claimant has been off work since December 7, 1984 and currently has a 100 percent loss of use of the right eye; and that the medical bills in the record are reasonable and causally connected to claimant's medical condition but the causal connection of the bills to the work injury remained in dispute.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 7, 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).

ANALYSIS

Claimant bears the burden of proving that he has suffered an injury arising out of and in the course of his employment, and that his present disability is causally connected to that injury. The deputy's decision did find that an injury arising out of and in the course of claimant's employment occurred on December 7, 1984, and therefore this issue, although stated

as an issue on appeal by claimant, will not be addressed. Essentially, claimant's issue on appeal is whether the deputy properly concluded that claimant had failed to show a causal connection between his present right eye condition and his work injury of December 7, 1984.

Claimant's present disability consists of a loss of vision in the right eye. Claimant was previously compensated for 100 percent loss of vision in his right eye for the 1969 injury. Thus, in order to establish entitlement to further benefits for the loss of vision in his right eye, claimant bears the burden to show that all or part of his present impairment of the right eye is causally connected to his work injury of December 7, 1984.

Claimant relies on the finding in 1983 by Dr. Ahn for the corroboration of his testimony that his 1969 100 percent loss of use of his right eye improved to 20/20 vision. However, cross-examination revealed that this examination did not involve a visual examination of the eye itself. This is confirmed by the notation on the form indicating that there was no evidence of injury to the eye, whereas claimant acknowledges that his right eye was scarred from the 1969 injury. In addition, Dr. Ahn acknowledged that it was possible for claimant to have memorized the eye chart used in determining that he had 20/20 vision in the right eye in 1983. Dr. Ahn also admitted that he could provide no personal knowledge of claimant's right eye vision in 1983. Dr. Ahn's 1983 examination finding that claimant had 20/20 vision in his right eye therefore has little reliability.

A prior examination by an optometrist, Dr. Don, is also in the record. However, claimant acknowledged that Dr. Don conducted an eye chart examination only and did not conduct an internal examination.

Claimant also proffers the testimony of Dr. Folk for the proposition that claimant's present right eye condition is causally related to his 1984 accident. However, Dr. Folk's statements contain indications that he was less than thoroughly familiar with claimant's prior eye injury. Dr. Folk referred to claimant having a prior injury 19 or 20 years earlier, which was incorrect. Dr. Folk based his conclusion on claimant's right eye examination result by Dr. Ahn in 1983. This finding, as shown above, is inherently unreliable. Dr. Folk's opinion on causal connection relied on a suspect examination result, and is therefore itself unreliable.

There is a direct conflict of testimony between claimant and Trooper Rude. The record at the hearing fails to establish the date of this incident. However, Trooper Rude testified it was sometime in 1984. Claimant's work injury herein occurred on December 7, 1984. Claimant testified that he did not notice

a loss of vision in his right eye until approximately two to two and a half weeks after his December 7, 1984 injury.

Trooper Rude testified he remembered the incident with claimant clearly, in that a driver opting to be arrested rather than sign a traffic citation is an unusual occurrence. Trooper Rude recalled claimant saying he was blind in one eye, and Trooper Rude performed followup investigation based on this statement. Although claimant denies making this statement, there is no showing in the record of how Trooper Rude would have known of claimant's eye problem other than being told of it by claimant himself. In addition, in assessing the credibility of witnesses, motive or incentive to fabricate is properly considered. Trooper Rude, as a witness with no pecuniary interest in the outcome of this case, has not been shown to have a motivation or incentive to fabricate his testimony. Claimant clearly does have a financial interest in the outcome of the case. The testimony of Trooper Rude in regards to claimant's statement that he was blind in one eye is found to be credible. In light of the record, which shows that Trooper Rude stopped claimant in 1984 and claimant's statement that his right eye vision loss did not develop until two to two and a half weeks after December 7, 1984, or near the very end of calendar year 1984, it is concluded that the conversation between Trooper Rude and claimant in regards to claimant's right eye vision occurred prior in time to claimant's alleged onset of symptoms of vision loss in his right eye two to two and a half weeks after his December 7, 1984 injury.

Claimant has failed to carry his burden to show that his present 20/100 vision in his right eye is causally connected to his truck accident of December 7, 1984.

FINDINGS OF FACT

1. Claimant was employed by defendant Green Field Transport Company on December 7, 1984.

2. Claimant received a work injury in 1969 to his right eye, for which claimant was compensated for 100 percent loss of use of the right eye.

3. Claimant stated to a state trooper in 1984 that he was blind in one eye.

4. Claimant is not credible.

5. The eye examinations of Dr. Ahn are unreliable in terms of establishing claimant's right eye vision at the time of the examinations or in determining whether claimant had scarring or other evidence of prior injury.

6. The conclusions of Dr. Folk are based on unreliable findings of Dr. Ahn and are not reliable.

7. Claimant's present right eye impairment is not causally related to his December 7, 1984 injury.

CONCLUSION OF LAW

Claimant has failed to carry his burden to show that his right eye impairment is causally related to his December 7, 1984 work injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant the sum of two hundred thirteen dollars ($213.00) as reimbursement for medical expenses related to bruises from the December 7, 1984 injury.

That claimant shall take nothing further from these proceedings.

That claimant shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 30th day of January, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CONNIE STREETER, Claimant, vs. IOWA MEAT PROCESSING CO., Employer, and CHUBB GROUP OF INSURANCE COMPANIES and ARGONAUT INSURANCE COMPANY, Insurance Carriers, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 730461/809945 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants Iowa Meat Processing Company and Chubb Insurance Group appeal from an arbitration decision awarding permanent partial disability benefits as the result of alleged injuries on March 28, 1983 and October 11, 1985.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits A through K. Iowa Meat Processing Company and the Chubb Insurance Group, and Iowa Meat Processing Company and Argonaut Insurance Companies filed briefs on appeal.

ISSUES

Defendants Iowa Meat Processing Company and the Chubb Insurance Group state the following issues on appeal:

1. Did the deputy commissioner err in finding no medical evidence or any other convincing evidence that the injury of March 28, 1983 was the cause of permanent functional impairment or permanent disability?

2. Did the deputy commissioner err in finding a simultaneous injury and in awarding benefits pursuant to Iowa Code § 85.34(2)(s)?

3. Did the deputy commissioner err in finding permanent impairment to the upper extremities rather than to the hands?

4. Did the deputy commissioner err in beginning permanency on December 16, 1985?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

Expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-761 (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962).

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).

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).

Iowa Code section 85.34(2)(s) states:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such, however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

Iowa Code section 85.34(1) states:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of 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.

For purposes of the schedule contained in Iowa Code section 85.34(2)(1), an injury confined to the wrist is treated as an injury to the hand. Elam v. Midland Mfg. Co., II Iowa Industrial Comm'r Rep. 141 (Appeal Decision 1981).

ANALYSIS

Defendants Iowa Meat Processing and Chubb Insurance Group urge on appeal that the deputy erred in finding that no permanent disability resulted from claimant's injury of March 28, 1983. Claimant was diagnosed as suffering from right carpal tunnel syndrome on April 14, 1983. Claimant underwent release surgery in May of 1983. Claimant returned to work without restrictions. Claimant was later found to have right tendonitis, status post carpal tunnel. Claimant did not receive any rating of permanency or indication of permanency for her right hand or wrist until after the second injury on October 11, 1985. Between May of 1983 and October of 1985, claimant did not miss work, and was able to engage in educational course work, including a typing course. Claimant did report pain extending up to her right elbow. Claimant's ability to continue working at her job, completion of a typing course, and the elapse of two years before her left hand and wrist condition compelled her to seek

further medical attention indicates that claimant die not have any permanent impairment of her right hand.or wrist following her right carpal tunnel release surgery in May of 1983.

The conclusion above assists in determining Chubb Insurance Group's second issue on appeal. Since claimant did not suffer permanent impairment as a result of the 1983 injury and surgery, the record supports the conclusion that claimant's left and right hand conditions found in 1985 were the result of a single cumulative injury process. The permanent condition found in 1985 was the result of cumulative trauma occurring between 1983 and October of 1985. In October of 1985, claimant was also found to have left carpal tunnel syndrome. The record shows that this condition was first noticed by claimant, and first noted by medical personnel, subsequent to her right wrist surgery in 1983. Thus, claimant developed both her permanent right hand and wrist condition and her left carpal tunnel syndrome subsequent to her 1983 surgery. This cumulative injury compelled claimant to leave work in October of 1985. Claimant has lost the use of both arms or both hands as the result of a single accident, that is, repetitive trauma to both wrists occurring between her surgery in May 1983 and October 1985, and claimant is to be compensated pursuant to Iowa Code section 85.34(2)(s).

Chubb Insurance Group's third issue on appeal deals with whether claimant's impairment is to the hand or to the arm. The mere fact that claimant's carpal tunnel condition resulted in pain into her right arm does not result in an impairment of the arm. The situs of the injury in this case is in claimant's wrist. Claimant's right epicondylitis, although producing pain, did not result in any impairment or disability to the arm, and was not shown to be permanent. Although the medical evidence rates claimant's permanent impairment as 10 percent of the upper extremity, there is no indication that the arms are impaired other than as the site of pain.

Claimant's surgery did not intrude into the arm. The pathology of the injury is confined to the wrist. Claimant's impairment is to the hand and does not extend into the arm.

According to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, 10 percent impairment of the upper extremity converts to 11 percent impairment of the hand. Eleven percent of the hand converts to six percent of the body as a whole. Claimant has two impairments of the upper extremity, so the combined values chart indicates claimant has a 12 percent impairment of the body as a whole. Claimant is entitled to 60 weeks compensation.

As a final issue, defendant Chubb Insurance Group urges rejection of December 16, 1985 as the date when claimant's permanency began in favor of May 9, 1986, the date on which

claimant's condition was given a permanent impairment rating. Chubb offers no compelling argument in favor of this, however, other than a reiteration of the earlier argument that the impairment did not extend to the arm. The use of December 16, 1985, the date claimant returned to light duty work, is a proper point in time under section 85.34(1) to establish the end of claimant's healing period and the beginning of the permanency.

FINDINGS OF FACT

1. Claimant was an employee of defendant employer on March 28, 1983.

2. On March 28, 1983, claimant received an injury arising out of and in the course of her employment with defendant employer.

3. Claimant's duties involved the use of both of her hands.

4. Claimant began to experience pain in her right wrist in January of 1983.

5. Claimant underwent carpal tunnel release surgery on her right hand in May of 1983.

6. Subsequent to the release surgery, claimant was not given any work restrictions, and did not miss work due to wrist pain again until October of 1985.

7. Between 1983 and 1985, claimant completed courses in typing and accounting.

8. Claimant continued to perform the same duties for employer from 1983 to 1985 as she performed prior to her wrist surgery.

9. In October of 1985, claimant was diagnosed as having left carpal tunnel syndrome and right epicondylitis.

10. Claimant received a medical release to return to work on December 16, 1985.

11. Claimant's carpal tunnel syndrome is confined to her left wrist and hand. Claimant's epicondylitis is confined to her right wrist and hand. Claimant has pain in her upper extremities but claimant does not have impairment or disability in her upper extremities.

12. Claimant did not suffer any permanent disability or permanent impairment as a result of her 1983 carpal tunnel release surgery.

13. Claimant developed her present right and left hand and wrist conditions simultaneously subsequent to her 1983 carpal tunnel release surgery.

CONCLUSIONS OF LAW

Claimant did not suffer any permanent disability or permanent impairment as a result of her 1983 carpal tunnel release surgery.

Claimant developed her present right and left wrist and hand conditions simultaneously between her May 1983 carpal tunnel release surgery and October 1985.

Claimant's present left and right hand and wrist conditions do not extend to the upper extremities.

Claimant's healing period ended December 16, 1985.

WHEREFORE, the decision of the deputy is affirmed in part and reversed in part.

ORDER

THEREFORE, it is ordered:

That defendants Iowa Meat Processing and Chubb Insurance Group are to pay unto claimant healing period benefits from November 12, 1985 until December 16, 1985, at the rate of two hundred fifty-one and 55/100 dollars ($251.55) per week.

That defendants are to pay unto claimant sixty (60) weeks of permanent partial disability benefits at a rate of two hundred fifty-one and 55/100 dollars ($251.55) per week from December 17, 1985.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants are to pay the costs of this action.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 31st day of March, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAURIE SUMMERS,	:	
	:	
Claimant,	:	File No. 770698
	:	
vs.	:	A P P E A L
	:	
JOHN MORRELL & COMPANY,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding healing period benefits and permanent partial disability benefits based on an industrial disability of 25 percent resulting from an injury on January 3, 1984.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits A through C; and defendant exhibits 1 through 5. Defendant filed a brief on appeal.

ISSUES

The issues on appeal are whether claimant suffered an injury which arose out of and in the course of her employment; whether there is a causal connection between the alleged work injury and the claimed disability; and the nature and extent of claimant's alleged disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant was born September 11, 1964 and was 19 years old at the time of the alleged injury. She attended school to the tenth grade. After dropping out of school she held jobs as a nurse's aide and a waitress prior to beginning work for defendant. She testified that she had not had an injury or serious illness prior to working for defendant. She started working for defendant on September 23, 1983 at a rate of $6.50 per hour. Her pay increased to $7.00 per hour on March 28, 1984. Claimant testified that on January 3 or 4, 1984 she fell on some steps at work, landed on her tailbone and felt pain that was not disabling. She also testified that she told

her foreman of the fall on the day it occurred and that she was not real sure of the date of the fall.

Claimant was seen at the Estherville Medical Center on February 10, 1984 for a sore left thigh but claimant had no recall of injury on that date. Claimant testified that she contacted the company nurse on March 23, 1984. The defendant's injury report card on March 23, 1984 reads, "Slipped down steps and bumbed [sic] tailbone." Claimant stated that although the injury report card was dated March 23, 1984 the fall was earlier than that date.

The weekend before the week of April 2, 1984 claimant was beaten by her boyfriend. As a result of the beating claimant had bruises on her face and neck. On April 5, 1984 claimant reported to the company nurse that the claimant wanted an appointment with a chiropractor because she had fallen down steps and hurt her back at work. Claimant sought treatment from the Moreau Chiropractic Clinic on April 5, 1984. The office notes from that clinic on that date read: "Pt fell down 3 stairs @ work by the time clock 2 wks past (3-23-84). Her current complaints are of L lateral leg (illegible)." Claimant testified that if Dr. Moreau's notes reflected that she told him that she fell on March 23, 1984 the notes would not be correct. She also testified that she did not associate her leg pain with an injury until someone told her that there was an association.

On May 14, 1984 claimant returned to the Estherville Medical Center for complaints of pain in her left thigh and in her lower back which was noted to be the same backache she had in February 1984. Claimant was referred to Richard F. Nice, M.D., an orthopaedic surgeon. An office note by Dr. Nice dated June 13, 1984 reads in part:

> Laurie is a 19 yr old female who fell down a flight of stairs at Christmastime [sic] at work. She did not think much of this and continued to work at Morrells in Estherville which requires her to do some lifting. About 2 weeks later she developed pain in her back. This was most severe with exertion and was predominantly on the left side of her low back. She then developed pain in her left buttock, behind her left knee and ankle and had persistent numbness in the lateral aspect of her left calf....
>
> ...She has very little tenderness in her back but she does have pronounced sciatic nerve tenderness in the sciatic nerve area in the left buttock which radiates down the left leg....
>
> ....

> We feel there is no question that Laurie has a disc herniation, probably at L4-5.

(Claimant's Exhibit B, page 4)

Claimant received conservative care from Dr. Nice. Dr. Nice opined that the accident claimant described to him was consistent with her lower back condition. He also opined that claimant had sustained a disc herniation and that claimant had a permanent partial physical impairment of five percent of the whole body. He testified that claimant would be best suited for jobs that did not require heavy lifting and a lot of sitting but he did not place any limitations on claimant. On cross-examination he testified that it may be weeks to conceivably months or years before pain occurs following an injury to a disc. He also testified on cross-examination that he was unaware that claimant had been beaten by her boyfriend but he could not recall anybody that got a disc herniation in their lumbar spine as a result of getting hit in the head and having their neck jerked around.

Claimant testified that she subsequently became pregnant and returned to school to obtain her GED diploma. She stated that she had been employed part-time as a homemaker health aide but had not otherwise sought employment. Claimant has started a course of study toward a nursing degree.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The first issue to be resolved is whether claimant suffered an injury which arose out of and in the course of her employment. Defendant argues that the deputy's finding that the claimant fell on steps at work on or about January 3, 1984 is unsupported by the record. Defendant implies that claimant's back condition was the result of the beating by claimant's boyfriend. While claimant's case may have been buttressed if she had been a better historian and if she had immediately recognized that her leg pain was the result of an injury to her back, there is nonetheless sufficient evidence to find that claimant's alleged injury was the result of a fall at work. It is uncontroverted that claimant reported the fall on or about January 3, 1984 to her foreman; that claimant sought treatment for leg pain on February 10, 1984; and that claimant did not associate her leg pain with a fall until sometime after the fall. The history that claimant gave Dr. Nice on June 13, 1984 is consistent with her actions in that she had leg pain and little tenderness in her back. She had sought treatment for her leg pain shortly after the date she alleges she fell. It is entirely reasonable for a person who falls on the tailbone not to recognize that

the fall is the cause of leg pain. Also, Dr. Nice testified that there may be a period of time before pain occurs following an injury to a disc.

Defendant's implication that claimant's back condition was the result of the beating by her boyfriend is not convincing. As discussed above claimant has sought medical treatment for the symptom of leg pain two months prior to the beating. She also reported the fall on March 23, 1984 to the company nurse. Also, importantly, Dr. Nice indicated that claimant's lumbar disc injury is inconsistent with a beating to the head and neck. Furthermore, Dr. Nice opined that claimant's condition was consistent with the accident she described. Claimant has proved that she suffered an injury on or about January 3, 1984 which arose out of and in the course of her employment.

The second issue to be resolved is whether there is a causal connection between the alleged work injury and the claimed disability. Claimant testified that she was in excellent health prior to her fall. Dr. Nice indicated that claimant's condition is consistent with the history of falling. Claimant had complaints of pain in her leg in February 1984. The evidence just given is uncontradicted. Dr. Nice indicated that claimant's condition is inconsistent with a beating to the head and neck. He also opined that claimant's condition is permanent. There is no evidence to contradict the assertion that there is a causal connection between the work injury and the claimed disability.

The last issue to be resolved is the nature and extent of claimant's alleged disability. It is Dr. Nice's uncontradicted opinion that claimant's condition is permanent. Dr. Nice also rated claimant's impairment of five percent of the body as a whole. Claimant was nineteen years old at the time of the injury. She has obtained her GED and is seeking retraining through schooling to become a nurse. **Given her age claimant should be able to be retrained, and it should be noted that she has attempted to do so.** Her employment history since the date of the injury which consists of occasional homemaker health aide does not demonstrate that claimant is highly motivated to work. Claimant's job at the time of her injury paid her $7 per hour. Claimant cannot do the work she was doing before her injury, and employment in jobs requiring lifting and prolonged sitting are not advisable. When all factors are considered claimant has sustained a 15 percent loss of her earning capacity.

FINDINGS OF FACT

1. On or about January 3, 1984, Laurie Summers was a resident of the state of Iowa, employed by defendant at Estherville, Iowa.

2. Claimant was injured on or about January 3, 1984 when she fell on steps at the employer's place of business.

3. Following the injury, claimant continued to work, but experienced increasing symptoms. She first sought medical care for those symptoms on February 10, 1984 at the Estherville Medical Center.

4. On March 23, 1984, claimant reported the fall to her employer, but the employer misinterpreted the incident as having occurred on the date that it was reported rather than on the date that it actually occurred.

5. A similar error regarding the date of injury is found in the treatment records of Dr. Moreau.

6. Following the injury, claimant continued to work, whenever work was available, until June 13, 1984, when Dr. Nice took her off work. She remained medically incapable of performing work in employment substantially similar to that she performed at the time of injury until October 15, 1984, when claimant reached the point that it was medically indicated that further significant improvement from the injury was not anticipated and she was released to return to light-duty work.

7. The assessment of claimant's case as made by Dr. Nice is accurate. Claimant's injury produced a herniated lumbar disc, but due to her age and symptomatology, surgery is not recommended at the present time. Claimant has a five percent permanent partial physical impairment of the body as a whole and is impaired in her ability to lift and in her ability to sit for prolonged periods of time.

8. Claimant gave the employer notice of her fall on March 23, 1984, a date within 90 days from the date of injury.

9. Claimant has sustained a 15 percent loss of earning capacity as a result of the injuries she sustained in the fall which occurred on or about January 3, 1984.

10. The fall that occurred on January 3, 1984 was a substanti factor in producing claimant's herniated disc and the continuing symptoms that she experiences in her low back and left leg.

11. Claimant's lower back was not injured in the incident where she was beaten up by her boyfriend in early April 1984.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of her employment with defendant on or about January 3, 1984.

The claim is not barred by the provisions of section 85.23 of the Code.

Claimant's work injury on or about January 3, 1984 was the cause of claimant's permanent disability.

Claimant's work injury on or about January 3, 1984 resulted in an industrial disability of fifteen percent.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That the employer pay claimant seventeen and five-sevenths (17 5/7) weeks of compensation for healing period at the stipulated rate of one hundred forty-six and 81/100 dollars ($146.81) per week payable commencing June 13, 1984.

That the employer pay claimant seventy-five (75) weeks of compensation for permanent partial disability at the stipulated rate of one hundred forty-six and 81/100 dollars ($146.81) per week payable commencing October 15, 1984.

That all amounts awarded be paid in a lump sum together with interest pursuant to section 85.30 computed from the date each weekly payment came due until the date of actual payment.

That defendant pay the costs of this action including the costs of transcription of the arbitration hearing.

That defendant file claim activity reports pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 22nd day of February, 1989.

DAVID E LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROGER W. TRUE, Claimant, vs. CATERPILLAR TRACTOR CO., Employer, Self-Insured, Defendant.	:	File No. 744226 A P P E A L D E C I S I O N

FILED

APR 26 1989

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying benefits from an alleged work injury June 25, 1982.

The record on appeal consists of the transcript of the arbitration hearing and claimant's exhibits 1 through 21. Neither party filed a brief on appeal.

ISSUES

Because neither party filed a brief on appeal this matter will be considered generally without any specified errors. The issues considered by the deputy were:

Whether claimant's work injury is causally connected to the disability on which he now bases his claim;

The nature and extent of claimant's permanent partial disability, if any; and

Claimant's entitlement to certain medical expenses pursuant to Iowa Code section 85.27.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment on June 25, 1982, when a part flew out of a machine he was operating and hit him on left side of the face.

2. Although claimant had been treating with the company doctor, he decided to pursue care with his family doctor.

3. Claimant was aware defendant would consider treatment with his family doctor unauthorized.

4. Notwithstanding such knowledge, claimant decided to pursue the treatment.

5. Claimant was eventually referred, through defendant, to the University of Iowa Hospitals and Clinics where he came under the care of Deborah Zeitler, D.D.S

6. Radiographs showed meniscus perforation on the left and bilateral degenerative joint disease of the temporomandibular joints and on June 26, 1983, claimant underwent surgery for meniscus repair of the left TMJ and a menisectomy of the right TMJ.

7. Following his surgery, claimant returned to work.

8. On April 4, 1987, claimant underwent right TMJ arthroplasty with implant removal and left TMJ arthroscopy.

9. Claimant has a permanent impairment as a result of his injury.

10. Claimant returned to work following surgery and is currently working under no medical restrictions or limitations.

11. Claimant continues to perceive pain and soreness in his facial muscles, follows a soft food diet, and is careful about lifting.

12. Claimant is currently employed in a position which does not require lifting more than one time per day and which he is able to perform.

13. Claimant suffers from non-industrial related low back pain which restricts his employability.

14. Claimant has not suffered any loss of earnings as a result of the injury of June 25, 1982.

CONCLUSIONS OF LAW

Claimant has not established he is entitled to medical expenses for the treatment provided by Dr. Sam Williams, Jackson County Hospital, and P.E. DeLong, D.M.D., such treatment being unauthorized.

Claimant has failed to establish that the work injury of June 25, 1982, is the cause of any permanent partial disability or industrial disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

That claimant pay the costs of the appeal including costs of transcription of the arbitration hearing.

That all other costs are assessed against defendant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 26th day of April, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEAN TUSSING, Claimant, vs. GEO. A. HORMEL & CO., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 734985/750400 R E M A N D D E C I S I O N FILED JUN 21 1989 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This case has been remanded by an Iowa Supreme Court decision filed January 20, 1988. The supreme court remanded this case: "...to the commissioner with instructions to reconsider the evidence relating to a work-related injury or as an aggravation of a previous one." Tussing v. George A. Hormel & Co., 417 N.W.2d 457, 458 (Iowa 1988).

The record on remand consists of the transcript of the arbitration proceeding, claimant's exhibits 1 through 10 and defendants' exhibits A through J.

ISSUE

The issue on remand is whether claimant sustained an injury arising out of and in the course of employment on May 9, 1983 resulting in a compensable disability.

REVIEW OF THE EVIDENCE

Claimant testified that he sustained an injury to his right shoulder in early May 1983. Claimant described how this injury occurred as follows:

> Q. All right. Now then in May -- early May, '83, did something happen involving your other arm, your right arm?
>
> A. My right arm. Well, I was still working in walliter, taking care of the walliter and taking the loads

away. And I was stacking and watching my walliter. And it's time-- You only have-- The walliter runs in about fifty cycles a minute, fifty to sixty cycles a minute so you only -- between your boxes that you're stacking and taking your load away, you only got about three minutes to finish your load and then pull it out and get another pallet down and get your -- your other pallet ready to go so you won't hold up the line.

Well, I started to -- got my load finished, and I started to pull it out. And I couldn't move it. It got stuck. We use-- Maybe I should tell you what we use. It's a hand truck, but they got small wheels on them. But they roll fairly easy on the floor usually.

But this one got stuck, and I couldn't pull it. And I seen a jam coming on my line, and I was wanting to get my load moved so I wouldn't get a jam and get things all jammed up. So I gave it a big jerk. And when I done that, I felt something in this arm and it hurt. It felt like somebody stuck me or bit me or something in there. It really--

Q. Whereabouts now?

A. Well, it was right up in this shoulder area.

Q. Your right shoulder area?

A. And down into this bicep.

Q. Okay.

A. So I finally -- I got the load loose. And the foreman wasn't around right at the moment, and so I went ahead and worked with my shoulder hurting and trying to calm down a little bit.

So I finished the-- When the foreman came around, I told him what happened. And he said, "Well, there isn't anybody right then to take my place. If I could get by, why," he said, "to try and do it until--"

Q. Who was the foreman?

A. This Bill Lenz.

(Arbitration Hearing Transcript, pages 31-32)

Claimant stated that he worked for two or three more days after the injury and then went on vacation for a week. Claimant

indicated that after returning to work he began to experience continued pain so he requested that an appointment be set up with the company doctor. Claimant believed that he went to see the company doctor on June 14, 1983. Claimant clarified that it was Cheryl Busboom, a medical aide, who he went to see on June 14. Claimant stated that Busboom gave him some pain pills and told him to take some time off work. He related that he returned to work on June 20, 1983 at the same job he was doing at the time of the injury which claimant described as a light duty job. Claimant indicated that he continued in that position through the balance of 1983 and into summer 1984. During that time claimant related that he saw several doctors including Robert Weatherwax, M.D., for left and right shoulder pain. Claimant revealed that at that time he was debating on which shoulder to have Dr. Weatherwax operate. Claimant stated that Dr. Weatherwax operated on the right shoulder in July 1984. Claimant opined that currently his right shoulder has an ache and a numb feeling in it and that it is not strong as it should be. Claimant also opined that he cannot return to work because of his right arm and shoulder.

On cross-examination claimant denied having right shoulder problems prior to the May 1983 injury but claimant admitted that he had had a right biceps tear in 1970. Claimant testified that the biceps tear caused little subsequent difficulty for him.

Defendants' exhibits C through G, I and J are copies of employers' first reports of injury prepared by defendant employer concerning claimant. Defendants' exhibit C reveals that claimant sustained a right shoulder muscle strain on November 16, 1959. Defendants' exhibit D reveals that claimant suffered a right shoulder muscle strain on July 12, 1961. Defendants' exhibit E discloses that claimant sustained a right upper arm and shoulder sprain on November 1, 1968. Defendants' exhibit F reveals claimant sustained a right deltoid muscle sprain on September 15, 1969. Defendants' exhibit G discloses the 1970 biceps tear of the right muscle to which claimant referred. Defendants' exhibit I discloses that claimant suffered a biceps muscle strain-right shoulder on January 30, 1975. Defendants' exhibit J reveals that claimant suffered right shoulder and arm stiffness on June 14, 1982. These exhibits indicate that claimant lost no time at work as a result of any of these injuries.

Claimant's wife also testified. She related that claimant cannot do many household chores he was able to do before the injury. On cross-examination she testified concerning the earlier incidents of injury to claimant's right shoulder:

> Q. We went through a whole list of first reports of injury. Do you remember Mr. Tussing ever coming

home and saying gosh, I was carrying 100-pound box of hearts and, gee, it hurt? Do you remember any of those incidents we talked about?

A. Yeah. There's been a few times, like I said, he's always -- since I've been married to him, his arm would bother him.

In a December 20, 1983 letter, Kenton K. Moss, M.D., reports the course of his treatment of the May 9, 1983 injury:

> Mr. Tussing has been followed here since 6-14-83 for problem with his right arm. He related the onset of his injury to one month prior to that visit when he was pulling a load of pepperoni weighing about 600# and having to strain and pull as the load had suddenly stopped. Since that time he's had increasing discomfort of the right shoulder area. When seen initially he was started on anti-inflammatory medications. He returned for f/u one week later. He had noted improvement and was placed on a 20# weight restriction limit at that time. He returned two months later with continued pain in the right arm. He was felt to have a chronic strain of the right biceps. He was told to continue on his anti-inflammatory medications on a regular basis and told to return in 10 days for f/u. The patient was not seen for f/u and did not return until 4 months later on 12-8-83 with the persistent complaints. Physical findings have revealed tenderness at the insertion of the biceps with the deltoid. It was felt to be consistent with a chronic muscle strain of the biceps on the right arm throughout this time.
>
> It is difficult to comment on permanent disability at this time since he's not received full medical therapy and has been somewhat irregular in his f/u visits. It was recommended that he be evaluated by an orthopedist or receive outpatient physical therapy. He has elected for orthopedic consultation and that has been arranged for 1-5-84 and 8:45 AM with Dr. Weatherwax in Fort Dodge.

(Claimant's Exhibit 9)

Claimant was also treated by Horst G. Blume, M.D., during the period of Dr. Moss' treatment. Dr. Blume opines in a May 29, 1984 letter:

> It is my opinion the patient's right biceps muscle has been injured on several occasions and the recent injury on May 9, 1983, is an aggravation of a pre-existing

condition. The disability to the right arm is permanent and is about 20-25% to the arm. This is the result of a number of accidents as I see the end result now.

(Cl. Ex. 5)

Dr. Weatherwax testified by deposition that he was aware of claimant's prior history of injuries to the right shoulder and biceps. Concerning his diagnosis of claimants condition and the onset of his shoulder problems Dr. Weatherwax opined:

Q. Is it fair to say, Doctor, without going through all the reports and histories and so forth that there are basically two conditions that you've treated in Mr. Tussing?

A. Well, it's fair to say that there are two diagnoses, but the condition is essentially the same. In other words, the biceps tendon rupture, one has to realize that the rotator cuff is directly on top of the biceps tendon and both of the problems are an impingement or pinching process that occurs in the shoulder.

Generally speaking if you rupture a biceps tendon, you can almost be assured that the rotator cuff has had some problem, either ruptured or is considerably degenerated. And so if someone presented initially with a biceps tendon rupture, I would strongly suspect that a rotator cuff has been injured as well because in order for the tendon to wear out-- The rotator cuff lies right on top of it and is the first thing to be pinched or worn.

(Weatherwax Deposition, p. 5)

Dr. Weatherwax opined further:

Q. Go ahead, Doctor.

A. Obviously he had a pre-existing condition that dates back to 1970 as far as his biceps tendon. And I again emphasize no one can tell you when his rotator cuff ruptured. Was that the rupture that he experienced pulling a cart of pepperoni, I don't know, Dr. Blume doesn't know, Dr. Fisher doesn't know. It is a continuum of pathology because they are so intimately related as far as I'm concerned.

Once the biceps tendon rupture [sic], you don't get re-rupture of the biceps tendon. It's ruptured and it's gone. It doesn't keep rehealing itself and re-rupturing. So in that regard no, I don't

agree that this is a repetitive re-injury to the biceps tendon. It is a repetitive re-injury to a mechanism that is so intimately related that is a continuum of rotator cuff, acromion, coracoacromial ligament, clavicle joint, and shoulder joint. That is all in continuity.

But what and when each of these things has occurred, the only thing I can tell you for sure is that at least in 1970 by evidence of the letter from Dr. Kersten, he had evidence of a longhead tendon rupture of his biceps in his right shoulder.

What further injuries, certainly he's had trouble in both shoulders that have been work related throughout the intervening time that are continuing to be aggravated by the cold environment, by the working conditions of overhead lifting, repetitive activities that continue to keep these shoulders, both left and right, inflamed and irritated. And when the rotater [sic] cuff ruptured I think is medical moot point that no one can tell you for sure.

(Weatherwax Dep., pp. 42-43)

Dr. Weatherwax agreed that the May 9, 1983 injury was an aggravating factor to the right shoulder and arm condition. In a September 20, 1984 letter Dr. Weatherwax opines concerning the extent of permanent impairment in claimant's right shoulder:

In regards to your recent letter of September 20th, 1984, regarding Mr. Tussing, I am unable to give you a full impairment rating on this gentleman because I anticipate he has continued improvement regards to his right shoulder in particular which has been operated on as you know. I will say, though, that either criteria established by the American Academy of Orthopaedic Surgery as well as those established by the American Medical Association for evaluating impairment, loss of the biceps tendon on one side represents approximately 10% upper limb impairment and resection of the distal clavicle part of the surgical procedure carried out represents another 5%. Additional impairment on the right shoulder would then be based on loss of motion and strength that can only be determined at least 4 to 6 months in the future. In regards to his left shoulder, I fully expect that he has a full thickness rotator cuff tear, but does not at this time clinically have evidence of biceps tendon rupture and again I would be unable to provide you any impairment rating on this shoulder at this time.

(Cl. Ex. 2)

Dr. Weatherwax indicated that claimant will have to limit his work to sedentary activities not involving lifting, pulling or bringing the arm above the shoulder.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 9, 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).

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 Hospital 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.

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson, 255 Iowa 1112, 125 N.W.2d 251; Yeager, 253 Iowa 369, 112 N.W.2d

299; Ziegler, 252 Iowa 613, 106 N.W.2d 591. See also Barz, 257 Iowa 508, 133 N.W.2d 704; Almquist, 218 Iowa 724, 254 N.W. 35.

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

ANALYSIS

The Iowa Supreme Court in remanding this matter indicated that the industrial commissioner should reconsider the evidence relating to a work-related injury occurring on May 9, 1983 either as a work-related injury or as an aggravation of a previous one and state reasons for rejecting evidence.

The starting point for this reconsideration must be that the claimant was not a credible witness. The previous appeal decision determined that claimant's credibility as a witness was questionable. The supreme court determined that the question whether the commissioner could overrule the deputy's findings on witness credibility was not preserved on appeal. Therefore, the prior determination that claimant was not a credible witness is final. Even if the question were not final, the record in this matter dictates a finding that claimant was not credible. The finding is based upon contradictions of claimant's testimony and not claimant demeanor at the hearing. Claimant denied having right shoulder problems prior to the May 1983 injury. His testimony was directly contradicted by numerous first reports of injury, one of which related to an injury less than one year before the alleged injury in question, and testimony of claimant's wife that his arm had bothered him for as long as they had been married (23 years). Claimant has been untruthful in a material aspect of his testimony and therefore his testimony cannot be relied upon. On review by the industrial commissioner, the commissioner may reverse the deputy industrial commissioner whenever the preponderance of the evidence indicates the deputy's

decision is incorrect. The industrial commissioner is not limited to the same standards of review as a court on judicial review. See F.C.C. v. Allentown Broadcasting Corp., 349 U.S. 358, 99 L.Ed. 1147, 75 S.Ct. 855 (1955). Also, Iowa Code subsection 17A.15(3) clearly provides, "On appeal from or review of the proposed decision, the agency has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule." The review by the industrial commissioner is de novo. The commissioner is in no sense bound by a deputy's proposed decision. "An agency loses no power of decision by having an administrative law judge preside at a hearing." Bangor and Aroostook Railroad Co. v. ICC, 574 F.2d 1096, 1110 (1st Cir.) citing to Davis, Administrative Law of the Seventies (1976 Supp. to Administrative Law Treatise) §10.03 at 313. "[S]lavish deference by the agency to the examiner's decision is not required." United States Retail Credit Association, Inc. v. F.T.C., 300 F.2d 212, 216 (4th Cir.). A reviewing court is not prevented from considering a proposed decision as it is part of the record but the proposed decision is not sacrosanct. See Id. at 217.

The question then is did the claimant prove by the preponderance of the evidence that an incident occurred on May 9, 1983 which was a work-related injury. Claimant's foreman did not witness the incident (Tr., p. 32, line 17). No other witnesses testified that the incident occurred. Claimant testified that he went on a week's vacation two or three days afterwards. He did not seek medical treatment until five weeks after the alleged incident. However, claimant did report to the foreman that he had been hurt and the information he gave to Dr. Moss was that the incident occurred. There is no independent corroboration of the occurrence of the incident. The only evidence of the incident is the testimony of an unreliable claimant and medical history based upon information supplied by that claimant. Claimant has not proved by a preponderance of the evidence that he suffered an injury on May 9, 1983 either as a work-related injury or as an aggravation of a previous one.

The medical evidence in this case indicates that claimant ruptured the biceps tendon in 1970. Dr. Weatherwax strongly suspected that the rotator cuff injury occurred at the same time. Claimant continued to work for over a year after May 9, 1983. Assuming for the sake of argument that a work incident occurred on May 9, 1983, the incident was not an injury that ruptured the biceps tendon or the rotator cuff. A work injury may also be an aggravation of a preexisting condition. That aggravation must be material in order to be compensable. While claimant's physicians agreed that he suffered an aggravation of his shoulder condition and these opinions are based on the history claimant provides his doctors, it is unclear whether the aggravation was material.

Even if claimant had proved he suffered an aggravation

of the preexisting condition he must also establish that the disability he currently suffers is causally connected to that injury. As causal connection is essentially within the domain of expert testimony, the opinions of claimant's primary treating physician, Dr. Weatherwax, are particularly crucial to claimant's case.

Dr. Weatherwax opined that claimant's present condition is the result of a continuum of pathology which is intimately related to the rupture of the biceps tendon in 1970. Moreover, Dr. Weatherwax testified that it is impossible to determine when the rotator cuff was ruptured but strongly suspected that it occurred when the biceps tendon ruptured in 1970. It must be remembered that claimant continued to work in the same job for over a year after the alleged May 9, 1983 injury just as he did after the previous shoulder injuries. Although Dr. Blume opined that the May 9, 1983 incident was an aggravation of a preexisting condition and assigned an impairment rating he does not causally connect the impairment to the May 9, 1983 work incident. Instead, he related the impairment to a number of accidents. The greater weight of evidence establishes that if there were a work injury on May 9, 1983, claimant suffered a slight temporary aggravation of his right shoulder condition resulting in no additional permanent disability.

One final matter should be noted. The Iowa Supreme Court decision, Tussing, 417 N.W.2d 457, 458, might seem to indicate that "the fact that Tussing was paid benefits for the resulting time missed after May 9, 1983" supports his contention that he suffered an injury that arose out of and in the course of his employment. The law changed for injuries occurring on or after July 1, 1982 regarding payments concerning liability disputes. See 1982 Iowa Acts, ch. 1161, sections 22 and 28. For injuries occurring after July 1, 1982, voluntary payment of benefits can be made without the necessity of establishing that an injury arose out of and in the course of employment.

FINDINGS OF FACT

1. Claimant did not sustain an injury to his right shoulder on May 9, 1983 at work.

2. Claimant sustained a right biceps tendon rupture and a rotator cuff injury in 1970.

3. Claimant has sustained right arm and shoulder strain for which first reports of injury were filed on at least six occasions since 1959.

4. Claimant returned to the same job after the May 9, 1983 injury and remained at that position until he underwent right shoulder surgery in July 1984.

5. Claimant sustained only a slight temporary aggravation of his right shoulder condition on May 9, 1983.

6. Claimant sustained no permanent disability as a result of any work incident on May 9, 1983.

CONCLUSIONS OF LAW

Claimant did not sustain an injury arising out of and in the course of his employment on May 9, 1983.

Claimant has not established that he suffers any permanent disability as a result of any event on May 9, 1983.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That claimant pay all costs of this appeal including any costs of this remand decision.

Signed and filed this 21st day of June, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CORA M. TUTTLE, Claimant, vs. THE MICKOW CORPORATION, Employer, and GREAT WEST CASUALTY, Insurance Carrier, Defendants.	File No. 672377 R E M A N D D E C I S I O N FILED DEC 20 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This case has been remanded by a district court decision "for determination of the appropriate rate of compensation and interest due the petitioner." The district court decision was subsequently affirmed by the court of appeals and the supreme court denied further review.

The record on remand consists of the transcript of the arbitration hearing, claimant's exhibits 1 through 6, 14 through 19, and 21 through 30, and the filings and stipulations of the parties throughout this proceeding.

ISSUES

The issues on remand are the appropriate rate of compensation and the amount of interest due claimant.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

Iowa Code section 85.36 (1981) provides, in part:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary

hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:

....

6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

Iowa Code subsection 85.61(12) (1981) provides:

"Gross earnings" means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

ANALYSIS

The issue of appropriate rate of compensation for owner/operator truck drivers is an issue that has perplexed decision makers in this agency as well as courts from other jurisdictions. A recent appeal decision by this agency offers guidance in resolving the issue. In Dale A. Christensen v. Hagen, Inc., File No. 643433, March 26, 1985, it was determined that the method of determining the appropriate weekly earnings of independent truck operators was to divide by three the net revenue of their truck. It was also determined that the fuel surcharge was not included in the net revenue of the truck and the average weekly salary of the husband and wife as co-drivers was equal. The general method used in Christensen will also be used in the instant case. Because of the facts of the instant case certain modifications in making the calculation of the weekly earnings is appropriate to arrive at the revenue generated from the operation of the truck and to arrive at the decedent's weekly earnings. The revenue generated from the operation of the truck will be referred to as the revenue of the truck and will be the basis for calculating the rate in this case.

Subsection 85.61(12), supra, excludes "irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare

benefits" from gross earnings. "The express mention of one thing in a statute implies the exclusion of others." State v. Hatter, 414 N.W.2d 333, 337 (Iowa 1987). Only those items mentioned should be excluded from the gross earnings of an employee. One of those items expressly excluded is reimbursement of expenses. Mickow reimbursed the decedent for certain of his expenses, namely the fuel surcharge and reimbursed [fuel] permits. The deposition of Walter J. Annett, general manager of Mickow, which is claimant's exhibit 23, explains in some detail what most of the items are on the settlement sheet which is claimant's exhibit 5. Reimbursement for surcharge is explained beginning at page 139 of exhibit 23. The amount for the reimbursed permits is explained beginning at page 55 of exhibit 23. The amount paid to the decedent for fuel surcharge and reimbursed permits should not be included in gross earnings.

Under the employment agreement (claimant's exhibit 2, paragraph I-5), the decedent was also responsible for paying for licensing and truck insurance so that the equipment would be operated in full compliance with the law. Walter Annett indicated that the method of paying for these items was for Mickow to pay the amounts due and then to periodically deduct a portion of the total amount from the payments due the decedent. In this manner, Mickow paid the amounts and was reimbursed by the employee. Decedent had the ultimate economic responsibility for these items. Nothing in the employment contract identifies how much, if any, of the payments represented a reimbursement for business-related expenses. This method of making deductions from the revenue of the truck before payment was made to decedent would not reduce the revenue of the truck. The deductions for these items should not be excluded in calculating decedent's weekly earnings.

The method of Mickow paying an item and decedent reimbursing for this item also appeared to be what was done with other items. For example, in the settlement sheet dated April 16, 1981 (Cl. Ex. 5) decedent appears to have generated gross earnings from pulling "Mercer #039836" but decedent reimbursed Mickow for "Mercer Ins." and "Mercer Ded."

The settlement sheet also indicates that Mickow paid decedent for drop-off or stop-off charges and "bounce" miles. The settlement sheet further indicates that decedent reimbursed Mickow for a brokerage fee and and trailer rental. The drop-off charges and "bounce" miles would be part of revenue of the truck. It is unclear whether the brokerage fee should be excluded pursuant to subsection 85.61(12). The payment for trailer rental appears to be a payment like maintenance of the tractor which was the economic responsibility of decedent. Defendants have not shown that decedent's gross earnings should be reduced by the amount of the brokerage fee or the trailer rental. The brokerage fee and the trailer rental will not be excluded.

Defendants argue that certain expenses associated with the costs of operation of equipment which are the economic

responsibility of the decedent should be deducted from the amounts paid to the decedent to determine decedent's gross earnings. This argument is not persuasive for a variety of reasons. One reason is that the language of the statute is clear that gross earnings is the starting point for calculation of benefits. Defendants' argument in effect makes a net income or profit the starting point. Defendants' argument is not consistent with the language of the statute. Statutory interpretation should avoid absurd or impractical results. See Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907, 913 (Iowa 1985). Any attempt to do as defendants advocate would lead to absurd results. For example, if an employee's cost of operating in a 13 week period or any other time period exceeded the revenue generated for that same time period, the result of defendants' position would be that an employee would not receive benefits because the gross earnings would be less than zero. Interpretation of statutes that result in absurd results such as this are not favored by the courts. Defendants' interpretation would also lead to impractical results. A creative mind could conjure up a magnitude of difficulties for this agency in attempting to calculate such things as depreciation, operating expenses, fair market rental of equipment, excise taxes, rate of return on investment, interest expense, etc., in determining how the revenue generated by the employee's operation should be reduced by equipment costs. Two examples should demonstrate the impracticality of such an interpretation of the statute. One example would be that two employees who are paid exactly the same amount would have very different rates of compensation merely because one had depreciation expense and the other did not or merely because one chose to treat a cost as a depreciation item rather than an expense item for income tax purposes. The second example would be that this agency would have to be expert in taxation, accounting, and finance in order to properly separate the costs of furnishing the labor from the costs of furnishing the equipment. It is interesting to note that defendants attempt to do so by using the decedent's federal income tax return despite the fact that applicable federal tax laws and Iowa's workers' compensation laws are clearly not in pari materia.

Two other matters need to be addressed. The first is how to consider the labor provided by decedent's wife when she drove. The deputy found that decedent's wife's output was 42 percent of the total family output. This finding was based upon an examination of the April and May logbooks for 1981 and appears to be accurate. Part of the revenue of the truck included the labor of decedent's wife as co-driver. In this case one-third of the revenue of the truck represents the earnings of both the decedent and his spouse and the spouse's share of the combined earnings is 42 percent of the total earnings.

The last matter to be addressed is that this matter was remanded for determination of the appropriate interest as well as the rate of compensation. The parties in their arguments make no particular argument regarding the interest. Interest accrues at the rate of 10 percent per year pursuant to Iowa Code section 85.30.

In summary, decedent's weekly earnings are his share of one-third of the amount of revenue generated from one operation of his truck. Claimant has proved that those amounts should include the appropriate revenues plus "bounce" miles and stop-off or drop-off charges. Fuel surcharges and reimbursed permits are reimbursement of expenses and should not be included. The other items that decedent reimbursed Mikow for are not reimbursement of expenses, expense allowances, or any other exclusion contained in subsection 85.61(12). The other items such as license fees, truck insurance, trailer rent, and brokerage fees are not excluded from decedent's gross earnings. Decedent's spouse's share of the revenue of the truck was 42 percent.

FINDINGS OF FACT

1. Decedent's weekly earnings is his share of one-third of the revenue generated from the operation of his truck.

2. Decedent's share of the charge for hauling, "bounce" miles, and drop-off or stop-off charges are included in the revenue generated from the operation of the truck.

3. Fuel surcharge and reimbursed permits are not included in the revenue of the truck.

4. License fees, truck insurance, trailer rent and brokerage fees are not excluded from the revenue of the truck.

5. The payments to decedent for revenue generated from the operation of the truck were (from claimant's exhibit 5):

3/12/81	1,961.00 x 75%	1,470.75	
	801.72 x 95%	761.63	
	Total		2,232.38
3/19/81	560.35 x 75%	420.26	
	Sammons #70981	511.50	
	Total		931.76
3/26/81	1,419.84 x 75	1,064.88	
	699.72 x 95%	664.73	
	Bounce	60.00	
	Maverick #2083	673.09	
	Total		2,462.70

4/2/81	1,123.64 x 75%	842.73	
	170.84 x 95%	162.30	
	Total		1,005.03
4/9/81	2,066.51 x 75%	1,549.88	
	Total		1,549.88
4/16/81	1,098.04 x 95%	1,043.14	
	Mercer #039836	562.43	
	Total		1,605.57
4/23/81	864.77 x 75%	648.58	
	bounce	135.00	
	Total		783.58
4/30/81	1,548.81 x 75%	1,161.61	
	344.63 x 95%	327.40	
	stop-off charge	100.00	
	Total		1,589.01
5/7/81	917.70 x 75%	688.28	
	stop-off charge	50.00	
	Total		738.28
5/21/81	581.02 x 75%	435.77	
	396.54 x 95%	376.71	
	Helms #453789	349.06	
	Total		1,161.54
5/28/81	784.55 x 75%	588.41	
	Total		588.41
6/4/81	2,277.47 x 75%	1,708.10	
	bounce	50.00	
	bounce	60.00	
	Mercer #046997	743.48	
	Total		2,561.58
6/18/81	627.90 x 75%	470.93	
	Jones #185502	588.90	
	" " #185650	477.14	
	bounce	50.00	
	bounce	40.00	
	bounce	100.00	
	bounce	60.00	
	Total		1,786.97
	Total revenue of the truck		$18,996.69

6. Claimant, decedent's wife, as a co-driver of decedent's truck, furnished 42 percent of the labor.

7. The weekly earnings of decedent and his wife represent one-third of the revenue of the truck.

8. The decedent's weekly earnings are calculated:

Total revenue of the truck	$18,996.69
Divided by 13 weeks equals	1,461.28
Divided by 1/3 equals	487.09
Less wife's share (42%)	204.58
Decedent's weekly earnings	$ 282.51

9. At the time of his death in June 1981, decedent was married and entitled to two exemptions.

CONCLUSIONS OF LAW

Decedent's rate of compensation is $176.48.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant weekly compensation at the rate of one hundred seventy-six and 48/100 dollars ($176.48) per week commencing on June 11, 1981 and continuing until such time as claimant becomes disqualified for compensation.

That interest is to accrue on this award at a rate of ten percent (10%) per year pursuant to section 85.30, Code of Iowa, from the date payments become due.

That any accrued but unpaid amounts shall be paid in a lump sum.

That defendants are to pay the Second Injury Fund two thousand dollars ($2,000.00).

That defendants are to pay unto claimant a burial benefit in the amount of one thousand dollars ($1,000.00).

That costs including the costs of this remand are taxed to defendants pursuant to Division of Industrial Services Rule 343-4.33.

That defendants be given credit for amounts previously paid.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 20th day of December, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM LLOYD TUTTLE, Claimant, vs. STANNARDS, INC., Employer, and FARMERS INSURANCE GROUP, Insurance Carrier, Defendants.	:	File No. 780967 A P P E A L D E C I S I O

FILED
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IOWA INDUSTRIAL COMM

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibit 1; and claimant's exhibits 2 through 6. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

I. Whether the deputy commissioner erred in computing the rate of compensation due the claimant through the computation of gross earnings and spendable earnings.

II. Whether the deputy commissioner erred in failing to make a finding as to the claimant's rate for healing period benefits.

III. Whether the deputy commissioner erred in its conclusions of law that claimant is entitled to permanent partial disability benefits in the amount of 25%.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein. In addition to the deputy's review of the evidence, the following evidence is noted:

William R. Pontarelli, M.D., recommended that claimant not return to his employment as a truck driver, stated that claimant's prior motorcycle accident did not contribute to his present impairment, and that claimant's weight gain affected the amount of pain claimant experienced but did not affect his impairment. Claimant testified that his manic-depressive disorder did not affect his school or work, but did make him nervous. David E. Booth, Jr., an accountant for Stannards, Inc., indicated that claimant was no longer working for defendant Stannards, Inc., because of his injury.

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."

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

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

In Parr v. Nash Finch Co., (Appeal Decision, October 31, 1980) the industrial commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results

in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, 288 N.W.2d 181.

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden, 288 N.W.2d 181.

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).

Iowa Code section 85.36 (1983) states in part:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:
>
> ....
>
> 6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

Iowa Code section 85.61(12) (1983) states:

> "Gross earnings" means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Iowa Code section 85.34(1) (1983) states:

> Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall

pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

ANALYSIS

The analysis of the evidence in regards to the rate issue by the deputy industrial commissioner is adopted. The arbitration decision determined the rate based on a gross earnings of $9,863.15 for the 13 weeks prior to claimant's injury. Claimant on appeal asserts that the proper gross earnings amount for this period is $10,742.13, pursuant to Exhibit 5. The discrepancy is in the amount of $878.98, which is the corrected accrual income amount for the week of May 16, 1984 to May 22, 1984. It appears that this amount was omitted from the calculation of rate, and therefore claimant's income for the 13 weeks prior to the date of injury is determined to be $10,742.13. All other provisions of the deputy's analysis in regards to rate are adopted herein, and claimant's rate of compensation is determined to be $417.15.

Claimant's second issue on appeal concerns the rate for the healing period, which was stipulated to be from June 12, 1984 until August 16, 1985. Claimant maintains the deputy erred in not setting forth the rate of compensation for the healing period. Section 85.34(1) provides that the employer shall pay compensation during the healing period and makes reference to section 85.37. Neither section states that a separate or different rate of compensation will be used during the healing period. Claimant's rate of compensation for the healing period is $417.15 per week.

The analysis of the evidence in conjunction with the law by the deputy in regards to claimant's third issue, the extent of industrial disability, is adopted.

FINDINGS OF FACT

1. Claimant received an injury to his back on June 12, 1984 arising out of and in the course of his employment with defendant.

2. Claimant underwent surgery for his back and has received two ratings of impairment of 20 percent of the body as a whole.

3. Claimant has a lifting restriction of 20 pounds.

4. Claimant's healing period is from June 12, 1984 until August 16, 1985.

5. Claimant was 33 years old at the time of the hearing and has a high school education.

6. Claimant cannot return to his duties as a truck driver due to his impairment.

7. Claimant's employer did not rehire claimant due to his impairment.

8. Claimant's prior motorcycle accident did not result in impairment.

9. Claimant's manic-depressive disorder does not contribute to his industrial disability.

10. Claimant is enrolled in a course of college study designed to prepare him for a career in food service work as a chef or restaurant manager.

11. Claimant has experienced a loss of earnings as a result of his injury of June 12, 1984.

12. Claimant's expected earnings as a chef or restaurant manager are less than claimant earned as a truck driver.

13. Claimant was paid according to his output.

14. Claimant's gross earnings for the 13 weeks prior to his injury was $10,742.13.

15. Claimant paid his own expenses for food, motels and labor out of his gross earnings and was not compensated for these items by his employer.

16. Claimant was single and without born children on the date of his injury.

17. Claimant's rate of weekly compensation is $417.15.

18. As a result of his injury on June 12, 1984, claimant has an industrial disability of 25 percent.

CONCLUSIONS OF LAW

Claimant's rate of weekly compensation is $417.15.

As a result of his injury on June 12, 1984, claimant has an industrial disability of 25 percent.

WHEREFORE, the decision of the deputy is affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant healing period benefits from June 12, 1984 until August 16, 1985 at the rate of four hundred seventeen and 15/100 dollars ($417.15) per week.

That defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at a rate of four hundred seventeen and 15/100 dollars ($417.15) per week from August 17, 1985.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall be given credit for any benefits previously paid.

That defendants shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to pay the costs of this action.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 19th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL J. ULRICH,

Claimant,

vs.

UNICOVER, INC.,

Employer,
Self-Insured,
Defendant.

File No. 779183

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision in which claimant was awarded permanent partial disability of seven percent of the body as a whole as the result of his injury and in which claimant was awarded healing period benefits from October 31, 1984 until April 3, 1985.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 and 2; and, defendant's exhibits A and B. Both parties filed briefs on appeal.

ISSUES

Claimant states the issue on appeal as:

Whether the deputy's award of healing period benefits only to April 3, 1985 is supported by substantial evidence.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence. It will not be set forth herein.

APPLICABLE LAW

Section 85.34(1), Code of Iowa, provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) he has returned to work; (2) is medically capable of returning to substantially similar employment; or, (3) has achieved maximum medical recovery. The industrial commissioner has recognized that healing period benefits can be interrupted or intermittent. Willis v. Lehigh Portland Cement Company, Vol. 2-1, State of Iowa Industrial Commissioner Decisions, 485 (1984).

Continuing to receive medical care which is maintenance in nature does not extend the healing period beyond the point where claimant actually stopped improving. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981); Derochie v. City of Sioux City, II Industrial Commissioner Report, 112 (1982) District Court Appeal, remanded for settlement.

ANALYSIS

The analysis of the evidence is consistent with the above cited law and is adopted. As the deputy noted, after April 3, 1985, Dr. Johnson was basing his release of claimant on factors other than claimant's physical condition. As stated, Dr. Johnson was basing later releases on claimant's actually having a job. Availability of work is not the criterion which determines the end of healing period. Where claimant has not returned to his former employment and is not capable of returning to substantially similar employment, maximum medical healing is the point of termination of healing period. The record as a whole supports the conclusion that claimant reached maximum healing on April 3, 1985.

As the parties have not challenged the deputy's determinations regarding other issues, the findings of fact and conclusions of law in the arbitration decision are adopted as set forth in that decision and will not be further discussed herein.

FINDINGS OF FACT

WHEREFORE, it is found:

1. On October 31, 1984, claimant was injured while driving a truck for defendant.

2. As a result of that injury, claimant has no permanent impairment.

3. As a result of that injury, defendant fired claimant.

4. Claimant has been released to return to work without restrictions.

5. Claimant could not return to any of his former employments.

6. On May 2, 1986, claimant went back to driving a tractor on a farm.

7. On April 3, 1985, Dr. Johnson recommended that claimant go back to work if appropriate work were found.

8. After April 3, 1985, Dr. Johnson based releases of claimant on factors other than claimant's physical condition, generally the availability or potential availability of employment.

9. Dr. Johnson was claimant's treating physician.

10. Dr. Carlstrom opined that claimant reached maximum benefits of healing in summer, 1985.

11. Per Dr. Emerson, claimant would not be able to drive at night on account of his medication, he might be able to do reasonably well in a job involving only daytime work.

12. Dr. Carlstrom and Dr. Emerson were examining physicians.

13. Defendant has paid for care Dr. Johnson provided claimant.

14. Claimant showed no reason for requesting alternate care.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

1. Claimant has met his burden of proving a permanent partial disability of seven percent as the result of his injury.

2. Claimant is entitled to healing period benefits from October 31, 1984 until April 3, 1985.

3. Dr. Johnson will remain authorized to treat claimant.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

Defendant pay claimant thirty-five (35) weeks of permanent partial disability benefits at the rate of two hundred sixty-eight and 90/100 dollars ($268.90) per week and twenty-two (22) weeks of healing period benefits at the rate of two hundred sixty-eight and 90/100 dollars ($268.90) per week.

Defendant is given credit for benefits previously paid.

Dr. Johnson will continue to be an authorized treating physician for any medical care causally related to claimant's injury.

Defendant will reimburse claimant eighty-six and 40/100 dollars ($86.40) for mileage.

Accrued benefits are to be paid 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 of the original proceeding are taxed to defendant pursuant to Division of Industrial Services Rule 343-4.33. Claimant is taxed costs of the appeal pursuant to the cited rule.

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

Signed and filed this 29th day of November, 1988.

Helenjean Walleser

HELENJEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MELVIN L. VAN CANNON, Claimant, vs. DEPARTMENT OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 832018 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent total disability benefits.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 5. Both parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are:

I. This case was wrongly decided because the deputy industrial commissioner inaccurately and erroneously stated the issue of the case and the claimant's burden of proof which resulted in erroneous findings of fact and conclusions of law in support of the decision.

II. This case was wrongly decided because the deputy industrial commissioner erroneously concluded that a preponderance of evidence showed the claimant suffered a personal injury on December 16, 1985, which arose out of and in the course of his employment and caused the subsequent disabling stroke during coronary artery bypass surgery on January 9, 1986.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted.

FINDINGS OF FACT

1. In September 1985, while at home, claimant experienced chest pain requiring hospitalization.

2. After an angiogram was performed, it was discovered claimant suffered from coronary artery disease and angioplasty was performed.

3. After surgery claimant underwent cardiac rehabilitation and was released to return to work December 1, 1985 symptom-free and without restrictions.

4. Claimant returned to work December 2, 1985, to his regular job and was able to perform his regular duties including working 17 hours during a snowstorm.

5. On December 16, 1985, while at work performing the assigned task of chopping frozen dirt and ice from a truck bed, claimant experienced chest pain, radiating down his arms, severe enough to require emergency care and hospitalization.

6. While hospitalized, claimant had a repeat angiogram and open heart surgery was recommended.

7. Quintuple coronary bypass graft operation was performed January 9, 1986, during which claimant suffered stroke syndrome (cerebral infarction).

8. William S. Wheeler, M.D., L. A. Iannone, M.D., and Paul From, M.D., agree the work incident precipitated the chain of events which ultimately led to claimant's disability and/or materially aggravated claimant's underlying heart disease.

9. Claimant incurred medical expenses as a result of his injury which have been paid under defendants' non-occupational group plan.

10. A bona fide dispute existed as to the benefits owed claimant with regard to the issue of causation.

CONCLUSIONS OF LAW

Claimant has established he suffered an injury on December 16, 1985, which arose out of and in the course of his employment and which materially aggravated preexisting heart disease.

Claimant has established the work injury is causally connected to the disability on which he now bases his claim.

Claimant has established medical expenses are causally connected to the work injury and defendants' liability therefor under Iowa Code section 85.27.

Claimant has not established entitlement to penalty benefits under Iowa Code section 86.13.

Defendants are entitled to credit under Iowa Code section 85.38(2) for benefits paid under a non-occupational group plan.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant permanent total disability benefits at the stipulated rate of one hundred eighty-four and 16/100 dollars ($184.16) per week for the period of his disability.

That defendants pay all medical expenses pursuant to Iowa Code section 85.27 and are entitled to a credit for all medical expenses paid under a non-occupational group plan.

That payments which have accrued shall be paid in a lump sum together with statutory interest thereon pursuant to Iowa Code section 85.30.

That defendants pay all costs including costs of transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

That defendants shall file claim activity reports pursuant to Division of Industrial Services Rule 343-3.1(2), as requested.

Signed and filed this 21st day of February, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD L. WALES, Claimant, vs. CATERPILLAR TRACTOR COMPANY, Employer, Self-Insured, Defendant.	:	File No. 763660 A P P E A L D E C I S I O N

FILED
MAR 31 1989
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying any benefits based upon permanent partial disability as a result of a work injury on April 18, 1984.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits A through D. The claimant filed a brief on appeal. Defendant filed no brief on appeal.

ISSUE

Claimant states the issue on appeal is, "whether or not the claimant is entitled to industrial disability as a result of his April 18, 1984 injury?"

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein. It should be noted that the arbitration decision's references to payment of permanent partial disability benefits is not adequately supported by the record. For purposes of review of this matter it is assumed that no permanent partial disability benefits have been paid.

The parties stipulated:

That an employer-employee relationship existed between claimant and employer at the time of the injury.

That claimant sustained an injury on April 18, 1984 which arose out of and in the course of employment with employer.

That claimant was paid temporary disability benefits for two weeks and one day from April 18, 1984 to May 2, 1984 and that temporary disability benefits are no longer in dispute in this case at this time.

That the type of permanent disability, in the event of an award of permanent disability benefits, is industrial disability to the body as a whole.

That in the event of an award of permanent partial disability benefits, that the commencement date of benefits is to be June 30, 1986 and the ending date of such benefits is March 16, 1987.

That the rate of compensation, in the event of an award, is $279.06 per week.

That claimant's entitlement to medical benefits is no longer in dispute.

That defendant makes no claim for credit for benefits paid prior to hearing either as employee nonoccupational group health plan benefits or as workers' compensation benefits.

That there are no bifurcated claims.

On April 18, 1984, claimant was injured while pulling a load as a power trucker. He suffered a sensation of pain in his back which radiated down to his feet. He was off work for two weeks and one day from April 18, 1984 to May 2, 1984.

James C. Donahue, M.D., plant physician, released claimant to return to work on May 3, 1984. Dr. Donahue imposed restrictions of no repetitive lifting, bending, pushing, pulling and no lifting over 25 pounds. Claimant worked until a general plant layoff occurred on April 1, 1985 at which time he was laid off.

A recall list was issued for the week of June 23, 1986. Claimant's name did not appear on that list. An employee by the name of G. A. Twigg was recalled to work on that list effective June 30, 1986. Claimant said that he inquired as to why Twigg was recalled and he was not and he was told that it was due to his weight restriction.

It had happened that Dr. Donahue had completed a "Disability Report" a few days before the recall on June 3, 1986 about claimant who was on layoff which appears to state "limit lifting to 45 lbs., no repetitive bending." In a letter dated February 26, 1987 Dr. Donahue wrote that "any individual having chronic back problems should be limited to 45 pounds lifting with no repetitive bending to return to work."

4. There was a layoff from April 1985 until the week of June 23, 1986.

5. Claimant had lifting restrictions of 45 pounds with no repetitive bending as of June 1986. Claimant had the same restrictions on March 16, 1987.

6. Claimant's lifting restrictions were not the result of a work injury on April 18, 1984.

7. Claimant's failure to be recalled to work on June 30, 1986 was not caused by his work injury of April 18, 1984.

8. Claimant was recalled to work on March 16, 1987.

CONCLUSION OF LAW

Claimant's work injury of April 18, 1984 is not causally related to claimant's alleged industrial disability from June 30, 1986 through March 16, 1987.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That the costs of this proceeding including the costs of transcribing the arbitration hearing are to be paid by claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 31st day of March, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILBERT E. WARD,

Claimant,

vs.

AMERICAN FREIGHT SYSTEM, INC.,

Employer,
Self-Insured,
Defendant.

File No. 774247

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding him permanent partial disability benefits based upon a 25 percent industrial disability. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 10, and 12 through 13b; and defendant's exhibits A through L. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

I. The limitation assessed on loss of earning capacity, due to the claimant's advanced age, is in error of law.

II. The 25 percent finding of a loss of earning capacity is too low and unsupported by substantial evidence in the record made before the Iowa Industrial Commissioner when that record is viewed as a whole.

III. The admission of the defendant's exhibit L and associated testimony was in error of law, unreasonable, arbitrary and clearly an unwarranted exercise of discretion.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the abitration decision are appropriate

to the issues and evidence.

ANALYSIS

The analysis of the deputy in conjunction with the issues and evidence presented is adopted.

The findings of fact, conclusions of law and order of the deputy are adopted herein.

FINDINGS OF FACT

1. Claimant injured his back on August 22, 1984 while working for defendant.

2. Claimant's injury consisted of a sprain or strain of the low back superimposed on degenerative changes.

3. Claimant is 62 years old.

4. Claimant has completed tenth grade.

5. Claimant has numerous medical problems not related to his work injury. Claimant's back condition relates to his work injury.

6. Claimant has limited job skills.

7. Claimant has worked primarily at manual labor jobs involving heavy lifting as well as bending, stooping, standing, and sitting.

8. Claimant cannot now perform the above physical maneuvers on a sustained basis.

9. Claimant's employer was unwilling to accommodate claimant's work release with a fifty pound lifting restriction.

10. Claimant was reluctant to seek vocational rehabilitation as claimant wanted to either work at his prior job or retire.

11. Claimant has not returned to work.

12. Claimant has retired.

13. Dr. Turner rates claimant's functional impairment at 20 percent of the whole man and Dr. Walker rates it at 49 percent of the whole man.

14. Claimant's loss of earnings capacity is 25 percent.

15. Claimant received full holiday pay on those days on

which he did not receive healing period benefits.

16. Dr. Walker's care of claimant was unauthorized, was not provided in an emergency, and did not benefit claimant significantly or reduce claimant's ultimate disability.

17. Claimant requested an independent medical examination with Dr. Walker after claimant had already received a permanent partial impairment rating.

CONCLUSIONS OF LAW

Claimant is entitled to permanent partial disability resulting from his August 22, 1984 injury of 25 percent.

Defendant is entitled to receive credit for permanent partial disability benefits already paid claimant representing ten percent permanent partial disability.

Claimant is not entitled to healing period benefits for those dates on which claimant received full holiday pay.

Claimant is not entitled to payment of any costs incurred with Dr. Walker under section 85.27.

Claimant is entitled to payment of costs of his July 24, 1985 evaluation with Dr. Walker under section 85.39.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant an additional seventy-five (75) weeks of permanent partial disability benefits at the rate of three hundred forty-three and 62/100 dollars ($343.62).

That defendant pay costs of claimant's July 24, 1983 examination with Dr. Walker.

That defendant pay accrued amounts in a lump sum.

That defendant pay interest pursuant to section 85.30.

That defendant pay costs pursuant to Division of Industrial Services Rule 343-4.33 including the costs of the transcription of the hearing proceeding.

That defendant file claim activity reports as required by the agency.

Signed and filed this 19th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

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Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BEVERLY J. WHITSEL,

Claimant,

vs.

MARIAN HEALTH CENTER,

Employer,
Self-Insured,
Defendant.

File No. 801042

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding temporary total disability benefits as the result of an alleged injury on July 12, 1985. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 9; and defendant's exhibits A and B. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. The deputy commissioner erred in determining that the claimant's July, 1985 back injury at MHC was not the cause of a permanent disability and in determining the amount of healing period and medical expense resulting therefrom.

2. The deputy commissioner erred in determining that claimant's bilateral carpal tunnel syndrome was not job related and in refusing to award medical benefits, healing period/temporary total disability and permanent partial disability relative thereto.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of her employment on July 12, 1985, when she fell and did the "splits."

2. Claimant worked part time until July 29, 1985, when she sought medical treatment and eventually came under the care of John J. Dougherty, M.D.

3. Claimant was taken off work until released to return without restriction on August 29, 1985.

4. Claimant returned to work but maintained she was unable to work and therefore left work again September 9, 1985.

5. Dr. Dougherty again released claimant to return to work November 23, 1985, but claimant declined to do so asserting she could not work.

6. Claimant continues to assert she is completely unable to work.

7. Claimant suffered from a preexisting back condition for which she had sought treatment.

8. Claimant was obese at the time of her fall and suffers from a thyroid deficiency.

9. Claimant has no permanent impairment nor permanent work restriction as a result of her fall on July 12, 1985.

10. Claimant temporarily aggravated, as a result of her fall on July 12, 1985, a preexisting condition.

11. Claimant was diagnosed as having bilateral carpal tunnel syndrome on September 12, 1985, and asserts an injury arising out of and in the course of her employment.

12. Claimant's treating physician gave varying opinions on causation, which included an opinion that claimant's weight and thyroid condition may be 100 percent responsible for her carpal tunnel condition; an opinion that claimant's carpal tunnel condition was almost invariably related to her work; and an opinion that claimant's condition was related to her work.

13. Claimant's bilateral carpal tunnel syndrome is only possibly related to her employment.

14. Claimant had a gastric bypass May 22, 1986, after which she reduced her weight to approximately 110 pounds but which did not improve her back condition.

15. The care of Horst Gunter Blume, M.D., and the expenses incurred for bilateral carpal tunnel surgery and gastric bypass surgery were not authorized.

CONCLUSIONS OF LAW

Claimant has failed to establish an injury of September 12, 1985, that arose out of and in the course of employment.

Claimant has established a temporary aggravation of a preexisting condition as a result of the work injury of July 12, 1985.

Claimant has established entitlement to temporary total disability benefits for the periods from July 29, 1985 through August 28, 1985, inclusive, and September 9, 1985 through November 23, 1985, as a result of the work injury of July 12, 1985.

Claimant has established entitlement to all disputed medical expenses incurred with William P. Isgreen, M.D.

Claimant has failed to establish the work injury of July 12, 1985, resulted in any permanent disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant is to pay claimant fifteen and two-sevenths (15 2/7) weeks of temporary total disability benefits at the stipulated rate of one hundred ninety-three and 71/100 dollars ($193.71) for the periods from July 29, 1985 through August 28, 1985, inclusive, and September 9, 1985 through November 23, 1985, inclusive.

That defendant shall receive credit for all disability benefits previously paid.

That defendant shall pay all disputed medical expenses incurred with Dr. Isgreen.

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

That defendant pay the costs of the arbitration proceeding and claimant shall pay the costs of this appeal.

That defendant file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 28th day of April, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN WILLARD,	:	
	:	
Claimant,	:	File No. 779876
	:	
vs.	:	A P P E A L
	:	
JOHN DEERE COMPONENT WORKS,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding claimant permanent partial disability benefits under Iowa Code section 85.34(2)(s).

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 13. Both parties filed briefs on appeal.

ISSUES

Defendant states the following issues on appeal:

I. Whether this proceeding is barred by the two-year statute of limitations contained in Iowa Code § 85.26(1).

II. Whether the Deputy erred in finding that Claimant sustained his burden of proving causal connection between his alleged injury and his employment as a broach machine operator.

III. Whether the Deputy erred in computing Claimant's award.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law are appropriate to the issue and evidence.

ANALYSIS

The deputy's analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. In May 1984, claimant became disabled as a result of a wrist problem.

2. Claimant's wrist problem was in the nature of carpal tunnel syndrome and degenerative joint disease.

3. Claimant's problems with his wrists developed over a number of years as a result of his employment activities.

4. Claimant was required to be off work for healing purposes following carpal tunnel release surgery and again following wrist fusions.

5. Claimant suffered permanent impairment equal to 32% of both upper extremities as a result of his work injuries.

6. Claimant's rate of compensation is $279.46.

7. Claimant's problems with his wrists developed simultaneousl

8. Claimant filed his claim for benefits in a timely manner.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that he received an injury arising out of and in the course of his employment.

Claimant has proven by a preponderance of the evidence that there is a causal relationship between his injury and the disability to his upper extremities.

Defendant failed to prove by a preponderance of the evidence that claimant's cause is barred by the statute of limitations.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant healing period benefits commencing with the first day he was off work because of his work injury and continuing until he returned to work following carpal tunnel release surgery.

That defendant shall thereafter commence payment of one hundred seventy (170) weeks of permanent partial disability at the rate of two hundred seventy-nine and 46/100 dollars ($279.46) until such time as claimant was again off work for wrist fusion surgeries at which time healing period benefits shall recommence until he again returned to work. The remaining permanent partial disability entitlement shall then recommence.

That defendant shall be given credit for healing period benefits pursuant to section 85.38.

That all accrued benefits shall be paid in a lump sum with interest.

That defendant shall pay the costs including the cost of the transcription of the arbitration hearing.

That defendant shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 14th day of September, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUSAN K. WYATT, Claimant, vs. HOLIDAY INNS, INC., d/b/a HOLIDAY INN DUBUQUE, Employer, and NORTHWEST NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 803544 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying further permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits A through D; and claimant's exhibits 1 through 13. Both parties filed briefs on appeal. Claimant also filed a reply brief.

ISSUES

Claimant failed to specify appeal issues in her brief. The appeal will be considered generally and without reference to specific issues.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant worked as a waitress for defendant. Claimant was 48 years old at the time of the hearing. On September 4, 1985 claimant tripped and fell forward onto the floor. Claimant immediately felt pain in her elbows and wrists. David S. Field, M.D., an orthopedic surgeon, stated that claimant's injuries were a fracture dislocation of the right elbow with

considerable comminution of the right radial head of the right wrist. The elbow dislocation fracture and the right wrist comminution were repaired surgically. The right wrist required the installation of a radial head implant.

Over the next several weeks claimant developed increasing pain and numbness in the median nerve distribution of the right hand. In November 1985, claimant was diagnosed as suffering from carpal tunnel syndrome of the right arm and hand. A surgical release of the median nerve entrapment was performed on November 20, 1985. Claimant was off work for her arm, wrist, and hand difficulties from September 4, 1985 until February 15, 1986. Claimant had no previous medical history of any arm or wrist problems before the work injury in this case. Claimant received a rating of 39 percent impairment of her right arm.

Claimant testified that beginning in February or March 1986 she developed pain in her low back, shoulder, neck and legs along with her arm and hand pain. However, claimant did not list these complaints in an interrogatory answered by her on April 28, 1986. Claimant sought medical treatment for these problems in June 1986 from a board certified neurologist, Patrick R. Sterrett, M.D. Dr. Sterrett's notes indicate claimant told him she had first experienced the pains seven weeks prior to her visit on June 22, 1986. Claimant was then hospitalized by Dr. Sterrett for a few days in August 1986 to rule out spinal disc disease and a possible condition of polymyalgia rheumatica. Tests during the hospital stay which included a myelogram and a CT scan found nothing unusual in claimant's spine. Dr. Sterrett consulted with Dr. Field and a rheumatology specialist, Richard Pena, M.D. Upon claimant's release from the hospital, Drs. Field, Sterrett, and Pena agreed to a probable diagnosis of fibrositis and myofascitis. Dr. Sterrett opined that the fibrositis and myofascitis was causally related to the September 4, 1985 fall at Holiday Inn. Dr. Pena stated that claimant's condition is probably not related to the fall in September 1985. Dr. Sterrett also stated that fibrositis and myofascitis fall more within Dr. Pena's area of specialty than his own and that he would expect the symptoms to occur closer in time to the trauma if myofascitis were the cause of claimant's condition.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 4, 1985 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). The expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

ANALYSIS

Claimant has already received benefits for the injury to her right arm. Defendants have acknowledged that the injury of September 4, 1985 was in the course of and arose out of claimant's employment. The issue on appeal appears to be whether claimant is entitled to further benefits for the pain she now experiences in her back, neck, shoulder and legs.

Claimant is required to establish that the condition causing the pain in her back, neck, shoulder and legs is causally connected to her injury of September 4, 1985. The medical evidence on this point is in conflict. Dr. Pena states claimant's present condition in her back, neck, shoulder and legs is probably not connected to her fall on September 4, 1985 while Dr. Sterrett, on the other hand, opined that claimant's present condition is related to her fall.

Initially, it is to be noted that Dr. Sterrett does not make a conclusive diagnosis or definite statement as to causal connection. Rather, his deposition statements were in terms of "probable", "may have", and "could be" in addition to "probable". Taken as a whole, his testimony at most only established claimant's fall as a possible cause of her present condition.

Dr. Sterrett repeatedly asserted that the causes of either fibrositis or myofascitis are not always definitely known. In addition, Dr. Sterrett attributes claimant's condition to one of two and possibly three causes, only one of which would be the result of claimant's fall. Dr. Sterrett also stated that he would expect claimant's symptoms to have appeared earlier than they did if the condition had in fact been caused by her fall. Finally, Dr. Sterrett acknowledged that he made a referral to Dr. Pena because Dr. Pena's area of specialty was more closely related to claimant's problems. The testimony of Dr. Pena will be given the greater weight.

Claimant bears the burden of proving a causal connection between her present disability and the injury of September 4, 1985. A possibility is insufficient, a probability is required. Claimant has failed to carry her burden as to causal connection. Because of this determination, it is not necessary to determine the extent of claimant's disability.

FINDINGS OF FACT

1. Claimant worked as a waitress for defendant employer.

2. On September 4, 1985 claimant suffered a falling injury which arose out of and was in the course of her employment.

3. Claimant suffered injuries to her wrists and arms and received workers' compensation benefits for those injuries.

4. Subsequent to her return to work, claimant experienced pain in her legs, shoulder, neck and back.

5. Claimant's pain in her legs, shoulder, back and neck arose after April 28, 1986.

6. Claimant sought medical help for the pain in her legs, shoulder, neck and back in June of 1986.

7. Claimant's fall on September 4, 1985 did not cause her leg, shoulder, back or neck pain or problems related thereto.

8. Claimant's stipulated rate of compensation is $70.83.

9. Claimant received a rating of impairment of her right arm of 39 percent.

CONCLUSIONS OF LAW

Claimant has failed to establish a causal connection between her present disability of her legs, shoulder, neck and back and her injury on September 4, 1985.

Claimant is entitled to healing period benefits from September 4, 1985 until February 15, 1986.

As a result of her injury of September 4, 1985 claimant has permanent disability of her right arm of 39 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant ninety-seven point five (97.5) weeks of permanent partial disability benefits at a rate of seventy and 83/100 dollars ($70.83) per week from February 15, 1986.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants are to pay the costs of the arbitration proceeding and claimant is to pay the costs of the appeal including the costs of the transcription of the hearing proceeding.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 18th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEAN YOUNG, Claimant, vs. DAHL'S FOODS, Employer, and MARYLAND CASUALTY, Insurance Carrier, Defendants.	File No. 793528 A P P E A L D E C I S I O N FILED AUG 26 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 6; claimant's exhibit 6 (in 3 parts); and defendants' exhibits A through D. Defendants' proposed exhibit E, filed post-hearing, was not considered pursuant to the ruling of the deputy industrial commissioner dated December 10, 1986. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: The extent of claimant's industrial disability.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

Briefly stated, claimant worked as a meat cutter and as second man or assistant meat manager at defendant Dahl's food store for over 17 years. Claimant's duties included boning, cutting, sawing, and grinding of meat products as well as clean up and working with customers. Claimant was required to lift various weights of meat up to 100 pounds.

On March 13, 1985, claimant was dumping a bone barrel weighing around 200 pounds when he felt a pain in his low back. Claimant continued to work for approximately two weeks, but when the pain persisted he sought medical care from James L. Blessman, M.D. Dr. Blessman referred claimant to Robert F. Breedlove, M.D., who performed a CT scan and myelogram which showed results within normal limits. Claimant was also directed by defendant insurance carrier to undergo an examination by Thomas A. Carlstrom, M.D. Claimant attended a pain center. None of claimant's physicians recommended surgery.

Claimant was earning $12.85 per hour, at the time of his injury. Claimant also had medical insurance benefits and stock option benefits as part of his employment. Claimant testified that subsequent to his injury he cannot lift or sit for more than a half hour, and cannot stand for extended periods of time. Claimant uses a back brace and a cane which were recommended by Dr. Blessman.

Claimant returned to Dahl's in October 1985 to reapply for employment. Claimant met with Robert Hand, president of the company, and others. Claimant provided a resumé of work experience; which included the following:

> JOB QUALIFICATIONS: Although I can't go back to my regular duties that involve a lot of lifting, I feel that I can still be a great asset to the company. I am strongly motivated to perform my job to the best of my abilities. Working has always been a top priority in my life. I have always been a keen observer of what goes on around me and that has given me many insights and methods to evaluate and incorporate into my job performance. In performing my job I am able to see the whole picture and not just one piece of the puzzle. This enables me to work efficiently with others and plan my next movement. I think I can help others who cannot see the whole picture and work towards the end smoothly.
>
> With a company of this size, I feel that there should be a place for me that would draw on my experience and knowledge and also would let me continue to grow with the company. With slight modification, my present position of Second Man could still be performed. I can still plan what needs to be done for the day in the cutting room and take care of the self service counter and limit my activities to just knife work.
>
> Some other jobs within the company I feel I could perform are taking care of the service counter and meat case and handling customers, doing the ads, Floor Manager, Grocery Manager and with light lifting,

I could perform as a Meat Manager.

A job I would like to create for myself uses my experience and my perception of a broad picture in uniting all the Meat Departments more efficiently. The duties would involve dealing with salesmen on availability of specials and demonstrations and distributing among the stores. I would also make the ads and make sure the product was available in all the stores. This would help with continuity between the stores. I would also like to spend time price checking between the Dahl's stores and other companies. I would also like to coordinate the man power between the stores during times of absence. I would keep job applications on file for the managers.

(Joint Exhibit 4)

Claimant was told he could not return to work in view of his restrictions. Mr. Hand testified that he then understood Mr. Young to be requesting a termination of his employment so that he could obtain his employee stock option money. Claimant was terminated effective October 5, 1985, "due to physical conditions which no longer allow you to perform your present job." Joint Exhibit 4, page 1. However, claimant informed Dahl's by letter that he did not request termination, and stated, "I would like to continue working for Dahl's and I had hoped that upon reading the resumé Mr. Hand would consider me for one of the positions listed. Please let me know if something comes up that Mr. Hand feels I can do." Jt. Ex. 4, p. 3. Dahl's then maintained the termination "since there was no job available in the meat department which you could handle based on your present physical condition." Jt. Ex. 4, p. 2.

On October 21, 1985 Dr. Carlstrom assigned claimant a permanent partial impairment rating of six percent of the body as a whole. Dr. Carlstrom concluded that claimant's condition was myofascial rather than neurological, and imposed a lifting restriction of 50 pounds and a repetitive lifting restriction of 10 to 15 pounds.

On November 21, 1985, Harold E. Eklund, M.D., conducted an x-ray examination of claimant's back and recommended that he engage only in employment that "requires no lifting, bending, stooping, or standing for long period of time on concrete floor." Jt Ex. 1, p. 43. In a February 1986 evaluation by the Iowa Division of Vocational Rehabilitation Services, claimant stated he was able to walk three miles daily and could stand at a wood lathe for three hours without discomfort.

Claimant obtained part-time employment as a security person with Younkers, as well as a temporary position with Wards during the Christmas season. Claimant's Younkers position became

full time in April or May 1986. Claimant earns $4.50 per hour as well as some fringe benefits at his Younkers job.

On June 17, 1986 Dr. Carlstrom stated: "I did see Dean Young back again on the 5th of June. He relates considerable improvement in his symptoms, and in my opinion, his impairment rating should be cut in half, to 3-4% of the body as a whole."

Dr. Carlstrom explained his reason for reducing the rating as follows:

> Q. I have just one. With regard to the limitations on the activities that you have just recounted from June of 1985 had there been an improvement in that regard by the time you saw Mr. Young in June of 1986?
>
> A. Yes.
>
> Q. In what regard?
>
> A. In what regard?
>
> Q. Yes.
>
> A. He was able to just basically move about much more comfortably. He no longer had difficulty lying down, no longer had difficulty with just walking comfortably around. He had significantly increased range of motion of his back on exam.

(Claimant's Ex. 6, pp. 20-21)

On July 8, 1986, Dr. Carlstrom opined:

> I know what I wrote you in June of 1986 regarding Dean Young's impairment. I do not think any significant change should be made to the restrictions I placed on him, although he should probably be able to at least attempt heavier activity within chosen parameters, that is if some work supervisor can evaluate his performance at a given level, I would think that no restrictions need to be placed of a formal nature, and only those need be performed, and any restrictions can be jointly agreed at between him and his employer.

(Jt. Ex. 1, p. 6)

After receiving this letter from Dr. Carlstrom, Robert Hand, president of Dahl's, set up another meeting with claimant, and offered claimant his old position as a meat cutter:

> But at the same time he was told when he could -- if he got better to come back and see us. And

since that point in time, we have had a meeting where we were prepared to put him back to work because we were under the impression that he could.

Q. Who gave you that impression?

A. We had a meeting -- Maryland Casualty Company, and from their information from the doctor that he was only three percent disabled and that he could perform the duties. And we agreed to put him back even in a work-hardening position, you know, if necessary, like four hours a day or whatever he felt he could do for a couple of three weeks until he got into the swing of things. But we felt he could perform the duties he had been doing within reason.

Q. Did Maryland Casualty tell you that it would be in your best interests to do that because things would not go well in workers' compensation if you didn't?

A. No, they did not. They just asked me if we would put him back to work and he was only three percent; and at that time, that was when the wheels were put into motion for the meeting we had on July 26th.

(Cl. Ex. 6, p. 77)

Kenneth Stroud, Dahl's vice president, stated:

Q. You mentioned something earlier that I wondered about. You said that when you talked to Mr. Hand, he said that it looked like Dean was ninety-seven percent able to do the work. What do you think he meant by that?

A. Well, I -- Bob and I had talked before, you know, and we was talking about disability and -- And he was quick to inform me that everybody -- nobody's a hundred percent, so the first thing that went through my mind, I wonder where I would rate in this deal.

But, anyway, I figured that if he was ninety-seven percent, then he could do just about anything, because of the fact that nothing would be a hundred percent at various times. So I assumed that he could do anything I could go down there and do, you know, if I had the knowledge. If I had the knowledge, I figured his body was as good as mine when he told me ninety-seven percent.

(Cl. Ex. 6, p. 27)

According to Robert Hand, claimant declined the employment in the meat department because he felt he could not perform the lifting duties involved:

A. This was the point when -- probably have been the latter part of July when -- in some conversation or letters with the insurance company and after Doctor Carlstrom's letters that it was our understanding that he probably could go back to work without any really great restrictions.

Q. Or significant restrictions?

A. Right. It would be what he would place on himself what he could do, and at that point it was decided to offer him the opportunity to come back, and an appointment was made and he came in. This was the appointment where Mr. Stroud and Mr. Nissen were also present.

Q. Right.

A. That meeting when Dean came in, it had to be a Saturday morning. I remember that.

Q. How did the conversation go?

A. I guess we were all -- everybody with the company was under the impression that he would be able to go back to work in the meat department. In fact, that's why we had the meat manager there at that point so he would understand also what the conditions would be and Mr. Stroud, who was the supervisor of that store, also.

And in the process of the conversation, Dean made the statement that there was no way he could go back to work in the meat department, which was kind of dumbfounding to us at that point.

We were kind of at a loss as to where to go at that point because that was our understanding that he would be able to, so when he left at that point I said the only thing I could do was to get back to the insurance company and see but that was my understanding, and that'sabout where it ended at that point.

Q. At that time did you indicate to him that if he felt he could come back and handle his job as a meat cutter the position was open?

A. Yes.

(Transcript, pp. 73-75)

Hand also stated that claimant's appearance was a factor in dealing with the public, and that claimant's appearance had been questionable in the past. In regards to claimant's personal appearance, Hand stated:

Q. What reservations did you have concerning his personal appearance and grooming?

A. There again I guess it would be comparing it to others, like even in the meat department where he worked where they wear white coats. It would be the way they wear their tie. It could be, I suppose, considered maybe sloppy attire as far as that part where his tie might not be tied. A shirt might not be buttoned properly or tie tied as the others.

That's the way we compare them. I mean, when you stand two people beside one another.

Q. Did you feel, though, that the basic requirements that you set out for somebody who works in an up-front position were something that Mr. Young could fulfill as long as he was advised what the requirements were?

A. I think so, or he would not have been offered it if we hadn't felt that he could fulfill given the opportunity.

(Tr. pp. 80-81)

Claimant stated his reasons for declining his old job:

Q. Mr. Young, you are aware that based upon Doctor Carlstrom's examination of you and the history that he took from you in June of 1986 he released you to return to work as a meat cutter if you were willing to give it a try, isn't that correct?

....

A. No and yes, in the respect that the weight limitation was still there and to go back strictly as a meat cutter in the position I had, he would have not been releasing me for that, to perform a function within the meat department.

....

A. To go back to the meat department, relying on my many years of knowledge within the meat cutting

> business, yes, because when I left when I was injured, in that market -- Fridays and Saturdays there is nothing to cutting five sides of beef on one day, lifting and cutting it and I -- there is no way I could do that, and if that was really -- if that was the intention of going back to the job, it was a waste of my time going there and Mr. Hand's and everybody else that was there at that meeting because I knew I couldn't do that.

(Transcript, pp. 51-53)

Claimant owns and operates woodworking tools in his home, and stated he has earned approximately $150 from this hobby in the past one and one-half years. Margaret Covey, a vocational rehabilitation counselor who began working with claimant in September of 1986, testified that a state vocational rehabilitation process had determined that claimant's woodworking skills would not provide an adequate income. Covey indicated that claimant had an aptitude for agriculture, and that claimant exhibited good interview skills during an interview for a job with Earl May Company that paid $4.00 per hour, but claimant was not hired. Covey stated that other employment opportunities for claimant included a position with Pioneer Company as a greenhouse technician at $6.00 - $8.00 per hour, or as an agriculture laboratory assistant for the state earning up to $9.00 per hour.

On August 8, 1986 Robert Hand stated in his deposition that there were no jobs with Dahl's that claimant was capable of performing in light of his physical restrictions:

> Like I said, just lifting sometime, someplace. I just can't think of a job in a supermarket where there isn't lifting and twisting involved.
>
> Q. Based on what you just told me, I take it it's your opinion based on your experience in the supermarket business that due to Dean's injuries he is basically unemployable in the supermarket business?
>
> A. I wouldn't say in that -- In our particular case, we don't because of our size -- I would think probably there are some large companies which have warehouses where there are jobs involving -- you know, with the meat buying for the warehouse and things like that. There are other jobs there such as that. I'm talking about as a meat cutter now on that part.
>
> ....
>
> Q. Based on what you just told me, I take it that it's your opinion from your experience in the grocery

business that due to Dean's back injury, the problems that he has with lifting, that he's basically unemployable in the grocery business except for some supermarket that might have a big warehouse where he could order?

A. And I suppose there might be some -- I guess you might call them meaningless jobs; they aren't meaningless -- you can wash windows and things like that. But that pays three and a half, four dollars an hour compared to a meat cutter's wages.

I suppose there's probably jobs that he could do, but they would be at a considerably less rate of pay.

(Cl. Ex. 6, pp. 67-70)

Kenneth Stroud, corporate vice president for Dahl's, stated:

Q. Based on your understanding of the problems that Dean experiences from his back due to his work injury, do you think there's any jobs at Dahl's that he could handle?

A. I sure couldn't think of anything.

(Cl. Ex. 6, p. 32)

Mark Nissen, claimant's former supervisor, testified as follows:

Q. Do you think that a job could be modified in the meat department where a man wouldn't have to do any lifting of over fifty pounds and wouldn't have to do any repetitive lifting of items over ten to fifteen pounds?

A. No.

Q. Is that true not only at the Dahl's stores but at all grocery stores?

A. Yes.

Q. You've been around grocery stores, working in them for at least seventeen years. Mr. Nissen, would your opinion be the same with respect to other jobs in a grocery store like Dahl's; that is, that because of those limitations, if Dean feels that he can't lift beyond those limitations of fifty pounds maximum or repetitive lifting of ten to fifteen pounds, that there would be no jobs that Dean could handle?

A. I don't believe there is a job in the grocery business.

Q. That he could handle?

A. That he could handle.

(Cl. Ex. 6, p. 49)

Subsequent to Dr. Carlstrom's July 8 letter, claimant contacted Dr. Carlstrom and requested a letter concerning his restrictions. On August 20, 1986, Dr. Carlstrom reiterated: "I note that in October of 1985, I suggested a lifting restriction of about 50 pounds and 15-pound repetitive restriction. I would recommend that those be continued in his case."

Dr. Carlstrom explained the reasons for his letter of August 20, 1986:

A. Well, the restrictions that I suggested in the August 1986 letter were generated by his request and I suppose should be considered to be the result of his request and his perception of what he was capable of doing. I also think that those restrictions are sound from a medical point of view.

(Jt. Ex. 6, p. 13)

Less than one week prior to the hearing in October 1986, claimant received a letter from Dahl's which offered him a position as a full time utility clerk at a beginning wage of $4.25 per hour with increases up to $5.00 per hour after 18 months. The letter also stated that if claimant was not capable of performing the duties of utility clerk, claimant could accept a position as part-time cashier at $4.25 per hour with increases up to $6.50 per hour after 18 months, if claimant's appearance and grooming were satisfactory. Claimant was also told he could obtain a full-time cashier position when a vacancy occurred.

Claimant expressed a reluctance to give up his new employment at Younkers as a security person, and also stated he declined the employment offer because he felt he was not capable of performing the duties of the positions, such as sacking groceries, loading carts and cars, bending and lifting items such as pet food bags and salt bags weighing up to 50 pounds, cases of pop, etc.:

Q. Do you know what the duties are of a utility clerk?

A. It would be sorting cans and bottles, sorting groceries, cashier work and sacking, loading cars. Basically a utility clerk -- my understanding of

what a utility clerk was when I was working for the company is where ever they needed a utility clerk -- they could put the utility clerk, if they need him, in the lunchroom washing dishes. He would be there if they needed him. Anyplace that they were needed.

That was -- because that's what the name implied, "utility." It could be used anyplace.

Q. Of the activities of the utility clerk, are there any of those activities that you think you cannot do due to your work injury? Whether it's loading cars or bottles, just what you can and cannot do.

A. I would say -- I don't know until I get into the actual -- to doing it. Jobs like sorting the cans and bottles, if that's a long period of bending and stooping -- days that I'm out there working at trucks, you have to bend down to cut the seal and unlock them and that.

If I do that a lot of times, I can be hurting pretty good in the back because of the bending and -- not doing lifting, just the bending down and squatting down and that. That could be something I would have problems with, but, as I say, I don't know until I try it.

Q. What about loading cars?

A. Loading cars if the bags were -- I could have problems there because of the twisting. If they was going into the back seat and that, there could be problems.

Q. What kind of -- let me start that question again.

The items that are sold at a grocery store include salt?

A. Yes.

Q. How many pounds of salt do they put in a bag like for your walk?

A. I would say they are 50-, 60-pound bags.

Q. Including dog food?

A. Yeah.

Q. How much are the bags of dog food?

A. Big bags are 50. Majority from 25 and 10, but they do have bags up to 50 pounds.

Q. Big boxes of detergent?

A. Thirty pounds, I think, the super big ones.

Q. What was the weight lifting restriction that Doctor Carlstrom put on you?

A. Fifty pounds.

(Tr., pp. 58-60)

The parties stipulated that claimant's healing period was from April 29, 1985 through June 17, 1986. Claimant did have a prior injury that severed some nerves in his right hand approximately 15 years earlier, resulting in some loss of feeling in his thumb and first finger. It was indicated that this injury may have affected his dexterity test.

APPLICABLE LAW

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).

As 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 opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) cited with approval a decision of the industrial commissioner for the following proposition:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered . . . In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because

> of the injury, to engage in employment for which he is fitted. * * * *

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson 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).

In Parr v. Nash Finch Co., (Appeal Decision, October 31, 1980) the industrial commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden v. Big Ben Coal Co, 288 N.W.2d 181 (Iowa 1980)

A claimant's industrial disability may be diminished by his failure to accept offered employment consistent with his impairment. Johnson v. Chamberlain Mfg. Corporation, 1 Iowa Indus. Comm'r Rep. 166 (Appeal Decision October 31, 1980).

Apportionment is limited to those situations where a prior injury or illness independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment-related aggravation. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

ANALYSIS

The sole issue on appeal is the extent of claimant's industrial disability. Several factors are involved in a determination of industrial disability. Claimant's physical impairment as a result of his injury is one such factor. Claimant has a permanent physical impairment rating of three to four percent of the body as a whole. Claimant has a lifting restriction of 50 pounds, and a restriction on repetitive lifting of 15

pounds. Claimant did not undergo any surgery.

Claimant's experience is in the grocery business. The record indicates that this work necessarily involves lifting weights in excess of his lifting restrictions. Claimant's supervisors testified that claimant would not be able to perform the duties of a meat cutter with his restrictions. Claimant is not able to perform the duties of the job he held at the time of his injury, or any job in the grocery business.

Claimant's age, education, and motivation to return to work are also relevant. Claimant was 47 years old at the time of the hearing, and had a high school education. Dr. Carlstrom commented that claimant was a "well motivated individual." When Dr. Blessman recommended a weight loss to claimant on July 5, 1985, claimant complied and lost 17 pounds by his next visit on August 30th. Claimant is involved with an over-eaters group. When claimant underwent a Short Term Evaluation at the Iowa State Vocational Rehabilitation Facility, it was noted that his work was done "with sincere effort." Margaret Covey also found claimant to be motivated to become gainfully employed. Claimant's supervisor stated that he felt claimant would be working if he could lift. Claimant was able to find substitute employment, and in fact was working two part-time jobs even though the hours involved were inconvenient. Claimant sought re-employment with Dahl's as shown by his resumé. Claimant's motivation to return to work is good.

Claimant's intelligence tests showed average intelligence although claimant was found to have a slight stress intolerance, and has difficulty spelling and writing.

Claimant was earning $12.85 per hour at the time of his injury. Subsequent to his injury, claimant has only been able to obtain employment paying $4.50 per hour. The vocational rehabilitation studies indicate that claimant has the potential to earn between $4.00 and $6.00 per hour at the positions identified, with a maximum of $9.00 per hour eventually. The employer offered claimant two positions just prior to the hearing in this case, both of which paid wages in the range of $4.00 to $6.00 per hour. Claimant has suffered a loss of earnings as a result of his injury.

It is noted that although two of claimant's supervisors mentioned that claimant might be well adapted to a position as a meat buyer in a large grocery warehouse, the record indicates that no such position exists with Dahl's, and the possibilities of such employment with another company was not explored by the vocational rehabilitation personnel.

The employer in this case initially refused to provide work to claimant because of the restrictions imposed as a result of his injury. Claimant's resumé and request for re-employment

was treated as a request for termination and application for stock option proceeds. Just prior to the hearing, the employer offered claimant two possible positions other than meat cutter, in spite of agreement among defendants' witnesses that claimant could not perform any job in the grocery business. These inconsistencies tend to call into question the credibility of some of defendants' witnesses.

A claimant's refusal to accept work consistent with his medical restrictions may justify a reduction of industrial disability. In this case, claimant actively sought reinstatement with Dahl's after his injury, but was not rehired. His refusal to accept the meat cutter's job when it was offered to him later was based on his perception of his own physical limitations. That perception was later confirmed by Dr. Carlstrom when he reiterated claimant's lifting restrictions. Dr. Carlstrom's letter of July 8, 1986, appears to have been read by the employer as a complete lifting of all restrictions, whereas the record shows that the restrictions were still medically necessary.

Claimant also refused the two positions offered immediately prior to the hearing. Although part of his refusal appears to have been based on antagonism toward Dahl's developed through the course of this case, his refusal was also based on his own perceived inability to perform the lifting aspects of those jobs. His supervisors conceded that virtually every job in the grocery business involved some lifting, either heavy or repetitive. By the time of the hearing, Dr. Carlstrom had reiterated the lifting restrictions.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 45 percent as a result of his injury on March 13, 1985.

Claimant had a prior injury to his hand. The extent of any disability as a result of this injury is not ascertainable from the record. The prior injury did not affect claimant's ability to perform his work as a meat cutter. An apportionment is not appropriate.

FINDINGS OF FACT

1. Claimant worked as a meat cutter for Dahl's where his duties involved lifting meat weighing up to 100 pounds.

2. Claimant suffered an injury to his back in the course of and arising out of his employment with Dahl's on March 13, 1985.

3. Claimant underwent a CT scan and myelogram which showed results within normal limits.

4. Claimant was given a permanent impairment rating of three to four percent of the body as a whole, a lifting restriction of 50 pounds and a repetitive lifting restriction of 10 to 15 pounds.

5. Claimant was earning $12.85 per hour at the time of his injury.

6. Claimant sought to return to work at Dahl's in October 1985, but was refused employment based on his medical restrictions.

7. Claimant has obtained full-time employment subsequent to his injury which earns $4.50 per hour.

8. Claimant is not able to perform the duties of a meat cutter due to his injury, and cannot perform any other jobs in the retail grocery business.

9. Claimant's healing period was from April 29, 1985 through June 17, 1986.

10. At the time of the hearing claimant was 47 years old, possessed average intelligence and had a high school education.

11. Claimant is motivated to return to work.

12. Claimant has lost earnings as a result of his injury of March 13, 1985.

13. Claimant has an industrial disability of 45 percent.

14. Claimant's rate of compensation was $380.14.

CONCLUSION OF LAW

Claimant has an industrial disability of 45 percent as a result of his injury of March 13, 1985.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant healing period benefits from April 29, 1985 until June 17, 1986 at the rate of three hundred eighty and 14/100 dollars ($380.14) per week.

That defendants are to pay unto claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at a rate of three hundred eighty and 14/100 dollars ($380.14) per week from June 18, 1986.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants are to pay the costs of the arbitration proceeding and claimant shall pay the costs of this appeal including the costs of the transcription of the hearing proceeding.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 26th day of August, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER