IAWC

DECISIONS OF THE IOWA INDUSTRIAL COMMISSIONER

July 1, 1989 through June 30, 1990

Clair R. Cramer
Acting Iowa Industrial Commissioner

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RODNEY ALEXANDER, Claimant, vs. GREAT PLAINS BAG CORPORATION, Employer, and SELF INSURERS SERVICE, INC., Insurance Carrier, Defendants.	:	File No. 768340 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 June 15, 1984.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 7 and 9 through 19; and defendants' exhibits A through D. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the following issues on appeal:

I. Did Robert Alexander engage in exertion on June 15, 1984, that was greater than the stress or exertion experienced in the normal, non-employment life of Robert Alexander or any other person.

II. Was the stress and exertion which Mr. Alexander underwent in the course of his employment on June 15, 1984, unusual in comparison with the normal stress and exertion of his employment.

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. Robert Alexander died on June 15, 1984 as a result of a heart attack which occurred at the employer's place of business in Des Moines, Iowa.

2. Robert Alexander was afflicted with severe preexisting coronary atherosclerosis.

3. Robert Alexander's preexisting coronary artery disease was the primary factor responsible for causing his death and would likely have eventually caused his death.

4. The coronary event which caused Robert Alexander's death on June 15, 1984 was not induced or caused by any activity in which Robert Alexander had engaged at his place of employment on June 15, 1984.

5. Stress or exertion which Robert Alexander experienced at his place of employment was not a substantial factor in bringing about the coronary event or death of Robert Alexander.

6. The exertion in which Robert Alexander engaged on June 15, 1984 was of no greater a degree or level than the stress or exertion experienced in the normal, nonemployment life of Robert Alexander or any other person.

7. The stress and exertion to which Robert Alexander was subjected at his place of employment on June 15, 1984 was not unusual in comparison to the normal stress and exertion of his employment.

8. Paul From, M.D., stated that it is not possible to determine whether Robert Alexander's death was merely the expected culmination of his coronary artery disease or whether exertion or stress at his place of employment prompted the death.

CONCLUSION OF LAW

Claimant has failed to prove, by a preponderance of the evidence, that Robert Alexander's death was proximately caused by an injury which arose out of and in the course of employment or that his death was proximately caused by his employment.

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 17th day of October, 1989.

DAVID R. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROLLAND L. ALLEN, Claimant, vs. HYMAN FREIGHTWAYS, Employer, and TRANSPORT INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 786303 A P P E A L D E C I S I O N FILED JUL 27 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding claimant permanent partial disability benefits as a result of an alleged injury sustained on December 3, 1984.

The record on appeal consists of the transcript of the arbitration decision and joint exhibits 1 through 15. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: "Has the claimant suffered an industrial disability beyond the 15 per cent [sic] found by the deputy industrial commissioner?"

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.

On appeal claimant argues that the limitations placed on him as a result of his injury would prohibit him from gaining a number of positions for which he is otherwise suited, if he were terminated or his present employment became otherwise unavailable. In effect, claimant is attempting to have the undersigned base an award on possible future developments of claimant's present condition. However, only claimant's present disability can form the basis of an award of benefits. Basing an award on possible developments of claimant's condition would be engaging in mere speculation. Should claimant's physical condition change or the circumstances surrounding his employment change he has the ability to file a review-reopening provided he meets the statutory requirements.

FINDINGS OF FACT

1. Claimant was a 57 year old truck driver at the time of the arbitration hearing.

2. As a result of the injury that claimant sustained on December 3, 1984, he has a 15 percent permanent impairment of the body as a whole, due to the condition of his shoulder.

3. Claimant is prohibited from working with his right hand overhead. He is also prohibited from engaging in strenuous use of the right arm in activities such as lifting, pushing and pulling.

4. Claimant is unable to perform the work of a city delivery truck driver, but has been able to continue employment as an over-the-road truck driver.

5. Claimant has sustained a 15 percent loss of earning capacity as a result of the permanent effects of the injury he sustained on December 3, 1984.

6. Claimant did not suffer any loss of actual earning other than the earnings lost during the period of recuperation from the injury of December 3, 1984.

CONCLUSIONS OF LAW

Claimant has a 15 percent permanent partial disability of the body as a whole which entitles him to receive 75 weeks of compensation under the provisions of Iowa Code section 85.34(2)(u).

Claimant has been previously paid 75 weeks of compensation for permanent partial disability and he has been fully paid

all compensation due or payable to him as a result of the December 3, 1984 injury.

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 claimant pursuant to Division of Industrial Services Rule 343-4.33.

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 27th day of July, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CARL A. ANDERSON, Claimant, vs. HON INDUSTRIES/PRIME MOVER COMPANY, Employer, and THE HARTFORD INSURANCE CO., Insurance Carrier, Defendants.	File No. 825104 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 benefits as a result of an alleged injury of July 12, 1984.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 18; and defendants' exhibits A through D. Claimant filed a brief on appeal.

ISSUE

Claimant states the issue on appeal is: "Whether claimant established a causal connection between his heart attack and employment."

REVIEW OF THE EVIDENCE

The arbitration decision dated February 14, 1989 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 issue and evidence.

ANALYSIS

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

FINDINGS OF FACT

1. Claimant experienced symptoms consistent with those of a heart attack on July 12, 1984 at defendant employer.

2. Claimant was hospitalized and found to be suffering an anteroseptal myocardial infarction.

3. Claimant was diagnosed as having severe coronary artery disease with 70 percent stenosis of the proximal left anterior descending coronary artery.

4. Marc Sink, M.D., internal medicine, opined that claimant's heart attack was not a work-related phenomenon but was caused by arterial sclerotic heart disease.

5. Philip A. Habak, M.D., cardiologist, rendered varying opinions on the issues of causal connection.

6. Dr. Habak's opinion was so equivocal as to fail to constitute a dependable opinion on the question of causal connection.

7. Claimant has failed to prove by the greater weight of the evidence that his myocardial infarction consituted an injury arising out of and in the course of his employment.

CONCLUSION OF LAW

Claimant failed to establish by the greater weight of the evidence that he sustained an injury on July 12, 1984 which arose out of and in the course of his employment with defendant or that work aggravated, accelerated, worsened or lightened up claimant's underlying cardiovascular disease so as to precipitate the myocardial infraction which occurred on July 12, 1984.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing as a result of these proceedings.

That claimant pay the cost of this proceeding including costs of transcription of the arbitration hearing.

Signed and filed this 15th day of February, 1990.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY S. ANDERSON,

Claimant

vs.

BONANZA RESTAURANT,

Employer,
Defendant.

File No. 861902

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a ruling on an order to submit proper proof of service which dismissed claimant's case. The record on appeal consists of the agency file on this matter.

ISSUE

Claimant specified no errors and filed no brief. The issue on appeal is whether the deputy properly dismissed this matter when claimant failed to respond to his order.

REVIEW OF EVIDENCE

On January 11, 1988, pro se claimant filed an original notice and petition alleging an injury of December 3, 1986. Also on January 11, 1988, claimant filed a hand written statement that read: "I mailed the form 100 to Bonanza of Coralville on January 11, 1988 by registered mail here is the green card."

Also filed with claimant's petition was a postal return receipt which showed a delivery date of January 5, 1988, and the signature of addressee as what appears to be Tarin Bickford. The receipt did not identify to whom the article was addressed.

On April 12, 1988, a deputy industrial commissioner issued an order concerning a failure to submit proper proof of service. In that order claimant was ordered to submit proper proof of service within ten (10) days. That order was sent return receipt requested and the signature of the addressee was Mary Anderson.

On May 12, 1988, a deputy dismissed claimant's case when there was no response to the April 12, 1988 order. That ruling was also sent return receipt requested and the signature of the addressee was Mary Anderson.

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 did not provide the deputy with proper proof of service. Claimant's attempted statement of service filed with the original notice and petition falls short in that it is impossible to tell that the form 100 was sent to the alleged employer. Claimant did not provide an affidavit of proof of service. The deputy requested proper proof of service and there was no response to that request. When the claimant failed to respond to the deputy's order, the deputy had the authority to dismiss the action. Claimant has provided no justification for failing to comply with the deputy's order. The deputy properly dismissed claimant's case.

FINDINGS OF FACT

1. Claimant filed an original notice and petition on January 11, 1988.

2. Claimant did not file an affidavit of proof of service.

3. The postal return receipt that claimant filed with her petition did not identify to whom the article was addressed.

4. On April 12, 1988, a deputy industrial commissioner ordered claimant to submit proper proof of service within ten days.

5. Claimant did not respond to a deputy industrial commissioner's order to submit proper proof of service.

CONCLUSION OF LAW

Claimant has failed to comply with an order of the deputy industrial commissioner.

WHEREFORE, the ruling of the deputy is affirmed.

//

ORDER

THEREFORE, it is ordered:

That claimant's case be dismissed.

That all costs of this action be paid by claimant.

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

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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Certified & Regular Mail

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY R. ARRICK, Claimant, vs. PERKINS RESTAURANTS, INC., Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 845438 A P P E A L D E C I S I O N

FILED
NOV 30 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 7, 1986. The record on appeal consists of the transcript of the arbitration proceeding and claimant's exhibits 1 through 28. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the following issues on appeal:

1. There is insufficient evidence of causation between the May 7, 1986 job injury and the back pains first mentioned on November 11, 1986.

2. The opinion of Dr. Margules is based on an inaccurate history.

3. If the claims were compensable, defendants should not be required to pay medical expenses incurred before November 11, 1986.

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 authorities are noted:

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 7, 1986 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

On appeal, defendants urge that claimant has failed to establish that his present back condition is causally related to his work injury on May 7, 1986. A review of the medical evidence reveals that Lynn L. Leibel, M.D., initially treated claimant after his injury, then referred claimant to Maurice P. Margules, M.D., a neurosurgeon. Dr. Margules, claimant's treating physician, concluded that claimant's back condition was causally connected to his work injury, and assigned claimant a rating of permanent partial impairment of five percent of the body as a whole.

Claimant was later examined by Michael J. Morrison, M.D., an orthopaedic surgeon. Dr. Morrison's examination of claimant did not include conducting x-rays, and lasted approximately 20 minutes. Dr. Morrison states that claimant has reached maximum healing from his work injury and that no permanent impairment is anticipated. Dr. Morrison did not express an opinion on causal connection.

Defendants assert that Dr. Margules made his conclusions based on an inaccurate medical history. The medical records do not show an indication of back pain from claimant to his physicians until November 11, 1986. Dr. Morrison testified that he would normally expect pain from claimant's injury to have occurred in two to four weeks.

Claimant testified that his back pain began after the incident, and became severe approximately two weeks before November 11, 1986, at which time he reported it to his physicians. See Transcript, p. 60. Dr. Margules apparently accepted claimant's history of back pain beginning with the work injury in May 1986, but not becoming severe until November 1986, and concluded that the back pain was causally connected to the work injury. Dr. Margules' report stated as follows:

> Following this incident, the patient did not think much about the pain that he had in the dorsal region, but the pain continued unchanged involving the level of approximately D8-D12. Patient noted that he had difficulty in forward flexion following this incident, but he continued to work until 10/29/86, when suddenly while at work, he had the onset of severe pain involving the LEFT hypogastrium.

(Claimant's Exhibit 2, p. 3)

Defendants point out that claimant visited several doctors between his injury on May 7, 1986, and his complaints of severe back pain in October 1986, and that the reports of those visits do not contain any reports of back pain. Claimant's explanation is that the pain was present since the injury, but did not become severe until October of 1986. However, exhibit 1, page 32, a report of D. Moffett, M.D., dated June 5, 1986, states: "Patient denies fever and chills, diarrhea, constipation or pain in the back...." Exhibit 1, page 34, a report of Dr. Moffett dated July 3, 1986, stated: "He denied any fevers, chills, diarrhea, constipation or pain in the back...." Exhibit 1, page 50, the hospital emergency room record at the time claimant was hospitalized, states that claimant reported the "sudden onset" of back pain.

These medical reports contradict claimant's statement that his back pain was present since his injury. If claimant was experiencing even slight back pain from the time of his injury, as he states, it is logical to assume he would have reported it to his physicians. It is even more logical that when specifically asked about back pain by Dr. Moffett, he would not have denied back pain if it in fact existed.

Dr. Margules' opinion on causal connection is clearly based on a medical history from claimant relating that the pain was present from the time of the injury, rather than originating in October 1986. A medical opinion based on an inaccurrate history is not reliable. Since no other medical opinion on causal connection appears in the record, claimant has failed to carry his burden to establish that his present back condition is causally related to his work injury on May 7, 1986.

Defendants' third issue on appeal, relating to their obligation to pay claimant's medical bills between his injury and Dr. Margules' diagnosis, is resolved by the above analysis. Defendants are not obligated to pay the medical bills in question.

FINDINGS OF FACT

1. On May 7, 1986 claimant suffered an injury to his right elbow which arose out of and in the course of employment with Perkins.

2. Claimant' present back condition is not caused by the work injury on May 7, 1986

CONCLUSIONS OF LAW

Claimant has failed to establish by a preponderance of the evidence that his present back condition is causally connected to his work injury of May 7, 1986.

Dr. Margules' opinion is based on an inaccurate medical history.

Claimant is not entitled to payment for the medical bills and services related to his back condition.

WHEREFORE, the decision of the deputy is reversed.

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 30th day of November, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD L. ASMUS, Claimant, vs. WAUKESHA ENGINE, Employer, and UNDERWRITERS ADJUSTING CO., Insurance Carrier, Defendants.	:	File No. 782289 A P P E A L D E C I S I O N FILED AUG 21 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying permanent partial disability benefits as the result of an alleged injury on November 30, 1984. The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 20; and defendants' exhibit A. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

I. Whether the finding of the Deputy Industrial Commissioner that Appellant was not a credible witness was supported by the evidence.

II. Whether the finding of the Deputy Commissioner that Appellant failed to prove he sustained an injury which arose out of and in the course of his employment was proper.

III. Whether a finding the Appellant sustained accidental injuries arising out of and in the course of the employment should result in an award of weekly compensation benefits and medical expenses.

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

Claimant raises as an issue on appeal the deputy's determination that claimant was not credible. Claimant's credibility is important in this case. Claimant is the only witness to the alleged injury. Although the deputy's determination that a witness was not credible is fully reviewable on appeal, when that determination is made based on the witness' demeanor, as opposed to objective aspects of the record such as inconsistent statements, the finding that a witness was not credible must be given great weight on appeal. In this case, the determination that claimant was not credible is based on both objective evidence and demeanor. Claimant made inconsistent statements during the hearing as to the date of the altercation with his wife. At one point he stated it was a year before the alleged work injury, but later claimant stated it was the same month. (Transcript, pages 45, 63.) The deputy also made a specific finding that claimant was not credible, based on his demeanor. The deputy's determination that claimant was not credible is affirmed.

Claimant has failed to establish that he suffered an injury that arose out of and in the course of his employment, or that his present condition is causally related to his alleged work injury.

Claimant is the only witness offering evidence that an injury arising out of or in the course of his employment occurred on November 30, 1984. No other witness corroborates claimant's version of the alleged injury. As claimant has been found not to be credible, there is no competent or reliable evidence to establish a work injury on November 30, 1984.

Even if claimant had established a work injury on November 30, 1984, the medical evidence offered to establish a causal connection is based on medical histories claimant provided to his physicians. Claimant failed to advise his physicians of his prior back injury at work, his car accident, or most significantly, his November 1984 domestic altercation with his wife that resulted in his hospitalization. Occurring in the same month as the alleged work injury, the latter incident is of special importance to any determination of causal connection.

When the medical history provided to a physician is inaccurate, the resulting medical opinion on causal connection is adversely affected. To base an award on inaccurate medical histories would be to engage in speculation as to the causal connection between claimant's condition and his work injury.

FINDINGS OF FACT

1. Claimant alleged he sustained an injury on November 30, 1984, after picking up a steel bar weighing approximately 98 pounds.

2. Except for missing two days work, claimant was able to continue working at his regular job.

3. Medical providers found no evidence of injury outside of strain associated with degenerative changes.

4. Claimant was hospitalized after an altercation with his wife in November 1984.

5. Claimant did not provide complete medical history information to his physicians.

6. Claimant was not a credible witness.

CONCLUSIONS OF LAW

Claimant failed to meet his burden that he sustained an injury which arose out of and in the course of his employment.

Claimant failed to establish a causal connection between his present condition and his alleged work injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

That costs are assessed against claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 24th day of August, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL SERVICES

FILED

JUL 31 1989

IOWA INDUSTRIAL COMMISSIONER

PAM ATTERBERG,	:	
	:	
Claimant,	:	File No. 841741
	:	
vs.	:	
	:	A P P E A L
SHELLER-GLOBE CORPORATION,	:	
	:	
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 as the result of an alleged injury on February 19, 1986. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 18; and defendant's exhibits A through D. Both parties filed briefs on appeal.

ISSUES

Defendant states the following issues on appeal:

1. Did the deputy err in finding that the claimant sustained an injury on February 19, 1986 which arose out of and in the course of her employment oat [sic] Sheller-Globe?

2. Did the deputy err in finding a causal relationship between the alleged injury and the claimant's disability?

3. Did the deputy err in awarding 75% 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 issues and the evidence.

ANALYSIS

Defendant argues on appeal that claimant has failed tc establish that her work injury of February 19, 1986, arose out of and was in the course of her employment. Claimant h a congenital back condition and a back injury unrelated to her work prior to February 19, 1986. Claimant had also unc back surgery prior to February 19, 1986. Claimant asserted that when she returned to work, she was required to perform duties normally performed by two persons, and that the addi strain resulted in an aggravation of her previous condition However, the testimony of Andy Edgar indicates that claiman job duties were not normally performed by two people.

The medical evidence of James B. Worrell, M.D., indica that claimant's work injury of February 19, 1986, did aggra her prior back condition. Although defendant argues that D Worrell did not state that the aggravation was permanent in nature, Dr. Worrell did assign claimant a rating of permane partial impairment of 5-8 percent of the body as a whole. William R. Pontarelli, M.D., attributed claimant's present condition to a "new problem" received "after working." Def argument that "after working" does not mean as a result of her work activity is rejected as unreasonable. Taking Dr. Pontarelli's testimony as a whole, his use of the phrase "a working" clearly refers to the fact that claimant's pain wa the result of her work activity, and not merely a reference to the time of day the pain began. Claimant testified that she experienced sudden onset of back pain while at work. C back pain after February 19, 1986, was described by claiman as originating in an area of the back differing from the lo of her previous laminectomy. Claimant's description of her condition before and after the February 19, 1986 incident w corroborated by the testimony of her son and her sister. Claimant met her burden in proving her aggravation of her b condition arose out of and was in the course of her employm

Defendant also asserts that claimant has failed to sho that her present condition is causally related to her work injury. Peter D. Wirtz, M.D., and Keith Riggins, M.D., exp no opinion on causation. Gary M. Crank, D.C., attributed c condition to her prior surgery, but conceded that claimant' work activity would have an effect on claimant's symptoms. Dr. Worrell testified that claimant's condition was caused by an aggravation of her previous condition by her work act Taken as a whole, the medical testimony establishes a causa connection between claimant's present condition and her wor injury of February 19, 1986. The medical testimony is corr by claimant's description of her condition before and after the work injury, and claimant's testimony in this regard is corroborated by the testimony of her son and her sister.

Defendant also challenges the deputy's finding that cl was 75 percent industrially disabled. Claimant has a ratin of permanent partial impairment of 5-8 percent of the body

as a whole. Defendant refused to rehire claimant, and cited as a reason claimant's medical restrictions and seniority rules. Claimant states she cannot lift more than 15-25 pounds. Dr. Crank noted test results that confirmed a loss of lifting ability. Claimant has experienced a substantial loss of earnings, in that her prior wages were $10.36 per hour and claimant now earns $3.50 per hour. Claimant was 29 years old at the time of the hearing, and had recently obtained a GED. Claimant's age makes retraining possible. Claimant's prior work experience is limited to factory work and waitress work. The vocational rehabilitation nurse testified that claimant was employable in grocery, restaurant or factory work. Claimant is currently employed at a gas station. Claimant is well motivated. Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 45 percent.

Defendant next raises as an issue apportionment for claimant's prior disability. While it is true that claimant had a good recovery from her earlier surgery, and was able to perform various household tasks, claimant nevertheless had a prior laminectomy. This is an intrusive surgery which necessarily causes some degree of impairment. Claimant did not have any lifting restrictions or ratings of permanent partial impairment prior to her February 19, 1986 injury. The greater weight of the evidence indicates that claimant had a five percent disability prior to her February 19, 1986 work injury.

FINDINGS OF FACT

1. Claimant was 29 years old at the time of the hearing.

2. Claimant obtained an eighth grade education and then subsequently obtained a GED.

3. Claimant has a congenital back condition.

4. Claimant injured her back at home in 1985.

5. Claimant underwent a laminectomy as a result of her 1985 back injury at home.

6. Claimant was off work from February 7, 1985 through January 28, 1986 because of her back injury at home in 1985.

7. Claimant's 1985 surgery was a success and as a result she was able to do her job when she returned to Sheller-Globe Corporation on January 29, 1986.

8. Claimant materially aggravated a preexisting back condition on February 19, 1986, while working for Sheller-Globe with resulting whole body impairment.

9. Claimant's current whole body impairment is attributable in part to 1) her congenital back condition; 2) her 1985 back injury at home; and 3) her 1986 work-related injury.

10. Sheller-Globe currently refuses to allow claimant to do a full-time job at its Keokuk plant because of fear of further injury to claimant.

11. Claimant's industrial disability is 45 percent.

12. Claimant had an industrial disability of five percent prior to her February 19, 1986 injury.

13. Claimant's stipulated weekly rate of compensation is $245.36.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that she materially aggravated her preexisting back condition on February 19, 1986, while working for Sheller-Globe.

Claimant has established by a preponderance of the evidence that there is a causal connection between her work-related injury of February 19, 1986, and some of her whole body impairment.

Claimant has established by a preponderance of the evidence that she is entitled to healing period benefits from February 19, 1986 through June 15, 1986.

Claimant has established by a preponderance of the evidence that she is entitled to 200 weeks of permanent partial disability benefits commencing on June 16, 1986, at a rate of $245.36.

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

ORDER

THEREFORE, it is ordered:

That defendant pay healing period benefits from February 19, 1986 through June 15, 1986 at a weekly rate of two hundred forty-five and 36/100 dollars ($245.36).

That defendant pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on June 16, 1986 at a weekly rate of two hundred forty-five and 36/100 ($245.36).

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

That defendant be given credit for benefits already paid to claimant.

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

That defendant shall file claim activity reports, pursuant to Division of Industrial Services rule 343-3.1(2), as requested by the agency.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JEFFREY BAILEY,	:	
Claimant,	:	File No. 831897
vs.	:	A P P E A L
FOX CONSTRUCTION,	:	D E C I S I O N
Employer, Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding claimant temporary total disability benefits based upon claimant's injury on September 26, 1986 which arose out of and in the course of his employment with defendant.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 6. Neither party filed a brief on appeal.

ISSUES

As neither party has filed a brief, no issues are specific on appeal. The appeal will be considered generally and without regards to specific issues.

REVIEW OF THE EVIDENCE

The arbitration decision filed July 5, 1989 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 began work for the defendant in July of 1986 selling fruits and vegetables. In August and September 1986 claimant drove a dump truck, operated a back hoe and performed welding for the defendant.

2. Claimant was paid by the hour.

3. Claimant was employed to perform a number of different tasks, rather than any certain specified piece of work.

4. Claimant was able to set his own days and hours of work.

5. There was no contract which specified a fixed price for a certain piece of work.

6. Defendant told claimant what to do and how it should be done on a recurrent basis.

7. Claimant was not free to employ others to assist him.

8. Defendant furnished the bulk of the necessary tools, equipment and supplies for the work which claimant performed.

9. The work claimant performed was a regular part of defendant's business.

10. Claimant was free to perform work for other individuals at times when he was not actually working for defendant.

11. Either claimant or defendant could have terminated their relationship at any time.

12. Claimant was an employee of George and Juanita Fox doing business as Fox Construction on September 26, 1986.

13. Claimant burned his foot while welding for Fox Construction at its place of business on September 26, 1986.

14. Claimant was medically incapable of returning to work substantially similar to that he performed at the time of injury from the date of injury until October 16, 1986, a period of three weeks.

15. In obtaining reasonable treatment for the injury, claimant incurred expenses with Broadlawns Hospital in the total amount of $2,828.94.

16. During the five weeks preceding the injury, claimant was paid a total of $520.50.

CONCLUSIONS OF LAW

The greater weight of evidence indicates claimant was an employee of defendant on September 26, 1986.

Defendant has failed to prove that claimant was an independent contractor.

Claimant sustained an injury on September 26, 1986 which arose out of and in the course of his employment with defendant.

Claimant's work injury of September 26, 1986 was the cause of three weeks temporary total disability.

Claimant has proved entitlement to medical benefits of $2,828.94.

Claimant's rate of compensation is $72.67 per week.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant three (3) weeks of compensation for temporary total disability at the rate of seventy-two and 67/100 dollars ($72.67) per week commencing September 26, 1986 as stipulated.

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

That defendant is to pay Broadlawns Hospital two thousand eight hundred twenty-eight and 94/100 dollars ($2,828.94) together with any cost of increase as resulting from lack of prompt payment pursuant to Iowa Code section 85.27.

That defendant is to pay the costs of this action and the costs of preparation of a transcription on appeal.

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

That defendant shall file a first report of injury pursuant to Iowa Code section 86.11.

Signed and filed this 30th day of November, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MENNIE J. BAKKER,	:	
Claimant,	:	File No. 774195
vs.	:	A P P E A L
LLOYD ALDINGER,	:	D E C I S I O N
Employer, Defendant.	:	

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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals an award of medical benefits but denying him any weekly benefits as the result of an injury on August 10, 1984.

The record on appeal consists of the transcript of the arbitration hearing and claimant's exhibits A through C.

ISSUE

Claimant requests an opportunity to take and submit additional evidence and seeks a reversal of the deputy's decision denying healing period and permanent partial or total disability.

REVIEW OF THE EVIDENCE

The arbitration decision filed October 12, 1988 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 evidence.

ANALYSIS

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

It should be noted that claimant filed an application for rehearing which was ruled on by the deputy on October 28, 1988.

The prehearing order of August 11, 1988 clearly indicated that an issue at the time of hearing was "whether claimant is entitled to temporary disability/healing period benefits or permanent partial or total disability benefits." The hearing transcript discloses that the deputy considered all elements remaining in dispute and asked counsel for claimant if there was any reason he should not proceed with the evidence. At the conclusion of the hearing he asked claimant's counsel if the record should be considered fully submitted.

Claimant has failed to give any reason why the matters sought to be introduced now could not have been produced at the time of the original hearing. There is no allegation that the evidence is newly discovered or was unavailable earlier. It appears that the only reason claimant is seeking a rehearing is because he does not like the results of the first hearing and would like an opportunity to rectify any deficiencies. If rehearings were granted under such circumstances no decision would have any finality. Claimant's request for rehearing was properly denied.

FINDINGS OF FACT

1. Claimant was an employee of Lloyd Aldinger on August 10, 1984.

2. While working at his job, claimant suffered a severe injury to his right leg with multiple fractures.

3. Claimant was disabled from his work while he healed from that injury; however, the extent of that healing period has not been established.

4. Claimant has not established that he suffered a permanent disability to his right leg.

5. It has not been shown that claimant's injury aggravated his back or other parts of his body as a whole beyond the right leg.

6. Claimant has incurred medical expenses for which he has not been reimbursed that are set forth in his petition.

7. Claimant has transportation expenses of unknown amount for which he has not been reimbursed that resulted from his work injury.

CONCLUSIONS OF LAW

Claimant has established that he suffered an injury arising out of and in the course of his employment with defendant Lloyd Aldinger on or About August 10, 1984.

Although claimant no doubt suffered from a substantial healing period, he has failed to present evidence to establish the duration of that healing period.

Although claimant claims to have permanent partial disability to his right leg (a scheduled member), he has failed to establish the nature and extent of his impairment.

Claimant is entitled to an award for medical expenses, but not for mileage.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant Lloyd Aldinger shall pay to claimant medical expenses set forth in his petition to St. Lawrence Hospital, Dr. Joseph A. Brunkhorst, and Ellsworth Municipal Hospital in the total sum of one thousand three hundred ninety and 60/100 dollars ($1,390.60).

That defendant shall pay all monies awarded herein in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That defendant shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.
That defendant shall file a claim activity report upon payment of this award pursuant to Division of Industrial Services Rule 343-3.1.

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

DAVID E. LINQUIST
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REGULAR AND CERTIFIED MAIL

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DALE L. BAKKER,	:	
Claimant,	:	File No. 830625
vs.	:	A P P E A L
WILSON FOODS, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

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IOWA INDUSTRIAL COMMISSIONER

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal.

However, the following statement in the deputy's decision is in error: "Likewise, claimant has not presented evidence to establish there is a loss of earning capacity."

The arbitration decision awarded claimant benefits. Benefits for permanent partial disability of the body as a whole cannot be awarded unless there is a loss of earning capacity. The assessment of industrial disability is a determination of the loss of earning capacity. Industrial disability is not a calculation, but an evaluation. The claimant's medical evidence shows a functional impairment of the shoulder. This functional impairment, along with the recommendations of claimant's physicians that he change occupations, does establish a loss of earning capacity.

The decision of the deputy is affirmed in all other respects.

Signed and filed this 18th day of April, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRENDA BENSON,	:	
	:	
Claimant,	:	File No. 765734
	:	
vs.	:	
	:	R U L I N G
GOOD SAMARITAN CENTER,	:	
	:	
Employer,	:	O N
	:	
and	:	
	:	R E H E A R I N G
ZURICH-AMERICAN INSURANCE COMPANIES,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

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, 1984. Claimant was paid 24 weeks of healing period/temporary total disability benefits by defendants up through October 22, 1984.

Claimant did not see a physician in connection with her injury again until April of 1986. On May 12, 1986, claimant went to Dr. Halter. On July 1, 1986, claimant filed her petition. It was not until February 2, 1987 that claimant obtained a rating of permanent physical impairment. The deputy's arbitration decision determined that claimant's healing period ended October 26, 1984 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 October 26, 1984. Defendants appealed. The appeal decision awarded claimant 75 weeks of permanent partial disability benefits commencing October 25, 1984. The appeal decision ordered defendants

to pay interest on any unpaid benefits from October 25, 1984. 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

The appeal decision in this case ordered defendants, Good Samaritan Center and Zurich-American Insurance Companies, to pay interest on unpaid weekly benefits from October 25, 1984, when claimant's permanent disability began. Defendants have requested rehearing on whether they are liable to claimant for interest on unpaid permanent partial disability benefits covering the period of time prior to the filing of the petition for benefits.

In essence, although the case is in arbitration, 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.

Although the case sub judice is in arbitration and Teel was in review-reopening, factually both cases are very 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. It is noted that interest was awarded from when claimant first returned to work, even though claimant was absent from work on subsequent occasions for surgical operations.

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. 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).

If the law applicable to review-reopening cases were applicable to the case sub judice, then Teel, rather than Dickenson, would apply to this case.

However, Teel is not directly applicable to these proceedings, as the present case is an arbitration case and not review-reopening. The court of appeals in Dickenson explicitly confined its ruling to review-reopening cases. The supreme court in Teel, although not expressly limiting its holding to review-reopening cases, was nevertheless dealing with a review-reopening case. There is no language in either Dickenson or Teel that indicates applicability to arbitration cases. Thus, the question of when interest should begin to accrue in this arbitration case will be determined without reliance on Dickenson or Teel. Instead, the question of when interest begins to accrue will be based on an analysis of section 85.30 and Farmer's Elevator Co. v. Manning, 286 N.W.2d 174 (Iowa 1979), which was a case in arbitration.

In Farmers Elevator, the employer denied liability. The court rejected the employer's argument that interest should commence only from the date of the district court affirmance of the agency's decision, and said that section 85.30 and other sections expressed a legislative intent that interest on unpaid compensation be computed from the date the payment becomes due, starting with the eleventh day after the injury. There is no discussion in that opinion going to when permanency became evident to the employer.

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." Thus, both Iowa Code section 85.30 and the Farmers Elevator case dictate that interest in this case is due on unpaid permanent partial disability benefits from when they became due at the end of the healing period.

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 unreasonably 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 her healing period) until the compensation is paid, defendants had the beneficial use of the compensation funds claimant became entitled to at the end of her 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 her loss of earning capacity during this period of her 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 she filed her petition, or when she received her rating of permanency. Claimant's permanent disability was found to have begun earlier, on October 25, 1984, at the end of her 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 October 25, 1984, 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). It is therefore concluded that in this case of arbitration under section 85.30, claimant is entitled to interest on her permanent partial disability award from October 25, 1984, the date on which her healing period ended and her permanent partial disability began.

CONCLUSION OF LAW

Claimant is entitled to interest on the award of permanent partial disability benefits from the end of the healing period (October 25, 1984).

ORDER

THEREFORE, it is ordered:

That defendants shall pay interest on unpaid portions of the award of permanent partial disability benefits from October 25, 1984.

Signed and filed this 18th day of October, 1989.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAWRENCE BERRY, Claimant, vs. ANDERSON ERICKSON DAIRY CO., Employer, and EMPLOYER MUTUAL COMPANIES, Insurance Carrier, Defendants.	File No. 842107 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 December 17, 1986. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1, 2 and 3; and defendants' exhibits A and B.

ISSUES

Defendants failed to enumerate issues in their appeal brief. Therefore, the appeal will be considered generally and without regard to specific issues.

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. The assessment of claimant's case as made by E. M. Mumford, M.D., is correct.

2. Claimant is not physically capable of performing the normal duties of a route delivery driver as a result of the injuries he sustained on December 17, 1986.

3. The injury foreclosed claimant from most types of employment which he could have otherwise performed in a semi-retired status even if he had chosen to retire from Anderson Erickson Dairy.

4. Claimant has a 40 percent loss of earning capacity that was proximately caused by the torn rotator cuff which he sustained on December 17, 1986.

CONCLUSIONS OF LAW

Claimant sustained a 40 percent permanent partial disability of the body as a whole as a result of the injuries he sustained on December 17, 1986 which arose out of and in the course of his employment with Anderson Erickson Dairy Company.

Claimant is entitled to receive 200 weeks of compensation for permanent partial disability under the provisions of Iowa Code section 85.34(2)(u).

The employer is entitled to credit for the 66 weeks of permanent partial disability compensation previously paid.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant two hundred (200) weeks of compensation for permanent partial disability at the stipulated rate of two hundred sixty-one and 60/100 dollars ($261.60) per week payable commencing July 22, 1987.

That defendants shall receive credit for the sixty-six (66) weeks of permanent partial disability compensation previously paid and shall pay all accrued unpaid amounts in a lump sum together with interest pursuant to Iowa Code section 85.30 computed from the date each payment came due until the date of actual payment.

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 28th day of February, 1990.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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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 R U L I N G O N A D J U D I C A T I O N O F L A W P O I N T

STATEMENT OF THE CASE

Claimant seeks an adjudication of law point.

ISSUE

When does interest on claimant's unpaid benefits begin to accrue?

APPLICABLE LAW

Iowa Code section 85.30 provides:

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

ANALYSIS

This is a review-reopening case based on a change of condition. Decisions of this agency have recently sought to clarify the question of when interest begins to accrue in workers' compensation cases. In Benson v. Good Samaritan Center,

Ruling on Rehearing, October 18, 1989, it was held that in an arbitration case, interest on unpaid compensation began to accrue from the end of the healing period. In Brittain v. Fisher Controls, (Ruling on Rehearing, November 20, 1989), it was held that in a review-reopening case based on a memorandum of agreement, interest would begin to accrue on unpaid compensation from the end of the healing period as well.

However, the present case, although in review-reopening, differs from Brittain in that claimant's petition was based on a change of condition occurring after an approved settlement. For purposes of review-reopening, a prior approved settlement is the equivalent of an award of benefits.

In Brittain, it was stated: "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." (Brittain, page 5.)

A review-reopening based on a change of condition differs from a review-reopening based on a memorandum of agreement. In the latter, no prior determination of entitlement to benefits, either by award or approved settlement, has been made. In this respect, a review-reopening based on a memorandum of agreement is substantially similar to an arbitration action. Thus, the interest accrual analysis laid down for arbitration cases in Benson was also utilized for review-reopening actions based on memorandums of agreement in Brittain.

However, in a review-reopening based on a change of condition, there has already been a determination of entitlement to benefits, either by award or approved settlement. If claimant establishes a change of condition has occurred, claimant is entitled to further benefits. Interest in review-reopening cases based on a change of condition accrues from the date of the final agency decision. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1954). Benefits are not awarded on a retroactive basis as they are in arbitration or review-reopening based on a memorandum of agreement. Thus, since benefits do not become "due" until the decision, it follows that interest on unpaid benefits in such cases does not begin to accrue until the date of the decision. Claimant cannot be entitled to interest on unpaid benefits at an earlier point in time than he became entitled to them.

The concept of review-reopening is unique to workers' compensation law. Unlike tort law, workers' compensation contemplates an injured worker re-opening his claim for benefits even after a "final" adjudication of the extent of the entitlement. The defendants' liability to claimant is fixed at the time of the first hearing, and it remains fixed until a

second hearing determines that claimant has experienced a change of condition. Claimant is not entitled to further benefits until he has established that a change of condition resulting in greater loss of earning capacity has occurred. Interest will accrue only from the date of the final agency action establishing that entitlement.

CONCLUSION OF LAW

Claimant is entitled to interest on unpaid benefits awarded by the appeal decision of March 31, 1989 from the date of the decision.

ORDER

THEREFORE, it is ordered:

That defendants shall pay interest on unpaid benefits from the appeal decision of March 31, 1989.

Signed and filed this 30th day of January, 1990.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANTHONY BOCKENSTEDT, Claimant, vs. NORTHWEST ERECTION SERVICES INC., Employer, and CIGNA INSURANCE COMPANIES and IOWA CONTRACTORS WORKERS' COMPENSATION GROUP, Insurance Carriers, Defendants.	File Nos. 850416 850417 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been review de novo on appeal. The decision of the deputy is affirmed and is adopted as the final agency action in this case, with the following additional analysis.

Claimant argues on appeal that he has shown both a traumatic injury in December of 1985, and a cumulative injury on December 19, 1986. However, claimant himself testified that his left ankle injury in 1977 had caused him ongoing pain from the time of the injury up until his alleged December, 1985 injury. Claimant also gave a history of ongoing pain to various physicians. Claimant's doctors failed to causally connect claimant's present condition to any injury in December, 1985 or on December 19, 1986. Rather, the medical evidence shows that claimant has traumatic degenerative arthritis as a result of his 1977 injury, as well as non-traumatic arthritis and sarcoidosis. Any of these conditions are as likely a source of claimant's present ankle condition as any alleged injuries in December of 1985 or on December 19, 1986. The greater weight of the medical evidence shows that claimant's present left ankle condition is a sequalae of his 1977 fall and left ankle injury.

In addition, claimant has failed to carry his burden to show that an injury has occurred in December of 1985 or on December 19, 1986. Claimant alleges merely that in December,

1985, he was walking down steps when his ankle locked up. Standing alone, this fails to establish an injury. When read in conjunction with claimant's past medical history of a broken ankle in 1977 and continuing pain since that time, it seems far more likely that claimant's ankle locking up in December, 1985 was a sequalae of the 1977 injury rather than a new injury caused by simply walking down some steps.

There is no indication in the record that any aspect of claimant's work contributed to the December, 1985 event. Claimant apparently relies on the mere fact that the event occured while he was at work. Although this may satisfy the "in the course of the employment" requirement, it does not satisfy the additional requirement that the injury "arise out of" the employment.

In regards to a cumulative injury on December 19, 1986, again claimant apparently reasons that since he continued to have episodes of pain after the December, 1985, locking up incident, therefore he has suffered a cumulative injury. A cumulative injury is a series of repetitive small traumas that, cumulatively, result in impairment. Claimant has not shown that he experienced any such repetitive trauma. Claimant has not carried his burden to show a cumulative injury.

Signed and filed this 10th day of May, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT E. BRAINARD, Claimant, vs. FORT DODGE LABORATORIES, INC., Employer, and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 686661 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Attorney Robert L. Ulstad has sought a determination of an attorney's lien and a determination of the amount of attorney fees in this case. A deputy's decision filed March 25, 1988, established the validity of the attorney's lien and set the amount of the attorney's fee. Claimant has appealed that decision. All parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

I. Whether the award of a $10,000.00 attorney lien in connection with the petition for review-reopening of 1984 to attorney Robert Ulstad was excessive.

II. The decision of the deputy is without authority from any statute or provision in the Iowa Code.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

The citations of law in the attorney fee 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. A reasonable fee for the services performed by Robert L. Ulstad on behalf of Robert Brainard in the second review-reopening proceeding is a sum having a present value of $10,000 computed as of April 29, 1986. That sum is equivalent to 17.16 percent of all amounts to be paid to Brainard under the structured settlement agreement which was approved as part of the overall settlement package.

2. If the amounts due to Ulstad had been paid at the appropriate times, he would have received $5,148 in an initial lump sum, $46.50 per month until the final lump sum is paid and a final amount of $3,432 upon payment of the final $20,000 lump sum.

3. The sum of $6,229.08 payable on April 29, 1988 is the equivalent of the sum of $5,148 payable on April 29, 1986.

4. The sum of $1,318.44 paid on April 29, 1988 is equal to $46.50 paid over a period of two years commencing in April 1986.

5. The sum of $7,547.52, payable on April 29, 1988, is equal to the value of all amounts which would have become payable to Ulstad prior to the month of May 1988.

6. When divided over the remaining eight years of the annuity, the sum of $7,547.52 has a present value that is equal to $114.29 per month paid each month for the remainder of the annuity portion of the structured settlement, commencing with the month of May 1988.

7. Ulstad is entitled to a lien upon the payments payable to Brainard in the future in an amount equal to the fees that are awarded in this decision.

8. The testimony of Robert Brainard is not reliable.

9. The testimony of Robert L. Ulstad is accepted as being generally correct in regard to the events that have occurred.

CONCLUSIONS OF LAW

Approval by the industrial commissioner of the amount of any attorney's lien is a prerequisite to the lien being enforceable against an employer or an insurance carrier.

Robert L. Ulstad is awarded attorney fees having a present value of $10,000 computed as of April 29, 1986. Ulstad's lien upon the amounts payable to Robert Brainard under the structured settlement agreement is approved in an amount equal to the fees which are awarded to Ulstad herein.

Ulstad should receive the fees at the rate of 17.16 percent of all sums paid in the future as and for the proportionate amount of the recovery which is allocable to his fees. Ulstad is also entitled to receive an additional amount of $114.29 per month payable during the remaining portion of the annuity part of the structured settlement to provide an amount which is substantially equal to the amounts that would have been paid to him if he had received 17.16 percent of all payments which have been paid to Brainard prior to the month of May 1988.

After making adjustments to convert all sums to present value, the lien shall be enforced by paying to Ulstad the sum of $160.79 per month commencing with the month of May 1988 and continuing each month for the remaining eight-year term of the annuity portion of the structured settlement agreement. Ulstad shall also receive the sum of $3,432 in a lump sum payable from the $20,000 final lump sum settlement which is part of the structured settlement agreement. The remainder should be paid to Brainard.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That attorney's fees for Robert L. Ulstad are fixed at an amount having a present value of $10,000 on April 29, 1986.

That Ulstad shall have an attorney's lien upon the settlement proceeds in an amount having a present value of $10,000 on April 29, 1986.

That Fort Dodge Laboratories, Inc. and Insurance Company of North America satisfy Ulstad's lien by paying to Ulstad, as and for attorney's fees rendered on behalf of Robert Brainard, the sum of one hundred sixty and 79/100 dollars ($160.79) per month commencing in the month of May 1988 and continuing each month thereafter throughout the annuity portion of the structured settlement agreement and an additional sum of three thousand four hundred thirty-two and 00/100 dollars ($3,432.00) at the time of the final twenty thousand dollar ($20,000) lump sum payment due at the expiration of the ten-year annuity provided by the structured settlement.

That the employer and insurance carrier shall pay the

amounts to Ulstad from the amounts which would be payable to Robert Brainard under the provisions of the structured settlement.

That the costs of this action are assessed against Robert E. Brainard pursuant to Division of Industrial Services Rule 343-4.33.

That the employer and insurance carrier shall pay to Ulstad interest on any unpaid amounts from the date such amounts were due until paid.

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CICELY BROWN, Claimant, vs. NISSEN CORPORATION, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 837608 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.

The record on appeal consists of the transcript of the arbitration hearing and exhibits 1 through 18. Both parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are:

I. Did the deputy err in finding an injury in July 1985 based on cumulative trauma when the medical evidence showed at most a preexisting disc disease and August 1984 disc protrusion, but not a series of minor traumas?

II. Did the deputy err in failing to apportion any disability caused by degenerative disc disease or any August 1984 disc protrusion for which no claim was made in this proceeding?

III. Did the deputy err in considering claimant's emotional problems when there was no evidence causally relating emotional problems to any work injury or setting forth their nature, extent or permanency?

IV. Did the deputy err in finding the odd lot doctrine applicable when claimant had not made a bona fide effort to find work and defendants' vocational expert found her competitively employable?

REVIEW OF THE EVIDENCE

The arbitration decision dated June 29, 1988, adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on July 11, 1985, 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 supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

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

> interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-761 (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962).

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 16, 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). 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, 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).

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).

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 first matter to be resolved is whether claimant suffered a cumulative or a traumatic injury. Claimant had a degenerative condition which progressed while she was employed by defendant employer. She developed a herniated disc during the course of her employment. The opinions of John Robb, M.D., who was the treating physician, will be given the most weight. The opinion of Martin F. Roach, M.D., is not persuasive and is given little weight. Dr. Roach was merely an evaluating physician who saw claimant more than a year after her alleged work injury. There was also an apparent inconsistency between recommending activity restrictions and a finding of no permanent impairment by Dr. Roach. Claimant testified on the day the injury occurred, July 11, 1985 (hereinafter the July 1985 injury), she was performing a task that involved lifting. She sought medical care. Her activity restrictions were greater after the July 1985 injury than before. She has been in pain and has not returned to work since shortly after the July 1985 injury. While claimant's condition may have deteriorated through the course of her employment, her current disability did not manifest itself until the July 1985 episode. Claimant had an impairment from the injury in August 1984 and that impairment may not have significantly increased after that but her disability did not occur until she suffered the exacerbation of the condition in the July 1985 injury. Defendants' reliance upon the decision in Babe v. Greyhound Lines, Inc. Nos. 706132 and 790714 (Appeal Decision February 29, 1988) is misplaced. In Babe, claimant's condition was virtually the same from the first of a series of traumatic injuries until the hearing. In the instant case, claimant's condition changed significantly enough after the July 1985 injury that she was no longer able to perform her job. Claimant suffered a traumatic injury on July 11, 1985, while working for defendant employer that caused her disability.

The second matter to be resolved is whether claimant's disability should be apportioned between a prior injury (August 1984) or degenerative disc disease and her July 1985 injury. It is well established that an employer takes an employee as is. The facts in this case are quite clear. Prior to the work injury in July 1985 claimant had suffered little if any loss of earning capacity. It should be remembered that the injury in August 1984 was also with defendant employer. Prior

to the injury in July 1985 claimant was working full time and was in fact working overtime. Testimony by defendants' witness, claimant's foreman, indicates that claimant's work performance was always consistent and was above the standards set by the employer. There was no need to modify the job in order for claimant to perform it. Subsequent to the July 1985 injury claimant has had pain which has prevented her from working. The pain is in part responsible for her inability to complete vocational retraining. Dr. Robb has placed activity restrictions on claimant that are much more severe than they were before the injury. Dr. Robb has limited claimant to working four to six hours per day. All of claimant's loss of earning capacity is a result of the July 1985 injury.

The next matter to be resolved is whether claimant's emotional problems are related to her work injury in July 1985. There is evidence that claimant suffered from emotional problems prior to July 1985. Claimant began seeing a psychiatrist only one week before the hearing. Claimant concedes in her appeal brief that because the referral took place shortly before the hearing "the full extent of these matters could not be developed." The relationship between the emotional problems and the work injury must be a probability and not merely a possibility. Most importantly the record in this matter is devoid of any medical evidence that claimant's emotional problems are causually connected to the July 1985 work injury. Claimant has not proved that her emotional problems are causally connected to the July 1985 work injury.

The last matter to be resolved is the extent of claimant's disability. Defendants assert that the deputy erred in determining that the claimant was permanently totally disabled and finding that she was an odd-lot employee. The first question that must be decided is if claimant has made a prima facie showing that she is unemployable. The test under Guyton v. Irving Jensen Co., 373 N.W.2d 101, (Iowa 1985) is whether claimant is unemployable not whether claimant can earn enough income to be self supporting. The court at 373 N.W.2d 106 held: "We therefore hold that when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market the burden to produce evidence of suitable employment shifts to the employer." The test used by the deputy, namely whether claimant has the ability to earn sufficient income to be self-supporting, is not consistent with the facts or the holding of Guyton. Use of the test used by the deputy could lead to absurd results. For example, a part-time employee who worked four hours per day at minimum wage and was injured and could after the injury be employed for the same four hours per day at the same minimum wage would be permanently totally disabled under the test used by the deputy. Under this hypothetical the injured worker would be permanently and totally disabled even though there might not be any loss of earnings nor earning

capacity. The correct test is whether claimant is employable in a competitive labor market.

Claimant has attempted only one job, that of a dish washer, which presumably involved standing for an extended period of time. Admirably, she has attempted retraining and vocational rehabilitation. She discontinued the attempt at retraining because she was unable to concentrate, function or sleep due to pain in her lower back and down her leg. Her second attempt at vocational rehabilitation initially involved fewer hours per day and fewer days per week. When she increased her attendance time, she discontinued attendance approximately one week before the hearing. Her reason for discontinuing this attempt appears to be due in part, to emotional problems. In prior agency decisions where the claimants have demonstrated a bona fide search for work by seeking retraining, the claimants have clearly established a bona fide effort at retraining.. Claimant has not clearly shown that she has made a bona fide effort at retraining. Under the facts presented in this case, claimant has not made a bona fide attempt to seek vocational rehabilitation. Claimant has not made a prima facie showing that she is unemployable.

Claimant was born June 12, 1937 and was 48 years old at the time of the July 1985 injury. She was paid $8.80 per hour prior to her injury. She has a fifteen percent impairment rating due to an injury of the lower back. Dr. Robb has limited claimant to four to eight hours of work per day. She has activity restrictions which prohibit extended periods of standing, sitting, or driving. She has a high school education and aptitudes for numerical and clerical skills and has good manual dexterity. When all factors are considered claimant has suffered a 70 percent loss of earning capacity.

FINDINGS OF FACT

1. Claimant was born June 12, 1937 and was forty-eight years old in July 1985.

2. Claimant was injured at work August 17, 1984 at defendant employer.

3. After medical treatment claimant returned to work following the August 17, 1984, injury and did the same job she was doing prior to the work injury.

4. Claimant was able to work overtime following the August 17, 1984 incident.

5. On or about July 11, 1985, claimant was working for defendant employer when she lifted a volleyball upright and felt pain in her lower back.

6. Following the July 11, 1985, incident claimant attempted to continue doing her job and worked for two days. Eventually she was unable to continue doing her job and has not worked after July 15, 1985.

7. The July 11, 1985 incident was a material aggravation of claimant's preexisting condition.

8. At the time of the July 1985 injury claimant was earning $8.80 per hour.

9. Claimant has a high school education and an aptitude for clerical work.

10. Claimant's one attempt at employment was unsuccessful, the job attempted involved prolonged standing.

11. Claimant has activity restrictions which prohibit prolonged sitting, standing, driving or lifting of weights over 40 pounds on an occasional basis and 20 pounds on a repetitive basis.

12. Claimant has sought vocational rehabilitation but has been unsuccessful due to her physical and mental condition.

13. Claimant has an impairment of fifteen percent of the whole person.

14. Claimant is not unemployable.

15. Claimant has a work history of department store sales clerk, order clerk, messenger, youth group program advisor, production line assembler, fast food restaurant manager, dance instructor and aerobics instructor.

16. Claimant has suffered a loss of earning capacity of 70 percent as a result of the work injury on July 11, 1985.

CONCLUSIONS OF LAW

Claimant has established she sustained an injury on July 11, 1985.

Claimant has establish that the work injury sustained on July 11, 1984, is the cause of an industrial disability of 70 percent.

Claimant has not established that she is unemployable.

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

ORDER

THEREFORE, it is ordered:

That defendants pay claimant healing period benefits from July 16, 1985 through April 23, 1986 at a rate of two hundred sixty-nine and 03/100 dollars ($269.03).

That defendants pay claimant three hundred fifty (350) weeks of permanent partial disability benefits at the rate of two hundred sixty-nine and 03/100 dollars ($269.03) per week commencing April 24, 1986.

That defendants receive credit for payments previously made and for the excess payment based upon use of an incorrect rate.

That all past due accrued amounts be paid in a lump sum together with interest pursuant to Iowa Code section 85.30.

That defendants pay the costs of this proceeding including the costs of transcription of the arbitration hearing and including the following:

Dr. Robb report	$100.00
Dr. Robb deposition transcript	173.00
Dr. Robb expert witness fee for deposition	150.00
Certified mailing fees	3.34
Total	$426.34

That defendants pay claimant's mileage expenses under Iowa Code section 85.27 in the total amount of four hundred twenty-six and 00/100 ($426.00).

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

Signed and filed this 30th day of November, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JIM R. BROWN, Claimant, vs. WEITZ COMPANY, Employer, and EMPLOYERS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	:	FILED MAR 13 1990 File No. 830840 IOWA INDUSTRIAL COMMISSIONER 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 alleged injury on July 15, 1986. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 10. Defendants did not file a brief on appeal.

ISSUES

The issues as stated by claimant are:

1. Are the facts as found by the Deputy Commissioner in error to the prejudice of the Claimant as they do not include reference to Dr. Taylor's statement to the Claimant on January 12, 1988, recommending the need to (by the Claimant) strongly consider anterior cruciate ligament surgery (Exhibit 8)?

2. Are the facts found by the Deputy Commissioner in error to the prejudice of the Claimant as they do not include reference to the contents of the insurance carrier letter to the Claimant dated July 2, 1987?

3. Does the Deputy Commissioner err as a matter of law to the prejudice of the Claimant in the application of Section 85.34(1) to the facts?

4. Does the Deputy Commissioner err as a matter of law to the prejudice of the Claimant in the application of Section 86.13 to the facts?

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

Claimant urges that the termination date of the healing period was improperly set. The deputy's arbitration decision set the end of the healing period at June 12, 1987. This was the date, established in Joint Exhibit 6, wherein claimant's physician rated claimant's permanent partial impairment. Although the rating was later changed due to an error in calculation under the AMA Guides to the Evaluation of Permanent Impairment, this was the point in time when claimant's physician was able to gauge the extent of claimant's permanent impairment. As the name implies, permanent impairment is not subject to improvement. A rating of permanent impairment indicates that the healing period has ended and further improvement is not anticipated. This satisfies the requirements of Iowa Code section 85.34(1).

Claimant relies on a statement by his physician dated January 12, 1988 recommending that claimant consider undergoing anterior cruciate ligament surgery. The fact that claimant may need to undergo further treatment does not mean that claimant is still in his healing period. Claimant's healing period can end and permanency begin with further treatment anticipated at a later time. Surgery may constitute treatment only. It does not automatically indicate that the surgery is designed to improve the condition. There is no indication in the record that further improvement was anticipated after June 12, 1987. Many times surgery is necessary to maintain a condition. Some injuries necessitate further surgery on a regular basis, in some cases for years, even though such surgeries are not designed to improve claimant's condition but rather to treat it. Anticipation of further surgery does not equate with anticipation of further improvement.

Claimant further argues that his benefits were improperly terminated by the insurance carrier. Claimant relies on Joint Exhibit 7, a letter dated July 2, 1987, in which the carrier

indicates that benefits being paid after December 1, 1986 would be considered permanency benefits.

Section 86.13 requires 30 days notice to a claimant before termination of benefits. In this case, claimant's benefits were not terminated. All that occurred was a designation by the insurance carrier as to how claimant's benefits would be subjectively treated by the carrier. Of course, this subjective determination is not binding on this agency, and indeed the deputy found that the permanency did not begin until later, June 12, 1987. Claimant's benefits did not end. All that changed was the label the insurance carrier applied to those benefits. Section 86.13 does not require a notice to claimant in such situations.

FINDINGS OF FACT

1. Claimant suffered a work-related injury to his left knee on July 15, 1986.

2. Claimant was released to return to work with limitations effective December 1, 1986.

3. The work to which claimant was released was not substantially similar to the employment in which claimant was engaged at the time of his injury.

4. Following an examination of June 11, 1987, claimant's treating physician expressed an opinion as to claimant's permanent impairment on June 12, 1987.

5. Although claimant's physician later expressed a different opinion as to claimant's impairment, the second opinion was merely to correct an error in the first calculation.

6. Claimant returned to work substantially similar to that in which he was engaged at the time of his injury in the first week of January 1988.

7. As stipulated, claimant has suffered a permanent partial impairment of 25 percent of left leg.

8. Claimant's benefits were not terminated by defendants.

CONCLUSIONS OF LAW

The expression of an opinion by a physician as to an individual's permanent impairment implies that the individual has reached maximum medical recovery as of the date of the opinion.

Claimant's healing period for the subject injury began on August 11, 1986 and ended on June 12, 1987.

Claimant's benefits were not terminated under Iowa Code section 86.13 and defendants were not required to give claimant notice of a mere change in designation of benefits.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant forty-three point seven one four (43.714) weeks of healing period benefits at the stipulated rate of two hundred twenty-three and 82/100 dollars ($223.82) per week, totalling nine thousand seven hundred eighty-four and 07/100 dollars ($9,784.07).

That defendants are to pay claimant fifty-five (55) weeks of permanent partial disability [based upon a twenty-five percent (25%) loss of use of his leg] at the stipulated rate of two hundred twenty-three and 82/100 dollars ($223.82), totalling twelve thousand three hundred ten and 10/100 dollars ($12,310.10).

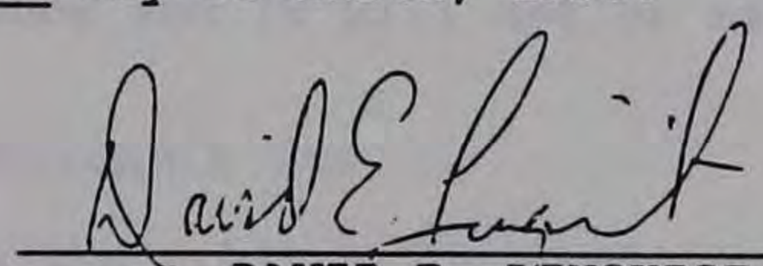
That defendants shall be entitled to credit for seventy-three (73) weeks of compensation paid at the stipulated rate of two hundred twenty-three and 82/100 dollars ($223.82), totalling sixteen thousand three hundred thirty-eight and 86/100 dollars ($16,338.86).

That the compensation awarded shall be paid to claimant as a lump sum together with statutory interest thereon pursuant to Iowa Code section 85.30.

That any costs of this action shall be assessed to defendants including the transcription of the hearing proceeding 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 13th day of March, 1990.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD BUTLER, Claimant, vs. ROWLEY INTERSTATE TRANSPORTATION CO., INC., Employer, and LUMBERMENS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	:	File No. 816925 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 temporary or permanent disability as a result of his October 11, 1985 injury and awarding claimant medical expenses.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 14. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether there is a causal connection between claimant's alleged injury and the disability.

REVIEW OF THE EVIDENCE

The arbitration decision dated April 27, 1989 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 issue and evidence.

ANALYSIS

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

FINDINGS OF FACT

1. Claimant established that he received an injury arising out of and in the course of his employment while pushing a pallet on October 11, 1985.

2. Claimant established that he incurred medical expenses as a result of the injury on October 11, 1985 in the amount of $94.00.

3. Claimant established that he injured his back at home on January 6, 1986.

4. Only one physician opined there is a possibility (but not to a reasonable degree of medical certainty) that claimant's back problems are related to his injury on October 11, 1985.

CONCLUSIONS OF LAW

Claimant failed to meet his burden of proof in establishing that his injury on October 11, 1985 caused either temporary or permanent disability.

Claimant incurred $94.00 in medical expenses at Lowell General Hospital.

WHEREFORE, the decision of the deputy is affirmed

ORDER

THEREFORE, it is ordered:

That defendants are liable for the payment of the following medical expenses:

Lowell General Hospital	$94.00

That defendants shall receive credit for benefits previously paid.

That claimant pay the costs of this appeal 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 31st day of May, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN A. CARLSEN, Claimant, vs. DEPARTMENT OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 736867 D E C I S I O N O N R E M A N D

STATEMENT OF THE CASE

An order of the Iowa District Court, in and for Woodbury County, the honorable Richard J. Vipond, J., presiding, has remanded this case for "further proceedings".

ISSUE

The district court decision of November 3, 1989, has affirmed the appeal decision of May 20, 1988, in all aspects except the apportionment of disability. The record is now re-examined to ascertain the degree of claimant's prior disability, if any.

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 17A.14(5) provides: "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence."

The industrial commissioner's findings have the effect of a jury verdict. Beier Glass Co. v. Brundige 329 N.W.2d 280, 282 (Iowa 1983); Ward v. Iowa Department of Transportation, 304 N.W.2d 236, 237 (Iowa 1981). The review exercised by a district court over agency action is not de novo. Purth v. Iowa Dep't Job Serv., 372 N.W.2d 269, 272 (Iowa 1985). The district court's review is limited as to corrections of errors of law, Newman v.

Iowa Dep't of Job Serv., 351 N.W.2d 805, 807 (Iowa 1985). The district court may modify or reverse an agency's final decision only if that decision is affected by error, in application of law, or Administrative Rule. Section 17A.19(8)(a)-(e), Iowa Code (1989). The district court may also reverse or modify the agency's final judgment if it is unsupported by substantial evidence in the agency record when viewed as a whole. Section 17A.19(8)(f), Iowa Code (1989). See Woods v. Iowa Dep't of Job Serv., 315 N.W. 2d 839, 840 (Iowa App. 1984).

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).

ANALYSIS

Claimant, prior to his June 16, 1983 injury, had a previous back condition. Claimant had undergone two fusion surgeries. Claimant also had a medically imposed lifting restriction not to lift over 50 pounds.

Although no rating of impairment was provided, the expertise of this agency shows that fusion surgery will necessarily result in some degree of physical impairment. By the same token, two fusion surgeries are likely to result in an even greater degree of impairment. The fact that claimant did, in fact, suffer some degree of physical impairment of his back is confirmed by the lifting restriction not to lift over 50 pounds.

Physical impairment is, of course, only one factor in the determination of industrial disability. The fact that claimant was able to keep on working is also a factor. However, it is also possible for a claimant to suffer an industrial disability and still be able to perform a particular job. Claimant's ability to perform the duties of his job, in spite of a back impairment, does not preclude the conclusion that claimant's overall earning capacity was affected by his back condition prior to his June 16, 1983 injury. Similarly, the fact that claimant may not have suffered a wage loss as a result of his prior back condition does not require a conclusion that he had not lost any of his earning capacity, as loss of earnings is not the equivalent of loss of earning capacity. Like physical impairment, loss of earnings and retention of one's job are singular factors among many factors in the determination of industrial disability. One can have industrial disability without a physical impairment rating, loss of earnings, or loss of one's job.

After again reviewing the record, it is concluded that claimant had a 25 percent industrial disability prior to his June 16, 1983 injury. All other aspects of the appeal decision of May 20, 1988 are re-incorporated herein.

FINDINGS OF FACT

1. Claimant was employed by defendant Iowa Department of Transportation from October 1966 until April 30, 1984.

2. Claimant received an injury to his back that arose out of and in the course of his employment on June 16, 1983.

3. Claimant had a prior fusion surgery of the L4-5 interspace in 1969, and an injury to his back in 1970 and second fusion surgery of the L4-5 interspace in 1971.

4. Claimant had a lifting restriction of 50 pounds prior to June 16, 1983.

5. As a result of the injury on June 16, 1983, claimant underwent a third fusion surgery at the L4-5 interspace on January 31, 1984.

6. Claimant voluntarily retired from work on April 30, 1984, pursuant to medical advice.

7. Claimant was 61 years old at the time of his injury on June 16, 1983.

8. Claimant reached maximum medical recovery on June 14, 1985.

9. Claimant has a lifting restriction of 15 pounds subsequent to his injury of June 15, 1983 and cannot bend, stoop, stand or sit for prolonged periods of time.

10. Claimant's work involved physical labor and the operation of heavy equipment, and required claimant to lift, bend, stoop, stand or sit for prolonged periods of time.

11. Claimant can no longer perform the duties of his job.

12. Claimant's education is limited to the eighth grade.

13. Claimant had an industrial disability of 25 percent prior to June 16, 1983.

14. Claimant's industrial disability at the time of hearing was 55 percent.

15. As a result of his injury of June 16, 1983, claimant has an industrial disability of 30 percent.

16. Claimant's rate is $187.90.

CONCLUSIONS OF LAW

Claimant suffered an injury to his back that arose out of and in the course of his employment on June 16, 1983.

Claimant has an industrial disability of 55 percent subsequent to his injury of June 16, 1983.

Claimant had an industrial disability of 25 percent prior to June 16, 1983.

Claimant met his burden in proving an industrial disability of 30 percent as a result of his June 16, 1983 injury.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at a rate of one hundred eighty-seven and 90/100 dollars ($187.90) per week from June 14, 1985.

That defendants are entitled to credit for benefits previously paid.

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.

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 29th day of January, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHUBB GROUP OF INSURANCE COMPANIES, Insurance Carrier, vs. CNA, Insurance Carrier, In The Matter of Clara Schexnayder, not a party, vs. Sioux Honey Association, not a party,	:	File No. 832446 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

CNA Insurance Company (hereinafter CNA) appeals and Chubb Group of Insurance Companies (hereinafter Chubb Group) cross-appeals from a decision on 85.21 benefits which ordered CNA to reimburse Chubb Group for medical benefits and permanent partial disability benefits but denied interest payments and attorneys' fees.

The record on appeal consists of stipulated facts and 16 stipulated exhibits with number 15 omitted. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are whether Chubb Group is entitled to reimbursement of medical benefits and permanent partial disability benefits and whether Chubb Group is entitled to interest payments and attorneys' fees.

REVIEW OF THE EVIDENCE

The decision on 85.21 benefits dated July 20, 1988, adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the decision on 85.21 benefits are appropriate to the issues and evidence. The following

additional citations are applicable. Iowa Code section 85.30 provides:

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

Iowa Code section 86.39 provides:

> All fees or claims for legal, medical, hospital, and burial services rendered under this chapter and chapters 85, 85A, 85B, and 87 are subject to the approval of the industrial commissioner, and no lien for such service is enforceable without the approval of the amount of the lien by the industrial commissioner. For services rendered in the district court and appellate courts, the attorney's fee is subject to the approval of a judge of the district court.

Iowa Code section 86.40 provides: "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner."

Workers' compensation statutes are to be liberally interpreted to benefit the injured worker.

> [T]he primary purpose of the workers' compensation statute is to benefit the worker and the workers' dependents insofar as the statute permits. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980). Thus the statute is to be interpreted liberally with a view toward that objective. Irish v. McCreary Saw Mill, 175 N.W.2d 364, 368 (Iowa 1970).

Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, 506 (Iowa 1981)

"It is also true, as argued by appellant, that the workmen's compensation statute is to be liberally construed, and where possible evils would result under either of two constructions, that which is to the advantage of the employee must control." Haverly v. Union Const. Co., 18 N.W.2d 629, 632 (Iowa 1945).

ANALYSIS

On appeal CNA argues that the deputy erred in finding that the employee in this proceeding, Clara Schexnayder, (hereinafter referred to as the injured worker) had a cumulative injury. CNA argues that this case is not factually appropriate

for the application of the cumulative injury rule. CNA's argument is not convincing. The injured worker in this case experienced pain and numbness in her hand approximately one month after commencing a job assignment where she unscrewed lids from jars. The injured worker sought medical treatment but missed work for only one-half day from the time she commenced the new job until May 17, 1986. (CNA was the insurance carrier for all relevant times after May 17, 1986.) Nothing in the record indicates a traumatic event that caused the injury. The injured worker suffered a compensable cumulative injury when she missed work for a compensable period of time. She missed work for a compensable period of time after May 17, 1986, and CNA was the insurance carrier at that time.

On cross-appeal Chubb Group argues that it should be awarded interest payments and attorneys' fees. Clearly, no interest can be allowed on payment of medical expenses. See Klein v. Furnas Electric Co., 384 N.W.2d 370 (Iowa 1986).

Workers' compensation laws are for the benefit of the injured worker. When an injured worker is entitled to weekly benefits, the benefits should be paid promptly. Employers and insurance carriers should be encouraged to promptly pay weekly benefits. In this case, Chubb Group paid weekly benefits to the injured worker. These benefits were paid even though Chubb Group, as found herein, was not ultimately liable and is to be reimbursed by CNA. Chubb Group paid weekly benefits that were the liability of CNA. In effect, CNA had use of money that was properly Chubb Group's. CNA should reimburse Chubb Group and pay interest at the rate provided in Iowa Code section 85.30 from the date Chubb Group paid benefits to the injured worker. If CNA were not required to pay interest, insurance carriers in similar circumstances would not be encouraged to promptly pay weekly benefits to injured workers. If an insurance carrier is not required to pay interest on the amount of weekly benefits, that insurance carrier will gain a windfall at the expense of another insurance carrier who promptly pays weekly benefits. If Chubb Group had not paid the weekly benefits to the injured worker, CNA would have been responsible for paying the weekly benefits plus interest to the injured worker. CNA is only being required to pay interest that it would have had to pay. It is appropriate that CNA pay Chubb Group interest from the time the weekly benefits were paid.

Chubb Group's argument that it is entitled to attorneys' fees is not convincing. There is simply inadequate justification, statutory or otherwise, for awarding Chubb Group attorneys' fees in this matter. Assuming for the sake of argument that either Iowa Code section 86.39 or 86.40 allowed for attorneys' fees in this situation, those code sections provide for the industrial commissioner to exercise discretion in approving the fees. There is no good reason why attorneys' fees should be awarded.

FINDINGS OF FACT

1. The injured worker suffered a gradual and progressive injury while working which resulted in a carpal tunnel release on August 6, 1986.

2. Chubb Group was the insurance carrier for the injured worker's employer through May 17, 1986.

3. CNA was the insurance carrier for the injured worker's employer for all times relevant after May 17, 1986.

4. The injured worker did not miss work for a compensable period of time until after May 17, 1986.

5. The injured worker's medical expenses, healing period and permanent partial disability benefits have been paid by Chubb Group as follows:

medical expenses	$3,089.03
weekly benefits	5,568.49
	$8,657.52

CONCLUSIONS OF LAW

Chubb Group is entitled to reimbursement of $8657.52 from CNA.

Chubb Group is entitled to interest on the reimbursement of the weekly benefits from CNA and interest shall accrue from the date paid by Chubb Group as provided in Iowa Code section 85.30.

Chubb Group is not entitled to interest on the reimbursement of medical expenses from CNA.

Chubb Group is not entitled to attorneys' fees from CNA.

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

ORDER

THEREFORE, it is ordered:

That CNA reimburse Chubb Group eight thousand six hundred fifty-seven and 52/100 dollars ($8,657.52) for a compensable injury to Clara Schexnayder, the injured worker, pursuant to section 85.21, Iowa Code (1987).

That CNA pay Chubb Group interest on reimbursement of weekly benefits from the date paid by Chubb Group.

That CNA pay all costs pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 23rd day of August, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUSSELL HOWARD CRAWFORD, Claimant, vs. TAMA MEAT PACKING CORP., Employer, and KEMPER INSURANCE, Insurance Carrier, Defendants.	:	File No. 803960 A P P E A L D E C I S I O N F I L E D AUG 16 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant permanent partial disability benefits based upon a ten percent disability of the right leg as a result of an alleged injury sustained on September 4, 1985.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 10. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is the nature and extent of claimant's alleged disability.

REVIEW OF THE EVIDENCE

The arbitration decision dated March 28, 1989, 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. The stab wound injury of September 4, 1985, to claimant's right leg was the cause of permanent disability.

2. Claimant sustained a permanent impairment of the saphenous nerve and the femoral, popliteal and saphenous leg veins.

3. Claimant has permanent swelling, numbness and weakness in his right leg as the result of these injuries.

4. Claimant sustained a ten percent permanent impairment of the right leg.

CONCLUSION OF LAW

The injury of September 4, 1985, was the cause of permanent partial disability of ten percent of the right leg.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant twenty-two (22) weeks of permanent partial disability benefits at the rate of two hundred seventeen and 62/100 dollars ($217.62) per week in the total amount of four thousand seven hundred eighty-seven and 64/100 ($4,787.64) commencing on January 13, 1986, as stipulated.

That these benefits are to be paid in a lump sum.

That interest accrues pursuant to Iowa Code section 85.30.

That defendants pay the costs of this proceeding, including the costs of transcribing the arbitration proceeding, one hundred fifty dollars ($150) of the expert witness fee for John R. Walker, M.D., and one hundred twenty-eight and 60/100 dollars ($128.60) for the court reporter fees for the deposition of Dr. Walker.

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

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRED CURRY, Claimant, vs. IOWA ASBESTOS COMPANY, Employer, and EMPLOYERS MUTUAL COMPANIES, AND IOWA CONTRACTORS WORKERS' COMPENSATION GROUP, Insurance Carriers, Defendants.	File No. 728713 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals and defendant Iowa Asbestos Co. and Iowa Contractors Workers' Compensation Group cross-appeals from an arbitration decision awarding medical benefits.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 4; and defendants' exhibits A through G. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal are:

1. Did the Deputy Commissioner err as a matter of law to the prejudice of the Claimant in putting the burden of affirmative defenses of changed environmental conditions and the ability to work in those conditions on the Claimant?

2. Did the Deputy Commissioner err as a matter of law to the prejudice of the Claimant in determining that the Claimant failed to establish by competent evidence that he has been disabled as a result of the occupational disease of asbestosis under Chapter 85A of the

Code of Iowa from engaging in employment under the same conditions for which he is suited?

Defendants', Iowa Asbestos Company and Iowa Contractors Workers' Compensation Group, state the issues on cross-appeal are:

I. Whether the deputy industrial commissioner erred when he ruled that the claimant was not disabled by his occupational disease and was not entitled to weekly benefits.

II. Whether the deputy industrial commissioner erred when he ruled that claimant is entitled to medical benefits pursuant to section 85A.5 when death or disablement has not resulted within three years after the last injurious exposure to the hazards of the disease.

REVIEW OF THE EVIDENCE

The arbitration decision filed June 17, 1988 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. Between December 1952 and June 1982, claimant suffered an occupational disease known as asbestosis from exposure to asbestos dust for at least five out of the last ten years before June 1982. Claimant's last 60 day exposure to asbestos dust visible to the naked eye was while working for Iowa Asbestos.

2. It could not be found that claimant's ongoing asbestosis condition is a cause of a permanent functional impairment or an inability to receive equal wages in comparable insulation construction work.

3. The condition of asbestosis may be progressive and reasonable treatment of this condition requires periodic physical examinations in the future to monitor the disease process.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to the medical benefits awarded below.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall provide, without cost to claimant, medical evaluations annually or more or less frequently as may be medically determined of his asbestosis condition at a major medical center such as the University of Iowa Hospitals and Clinics Pulmonary Care Department or comparable institution and shall provide such care and treatment at defendants' expense as recommended by the evaluating center. The first examination evaluation shall take place within ninety (90) days upon claimant's request for such an evaluation subsequent to this award.

That the costs of this appeal are to be shared equally pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 26th day of December, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DORRANCE J. DEAN,	:	
Claimant,	:	File No. 832035
vs.	:	A P P E A L
FDL FOODS, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
DEC 29 1989
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding permanent partial disability.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits A through P; and defendant's exhibits 1 through 6. Both parties filed briefs on appeal.

ISSUES

Defendant states the issues on appeal are:

I. The Hearing Officer abused his discretion in finding that Claimant sustained his burden of proof that his injury arose out of and in the course of employment because the only evidence of the occurrence of a work-related injury is Claimant's testimony and Claimant is not a credible witness.

II. The Hearing Officer abused his discretion in finding that Claimant sustained his burden of proof that his injury arose out of and in the course of employment because the opinion testimony on causation by Dr. Field is insufficient to make a prima facie case.

REVIEW OF THE EVIDENCE

The arbitration decision filed September 27, 1988 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 a herniated L2-3 lumbar disc as a result of lifting a stand that was stuck in a floor drain grate as part of the duties of his employment at FDL Foods, Inc.

2. The injury occurred at Dubuque, Iowa on May 1, 1986.

3. Although defendant raised questions regarding claimant's credibility, the undersigned finds claimant to be credible in all relevant facts material to this action.

4. At the time of the hearing claimant was 39 years of age, married and was entitled to three exemptions for income tax purposes.

5. Claimant's gross average weekly wage at the time of the injury was $343.00.

6. All medical care that claimant received for his back was proximately caused by the May 1, 1986 injury.

7. Claimant has a 15 percent permanent functional impairment. He continues to experience pain, numbness and tingling as a result of the injury. He is restricted to a 20 pound lifting limit.

8. Most of claimant's work experience is in packinghouse work.

9. Claimant's level of intellectual functioning cannot be accurately determined from the evidence presented, but based upon his appearance and demeanor and in light of all the evidence in the record, he does not appear to be well suited for academic pursuits or intellectual activity.

10. The herniation of claimant's L2-3 disc is a new injury and is not a direct outgrowth of his prior spinal fusion surgery.

11. Claimant has experienced a 20 percent loss of earning capacity as a result of the May 1, 1986 injury.

CONCLUSIONS OF LAW

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

Claimant sustained an injury to his back on May 1, 1986 which arose out of and in the course of his employment with FDL Foods, Inc.

The injury was a proximate cause of the permanent disability with which claimant is presently afflicted.

Claimant has a 20 percent permanent partial disability, in industrial terms, as a result of the injury of May 1, 1986.

Claimant is entitled to exemptions only for those persons who were his dependents for purposes of income tax exemptions at the time of the injury. Accordingly, his exemptions are himself, his spouse and his son. They do not include his adult daughter and his grandchild who resided with him, even though he contributed to their support.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant one hundred (100) weeks of compensation for permanent partial disability at the rate of two hundred nineteen and 33/100 dollars ($219.33) per week commencing February 23, 1987.

That defendant receive credit for the overpayment of healing period compensation, which amounts to two and 79/100 dollars ($2.79) per week for the thirty-seven point eight (37.8) weeks which have been paid, resulting in a total credit of one hundred five and 46/100 dollars ($105.46).

That defendant pay all accrued amounts in a lump sum, together with interest at the rate of ten percent (10%) per annum pursuant to Iowa Code section 85.30.

That defendant pay claimant two hundred thirty-two and 00/100 dollars ($232.00) in section 85.27 benefits.

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

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 29th day of December, 1989.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARRIET DEN HARTOG, Executor of the Estate of LARRY DEN HARTOG, Deceased, Claimant, vs. FARMERS COOP OIL ASSOC., Employer, and FARMLAND MUTUAL, Insurance Carrier, Defendants.	:	File No. 777409 A P P E A L D E C I S I O N FILED AUG 25 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant healing period benefits, permanent partial disability benefits and medical benefits as a result of an alleged injury that occurred on May 16, 1984. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A through Z, AA through ZZ, AAA through ZZZ, AAAA, BBBB, and CCCC; and defendants' exhibits 1 through 13. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. The deputy failed to place on claimant the burden to prove that the injury to Larry Den Hartog arose out of and in the course of his employment.

2. Larry Den Hartog's abandonment of his business responsibilities before ever completing activity beneficial to his employer, constitutes a major deviation and total abandonment of his employment obligation.

3. In the case of a major deviation from the business purpose, compensation is barred because the employee is deemed to have abandoned any business purpose, and merely driving on a route leading toward his home does not qualify as arising out of his employment.

4. In the case of a major deviation from the business purpose, compensation is barred because the employee is deemed to have abandoned any business purpose, and he cannot bring himself back within the ambit of his employment until first taking some action beneficial to his employer or in furtherance of his employment purpose.

5. All potential liability of employer and insurance carrier to Larry Den Hartog terminated pursuant to Iowa Code section 85.31(4) on September 8, 1985 when Larry Den Hartog died while this claim was unliquidated.

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.

The following additional comments are made to augment the analysis by the deputy which is adopted. Defendants argue that the claim of claimant is barred in it's entirety pursuant to Iowa Code section 85.31(4).

Iowa Code section 85.31(4) provides:

> Where an employee is entitled to compensation under this chapter for an injury received, and death ensues from any cause not resulting from the injury for which the employee was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

In support of their argument defendants cite Vanni v. Ringland-Johnson-Crowley Company and Bituminous Casualty Company, Vol. 1 Iowa Industrial Commissioner Report 353 (1980). As the deputy correctly discussed, the decision reached in Vanni is inconsistant with a prior appeal decision which was later cited as authority in an appeal decision which was subsequent to Vanni. In the prior appeal decision, Lundeen v. Quad City Construction, Thirty-fourth Biennial Report of the Industrial Commissioner 193 (Appeal Decision 1980) it was decided that the proper construction of section 85.31(4) was:

> In light of the purpose and principles served by the Iowa Workers' Compensation Act, it cannot be said that an employer is released from all liability incurred and owing prior to a claimant's untimely death. A fair interpretation of Iowa Code section 85.31(4) indicates that any portion of an award which has not accrued as of the date of a claimant's non-related death will abate along with any liability on the part of the employer. However, any award which has accrued prior to a claimant's demise that is still owing upon the date of claimant's death does not abate.

That construction was later repeated as the applicable law in Handel v. Determann Industries, Inc., (Appeal Decision January 28, 1983)

The proper construction of section 85.31(4) is the quoted discussion from Lundeen and later cited in Handel. Workers' compensation statutes are to be construed liberally in favor of the workers. To hold as defendants argue in this case would be to deny payment of benefits. To so hold would unjustly enrich defendants and reward them for failure to make timely payments. To the extent that the Vanni decision is inconsistent with the holdings in Lundeen and the instant case, it should not be followed.

FINDINGS OF FACT

1. Employer had sent claimant to the school in Kansas City and had agreed to pay claimant his average hourly wage while attending the school, pay the expenses of the school, and pay claimant's transportation and travel expenses to and from the school.

2. Claimant was returning home from the school at the time of his accident on May 16, 1984.

3. Claimant sustained an injury on May 16, 1984, which arose out of and in the course of his employment at the time of the automobile accident while returning home from the school.

4. Claimant was unable to work due to the injury from May 16, 1984 to November 1, 1984.

5. Alan Pechacek, M.D., determined that claimant sustained a permanent functional impairment of eight percent to the body as a whole.

6. Claimant was no longer able to perform employment which requires moderate to heavy physical labor as he had done in the past and that claimant was limited to light, sedentary

office type of work with a lot of freedom of movement after the injury.

7. Claimant sustained an industrial disability in the amount of 40 percent of the body as a whole.

8. Claimant's death on September 8, 1985, was not due to this injury but was a result of causes unrelated to this injury.

9. Claimant incurred $79,485.02 in medical expenses.

10. Claimant commenced this action in person while still living.

11. The estate was substituted as the party claimant after his death.

12. Employer's liability had not been established by settlement, award or otherwise at the time of claimant's death on September 8, 1985.

13. Defendants had paid no benefits to claimant or to his estate up to the time of his death.

14. There was no evidence to indicate that claimant's injury was a result of his own willful intent to injure himself.

15. There was no evidence that alcohol or any other drug substance was a substantial factor in causing the injury.

16. There was evidence that in the past claimant had suffered blackouts, fainting episodes and at least one gran mal seizure.

17. Claimant did not feel well the night before he left home, that claimant's daughter reported that he had a headache the morning that he left home, and that claimant testified that he was sick on the morning of May 16, 1984 and did not go to breakfast at that time.

CONCLUSIONS OF LAW

Claimant sustained an injury on May 16, 1984, which arose out of and in the course of employment with employer.

Claimant is entitled to healing period benefits from May 16, 1984 to November 1, 1984.

The injury was the cause of permanent disability.

Claimant is entitled to permanent partial disability benefits from November 1, 1984 until the date of his death on September 8, 1985.

Claimant is entitled to medical expenses for this injury.

Claimant did not willfully intend to injure himself.

Alcohol or other drug substances were not a substantial factor in causing claimant's injury.

The estate was a proper party to this action after claimant's death and is entitled to recover both medical expenses and workers' compensation benefits from the date of injury until the date of death.

Iowa Code section 85.31(4) did not extinguish claimant's rights to recovery and any compensation or benefits which had accrued prior to claimant's decedent's death that was still owing upon the date of claimant's decedent's death does not abate.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant twenty-four point two eight six (24.286) weeks of healing period benefits at the rate of one hundred seventy-two and 35/100 dollars ($172.35) per week for the period from May 16, 1984 to November 1, 1984 in the total amount of four thousand one hundred eighty-five and 69/100 dollars ($4,185.69).

That defendants pay to claimant forty-four point five seven one (44.571) weeks of permanent partial disability at the rate of one hundred seventy-two and 35/100 dollars ($172.35) per week for the period from November 1, 1984 to September 8, 1985 in the total amount of seven thousand six hundred eighty-one and 81/100 dollars ($7,681.81).

That these benefits are to be paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That defendants pay to claimant seventy-nine thousand four hundred eighty-five and 02/100 dollars ($79,485.02) in medical expenses.

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.

That this case is to be returned to the prehearing calendar for assignment on the issue of penalty benefits pursuant to Iowa Code section 86.13.

Signed and filed this 25th day of August, 1989.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

JUL 31 1989

IOWA INDUSTRIAL COMMISSIONER

JOHN R. DENNIS, Claimant, vs. CONSOLIDATED FREIGHTWAYS, INC., Employer, and OLD REPUBLIC INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 810512 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 13, 1985. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 48; and defendants' exhibits A through G.

ISSUES

Defendants state the following issues on appeal:

1. Causal connection of the alleged injury to the present disability, and to any disability after February 3, 1986.

2. The rejection of the deposition testimony of Dr. Crank without a stated reason.

3. The nature and extent of any permanency.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence. In addition, the following aspects of the evidentiary record are noted:

Claimant worked as a laborer. On November 13, 1985, claimant was lifting a heavy bag when he injured his back. Claimant consulted Gary M. Crank, D.C., a chiropractor in the state of Illinois. Dr. Crank found no permanency and released claimant to work.

Claimant then consulted Duane K. Nelson, M.D., an orthopedic surgeon. Claimant was also seen by J. N. Weinstein, M.D. Dr. Weinstein opined that claimant's current condition was causally connected to the November 13, 1985 injury. Dr. Weinstein also assigned claimant a permanent partial impairment rating of 8-10 percent of the body as a whole.

Claimant states he cannot currently lift more than 60-65 pounds. Claimant has returned to his old job at a slightly higher rate of pay, due to intervening pay raises negotiated by claimant's union. Prior to the injury of November 13, 1985, claimant was required to undergo Interstate Commerce Commission physicals.

APPLICABLE LAW

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

ANALYSIS

The employer's first issue on appeal concerns whether claimant has established a causal connection between his present condition and his work injury. Dr. Weinstein testified that a causal connection existed. Dr. Crank stated that claimant's present condition could have been caused by his November 13, 1985 injury or by other factors, including obesity. Dr. Lehman, Dr. Shafer, Dr. Moler, and Dr. Mumford indicated that the origin of claimant's condition was unknown, while Dr. Carillo, Dr. Nelson and Dr. Martin expressed no opinion on causation. Defendant employer argues that Dr. Weinstein did not have a complete history of claimant's prior injuries. Claimant and his wife testified that claimant's back and his ability to perform physical tasks was worse after his injury.

Most of claimant's physicians either did not express an opinion on causation, or expressed the opinion that the causation was unknown. There is no medical opinion relating claimant's condition to any causative factor other than claimant's work injury. Even Dr. Crank, who does not assign any permanency to claimant's condition, acknowledges that the condition could be work related. Dr. Weinstein's opinion on causal connection relates claimant's present condition to his work injury.

It is also noted that claimant had a physical for his job prior to his injury on November 13, 1985, and that no impairment was indicated. The greater weight of the evidence indicates that claimant's present condition is causally connected to his work injury of November 13, 1985.

Defendant employer also raises as an appeal issue the

nature and extent of claimant's disability. Claimant received a rating of permanent impairment from Dr. Weinstein of 8-10 percent. Claimant states he cannot lift more than 60-65 pounds. Claimant cannot drive as far as he used to be able to. However, claimant has returned to his old job, and now earns even more than he did at the time of his injury. Claimant's age at the time of the hearing was 36. Claimant's education is limited to the 10th grade. Claimant's work experience consists of factory work and driving a truck.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 15 percent.

FINDINGS OF FACT

1. Claimant injured his back on November 13, 1985, while working for Consolidated Freightways.

2. Claimant sustained 8-10 percent whole body impairment as a result of his work-related injury of November 13, 1985.

3. Claimant returned to work full time on August 24, 1987.

4. Claimant has not suffered a loss of wages.

5. Claimant's loss of earning capacity is 15 percent.

6. Claimant's stipulated rate of $368.67.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that he sustained a work-related injury on November 13, 1985.

Claimant has established by a preponderance of the evidence that there is a causal connection between claimant's work-related injury and his whole body impairment.

Claimant is entitled to healing period benefits from November 13, 1985 through August 23, 1987 for any weeks that he has not previously been paid for.

Claimant has established entitlement to 75 weeks of permanent partial disability benefits based on industrial disability of 15 percent.

Defendants owe the contested medical bills.

Claimant is not entitled to penalty benefits.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay healing period benefits for the period described above at a weekly rate of three hundred sixty-eight and 67/100 dollars ($368.67).

That defendants pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on August 24, 1987 at a weekly rate of three hundred sixty-eight and 67/100 dollars ($368.67).

That defendants pay the contested medical bills.

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

That defendants be given credit for benefits already paid to claimant.

That defendants pay the costs of this action pursuant to Division of Industrial Services Rule 343-3.1(2), as requested by the agency.

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

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD DUPREE, Claimant, vs. CITY OF MOUNT PLEASANT, IOWA, Employer, and NORTHWESTERN NATIONAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 840913 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision which determined claimant's rate of compensation. In a ruling dated March 17, 1989 the undersigned reinstated claimant's appeal because the only issue on appeal is the rate of compensation. The determination of that issue is dispositive of this contested case.

The record on appeal consists of the stipulations in this matter. Claimant filed a brief on appeal.

ISSUE

The issue on appeal is the rate of compensation.

REVIEW OF THE EVIDENCE

The arbitration decision dated January 30, 1989 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

One preliminary matter needs to be discussed. In claimant's appeal brief the argument is made that the deputy erred in rejecting a part of the stipulation. The part of the stipulation in question is the statement that claimant was employed on

a part-time basis by defendant employer. While it is normally true that stipulations are accepted, there are instances when stipulations will be rejected. Stipulations that are contrary to the law or that resolve the conclusion of law at issue in a contested case proceeding can be rejected. The determination whether claimant was "part-time" thus possibly making Iowa Code section 85.36(10) applicable is the question at issue. The stipulation should be rejected to the extent that it would resolve the conclusion of law at issue in this case. Furthermore, while a deputy industrial commissioner may not overrule another deputy industrial commissioner, the industrial commissioner has the authority to overrule a deputy industrial commissioner. Therefore, the industrial commissioner could, if necessary, overrule a deputy who determined that the stipulations were to be accepted. The deputy who made the arbitration decision made no error in his treatment of the stipulations.

The issue to be resolved in this case is the rate of compensation. Claimant argues on appeal that Iowa Code section 85.36(10) is applicable and that as a result, income earned from other employment should be included in calculating the proper rate of compensation.

Claimant's argument is not persuasive for a variety of reasons. Claimant cites no legal authority on point in support of claimant's argument. Claimant attempts to argue that an elected city official who is paid an annual salary regardless of the hours worked is in the same line of industry as other employees of the government such as someone who works for the Department of Corrections and is paid on a bi-weekly basis for presumedly working forty hours a week. The line of industry involved in this matter is an elected city official who is paid on an annual salary. There is no indication in the record nor no argument made that this claimant's earnings as an elected official were less than the earnings of other similar elected officials. The deputy correctly discussed that an elected city official may well be considered a full-time position because of the demands placed on the official. Even if one were to assume for the sake of argument that claimant worked less than full time for defendant employer, there is no indication from the record in this matter that claimant earned less than someone who worked "full-time." That is, there is no indication in the record what an elected city official who worked "full-time" would earn.

The deputy correctly stated:

> It as [sic] not been shown that section 85.36(10) is as applicable to claimant's situation as is section 85.36(5). The latter section clearly applies, while the former requires strained construction at best. While the statute should be liberally construed in favor of claimants, Caterpillar Tractor Company v. Shook, 313 N.W.2d 503 (Iowa 1981), that construc-

tion must be within reason. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

It has not been shown that Iowa Code section 85.36(10) is applicable in this case. By contrast, it is clear that Iowa Code section 85.36(5) does apply. Claimant was paid an annual salary. The annual salary should be divided by fifty-two in calculating the weekly compensation in this case.

FINDINGS OF FACT

1. Claimant was injured by gunshot wounds on December 10, 1986.

2. At the time of his injury, claimant's annual salary, as councilperson, was $660.00 (or a weekly average of $12.69).

3. At the time of his injury, claimant was married and entitled to two exemptions.

CONCLUSION OF LAW

Claimant's rate of weekly compensation must be calculated under Iowa Code section 85.36(5).

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That compensation shall be paid to claimant on the basis of a weekly benefit amount of twelve and 07/100 dollars ($12.07).

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

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY EGINOIRE, Claimant, vs. SUPER VALU STORES, INC., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 713369 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 30 percent industrial disability as a result of a work-related injury to his back on September 10, 1982.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 12. Both parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are:

1. The Deputy erred in her interpretation that Dr. Patrick's 20 percent impairment rating was as a result of the injury of September 10, 1982.

2. The Deputy erred when she found that the claimant sustained a loss of earning capacity entitling him to an award of 30 percent industrial disability.

REVIEW OF THE EVIDENCE

The arbitration decision dated May 19, 1989 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 to his back which arose out of and in the course of his employment on September 10, 1982, when he fell while exiting his truck.

2. Claimant was initially treated with epidural steroid injections and then Chemonucleolysis and released to return to work.

3. Claimant returned to work, worked for a period of time and began experiencing symptoms in his back.

4. Claimant's treatment culminated in an L5-S1 bilateral laminectomy-discectomy on September 4, 1984.

5. While recovering from surgery, claimant began experiencing pain in his right hip.

6. Claimant was released to return to work without restrictions on February 11, 1985.

7. Claimant worked at his regular job until undergoing a total hip arthroplasty on December 10, 1985.

8. The underlying cause for the arthroplasty was degenerative arthritis of the hip, not caused by claimant's employment.

9. Claimant's employment did not aggravate, accelerate, worsen or lighten up the degenerative arthritis so as to cause disability.

10. Claimant's injury of September 10, 1982 is the cause of permanent disability.

11. Claimant's injury of September 10, 1982 has caused a permanent partial impairment, a loss of earning capacity, and an actual loss of earnings.

12. Claimant was 48 years old at the time of the hearing, with a ninth grade education and no other formal training or

education who has earned his living primarily as a laborer and truck driver.

13. As a result of his injury, claimant is precluded from engaging in at least some of the occupations for which he is fitted.

14. Claimant has returned to work as a truck driver but has had to modify his activities by bidding on shorter runs, pallet loads and fewer hand unload runs.

15. Claimant's employer acknowledges claimant is not capable of doing all the aspects of his job.

16. Claimant currently holds stable employment.

17. Claimant, as a result of the injury of September 10, 1982, has sustained an industrial disability of 30 percent.

18. Claimant sought treatment with a chiropractor prior to defendants designating a physician for his treatment although defendants were aware claimant had sustained an injury arising out of and in the course of his employment.

CONCLUSIONS OF LAW

Claimant failed to establish a causal connection between the total hip arthroplasty and his employment or injury of September 10, 1982.

Claimant has shown that as a result of the injury of September 10, 1982, he sustained a permanent partial disability of 30 percent for industrial purposes.

Claimant has shown his entitlement to medical benefits.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at the stipulated rate of three hundred ten and 21/100 dollars ($310.21) per week commencing February 6, 1984.

That defendants shall receive full credit for all disability benefits previously paid.

That defendants shall pay all disputed medical expenses as found in joint exhibit 11.

That payments which have accrued shall be paid in a lump sum together with statutory interest thereon pursuant to Iowa Code section 86.30

That defendants shall file a claim activity reports purusant to Division of Industrial Services Rule 343-3.1(2).

That defendants pay the costs of this action including the costs of transcription of the arbitration hearing.

Signed and filed this 31st day of May, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TONY R. ELDRENKAMP, Claimant, vs. ARCHER DANIELS MIDLAND, Employer, and NORTHWESTERN NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 797085 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 80 percent industrial disability benefits on account of a June 12, 1985 work-related injury.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 9; and defendants' exhibits A through H. Both parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are:

1. The award of industrial disability of 80% of the whole person is unsupported by substantial evidence in the record made before the deputy industrial commissioner when that record is viewed as a whole.

2. The deputy's finding that claimant "eventually proved unable to continue [his work] because of injures" is unsupported by the evidence.

3. The deputy industrial commissioner erred in raising the "odd lot doctrine" in the arbitration proceeding

where claimant had failed to raise that issue at any time prior to or during the hearing.

4. The evidence does not support a finding that claimant could fall within the odd lot doctrine under any circumstances.

REVIEW OF THE EVIDENCE

The arbitration decision dated May 16, 1989 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.

In addition, defendants contend that the record fails to support a finding of 80 percent industrial disability as a result of claimant's June 12, 1985 work-related injury. Defendants rely upon claimant's ability to return to his pre-injury position with defendants. Loss of actual earnings does not equate to loss of earning capacity. Reduction of actual earnings or the lack thereof, like functional impairment, is only one component of earning capacity. Claimant's work restrictions limit his ability to secure a position for which he is qualified. Claimant's work experience is limited to unskilled employment and claimant's restrictions limit his exposure to hot and cold temperatures, as well as chemicals and ultraviolet light. Claimant's past work history is limited to the unskilled labor market and the claimant's restrictions close off areas of this market.

Evidence supports the deputy's finding that claimant was "unable to continue because of his injuries." Claimant and his wife testified that claimant's hands would swell and turn black and blue after work, as a result of claimant's burns. Clearly, claimant's injury made it more difficult to continue working with defendants.

While the deputy industrial commissioner's decision mentioned the odd-lot doctrine, the deputy did not find that claimant's case fell within the category of odd-lot. Nor did claimant raise the issue of odd-lot at the hearing. The deputy's passing comments on odd-lot does not amount to raising the issue of the odd-lot doctrine.

FINDINGS OF FACT

1. As stipulated, claimant suffered a work-related injury on June 12, 1985.

2. The work-related injury caused claimant severe burns to 58 percent of his body surface with deep burns on the face and hands and mostly second degree burns on the neck, chest, back, arms and legs.

3. Despite extensive surgical repair and physical therapy, claimant has a combined functional impairment to all four extremities and his trunk of 65 percent.

4. Claimant's limitations include the need to be protected from ultraviolet light, exposure to chemicals, and the need to be employed in a temperature controlled environment.

5. Claimant was a credible witness.

6. Claimant was 31 years old at the time of hearing.

7. Claimant completed the ninth grade.

8. Claimant's work experience is limited to the unskilled labor market.

9. Claimant has shown excellent motivation to return to work by actually performing similar employment for two years after his injury, although he eventually proved unable to continue because of his injuries.

10. Claimant suffered depression and a diminution of his social skills by reason of the work injury.

11. As stipulated, claimant is entitled to a healing period from June 13, 1985 through August 12, 1986.

12. Claimant has shown that he has a reduction in his earning capacity.

CONCLUSIONS OF LAW

Claimant suffered an injury arising out of and in the course of his employment on June 12, 1985.

Claimant's injury caused a healing period as stipulated and industrial disability of 80 percent of the whole person, or 400 weeks.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant four hundred (400) weeks of permanent partial disability benefits at the stipulated rate of three hundred twenty-eight and 53/100 dollars ($328.53) per week commencing August 13, 1986.

That after first deducting benefits voluntarily paid to claimant for his healing period from June 13, 1985 through August 12, 1986, defendants shall be entitled to credit for all other weekly benefits paid to claimant as and for permanent partial disability.

That any accrued benefits ordered hereunder that have not been paid shall be paid to claimant as a lump sum together with statutory interest thereon pursuant to Iowa Code section 85.30.

That defendants pay the costs of this action 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 31st day of May, 1990.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY EVANS, Claimant, vs. HENNINGSEN CONSTRUCTION CO., Employer, and CIGNA INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 798259 A P P E A L D E C I S I O N

FILED
FEB 26 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding claimant healing period and permanent partial disability benefits based on a 25 percent industrial disability.

The record on appeal consists of the transcript of the arbitration hearing, joint exhibits 1 through 15, and 17 through 24. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal are:

I. The deputy erred by finding an industrial disability significantly less than the functional impairment of American Medical Association, Guides to the Evaluation of Permanent Impairment.

II. The award of 25% industrial disability being less than the functional impairment is not supported by sufficient findings or evidence.

III. The deputy erred in fixing the industrial disability less than the functional impairment.

REVIEW OF THE EVIDENCE

The arbitration decision dated December 22, 1988 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.

Division of Industrial Services Rule 343-2.4 states:

> The Guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under Iowa Code section 85.34(2)"a"-"r."

ANALYSIS

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

Division of Industrial Services Rule 343-2.4 states that the AMA Guides to the Evaluation of Permanent Impairment may be used to determine permanent partial disability under Iowa Code section 85.34(2)"a"-"r." Claimant contends that the AMA Guide should be used to determine the extent of claimant's impairment.

Arnis Grundberg, M.D., has been claimant's treating physician since June 5, 1986 and gave claimant a rating of 35 percent permanent impairment of the hand. R. Schuyler Gooding, M.D., assigned permanent partial disability as ten percent of the body as a whole due to claimant's back injury. A rating of 35 percent permanent impairment of the hand is not equivalent to 35 percent functional impairment of the body as a whole. A deputy is not compelled to use the AMA Guides to determine functional impairment when claimant's physicians have supplied the appropriate ratings.

First, claimant failed to make a prima facie showing of 42 percent functional impairment of the body as a whole. Even if claimant had made a prima facie case of 42 percent functional impairment, it is wrong to assume that industrial disability is the same as ones functional impairment. In addition, claimant incorrectly contends that since he has made a prima facie case of 42 percent functional impairment, the burden shifts to the defendants. A showing of functional impairment does not entitle a finding of industrial disability, nor does it shift the burden to the defendants. See Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964) and McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976).

Furthermore, claimant incorrectly argues that the deputy erred in fixing industrial disability less than functional impairment. Functional impairment is merely one factor to be considered in determining industrial disability. Industrial disability is comprised of a number of factors which must be weighed in conjunction with functional impairment. See Petersen v. Iowa Beer & Liquor Control Department, Vol. II-1 State of Iowa Industrial Commissioner's Decisions 423 (1984). Industrial disability is not a calculation but an evaluation of the employee and his injury. Factors are not plugged into an equation to determine industrial disability. The deputy is to weigh all the evidence presented to determine industrial disability. Industrial disability may be more, equal to or less than functional impairment, functional impairment does not limit industrial disability.

The record supports the deputy's conclusion of 25 percent industrial disability. Claimant was 30 years old at the time of the hearing with average intelligence. Claimant has received his GED after his injury. Physicians have assigned functional impairment to claimant's right hand as 35 percent and 10 percent permanent partial disability to the body as a whole due to claimant's back and neck injury. Claimant is permanently restricted in pushing, pulling or lifting over 20 pounds with his right hand. There are no restrictions as a result of claimant's back injury. Claimant's attitude towards vocational retraining adversely reflects upon claimant's motivation. Claimant had one job but quit due to the drive and paperwork involved with the job. Claimant continued to insist upon on-the-job training rather than schooling and continued to apply for jobs which were beyond his physical limitations. Vocational counselor, Alfred Marchisio, testified that claimant was employable under his current physical restrictions and specified a number of positions which claimant is qualified to perform.

While claimant is not capable of engaging in his former occupation, he can use his expertise in construction to obtain a sedentary position in the construction industry. Evidence supports the deputy's decision of 25 percent industrial disability.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment on June 18, 1985.

2. Claimant's injuries were to his hand and back.

3. Claimant sustained a permanent injury to the body as a whole.

4. Claimant reached maximum medical recovery on January 27, 1987.

5. Claimant has a permanent impairment and permanent work restriction as a result of the injury of June 18, 1985 which prohibits him from engaging in his regular occupation of steelworker.

6. Claimant, age 30, with an eleventh grade formal education acquired his GED subsequent to his injury and has the qualifications, intellectually, emotionally and physically to reenter the job market.

7. Claimant's motivation is poor.

8. Claimant suffered a loss of earning capacity as a result of the injury of June 18, 1985.

9. Defendant employer failed to provide claimant with a job when he was released to return to work.

10. Claimant sustained a permanent partial disability of 25 percent for industrial purposes as a result of the injury of June 18, 1985.

CONCLUSIONS OF LAW

Claimant has established that the accident of June 18, 1985 resulted in an injury to the body as a whole and that he is entitled to a determination of industrial disability.

As a result of the injury of June 18, 1985, claimant has sustained a permanent partial disability of 25 percent for industrial purposes.

Claimant has established a healing period from June 18, 1985 up to and including January 27, 1987.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant eighty-four point one four three (84.143) weeks of healing period benefits at the stipulated rate of one hundred eighty-four and 81/100 dollars ($184.81) for the period from June 18, 1985 up to and including January 27, 1987.

That defendants shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the

stipulated rate of one hundred eighty-four and 81/100 dollars ($184.81) commencing January 28, 1987.

That defendants shall receive full credit for all disability benefits previously paid.

That defendants pay accrued amount in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay the costs of the hearing proceeding and claimant pay the costs on appeal including the costs of the transcription of the hearing proceeding 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 26th day of February, 1990.

David E. Linquist
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUDITH EVERS,

Claimant,

vs.

WEST DELAWARE COUNTY,
COMMUNITY SCHOOL DISTRICT,

Employer,

and

EMPLOYERS MUTUAL COS.,

Insurance Carrier,
Defendants.

File Nos. 805442
819213

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 alleged injuries on September 16, 1985 and March 10, 1986. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A through V; and defendants' exhibits 1 through 10.

ISSUES

Neither party filed a brief on appeal. Therefore, the appeal will be considered generally and without regard to specific issues.

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 deputy's decision made a determination that claimant's injuries extended beyond the upper extremities and involved the body as a whole. However, a review of the record reveals that claimant did not voice any complaints of neck pain to either her family physician or her orthopedist, Marvin F. Roach, M.D., until late in her treatment. Claimant did voice complaints of shoulder pain to her therapist during this period, however.

After her evaluation by John R. Walker, M.D., claimant returned to Dr. Roach. Dr. Roach was told of the cervical complaints for the first time, and examined claimant again. Dr. Roach noted that he found no indication of cervical injury. Dr. Roach is claimant's treating physician. Dr. Walker was an evaluating physician only. Dr. Roach had greater contact with claimant and over a longer period of time. Dr. Walker acknowledged his conclusion that claimant's work injuries caused her neck pain was based on an "assumption" that no other injury or other intervening cause existed. Dr. Roach specifically stated that claimant's neck pain was not caused by her work injuries. The opinion of Dr. Roach will be given the greater weight. Claimant bears the burden of proof. Claimant has failed to establish that her work injuries on September 16, 1985 and March 10, 1986 extended beyond her upper extremities and into the body as a whole.

Thus, claimant's award is limited to the scheduled amounts for the injuries to her right and left arms. Dr. Roach assigned claimant a two percent permanent partial impairment of each upper extremity. Dr. Walker assigned an impairment of 38 percent for the left upper extremity and 40 percent for the right upper extremity. Again, Dr. Roach was claimant's treating physician and had far greater opportunity to observe claimant's degree of impairment. Dr. Roach's opinion will be given the greater weight as to degree of impairment. Claimant is entitled to an award of two percent of the right arm and to an additional award of two percent of the left arm.

Claimant's rate of compensation was incorrectly calculated by the defendants. Defendants acknowledge in their trial brief that claimant's annual income was divided by 52 weeks. However, claimant is a school employee. Although she is paid on an annual basis, her work was performed during a 9 month period. The deputy correctly applied the formula utilized in Utsler v. Carlisle Community School, (Review Reopening Decision, December 17, 1982).

Defendants objected to the fees for the services of Dr. Walker as being unauthorized. However, exhibit K clearly authorizes the services of Dr. Walker for purposes of a

permanency evaluation. There is no showing that Dr. Walker's fees are for treatment. Indeed, Dr. Walker in his reports makes it clear that he is conducting an evaluation only, as he makes reference to possible methods of treatment should he be asked to initiate treatment. The deputy correctly ordered the defendants to pay the medical bills in question.

The deputy ordered defendants to pay additional healing period benefits to claimant through the time of Dr. Walker's letter of February 4, 1987. In that letter, Dr. Walker states that claimant has reached maximum healing in that nothing further is being done for her. Dr. Roach did not establish a date for the end of claimant's healing period, but did acknowledge at his deposition on March 9, 1988 that nothing further could be done for claimant. The deputy's determination was appropriate.

FINDINGS OF FACT

1. On September 16, 1985 claimant received an injury to her left arm arising out of and in the course of her employment.

2. On March 10, 1986 claimant received an injury to her right arm arising out of and in the course of her employment.

3. Claimant reached maximum recovery on February 4, 1987 when Dr. Walker issued his report.

4. Claimant worked nine months per year and was to be paid over a twelve month period.

5. Claimant's gross weekly wage for the period from September 17, 1985 to January 7, 1986 was $120.00 per week.

6. Claimant's gross weekly wage for the period from March 16, 1986 to June 19, 1986 was $138.00 per week.

7. Claimant's medical expenses were authorized.

8. Claimant's left arm injury does not affect the body as a whole.

9. Claimant's right arm injury does not affect the body as a whole.

10. Claimant has permanent partial impairment of two percent of each arm as a result of her work injuries.

CONCLUSIONS OF LAW

Claimant has met her burden in proving her left arm complaints are causally connected to her injury of September 16, 1985.

Claimant has met her burden in proving that her right arm complaints are causally connected to her injury of March 10, 1986.

Claimant is entitled to healing period benefits from her left arm injury for the period from September 17, 1985 to January 7, 1986 at the rate of $88.10 per week.

Claimant is entitled to healing period benefits from her right arm injury for the period from March 16, 1986 to June 19, 1986 at the rate of $99.96 per week.

Claimant is also entitled to healing period benefits from June 19, 1986 to February 4, 1987 at the rate of $99.96 per week.

As a result of her left arm injury on September 16, 1985, claimant is entitled to five weeks of permanent partial disability benefits at a rate of $99.96 per week.

As a result of her right arm injury on March 10, 1986, claimant is entitled to five weeks of permanent partial disability benefits at a rate of $99.96 per week.

Claimant is entitled to have $521.00 paid to the Delaware County Memorial Hospital by defendants, $387.00 paid to Dr. Walker and a reimbursement of $139.86 to her for mileage.

Claimant is entitled to have the following matters taxed as costs to the employer:

Medical report	$ 50.00
Certified mailing for service of original notice	6.68
Costs of serving subpoena on Linda Ryan	15.00
Witness fees	40.00
Total	$111.68

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 September 17, 1985 to January 7, 1986 at the rate of eighty-eight and 10/100 dollars ($88.10) per week; defendants are to pay unto claimant healing period benefits from March 16, 1986 to June 19, 1986 at the rate of ninety-nine and 96/100 dollars ($99.96) per week; defendants are to pay unto claimant thirty-three (33) additional weeks of healing period benefits at a rate of ninety-nine and 96/100 dollars ($99.96) per week and ten (10) weeks of permanent partial disability benefits at a rate of ninety-nine and 96/100 dollars ($99.96) per week.

That defendants are to receive credit for benefits previously paid.

That defendants are to pay the following medical expenses:

Delaware County Memorial Hospital	$521.00
Dr. Walker	387.00
Total	$908.00

That defendants are to pay claimant reimbursable expenses for mileage in the amount of one hundred thirty-nine and 86/100 dollars ($139.86).

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

That costs are taxed to defendants pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 29th day of December, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID L. FREDERIKSEN, Claimant, vs. PIZZA HUT RESTAURANT OF ATLANTIC, IOWA, Employer, and HOME INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 826930 A P P E A L D E C I S I O N F I L E D JUL 27 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant temporary total disability benefits and medical expenses as a result of an alleged injury on February 18, 1986.

The record on appeal consists of the transcript of the arbitration decision and joint exhibit 1. The claimant filed a brief on appeal.

ISSUE

Claimant states the following issue on appeal: "The Industrial Commissioner erred in finding that the injury of claimant-appellant did not 'arise out of' his employment."

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. On February 18, 1986, claimant suffered an injury to his right hand when he struck a plastic plate with his right hand while on break.

2. Claimant has failed to introduce any evidence which shows it to be more likely than not that anything connected with his employment at Pizza Hut was a substantial factor in causing him to strike a plate with his right hand.

CONCLUSION

Claimant has failed to establish by a preponderance of the evidence, that he sustained an injury on February 18, 1986, which arose out of his employment with Pizza Hut Restaurant of Atlantic, Iowa.

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 pursuant to Division of Industrial Services Rule 343-4.33.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN A. GALLARDO,

Claimant,

vs.

THE FIRESTONE TIRE & RUBBER COMPANY,

Employer,

and

CIGNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 643357

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 July 30, 1980. The record on appeal consists of the transcript of the review-reopening proceeding and joint exhibits 1 through 55. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the following issues on appeal:

I. A change of condition occurred between the hearing on November 8, 1985, and the date of the hearing on April 4, 1988, in the claimant's industrial disability which would allow additional benefits to be awarded to the claimant based upon how the injury has affected his ability to earn a living.

II. The extent of industrial disability to this claimant due to his worker's [sic] compensation injury of July 30, 1980, is permanent total disability which should be recognized and awarded to the claimant herein.

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 threshold question to be addressed is whether claimant has shown a change of condition since the prior award of benefits. A review of the record shows that claimant's physical condition is essentially the same as it was at the time of the prior hearing. However, a change of condition can occur without a change in physical condition. Claimant asserts that he has suffered an economic change of condition in that he is no longer employed by Firestone.

At the time of his injury, claimant was a tire builder. After his injury, claimant attempted to return to tire building but found he was unable to perform those duties. Claimant then underwent surgery, and was off work for six months. When he returned to work in July 1981, claimant was assigned to various jobs, including pulling weeds, working as a janitor, and eventually returning to tire building. Claimant's back condition worsened, and a second surgery was performed in February 1983.

Claimant returned to work again, and was then assigned to clean water fountains and other janitor work. Following this, claimant was assigned to look for defects in tires, which did require lifting tires; operating a forklift; and operating a machine which weighed tires. In October 1985, he was assigned to a job which claimant himself described as "doing nothing." Claimant then went on vacation just prior to the first review-reopening hearing. At the time of the original review-reopening hearing in October 1985, claimant asserted he was not able to perform any jobs at Firestone.

The deputy's original review-reopening decision, which established claimant's industrial disability at 50 percent, noted:

> Claimant's current employment with Firestone is a consideration in assessing his industrial disability; his current employment lessens his industrial disability and defendants' resulting liability.

Shortly after the original review-reopening hearing, claimant attempted to return to work in November of 1985. Claimant worked for two and one-half weeks, then concluded he would retire. Claimant later sought and received a disability retirement pension. Claimant also filed a second review-reopening seven days after filing an appeal of the deputy's original review-reopening decision. The appeal decision reduced claimant's award to 40 percent industrial disability. The appeal decision concluded that although the defendants' efforts to keep claimant employed were noted by the deputy, they were not taken into consideration in determining industrial disability.

Claimant correctly points out that a physical change of condition is not necessary to justify a further award on review-reopening, and that a loss of earnings caused by the work injury and not contemplated by the original award may justify a further award of benefits. However, in this case claimant, at the time of the first review-reopening hearing, was asserting that he was not employable at Firestone. Defendant employer was clearly having difficulty placing claimant in a position consistent with his physical restrictions, finally resulting, at the time of hearing, in claimant being paid to do nothing at all.

The original review-reopening decision and the later appeal decision clearly utilized defendants' efforts to keep claimant employed as a factor. There is no showing that those efforts on the part of defendant changed or altered after the decision was rendered. Rather, claimant unilaterally concluded that his physical impairment made it dangerous for him to work near equipment after his leg "gave out" at work.

Claimant testified that he retired following the incident where his leg "gave out" because he felt that this made it dangerous for himself and others to be around equipment. Although claimant's stated reasons for retiring--avoiding further injury to himself and others--is commendable, it does not justify the remedy utilized by claimant, i.e. retiring from work. There is no indication that claimant requested his employer to find him an alternative position that would not bring him into contact with equipment. Claimant concluded, on his own, that retirement was necessary. "Defendants are only responsible for the reduction of claimant's earning capacity which was caused by his injury, and are not responsible for the reduction of earnings claimant will actually have because he voluntarily resists return to the work force." Williams v. Firestone Tire and Rubber Co., III Iowa Industrial Commissioner Report 279 (Review-reopening decision, September 28, 1982).

The fact that claimant is no longer employed by Firestone is a non-physical change of condition. However, in order to justify the award of further or lesser benefits, that change of condi-

tions must be shown to have been causally related to claimant's work injury. Claimant subjectively considers his decision to retire to have been prompted by his injury, but there is no objective showing to corroborate his decision.

In addition, even if claimant's decision to retire was caused by his work injury, it appears that those physical factors existed at the time of the first review-reopening hearing. Indeed, in light of the fact that claimant's petition for a second review-reopening was filed within a very short time after the first review-reopening decision was issued, it is difficult to conclude that the physical factors that claimant says prompted his decision to retire did not exist at the time of the first hearing. This is not a case where, after an award of benefits, a claimant experiences a non-physical change of condition, such as a job loss, due to a result of the work injury that was not foreseen at the time of the hearing. Those circumstances might very well justify a further award of benefits. Rather, here claimant's physical condition did not change in the short time between the first hearing and the filing of the second petition. All that changed was claimant's decision to retire, which was his voluntary act and may or may not have been based on his injury.

If anything, claimant's decision to retire without good cause related to his injury casts doubt on his motivation. If it had been known at the time of the first hearing that claimant would be deciding to retire so soon, it is very possible the award of industrial disability would have been less. If such an event were considered a change of condition, which it is not, claimant's benefits might be reduced as opposed to increased.

The original review-reopening decision and appeal decision were based in part on the employer's efforts to provide substitute employment to claimant. That factor has not changed since the original review-reopening decision. All that has changed is claimant's decision to retire. Claimant has failed to show a change of condition subsequent to the award caused by his original injury. The change of condition, if any, that has occurred came about as a result of claimant's own decision to retire.

Because claimant has failed to establish a change of condition since the original award of benefits, claimant's second issue will not be addressed.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment on July 30, 1980.

2. Claimant underwent back surgery on December 4, 1980 and again on February 10, 1983 as a result of the work injury.

3. Claimant returned to work in August 1983 doing a variety of light duty jobs and perceived that after this he had gotten considerably worse.

4. Claimant went on vacation and advised his physician in October 1985 that he was not employable with defendant employer.

5. Claimant returned to work for a short period of time in November 1985 and never returned to the plant.

6. Claimant is currently receiving a monthly pension.

7. Claimant's primary physician found no objective change in claimant's condition from 1985 to the present.

8. Claimant's physical condition has not changed.

9. Claimant currently has the same physical complaints he had at the time of the prior award.

CONCLUSION OF LAW

Claimant has failed to sustain his burden of proof to show a change in condition which would entitle him to any further benefits under the Iowa Workers' Compensation Act.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

That each party is assessed their own costs with defendants assessed the costs of the attendance of the court reporter and claimant assessed the cost of the transcription of the hearing proceeding pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 29th day of December, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MIKE GALLI, Claimant, vs. ADVANCED DRAINAGE SYSTEMS INC., Employer, and KEMPER INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 825795 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 July 10, 1986.

The record on appeal consists of the transcript of the arbitration proceeding; defendants' exhibit 20; claimant's exhibits B through E, F(b), F(c), F(d), G and H; and joint exhibits 1 through 19. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the following issues on appeal: "1. Did the Deputy err in awarding industrial disability? 2. Did the Deputy err in awarding penalty benefits for the Respondents unreasonably withholding or delaying payments?"

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

Claimant was released to return to work after his injury by his physician without any restrictions. Claimant testified that he attempted to return to work, but was told by his employer that the insurance company would not let the employer rehire claimant because of his injury. Claimant also stated that the employer characterized him as "accident prone." The employer denies this.

The employer did, however, clearly refuse to rehire claimant when he first returned to work, due to claimant's injury. The employer then hired another employee to take over claimant's duties. The employer, on appeal, states that the reason claimant was not rehired was due to economic circumstances, the seasonal nature of the work, and a rehire system based on seniority, and not due to his injury. The record shows that the employer hired, in the months following the injury, two or three similarly skilled employees to do work similar to that which claimant was performing at the time of his injury. Contrary to the employer's argument, the fact that the Iowa Civil Rights Commission failed to take action on claimant's claim of discrimination on the basis of disability has no binding effect or relevance in this action, as clearly other factors and criteria are involved in a civil rights action that are not applicable to a workers' compensation proceeding.

Even considering the seasonal nature of the employer's work, and the possibility that claimant, had he not been injured, may have been subject to layoff, nevertheless the record clearly establishes that at the time of his initial attempt to return to work, claimant was denied re-employment even though there were no physical restrictions preventing his rehire. There is no indication in the record that claimant would have been subject to layoff at that point in time had he not been injured. The economic or seasonal factors relied on by employer did not prevent the employer from hiring a substitute employee to replace claimant. But for claimant's injury, claimant would have continued working for employer for some period of time, but because of his injury claimant was not rehired and therefore suffered a loss of wages.

The employer correctly points out that claimant has not suffered a permanent physical impairment as a result of his injury, and that claimant is now earning more in wages than previously and now has more stable, year-around employment. Nevertheless, an employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disabil-

ity. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). The employer could not predict that claimant would be able to find substitute work when it refused to rehire claimant, and in fact claimant was without wages for a substantial period of time due to the employer's refusal to rehire. Claimant has suffered a ten percent industrial disability.

The deputy also imposed a penalty of 50 percent of unpaid benefits pursuant to section 86.13. However, in light of the fact that no impairment rating or other indication of permanency existed, a penalty is not appropriate.

FINDINGS OF FACT

1. Claimant was injured on July 10, 1986 while working for defendant employer.

2. Claimant's injury on July 10, 1986 was the result of his employment with defendant employer.

3. Claimant was released to return to work on August 22, 1986 and sought the return of his job with defendant employer.

4. Defendant employer refused to allow claimant to return to work upon his release.

5. Defendant insurance company instructed defendant employer not to allow claimant to return to work upon his release.

6. Claimant has a ten percent industrial disability resulting from his injury of July 10, 1986.

7. Claimant has a loss of earnings and earning capacity.

8. Claimant reached maximum recovery on August 22, 1986.

9. Defendants are to pay Iowa Musculoskeletal Center's bill for $144.00 and all mileage set out in exhibit F(c) except for the mileage to and from George A. Neff, D.C.

CONCLUSIONS OF LAW

Claimant's injury arose out of and in the course of his employment on July 10, 1986.

Claimant has established a causal connection between his injury of July 10, 1986 and his disability.

Claimant has incurred a loss of earnings and earning capacity as a result of his injury of July 10, 1986.

Claimant has a ten percent industrial disability.

Claimant is entitled to 5 5/7 weeks of healing period benefits for the period beginning July 14, 1986 up to August 22, 1986 at the rate of $136.24 per week.

Claimant is entitled to have Iowa Musculoskeletal Center's bill for $144.00 be paid and all mileage set out in exhibit F(c) except for Dr. Neff.

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

ORDER

THEREFORE, it is ordered:

That claimant is entitled to five and five-sevenths (5 5/7) weeks of healing period benefits at the weekly rate of one hundred thirty-six and 24/100 dollars ($136.24).

That claimant is entitled to fifty (50) weeks of permanent partial disability benefits at the rate of one hundred thirty-six and 34/100 dollars ($136.24) commencing August 22, 1986.

That defendants shall be given credit for the nine and two-tenths (9 2/10) weeks of compensation that defendants have already paid to claimant.

That defendants shall pay the one hundred forty-four dollar ($144.00) bill of the Iowa Musculoskeletal Center, P.C., and claimant's transportation expenses set out in exhibit F(c) except for the mileage to and from Dr. Neff's office.

That defendants shall pay the 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.

That defendants shall 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 30th day of November, 1989.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VAN S. GARRETT,	:	
Claimant,	:	File No. 777583
vs.	:	
CATERPILLAR TRACTOR COMPANY,	:	A P P E A L
Employer, Self-Insured, Defendant.	:	D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding medical benefits, healing period benefits, and permanent partial disability benefits based on an industrial disability of 40 percent.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 13; and defendant's exhibit A. Both parties filed briefs on appeal.

ISSUES

Defendant states in its appeal brief that the issues on appeal are whether:

I. The deputy erred in concluding that claimant satisfied his burden to establish an injury arising out of and in the course of the employment.

II. The deputy erred in ruling that claimant sustained his medical burden of proof to establish a causal connection between the alleged injury and claimant's need for low back surgery.

Claimant discussed these issues in his appeal brief. No other issues were preserved on appeal by discussion of the issues in the appeal brief of either party.

REVIEW OF THE EVIDENCE

The arbitration decision dated December 8, 1987 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 first issue to be resolved is whether claimant suffered an injury that arose out of and in the course of his employment. Claimant described the incident as follows. He was working in an area where he was assigned to work and he was lifting a part that weighed approximately 60 pounds. He was lifting a part from a tub that was approximately 32-48 inches high. This account was verified by claimant's foreman who was called as a witness for defendant. Some aspects of claimant's description of other events at the time of the incident are not fully corroborated by other witnesses. Claimant testified that a co-employee, Cora Marsh, helped him and that he sat on the floor. Marsh said she did not recall helping. However, she did recall that claimant had stated that he had been injured and that she told him to go see the company doctor. Claimant's foreman, Malvin Hightower, testified that he did not recall helping claimant. However, Hightower did indicate that normally a worker could not leave the work area to go see the company doctor without Hightower's permission. Hightower also indicated that a hoist would be used to lift parts over 50 pounds. Both claimant and Marsh indicated that workers were discouraged from taking the time to use the hoist. Hightower admitted that he had not reviewed any records prior to his testimony. The discrepancies of testimony are discussed here because defendant in its appeal brief relies heavily on the alleged discrepancies and claimant's credibility. The medical reports verify claimant's assertions on how and when the injury occurred. The defendant's medical report recorded a date of injury on October 3, 1984. Claimant sought care from William Reinwein, M.D., who recommended that claimant be off work beginning October 4, 1984. Claimant was also evaluated by Byron W. Rovine, M.D., who had not had an opportunity to see claimant's x-rays but recommended claimant begin a remedial exercise program.

When all the evidence is considered claimant has demonstrated that he suffered an injury that arose out of and in the course of his employment. Claimant was at work doing an

activity that was work related. He was doing an activity that would cause an injury to his lower back. His account was corroborated, particularly by the medical reports. Claimant has proved that on October 3, 1984 he suffered an injury that arose out of and in the course of his employment.

The next issue to be resolved is whether there is a causal connection between the work injury and claimant's medical treatment. Defendant relies upon the medical evaluations of Dr. Rovine and upon attempts to discredit the medical reports of Dr. Reinwein. Dr. Rovine's medical reports should be discarded on the basis of those reports alone. On October 16, 1984 Dr. Rovine reports that he had not seen x-rays. On April 29, 1987 he was critical of the fact that claimant had surgery without a real trial of conservative treatment but had erroneously thought claimant was injured only one month before the surgery. On May 1, 1987 he indicates he had then located his own records and discovered the date of the work injury was October 3, 1984.

Defendant's attempts to discredit the medical reports of Dr. Reinwein are based upon the assertion that certain of the medical records were not signed by Dr. Reinwein. Merely because the medical reports may not have been signed by him does not mean that the medical record, which is from his records, is not reflective of his opinion. Furthermore, the form in question was dated November 13, 1985 and a letter by Dr. Reinwein dated March 25, 1986 gives no indication that the form incorrectly reflects Dr. Reinwein's opinion. As claimant correctly notes in his appeal brief, defendant could have deposed Dr. Reinwein but did not do so. Dr. Reinwein is an orthopedic surgeon and was the primary treating physician who treated claimant for a period of a year. His medical records indicate claimant's disability was caused by an injury at work. That opinion was directly supported by F. Dale Wilson, M.D. Dr. Reinwein's medical evidence will be given the most weight.

After Dr. Reinwein's conservative treatment proved unsuccessful, he recommended surgery which was performed. According to Dr. Reinwein the surgery improved claimant's condition. Claimant has proved by the greater weight of evidence that his work injury on October 3, 1984 was causally connected to his back surgery.

FINDINGS OF FACT

1. On October 3, 1984 claimant was lifting a part out of a tub that was approximately 32-48 inches high while

working for defendant. The part weighed approximately 60 pounds.

2. Claimant injured his lower back when lifting the part.

3. Claimant sought care from the company doctor on October 3, 1984.

4. Claimant also sought care from Dr. Reinwein.

5. Dr. Reinwein, an orthopedic surgeon, was the primary treating physician.

6. Dr. Reinwein's opinions are the most reliable.

7. Medical records of Dr. Reinwein indicate that claimant's injury was work related.

8. The injury consisted of a herniated disc at two levels in claimant's lower spine which was not accurately, fully diagnosed until November 1985.

9. Claimant underwent conservative treatment from October 1984 through November 1985.

10. Dr. Reinwein recommended surgery which was performed in November 1985.

11. The medical expenses requested by claimant in the prehearing report (Exhibit 12) totaling $3,712.50 are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of the work injury of October 3, 1984.

CONCLUSIONS OF LAW

Claimant has proved that he suffered an injury on October 3, 1984 that arose out of and in the course of his employment with defendant.

Claimant has proved that there is a causal connection between the work injury and the medical expenses incurred.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant two hundred (200) weeks of permanent partial disability benefits at the rate of three hundred four and 79/100 dollars ($304.79) per week from January 29, 1986.

That defendant pay claimant healing period benefits from October 3, 1984 through January 20, 1985 and from November 3, 1985 through January 28, 1986 at the rate of three hundred four and 79/100 dollars ($304.79) per week.

That defendant pay claimant the sum of three thousand seven hundred twelve and 50/100 dollars ($3,712.50) as reimbursement for medical expenses.

That defendant pay accrued weekly benefits in a lump sum and shall receive a credit against this award for all benefits previously paid as set forth in the prehearing report.

That defendant receive credit for previous payments of benefits under a nonoccupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2) as set forth in the prehearing report.

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

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

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 31st day of October, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY GLIENKE,	:	
	:	
Claimant,	:	File No. 804586
	:	
vs.	:	
	:	A P P E A L
WILSON FOODS CORPORATION,	:	
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision granting permanent partial disability benefits as a result of an alleged injury on September 3, 1985.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 6. Both parties filed briefs on appeal. The defendant filed a reply brief.

ISSUE

The defendant states the following issue on appeal: 1) Whether there is a permanent partial disability owing.

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 sustained severe burns to the left hand, wrist, arm, back, lower left abdomen and upper left thigh on September 3, 1985.

2. As a result of these burns, claimant's left hand, wrist and arm become stiff and numb in cold weather and form water blisters in hot weather.

3. Due to all of these injuries, claimant's whole body has become sensitized to hot and cold temperatures and that claimant has developed an intolerance for extreme hot and cold environments, and develops blisters from exposure to direct sunlight.

4. Albert E. Cram, M.D., verified these facts and found that claimant sustained a one percent permanent functional impairment due to permanent skin changes and intolerance to hot and cold.

5. Claimant sustained an industrial disability of 10 percent of the body as a whole.

CONCLUSIONS OF LAW

The injury of September 3, 1985 was the cause of permanent disability.

The injury caused industrial disability to the body as a whole.

Claimant is entitled to 50 weeks of permanent partial disability benefits based upon a 10 percent industrial disability to the body as a whole.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay to claimant fifty (50) weeks of permanent partial disability benefits at the rate of one hundred eighty and 51/100 dollars ($180.57) per week in the total amount of nine thousand twenty-eight and 50/100 dollars ($9,028.50) commencing on October 22, 1985 which is the commencement date stipulated to by the parties.

That this amount is to be paid to claimant in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That defendant is charged with the costs of this action including transcription of the arbitration hearing 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 filed this 27th day of July, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN GRAVES,

Claimant,

vs.

FRENCH & HECHT,

Employer,
Self-Insured,
Defendant.

File Nos. 803214
767270

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant and defendant appeal from an arbitration decision awarding permanent partial disability benefits as the result of alleged injuries on June 12, 1984 and August 13, 1985. The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 9.

ISSUES

Neither party filed a brief on appeal. Thus, the appeal will be considered generally and without regard to specific issues.

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

Claimant has shown that on August 13, 1985, he suffered a work injury to his back that resulted in permanent impairment. The report of John Sinning, M.D., causally connects claimant's present condition to the August 13, 1985 injury. Dr. Sinning appears to have been aware of claimant's prior falls and back injuries, and has nevertheless concluded that the August 13, 1985 injury is the cause of claimant's present condition. His opinion is uncontroverted.

Claimant is 34 years of age, with a high school education.

His work experience is limited to manual labor involving lifting. Claimant now has permanent lifting restrictions as a result of the August 13, 1985 injury. Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 30 percent.

Claimant's medical expenses are also causally connected to his work injury.

FINDINGS OF FACT

1. On August 13, 1985, claimant suffered an injury to his low back which arose out of and in the course of his employment with employer while lifting at work.

2. The work injury of August 13, 1985, was a cause of a five percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no repetitive lifting over 50 pounds and no occasional lifting over 100 pounds. Claimant must be able to change positions and cannot stand continuously while working at shoulder height or above. Bending and twisting must also be limited.

3. The work injury of August 13, 1985, and the resulting permanent partial impairment and work restrictions, was a cause of a 30 percent loss of earning capacity. Claimant is unable to return to his former heavy work for employer and to other heavy work generally. Heavy work is the employment to which claimant is best suited given his work history, age and education. Claimant is currently unemployed but only in part due to his disability. Claimant was terminated by employer for absenteeism unrelated to his work injury. Claimant's potential for rehabilitation employment is unknown but claimant is relatively young and has a high school education. Claimant has not been offered vocational rehabilitation by the employer. Claimant reached maximum healing on December 31, 1985.

4. The medical expenses listed in the prehearing report, which total $1,577.20 were authorized by defendant. The expenses were incurred as a result of a referral by a physician authorized by defendant.

CONCLUSION OF LAW

Claimant has established by a preponderance of the evidence entitlement to the permanent partial disability benefits and medical benefits awarded below.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant shall pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of one hundred ninety-two and 62/100 dollars ($192.62) per week from December 31, 1985.

That defendant shall pay to Michael R. DeBlois, D.O., the sum of two hundred thirty-nine and 00/100 dollars ($239.00) plus any late payment charges authorized by law and the sum of one thousand three hundred thirty-eight and 20/100 dollars ($1,338.20) to the Davenport Osteopathic Hospital plus any late payment charges authorized by law.

That defendant shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for any permanent partial disability benefits previously paid.

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

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

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

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS GREEN, Claimant, vs. HYMAN FREIGHTWAYS, Employer, and TRANSPORT INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILED MAR 2 1990 IOWA INDUSTRIAL COMMISSIONER File No. 830435 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 alleged injury on November 1, 1984. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 9; and defendants' exhibits A through L. Only a portion of exhibit G was admitted into the record. Both parties filed briefs on appeal.

ISSUE

Whether the deputy industrial commissioner erred in calculating the rate of compensation to be awarded in this case.

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, with the addition of relevant precedents noted in the analysis section of this decision.

ANALYSIS

Claimant argues on appeal that the deputy incorrectly calculated the rate of his weekly benefits awarded. The deputy's decision noted that claimant was paid with two separate checks issued by his employer for hauling freight with a truck claimant owned. One check was designated wages, the second check was designated as fees for the use of claimant's truck.

Claimant urges that the deputy should have followed the reasoning contained in Sperry v. D & C Express, Inc., (Appeal Decision, December 10, 1987). That decision held that the portion of claimant's revenue from driving his truck representing reimbursement for the expenses and use of the truck itself, as opposed to the wage portion of the payment, could not be determined from the record, and therefore the entire revenue from the truck was used to determine claimant's rate. However, subsequent to the filing of briefs in this case, the Sperry case was decided by the Iowa Supreme Court. The Court held that a truck owner-operator who is paid his wages and expenses together must deduct the expense portion of the revenue to determine the wage portion in the determination of a workers' compensation rate. In addition, Tuttle v. Stannards, Inc., (Remand Decision, December 20, 1988), presently on appeal to the Iowa District Court, also holds that a truck driver's expenses must be deducted from the total revenue of the truck. Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985), approved a method whereby one-third of the gross revenue of the truck was designated wages and two-thirds as truck expense. In Sperry, above, the supreme court approved a one-fourth/three-fourths division. Claimant's reliance on the appeal decision in Sperry is no longer valid.

In addition, the agreement between the employer and employee in this case to pay claimant in two checks, one check for wages and another check for expenses, distinguishes this case from Sperry, Tuttle, and Christensen. Those cases necessitated a division of the gross revenue of the truck between wages and expenses because both amounts were paid to claimant together. In this case, the division between wages and expenses has already been established by the parties. Although such a division would not be controlling in every case, here the division results in a proportional relationship between the wages and the expenses roughly similar to the one-fourth or one-third approach in the above cited cases. The two checks were issued to claimant on separate dates. The two checks came from different departments of the employer. The two checks were treated differently by both the employee and the employer in terms of tax reporting. Finally, it is noted that the two check arrangement was part of a negotiated collective bargaining agreement. The division affected by the parties is not unconscionable in its terms. The wage amount designated by the parties in this case will be used

to determine claimant's rate of compensation. The deputy properly distinguished this case from Sperry and applied the correct analysis.

FINDINGS OF FACT

1. On November 1, 1984 claimant was a resident of the state of Iowa, employed by Hyman Freightways.

2. Claimant regularly worked for the employer in the state of Iowa and worked from terminals operated by the employer in the state of Iowa, although a majority of claimant's working time was not spent within the state of Iowa.

3. Claimant injured his back on November 1, 1984 while moving bags of bentonite in a semi-trailer near Cody, Wyoming as part of the duties of his employment with Hyman Freightways.

4. During the 13 weeks immediately preceding the week in which claimant was injured, his gross earnings were $7,331.36.

5. Claimant's expenses with John Sinnott, D.O., Marian Health Center and Horn Memorial Hospital were incurred in obtaining reasonable treatment for the injury and are fair and reasonable in the amount charged. The total claimed medical expenses which are reasonable and necessary are $1,318.00.

6. Claimant traveled 1,484 miles in obtaining medical treatment prior to July 1, 1986 and 510 miles subsequent to July 1, 1986.

7. Claimant has experienced a 40 percent loss in his earning capacity as a result of the injuries he sustained on November 1, 1984.

CONCLUSIONS OF LAW

Claimant sustained an injury to his back on November 1, 1984 which arose out of and in the course of his employment with Hyman Freightways.

Claimant is entitled to receive 60.143 weeks of compensation for healing period and 200 weeks of compensation for permanent partial disability.

Claimant's rate of compensation for healing period and permanent partial disability is $344.68.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant sixty point one four three (60.143) weeks of compensation for healing period at the rate of three hundred forty-four and 68/100 dollars ($344.68) per week payable for the stipulated periods running from November 3, 1984 through March 9, 1985; from March 16, 1985 through August 25, 1985; and from November 2, 1985 through March 12, 1986.

That defendants pay claimant two hundred (200) weeks of compensation for permanent partial disability at the rate of three hundred forty-four and 68/100 dollars ($344.68) payable commencing upon the date stipulated by the parties of March 13, 1986.

That defendants pay the following medical expenses:

Dr. John Sinnott	$ 18.00
Marian Health Center	880.00
Horn Memorial Hospital	52.00
Horn Memorial Hospital	368.00
Total	$1,318.00

That defendants pay claimant transportation expenses in the amount of four hundred sixty-three and 26/100 dollars ($463.26).

That defendants receive credit for all amounts previously paid.

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

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 2nd day of March, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JIM GREIF, Claimant, vs. FIRESTONE TIRE & RUBBER CO., Employer, and CIGNA INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 809549 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 permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 7. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is:

Whether the greater weight of the evidence supports the deputy industrial commissioner's decision finding that claimant failed to prove a causal connection between his November 8, 1985 work-related injury and his alleged permanent partial disability.

REVIEW OF THE EVIDENCE

The arbitration decision dated June 6, 1989 accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICALBE LAW

The citations of the 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. As stipulated, claimant sustained an injury on November 8, 1985 arising out of and in the course of his employment with Firestone Tire & Rubber Company. The injury manifested itself by a sharp pain to the upper back.

2. Claimant chronically suffered pain to the lower back, and developed lower back pain and radiculopathy to the right leg several days after the work injury.

3. Claimant saw three physicians for this back pain and radiculopathy and has been given restrictions against lifting in excess of 50 pounds and repetitive bending and twisting; Dr. Boarini believes claimant to be 1-2 percent "disabled."

4. The evidence does not show that any of claimant's physicians have expressed a view as to whether claimant's physicial limitations are causally related to the work injury in the upper back, although Dr. Gustafson checked a box indicating that the limitations were industrial in nature.

CONCLUSION OF LAW

Claimant failed to prove by the greater weight of the evidence a causal connection between the stipulated work-related injury of November 8, 1985 and his subsequent disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from this proceeding

That claimant pay the costs of this action including the costs of transcription of the arbitration hearing.

Signed and filed this 31st day of May, 1990.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STUART HALL,	:	
Claimant,	:	
vs.	:	File No. 688256
BACKMAN SHEET METAL,	:	
Employer,	:	A P P E A L
and	:	D E C I S I O N
IOWA CONTRACTORS' WORKERS' COMPENSATION GROUP,	:	FILED
Insurance Carrier, Defendants.	:	SEP 28 1989
		IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals and defendants cross-appeal from a review-reopening decision awarding healing period benefits and allowing a credit for overpayment of permanent partial disability benefits.

The record on appeal consists of the transcript of the review-reopening hearing and exhibits 1 through 12. Both parties filed briefs on appeal.

ISSUE

The dispositive issue on appeal is whether claimant has proved a change of condition as it relates to entitlement of additional healing period benefits.

REVIEW OF THE EVIDENCE

The review-reopening decision dated May 25, 1988 adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Briefly stated, the facts are as follows: In a prior review-reopening (dated February 25, 1985) a deputy industrial commissioner found that claimant's healing period

ended on March 22, 1983. Claimant's maximum level of medical improvement from a work injury on November 5, 1981 without further treatment was found in that decision to have been reached on March 22, 1983. The prior review-reopening hearing was held on November 20, 1984 and an award of benefits for a 32 percent permanent partial impairment of the hand was made. The decision also determined that claimant was entitled to further medical treatment. That further medical treatment took place on July 16, 1985 when ulnar nerve compression, right was performed. The doctor who performed the surgery rated the disability as 20 percent of the hand following the surgery.

Claimant testified to the following:

Q. Mr. Hall, going back to when this claim was initiated and then a decision resulted from it in February of 1985, where were you working then?

A. I wasn't.

Q. Were you in any way connected with any company at that time?

A. '85, '85. I was off of work from Backman Sheet Metal at that time.

....

Q. And when you were at the hearing in November of 1984, was your hand about the same as it was in September of 1984?

A. Yes.

Q. And then in February of 1985, when you received the ruling from the deputy after your November hearing, in February of 1985 was your hand about the same as it was at the hearing?

A. I would say so, yes.

Q. In fact, that's what Dr. Pakiam says, isn't it, when you went back to see him in February, which was a month, month and a half after the exam, your hand was still the same as it was in September of '84 when he saw you last?

A. That's correct.

....

Q. I think this has already been established, Mr. Hall, but I want to make sure that it's clear. Between September of '84 and July of '85, you were not working anywhere at all, is that right?

A. Yes, sir, that's correct.

(Transcript, pages 11 - 28)

APPLICABLE LAW

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

ANALYSIS

The dispositive issue on appeal is whether claimant has proved a change of condition so that he is entitled to the claimed healing period benefits. Claimant alleges that healing period benefits should be paid from the date of the prior review-reopening decision (February 25, 1985) until the date a surgery was done (July 16, 1985). Healing period benefits after the surgery are not at issue.

Claimant seeks further benefits under review-reopening. Claimant bears the burden of showing that he has suffered a change of condition subsequent to the prior review-reopening decision that was not contemplated in the prior decision that would justify additional healing period benefits. It is not clear what claimant alleges would be a physical change in claimant's condition. Claimant's own testimony was that his hand was the same in February 1985 as it was in November 1984 when the prior review-reopening hearing was held. The hand was the same in November 1984 as it was in September of 1984. The prior review-reopening hearing was held November 20, 1984. There is no medical evidence that would demonstrate that there was a physical change of condition between November 1984 and July 1985. The only evidence of a physical change of condition was an improvement in claimant's condition after the surgery in July 1985. There is no evidence that claimant's physical condition changed at the time alleged that would show that a change of condition that was not contemplated in the prior decision. The prior decision ordered that claimant was entitled to medical treatment. That medical treatment was ordered in order to improve claimant's condition. That improvement took place. Claimant has not proved a change of physical condition that was not anticipated at the time of the prior decision.

Claimant may also be entitled to further benefits for a non-physical change of condition. The non-physical change of condition apparently alleged by claimant is that he was "off work." Again, claimant's own testimony contradicts his apparent allegation. Claimant testified that he did not work between September 1984 and July 1985. Claimant was off work at the time of the prior decision. The prior decision contemplated that claimant was off work. Claimant has not proved a non-physical change of condition.

Claimant has failed to show either a physical or non-physical change of condition from the prior review-reopening decision for the period February 25, 1985 through July 16, 1985.

It will be found that claimant is not entitled to the healing period benefits claimed. Defendants have indicated that credit, if any, for an alleged overpayment of permanent partial disability benefits would only be an issue in this matter if additional healing period benefits were awarded. (*See*, Tr., p. 10, ll. 2-12). Therefore, it is unnecessary to determine if any credit is applicable.

FINDINGS OF FACT

1. The prior review-reopening hearing in this matter was held November 20, 1984 and the prior review-reopening decision was issued February 25, 1985.

2. The prior review-reopening found that claimant's healing period ended March 22, 1983; that claimant should have further medical treatment; and that permanent partial disability was then 32 percent of the right hand.

3. Claimant's physical condition did not change from September 1984 to July 15, 1985.

4. Claimant did not work from September 1984 to July 15, 1985.

5. Claimant's non-physical condition did not change from September 1984 to July 1985.

6. Claimant does not have any increase in healing period benefits for the time period February 25, 1985 through July 15, 1985.

CONCLUSIONS OF LAW

Claimant has failed to prove a physical or non-physical change of condition not contemplated by the review-reopening decision dated February 25, 1985.

Claimant is not entitled to healing period benefits for the time period February 25, 1985 through July 15, 1985.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the costs of this appeal including the costs of transcription of the review-reopening.

That defendants pay all other costs of this proceeding.

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

David E. Linquist

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAM HIBBS, Claimant, vs. EATON CORPORATION, Employer, Self-Insured, Defendant.	: : : : : : : : : :	File No. 753666 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 alleged injury on December 6, 1983. Defendant cross-appeals.

The record on appeal consists of the transcript of the arbitration proceeding along with claimant's exhibits 1, 2A, 2B, 3A, 3B, 4, 5, 6, 8, 9, 10 and 10A. The portion of exhibit 9 which was received into evidence is pages 1 through 32, 35 through 42 and 119 through 123. The balance of exhibit 9 is in the record as an offer of proof only. Claimant's exhibit 12 is in the record as an offer of proof only. The record also contains defendant's exhibits A through Z, AA, BB, CC, DD, EE, FF, GG and HH. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the following issues on appeal:

I. The deputy erred in his assessment of the claiment's [sic] credibility.

II. The deputy erred in failing to award industrial disability.

Defendant states the following issues on cross-appeal:

A. Whether the Deputy Industrial Commissioner erred in failing to bar claimant from receiving compensation benefits because of false representations made on her medical history questionnaire.

B. Whether the Deputy Industrial Commissioner erred in ordering the employer to pay medical expenses that were not admitted into evidence.

C. Whether the Deputy Industrial Commissioner erred in failing to at least order that claimant pay her own costs.

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 authorities are noted:

An issue that could have been raised at the time of the hearing cannot be raised for the first time on appeal. Marcks v. Richman Gordman, (Appeal Decision, June 29, 1988); In re Jack H. Kohlmeyer, (Appeal Decision, February 22, 1990).

Division of Industrial Services Rule 343-4.17 states, in part:

> Each party to a contested case shall serve all medical records and reports concerning the injured worker in the possession of the party upon each opposing party not later than twenty days following filing of an answer, or if not then in possession of a party, within ten days of receipt.

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted with the following exception. The deputy's decision contained this statement:

> It is expected that any injury, even to a scheduled member, carries with it some emotional distress, but that is considered in the scheduled member system adopted by the legislature, at least to the extent that the condition does not rise to the severity of producing actual disability from gainful employment.

This is an incorrect statement of the law. Scheduled injuries are presumed to contemplate any industrial disability resulting from the injury, and any psychological effects of the injury. Cannon v. Keokuk Steel Casting, (Appeal Decision, January 27,

1988). The degree of disability is not relevant in a scheduled injury, as the injury is compensated on the basis of the physical impairment.

In addition, it is noted that claimant attempts to raise the issue of Iowa Code section 86.13 penalty for the first time on appeal. Since this issue was not listed on the hearing assignment order as an issue at the arbitration hearing, it cannot be considered on appeal.

Defendant seeks to have costs assigned to claimant on appeal. The assessment of costs is within the discretion of the agency. The defendant shall pay the costs of this action, including the cost of the transcript on appeal.

It is also noted that although claimant may have exhibited discomfort while testifying. Such discomfort may have been attributable to her medical condition rather than her truthfulness, or to the natural tendency toward apprehension of any witness during cross-examination. The credibility of claimant's testimony is not affected by her display of discomfort.

On cross-appeal, the defendant disputes the deputy's determination of liability for several of claimant's medical bills. The defendant points out that the deputy, at the hearing, excluded from the record many bills contained in exhibit 9 as being untimely served. The deputy also limited argument at the conclusion of the hearing to only those medical bills in exhibit 9 that were admitted. The excluded portion of exhibit 9 was offered by claimant as an offer of proof only.

Defendant objects to that portion of the arbitration decision that orders defendant to pay medical bills contained in the excluded portion of exhibit 9. Defendant has indicated a willingness to accept responsibility for some of these bills, but continues to object to others.

Defendant will be ordered to pay the bill from St. Joseph Mercy Hospital, except for that portion that relates to treatment of an irritable bowel syndrome. Defendant will not be ordered to pay the bill from Sickroom Service to the extent said bill duplicates the bill from Corner Drug Store Company. Defendant will be ordered to pay the bill from Surgical Associates of North Iowa to the extent said bill represents medical services provided to claimant, but defendant is not required to pay any portion of that bill relating to services to claimant's husband, Wayne Hibbs.

The bills from McFarland Clinic, P.C.; Des Moines Orthopedic Surgeons; Radiologist of Mason City; and Belmond Community Hospital, are excluded from the record as not being served on

defendant in a timely fashion, and defendant will not be ordered to pay said bills.

FINDINGS OF FACT

1. The injury claimant sustained on December 6, 1983 was limited to her right knee.

2. Subsequent to December 6, 1983, claimant experienced pain and discomfort in various parts of her body and emotional distress.

3. Any disability that resulted from any physical or psychological pain, discomfort or distress that may have resulted from the December 6, 1983 was temporary in nature and produced no permanent impairment or permanent disability, other than the two and one-half percent permanent impairment of claimant's right leg as determined by Wayne E. Janda, M.D.

4. The final assessments made by Dr. Janda, Donald Burrows, M.D., and Michael Taylor, M.D., are correct.

5. Following the injury on December 6, 1983, claimant was medically incapable of performing work in employment substantially similar to that she performed at the time of injury until August 22, 1985 when Dr. Janda determined that she had reached the point it was medically indicated that further significant improvement from the injury was not anticipated and an impairment rating was assigned.

6. Expenses incurred prior to August 22, 1985 for claimant's orthopaedic problems are reasonable treatment for the injury.

7. Treatment for the alleged pulmonary embolism condition that was provided for prior to claimant's release from Iowa Methodist Medical Center on June 13, 1985 constitutes reasonable treatment for the injury.

8. The following medical expenses were incurred in obtaining reasonable treatment for the injury of December 6, 1983:

Iowa Methodist Medical Center	$	278.02
Independent Medical Surgical Group		529.00
Radiology Professional Corporation		182.20
Surgical Associates of North Iowa		309.00
Steel Memorial Clinic		320.00
Corner Drug Store Company		569.29
Redder Drug		117.90
St. Joseph Mercy Hospital		10,792.44
Sickroom Service		69.95

ITS Home Care	118.80
Miller Medical Service	65.00

9. Claimant has been fully paid for all transportation expenses.

CONCLUSIONS OF LAW

Claimant's healing period, under the provisions of Iowa Code section 85.34(1), commenced on December 6, 1983 and runs through August 22, 1985, a period of 89.143 weeks.

Claimant is entitled to receive 5.5 weeks of compensation for a two and one-half percent permanent partial disability of her right leg payable commencing August 23, 1985.

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

ORDER

THEREFORE, it is ordered:

That defendant pay claimant eighty-nine point one four three (89.143) weeks of compensation for healing period commencing December 6, 1983 at the stipulated rate of two hundred forty-nine and 78/100 dollars ($249.78) per week.

That defendant pay claimant five point five (5.5) weeks of compensation for permanent partial disability at the stipulated rate of two hundred forty-nine and 78/100 dollars ($249.78) per week commencing August 23, 1985.

That the defendant is entitled to credit for all amounts previously paid and shall pay any past due accrued amounts in a lump sum together with interest pursuant to Iowa Code section 85.30.

That defendant pay the following medical expenses:

Iowa Methodist Medical Center	$ 278.02
Independent Medical Surgical Group	529.00
Radiology Professional Corporation	182.20
Surgical Associates of North Iowa	309.00
Steel Memorial Clinic	320.00
Corner Drug Store Company	569.29
Redder Drug	117.90
St. Joseph Mercy Hospital	10,792.44
Sickroom Service	69.95
ITS Home Care	118.80
Miller Medical Service	65.00

That defendant is ordered to pay claimant's medical bills incurred at St. Joseph Mercy Hospital but not that portion of the bill which relates to treatment of claimant's bowels; claimant's bill from Sickroom Service only to the extent said bill is not duplicative of the bill from Corner Drug Store Company; and claimant's bill from Surgical Associates of North Iowa, but only to the extent said bill represents services rendered to claimant.

That the defendant shall receive credit for all amounts previously paid. Nothing herein requires payments in excess of the actual charges.

That the defendant 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 30th day of March, 1990.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DIANE HICKMAN, Claimant, vs. CONTINENTAL BAKING COMPANY, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	File No. 846909 A P P E A L D E C I S I O N FILED JUL 27 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision granting claimant healing period benefits, permanent partial disability benefits and medical costs as a result of an alleged injury on February 19, 1987.

The record on appeal consists of the transcript of the arbitration hearing, claimant's exhibits 1 through 16 and defendants' exhibit A.

ISSUES

The issues stated by the defendants' appeal notice are as follows:

1. Claimant failed to establish that her hernia condition arose out of and in the course of her employment activities.

2. The evidence adduced at the time of trial failed to support a conclusion that claimant sustained a permanent partial disability in the amount of 15 percent of the body as a whole.

An order by the industrial commissioner directed that the defendants' brief not be considered on appeal.

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 February 19, 1987, while pulling carts which weighed approximately 200-300 pounds in the course of her employment with Continental Baking Company, claimant experienced pain in her groin.

2. Claimant had had pelvic pain prior to February 19, 1987 and had treated with Glen Krug, D.O., for irregular heavy vaginal bleeding and chronic pelvic pain prior to that date.

3. Claimant's chronic pelvic pain, dysfunctional uterine bleeding and irregular menses had been unresponsive to D & C and many cycles of antibiotic therapy.

4. John T. Johnson, D.O., diagnosed right inguinal hernia after the February 19, 1987 incident.

5. On April 24, 1987, claimant underwent both a vaginal hysterectomy and repair of the right inguinal hernia.

6. On May 7, 1987, claimant treated with Raymond W. Dasso, M.D., for complaints of back pain.

7. Claimant did not indicate a history of injury or accident and did not know the cause of her back pain.

8. Claimant returned to work on July 13, 1987.

9. Claimant continued to experience abdominal pain after her work return.

10. On August 19, 1987, Dr. Johnson restricted claimant to permanent light duty with no lifting, pulling or pushing.

11. Dr. Johnson's restrictions would be consistent with restrictions found after hernia repair surgery.

12. Dr. Johnson's restrictions would also be consistent with at least temporary restrictions after hysterectomy.

13. Claimant's work incident as described is consistent

with activity which could produce hernia.

14. Claimant's work as described did not produce her gynecological problems.

15. Claimant was 35 years old at the time of the arbitration hearing.

16. Claimant has a five percent permanent partial impairment of the body as a whole.

17. The impairment cannot be apportioned between claimant's gynecological problem and her hernia and its sequela, but is not inconsistent with impairment subsequent to hernia and hernia repair.

18. Claimant did not produce evidence concerning her prior education or work experience.

19. Claimant apparently has generally worked in heavy industry.

20. Claimant earned $10.20 per hour with Continental Baking.

21. Claimant was discharged after Dr. Johnson placed his permanent light duty restrictions on the grounds that no jobs were available within her restrictions.

22. Claimant is well-motivated to work.

23. Claimant was working at Iowa Beef Processors at time of hearing and earning $6.00 per hour.

24. Claimant's work for Continental Baking could be classified as heavy industrial labor.

25. Claimant's current position could also be classified as heavy industrial labor.

26. Claimant's current position is of a lighter nature than her Continental Baking position and apparently is within claimant's restrictions.

27. Claimant's restrictions likely preclude her from certain heavy industrial labor employment.

28. Claimant apparently has not sought vocational rehabilitation.

29. The record does not indicate whether claimant would be a good candidate for such efforts.

30. C. L. Peterson, D.O.'s examination of claimant on

March 17, 1987 related to her work injury.

31. Dr. Johnson's examinations and treatment of claimant on June 22, 1987, July 30, 1987, August 13, 1987, August 25, 1987 and August 27, 1987 related to her work injury.

32. Y. M. S. Bushan, M.D.'s treatment of claimant of August 24, 1987 related to her work injury.

CONCLUSIONS OF LAW

Claimant has established an injury which arose out of and in the course of her employment by way of her right inguinal hernia on February 19, 1987.

Claimant has established a causal relationship between that injury and claimed disability as such disability relates to her right inguinal hernia.

Claimant is entitled to permanent partial disability in the amount of 15 percent of the body as a whole as a result of her February 19, 1987 injury.

Claimant is entitled to payment of medical costs with C. L. Peterson, D.O.; John Johnson, D.O.; and Y. M. S. Bushan, M.D., as outlined in the above applicable law and analysis.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant healing period benefits at the rate of two hundred seventy-one and 88/100 dollars ($271.88) per week from April 24, 1987 to July 13, 1987.

That defendants pay claimant permanent partial disability benefits at the rate of two hundred seventy-one and 88/100 dollars ($271.88) per week for seventy-five (75) weeks with such payments to commence on July 13, 1987.

That defendants pay claimant medical costs with C. L. Peterson, D.O., in the amount of twenty-three and 00/100 dollars ($23.00); with Y. M. S. Bushan, M.D., in the amount of twenty-five and 00/100 dollars ($25.00); and, with John Johnson, D.O., in the amount of three hundred forty-two and 00/100 dollars ($342.00).

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That claimant and defendants bear their own costs of this proceeding as stipulated in the prehearing report.

That defendants bear the costs of transcription of the arbitration hearing.

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

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

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1701

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROGER HINGTGEN, Claimant, vs. FDL FOODS, INC., Employer, Self-Insured, Defendant.	:	File Nos. 799425/767792 A P P E A L D E C I S I O N

FILED

JUL 31 1989

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant any benefits. The deputy in her arbitration decision decided that claimant could amend the original notice and petition to change the alleged injury date from December 20, 1982 to April 25, 1983.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 3. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether there is a causal connection between claimant's alleged injuries on April 25, 1983 and January 23, 1984 and his claimed permanent disability.

REVIEW OF THE EVIDENCE

The arbitration decision dated February 1, 1989 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.

FINDING OF FACT

1. Claimant did not sustain permanent or temporary injuries to his right and left shoulders as a result of two work related incidents which occurred on April 25, 1983 and on January 23, 1984.

CONCLUSION OF LAW

Claimant has not established a causal connection between alleged injuries on April 25, 1983 and January 23, 1984 and a permanent disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE it is ordered:

That claimant takes nothing from these proceedings.

That claimant pay the costs of this proceedings including transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

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

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDNA HOCH, Claimant, vs. WESTVIEW CARE CENTER, Employer, and BITUMINOUS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 844438 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 February 17, 1987. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 7. Both parties filed briefs on appeal.

ISSUE

The issue on appeal as stated by defendants is:

> Did the deputy err in determining that the claimant had established by a preponderance of the evidence that she 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 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 employed by defendant employer on February 17, 1987.

2. Claimant suffered an injury to her back while taking CPR training on that date.

3. The CPR training occurred on the employer's premises, with the employer's encouragement, and was for the mutual benefit of claimant and employer.

4. Claimant's injury followed as a natural incident of her work.

5. Claimant's injury caused temporary total disability of ten weeks, six days.

6. Claimant accrued reasonable and necessary medical expenses as set forth in joint exhibit 3 totalling $1,087.00.

CONCLUSIONS OF LAW

Claimant suffered an injury that arose out of her employment.

Claimant's injury occurred in the course of her employment.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant ten point eight five seven (10.857) weeks of temporary total disability at the rate of one hundred forty-three and 25/100 dollars ($143.25) per week in the total amount of one thousand five hundred fifty-five and 27/100 dollars ($1,555.27).

That defendants pay medical expenses as set forth in joint exhibit 3 in the total sum of one thousand eighty-seven and 00/100 dollars ($1,087.00).

That defendants pay this amount in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

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 17th day of October, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD L. HOLLAND,

Claimant,

vs.

ASSOCIATED GROCERS OF IOWA,

Employer,

and

THE TRAVELERS,

Insurance Carrier,
Defendants.

FILED

FEB 26 1990

IOWA INDUSTRIAL COMMISSIONER

File No. 757549

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 January 10, 1984. Claimant cross-appeals. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 17. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the following issue on appeal: "Did the deputy err in determining that the claimant was entitled to a 20% industrial disability rating despite claimant's continued employment in his normal work duties at his normal rate of pay?"

Claimant states the following issues on cross-appeal:

Did the Deputy Industrial Commissioner err in determining that the Claimant was entitled to only a 20 percent industrial disability rating despite the fact that the Claimant lost substantial earning capacity...?

Whether or not the 85.35 settlement entered into between the Claimant and the FAIRCO-AGI and National Union Fire Insurance Company precluded any consideration of the Claimant's employment situation after the Claimant's injury of April 23, 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 in the arbitration decision are appropriate to the issues and the evidence.

ANALYSIS

Although not listed as a formal issue on appeal, defendants urge that claimant is prohibited from listing any issues on cross-appeal as the claimant's cross-appeal was not timely filed. However, a review of the file indicates that claimant's cross-appeal was timely filed, although the cross-appeal contained an error in the caption. It is clear that the parties were not mislead by the error as to who the parties in interest were. The Iowa Supreme Court has held that allowing amendment to pleadings is the rule; denial is the exception. Galbraith v. George, 217 N.W.2d 598 (Iowa 1974). Considerable discretion is allowed in determining whether or not leave to amend should be granted. Ackerman v. Lauver, 242 N.W.2d 342 (Iowa 1976). Claimant's cross-appeal issues are considered in this decision.

Defendants argue on appeal that the award of 20 percent industrial disability to claimant as a result of his January 10, 1984 work injury is improper. Defendants urge that claimant suffered no disability following his January 10, 1984 injury, and point to the fact that claimant was able to return to work without restrictions, and did not suffer any wage loss. Defendants correctly point out that a rating of impairment does not necessarily require a finding of industrial disability. However, the uncontroverted medical evidence establishes that claimant did have a five percent permanent partial impairment following his January 10, 1984 injury.

It is entirely possible for a claimant to suffer a loss of earning capacity and yet continue to work at the same job and not experience a loss of wages. In this case claimant's five percent impairment following his January 10, 1984 injury, coupled with his work history involving physical labor, indicates some loss of earning capacity.

Claimant argues that his second injury on April 23, 1985 was caused by his increased susceptibility to injury from the January 10, 1984 injury. Claimant cannot argue that his January 10, 1984 injury has contributed to his April 23, 1985 injury. Claimant has entered into a special case settlement for the April 23, 1985 injury. By entering into such a settlement, claimant has

acknowledged that the April 23, 1985 injury did not arise out of and in the course of his employment. If claimant feels that his April 23, 1985 injury was caused by his January 10, 1984 injury, or that he was more susceptible to the second injury because of the first, then claimant should not have entered into a special case settlement of that injury under section 85.35. The settlement under that section constitutes a determination that the injury did not arise out of or in the course of the employment. Claimant cannot now seek a determination that the April 23, 1985 injury was caused by an earlier work injury.

Claimant asserts that his inability to perform the work of a truck driver, which necessitated a job change to a supervisory position paying much less, was the result of the earlier injury, even though claimant did not change jobs until after the second injury. Claimant relies on a statement by his physician that claimant could return to work, but that if he was unable to continue driving truck, he should consider a supervisory position.

Claimant was able to return to work after the first injury, and to perform his duties. Claimant worked as a truck driver for 10 months, then was off work again after the April 23, 1985 incident. Claimant then worked as a truck driver for another 12 months, then decided to change jobs and suffer a wage loss. The April 23, 1985 injury has been compensated. Although the possibility that claimant would not be able to continue driving a truck apparently existed prior to the second injury, since claimant's doctor mentioned that contingency, that falls far short of a showing by claimant that he was unable to perform his truck driving duties after the first injury, especially where the record shows he did in fact perform those duties up until the second injury. Claimant's appeal argument that the restrictions placed on him after the second injury should have been placed on him after the first injury are contradicted by medical evidence that they were not imposed until after the second injury. Claimant asserts that his original injury on January 10, 1984 has caused at least part of his present disability, and that he was able to work again as a truck driver following the first injury in part because he was trying to preserve his pension. This was noted by at least one of claimant's physicians. Nevertheless, claimant did not feel compelled to change jobs until a full year after his second injury which was one year and ten months after his first injury. It is also noted that claimant received a rating of permanent physical impairment of 15 percent of the body as a whole as a result of the April 23, 1985 injury indicating that the second injury contributed a greater degree of impairment.

The settlement in regard to the April 23, 1985 injury did reserve to claimant the right to pursue compensation for any injury prior to April 23, 1985. Claimant has shown, at most,

only the testimony of physicians that claimant's return to truck driving and unloading after the January 10, 1984 injury, was with some reservations. Claimant was not restricted from returning to this work. Although one of claimant's doctors was aware that claimant was returning to this work in part to preserve his pension, no restriction against a return to truck driving or unloading was imposed. From the medical evidence in the record, claimant was capable of performing the duties of his truck driving and unloading job after his January 10, 1984 injury. His decision to abandon this job occurred a full year after his second injury and the record is insufficient to establish which injury played a greater role in producing his present disability. However, clearly claimant's second injury resulted in greater impairment.

In light of claimant's age of 49, his high school education, two impairment ratings of five percent of the body as a whole, his work history, his continued earnings and ability to perform his job after the January 10, 1984 injury, his motivation, and all other appropriate factors for determining industrial disability, it is determined that claimant has an industrial disability of 20 percent as a result of his January 10, 1984 injury.

Claimant's second issue on appeal is whether he is prohibited by the 85.35 settlement from establishing a loss of earning capacity subsequent to the April 23, 1985 injury. Claimant is not prohibited from establishing any effects on his earning capacity subsequent to the April 23, 1985 injury stemming from the January 10, 1984 injury or another incident. Claimant is only precluded from seeking a further award based on the April 23, 1985 injury. Claimant would be entitled to show any effects of his January 10, 1984 injury that manifested themselves after the April 23, 1985 injury. However, as noted above, claimant has failed to show that his increase in disability after April 23, 1985 was caused by the January 10, 1984 injury.

FINDINGS OF FACT

1. On January 10, 1984 claimant suffered a disc injury to the L4-5 level of his spine which arose out of and in the course of his employment with AGI. This injury compelled claimant to undergo a Chymopapain injection which collapsed the L4-5 disc and relieved pressure on adjacent nerves which was causing severe pain.

2. The work injury of January 10, 1984 was a cause of a five percent permanent partial impairment to the body as a whole.

3. On April 23, 1985, while unloading freezer boxes, claimant injured his back again at the L5-S1 level of his spine requiring fusion surgery of the vertebra at that level. Claimant

suffered an additional 15 percent permanent partial impairment from this second injury.

4. The work injury of January 10, 1984 and the resulting permanent partial impairment was a cause of a 20 percent loss of earning capacity independent of the April 23, 1985 work injury.

CONCLUSION OF LAW

Claimant has an industrial disability of 20 percent as a result of his January 10, 1984 injury.

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 three hundred one and 69/100 dollars ($301.69) per week from June 18, 1984.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all permanent partial disability benefits previously paid.

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 the transcription of the hearing proceeding 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 26th day of February, 1990.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD W. HOUSTON, Claimant, vs. IOWA MEN'S REFORMATORY, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 894129 A P P E A L D E C I S I O N

FILED

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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a ruling on motion to dismiss denying claimant's cause of action.

The record on appeal consists of claimant's petition, defendants' motion to dismiss and the ruling on the motion to dismiss. Both parties filed briefs on appeal.

ISSUE

Claimant states the issue on appeal is whether the deputy industrial commissioner erred in sustaining defendants' motion to dismiss.

REVIEW OF THE EVIDENCE

The ruling on the motion to dismiss filed February 3, 1989 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the ruling on the motion to dismiss are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the ruling on the motion to dismiss is adopted.

FINDINGS OF FACT

1. Claimant was injured July 16, 1986 while an inmate at the Iowa Men's Reformatory.

2. Claimant's original petition seeking arbitration and medical benefits was filed with the industrial commissioner's office on December 19, 1988.

CONCLUSIONS OF LAW

Deputy industrial commissioner did not err in sustaining defendants' motion to dismiss. Claimant failed to file his original petition for arbitration and medical benefits within the two year statutory time limit as required by Iowa Code sections 85.59 and 85.26. While the deputy industrial commissioner went outside of the pleadings to determine whether an acknowledgment of compensability was on file, it was done for the claimant's benefit and in no way prejudiced the claimant.

Defendants' failure to file an acknowledgment of compensability pursuant to Iowa Code section 85.59 does not extend the statute of limitations beyond two years. The acknowledgment of compensability satisfies the notice of injury requirement, Iowa Code sections 85.59 and 85.23. Defendants' failure to file an acknowledgment of compensability does not affect the statute of limitations.

WHEREFORE, the ruling of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That the motion to dismiss is sustained, claimant has failed to state a claim upon which relief may be granted.

Signed and filed this 30th day of November, 1989.

David E. Linquist

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARSHA K. HURSEY, Claimant, vs. GARY AND PAT McCLURE d/b/a COUNTRY COTTAGE, Employer, Defendant.	:	File No. 844849 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 disability benefits, healing period benefits, and medical expenses.

The record on appeal consists of the transcript of the arbitration hearing, joint exhibits 1 through 4 and defendant's exhibit 5. Both parties filed briefs on appeal.

ISSUES

The issue on appeal is whether the injury to claimant's left thumb on December 24, 1986 arose out of and in the course of her employment with defendant.

REVIEW OF THE EVIDENCE

The arbitration decision filed July 28, 1988 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on December 24, 1986 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 legal test for determining the compensability of injuries for social activities is discussed in Linderman v. Cownie Furs, 234 Iowa 708, 13 N.W.2d 677, 680-81 (1944).

A good statement of the test to be applied is contained in a case where compensation was denied. See Smith v. Steamless Rubber Company, 111 Conn. 365, 150 A. 110, 111, 69 A.L.R. 856, where the court stated: "Where an employer merely permits an employee to perform a particular act, without direction or compulsion of any kind, the purpose and nature of the act becomes of great, often controlling significance in determining whether an injury suffered while performing it is compensable. If the act is one for the benefit of the employer or for the mutual benefit of both, an injury arising out of it will usually be compensable; on the other hand, if the act being performed is for the exclusive benefit of the employee so that it is a personal privilege, or is one which the employer permits the employee to undertake for the benefit of some other person or for some cause apart from his own interests, an injury arising out of it will not be compensable."

The test was further discussed in Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

When faced on prior occasions with the argument that an injured employee's presence at the scene of an accident was not "required," this court has adopted a liberal interpretation of the "course of employment" criterion. We have thus said that

> [a]n injury occurs in the course of the employment when it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandon-

ment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Bushing v. Iowa Railway & Light Co. 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929) (citations omitted, emphasis added [by the court]).

....

The test is whether the act is "in any manner dictated by the course of employment to further the employer's business."

Id. at 177.

In Briar Cliff College v. Campolo, 360 N.W.2d 91, 94 (Iowa 1984), the court stated:

The commissioner also relied upon Larson's business-related benefit test which states that recreational or social activities are in the course of employment when "[t]he employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." 1A A. Larson, Workmen's Compensation § 22.00, at 5-72 (8th ed. 1982). Stating that it was the "degree of employer benefit which heavily tips the scale in the claimant's favor" and "[a]nother factor weighing in claimant's favor is the special nature of a teacher's job," the deputy commissioner found claimant had established that the death had occurred in the course of decedent's employment. The commissioner affirmed on appeal.

We conclude that the commissioner applied the correct principles of law. Whether decedent's acts benefited his employer is a question of fact.

ANALYSIS

The starting point in this case is whether claimant has met her burden of proof that her injury on December 24, 1986 arose out of and in the course of her employment. The test under Iowa case law is whether claimant was engaged in some activity necessary for the substantial direct benefit or interest of her em-

ployer. The claimant cut her left thumb while carrying cups at a Christmas party held on the employer's premises.

It has been discussed that a general boost to morale is not enough to constitute benefit to an employer. "Employer benefit, as in the opportunity to work in a few remarks on salesmanship, argues for coverage, but a general boost to morale is not enough." 1A Larson, Workmen's Compensation Law §22.23(b) at 5-126 (1985) citing to Wooten v. Roden, 260 Ala. 606, 71 So.2d 802 (1954).

The only evidence of employer benefit in this case was an attempt by claimant to show that the social activity, a Christmas party, improved the morale of the employees. There was testimony that the morale of the employees was good and did not need improvement. It will be assumed that this party, like any Christmas party, would at least maintain the otherwise good morale of the employees. But a general boost to morale is not enough. The only other evidence of possible employer benefit presented by the claimant was a fairly loosely organized gift exchange. Some employees participated in a grab bag. A group of employees, for the first time in the existence of the employers, gave the employers a gift. One employee individually gave the employers a gift. The employers gave some employees gifts at the party but gave others gifts at other times. When the party was planned it was not known whether Patricia McClure, one of the employers, would be at the party. She returned from a business trip to California the morning of the party. The party was not planned to present an opportunity for the employers to give employees gifts nor for the employers to make speeches, awards, etc.

There was no indication that the employer gained any benefit from the party other than a general boost of morale. Claimant has not proved that the party at which she was participating was activity necessary for the benefit or interest of the employer. Claimant has not proved that the activity was a substantial direct benefit to the employer. Thus, claimant has not proved that she suffered an injury that arose out of and in the course of her employment.

FINDINGS OF FACT

1. Claimant was an employee of defendant employer on December 24, 1986.

2. On December 24, 1986 a Christmas party was held on defendant-employer's premises.

3. On December 24, 1986 claimant injured her left thumb at the Christmas party while carrying cups.

4. The defendant employer benefited from the party by maintaining a good relationship with the employees.

5. The gift exchange at the party was not for the benefit of the employer.

6. The party was of no benefit nor interest to the employer other than maintaining good morale.

7. The party was not a substantial direct benefit to the employer.

CONCLUSION OF LAW

Claimant has not proved that she suffered an injury on December 24, 1986 that arose out of and in the course of her employment.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That defendant, Gary and Pat McClure, d/b/a Country Cottage, pay the costs of these proceeding including the costs of transcribing the arbitration hearing.

Signed and filed this 22nd day of November, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DOROTHY HUTCHISON, Claimant, vs. LITTLE GIANT CRANE AND SHOVEL INC., Employer, and THE HARTFORD INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 820225 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitratiion decision awarding permanent partial disability benefits as a result of an alleged injury on February 3, 1986.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits A through K and claimant's exhibits I through K. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUE

Claimant states the following issue on appeal: "Whether it was error for the Deputy Commissioner to award only 35 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 issues and the evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law

is adopted. Although the analysis of the evidence is adopted, a clarification is appropriate. The deputy in his analysis and findings of fact referred to a loss of income and a wage loss. A loss of earnings and a loss of earning capacity are different. A loss of earnings occurs at a particular point in time and is considered in determining a loss of earnings capacity. The loss of earning capacity or industrial disability refers to claimant's inability to produce earnings in the future.

FINDINGS OF FACT

1. Claimant sustained an injury on February 3, 1986, while employed by employer when she slipped on a metal step and injured her neck.

2. Claimant was 40 years old on the date of the injury.

3. Stuart R. Winston, M.D., performed an interbody cervical fusion of C-5-6 on April 11, 1986.

4. Claimant still experiences numbness in the right hand and fingers, drops objects, has reduced strength, has a slightly limited range of motion and that continuous work with the right arm causes pain in her neck and causes headaches.

5. Dr. Winston, the treating physician, determined that claimant sustained a permanent functional impairment of eight percent of the body as a whole; that she was unable to continue to perform her old job with employer; and that he recommended that she be retrained to perform sedentary work in the future.

6. David J. Boarini, M.D., an evaluating physician, assessed a six to eight percent permanent impairment of the body as a whole; that prolonged heavy labor might be too uncomfortable to be reasonable; that claimant might find that she could not tolerate continuous turning of the head and heavy work; and that claimant's complaints were not inconsistent with her injury and surgery.

7. Claimant tried to perform her former job, but testified that she was unable to do it.

8. Claimant was earning $11.39 per hour at the time of the injury and that if she were still performing this job she would be earning $12.06 per hour.

9. Claimant is currently earning $3.35 per hour and has worked on a part-time basis as much as 39 hours per week.

10. Kathryn Bennett testified that claimant could expect to earn approximately $4 to $5 per hour after she had been employed for awhile.

11. Claimant has sustained a wage loss in excess of 50 percent of her former earnings.

12. Claimant has certain disincentives to work since the injury occurred on February 3, 1986: (1) the adoption of an infant, (2) she has financial support from her husband of 19 years, and (3) her arm hurts.

13. Claimant has sustained an industrial disability of 35 percent of the body as a whole.

14. The 32 hour week in claimant's last 13 weeks of employment prior to the injury was not representative of claimant's gross weekly earnings.

15. The proper rate of compensation is $276.45 per week.

CONCLUSIONS OF LAW

Claimant has sustained an industrial disability of 35 percent of the body as a whole and is entitled to 175 weeks of permanent partial disability benefits.

The proper rate of compensation is $276.45.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of two hundred seventy-six and 45/100 dollars ($276.45) per week in the total amount of forty-eight thousand three hundred seventy-eight and 75/100 ($48,378.75) commencing on October 6, 1986.

That defendants are entitled to a credit for all permanent partial disability benefits paid to claimant prior to hearing and after the hearing.

That defendants are liable for the difference in benefits between two hundred seventy-three and 35/100 dollars ($273.35) and two hundred seventy-six and 45/100 dollars ($276.45) per week on all of the prior payments of healing period benefits and permanent partial disability benefits previously made to claimant: (1) defendants paid healing period benefits, and (2) defendants had agreed to pay claimant 100 weeks of permanent partial disability prior to hearing at the rate of two hundred seventy-three and 35/100 dollars ($273.35) per week and were in the process of making these payments at the time of the hearing.

That all accrued amounts are to be paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That claimant pay the costs of this appeal including the costs of transcription of the arbitration hearing.

That defendants pay all other costs of this proceeding 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 July, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JESSE W. JAMES,	:	
	:	
Claimant,	:	File No. 747521
	:	
vs.	:	A P P E A L
	:	
SHELLER-GLOBE CORPORATION,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant death benefits and burial expenses.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 38; and defendant's exhibits A through C. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are:

1. Whether Rosa Lee James sustained injuries arising out of and in the course of her employment with the defendant;

2. Whether injuries allegedly arising out of and in the course of Rosa Lee James' employment was a proximate cause of her death; and

3. Whether defendant is liable for death benefits and burial expenses.

REVIEW OF THE EVIDENCE

The arbitration decision filed September 20, 1988 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. The decedent was afflicted with a predisposition towards asthma.

2. The decedent developed asthma while employed with the defendant.

3. Decedent's asthma was the primary factor responsible for her death.

4. Decedent died on September 7, 1985 of asthma while at home.

5. Claimant was married to the decedent at the time of her death.

6. Decedent's employment with the defendant was not the proximate cause of her fatal asthma attack on September 7, 1985.

CONCLUSION OF LAW

Claimant has failed to prove by the greater weight of the evidence that decedent's death was proximately caused by an injury which arose out of and in the course of her employment or that her employment with the defendant was the proximate cause of decedent's death.

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 cost of transcribing the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

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

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS JANSSEN, Claimant, vs. SMITHWAY MOTOR XPRESS, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 830524 A P P E A L D E C I S I O N FILED JUL 27 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying any type of disability benefits as a result of an alleged injury on June 18, 1986, because claimant failed to establish the existence of an employer-employee relationship with defendant Smithway Motor Xpress.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 34 except exhibit 31. Exhibit 31 was properly excluded by the deputy. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUE

Claimant states the following issue on appeal: "Whether the hearing officer erred in finding that claimant failed to establish that he suffered an injury arising out of and in the course of employment with Smithway Motor Xpress by failing to establish an employment relationship with Smithway Motor Xpress."

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 is a 48 year old man who was working as a truck driver at the time of his injury.

2. Jerry Layman contacted claimant to drive Layman's truck.

3. Claimant interviewed with Smithway Motor Xpress for approval as a driver under an agreement between Smithway Motor Xpress and Jerry Layman.

4. Claimant's agreement for compensation was not with Smithway Motor Xpress.

5. The truck claimant was driving and removing the tarp from at the the time of the injury was owned by Jerry Layman and leased to defendant Smithway Motor Xpress. Claimant was paid directly by Jerry Layman on a weekly basis.

6. Claimant failed to show he was an employee of defendant Smithway Motor Xpress.

7. Claimant failed to establish that he sustained an injury on June 18, 1986 arising out of and in the course of employment with Smithway Motor Xpress.

CONCLUSIONS OF LAW

Claimant has failed to prove, by a preponderance of the evidence, that he had employment relationship with Smithway Motor Xpress on June 18, 1986.

Claimant has failed to prove, by a preponderance of the evidence, that he sustained an injury to his back which arose out of and in the course of his employment with Smithway Motor Xpress.

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 including transcription of the arbitration hearing are assessed against the claimant pursuant to Division of Industrial Services Rule 343-4.33.

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

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BOBBY JONES,	:	
Claimant,	:	File No. 865970
vs.	:	A P P E A L
GEORGE A. HORMEL & CO.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal.

The decision of the deputy is affirmed and is adopted as the final agency action in this case.

In addition, the following analysis is made:

Defendant alleges on appeal that claimant has failed to carry his burden to show that his present carpal tunnel syndrome is causally connected to his work. Defendant correctly points out that although lay testimony can supplement expert testimony on the question of causal connection, it cannot serve as a substitute for a complete lack of expert testimony establishing causation. However, read as a whole, the medical evidence appears to attribute claimant's present carpal tunnel syndrome to his work environment. In particular, claimant's exhibit 5, a report by March E. Hines, M.D., states:

> Bobby...began fatting hams around 1978 or 1979 and began having hand numbness bilaterally in 1979. After he changed to shanking (open boning of hams), he had much less difficulty, although he had continued difficulties despite this. He was off approximately three months but had no numbness and went back to racking and clipping hams approximately five weeks ago and began developing pain in the right palm with numbness in the median distribution. This particular job required him to push a press with his right palm of his hand repeatedly.

Although the record lacks an explicit statement of causal connection, the medical reports do address claimant's carpal

tunnel syndrome as a problem stemming from claimant's work. Claimant has carried his burden to show that his carpal tunnel syndrome is caused by his work conditions.

Signed and filed this 19th day of April, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIOLA E. KING, Claimant, vs. CITY OF MOUNT PLEASANT, IOWA, Employer, and NORTHWESTERN NATIONAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 840912 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision which determined claimant's rate of compensation. In a ruling dated March 17, 1989 the undersigned reinstated claimant's appeal because the only issue on appeal is the rate of compensation. The determination of that issue is dispositive of this contested case.

The record on appeal consists of the stipulations in this matter. Claimant filed a brief on appeal.

ISSUE

The issue on appeal is the rate of compensation.

REVIEW OF THE EVIDENCE

The arbitration decision dated January 30, 1989 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

One preliminary matter needs to be discussed. In claimant's appeal brief the argument is made that the deputy erred in rejecting a part of the stipulation. The part of the stipulation in question is the statement that claimant's decedent was employed

on a part-time basis by defendant employer. While it is normally true that stipulations are accepted, there are instances when stipulations will be rejected. Stipulations that are contrary to the law or that resolve the conclusion of law at issue in a contested case proceeding can be rejected. The determination whether claimant's decedent was "part-time" thus possibly making Iowa Code section 85.36(10) applicable is the question at issue. The stipulation should be rejected to the extent that it would resolve the conclusion of law at issue in this case. Furthermore, while a deputy industrial commissioner may not overrule another deputy industrial commissioner, the industrial commissioner has the authority to overrule a deputy industrial commissioner. Therefore, the industrial commissioner could, if necessary, overrule a deputy who determined that the stipulations were to be accepted. The deputy who made the arbitration decision made no error in his treatment of the stipulations.

The issue to be resolved in this case is the rate of compensation. Claimant argues on appeal that Iowa Code section 85.36(10) is applicable and that as a result, income earned from other employment should be included in calculating the proper rate of compensation.

Claimant's argument is not persuasive for a variety of reasons. Claimant cites no legal authority on point in support of claimant's argument. Claimant attempts to argue that an elected city official who is paid an annual salary regardless of the hours worked is in the same line of industry as other employees of the government such as someone who works for the Department of Corrections and is paid on a bi-weekly basis for presumedly working forty hours a week. The line of industry involved in this matter is an elected city official who is paid on an annual salary. There is no indication in the record nor no argument made that this claimant's decedent's earnings as an elected official were less than the earnings of other similar elected officials. The deputy correctly discussed that an elected city official may well be considered a full-time position because of the demands placed on the official. Even if one were to assume for the sake of argument that claimant's decedent worked less than full time for defendant employer, there is no indication from the record in this matter that claimant's decedent earned less than someone who worked "full-time." That is, there is no indication in the record what an elected city official who worked "full-time" would earn.

The deputy correctly stated:

> It as [sic] not been shown that section 85.36(10) is as applicable to claimant's situation as is section 85.36(5). The latter section clearly applies, while the former requires strained construction at best. While the statute should be liberally construed in favor of claimants, Caterpillar Tractor Company v. Shook, 313 N.W.2d 503 (Iowa 1981), that construc-

tion must be within reason. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

It has not been shown that Iowa Code section 85.36(10) is applicable in this case. By contrast, it is clear that Iowa Code section 85.36(5) does apply. Claimant's decedent was paid an annual salary. The annual salary should be divided by fifty-two in calculating the weekly compensation in this case.

FINDINGS OF FACT

1. Claimant's decedent was assassinated on December 10, 1986.

2. At the time of his death, claimant's decedent was mayor of the city of Mount Pleasant, Iowa, and earned an annual salary of $4,800.

3. At the time of his death, claimant's decedent was survived as a dependent only by his widow, claimant Viola E. King.

CONCLUSION OF LAW

Claimant's rate of weekly compensation must be calculated under Iowa Code section 85.36(5).

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That compensation shall be paid to claimant on the basis of a weekly benefit amount of seventy-six and 91/100 dollars ($76.91).

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

IN RE: JACK H. KOHLMEYER, a/k/a JACK KOHLMEYER, Deceased, IOWA-ILLINOIS GAS & ELECTRIC, Employer, Self-Insured, Petitioner, vs. JEANNINE MCINTIRE, a/k/a, JEANNINE KOHLMEYER, SUSAN KOHLMEYER, GUARDIAN, LARRY L. KOHLMEYER,. Respondents.	FILED FEB 22 1990 File No. 798651 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a dependency decision finding that she was not the common-law wife of Jack Kohlmeyer, deceased. The record on appeal consists of the transcript of the dependency proceeding; Jeannine McIntire a/k/a Jeannine Kohlmeyer's exhibits 1, 4,5, 7-14, 17-22, 24-89, 92-112; employer's exhibits 1 through 14; and Larry Kohlmeyer and Susan Kohlmeyer's exhibits 1 through 51.

ISSUES

Jeannine Kohlmeyer states the following issues on appeal:

1. That the Deputy Industrial Commissioner erred in giving "little weight" to the testimony of Jeannine Kohlmeyer.

2. That the Deputy Industrial Commissioner erred in finding the testimony of James Burm "unreliable."

Mr. Larry L. Shepler
Attorney at Law
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400 Main Street
Davenport, Iowa 52801

3. That the Deputy Industrial Commissioner erred in failing to give substantial weight to the testimony of Russell Nading regarding joint tenancy.

4. That the Deputy Industrial Commissioner erred in failing to give substantial weight to the testimony of Phillip Gunderson regarding providing information to the newspaper for the obituary of Jack Kohlmeyer.

5. That the Deputy Industrial Commissioner erred in failing to give weight to the testimony regarding "divorce" and custody of Eric.

6. That the Deputy Industrial Commissioner erred in failing to consider the biases of certain witnesses in assessing their credibility.

7. That the Deputy Industrial Commissioner erred in finding credible the testimony regarding introductions made at a Christmas party in December 1984.

8. That the Deputy Industrial Commissioner erred in finding credible the testimony of Christopher Parker.

9. That the Deputy Industrial Commissioner erred in finding that Jack Kohlmeyer made an "intentional misrepresentation" to Florence Hoover regarding his marital status.

10. That the Deputy Industrial Commissioner erred in finding that certain documentary evidence submitted by Petitioner and by Respondents, Susan Kohlmeyer and Larry L. Kohlmeyer, leads to a conclusion of no common law marriage between Jack and Jeannine Kohlmeyer.

11. That pursuant to Iowa Code §85.31(3), Jeannine Kohlmeyer is entitled to benefits as a dependent of Jack Kohlmeyer even if she is not found to be the common law spouse of Jack Kohlmeyer.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

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

ANALYSIS

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

In addition, it is noted that claimant has properly asserted that the standard of review in an appeal decision to the industrial commissioner is de novo, and not whether substantial evidence exists in the record. Defendant's appeal brief references to "substantial evidence" are in error. The case has been considered de novo on appeal.

The deputy also gave appropriate weight to the testimony of Jeannine Kohlmeyer. It is proper to take into consideration the interest in the outcome of any witness. The interest in the outcome of other witnesses in the case was also appropriately considered. The testimony of Jeannine McIntire, a/k/a Jeannine Kohlmeyer, was considered by the deputy and considered de novo on appeal and given appropriate weight.

Claimant raises on appeal a request that she be found to be a partial dependent of the deceased. Claimant cannot raise this request for the first time on appeal. Chamberlin v. Ralston Purina (Appeal Decision, October 29, 1987); Marcks v. Richman Gordman, (Appeal Decision June 29, 1988). In addition, even if claimant's request could be considered, there is ample evidence in the record to show that claimant at various times applied for public assistance and listed herself as a single head of household, as well as other indications that claimant did not consider herself to be a dependent of the deceased. Finally, the fact that the deceased may have contributed to claimant financially in some degree does not, by itself, establish dependency.

The analysis of the deputy is adopted herein in all other respects.

FINDINGS OF FACT

1. Jack Kohlmeyer was married to Susan Kohlmeyer from 1972 until that marriage was terminated by divorce in February 1983.

2. Jack Kohlmeyer and Jeannine McIntire cohabited continuously from approximately May of 1982 until Jack's death on June 27, 1985.

3. Although Jack and Jeannine cohabited, they did not have a present intent or agreement to be married. They intended to cohabit without being married.

4. Jack and Jeannine did not publically declare themselves to be husband and wife.

5. Jack and Jeannine's representation to Florence Hoover of being married was an intentional misrepresentation made for the sole purpose of inducing Hoover to rent an apartment to Jack.

6. The testimony from James Burm is unreliable.

7. The testimony from Kathy Palzkile is unreliable.

8. The testimony from Jeannine is given little weight due to her interest in the outcome and to the conflicts between her testimony and her actions.

9. The testimony from the other witnesses is found to be generally credible.

10. Jack and Jeannine did not own any real or personal property in any form of joint or common ownership.

11. Jack and Jeannine consistently indicated that they were unmarried whenever either of them executed any written instrument of apparent importance.

12. Since Jack's death and at the time of hearing, Jeannine has frequently used Kohlmeyer as her surname. Prior to Jack's death, she consistently used McIntire as her surname, except for one magazine subscription ordered shortly prior to Jack's death.

13. Jack consistently represented Jeannine to be his girlfriend or fiancee rather than his wife or spouse.

14. Jack issued checks to Jeannine McIntire on several occasions, including the day he died, but he never issued a check to her using the name of Jeannine Kohlmeyer.

15. Jack and Jeannine had separate mailboxes at Fairfax and no joint or common mailbox.

16. Jack and Jeannine maintained separate bank accounts and had no joint or common bank account.

17. Jack and Jeannine had no joint or common debts, charge accounts or credit cards except for the loan for the rings which were purchased on February 2, 1985. In the documents made as part of that transaction, Jack and Jeannine represented that they were not husband and wife.

18. Neither Jack nor Jeannine had made any arrangements to provide for the other in the event of one's death. The evidence includes no wills or joint property ownership. None of Jack's life insurance was payable to Jeannine. Jack had discussed joint home ownership with Russell Nading, but the plan as disclosed by

Nading was that Jack would purchase the property in his own name and then later place Jeannine's name on it as a joint tenant.

19. The appearance and design of the ring displayed by Jeannine at hearing is as consistent with the ring being an engagement ring or a piece or ornamental jewelry as it is with the ring being a wedding band.

20. Jack and Jeannine probably planned to marry after Jeannine moved to Fort Dodge, but Jack died before the marriage occurred.

CONCLUSIONS OF LAW

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

Jeannine McIntire has failed to prove by a preponderance of the evidence that a common law marriage existed between her and Jack Kohlmeyer at or prior to the time of his death on June 27, 1985.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That the employer, Iowa-Illinois Gas & Electric, pay weekly compensation in the amount of three hundred forty-six and 34/100 dollars ($346.34) to Susan Kohlmeyer, guardian for Misty and Christopher Kohlmeyer, Jack's children and only dependents.

Signed and filed this 22nd day of February, 1990.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUST%RIAL COMMISSIONER

BETTY J. KLODT,	:	
	:	
Claimant,	:	File No. 855422
	:	
vs.	:	
	:	A P P E A L
HILLSIDE MANOR CARE CENTER,	:	
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying medical benefits as the result of an alleged injury on April 30, 1987. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 8; and defendant's exhibits 1 and 2. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issue on appeal: "Did the Deputy err in denial of 85.27 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 initial question to be addressed is whether claimant has shown that on April 30, 1987, she suffered an injury. Claimant testified to swallowing a chicken bone at work which she alleges lodged in her throat. However, none of the medical evidence corroborates her statement. No bone was found during several internal examination procedures. Claimant stated that her doctor told her he had seen some redness in her throat, but this statement is not corroborated by any of the medical evidence. It is concluded that claimant has failed to establish

that an injury occurred on April 30, 1987.

Even assuming that claimant had shown that an injury occurred, claimant also bears the burden of showing that the injury arose out of and was in the course of her employment. Claimant was on the employer's premises at the time of the alleged injury. The food was prepared by the employer. Claimant was clearly in the course of her employment at the time of the alleged injury.

However, claimant must also show that her alleged injury arose out of her employment. This requires a showing of a causal connection between the alleged injury and the employment. Even if claimant did in fact swallow a chicken bone, claimant has not shown that this occurrence arose out of her employment. To have arisen out of the employment, the injury must be caused by some aspect of the employment that significantly increases the danger of injury. Eating a chicken bone is equally hazardous whether it occurs at work or at home or in a restaurant. Claimant's employment did not significantly increase that hazard.

Claimant has also failed to show a causal connection between the medical expenses and her alleged work injury. Claimant argues that the costs of the internal examination procedures are recoverable since they were performed to ascertain if a chicken bone was in fact lodged in claimant's throat. A claimant who undergoes a medical procedure always runs the risk that the results of the procedure may reveal that the ailment is not compensable. The mere fact that the procedure was commenced with a subjective belief by claimant that the ailment was work related does not make the procedure compensable as related to a work injury. The procedures did not reveal a work-related injury. Claimant is not entitled to medical benefits.

In his brief claimant stated:

> The Deputy seems to reason that because there is no medical evidence to prove that IN FACT there was a chicken bone lodged in Betty Klodt's throat, she is not entitled to reimbursement for the stipulated medical expenses for looking for the bone.
>
> This reasoning is ridiculous and would lead to the extreme situation where an employee, who in good faith believing that she is suffering from an injury which arose in the work place, must run the risk that such is not the case when she seeks medical attention for that condition.
>
> Contrary to the analysis provided by the Deputy, there is no medical evidence to indicate that the act of eating chicken was NOT the probable cause of the operative procedure for which the medical

bills were incurred.

....

Since when are medical bills incurred for diagnosis or testing disallowed simply because no condition was found which in retrospect pinpoint the exact medical cause?

The above statements reverse the burden of proof. Claimant has the burden of proof not defendants. Furthermore, claimant's do run the risk of having to pay for medical expenses if they are unable to prove injuries arose out of and in the course of employment or a causal connection between injuries and the medical expenses they incur. Employers do not become liable because of good faith of an employee. Employers become liable when the employee meets the statutory requirements of proof.

It should be mentioned that it does not help a party's position to state in a brief that a deputy's "reasoning is ridiculous" when such reasoning is based on the facts presented and the appropriate law.

FINDING OF FACT

1. Claimant did not have a chicken bone lodged in her throat as a result of eating chicken at her employers on April 30, 1987.

2. Claimant's throat problems were not the result of any work related incident on April 30, 1987.

CONCLUSION OF LAW

Claimant failed to prove she received an injury arising out of and in the course of her employment with defendant on April 30, 1987.

Claimant failed to prove that any claimed medical expenses were causally connected to an injury arising out of and in the course of her employment.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant takes nothing from these proceedings.

That claimant pays costs of these proceedings pursuant to Division Industrial Services Rule 343-4.33.

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUZANNE K. WILLIAMS KOSTELAC, Claimant, vs. FELDMAN'S, INC., Employer, and GREAT AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	File No. 760401 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 death benefits to claimant as a surviving spouse.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 18. Both parties filed briefs on appeal.

ISSUES

The issue on appeal is whether claimant's decedent's death is compensable.

REVIEW OF THE EVIDENCE

The arbitration decision filed December 14, 1988 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that claimant's decedent received an injury which arose out of and in the course of decedent's 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.

A determination that an injury "arises out of" the employment contemplates a causal connection between the conditions under which the work was performed and the resulting injury; i.e., the injury followed as a natural incident of the work. Musselman, 261 Iowa 352, 154 N.W.2d 128; Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941).

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 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.

It was stated in McClure, 188 N.W.2d 283 that, "'in the course of' the employment refers to time, place and circumstances of the injury....An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto."

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

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

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

The Iowa Supreme Court on two occasions has discussed whether an employee's death from suicide is compensable. In Reddick, 230 Iowa 108, 296 N.W. 800 the court stated at 803:

> It was of course incumbent upon appellant to prove by a preponderance of the evidence that death was caused by injury arising out of and in the course of employment....If appellant sustained this burden she was entitled to prevail unless appellee succeeded in proving by a preponderance of the evidence one or both of the affirmative defenses of suicide and intoxication.

The court found that the employee's death arose out of and in the course of his employment and that the employer had failed to prove the death was a suicide.

In Schofield v. White, 95 N.W.2d 40 (Iowa 1959), the court held at 45-46:

> From a careful examination of the record, and particularly the testimony of the medical experts, we are convinced that there was sufficient competent evidence to sustain the commissioner's decision. "The American cases generally have adopted the rule that where insanity and suicide follow an injury to a workman which was otherwise compensable, compensation may be awarded if he took his own life through an uncontrollable impulse, or in a delirium of frenzy, and without conscious volition to cause death, since under such circumstances there was a direct and unbroken causal connection between the injury and the suicide and no intervening cause. But where suicide on account of the consequences of a compensable injury results

> from a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and physical effect of the suicidal act, even though the choice is dominated by a disordered mind, there is a new and independent agency which breaks the chain of causation arising from the injury, and no compensation can be had." 58 Am. Jur., Workemen's Compensation, §262. Barber v. Industrial Commissioner, 241 Wis. 462, 6 N.W.2d 199, 143 A.L.R. 1222.

> This case presents a new issue not heretofore decided by this court. Claimant having pleaded and proved suicide must get around the statutory provision that compensation shall not be allowed for an injury caused by the employee's wilful intent to injure himself. To do this she must prove the mental condition of her decedent at the time of the suicidal act was such that he was motivated by an uncontrollable impulse or in a delirium of frenzy, without conscious volition to produce death.

The court found that the industrial commissioner's award of benefits was supported by substantial competent evidence.

ANALYSIS

The issue to be resolved in this matter is whether claimant's decedent's death is compensable. Several preliminary comments are appropriate.

As discussed above in the applicable law portion of this decision, the Iowa law on this issue is found in the holding of Schofield, 95 N.W.2d 40. That case relied upon the quoted portion of 58 Am.Jur., Workmen's Compensation, §262. That topic can now be found in 82 Am.Jur., 2d Workmen's Compensation §310 at page 101 which reads in relevant part:

> A number of cases have adopted the general rule that where insanity and suicide follow an injury to a workman which was otherwise compensable, compensation may be awarded if he took his own life through an uncontrollable impulse, or in a delirium of frenzy, and without conscious volition to cause death, since under such circumstances there was a direct and unbroken causal connection between the injury and the suicide and no intervening cause. Other cases have adopted the general rule that where an injury and its consequences directly result in a workman's loss of normal judgment and domination by a disturbance of the mind, causing suicide, his suicide is compensable, and the rule of some other cases differs from this only in requiring that the insanity must be the direct result of the injury itself or the shock produced by it, and not an

> indirect result caused by brooding over the injury and its consequences, while still other cases allow death benefits for suicide where a compensable injury results in brain derangement other than discouragement, melancholy, or any other "sane" condition, which, in turn, causes the death by suicide. Where the compensation act does not require the element of "accident" as a condition of compensability, compensation has been awarded for the death of a workman by suicide while insane as the result of overwork, without any injury of a traumatic nature.

The issue has also been discussed by one noted authority 1A Larson Workmen's Compensation Law §§36.20-36.40. While the cited portion from Am.Jur., 2d, supra, and the discussion in Larson indicate that the Iowa law may be the minority view and that the trend is toward the chain of causation standard, the law in Iowa is Schofield. Case law renouncement of the Iowa law, if it is to occur, should come from the source of the law, namely the Iowa Supreme Court in this case. The court has indicated that it will change its rule of law when necessary. See Hansen v. Reichelt, ___ N.W.2d ___ (Iowa 1990).

In order for claimant to prevail she must prove that her decedent suffered an injury that arose out of and in the course of his employment and defendants have not proved his death by suicide was from a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and physical effect of the suicide act. There is no assertion (and properly so) that decedent's death directly arose out of and in the course of his employment. (Decedent's death occurred in the garage of his private residence and unlike Reddick, 230 Iowa 108, 296 N.W. 800, there is no indication that decedent would be performing tasks related to his employment in the garage.)

The first step in resolving this matter is to determine whether the decedent suffered an injury that arose out of and in the course of his employment. The injury that claimant apparently relies upon would be the decedent's alleged depression. The standard for determining whether a mental injury arose out of and in the course of employment was discussed in Ohnemus v. John Deere Davenport Works, (Appeal Decision, February 26, 1990).

> In order to prevail claimant must prove that he suffered a non-traumatically caused mental injury that arose out of and in the course of his employment. This matter deals with what is referred to as a mental-mental injury and does not deal with a mental condition caused by physical trauma or a physical condition caused by mental stimulus. The supreme court in Schreckengast v. Hammer Mills, Inc., 369 N.W.2d 809

(Iowa 1985), recognized that issues of causation can involve either causation in fact or legal causation. As stated in footnote 3 at 369 N.W.2d 810:

> We have recognized that in both civil and criminal actions causation in fact involves whether a particular event in fact caused certain consequences to occur. Legal causation presents a question of whether the policy of the law will extend responsibility to those consequences which have in fact been produced by that event. State v. Marti, 290 N.W.2d 570, 584-85 (Iowa 1980). Causation in fact presents an issue of fact while legal causation presents an issue of law. Id.

That language was the basis of the language in Desgranges v. Dept of Human Services, (Appeal Decision, August 19, 1988) which discussed that there must be both medical and legal causation for a nontraumatic mental injury to arise out of and in the course of employment. While Desgranges used the term medical causation the concept involved was factual causation. Therefore, in this matter it is necessary for two issues to be resolved before finding an injury arising out of and in the course of employment - factual and legal causation. Proving the factual existence of an injury may be accomplished by either expert testimony or nonexpert testimony.

....

> Not only must claimant prove that his work was the factual cause of his mental injury, claimant must also prove that the legal cause of his injury was his work. In order to prove this legal causation claimant must prove that his temporary mental condition "resulted from a situation of greater dimensions than the day to day mental stresses and tensions which all employees must experience." Swiss Colony v. Department of ICAR, 240 N.W.2d 128, 130 (Wisc. 1976).

In the instant case there are opinions from three psychiatrists and testimony from lay witnesses as to the factual cause of the decedent's condition. The three psychiatrists all agree that the decedent's condition was a major depressive disorder. The lay testimony might establish the existence of certain facts but given the complexities of determining the factual cause of a major depressive disorder the opinions of psychiatrists are more reliable. None of the psychiatrists had an opportunity to treat decedent and all were asked to perform what was characterized as a "psychological autopsy." The psychiatrists who served as witnesses for claimant, E. A.

Kjenaas, M.D., and Keith Barnett, D.O., opined that the decedent's work caused his suicide. Dr. Kjenaas felt that the major depressive disorder of decedent was due to environmental factors and that decedent would not have developed the condition but for his job. Michael J. Taylor, M.D., who served as defendant's witness disagreed with Dr. Barnett and Dr. Kjenaas that there was enough evidence to form an opinion on a connection between decedent's work and his mental condition. (Ex. 16, p. 22) The opinions of Dr. Taylor are the most reliable for the following reasons. Dr. Taylor had more information available to him (depositions of claimant, Dr. Barnett and Dr. Kjenaas) than did Dr. Barnett and Dr. Kjenaas. Furthermore, he took into account the possibilities of prior events and environmental factors other than employment in assessing decedent's condition. Also, Dr. Taylor's descriptions and explanation of decedent's actions in the last two days of his life are reasonable and plausible. Not only did Dr. Taylor's portrayal of major depressive disorder describe decedent's behavior in this case, but his explanation as to why his opinions differed from Dr. Barnett and Dr. Kjenaas was convincing. Dr. Barnett's opinion was based only upon selected information supplied by claimant's counsel, he was not aware of decedent's personal life, and was not aware of decedent's prior history of depression. Dr. Kjenaas agreed that major depressive disorder could be caused by environmental factors but he knew nothing of decedent's nonemployment life. In short, the opinions of Dr. Barnett and Dr. Kjenaas are not reliable because they acknowledged that other environmental factors could cause decedent's condition but they formed their opinions without knowing what those other factors were.

It was Dr. Taylor's opinion that decedent's work may have possibly caused his mental condition. A possibility is not sufficient to meet claimant's burden of proof. Claimant has not proved that decedent's work was the factual cause of the decedent's major depressive disorder.

Even if claimant had proved that decedent's work was the factual cause of decedent's mental condition, claimant must also prove that it was the legal cause. The standard for making this determination is whether claimant proved that decedent's mental condition resulted from a situation of greater dimensions than day to day mental stresses and tensions which all employees must experience. The evidence in this case shows that decedent was attempting to manage retail establishments in a geographical area where there was allegedly an unfavorable economic climate. The decedent felt pressure from his mother-in-law, who was owner of the business, the business' creditors, and the business' bank. Managers of retail businesses generally have these types of problems. It is difficult to determine whether decedent's situation was greater in dimension than situations all employees must experience. Likewise, it is difficult to determine if

decedent's employment was the cause of his mental disorder or whether the employment materially aggravated a preexisting condition. It is impossible to determine whether decedent's employment was the legal cause of his mental condition.

In summary, claimant has not proved that decedent suffered an injury that arose out of and in the course of his employment.

Even if claimant had proved that the decedent had suffered an injury that arose out of and in the course of his employment, she may not recover if defendants can prove an affirmative defense. Under Iowa law benefits are not allowed if defendants can prove the injury was result of decedent's wilful intent to injure himself. The standard to be used under Iowa law is whether the suicide was from a "voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and physical effect of the suicidal act." See Schofield, 95 N.W.2d 40. Again, Dr. Taylor's opinions are relied upon. His opinions give a logical and reasonable explanation of decedent's actions the day before and the day of the suicide. Decedent's suicide took place at his home on a day which he appeared to have gone to work. There was a calculated effort by decedent to take his own life. Decedent's suicide meets the standard of the affirmative defense. Even if decedent had suffered an injury that arose out of and in the course of employment, claimant's claim is not allowed.

FINDINGS OF FACT

1. On September 14, 1982, Dean M. Williams was a resident of the state of Iowa employed by Feldman's, Inc., at Storm Lake, Iowa.

2. On September 14, 1982, Dean M. Williams caused his own death by operating an automobile in a closed garage at his residence.

3. Dean M. Williams was survived by Suzanne K. Williams, his spouse, who remained unmarried following his death until April 13, 1987.

4. Dean M. Williams had been employed by Feldman's, Inc., as manager of its store in Storm Lake, Iowa.

5. The store and business in general had been profitable during the early years of his employment, but in the late 1970's and early 1980's, the business became unprofitable.

6. When the business had been economically successful, Dean M. Williams was a happy, outgoing individual who appeared to be physically and emotionally healthy.

7. As the business declined, Dean M. Williams appeared to become less visible happy, outgoing and emotionally healthy.

8. The fact of the business decline and Williams' apparent inability to remedy the situation placed stress upon Williams.

9. The level and degree of stress was further heightened by a meeting that Williams had with the owner of the business and her banker associate a few weeks prior to his death.

10. For a period of at least several months prior to his death, Dean M. Williams had been suffering from a major depressive disorder.

11. Williams may have had as many as two prior depressive episodes, both of which occurred at a time connected with other business setbacks which Williams had experienced. Williams did not have any observable psychological or emotional problems or disorders other than at the time of business setbacks.

12. There is a possibility but not a probability that Williams' employment was the cause of his major depressive disorder.

13. It is not possible to determine whether the situation of Williams' employment subjected him to stresses greater than those which all employees must experience.

14. Williams' major depressive disorder was not the result of his employment.

15. It is impossible to determine whether Williams' major depressive disorder was materially aggravated by his employment.

16. Williams' suicide was well planned and the plan for suicide had been formulated at least the day before it took place.

17. Williams knew the purpose and physical effect of being in a closed garage with an automobile engine running.

18. Williams voluntarily and wilfully chose to take his own life.

19. Williams possessed a moderately intelligent mental power when he planned and carried out his suicide.

CONCLUSIONS OF LAW

Claimant has failed to prove that the decedent suffered an injury that arose out of and in the course of his employment.

Defendants have proved that the decedent's suicide was a wilful intent to injury himself.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That defendants pay all costs of action including the costs of transcription of the arbitration hearing.

Signed and filed this 13th day of June, 1990.

David E. Linquist

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUZANNE K. WILLIAMS KOSTELAC,

Claimant,

vs.

FELDMAN'S, INC.,

Employer,

and

GREAT AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 760401

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FILED

JUN 19 1990

INDUSTRIAL SERVICES

The appeal decision in this matter filed June 13, 1990 is modified to read at page 8, the second full paragraph as follows:

Even if claimant had proved that the decedent had suffered an injury that arose out of and in the course of his employment, she may not recover if defendants can prove an affirmative defense. Under Iowa law benefits are not allowed if defendants can prove the injury was result of decedent's willful intent to injury himself. The standard to be used under Iowa law is whether the suicide was from a "voluntary willful choice determined by a moderately intelligent mental power which knows the purpose and physical effect of the suicidal act." See Schofield, 95 N.W.2d 40. Again, Dr. Taylor's opinions are relied upon. His opinions give a logical and reasonable explanation of decedent's actions the day before and the day of the suicide. Decedent's suicide took place at his home on a day on which it did not appear that he went to work. There was a calculated effort by decedent to take his own life. Decedent's suicide meets the standard of the affirmative defense. Even if decedent had suffered an injury that arose out of and in the course of employment, claimant's claim is not allowed.

Signed and filed this 19th day of June, 1990.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAROLD C. LEOHR, JR.,

Claimant,

vs.

R & A TRUCKING,

Employer,

and

THE TRAVELERS COMPANY,

Insurance Carrier,
Defendants.

FILED

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IOWA INDUSTRIAL COMMISSIONER

File No. 812964

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 healing period and permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 3, 5 through 8 and 10 through 12; and claimant's exhibits 4 and 9. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal are:

I. Whether the deputy industrial commissioner erred in not awarding the claimant a running award for healing period benefits and whether the deputy industrial commissioner erred in not entering an order authorizing the claimant to obtain further medical treatment from Dr. Delbridge or other qualified hand surgeons to relieve his pain syndrome and to get maximum function of the hand. In the alternative if the industrial commissioner should determine that there should not be a running award, the issue is whether the deputy industrial commissioner was correct in setting the end of the healing period as April 22, 1986 as opposed to June 1, 1986.

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CONCLUSION OF LAW

Claimant has not proved entitlement to reimbursement for an evaluation of permanent disability by a physician of his choice.

WHEREFORE, the ruling of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant's application is denied.

Signed and filed this 29th day of September, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAWRENCE M. MASEAR, Claimant, vs. SUPER VALU STORES, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File Nos. 795854/834958 A P P E A L D E C I S I O N FILED JUL 31 1989 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding claimant 11 weeks of permanent partial disability for a knee injury on May 22, 1984; 50 weeks of permanent partial disability benefits for a shoulder and neck injury May 9, 1986; and 10 weeks of healing period benefits.

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

ISSUE

The issue on appeal is the extent of permanent disability for each of claimant's injuries.

REVIEW OF THE EVIDENCE

The arbitration decision dated March 17, 1989 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 appropria 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 injured his left knee on May 22, 1984 while working for defendant employer.

2. Surgery to remove the meniscus on claimant's left knee on or around June 3, 1985 was a result of claimant's May 22, 1984 injury.

3. Claimant's disability to his lower extremity is a result of his injury of May 22, 1984.

4. Claimant has a five percent impairment to his left lower extremity as a result of his injury of May 22, 1984.

5. Claimant incurred a healing period as a result of the May 22, 1984 injury from and including May 27, 1985 up to and including August 4, 1985.

6. The weekly rate of compensation for claimant's May 22, 1984 injury is $423.52 per week.

7. Claimant injured his shoulder and cervical neck area on May 9, 1986 when he was struck by a crank while letting down the dolly on his truck.

8. Claimant has a ten percent impairment to his shoulder and cervical area which is a result of his injury of May 9, 1986.

10. Claimant could have had his same job with defendant employer that he had on May 9, 1986 or could have had another job with defendant employer which would have been less strenuous and paying approximately 30 percent less income.

11. Claimant has a loss of earning capacity as a result of his injury of May 9, 1986.

12. The weekly rate of compensation of claimant for the May 9, 1986 injury is $488.24.

CONCLUSIONS OF LAW

Claimant's injury on May 22, 1984 arose out of and in the course of his employment.

Claimant's impairment to his left lower extremity is causally connected to his injury on May 22, 1984.

Claimant has a five percent impairment to his left lower extremity as a result of his injury of May 22, 1984.

Claimant is entitled to healing period benefits for ten weeks beginning May 27, 1985 to and including August 4, 1985 at the rate of $423.52.

Claimant's shoulder and cervical area injury on May 9, 1986 arose out of and in the course of his employment.

Claimant's disability to his shoulder and cervical neck area is causally connected to his injury of May 9, 1986.

Claimant incurred a ten percent industrial disability as a result of his injury of May 9, 1986.

Claimant is entitled to no healing period benefits as claimant was not off work as a result of his May 9, 1986 injury.

Claimant's weekly benefit rate for the May 9, 1986 injury is $488.24.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant eleven (11) weeks of permanent partial disability at the stipulated rate of four hundred twenty-three and 52/100 dollars ($423.52) per week commencing August 5, 1985 for the injury of May 22, 1984.

That defendants pay claimant healing period benefits for ten (10) weeks beginning May 27, 1985 to and including August 4, 1985 at the stipulated rate of four hundred twenty-three and 52/100 dollars ($423.52) for the injury of May 22, 1984.

That defendants pay claimant fifty (50) weeks of permanent partial disability benefits at the stipulated rate of four hundred eighty-eight and 24/100 dollars ($488.24) beginning November 29, 1986 for the May 9, 1986 injury.

That defendants receive credit for benefits already paid.

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

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

That claimant pay the costs of this appeal including the costs of transcribing the arbitration hearing.

That defendants pay all other costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

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

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

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM RAMSEY MASON, Claimant, vs. THERMO-GAS, Employer, and NORTHWEST NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 819978/816116 A P P E A L D E C I S I O N FILED JUL 28 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding the claimant 200 weeks of permanent partial disability and reimbursement for medical expenses for work injuries sustained to his lower back on April 18, 1984 and January 28, 1985.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 3; claimant's exhibits 1 through 3; and defendants' exhibits 1 through 3. Both parties filed a brief on appeal.

ISSUES

Defendants state the following issues on appeal:

1. The award of 40% permanent partial disability is unsupported by substantial evidence in the record made before the deputy industrial commissioner when that record is viewed as a whole.

2. The award of 40% permanent partial disability is unreasonable, arbitrary and capricious, and characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

3. The admission into evidence of those portions of claimant's exhibits 2 and 3 relating to Dr. Dasso's

opinions on "disability" was prejudicial error.

4. The award of medical expenses to claimant and the finding that the appellants did not offer to claimant treatment for his work-related injuries are unsupported by substantial evidence.

REVIEW OF THE EVIDENCE

The following is a brief summary of the evidence pertinent to this decision. However, all of the evidence presented was considered in arriving at this decision.

William Ramsey Mason is the claimant in this case. P. K. McGinnis is claimant's father-in-law. Randy McGinnis is claimant's brother-in-law. Charles Corey is an LP dealer by whom claimant was employed after sustaining the two alleged injuries involved in this case. The summary of the evidence is based on the testimony of the claimant, P. K. McGinnis, Randy McGinnis and Charles Corey who all testified on claimant's behalf.

Claimant who was born on August 20, 1950, graduated from high school and completed one semester of college. Upon leaving college, claimant played the keyboard, piano and organ in a musical band for approximately three to four years. Following working as a musician, claimant worked as a bartender for a short period of time coupled with working in the field for his father-in-law during the summer months. Claimant then decided to leave bartending and began working as a process control technician for Chemplex, a plastic plant in his area. At Chemplex claimant received on-the-job training and remained in their employ for approximately two years. Claimant began working for the defendant, Thermo-Gas, a LP dealer in 1979.

Initially, claimant was a bulk tank driver at Thermo-Gas making day-to-day deliveries of LP gas to commercial and residential customers. This work required some billing responsibilities and route making. The physical aspects of the job required driving the gas tank truck along with dragging the large hoses 20 to 100 feet to fill each customer's propane tank.

Within approximately two and one-half years, claimant moved to service work in which he repaired and serviced propane furnaces, hot water heaters and other propane gas appliances. Claimant testified that this work involved occasional lifting up to 50 pounds. In the spring of each year, Thermo-Gas sold liquid fertilizer to local farmers. This fertilizer was mixed on the premises of Thermo-Gas. Claimant was assigned to these mixing duties each year. It was while performing this mixing work that claimant was first injured.

Claimant initially earned $5.50 per hour in the delivery

job. According to his pay records at Thermo-Gas, claimant was earning from $1300 to $1500 per month at the time of the work injury. The exact amount of the earnings varied from month to month for reasons not entirely clear in the record. Claimant stated at hearing that he had no prior back injuries or back difficulties before April 1984 and was fully able to perform physically all work assigned to him.

The facts surrounding the work injury of April 18, 1984 are not in real dispute. Claimant testified that he slipped on fertilizer which had been spilt onto wooden steps in his work area and he fell on the steps striking his back. Following the injury, claimant was treated for low back and right hip pain by Dale Weber, M.D., whose only diagnosis was a contusion to the back after x-rays failed to reveal any abnormalities. This treatment consisted of a couple of weeks of physical therapy including hot packs and ultrasound therapy. During this time, claimant continued to work at Thermo-Gas. Claimant testified that he was able to work despite ongoing back pain because fellow employees assisted him in performing heavy work. After completing the physical therapy, claimant discontinued treatment but stated that the pain continued on occasion depending upon his activity both at home and at work.

In the summer of 1984, before the second alleged work injury, claimant became the company bookkeeper which included keeping books of account, making reports and posting data to accounts. Claimant said that he was offered this job by his manager in part because the manager knew of his continuing back problems after the April 1984, injury and that the book-keeping work would be easier for him. Claimant said that his back problems were largely responsible for him accepting this type of work. From claimant's pay records, there was no notice-able change in claimant's earnings following his transfer from repair work to the office as a bookkeeper.

While working as a bookkeeper at Thermo-Gas, claimant testified that he was injured again on January 28, 1985, while he was walking in the plant yard after taking a reading on one of the storage tanks. Apparently, recording such readings was a part of his bookkeeping job. Claimant said that he slipped on some ice and fell on a frozen "rut" made by one of the propane trucks and struck his back in the same place as the injury in April 1984. Claimant again felt immediate pain in his back but this time more localized in the area of the injury. He then began to receive treatment from Dale Wulf, M.D. After taking x-rays which again revealed nothing abnormal, Dr. Wulf diagnosed contusion of the back and prescribed further physical therapy and light duty work. Claimant said that a lump developed on his spine at that time which persists today. Most of his physicians have opined however, that this lump was not due to the work injuries. Claimant stated that Dr. Wulf told him to return on an as needed basis. However, claimant ended his

physical therapy treatment on his own in February 1985. At the hearing, claimant said that he continued to have pain but controlled his pain by performing various home exercises he learned following the first injury. He testified also that he changed positions frequently while working as the company bookkeeper in order to ease the pain.

Claimant ended his bookkeeping job and his employment at Thermo-Gas on September 17, 1985. Claimant said that he had difficulties with handling the job as a bookkeeper despite receiving some training from Thermo-Gas. This difficulty had nothing to do with his physical problems. Claimant stated that he experienced the most difficulties when Thermo-Gas attempted to computerize the bookkeeping system. Claimant said that despite receiving a few days of training in computer operation, he had considerable difficulty converting the accounts using the computer program. Whether claimant was terminated or voluntarily quit is unclear in the record. Claimant testified that after taking a few days off and thinking about his difficulties as a bookkeeper, he asked Thermo-Gas to transfer him back to the position he held before becoming a bookkeeper. Claimant said that Thermo-Gas refused this request because they were reluctant to terminate the person who had been hired to fill the position when claimant became the bookkeeper. Claimant stated at hearing that he had been "laid off" at that time and then began to draw unemployment benefits.

In the latter part of 1985 claimant, on two occasions, attempted to work for another LP dealer in bulk deliveries as he had done for Thermo-Gas back in 1979. However, claimant said that he experienced considerable difficulties with his back on the hoses. Claimant's inability to continue due to his back difficulties and the strenuous nature of this work was verified at hearing by this LP dealer, Charles Corey.

Upon experiencing difficulties with the new bulk delivery job, claimant consulted an attorney and then sought treatment from Raymond W. Dasso, M.D., a board certified orthopedic surgeon, in February 1986. This orthopedist has over 30 years of experience in orthopedic surgery. After his examination of claimant, Dr. Dasso ordered a CT scan and myelogram test. The myelogram test was found to be normal but the CT scan revealed mild degenerative changes with central bulging of the annulus fibrosis at L4-5. No herniation of the disc was found. Dr. Dasso diagnosed claimant suffered from "lumbosacral myofiascial [sic] strain, fairly severe and chronic." The doctor prescribed physical therapy and attendance at a back school. The doctor felt that the back school was necessary to prevent further injury, not to change claimant's condition. On August 7, 1986, Dr. Dasso discontinued physical therapy as he felt that further therapy would no longer help claimant and rated claimant as suffering from a 30 percent permanent partial disability. Dr. Dasso testified that it was his opinion that claimant's

condition had not gotten any better or any worse since the first time he saw him. In December 1986, he lowered the rating to 25 percent and opined that in his deposition that such permanent disability is causally connected to the January 28, 1986 fall at Thermo-Gas. Dr. Dasso also imposed permanent restrictions upon claimant's future activity consisting of no lifting over 15 pounds and no excessive bending, stooping or twisting. Dr. Dasso also stated in his written reports that claimant cannot work over six hours per day. However, this six hour limitation apparently only applied to claimant's current work because Dr. Dasso stated in his deposition that claimant could work as a bookkeeper or in some other sedentary occupation up to eight hours per day.

Claimant testified that he sought employment in the area of his residence near Savanna, Illinois but was not able to find suitable employment. He also sought employment from Chemplex, one of his previous employers. However, the available jobs at Chemplex involved outside work which could be strenuous, and they also involved a 12 hour shift which claimant felt that he would be unable to perform on a day-to-day basis.

At the present time claimant works for his father-in-law as a retail clerk at a roadside produce stand. Claimant's father-in-law owns and operates a truck garden and the stand. The father-in-law testified that he hired claimant due to his troubles and pays him $5.00 an hour only because he is a relative. The father-in-law testified that he pays non-relative employees a minimum wage of $3.35 per hour. Claimant only works part-time at the stand which is only operated in the summer and fall. Last winter, claimant worked part-time for a furniture refinisher at minimum wage. Corey, the LP dealer in the Savanna, Illinois area, testified that jobs are difficult to find in the Savanna area at the present time due to a depressed economy.

ANALYSIS

The first two issues raised by defendants both relate to the nature and extent of claimant's permanent partial disability. On appeal the defendants argue that the deputy erred in determining an award of 40 percent industrial disability because there was insufficient evidence to justify such a finding.

The evidence shows that claimant slipped and fell while working for Thermo-Gas on April 18, 1984 and January 28, 1985. In February 1986 claimant sought treatment from Dr. Raymond Dasso, a board certified orthopedic surgeon who treated claimant and gave him a 25 percent permanent partial "disability" rating and opined that such permanent "disability" is causally connected to the injury of January 28, 1985.

Dr. Dasso is not qualified to give an opinion as to disability rating. He is only qualified to give an impairment

rating which he failed to give in this case. By giving a 25 percent permanent partial disability rating it appears that Dr. Dasso is invading the province of the industrial commissioner by rating claimant's industrial disability rather than evaluating only his functional impairment. Wright v. Walter Kidde Company, 33 Biennial Report of the Industrial Commissioner 237 (Appeal Decision 1977). The matter of industrial disability is a mixed question of law and fact and as such, it is not a proper subject of expert testimony. Dougherty v. Boyken, 261 Iowa 602, 607, 155 N.W.2d 488, 491 (1968). For this reason, the opinion of Dr. Dasso with regard to disability is given little weight.

However, Dr. Dasso did impose permanent restrictions upon claimant's future activity, consisting of no lifting over 15 pounds and no excessive bending, stooping or twisting.

This type of 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).

Prior to sustaining the injuries on April 18, 1984 and January 28, 1985, claimant was in excellent medical condition. He had no functional impairments or ascertainable disabilities. There was no evidence of claimant's inability to fully perform physical tasks involving heavy lifting, repetitive lifting, bending, twisting, stooping, and prolonged standing.

At the present time claimant's medical condition prevents him from returning to his former employment or to any other employment which requires a violation of the work restrictions. It is clear that claimant would have to make accommodations for his physical impairments in any work of the same nature as his prior employment with the defendant employer.

Despite his physical impairments and age, claimant is fortunate enough to be both intellectually and physically able to work as a full time bookkeeper, office clerk or other low grade clerical office work.

Claimant has had some office experience at Thermo-Gas. Also, claimant did not lose his job at the defendant because of his disability. Claimant also has a high school education with some college. For these reasons claimant should be able to work full time in some office type position.

Claimant has been unable to find suitable light duty employment in his area despite his motivation to do so. This is part due to the depressed state of the economy. However, 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).

It should be noted that Dr. Dasso's opinion that claimant's condition is causally connected to the work injuries is virtually uncontroverted. Ralph H. Congdon, M.D., examined claimant one time for a second opinion apparently in response to a request by defendants. Dr. Congdon, whose credentials and experience are not in the record, stated in a letter dated July 7, 1987, "These modalities of testing do not elucidate the etiologies of the patient's problem but certainly put the potential for award in a "lighter gray zone"." Dr. Congdon examined claimant in February 1987 which was more than two years after claimant's second injury. He did not opine that there was no causal connection but merely stated that he did not find the etiology of claimant's problem. Dr. Dasso is a qualified board certified orthopedic surgeon with over 30 years of experience. While claimant did not see Dr. Dasso until a year after the second work injury, Dr. Congdon did not examine claimant until a year after that. Dr. Dasso's opinion will be accepted. After each of the injuries claimant received very limited medical treatment and did not pursue medical treatment.

Even though Dr. Dasso's opinion is accepted to establish that there is a causal connection between claimant's work injuries and the alleged permanent disability, as discussed above, Dr. Dasso opinion as to "disability" is not appropriate. Several facts of this case indicate that claimant's condition may not be as severe as alleged. After each of the injuries claimant returned to the same work without missing any work. In fact, he worked overtime after the first injury. Sometime after the second injury he expressed a desire to return to a job that appears to be more physically demanding when he did not feel confident that he had the mental ability to do the book-keeping job. After the second injury he returned to work with his father-in-law doing a job he had before the two injuries. On cross-examination Dr. Dasso testified:

> Q. Can you tell me, sir, what restrictions of motion that he has as a result of your examinations, from normal?
>
> A. Let's see. Well, he has some restrictions, not marked, but some restrictions of lateral bending on the right and left.
>
> Q. How much?
>
> A. Oh, 5 to 10 degrees.

Q. What would you consider to be normal lateral bending, right and left?

A. About 25 for a man his age, 25 degrees.

Q. And he has 20, then, are you saying?

A. He had 16 and 18. 16 on the right and 18 on the left.

Q. Okay. Any other loss of function that you find in the back?

A. No other loss of range of motion, no.

In summary, claimant's impairment is permanent but it is not as severe as he alleges.

After examination of the foregoing factors coupled with claimant's work restriction given by Dr. Dasso. It is determined that claimant has suffered a 15 percent loss of earning capacity from his work injury.

While defendants state the one of the issues on appeal is that the admission of certain evidence (claimant's exhibits 2 and 3) was prejudicial error, the thrust of their argument in their appeal brief is that the deputy misinterpreted the evidence and gave improper weight to the evidence. Defendants on appeal give no good reason why the admission of the evidence was erroneous. The evidence was properly admitted. However, defendants do properly point out that while Dr. Dasso gave a rating of "disability" the deputy appears to have treated the rating as one of "impairment". As discussed above, Dr. Dasso is not qualified to give a rating of disability and his opinion will be given proper weight.

The last issue to be resolved is whether claimant should be awarded medicial expenses. Defendants rely upon Smith v. Iowa Beef Processors, Inc., 1-3 State of Iowa Industrial Commissioner Decisions 693(1985) in arguing that claimant should not be awarded medical expenses because the medical care was unauthorized. Defendants reliance upon Smith is misplaced for several reasons. Smith was a review-reopening proceeding where the deputy found that there was no causal connection between the medical treatment and the alleged injury. In the instant case there is a causal connection between the medical treatment and the injuries. Also, Smith was decided before Kindhart v. Fort Des Moines Hotel, 1-3 Iowa Indus. Comm'r Dec. 611 (Appeal Dec. 1985). Kindhart followed an earlier appeal decision, Barnhart v. MAQ, Inc., I Iowa Indus. Comm'r Rep. 16(1981), and held that it is inconsistent to deny liability and the obligation to furnish care on one hand and at the same time claim a right to choose the care. Further, the defendants have denied liability because

they allege there was no causal connection between the medical treatment and the injury and they have argued that the treatment was unauthorized.

It should be noted that this is not a case where claimant's condition improved from the medical treatment. Dr. Dasso, who treated claimant during the period in question, opined that claimant's condition did not improve from the treatment.

The facts in this case are different from the facts in the cases cited above discussing liability for medical expenses. In this case the employer provided care for claimant immediately after his injuries. The employer apparently paid for and controlled that care. Claimant discontinued the care chosen by the employer when he failed to keep appointments. He was consequently discharged from care on February 22, 1985. A year later claimant, without apparent knowledge of the employer, sought medical care. When that care was initially sought, defendants had had no opportunity to provide further care or deny liability for the care. However, shortly after the care began claimant filed his original notice and petition. In their answer filed April 2, 1986, the defendants promptly denied liability, for among other things, medical expenses. Defendants denial of liability and denial of a causal connection to the claim of claimant continued throughout the proceedings. Under the facts of this case defendants are responsible for payment of medical treatment from the date they denied liability which was when the answer was filed. However, defendants are not responsible for the medical treatment prior to when the answer was filed. (Dr. Dasso on February 27, 1986 for $175 and Rock Island Radiology Associates, Ltd. on February 27, 1986 for $81. Total of $256 in treatment before the answer was filed.)

FINDINGS OF FACT

1. On April 18, 1984, claimant fell on wooden steps while mixing fertilizer for defendant employer.

2. On January 28, 1985, claimant slipped on ice in the plant yard and fell on a frozen rut on the defendant employer's premises.

3. The incidents on April 18, 1984 and January 28, 1985, resulted in injuries to claimant's lower back and both injuries arose out of and in the course of claimant's employment with defendant employer.

4. Claimant had no physical limitations before April 18, 1984.

5. Claimant was born August 20, 1950, and was 33 and 34 years old on the dates of the respective injuries.

6. The work injury of January 28, 1985 resulted in a permanent partial disability.

7. Claimant's physical limitations are not as severe as he alleges.

8. Claimant has not been able to return to work in employment in the propane injury for which he is best suited. Claimant has worked as a bookkeeper and has one semester of college but the bookkeeping job was not successful. Claimant has skill in the repair of LP gas appliances but has not been able to find, at the present time, utilization of such skills in employment suitable to his physical limitations. Claimant has been a bartender and currently works as a retail salesclerk. Claimant's earnings at the time of his work injury was approximately $1300 to $1500 per month. Claimant's current job only provides income to most people at $3.35 per hour although claimant is currently making $5.00 per hour because he is working for a relative.

9. The medical expenses requested by claimant as set forth in the prehearing report totaling $2,781.11 are fair and reasonable and were incurred for fair and reasonable treatment for the work injuries of April 18, 1984 and January 28, 1985.

10. Claimant's condition did not improve as a result of treatment he received under Dr. Dasso's direction which took place from February 27, 1986 through November 23, 1987.

11. Defendants offered claimant treatment for the injuries immediately after the injuries on April 18, 1984 and January 28, 1985.

12. Claimant discontinued treatment by the employer's chosen physician for the January 28, 1985 injury in February 1985.

13. Defendants did not offer claimant treatment after September 1985.

14. Defendants have denied liability for symptoms in claimant's back on April 2, 1986 when they filed their answer to claimant's original notice and petition.

15. The work injury of January 28, 1985, and the resulting permanent partial impairment was a cause of a 15 percent loss of earning capacity.

CONCLUSIONS OF LAW

As a result of his work injury of January 28, 1985, claimant has an industrial disability of 15 percent.

Claimant has proved entitlement to reimbursement for medical expenses ordered below.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of two hundred five and 69/100 dollars ($205.69) per week from January 28, 1985.

That defendants shall pay to claimant the sum of two thousand seven hundred eighty-one and 11/100 ($2781.11) as reimbursement for medical expenses.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for 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 cost of this action pursuant to Division of Industrial Services Rule 343-4.33.

That defendants shall file activity reports on 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 July, 1989.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD K. MATHIS,	:	
Claimant,	:	
vs.	:	File No. 840015
IOWA DEPT. OF TRANSPORTATION,	:	
Employer,	:	A P P E A L
and	:	D E C I S I O N
STATE OF IOWA,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant benefits and the ruling on the motion requesting permission to submit additional evidence.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 12. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

The issues on appeal are:

1. Whether the deputy commissioner erred in denying claimant's motion to submit additional evidence.

2. Whether the deputy commissioner erred in finding that claimant failed to meet his burden of proof as to permanent partial disability and odd-lot.

REVIEW OF THE EVIDENCE

The arbitration decision filed December 15, 1988 adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant failed to show for the hearing scheduled November 14, 1988 at 4:00 p.m. in Council Bluffs. Counsel for claimant was present. The hearing was conducted as if claimant was present. Claimant then had three days to submit a brief showing of good cause to support their motion for permission to submit additional evidence. In an affidavit filed November 17, 1988, claimant stated that his brother-in-law died on November 2, 1988. Claimant stated that he was involved with the funeral and forgot about himself.

Claimant's request for permission to submit additional evidence was denied on November 30, 1988.

The parties stipulated claimant's injury on November 26, 1986 arose out of and in the course of employment with defendant, there is a causal connection between claimant's back injury, and the disability which he is basing his claim.

APPLICABLE LAW

Division of Industrial Services Rule 343-4.31 states: "No evidence shall be taken after the hearing."

Division of Industrial Services Rule 343-4.28 states in pertinent part:

> The commissioner shall decide an appeal upon the record submitted to the deputy industrial commissioner unless the commissioner is satisfied that there exists additional material evidence, newly discovered, which could not with reasonable diligence be discovered and produced at the hearing.

Division of Industrial Services Rule 343-4.23 states in pertinent part:

> Continuances of hearings in contested cases shall be granted only by the industrial commissioner or the commissioner's designee. Requests for continuance shall state in detail the reasons for the request and whether the opposing party accedes to the request. The industrial commissioner or the commissioner's designee shall enter an order granting or denying the request.

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960). See also Barz v. Oler, 257 Iowa 508, 133

N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

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.2d 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term `disability' to mean `industrial disability' or loss of earning capacity and not a mere `functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257.

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).

ANALYSIS

Division of Industrial Services Rule 343-4.23 requires that a request for continuance shall state, in detail, the reasons for such a request, attorneys for claimant failed to state any reason to justify a continuance. Claimant's attorney stated that he had "no idea why he [claimant] is not here." A continuance is only appropriate where good cause is shown or in emergencies. Certainly, the death of a close relative could be a good reason to support a motion for continuance. However, the deputy needed some reason to grant a continuance and none was given at the time of the hearing. A request for a continuance is a prospective rather than a retrospective event. A deputy cannot grant a continuance of a hearing after the fact. Therefore, the request for continuance was properly denied.

It would be inappropriate for the deputy to take additional evidence after the hearing. Division of Industrial Services Rule 343-4.31 clearly states that no evidence shall be taken after the hearing. Since the hearing was completed on November 14, 1988, the deputy lacked the authority to take additional evidence after that date.

Finally, on appeal, Division of Industrial Services Rule 343-4.28 limits the ability of the industrial commissioner to admit additional evidence. The rule provides that only newly discovered evidence shall be admitted upon a showing that it could not be discovered and produced at the hearing. Claimant's testimony is not newly discovered evidence. While the industrial commissioner empathizes with claimant and his family during their time of loss, the commissioner lacks the authority to admit additional evidence unless it satisfies rule 4.28.

The underlying problem appears to be a lack of communication between claimant and his attorney. The statutes and rules regarding a hearing are to aid both parties in preparation and presentation of their case. The statutes and rules do not differentiate between claimant and defendants, both have rights that are protected by the law and are entitled to their day in court. To grant claimant's request for a continuance would not only unduly prejudice the defendants it would also establish an unworkable precedent for future hearings. The statute limits the commissioner's ability to help the claimant in this situation.

Claimant failed to prove permanent partial disability and odd-lot.

FINDINGS OF FACT

1. Claimant had an injury that arose out of and in the course of his employment with defendant employer on November 26, 1986.

2. Claimant fell on his back out of a truck on November 26, 1986.

3. Claimant has not worked for the defendant employer since the injury on November 26, 1986.

4. As a result of his injury, claimant has some permanent impairment.

5. There is no evidence that claimant is not employable.

6. There is no evidence as to claimant's education.

7. There is no evidence as to claimant's prior work experience.

8. There is no evidence as to claimant's attempts to find employment following his injury.

CONCLUSIONS OF LAW

Claimant has failed to meet his burden in proving he is permanently partially disabled.

Claimant has failed to meet his burden in proving he is an odd-lot employee.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall receive no further benefits as a result of this proceeding

That claimant shall pay the costs of this action including the cost of transcription of the arbitration hearing.

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GENNY E. MCCLELLAN, Claimant, vs. MIDWEST BISCUIT COMPANY, Employer, and WAUSAU INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 802020 A P P E A L D E C I S I O N FILED SEP 29 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent total disability benefits as the result of an alleged injury on August 8, 1985.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 10. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. Claimant failed to prove by a preponderance of the evidence and within a reasonable degree of medical certainty that she sustained a personal injury on August 8, 1985 resulting in permanent industrial disability.

2. The claimant has not sustained her burden of proof and has not established that she is an odd lot employee and further has not established under any scenario that she is permanently and totally disabled.

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

Defendants raise as issues on appeal whether claimant has proven a causal connection exists between her present condition and her work injury of August 8, 1985, and the nature and extent of claimant's disability.

The record contains the medical evidence of Gordon Baustian, M.D., which refers to claimant's work injury as the cause of claimant's condition. Koert R. Smith, M.D., made a determination that claimant's neurogenic low back pain was from a disc "injury". Other medical evidence indicates that claimant had a preexisting degenerative disc disease. Claimant worked for many years without difficulty. Claimant had no lifting restrictions prior to her injury of August 8, 1985. Claimant stated she did not have any back problems before her work injury. After her work injury, claimant experienced consistent symptoms, including acute episodes of pain which were not present before the August 8, 1985 injury. Patrick Kessler, M.D., concluded that claimant's condition was the result of a degenerative disc disease alone. However, the testimony of Dr. Smith, who had the most direct contact with claimant, will be given the greater weight. It is concluded that claimant has established by a preponderance of the evidence that her present back condition is causally connected to her work injury of August 8, 1985.

Defendants also argue on appeal that claimant has not established that her condition as a result of the work injury is permanent. Although Dr. Smith did at one point predict that claimant's condition would improve, both Dr. Smith and Dr. Kessler assigned claimant a rating of permanent impairment of five percent of the body as a whole. There is no medical evidence indicating that claimant's back condition is not permanent.

Defendants also urge that the deputy erred in finding that the claimant was permanently totally disabled. The deputy made a determination that claimant was an "odd lot" employee. However, in order to be an "odd lot" employee, claimant must have made a good faith effort to seek employment. In the instant case, claimant initially made commendable efforts to regain her position with employer. Claimant twice requested medical permission to return to work. After discovering that she could no longer perform the duties of her job, claimant made only perfunctory efforts to find substitute employment. Claimant registered with Job Service on two occasions, but reportedly was told that no jobs were available with her restrictions. Claimant's only other job seeking efforts were confined to

scanning newspaper ads, and making one application to a retail store. Defendants point out that this application and the second visit to Job Service did not take place until two weeks before the hearing, and claimant has acknowledged that these occurred at the prompting of her attorney. There is also in the record the testimony of Dr. Smith that claimant expressed a plan not to return to work, and Dr. Smith's agreement with that decision. Defendants' vocational counselor testified that he made himself available to claimant for job placement, but claimant failed to contact him and failed to complete a questionnaire that would have been useful in identifying employment opportunities for claimant.

Taken as a whole, it is concluded that claimant has not made the requisite good faith attempts to find substitute employment to qualify her as an "odd lot" employee. Thus, the extent of claimant's disability will be assessed without reliance on the odd lot doctrine.

Claimant's physical impairment is a factor to be utilized in the determination of claimant's disability. Claimant has two ratings of five percent permanent partial impairment of the body as a whole. Claimant has significant permanent restrictions, including an inability to work for more than four hours per day. Claimant is unable to lift more than 10 pounds. Claimant is likely to experience recurring episodes of acute back pain that would require absence from work.

Claimant's education consists of a high school diploma, but standardized tests reveal that claimant has a deficiency in math skills. Claimant's work experience consists of several years of work in manual labor and factory jobs. Claimant has no special skills, and vocational testimony in the record indicates that claimant's age makes retraining difficult.

Claimant's proximity to normal retirement age also affects her industrial disability. Claimant is near the end of the normal work life. Compared to a younger worker with the same injury, claimant has lost less future earning capacity as a result of her injury.

Claimant has not worked since her last attempt to return to her old job, and thus has experienced a significant loss of wages. However, claimant might have minimized that loss by cooperating with the vocational rehabilitation experts who testified, or by actively seeking substitute employment on her own. Claimant's doctor has stated she is capable of performing sedentary work involving sitting, standing or walking for two hours at a time with rest in between. Clark Williams, vocational consultant, testified that sedentary jobs are available to claimant, but was unable to identify a specific job. However, Mr. Williams was not able to complete his evaluation due to claimant's non-cooperation. Vocational consultant, G. Brian

Paprocki, testified that claimant is unemployable. Mr. Paprocki's testimony was based on a telephone conversation. The record indicates Paprocki's involvement was for the purpose of litigation and not to help claimant secure employment. His testimony is given no weight.

Claimant has not shown good motivation to return to work. Nevertheless, even if claimant had sought substitute employment, at best her employment opportunities would have been severly limited. Claimant can only work a few hours a day, and is likely to be absent from work on a frequent basis. The combination of claimant's physical impairment, age, and resrictions make it unlikely that claimant could find employment even with proper motivation.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to be permanently and totally disabled.

FINDINGS OF FACT

1. The work injury of August 8, 1985, was a cause of a five percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of not standing, sitting nor walking over two hours at any time.

2. Claimant has a lifting restriction of not over 10 pounds.

3. Claimant cannot work more than four hours per day.

4. Claimant is 59 years old.

5. Claimant has a high school education.

6. Claimant has deficient math skills.

7. Claimant's work experience is limited to physical labor and factory work.

8. Claimant has lost her capacity to earn wages.

CONCLUSIONS OF LAW

Claimant has established by the greater weight of the evidence that her present back condition is permanent and is causally related to her work injury of August 8, 1985.

Claimant is not an "odd-lot" employee.

Claimant has established by the greater weight of the evidence that she is permanently and totally disabled as a

result of her work injury of August 8, 1985.

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

ORDER

THEREFORE, it is ordered:

That defendant is to pay unto claimant permanent total disability benefits at a rate of one hundred twenty-seven and 83/100 dollars ($127.83) during the period of her disability.

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 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 September, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GENNY E. MCCLELLAN,

Claimant,

vs.

MIDWEST BISCUIT COMPANY,

Employer,

and

WAUSAU INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 802020

R U L I N G

O N

R E H E A R I N G

STATEMENT OF THE CASE

Defendants have been granted a rehearing on the appeal decision filed September 29, 1989.

ISSUE

Whether claimant has established that she is permanently totally disabled.

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 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).

ANALYSIS

Defendants have sought a rehearing of the appeal decision filed September 29, 1989. In essence, defendants argue that the decision fails to give proper weight to claimant's alleged lack of cooperation with the vocational rehabilitation worker. Defendants argue that this failure to cooperate displays a lack of motivation, and therefore the award of permanent total disability is inappropriate. Defendants also argue that awarding permanent total disability in the face of this non-cooperation sends an inappropriate message to employers, discouraging vocational rehabilitation efforts.

Defendants recite, in support of their allegation of non-cooperation and lack of motivation, the fact that claimant failed to complete a form requested of her by the vocational rehabilitation worker, and the fact that claimant did not maintain contact with the worker. Claimant responds by pointing out that the form in question was long and complex, and beyond claimant's understanding. In addition, claimant argues, the form requested irrelevant details such as claimant's past dating partners and roommates.

Defendants improperly focus on one factor in the determination of industrial disability, motivation. Several factors, including claimant's age, education, degree of physical impairment, past work experience, loss of earnings, etc., go into any analysis of industrial disability. Defendants conclude that if claimant's motivation is found to be lacking, then a finding of permanent total disability is foreclosed. This is incorrect. Although motivation or lack thereof is certainly a factor of industrial disability, it is no more controlling than any other factor. Even if claimant is found to lack motivation to return to work, other factors in the industrial disability determination may nevertheless establish industrial disability of varying degrees, including permanent total disability.

In addition, the record does not clearly show claimant is without motivation. Claimant on two occasions requested back to work slips from her doctors, but subsequently found she could not perform her duties. Claimant's failure to complete the vocational rehabilitation worksheet, although not to be condoned, does not in and of itself require a conclusion that claimant is not motivated to return to work. These factors were duly noted in the appeal decision and their effect on the determination of industrial disability gauged.

Claimant's work restrictions severely limit the job possibilities available to her. Clark Williams, the vocational rehabilitation worker, identified several jobs from a list of job titles. However, he was not retained for placement, but for job identification only, and he had not investigated any of the positions to ascertain if claimant could actually perform the duties in light of her restrictions. Claimant's age and education make finding a job very difficult for her. Even with the best motivation to return to work, claimant would have a very difficult time in finding work fitting her restrictions.

In essence, defendants simply disagree with the weight given in the appeal decision to claimant's motivation. Defendants feel the evidence shows claimant was not motivated, and that this precludes a finding of permanent total disability. The appeal decision concluded that claimant's lack of efforts to find substitute employment did not qualify her as an "odd lot" worker.

A worker can fail to establish that she is "odd lot" and yet be entitled to a finding of permanent total disability.

The conclusion that claimant is entitled to a finding of permanent total disability is limited to this case and these particular facts. This is not to mean that under a different set of facts, involving a different worker with different restrictions, the same conclusion would be reached. Since claimant's industrial disability is a factual determination, this conclusion should not, contrary to defendants' argument, discourage employers from utilizing vocational rehabilitation services in the future.

The appeal decision found that claimant did not have good motivation to return to work. The appeal decision, nevertheless, concluded that the other factors of industrial disability compelled a conclusion that claimant is, as a result of her work injury, permanently and totally disabled. Defendants have not offered any new arguments that require a different conclusion. The appeal decision of September 29, 1989 will remain unchanged.

FINDINGS OF FACT

1. The work injury of August 8, 1985, was a cause of a five percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of not standing nor walking over two hours at any time.

2. Claimant has a lifting restriction of not over 10 pounds.

3. Claimant cannot work more than four hours per day.

4. Claimant is 59 years old.

5. Claimant has a high school education.

6. Claimant has deficient math skills.

7. Claimant's work experience is limited to physical labor and factory work.

8. Claimant has lost her capacity to earn wages.

CONCLUSIONS OF LAW

Claimant has established by the greater weight of the evidence that her present back condition is permanent and is causally related to her work injury of August 8, 1985.

Claimant is not an "odd-lot" employee.

Claimant has established by the greater weight of the evidence that she is permanently and totally disabled as a result of her work injury of August 8, 1985.

ORDER

THEREFORE, it is ordered:

That defendants is to pay unto claimant permanent total disability benefits at a rate of one hundred twenty-seven and 83/100 dollars ($127.83) during the period of her disability.

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

Signed and filed this 30th day of January, 1990.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY W. McCLURE, Claimant, vs. AUDUBON BROOKHISER TRANSPORT INC., Employer, and HAWKEYE-SECURITY INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 795095 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a ruling denying defendants' motion for rehearing and for reconsideration and granting claimant's motion for summary judgment.

The record on appeal consists of the deputy industrial commissioner's ruling on defendants' motion for rehearing and reconsideration and the agency's file on the matter. Defendants filed a brief on appeal.

ISSUES

Defendants state the issues on appeal are:

1. Whether a wheelchair is an appliance or a permanent prosthetic device.

2. Whether the defendants are liable to furnish claimant a replacement wheelchair which wore out through ordinary wear and tear.

REVIEW OF THE EVIDENCE

The ruling on the motion for summary judgment filed November 10, 1988 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

In ruling on a motion for a summary judgment, the court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does. See, Bauer v. Stern Finance Company, 169 N.W.2d 850, 853 (Iowa 1969).

Iowa Code section 85.27 provides in pertinent part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.
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> ....
>
> When an artificial member or orthopedic appliance, whether or not previously furnished by the employer, is damaged or made unusable by circumstances arising out of and in the course of employment other than through ordinary wear and tear, the employer shall repair or replace it.

Division of Industrial Services Rule 343-8.5(85) provides:

> Appliances are defined as hearing aids, corrective lenses, orthodontic devices, dentures, orthopedic braces, or any other artificial device used to provide function or for therapeutic purposes.
>
> Appliances which are for the correction of a condition resulting from an injury or appliances which are damaged or made unusable as a result of an injury or avoidance of an injury are compensable under Iowa Code section 85.27.

In a decision of 85.27 benefits, the deputy industrial commissioner determined that special shoes prescribed for claimant and built for him to correct a compensable injury, were an appliance. In addition, defendant was liable to furnish replacement shoes which wore out through ordinary wear and tear. Giese v. Capital Foods, III Iowa Industrial Commissioner Report 95 (1983).

ANALYSIS

Defendants raised an issue of genuine fact in their motion for rehearing which merits determination. The factual issue raised is whether claimant's wheelchair wore out through ordinary wear and tear, or if the wheelchair was made unusable as a result of claimant's current employment. Since this issue was not originally before the deputy, claimant's motion for summary judgment is overruled. An evidentiary hearing is necessary to determine the factual issues of the case.

The deputy was correct in determining that a wheelchair is an orthopedic appliance and not a prosthetic device. A prosthetic device is an artificial device designed to replace a missing part of a human body. As a wheelchair does not replace a missing body part, it is not a prosthetic device. On the other hand, a wheelchair is a device designed to provide the claimant with mobility, the former function of his legs, and is an orthopedic appliance.

The second issue is whether defendants are required to replace an orthopedic appliance which wore out through ordinary wear and tear. As stated, a factual dispute exists as to whether claimant's wheelchair wore out as a result of ordinary wear and tear or was made unusable due to claimant's current employment.

If the deputy determines that claimant's wheelchair wore out through ordinary wear and tear, then defendants are required to repair or replace it. Claimant's wheelchair is designed to relieve the claimant of the physical effect of a compensable injury, but for claimant's employment with defendants, he would not be in the wheelchair. Section 85.27 does limit an employer's liability in regard to permanent prosthetic devices. However, according to Iowa Code section 85.27, the employer is still required to furnish reasonable and necessary crutches, artificial members and appliances that wear out through ordinary wear and tear. As long as claimant's wheelchair is necessary, defendants are required to repair and replace claimant's wheelchair that has worn out through ordinary wear and tear.

On the other hand, if claimant's wheelchair was made unusable by circumstances arising out of and in the course of his current employment, defendants are not required to repair or replace that wheelchair. It is clear that the last paragraph of section 85.27 refers to claimant's current employer and not defendants. Section 85.27 requires the claimant's current employer repair or replace an orthopedic appliance made unusable by his current employment rather than ordinary wear and tear. On remand, the deputy should determine whether claimant's wheelchair was made unusable by circumstance other than ordinary wear and tear, and if so, defendants are not required to replace that

wheelchair. Defendants are not relieved of their liability to furnish claimant additional wheelchairs that wear out through ordinary wear and tear.

FINDINGS OF FACT

1. Claimant is confined to a wheelchair as a result of a compensable injury.

2. Claimant's wheelchair is designed to provide the claimant with mobility, the former function of his legs.

CONCLUSION OF LAW

A wheelchair is an orthopedic appliance.

An evidentiary hearing is necessary to determine the cause of claimant's wheelchair wearing out.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant's motion for summary judgment is overruled.

That this case is placed back into assignment for pre-hearing.

Signed and filed this 26Th day of December, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SCOTT C. MCKELVEY, Claimant, vs. BURLINGTON MEDICAL CENTER, Employer, and ST. PAUL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 772870 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 as the result of an alleged injury on August 20, 1984. The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 15. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: Whether the deputy commissioner's finding that claimant only has a 20 percent permanent partial disability of his right arm as a result of the injuries he sustained on August 20, 1984, was contrary to law and the evidence and following therefrom whether the deputy commissioner's further assessment of costs against the claimant was in error.

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.

FINDING OF FACT

Scott C. McKelvey has a 20 percent permanent partial disability of his right arm as a result of the injuries he sustained on August 20, 1984.

CONCLUSION OF LAW

Scott C. McKelvey is entitled to receive 50 weeks of compensation for permanent partial disability representing a 20 percent permanent partial disability of his right arm under the provisions of Iowa Code section 85.34(2)(m).

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from this proceeding as his entitlement to compensation was fully paid voluntarily by the defendants prior to hearing.

That the costs of this action are assessed against claimant pursuant to Division of Industrial Services Rule 343-4.33, including the following:

Cynthia Varelli, Dr. Fischer's deposition	$ 59.00
Linda M. Flakne, Dr. Jochims' deposition	155.00
Expert witness fee, Dr. Jochims	150.00
Total	$ 364.00

Signed and filed this 15th day of August, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

IRVING A. MERRILL, Claimant, vs. EATON CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 707565 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 alleged injury on July 7, 1982.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A, B, D and reports attached to a letter dated October 25, 1988; and defendant's exhibits 1 through 4. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUE

Claimant states the following issue on appeal: Whether claimant is entitled to permanent total 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

On appeal, claimant urges that the deputy's award of 50 percent industrial disability is inadequate and that he is entitled to a finding that he is permanently and totally disabled. In particular, claimant argues that the deputy's

decision places too much weight on claimant's age and his retirement. The deputy's analysis is incorporated herein by reference with the following additional analysis.

Claimant was 68 years old at the time of the hearing. After his injury, claimant returned to work. When claimant approached the age of 65, claimant told his employer he wished to retire. The employer had provided claimant with another job after he returned to work. Claimant maintains that although he performed this job for two years after returning, he was unable to physically handle the duties and that his decision to retire was therefore involuntary. Claimant states he would have liked to keep working beyond the age of 65, but his injury prompted him to retire at age 65.

Although the parties devote much of their appeal briefs to the question of whether claimant's retirement at age 65 was voluntary or not, it is beyond question that claimant was not asked to retire, but chose to retire. Claimant maintains that he was forced to retire, not by his employer, but by his physical condition as a result of the injury. There is no medical evidence in the record to substantiate this, other than the general admonition of claimant's physicians that he return to work duties as he was able to. None of claimant's physicians stated that claimant should retire. The decision to retire was made by claimant alone.

The question of whether claimant's retirement was voluntary or not is secondary to the effect of claimant's age on his industrial disability. Claimant's age places him at a stage in life when most workers are retired or contemplating retirement. Claimant's injury has deprived him of earning capacity, but claimant has lost less earning capacity than that suffered by a younger worker with the same injury. 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., 34 Report of the Iowa Industrial Commissioner Thirty-fourth (Appeal Decision 1979). Thus, although claimant's retirement and the circumstances behind it are given weight, claimant's age and proximity to retirement age are factors in the determination of industrial disability whether claimant retires or not.

FINDINGS OF FACT

1. Claimant sustained various injuries arising out of and in the course of his employment on July 7, 1982.

2. As a result of the July 7, 1982 injury, claimant had surgery on his right shoulder and right ankle.

3. Claimant returned to work on December 1, 1983 after his injury on July 7, 1982 and he continued his employment until November 18, 1985.

4. Claimant voluntarily retired on November 18, 1985, at the age of 65.

CONCLUSIONS OF LAW

As a result of the July 7, 1982 injury, claimant is functionally impaired.

Claimant has met his burden of proving he has a 50 percent permanent partial disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant is to pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of two hundred seventy-one and 62/100 dollars ($271.62) per week.

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 is to take credit for benefits previously paid claimant.

That costs of this action are assessed against the defendant pursuant to Division of Industrial Services Rule 343-4.33.

That defendant shall file a claim activity report upon payment of this award.

Signed and filed this 9th day of May, 1990.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARGARET MEYER, Surviving Spouse, and MARVIN H. MEYER, ESTATE by MARGARET MEYER, Executor, Claimant,	:	File No. 797037
vs.	:	A P P E A L
IOWA STATE PENITENTIARY, Employer,	:	D E C I S I O N
and	:	
STATE OF IOWA, Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant benefits.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 38; and defendants' exhibits A through E. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant's claim for death benefits is barred by Iowa Code section 85A.12 (1983). Claimant also raises certain constitutional arguments that will also be addressed.

REVIEW OF THE EVIDENCE

The arbitration decision filed November 14, 1988 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 issue and evidence.

ANALYSIS

Certain material facts are not in dispute. Claimant's decedent was employed by defendant employer from September 1, 1963 until December 15, 1978, when he retired. The last day decedent worked was October 13, 1978. Claimant was exposed to asbestos during his employment. In the time period between December 15, 1978 and January 1982 the decedent sometimes had flu-like symptoms which lasted a day or so. The decedent was hospitalized in January 1982 and eventually died on June 22, 1983. An autopsy performed on the date of death states that mesothelloma of the right hemlthorax was the number one anatomic diagnosis. The death certificate dated June 26, 1983 shows that the first cause of death was cerebral hemorrhage and pneumonia and the second cause of death was mesothelloma (malignant) - primary site pleura. Claimant learned decedent had cancer in March of 1982. The first notice claimant gave to the employer was the original notice and petition which was served on June 24, 1985. The claimant initiated this proceeding after she had obtained the autopsy with the assistance of her attorney. Claimant did not see the death certificate until after this proceeding was initiated.

Under Iowa Code section 85A.12 an employer is not liable unless the provisions of that section are satisfied. The provisions include a requirement that "disablement or death results within three years in case of pneumoconiosis, or within one year in case of any other occupational disease, after the last injurious exposure to such disease in such employment." It should be noted that there is no indication in the record that compensation had been paid or awarded. Therefore, the quoted language is dispositive of this matter.

Disablement is defined in Iowa Code section 85A.4 as follows:

> Disablement as that term is used in this chapter is the event or condition where an employee becomes actually incapacitated from performing the employee's 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.

Under the statutory definition of disablement or under the concept of industrial disability, the earliest the decedent could have been disabled was when he was hospitalized in January 1982. There was no time prior to January 1982 that he was incapacitated from performing work. Flu-like symptoms that lasted a day or so prior to them would not constitute disablement. Decedent died on June 22, 1983. The last date he was exposed to a disease in his

employment would be the last day he worked which was October 13, 1978. Neither decedent's disablement nor his death occurred within one year of October 13, 1978. Likewise, neither decedent's disablement nor death occurred within three years of October 13, 1978. Claimant's claim is barred by Iowa Code section 85A.12. The claim is barred whether decedent suffered from pneumoconiosis or from an occupational disease. The conclusion is the same whether decedent had an occupational disease or pneumoconiosis. Therefore, no ruling on whether decedent suffered pneumoconiosis is necessary. The employer's liability has been lost through the passage of time.

The so called discovery rule has no application in light of the statutory language used in Iowa Code section 85A.12. The concepts of injury and occupational disease cannot be used interchangeably. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 190 (Iowa 1980). The legislature has recognized a distinction between an injury and an occupational disease. See Iowa Code section 85.61(5).

Claimant also raises certain constitutional questions that can be dealt with summarily. It is unclear whether claimant is attacking the constitutional validity of the statute involved. This agency has no jurisdiction to determine the constitutional validity of the statute. Salsbury Laboratories v. Iowa, Etc., 276 N.W.2d 830 (Iowa 1979). If claimant raises constitutional issues other than the validity of the statute, those issues need not be considered when another question is decisive. See Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981). The interpretation of the statute is determinative of this appeal and the constitutional issues raised are not reached.

FINDINGS OF FACT

1. Claimant's decedent was employed by defendant employer from September 1, 1963 to December 15, 1978.

2. Claimant's decedent last performed work for defendant employer on October 13, 1978.

3. Claimant's decedent was exposed to asbestos and asbestos dust during the course of his employment for defendant employer.

4. Claimant's decedent incurred an occupational disease as a result of his employment for defendant employer.

5. Claimant's decedent's last injurious exposure to an occupational disease in his employment was October 13, 1978.

6. Claimant's decedent was first disabled from an occupational disease when he entered Fort Madison Hospital on January 25, 1982.

7. Claimant's decedent died on June 22, 1983.

CONCLUSION OF LAW

Claimant's decedent's disablement or death did not occur within three years or one year of his last injurious exposure to an occupational disease.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That costs of this action including transcription of the arbitration hearing are charged to claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 27th day of February, 1990.

David E. Linquist

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAWRENCE "BUD" MILLER, Claimant, vs. WOODWARD STATE HOSPITAL SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendant.	File No. 853647 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

The undersigned has been delegated authority pursuant to Iowa Code section 86.3 to issue the final agency decision in this case. Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on August 7, 1987. Claimant cross-appeals. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A through J; and defendants' exhibits 1 through 8. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the following issues on appeal:

I. The deputy erred in holding that the claimant's injury arose out of his employment.

II. The deputy erred in declaring that any industrial disability suffered by the claimant was attributable solely to the first heart attack of August 7, 1987.

III. The deputy erred in finding that the claimant had suffered a 60 percent loss of earning capacity.

IV. The deputy erred in refusing to recuse himself from hearing and deciding this case based on a conflict of interests.

Claimant states the following issue on cross-appeal: "Whether claimant is permanently totally disabled."

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence, with the additional citations of law contained in the analysis below.

REVIEW OF THE EVIDENCE AND ANALYSIS

Defendants have raised as an issue on appeal the denial of their motion for the hearing officer to recuse himself from hearing the case. The deputy industrial commissioner assigned to hear the case was Larry P. Walshire. Mr. Walshire is a member of Local 3450, Iowa Council 61, American Federation of State, County and Municipal Employees (AFSCME). AFSCME is a union representing state employees in collective bargaining matters. Mr. Walshire serves as President of Local 3450, and has been involved on behalf of state employees in grievance proceedings as well as wage negotiations. The claimant appearing before Deputy Walshire in this case is a state employee and a member of AFSCME, and one of the defendants is the State of Iowa, the governmental entity Mr. Walshire bargains with as a union official.

Defendants filed a motion seeking a recusal of Deputy Walshire from hearing the case. Defendants pointed out Iowa Administrative Code section 343-4.38 (17A), which provides:

> Any individuals presiding over contested cases before the industrial commissioner shall disqualify themselves from conducting a hearing on the merits or deciding any contested case in which such individual has substantial prior contact or interest or is so related to or connected with any party or attorney thereto so as to give, in the opinion of the person presiding, even the appearance of impropriety for such individual to conduct such hearing or decide such case.

Rule 4.38 was cited by defendants in their motion for recusal. However, 4.38 deals with self-disqualification by the hearing officer. By its language, the rule is invoked only when the deputy subjectively concludes that an appearance of impropriety exists. Deputy Walshire concluded that no appearance of impropriety existed.

The actual nature of the defendants' motion for recusal was a claim of bias. As a motion for involuntary disqualification, defendants' motion should not have been brought under rule 4.38, but under Iowa Code section 17A.17(4). That section states:

> A party to a contested case proceeding may file a timely and sufficient affidavit asserting disqualification according to the provisions of subsection 3, or asserting personal bias of an individual participating in the making of any proposed or final decision in that case. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

Iowa Code 17A.17(4) also refers to a timely affidavit alleging grounds for disqualification. A motion for recusal filed on the morning of the scheduled hearing cannot be viewed as timely, especially in light of the requirement of 17A.17(4) that the agency, presumably someone other than the deputy who is alleged to be biased, determine the matter. Deputy Walshire's union position and activities were known to the defendants well in advance of the date of the hearing. Regardless of the merits of the motion for recusal based on Deputy Walshire's union position, it was not properly raised in this instance, and will not be addressed on appeal.

However, on appeal the defendants also raise the issue of Deputy Walshire's personal bias as a ground for disqualification, separate and distinct from any possible bias or impropriety by virtue of his union position and activities. The basis of the allegation of personal bias stems from comments made by Deputy Walshire at the time of the hearing, and in his written ruling on the motion for recusal, which was provided to the defendants at the time of the hearing. Since the basis of the claim of personal bias first arose at the hearing, there was no opportunity for the defendants to seek a determination by the agency on grounds for disqualification under 17A.17(4) prior to the hearing. This appeal is, in effect, the first opportunity for the question of personal bias to be addressed by the agency. Thus, the personal bias question will be dealt with in this decision.

Bias has been defined as "advance, preconceived mental attitude or disposition, toward a party to a controversy, of such weight and nature as to materially impair or destroy that impartiality essential to a fair hearing". Cedar Rapids Steel Transp. v. Iowa State Com. Com'n, 160 N.W.2d 825 (Iowa 1968). After receiving the motion for recusal based on his union activities, the following conversation between Deputy Walshire and the parties took place on the record:

> The hearing commences on October 14, 1988. At the time and place previously set by order of the deputy commissioner who handled the last prehearing

conference. Claimant appears at this hearing in person with his attorney, Joseph Bauer. The defendant appears by and through its attorney, Assistant Attorney General Eleanor Lynn. At this time I appoint Susan Peterson as the official shorthand reporter of the proceeding and as custodian of her notes of this proceeding.

It is my understanding that the State has a motion dealing with my hearing this case. And I'll turn it over to the State at this time to make whatever records it wishes to make.

Ms. Lynn: I would like, at this time, to make a motion for this hearing officer to recluse (sic) himself in this matter in view of the hearing officer's involvement in AFSCME and president of the local unit of AFSCME and chairman of the procedures of the fiscal bargaining unit negotiating team. My understanding through Answers to Interrogatories and answers in depositions in this matter is that the claimant is dues-paying member of AFSCME. The combination of those factors calls into question the impartiality of the hearing officer or gives at least the appearance of impropriety due to the fiduciary duty of the hearing officer to AFSCME members.

I would like to base this motion on Iowa Administrative Code 343-4.38 as well as Canon 2 and Canon 5 of the Code of Judicial Conduct and any and all other matters in case law cited in the brief of Twaddle, T-w-a-d-d-l-e, versus Glenwood State Hospital School, File Number 529223.

Deputy Commissioner Walshire: Mr. Miller, would you raise your right hand to be sworn?

Laurence D. Miller, called as a witness, having been first duly sworn, testified as follows:

Examination by Deputy Commissioner Walshire:

Q. Mr. Miller, are you indeed a member of AFSCME, which is a labor union within the state of Iowa?

A. Yes, I am.

Q. And what bargaining unit are you in?

A. Local 299.

Q. You're in Local 299, which is a local limited to the geographical area of Woodward State Hospital, is that correct?

A. Right.

Q. And the bargaining unit you're in is a technical bargaining unit in your classification?

A. Yes, it is.

Q. You are not a professional fiscal and staff --

A. No.

Q. -- employee? Okay. And you're not in a local called 3450 which I am president of which is a local consisting of technical and professionals in the capitol complex?

A. No, I'm not.

Deputy Commissioner Walshire: In light of those answers to the questions, I will have to deny your motion. I am not in any leadership capacity over this individual, never have been, and specifically have issued a written ruling in the past on this very same motion. And I will hand this out to the parties at the present time as my ruling. Mr. Bauer, here's your copy. And, State, here's your copy.

Mr. Bauer: Thank you, Your Honor.

Ms. Lynn: Thank you.

Deputy Commissioner Walshire: I think it fully sets out the reasons why I feel fully able to hear this case, and if there is any impropriety at all in the system, it's that management has the last word in this agency, not an AFSCME member. That is, my decisions are appealed de novo to my industrial commissioner, who is a member of the management team and appointed and essentially serves at the pleasure of the governor even though it is for a term, but --

Mr. Bauer: Can I add something?

Deputy Commissioner Walshire: Why, you go ahead.

Mr. Bauer: I don't know what this has bearing on legally, but I guess my response to the motion -- I don't know what your ruling's going to be, but my

response to the motion is that I incorporated all those arguments which you have set forth in your ruling.

As a sidelight, I guess I don't know whether the attorney general himself is involved in the decision to do this, but it would seem at least as a prospect absolutely that a person who is normally a Democrat running for governor involved in questioning union activity makes an interesting observation as to what his motivations may be.

Ms. Lynn: Yeah, I'm going to move to strike that in view of the fact that you've already ruled on the motion.

Deputy Commissioner Walshire: Well, everything will be a part of the record. If I move to strike it, it will be part of the record.

Mr. Bauer: I profess my remarks -- I don't know if they have anything to do legally. I question whether first of all it's any -- it has any valid meaning here anyway, but --

Deputy Commissioner Walshire: I'd also like to -- for the record -- that it's rather interesting that this motion occurs. I've been involved in union activities for the last four years, heavily involved in them, acting in a leadership capacity and been a member and officer of the local for over two years. It was only after I issued an adverse decision against the state attorney general's office imposing punitive damages upon the State for unreasonable denial of a claim in March that I started receiving these reclusal (sic) orders or requests. I'm -- I hope this is not retaliation for that decision. But I can only say that it never happened before that decision, and it's happened consistently beginning in April soon after this decision occurred.

Ms. Lynn: Your Honor -- I'm sorry. I thought you were done.

Deputy Commissioner Walshire: I would ask the attorney general's office to consider its own ethics in this matter. Enough said.

Ms. Lynn: May I state, for the record, Your Honor, that I was present at the staff meeting where this issue was discussed and the particular decision that you're referring to wherein any sanctions may have been ordered was never, never brought up at that meeting in

any way in any context. I believe that the matter turned more on -- I'm not sure when you even became president of the local chapter, but it was at that time it became known at least.

Deputy Commissioner Walshire: It's also interesting in observations is that our deputy commissioners who are a little more conservative in their views are officers of my local and are not asked to recluse (sic) themselves from any involvement in State cases.

Ms. Lynn: I don't know who the other officers are, Your Honor.

Deputy Commissioner Walshire: That probably wasn't discussed either, was it?

Ms. Lynn: No. I know of at least one other hearing officer that was discussed in terms of his functions in the union, but I don't know of others beyond the two of you.

Deputy Commissioner Walshire: You wouldn't bother to explain why you're limiting your asking to just two individuals in this office?

Ms. Lynn: It was based within the functions in the union. There was a discussion as to whether mere membership in AFSCME would be enough to request a reclusion. It was felt that mere membership would not.

Deputy Commissioner Walshire: Due to the fact that you asked me to represent -- some administrative law judges and all the agencies at the capitol complex are represented by my local. All administrative law judges, not just a few, and many of those are members and some are officers of my local, yet no reclusal (sic) requests are made to those in which the State is a part in every one of those cases.

Ms. Lynn: I can assure Your Honor, there is nothing personal in this, especially on my part.

Deputy Commissioner Walshire: I find it hard to believe that. Let's move on. Again my decision is de novo to my commissioner, and if there's any impropriety, it will be taken care of in any appeal process, I assume.

In his written ruling on the motion, Deputy Walshire stated:

> The undersigned hopes that the recusal request was not motivated by retaliation for any prior proposed decision or a desire to influence the undersigned's proposed decision in this or any other case. However, even if made with innocent intentions, a recusal request adversely affects the decision making process and should not be frivolously advanced. After receipt of such a request, a decision maker's impartiality has been maligned whether by design or not....
>
> Decision makers in this understaffed agency have enough of a burden to bare (sic) and do not need additional, unnecessary pressures. The staff of the attorney general's office in its zealous attempt to point out alleged ethical violations of deputy commissioners appears to have overlooked a few ethical considerations themselves.

Deputy Walshire then recited Iowa Code of Professional Responsibility Disciplinary Rule DR7-102(A), dealing with asserting a position merely to harass or maliciously injure another, and DR8-102(B), dealing with knowingly making false accusations against a judge or other adjudicatory officer.

Clearly, such comments show that a personal animosity toward the assistant attorney general presenting the recusal motion and toward the state of Iowa existed in the deputy's mind. A reading of the transcript and the written ruling would leave no doubt that, prior to any evidence being presented, the state of Iowa was not enjoying its right to have the matter decided by an impartial and unbiased decision maker. Accusations of unethical behavior, of conspiracy to pressure a particular decision result, and of judge "harassment" indicate bias. The deputy's verbal comments that he "doubted" the motivation behind the filing of the recusal motion, coupled with the statement in the written ruling that the mere filing of the motion to recuse was regarded as maligning his impartiality, also indicate bias.

It is therefore concluded that Deputy Walshire displayed personal bias towards the defendants on the date of the hearing, and should have been disqualified from hearing the case. The case should have been reassigned to another deputy who did not display such bias. However, the timing of the display of bias was such that the hearing was conducted by Deputy Walshire without a determination of disqualification by the agency as required by Iowa Code 17A.17(4).

The arbitration decision itself is, by statute, reviewed de novo on appeal. Initially, it is noted that Deputy Walshire, both as part of his written ruling on the motion to recuse and in

his verbal comments at the hearing, noted that any impropriety in his presiding over the hearing could be corrected on de novo appeal to the Industrial Commissioner. However, any party appearing before a judicial officer, whether the officer is a district court judge or an administrative law judge, is entitled to due process under both the U. S. Constitution and the Iowa Constitution. In that decision makers in judicial proceedings adjudicate the rights and responsibilities of citizens and entities in our society with great importance and far reaching effects for the parties, it is essential that all parties to litigation can rest assured that they enter the courtroom or hearing room with an impartial trier of fact presiding. To say that any impartiality or lack of due process is not important because it can be corrected later on appeal indicates a misunderstanding of the very nature of due process. Justice delayed is justice denied. If a party must undergo the expense, the uncertainty, and the delay of an appeal to obtain the due process that the party was entitled to at the first level of adjudication, then our system is not fulfilling its obligation. If a party is aggrieved at the first level of adjudication by a biased hearing officier and cannot afford to pursue an appeal, the denial of due process would never be addressed. A party is entitled to due process at all levels of the adjudication process, not just at the appellate level. It is therefore inappropriate to excuse bias by relying on de novo appellate review to correct the bias.

The deputy's decision will now be reviewed de novo. Claimant, 43 years old, with a high school education and 2 and 1/2 years commercial art institute training, was employed by Woodward State Hospital School as a resident treatment worker, where his duties included the care and supervision of retarded persons and custodial duties. Claimant was working the 10:45 p.m. to 6:00 a.m. shift on August 7, 1987, when he experienced stomach discomfort and began to vomit blood at about 1:00 a.m.. Claimant testified he thought he was experiencing indigestion. Claimant had a history of morning nausea, and had had a heart stress test administered to him three days before by his physician, with a result of no abnormality.

A co-worker called claimant's supervisor and informed her of claimant's illness. Claimant decided to continue working, and later washed some laundry barrels. Claimant testified that after this activity he began to experience chest pains. Claimant's supervisor was called two more times and on the third call the supervisor told claimant he should leave work as soon as a replacement arrived. There was testimony that the hospital was overstaffed that night and a replacement was readily available. However, the arrival of the replacement took 20 minutes during which time claimant continued to work by folding clothes.

Claimant left work at approximately 3:00 a.m., and began to drive home, which was 17 miles away. Claimant testified that during this trip he had to stop several times because of pain and discomfort and that the trip took over an hour. Claimant collapsed on his front porch where his wife found him and took him to the hospital. At the hospital claimant underwent an angioplasty on his left ventricular coronary artery, which was found to be blocked. Claimant was diagnosed as having suffered a heart attack. Myocardial infarction or death of heart muscle tissue, had occurred.

Claimant had been experiencing chest pains for a period of 3 or 4 weeks prior to his heart attack on August 7, 1987, and medical records indicated that claimant experienced chest pain as early as September of 1986. Claimant also had a family history of heart disease and claimant had high blood pressure. Claimant was also a smoker.

After his August 7, 1987 heart attack claimant was off work until October of 1987, when he resumed his duties. Claimant continued to experience periodic chest pain. On May 10, 1988, claimant suffered a second heart attack while mushroom hunting. Claimant was hospitalized and another angioplasty performed. Claimant's blockage was found to be located in a different part of the heart than was involved in the August 7, 1987, heart attack. One of claimant's doctors, Mark McGaughey, M.D., described the May 10, 1988, heart attack as less severe than the August 7, 1987, heart attack, but stated that both heart attacks resulted in the death of heart tissue.

Dr. McGaughey stated that claimant, as a result of his August 7, 1987, heart attack, should be restricted from heavy work but could perform desk work. F.S. Downs, M.D., also restricted claimant from returning to his former work at Woodward State Hospital School and restricted claimant to non-stress work.

Claimant seeks an award under the holding of Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Under this case, a claimant with a prior heart condition is not required to show the unusual stress required by Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). Rather, under Varied Enterprises, claimant may be able to show that his present condition arose out of his employment if the evidence shows that claimant continued working after the onset of heart attack symptoms, and that the continuation of work contributed to the impairment caused by the heart attack.

Defendants argue on appeal that claimant here, unlike the claimant in Varied Enterprises, was not impelled to remain at work once his heart attack symptoms occurred. Defendants points out that claimant was not told he had to remain at work, and in fact claimant was readily given permission to leave once he

requested it, although a delay did occur while a replacement was found.

Although the Varied Enterprises case did involve a truck driver who felt impelled to continue working after the onset of heart attack symptoms because of his probationary status with his employer, there is no explicit requirement in that case that a worker feel impelled to remain at work because of a fear of losing one's job. Indeed, the Varied Enterprises court implied that such compelling circumstances, although present in that case, were not a prerequisite to compensation:

> Moreover, we view the example set forth in the Larson treatise as only having reference to one type of situation which strongly demonstrates a causal contribution to employment. It does not purport to establish an absolute requirement that a claimant be motivated to continue working in the face of a known health deprivation in order to produce a compensable situation.

Varied Enterprises, at 409.

A worker who is conscientious may delay seeking medical treatment simply because of a self-imposed work ethic that dictates against taking sick leave unless absolutely necessary. If this delay results in additional injury, the injury does arise out of the employment. This is especially true here, where there is every indication that claimant did not recognize he was experiencing a heart attack, but instead felt he was suffering indigestion. Thus, the essential inquiry under Varied Enterprises is whether claimant underwent additional stress resulting in impairment by continuing to work after the onset of heart attack symptoms. Compensability hinges on whether claimant's continued work activity substantially contributed to his condition, and not whether claimant felt impelled to continue working or merely chose to continue working.

The stress resulting from continuing to work can take the form of additional physical stress, mental stress, or an increase in impairment caused by delaying the acquisition of medical assistance. In this case, claimant's decision to continue working resulted in claimant washing out heavy laundry barrels, which then resulted in chest pains. However, Dr. McGaughey opined that although additional physical stress during the early stages of a heart attack may increase impairment, that was not indicated in this case.

Dr. McGaughey placed greater emphasis on the delay in obtaining medical treatment. Claimant testified that he left work approximately one and one half to one and three quarters hours after he first experienced symptoms. Claimant then drove home, a trip that took from one hour to one hour and fifteen

minutes. Claimant was admitted to Boone County Hospital, where he remained for an hour and forty-five minutes before being transferred to Mercy Hospital in Des Moines, where he was admitted at 7:35 a.m. Dr. McGaughey testified that heart attack patients that are treated within one and a half hours and not beyond four hours of the blockage will suffer less damage because beyond four hours, the heart muscle tissue will have already died.

Thus, claimant was not seen by a physician until approximately three hours after his symptoms first occurred. Claimant was then transferred to another hospital and admitted before the angioplasty itself was performed. The three hour delay represented by the time claimant continued to work after the onset of symptoms and his drive home meant that even an angioplasty could do little to help claimant, since much of his heart tissue apparently died during the delay. Dr. McGaughey opined that this delay resulted in additional, irreversible damage to claimant's heart tissue. The damage to claimant's heart caused by the delay in obtaining treatment while claimant continued to work is an injury arising out of his employment.

The second issue on appeal is to what extent claimant's present disability stems from his work related heart attack. Claimant suffered two heart attacks. It has been determined above that the heart attack of August 7, 1987, was work related. Claimant's second heart attack, while mushroom hunting on May 6, 1988, was clearly related. Claimant went back to work at his old job after his first heart attack. Claimant's restrictions were imposed after his second heart attack.

Dr. McGaughey stated that claimant's second heart attack was unrelated to the first heart attack, and pointed out that a separate blood vessel was involved in the May 6, 1988 heart attack that was not involved in the August 7, 1987, heart attack. However, Dr. McGaughey attributed both heart attacks to rapidly progressive coronary disease. Dr. McGaughey also testified that claimant suffered a 20 percent permanent partial impairment of the body as a result of the August 7, 1987, heart attack. Dr. McGaughey's statements as to restricting claimant from heavy work were also made in response to a question about the effects of the August 7, 1987, heart attack. Dr. Brown recommended claimant seek a less stressful job after the first heart attack and before the second heart attack occurred. The ejection fraction of 45 percent of the heart, which formed the basis for Dr. McGaughey's rating, was known within six weeks after claimant's first heart attack. Dr. McGaughey did not ascribe any rating of impairment or work restrictions to the May 6, 1988, heart attack. The heart damage that forms the basis of claimant's present condition existed prior to the May 6, 1988 heart attack, and was clearly caused by the August 7, 1987, heart attack. There is no indication that claimant's less severe heart attack on May 6,

1988, caused any permanent impairment. Claimant's present impairment is attributable to his August 7, 1987, heart attack.

The nature and extent of claimant's disability is to be measured industrially. Claimant is 43 years old. This age normally represents a point in a worker's career when earnings are highest. Claimant's education beyond high school is minimal, and limited to the field of commercial art. Claimant's work experience consists of retail management and his work as a resident treatment worker. Claimant's doctors have indicated he cannot return to his work as a resident treatment worker.

Claimant has suffered a 20 percent permanent partial impairment of his body. Claimant has restrictions against heavy work, or stressful work. Claimant has not been offered alternative employment within his restrictions by the employer. However, claimant has made no conscientious efforts to find substitute employment on his own.

There is no medical evidence that claimant is totally incapable of performing work. Claimant's rating of physical impairment is less than total, and claimant has not pled the odd lot doctrine. Even if the odd lot doctrine had been pled, claimant has not shown sufficient attempts to find employment to invoke the burden-shifting effect of the odd lot doctrine. Claimant is capable of performing work within his restrictions. Claimant is not permanently totally disabled.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 45 percent.

FINDINGS OF FACT

1. On August 7, 1987, claimant suffered a heart attack in the course of his employment at Woodward State Hospital.

2. Claimant continued working for over 2 hours while experiencing severe vomiting with blood and chest pains.

3. Claimant left Woodward at 3:30 a.m. and returned home, a trip which took over an hour, and was immediately transported by his wife to the hospital.

4. Claimant underwent angioplasty surgery to remove the blockage in one of his coronary arteries but surgery was too late to prevent extensive heart damage.

5. It is probable that had claimant been treated sooner, heart damage would have been significantly less.

6. On May 10, 1988, claimant experienced a second heart attack as a result of a blockage of a different artery than the artery involved in the August 1987 attack.

7. The work injury or heart attack of August 7, 1987, was a cause of a 20 percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no heavy lifting or work or stressful employment of any kind.

8. Claimant is 43 years of age and has a high school education with some advanced art training.

9. Claimant's restrictions prevent him from returning to the work for which he is best suited given his work history and education.

10. Claimant has not been offered any alternative employment by the State of Iowa.

11. Claimant has shown little motivation to seek alternative employment or vocational rehabilitation on his own.

12. The work injury and heart attack of August 7, 1987 and resulting permanent partial impairment and work restrictions were a cause of a 45 percent loss of earning capacity.

13. The medical expenses listed in the prehearing report constitute reasonable and necessary treatment of the work injury on August 7, 1987, except for the expenses relating to the treatment of claimant's heart attack on Ma 10, 1988, namely: The Mercy Care on May 10 through May 16, 1988 ($8,167.25); the care of Dr. Downs on May 10, 1988 ($74.00); and the care the Cardiology Associates from May 11, 1988 through May 15, 1988 ($2,819.00).

CONCLUSIONS OF LAW

Claimant's continued work on August 7, 1987, after the onset of heart attack symptoms was an injury arising out of and in the course of his employment.

Claimant's work injury of August 7, 1987 was a substantial cause of claimant's present impairment.

Claimant has an industrial disability of 45 percent.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the rate of two hundred twenty-one and 08/100 dollars ($221.08) per week from October 27, 1987.

That defendants shall pay claimant the medical expenses listed in the prehearing report except those expenses relating to treatment of the May 1988 heart attack set forth in finding number 6 above. Claimant shall be reimbursed if he has paid those expenses. Otherwise, defendants shall pay the provider directly subject to any attorney lien claimant's attorney may have for these 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 receive credit for previous payment 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 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 and specifically the costs listed by claimant's attorney in the prehearing report, exhibit I.

That defendants shall file an activity report 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 May, 1990.

Jon E. Heitland

JON E. HEITLAND
CHIEF DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN W. MINNER, Claimant, vs. ADM, Employer, and OLD REPUBLIC INSURANCE CO., Insurance Carrier, Defendants.	File No. 828393 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 healing period benefits and permanent partial disability benefits based on an industrial disability of 40 percent.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits A and B; claimant's exhibits 1 and 2; and defendants' exhibits 1 through 4. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are whether there is a causal connection between claimant's alleged work injury and the alleged permanent disability and the extent of claimant's permanent disability, if any.

REVIEW OF THE EVIDENCE

The arbitration decision filed August 30, 1988 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 began work for defendant employer in 1971.

2. Claimant received one to two chiropractic treatments per year for lower neck and upper back problems from 1976 to 1985.

3. Claimant, from nonwork activities, had lower cervical, upper thoracic strain in July 1984 and had upper cervical strain in August 1984.

4. Claimant received chiropractic treatment from Elvin Lessenger, D.C., from January 1986 to June 21, 1986.

5. Claimant sought chiropractic treatment for pain in the upper back as a result of heavy lifting at home on June 18, 1986.

6. Claimant received a treatment and a follow-up check from Dr. Lessenger on June 19, 1986 and was treated by Francois LeRoux, D.C., on June 26 and 27, 1986.

7. Dr. Lessenger indicated that claimant was experiencing symptoms related to his right arm on June 19, 1986.

8. On June 29, 1986 claimant was shoveling corn mush at work when he felt pain in the upper neck on the right side.

9. Claimant reported the incident of June 29, 1986 to the employer and finished work that day and worked the following four days at which time he took a week of vacation.

10. Claimant was seen by Eugene Herzberger, M.D., a neurosurgeon on July 15, 1986. Dr. Herzberger diagnosed disc herniations at C6-7 and C5-6.

11. When seen by Dr. Herzberger claimant complained of pain in the right shoulder and right upper extremity.

12. The history given to Dr. Herzberger did not include the incident on June 18, 1986, did not include claimant's prior back

problems, and indicated that the symptoms started immediately with the incident on June 29, 1986.

13. On December 29, 1987 claimant was examined by William Robb, M.D., a board certified orthopedic surgeon.

14. Dr. Robb reviewed the medical records of claimant and pertinent depositions and offered an opinion as to causal connection.

15. It was Dr. Robb's opinion that heavy lifting was not a causal factor but did aggravate claimant's condition.

16. Dr. Robb thought that the lifting episode on June 18, 1986 would have aggravated claimant's condition if that incident were the only traumatic event.

17. Dr. Robb thought that the onset of the disc herniations preceded claimant's July 18, 1986 surgery by at least six weeks, possibly two or three months.

18. Claimant's condition was materially aggravated by the June 29, 1986 incident.

19. Dr. Robb could not quantify the degree of herniations prior to and subsequent to the June 29, 1986 incident.

20. As a result of claimant's athletic endeavors and workouts he was in excellent physical condition at all times material herein.

21. At no time prior to June 29, 1986 did any injury cause claimant a loss of work or a substantial reduction in functional activity.

22. The incident on June 29, 1986 was a substantial factor in claimant's need for fusion surgery to relieve pain.

23. The incident on June 29, 1986 was the cause of a seven to ten percent permanent impairment to the body as a whole and of permanent restrictions consisting of avoidance of repetitive lifting.

24. Claimant was 36 years of age on the date of the work injury.

25. Claimant appears to possess above average intelligence.

26. Although claimant returned to work after surgery and was able to perform the work, claimant had to modify his work activities to avoid pain and continue working.

27. At the time of the arbitration hearing claimant was unemployed but was attending college.

28. The work injury of June 29, 1986 was the cause of a 40 percent loss of earning capacity.

CONCLUSIONS OF LAW

Claimant has proved that there is a causal connection between the alleged work injury on June 29, 1986 and his permanent disability.

Claimant has proved that the work injury of June 29, 1986 was the cause of an industrial disability of 40 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant two hundred (200) weeks of permanent partial disability benefits at the rate of three hundred forty-one and 79/100 dollars ($341.79) per week from March 14, 1987.

That defendants (as stipulated) pay to claimant healing period benefits from June 16, 1986 through March 13, 1987 at the rate of three hundred forty-one and 79/100 dollars ($341.79) per week.

That defendants pay accrued weekly benefits in a lump sum and receive a credit as stipulated in the prehearing report for past payment of benefits.

That defendants pay interest on weekly 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 as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 29th day of November, 1989.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS MOCKENHAUPT, Claimant, vs. GEORGE A. HORMEL CO., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 767982/847923 847924/847925 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

Second Injury Fund of Iowa and defendant employer (hereinafter employer) appeals from an arbitration decision awarding permanent partial disability benefits and Second Injury Fund benefits.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 and 2 and 4 through 18; and defendants' exhibits D-1 through D-7. The Second Injury Fund, the employer, and the claimant filed briefs on appeal.

ISSUES

The issues on appeal are the Second Injury Fund liability, if any, and the nature and extent of claimant's alleged disability resulting from a work injury on April 27, 1987.

REVIEW OF THE EVIDENCE

The arbitration decision filed October 31, 1988 adequately and accurately reflects the pertinent evidence and it will not be

reiterated herein. Additional evidence necessary for the analysis and the findings of fact will be discussed as appropriate.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence. The following additional citation is also appropriate.

The Iowa Supreme Court most recently discussed the liability of the Second Injury Fund in Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989). The court stated at 358:

> The language of the second injury act supports this conclusion by providing that "[t]he 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." To hold otherwise would in effect penalize the employer who hired a person with a prior injury. The purpose of Second Injury Fund statutes was to provide a more favorable climate for the employment of persons injured through service in World War II. Jackwig, The Second Injury Fund of Iowa: How Complex Can a Simple Concept Become?, 28 Drake L.Rev. 889, 890-91 (1979). Similar considerations still weigh heavily in our interpretation of the second injury act. See, e.g., Anderson v. Second Injury Fund, 262 N.W.2d 789, 791-92 (Iowa 1978)(purpose to encourage employers to hire handicapped workers).
>
> In the present case, there seems to be no argument about the extent of the second injury standing alone: it is a scheduled injury which does not extend to the body as a whole, even though the cumulative effect of this injury and the prior injuries was to cause such disability.
>
> In this case, if it had not been for the prior injuries sustained by Neelans, the employer would be liable only to the extent provided by the schedule for a leg injury. To hold that the present employer would be liable for payment of a greater amount as a result of the preexisting injuries would be inconsistent with the purpose and language of the statute.

The industrial commissioner correctly ruled that the Second Injury Fund should be responsible for the industrial disability, less the total of the scheduled injuries, or a total of 262 weeks. Accordingly, we reverse and remand for reinstatement of the order by the commissioner.

ANALYSIS

Several issues raised by the Second Injury Fund can be dealt with summarily. Under the holding in Neelans, 436 N.W.2d 355, the Second Injury Fund is liable for the cumulative industrial disability less the total of the scheduled injuries. (In fairness to the Second Injury Fund, it should be noted that the Second Injury Fund's appeal brief was filed prior to the Neelans decision.)

The Second Injury Fund correctly notes that it is not liable for interest on unpaid compensation benefits. See Braden v. Big "W" Welding Service, (Appeal Decision, October 28, 1988). 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 Second Injury 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.

The Second Injury Fund asserts that the order of the arbitration decision is unclear whether the assignment for the bifurcated hearing on penalty pursuant to Iowa Code section 86.13 applies to the Second Injury Fund. The Second Injury Fund, in effect, argues that penalty is not applicable to it. That argument should be raised at the proceeding regarding the imposition of the penalty. The issue of whether a penalty can be imposed against the Second Injury Fund was not decided by the deputy and is not now properly before the industrial commissioner. It

should be noted that the industrial commissioner is not bound by the arbitration decision cited by the Second Injury Fund. The issue can be decided in further proceedings, if necessary.

The Second Injury Fund raises another argument in its appeal brief which, although not specifically addressed in Neelans, can be disposed of here. The Second Injury Fund argues that it is not liable because claimant does not have a qualifying disability because the injuries were not "substantial." In Neelans, the claimant had a ten percent impairment to the hand and a twenty percent impairment to the leg. The court found the Second Injury Fund liable. Second Injury Fund attempts to take the facts of prior supreme court cases and make law applicable to all cases. By doing so the Second Injury Fund attempts to modify the clear language of the statute. There is simply not good justification to require, as the Second Injury Fund urges, that a claimant's disability be "significant" or "substantial" in order for the Second Injury Fund to incur liability. This is particularly true in light of the Neelans case in which the Second Injury Fund was found to be liable in a case involving what could be characterized as nonsignificant or nonsubstantial disabilities, namely scheduled member disabilities of ten and twenty percent. See also McCoy v. Donaldson Company Inc., (Appeal Decision, April 28, 1989).

Second Injury Fund also argues claimant is limited to assertion of a first and second injury only and that only the first two in time should be considered. In this case the first two in time are both to the left arm and under Second Injury Fund's theory Second Injury Fund would not be liable. While Second Injury Fund argues that this is a perfectly valid defense it cites no case law nor statute for the theory. Second Injury Fund's argument is at odds with the purpose of the Second Injury Fund as enunciated in the Iowa courts, most recently in Neelans. Second Injury Fund's argument simply does not make sense. Why should an employee who has had multiple injuries at various times to the same enumerated scheduled member be denied Second Injury Fund compensation whereas an employee whose "first injury" is a single injury would receive benefits? In addition, Second Injury Fund's argument is inconsistent with the statute. Iowa Code section 85.64 enumerates five scheduled members (hand, arm, foot, leg, or eye). The statute clearly contemplates the possibility of Second Injury Fund liability when an employee loses the use of a hand, arm, foot, and leg in separate injuries and then loses the use of an eye. Simply stated, Iowa Code section 85.64 does not limit Second Injury Fund liability to the first two injuries in time. See also Shank v. Mercy Hospital Medical Center, (Appeal Decision, August 28, 1989) where the Second Injury Fund was found to be liable to a claimant who had loss of use of both eyes due to a congenital condition and later suffered a partial loss of ten percent to the right leg.

Second Injury Fund also argues that claimant's condition is an occupational disease. Second Injury Fund makes its arguments without proving the facts necessary. Second Injury Fund has not proved that claimant's condition is an occupational disease.

The last matter to be discussed is raised by both Second Injury Fund and the employer. The employer acquiesces to the deputy's findings that claimant suffered left carpal tunnel syndrome in 1984 and left ulnar nerve injury in 1986 and right carpal tunnel syndrome in 1986. Both the employer and the Second Injury Fund assert that claimant has suffered no industrial disability. The starting point for determining the liability of the Second Injury Fund and the employer is to summarize the nature of claimant's injuries. Claimant suffered carpal tunnel syndrome of the left arm on June 21, 1984. Claimant suffered right carpal tunnel syndrome on July 2, 1986. The injury dates are determined under McKeever to be when claimant first missed work for a compensable period of time because of the condition. The first time claimant missed work for each of these conditions is when he had surgery for the condition. Claimant missed work continuously from May 7, 1986 through August 22, 1986 (See Exhibit 16). Claimant had surgery for the left ulnar condition on May 7, 1986 and then without returning to work had surgery for the right carpal tunnel syndrome on July 2, 1986. The injury date for claimant's right arm condition is July 2, 1986. Claimant had problems relating to his neck as early as 1981. Claimant eventually sought treatment from B. D. Lange, D.C., who treated claimant and took claimant off work April 28, 1987 through June 10, 1987. Dr. Lange's diagnosis was cervical spondylosis C5-6 made symptomatic by chronic cervical thoracic sprain. Claimant's injury to his neck occurred on April 27, 1987.

The next step in determining the liability of the Second Injury Fund and the employer is to determine the nature and extent of claimant's disabilities from each of the injuries. Jerome Bashara, M.D., orthopedic surgeon, was claimant's treating physician for the three surgeries to claimant's arms. His opinions as to impairment are based upon his extended care of claimant. His opinions as to the impairment for claimant's arms is consistent with Thomas A. Carlstrom, M.D., neurosurgeon, who agreed that the involved surgeries would result in impairment ratings given by Dr. Bashara. Dr. Bashara's ratings and causal connections will be accepted.

Claimant's work injuries of June 21, 1984 and May 7, 1986 were each the cause of a five percent loss of the use of the left arm (total ten percent of the left arm). Claimant's work injury on July 2, 1986 was the cause of a five percent loss of use of his right arm. Claimant's work injury on April 27, 1987 is the cause of eight percent permanent functional impairment of the body as a whole.

The Second Injury Fund became liable for payment of benefits when claimant suffered a permanent loss to the second enumerated scheduled member (the right arm) on July 2, 1986. In order to determine the amount of the liability of the Second Injury Fund it is necessary to determine claimant's industrial disability at that time. Claimant had the impairments discussed above (ten percent to the left arm and five percent to the right arm). He had returned to work with the same employer but was performing different jobs than before the injuries. It does not appear claimant suffered any actual loss of earnings. Claimant was born July 5, 1950 and was 35 years old as of July 2, 1986. Claimant suggests that he will not be able to continue working for the employer much longer. Most medical personnel agree that claimant cannot continue to do the type of work claimant has had with this employer. Claimant has a high school education. There is virtually no evidence shown to indicate claimant's potential for vocational rehabilitation. When all the relevant factors are considered, claimant's cumulative industrial disability was 30 percent as a result of the injuries to his left and right arms. The liability of the Second Injury Fund 112.5 weeks (.30 x 500) - [(.10 x 250) + (.05 x 250)].

It is also necessary to determine claimant's current cumulative industrial disability to determine the employer's liability as a result of the April 27, 1987 injury. The factors discussed above are also relevant to this determination. In addition, claimant has an eight percent functional impairment of the body as a whole due to a back condition at the C5-6 level. Claimant has not had surgery for his back condition. Claimant testified on cross-examination that his shoulders and neck were more painful than his hands and elbow. Although claimant gave this testimony, he had no actual loss of earnings after April 27, 1987. Dr. Bashara opined that claimant had a 17 percent permanent partial impairment that was work related and he felt that claimant's work-related back condition was an eight percent impairment. Claimant's current cumulative industrial disability is 50 percent. The employer's share of this industrial disability is 20 percent.

FINDINGS OF FACT

1. Claimant was born July 5, 1950. He was 35 years old on July 2, 1986 and was 36 years old on April 27, 1987.

2. On June 21, 1984 claimant suffered a cumulative work injury consisting of carpal tunnel syndrome of the left arm.

3. Claimant had surgery for the carpal tunnel syndrome of the left arm.

4. The work injury on June 21, 1984 was the cause of a five percent functional impairment to the left arm.

5. On May 7, 1986 claimant suffered a cumulative work injury consisting of cubital tunnel syndrome injury to the ulnar nerve of the left arm.

6. Claimant had surgery for a condition resulting from the injury on May 7, 1986.

7. The work injury on May 7, 1986 was the cause of an additional five percent functional impairment to the left arm.

8. As a result of the work injuries on June 21, 1984 and May 7, 1986 claimant has a functional impairment of ten percent to the left arm.

9. On July 2, 1986 claimant suffered a cumulative work injury consisting of carpal tunnel syndrome of the right arm.

10. Claimant had surgery for the carpal tunnel syndrome of the right arm.

11. The work injury on July 2, 1986 was the cause of a five percent functional impairment to the left arm.

12. Claimant has a high school education and exhibited average intelligence at the arbitration hearing.

13. Claimant returned to work with the same employer.

14. Claimant had no actual loss of earnings.

15. There was no showing of claimant's potential for vocational rehabilitation.

16. Claimant is not physically able to perform the type of work for which he is best suited.

17. Claimant will not be able to continue his current employment with the employer.

18. Claimant's cumulative loss of earning capacity as a result of the injuries on June 21, 1984, May 2, 1986 and July 2, 1986 was 30 percent.

19. On April 27, 1987 claimant suffered a cumulative work injury to his neck at the C5-6 level.

20. Claimant has not had surgery for the April 27, 1987 injury.

21. The work injury on April 27, 1987 is the cause of an eight percent functional impairment to the body as a whole.

22. Claimant's cumulative loss of earning capacity as a result of the injuries on June 21, 1984, May 2, 1986, July 2, 1986 and April 27, 1987 was 50 percent.

CONCLUSIONS OF LAW

Claimant has proved that the work injury on June 21, 1984 was the cause of a five percent disability to the left arm.

Claimant has proved that the work injury on May 7, 1986 was the cause of an additional five percent disability to the left arm.

Claimant has proved that the work injury on July 2, 1986 was the cause of a five percent disability to the right arm.

Claimant has proved that the work injuries of June 21, 1984, May 7, 1986 and July 2, 1986 were the cause of an industrial disability of 30 percent.

Claimant has proved that the work injury on April 27, 1987 was the cause of an additional 20 percent industrial disability.

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

ORDER

THEREFORE, it is ordered:

That defendant, Liberty Mutual pay claimant twelve point five (12.5) weeks of permanent partial disability benefits at the rate of two hundred twenty-two and 18/100 dollars ($222.18) per week plus interest from August 13, 1984.

That defendant, Hormel, as self-insured pay claimant:

Twenty-five (25) weeks of permanent partial disability benefits at the rate of two hundred forty-two and 78/100 dollars ($242.78) per week plus interest from August 25, 1986;

Healing period benefits from April 27, 1987 through June 9, 1987 at the rate of two hundred forty-eight and 73/100 dollars ($248.73) plus interest; and

One hundred (100) weeks of permanent partial disability benefits at the rate of two hundred forty-

eight and 73/100 dollars ($248.73) per week plus interest from June 10, 1987.

That defendant, Second Injury Fund, pay claimant one hundred twelve point five (112.5) weeks of permanent partial disability benefits at the rate of two hundred forty-two and 78/100 dollars ($242.78) per week beginning on the twenty-sixth (26th) week after August 25, 1986.

That defendants pay accrued weekly benefits in a lump sum and shall receive credit against this award for benefits previously paid.

That defendants receive credit for previous payment of benefits under a non-occupational group insurance plan under Iowa Code section 85.38(2) as set forth in the prehearing report except for the one (1) week of paid vacation.

That defendants, Hormel and Second Injury Fund, share equally the costs of transcribing the arbitration hearing.

That remaining costs shall be paid by the party incurring the cost.

That defendants filed 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 be set back into immediate assignment for prehearing on the extent of additional weekly benefits to which claimant is entitled for an alleged unreasonable failure to timely pay this claim.

Signed and filed this 29th day of December, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD G. MOORE, Claimant, vs. PEPSI COLA BOTTLING CO., Employer, and FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 818213 A P P E A L D E C I S I O N

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 and claimant's resistance to motion for summary judgment. 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

Claimant Ronald Moore received an injury arising out of and in the course of his employment on May 6, 1983, while working in the state of Iowa. Claimant was paid benefits under the Nebraska Workers' Compensation Act.

There was no first report of injury or denial of liability filed within the state of Iowa with regard to claimant's injury.

The petition in this case was filed on May 6, 1986.

APPLICABLE LAW

Iowa Code section 85.26 (1989) provides in relevant part:

> 1. An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.
>
> 2. An award for payments or an agreement for settlement provided by section 86.13 for benefits under this chapter or chapter 85A or 85B, where the amount has not been commuted, may be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under the award or agreement. If an award for payments or agreement for settlement as provided by section 86.13 for benefits under this chapter or chapter 85A or 85B has been made and the amount has not been commuted, or if a denial of liability is not filed with the industrial commissioner and notice of the denial is not mailed to the employee, on forms prescribed by the commissioner, within six months of the commencement of weekly compensation benefits, the commissioner may at any time upon proper application make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section 85.27. The failure to file a denial of liability does not constitute an admission of liability under this chapter or chapter 85A, 85B, or 86.

Iowa Code section 86.13 (1989) provides in relevant part: "If an employer or insurance carrier fails to file the notice required by this section, the failure stops the running of the time periods in section 85.26 as of the date of the first payment."

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 limita-

tions. However, memorandums of agreement were abolished July 1, 1982. As claimant's injury occurred after that date, no memorandum of agreement could have been filed.

Claimant's injury was May 6, 1983, and the original petition in this proceeding was filed on May 6, 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.

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 Nebraska 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. Claimant Ronald Moore received an injury arising out of and in the course of his employment on May 6, 1983, while working in the state of Iowa.

2. Claimant was paid benefits under the Nebraska Workers' Compensation Act.

3. There was no first report of injury or denial of liability filed within the state of Iowa with regard to the injury of May 6, 1983.

4. The petition in this case was filed on May 6, 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 28th day of July, 1989.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAM MOORHEAD (Willis O., Moorhead, Deceased),	
Claimant,	
vs.	
FISHER TRUCKING,	File No. 707893
Employer,	A P P E A L
and	D E C I S I O N
TRAVELERS INSURANCE COMPANY,	
Insurance Carrier, Defendants.	

STATEMENT OF THE CASE

Defendants appeal from a partial commutation decision awarding claimant a partial commutation of benefits previously awarded. Claimant cross-appeals.

The record on appeal consists of the transcript of the commutation proceeding; claimant's exhibits A through M; and defendants' exhibits 1 through 4. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issue on appeal:

Whether a partial commutation is in claimant's best interests.

Claimant states the following issues on cross-appeal:

Whether the deputy industrial commissioner erred in ruling that the contingent fee contract is violative of public policy.

Whether the deputy industrial commissioner erred in reducing the amount of partial commutation.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

Iowa Code section 85.45 states, in part:

> Future payments of compensation may be commuted to a present worth lump sum payment on the following conditions:
>
> ....
>
> 2. When it shall be shown to the satisfaction of the industrial commissioner that such commutation will be for the best interest of the person or persons entitled to the compensation, or that periodical payments as compared with a lump sum payment will entail undue expense, hardship, or inconvenience upon the employer liable therefor.

A commutation may be ordered when the commutation is shown to be in the best interests of the person or persons entitled to the compensation or that periodical payments as compared to a lump sum payment will entail undue expense on the employer. Diamond v. The Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964).

Factors relied on in determining if a commutation is in the claimant's best interests include: the claimant's age, education, mental and physical condition, and actual life expectancy; the claimant's family circumstances, living arrangements, and responsibilities to dependents; the claimant's financial condition, including all sources of income, debts, living expenses; and the reasonableness of claimant's plans for the commuted funds and claimant's ability to manage the funds or arrange for someone else to manage them. Dameron v. Neumann Bros., Inc., 339 N.W.2d 160 (Iowa 1983).

ANALYSIS

Defendant appeals the deputy's determination that a partial commutation is not in her best interests. Under the workers' compensation law, when a commutation is sought, the claimant's best interests are controlling. Weekly benefits are the norm, a lump sum payment of benefits is the exception. Before even a partial commutation can be granted, it must be determined that claimant's best interests will be served by the commutation.

Claimant's past history of financial management is highly relevant to the question of whether a lump sum distribution to

claimant is appropriate. Claimant has invested her past income not needed for her living expenses in three areas: real estate, a video business, and horses.

Claimant contributed one-half of the down payment on each of two tracts of farmland, and is currently paying one-half of the payments on these purchases, in conjunction with Dennis Fisher. Claimant lives with Dennis Fisher and has for some time. Claimant states she has no plans to marry Fisher. Claimant's name does not appear on the title of one of the tracts and her name was added to the title of the second tract only after some time had passed since the purchase. Claimant acknowledges that she is not in a partnership with Dennis Fisher and that if he asked her to move out, she would have to go to court to secure her interest in these properties.

Claimant's past actions in investing a substantial sum in real estate without even seeing that the property was put into her name casts significant doubt on her business acumen. Claimant has risked these sums by relying on her personal relationship with Dennis Fisher. Legally, she has no present ownership rights to one of these properties, and would have to successfully sue Fisher to obtain her share of the property if their relationship should sour. This does not display wise investment planning.

In addition, claimant's use of this farmland displayed a less than maximum potential. Claimant sold hay off the ground generating about $1000 per year. The record shows that rental of the ground for grazing would have produced significantly more income.

Claimant also invested a substantial sum in a video business. The business has shown a monthly profit only recently and only for one month at the time of the hearing. Claimant's share was $200 for that month although claimant had invested over $6000 six months earlier. This is a modest return on her investment especially since claimant also works at the video store. Although the losses of the business were not set out in the record, claimant described them as less than $10,000.

It is not unusual for a new business to operate at a loss for a time before generating a profit. However, it is fair to say that claimant's decision to invest her money in this business has not met with glowing financial success after half a year.

Claimant also invested money in registered quarterhorses. Claimant indicated this was more of a hobby than an investment and that she thought the horses would make money from the sale of foals, but that was not the main purpose in buying them. Claimant has not made any money off these horses as the one foal

produced died. Claimant invested nearly one fourth of her excess income in what she herself describes as a hobby.

Claimant desires a commutation in part to invest in a cattle operation. However, claimant acknowledges she has little experience in this area, having only raised three hogs and three calves in the past. Claimant has investigated the costs of this investment, including the cost of the livestock, fencing, and trailer. However, defendants have put into the record evidence that the cattle industry is a volatile one, and that the risks are numerous even for those experienced in the industry.

Another intended use of the commuted funds would be to set up a trust for claimant's daughter's education. Claimant has commendably consulted two financial advisers on the amounts that would be needed to meet her child's educational needs, and has consulted an attorney on the type of trust that would guarantee that the funds were restricted to this purpose. However, it was brought out on cross-examination of claimant that she could, by saving her workers' compensation benefits, produce the same amount of money in approximately two years. Claimant has been able to save $19,000 from workers' compensation and social security benefits above her living expenses in the past, and has invested them in real estate, her video business and horses rather than her daughter's education plans.

Finally, claimant plans to use the remainder of the commuted funds to invest in certificates of deposit or zero coupon bonds. Again, however, it was brought out that none of the proposed investments yield over ten percent, the current discount rate a commutation would require.

Taking into account all of the above, although claimant does have some money management experience and does have a specific plan for the commuted funds, her past actions speak loudly to her apparent willingness to invest large sums of money less than prudently. Her actions in investing in real estate to which she has no legal title, in a business which shows little profit, and in a hobby which generates no income casts doubt on her ability to invest in a cattle business which is by its nature financially risky and with which she has no experience. Since her workers' compensation benefits provide claimant with discretionary income, claimant can provide for her daughter's future educational needs by periodically investing those funds into a trust. A commutation of benefits is not in claimant's best interests.

On cross-appeal, claimant urges that the contingent fee arrangement in this case was not void as violating public policy and should be reinstated, or, in the alternative, that the commuted amount should not be reduced by the amount of the fee since claimant will now need to pay her attorney from the proceeds of the commutation on a quantum merit basis. Since a

commutation has been denied, these issues are now moot. However, it is noted that under Rickett v. Hawkeye Building Supply Co., (Appeal Decision June 28, 1988), a contingent fee in a commutation proceeding is improper. Claimant has already been awarded compensation. Claimant's attorney does not obtain further compensation for claimant in a commutation proceeding. For this reason, a contingent fee in a commutation proceeding violates public policy.

FINDINGS OF FACT

1. Pam Moorhead, widow of Willis O. Moorhead, is single and has one child of her marriage to Willis Moorhead: Jessica, born May 31, 1982.

2. Claimant is receiving weekly benefits based on the death of Willis Moorhead in the amount of $227.54, and has been receiving those benefits since Mr. Moorhead's death on July 14, 1982.

3. Claimant has monthly income (including her daughter's Social Security benefits), even without counting workers' compensation benefits, in excess of $1,200.

4. Claimant has monthly expenses of approximately $1,300.

5. Claimant desires to commute benefits to her daughter's 18th birthday, or 587 weeks at the time of hearing.

6. Claimant intends to use $25,000 of the proposed $80,000 commutation to set up a cow/calf cattle operation on her rural property, $20,000 to fund her daughter's college education costs, $8,000 for payment of attorney fees, and $27,000 for investment.

7. There are certain risks to the proposed use to which claimant intends to put the proceeds of her commutation; in particular, the cattle market is volatile, particularly for a small operator.

8. Claimant's video business operated at a loss for six months and has only shown a profit for one month.

9. Claimant has invested in two tracts of real estate, but has failed to cause her name to be reflected in the title of one tract and only had her name added to the second tract sometime after its purchase.

10. Claimant is not married to or in partnership with Dennis Fisher.

11. Claimant has not demonstrated good financial planning in her real estate investments.

12. Claimant has not demonstrated good financial planning in her business investments.

13. Claimant has not demonstrated good financial planning in her livestock investments.

14. Claimant has little experience in the cattle raising industry.

15. Claimant is capable of meeting her child's future educational needs without a commutation of her workers' compensation benefits.

CONCLUSIONS OF LAW

A commutation of workers' compensation benefits is not in claimant's best interests.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant's application for partial commutation is denied.

That each party pay their own costs in this proceeding, including one-half of the costs of the appeal.

Signed and filed this 19th day of April, 1990.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. MORGAN,

Claimant,

vs.

ROBERT BARNES, d/b/a BARNES, CONSTRUCTION CO.,

Employer,

and

GENERAL CASUALTY COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 865365

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a ruling by the deputy industrial commissioner sustaining a motion for summary judgment. The record on appeal consists of the pleadings, motions and rulings in the file. Claimant filed an appeal brief.

ISSUES

The issues as stated by claimant are as follows:

1. This case is distinguishable from Sawyer v. National Transportation Co. file No. 789205 relied on by the Deputy Commissioner in that the matter had been fully resolved and settled before the Nebraska Division of Workers' Compensation while in this case the payments were made at the choice of the defendants for their benefit and do constitute "weekly compensation' as defined in Section 85.26.

2. When the Employer-Insurance Carrier voluntarily make weekly compensation payments to a worker injured

in Iowa (whether the compensation payments are the correct rate or not) and subject to the Iowa Workers' Compensation Laws, are they required to file with the Industrial Commissioner....a notice of Commence [sic] of the Payments? ($86.13)

a. If affirmative, does defendant Employer-Insurance Carrier's failure to file this notice in this case stop the running of the time periods in Section 85.26 as of the date of first payment?

3. Do weekly compensation payments made by the Employer-Insurance Carrier voluntarily made to an injured worker subject to the Iowa Workers' Compensation Laws extend the statute of limitations for 3 years from the last payment, whether the rates are correct or not as defined in Section 85.26(1)?

4. Can the Employer-Insurance Carrier unilaterally and without disclosure to the worker injured in Iowa and eligible to file a claim in either Missouri or Iowa make payments weekly to the worker for almost three years using the rate of the state where the benefits are substantially less and claim that the statute of limitations has run because they paid the worker weekly compensation but under the rate of the lesser state?

APPLICABLE LAW

Iowa Code section 85.26 states in pertinent part:

1. An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

2. An award for payments or an agreement for settlement provided by section 86.13 for benefits under this chapter or chapter 85A or 85B, where the amount has not been commuted, may be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under the award or agreement.

ANALYSIS

Claimant seeks review of a ruling by the deputy industrial commissioner that sustained defendants' motion for summary judgment. The ruling is based on section 85.26(1), the statute of limitations.

Claimant was injured in the state of Iowa on July 14, 1984. Claimant was a resident of the state of Missouri at the time. The employer was based in Missouri. The employer voluntarily paid benefits to claimant under Missouri's workers' compensation law. No payments were made under Iowa workers' compensation law.

Iowa Code section 85.26(1) requires that an original proceeding for benefits be instituted within two years of the date of injury, or, if benefits have been paid pursuant to Iowa Code section 86.13, within three years of the last payment. Claimant's petition was filed March 9, 1988.

Claimant maintains that the payments under Missouri's workers' compensation statute should extend the time for filing his Iowa action. However, the case of Sawyer v. National Transportation Co., ___ N.W.2d ___ (Iowa 1989) establishes that payment of workers' compensation benefits pursuant to another state's workers' compensation statute does not constitute the payment of benefits under Iowa Code section 86.13.

Claimant seeks to distinguish the Sawyer case by pointing out that the Nebraska payments made in that case were based on an award of benefits, whereas claimant in this case did not receive an award but merely voluntary payments of benefits. However, the Sawyer case concluded that the "award for payments or an agreement for settlement provided by section 86.13 for benefits under this chapter...." language in section 85.26(2) referred to Iowa benefits. Similarly, "if weekly compensation benefits are paid under section 86.13...." in section 85.26(1) refers to payment of weekly benefits under Iowa law.

The three year statute of limitations in either section 85.26(1) or 85.26(2) is available only when payments are made under Iowa's workers' compensation law. Payments under another state's laws, whether in the form of an award or voluntary payments, do not extend the Iowa statute of limitations from two years to three years from the last payment. Similarly, the provisions of section 86.13, which toll the running of the statute of limitations when the employer fails to file a notice of commencement of payments, contemplates commencement of payments under Iowa's workers' compensation law.

Claimant argues that he was "deceived" by employer's voluntary payments to him under Missouri law, which also resulted in a

lower rate of payment than he feels he was entitled to under Iowa law. However, the employer is not under an obligation to inform claimant of what jurisdictions he might have a cause of action in. Similarly, the employer is not obligated to inform claimant which state might offer him the most favorable rate. Finally, the employer is not obligated to inform claimant of the various statutes of limitations which might apply to his situation. These matters are claimant's own responsibility. Claimant neglected to seek legal counsel until the Iowa statute of limitations had expired. He assumed the employer would pay him the highest rate he might be entitled to. Claimant relied on this assumption at his own peril.

Claimant's petition was not filed within the time period required by the statute of limitations. The decision of the deputy granting the motion for summary judgment was appropriate. This agency lacks jurisdiction to consider claimant's petition.

FINDINGS OF FACT

1. Claimant, a resident of Missouri, was injured in the state of Iowa on July 14, 1984.

2. Claimant was paid workers' compensation benefits on a voluntary basis under Missouri workers' compensation law.

3. Claimant did not file a petition for Iowa workers' compensation benefits within two years of the date of injury.

4. Claimant did not receive an award of benefits, settlement, or voluntary payment of benefits under Iowa workers' compensation law.

CONCLUSIONS OF LAW

Claimant failed to file his petition for workers' compensation benefits within the statute of limitations.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants' motion for summary judgment should be and is hereby sustained. Claimant shall take nothing as a result of this proceeding.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LINDA V. MORSE, Claimant, vs. CHAMPION GLOVE MFG. CO., Employer, and EMPLOYERS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	:	File No. 813735 A P P E A L D E C I S I O N FILED OCT 17 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on May 10, 1985. The record on appeal consists of the transcript of the arbitration hearing and claimant's exhibits A through E. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the following issues on appeal:

1. The deputy erroneously substituted his judgment for the medical opinion of Dr. Burrows when the deputy concluded that claimant's underlying asthma was caused by exposure to dust in the work environment.

2. There is no competent medical evidence in the record that claimant's condition of asthma was caused by exposure to dust in the work environment.

3. There is no medical evidence in the record that claimant's preexisting asthmatic condition was permanently aggravated, exacerbated, or lighted up by exposure to elements in the work environment.

4. Where a preexisting or personal medical condition makes an individual incompatible with activity in the work environment, the claimant is not entitled to permanent disability

benefits.

Claimant states the following issues on cross-appeal:

1. Whether or not Claimant sustained an injury that arose out of and in the course of employment.

2. Claimant's entitlement as a result of her 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.

ANALYSIS

Defendants allege that the deputy improperly disregarded the medical evidence of Donald Burrows, M.D. Dr. Burrows testified that claimant's exposure to dust at her employment did not cause her asthma, but rather aggravated a preexisting asthma condition. The issues on appeal are whether the dust exposure on May 10, 1985 aggravated claimant's preexisting asthma; whether that aggravation was permanent or temporary; and, if permanent, the extent of the disability claimant now has as a result of that aggravation.

Claimant was compelled to leave work on May 15, 1985, due to an asthma attack. Claimant was hospitalized. Upon her release from the hospital on May 21, 1985, claimant returned to work but after four hours began experiencing problems again. Dr. Burrows attributed claimant's attacks to her work environment. Claimant has clearly shown that on May 15, 1985, and on May 21, 1985, her asthma was aggravated by her work environment.

Although claimant has shown an aggravation of her condition, there is no showing that the aggravation was permanent. Dr. Burrows clearly stated that if an aggravation occurred, it was not permanent. His description of the nature of asthma, and his comments that after the exposure is terminated, the airways will unswell and return to normal, indicate that claimant's aggravation was temporary in nature. This is corroborated by his release of claimant to return to work and his statement that her asthmatic reaction had reversed itself. When claimant attempted to return to work, she again experienced breathing difficulty. There is no testimony from Dr. Burrows that this second reaction was because claimant's asthma had been permanently aggravated by the first exposure. It is just as likely that claimant's preexisting asthma again reacted to the dust exposure

at work, resulting in another period of temporary impairment.

Dr. Burrows then advised claimant not to return to her work environment. Claimant had been diagnosed as asthmatic at least eight years prior to her May 10, 1985 exposure. She had been treated for that condition intermittently since then. There is testimony in the record that other everyday substances outside of claimant's work environment also caused claimant to have asthmatic reactions. Although claimant had worked for defendants for many years prior to her reaction on May 10, 1985, without a prior incident of asthmatic reaction to dust at work, claimant clearly had been treated for asthma for many years. Claimant now has a medical restriction not to work in a dusty environment such as she worked in at Champion. There is no medical evidence to indicate whether this restriction is the result of the incident on May 10, 1985, or whether it is yet another manifestation of her asthmatic condition which preexisted her work incident of May 10, 1985. Claimant bears the burden of proof. It would be speculation to assume that the inability to work in a dusty environment came about as a result of the May 10, 1985, incident in the absence of medical testimony so indicating. Claimant worked at various jobs with defendant employer. The mere absence of such an incident prior to May 10, 1985 is insufficient to carry claimant's burden to show she has suffered a permanent disability as a result of the May 10, 1985 incident.

Claimant cites Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980) and argues that because claimant has now found that she can no longer work for defendant employer because of her asthma, she is entitled to benefits. However, where, as here, the condition that necessitates the change in employment has not been shown to have been caused by a work exposure, claimant is at most entitled to temporary disability benefits only. Robinson v. Marting Manufacturing, Inc., I-4 State of Iowa Industrial Commissioner Decisions 1050, Appeal Decision, June 24, 1985. Claimant has shown entitlement to temporary total disability only.

FINDINGS OF FACT

1. On May 10, 1985, claimant suffered a severe asthmatic attack as a result of exposure to dust at work.

2. Claimant had been diagnosed and treated for asthma prior to May 10, 1985.

3. Claimant returned to work and again experienced an asthma attack.

4. The medical evidence establishes that claimant's asthma was temporarily aggravated by the May 10, 1985 incident.

CONCLUSION OF LAW

Claimant has established entitlement to temporary total disability.

Claimant has failed to establish that she suffered a work injury on May 10, 1985 that resulted in permanent disability.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant temporary total disability from May 10, 1985 through May 21, 1985 at the rate of two hundred thirty-five and no/100 dollars ($235.00) per week.

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.

That claimant 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 17th day of October, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LINDA V. MORSE, Claimant, vs. CHAMPION GLOVE MFG. CO., Employer, and EMPLOYERS MUTUAL CASUALTY, COMPANY, Insurance Carrier, Defendants.	:	File No. 813735 R U L I N G O N R E H E A R I N G

FILED

JAN 23 1990

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant was granted a rehearing of the appeal decision filed October 17, 1989.

ISSUES

Claimant's application for rehearing recited only that claimant desired a rehearing on the question of assessment of costs. However, claimant's rehearing brief addresses the issue of costs and the determination in the appeal decision that claimant is entitled to temporary total disability benefits only. A rehearing on the latter issue was not granted. This rehearing decision will be limited to the assessment of costs.

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 343-4.33 states in 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."

ANALYSIS

The assessment of costs are within the discretion of the industrial commissioner. The mere fact that claimant receives a small award or no award at all does not prohibit the assessment of costs against claimant.

In this case, claimant did receive an award of benefits. Both parties filed appeals of the deputy's decision. It is appropriate that defendants pay the costs of the original action, and claimant and defendants each pay half of the costs of the appeal.

FINDINGS OF FACT

1. Claimant was awarded benefits pursuant to the decision of the deputy industrial commissioner.

2. Both claimant and defendants filed an appeal of the deputy's decision.

CONCLUSION OF LAW

Defendants should pay the costs of the arbitration proceedings. Defendants and claimant should pay the costs of the appeal on an equal basis.

ORDER

THEREFORE, it is ordered:

That defendant shall pay the costs of the arbitration proceedings.

That defendants and claimant shall bear the costs of the appeal proceedings on an equal basis.

Signed and filed this 23rd day of January, 1990.

David E. Linquist

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY R. MURKINS, Claimant, vs. IOWA DEPARTMENT OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File Nos. 803246 809975 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 claimant temporary total disability and medical benefits as a result of an injury March 20, 1985, and denying any benefits as a result of an alleged injury on November 8, 1985.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits A through Z and AA through II; and defendants' exhibits 1 through 9. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant sustained an injury on November 8, 1985, that arose out of and in the course of his employment with defendant employer.

REVIEW OF THE EVIDENCE

The arbitration decision dated December 17, 1987, 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 issue and evidence.

ANALYSIS

One preliminary matter should be discussed first. Claimant states in his appeal brief that the deputy incorrectly described the stipulations in this matter. The deputy described one of the stipulations as "any new or additional permanent partial impairment [sic] would be attributable to the alleged injury of November 8, 1985" (Emphasis in the original). At the arbitration hearing claimant's counsel stated:

> But I think the record indicates it's our position that essentially this permanent disability that he has now came out of that November 8th, '85, accident, because he never went back after that one. He went back after the other one. And he was able to do his old job after the March incident.

(Transcript, page 60, lines 1-7)

The deputy properly concluded that claimant was seeking no permanent disability benefits as a result of the March 20, 1985 injury. The award of temporary total disability benefits for the March 20, 1985 injury (March 20, 1985 through May 5, 1985) has not been appealed by either party. Even if the stipulation were improperly stated, claimant has not proved that the March 20, 1985 injury was the cause of any amount of permanent disability. Claimant had discontinued treatment from Mark A. Kruse, D.C., from October 7, 1985 through September of 1986. When David G. Paulsrud, M.D., saw claimant after the November 8, 1985 alleged injury claimant did not mention the incident in March 1985. There is no reliable medical evidence that would demonstrate that the March 20, 1985, incident was the cause of any permanent disability.

The issue that is dispositive of this appeal is whether claimant sustained an injury on November 8, 1985, which arose out of and in the course of his employment. Claimant alleges the following happened. He was descending the ladder of a piece of equipment when he caught his left heel and fell six to eight feet to the ground. He landed flat on his back and hit the back of his head. He had "real, real bad jabs" in the lower back and tingling sensations in the left leg. He was not sure whether he lost consciousness. He let out a yell when he hit the ground that his coworker would have heard. He managed to drive a truck back to Sioux City [distance unknown] and his back "hurt like hell." He did not go to see Dr. Kruse because the employer had not been paying the medical bills of Dr. Kruse and he was scared to run up a bill. He has been unable to work since the November 8, 1985 incident.

There are other facts in this case that do not support and sometimes contradict claimant's allegations. Also, there are facts that are inconsistent with claimant's allegations.

As a backdrop to claimant's alleged fall there is testimony from several individuals (Thomas Brosamle, Jill Swanson, and Kathy Duque) that the claimant's wife had indicated prior to the alleged fall that claimant would have a fall. While admittedly Brosmale, Swanson (Brosmale's daughter) and Duque could be characterized as somewhat hostile towards claimant's wife and possibly claimant, that hostility, if any, cannot totally negate the common theme from three witnesses that claimant's wife forecasted an accident by claimant. Also, as a backdrop to the alleged November 8, 1985 incident is the employer's attempt, beginning apparently in a letter dated November 1, 1985, to control medical treatment and to not authorize any further treatment by Dr. Kruse.

Claimant's coworker who was in the area at the time of the alleged fall did not hear claimant yell. This coworker, who was the only other person present, did not see claimant fall. Claimant had seen Dr. Kruse 34 times from March 23, 1985 through October 7, 1985, and had seen him ten times from the date he had returned to work from the March 20, 1985 injury (May 5, 1985) until October 7, 1985. Claimant had paid none of his bills from Dr. Kruse but when the alleged injury occurred which by claimant's own description caused him severe pain, he did not seek care from Dr. Kruse. He sought care from Dr. Paulsrud who, on November 14, 1985, diagnosed degenerative disc disease. Dr. Paulsrud noted tenderness over the lumbosacral junction and straight leg raising positive on the left at about 50 degrees. Dr. Paulsrud did not note any bruising nor any problems with the head. Claimant had a history of low back pain and pain in his left leg. Dr. Paulsrud released claimant to light duty work as early as December 12, 1985, and gave claimant a work release for February 3, 1986. Claimant apparently first mentioned having headaches to Dr. Paulsrud December 23, 1985.

Claimant has the burden of proving an injury that arose out of and in the course of his employment on November 8, 1985. Claimant has not met his burden. There are too many inconsistencies and contradictions to accept claimant's allegation that an incident occurred on November 8, 1985, which caused a work injury. A scenario of claimant's wife predicting a fall, an unseen fall, and claimant's failure to seek immediate care from Dr. Kruse for an allegedly severly painful condition simply lead to the conclusion that the fall did not happen.

FINDINGS OF FACT

1. Claimant was born on May 1, 1954.

2. Claimant graduated from high school in 1972 and was a poor student while attending high school.

3. Claimant started working for Iowa Department of Transportation (IDOT) on April 25, 1975.

4. In 1975, claimant injured his back while working for IDOT.

5. In 1976, claimant reinjured his back or aggravated his 1975 back injury.

6. In 1981, claimant entered into a special case settlement regarding his 1975 and 1976 back injuries sustained while working for IDOT.

7. On March 20, 1985, claimant materially aggravated the portion of his back that was injured at work in 1975 and 1976; this material aggravation caused claimant to miss work from March 20, 1985 through May 5, 1985.

8. On November 8, 1985, claimant did not injure his back while working for IDOT.

9. Claimant's stipulated rate of weekly compensation regarding the material aggravation of March 20, 1985 is $187.02.

CONCLUSIONS OF LAW

Claimant has proved entitlement to temporary total disability benefits from March 20, 1985 through May 5, 1985.

Claimant has not proved that he sustained an injury on November 8, 1985, that arose out of and in the course of his employment with IDOT.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant temporary total disability benefits at a rate of one hundred eighty-seven and 02/100 dollars ($187.02) from March 20, 1985 through May 5, 1985.

That defendants pay any contested medical bills regarding the incident of March 20, 1985.

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 each party pay their own costs of this action as described in Division of Industrial Services Rule 343-4.33.

Claimant shall pay the costs of this appeal including the costs of transcribing the arbitration hearing.

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

That this case be returned to docket for resolution of the Iowa Code section 86.13 penalty benefits issue regarding temporary total benefits from March 20, 1985 through May 5, 1985 (File No. 803246).

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EUGENE CLARENCE NAMANNY, Claimant, vs. STELLCO, Employer, and LIBERTY MUTUAL INS. CO., Insurance Carrier, Defendants.	FILED OCT 17 1989 File No. 828860 IOWA INDUSTRIAL COMMISSION 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 June 25, 1986. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 10; and defendants' exhibits A and B. Defendants did not file a brief on appeal.

ISSUES

Claimant states the following issues on appeal:

I. The failure of defendants to timely supplement their answers to interrogatories raises the question whether their expert testimony should be admitted and the commissioner would be within the scope of his discretion in denying admission of testimony.

II. Claimant has carried his burden of proof with respect to the incident of June 25, 1986, being the cause of his present disability and even if the expert testimony of the defendants is admitted, it should be given little weight.

III. The Commissioner should adopt a "positional risk" for employees whose employment subjects them to greater stress than ordinary living.

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 Division of Industrial Services Rule 343-4.35 states:

> Rules of Civil Procedure. 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 Division of Industrial Services Rule 343-4.36 states:

> Compliance with order or rules. 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.

Iowa Rule of Civil Procedure 125 provides, in pertinent part:

> Discovery of Experts....
>
> ....

> (c) Duty to supplement discovery as to experts. If a party expects to call an expert witness when the identity or the subject of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the information described in subdivisions "a"(1)(A)-(C) of this rule, as soon as practicable, but in no event less than thirty days prior to the beginning of trial except on leave of court. If the identity of an expert witness and the information described in subdivisions "a"(1)(A)-(C) are not disclosed in compliance with this rule, the court in its discretion may exclude or limit the testimony of such expert, or make such orders in regard to the nondisclosure as are just.

ANALYSIS

Claimant's initial issue on appeal concerns the admission of defendants' expert witness testimony. Defendants were served with interrogatories on January 21, 1987, which, among other things, requested identification of any expert witnesses defendants intended to rely on. A prehearing conference was held on January 22, 1988. Subsequent to that conference, a hearing assignment order was issued setting the hearing for April 27, 1988. The order also required service of witness lists no later than 15 days prior to the hearing.

On February 23, 1988, claimant filed a motion to compel answers to interrogatories. On March 17, 1988, defendants filed answers to the interrogatories, but did not identify expert witnesses.

On March 28, 1988, the parties orally agreed on a date and time for an examination of claimant by defendants' expert in question, Alan H. Fruin, M.D. This conversation was later confirmed by letter, and the examination took place on April 8, 1988. On April 11, 1988, defendants received Dr. Fruin's report, which was then served on claimant. On April 13, 1988, claimant received a list of defendants' witnesses, including Dr. Fruin. Defendants did not formally supplement the interrogatory dealing with expert witnesses until three days before the hearing.

The parties appear to regard defendants' service of witness lists on claimant on April 13, 1988, as timely and in compliance with the hearing assignment order. Claimant, however, argues that defendants also had a duty to comply

with Iowa Rule of Civil Procedure 125(c), and supplement the interrogatory answers with the name of Dr. Fruin no later than 30 days before the hearing. Defendants clearly did not do so.

The question then becomes whether defendants, having provided claimant with Dr. Fruin's name as an expert witness for the defense pursuant to the hearing assignment order, were also obligated to comply with Iowa Rule of Civil Procedure 125(c) and supplement the interrogatory answer dealing with expert witnesses.

It should be noted that claimant is not claiming surprise or prejudice. Claimant would not be able to do so, in light of the formal notice of Dr. Fruin's testimony that was given to claimant under the hearing assignment order, and claimant's own participation in the scheduling of the examination by Dr. Fruin. Rather, claimant relies on a technical noncompliance with Iowa R.Civ.P. 125.

Division of Industrial Services Rule 343-4.35 incorporates the Iowa Rules of Civil Procedure for agency proceedings. However, rule 4.35 also states that when a conflict between agency rules and the rules of civil procedure exists, the agency rule shall prevail.

In the instant case, the 15 days before hearing requirement is not set forth in an agency rule, so there is not a direct conflict between an agency rule and a rule of civil procedure. However, Division of Industrial Services Rule 343-4.36 provides sanctions, including the exclusion of evidence, for noncompliance with the order of a deputy. Thus, the hearing assignment order is given the force and effect of a rule under rule 4.36.

Are Iowa R.Civ.P. 125(c) and the hearing assignment order pursuant to Division of Industrial Services Rule 343-4.36 in conflict with each other? Both provide for discovery between litigants. Both relate to apprising opposing parties of expert witnesses intended to be relied upon at the hearing. It is clear that the hearing assignment order requirement of exchanging expert witness lists no later than 15 days before the hearing is the functional corollary of Iowa R.Civ.P. 125(c). Both rules serve the same purpose, but impose differing time frames. It therefore appears that Iowa R.Civ.P. 125(c) and the hearing assignment order pursuant to Division of Industrial Services Rule 343-4.36 are in conflict. Pursuant to Division of Industrial Services Rule 343-4.35, that conflict is resolved in favor of the agency rule. Rule 4.35 supplants rule of

civil procedure 125(c) for workers' compensation proceedings.

It is noted that even if Iowa Rule of Civil Procedure 125(c) were controlling, that rule provides that "the court in its discretion may exclude or limit the testimony of such expert..."(emphasis added). Thus, the deputy was entitled to admit such testimony even if rule 125(c) were applicable. "Exclusion is justified only when prejudice would result. [The purpose of the rule] is to avoid surprise to the litigants and to allow the parties to formulate their positions on as much evidence as is available." *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985). The deputy properly refused to exclude defendants' expert witness for noncompliance with Iowa R.Civ.P. 125(c).

The deputy made a finding that the blackout incident did not arise out of the employment. Claimant, however, states as an issue on appeal whether claimant has shown a causal connection between his present disability and the blackout incident. In his appeal brief, claimant appears to address the arising out of issue. Claimant's second issue on appeal is read to concern whether his work injury arose out of his employment.

The record contains the testimony of three physicians. William Abraham, M.D., a resident internist, stated that no causal connection between claimant's stroke and his work existed. David G. Windsor, M.D., a psychiatrist, found a causal connection. Alan H. Fruin, M.D., a neurosurgeon, testified there was no causal connection. Dr. Fruin based his conclusion on the claimant's history of mild strokes before the work injury, as well as radiographic evidence of past cerebral vascular problems. Dr. Abraham also noted the evidence of prior strokes in forming his conclusion. There is no indication in the record as to whether Dr. Windsor has expertise or experience with strokes and seizures.

Dr. Fruin stated he had read claimant's depositions and was familiar with claimant's activities leading up to the incident. It can therefore be presumed that Dr. Fruin did not regard claimant's sleep activities prior to the incident as a "prolonged" deprivation of sleep. The opinion of Dr. Fruin will be given the greater weight. Claimant has failed to establish a causal connection between his present condition and his work injury.

Claimant's final issue on appeal urges this agency to adopt a "positional risk" approach. Claimant appears to argue that stress and anxiety connected with his work led to his blackout on June 15, 1986. Claimant's argument that

"the normal person on the street need not be concerned with overweight trailers, loading procedures or time schedules" once again addresses the question of whether claimant's blackout incident arose out of his employment. The physicians whose testimony is in the record, particularly that of Dr. Fruin, were based on medical histories that related claimant's activities, including the stress of adhering to a time schedule. The greater weight of the medical evidence fails to establish that these factors caused claimant's blackout, as discussed above.

FINDINGS OF FACT

1. Claimant was an employee of defendant employer on June 25, 1986.

2. On June 25, 1986, claimant suffered a stroke or seizure while employed by defendant employer.

3. Claimant had a history of strokes prior to June 25, 1986.

4. Claimant's stroke on June 25, 1986, was not caused by his employment.

CONCLUSION OF LAW

Claimant has failed to establish by the greater weight of the evidence that the stroke he suffered on June 25, 1986, arose out of his employment.

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 pursuant to Division of Industrial Services Rule 343-4.33.

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

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT NICOLAUS,	
Claimant,	
vs.	File No. 713224
HINSON MANUFACTURING COMPANY,	A P P E A L
Employer,	D E C I S I O N
and	
KEMPER GROUP,	
Insurance Carrier, Defendants.	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant permanent partial disability benefits based on an industrial disability of 30 percent.

The record on appeal consists of the transcript of the arbitration hearing and defendants' exhibits A through K. Both parties filed briefs on appeal and defendants filed a reply brief.

ISSUES

Defendants state the issues on appeal are:

1. Whether the Claimant sustained his burden of proof by a preponderance of the evidence that the injury of September 2, 1982 was the cause of both temporary and permanent disability.

2. Whether the Claimant is entitled to 104 weeks of healing period benefits for the period from September 2, 1982 to September 1, 1984.

3. Whether the Claimant is entitled to 150 weeks of permanent partial disability benefits based upon an industrial disability rating of 30% of body as a whole.

4. Whether the proper rate of compensation is $196.36 per week.

REVIEW OF THE EVIDENCE

The arbitration decision dated February 23, 1989 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. Medical evidence establishes that claimant sustained an injury to his left shoulder as a result of his September 2, 1982 injury.

2. Claimant's injury is not limited to his upper left extremity but extends to the body as a whole.

3. Claimant was 39 at the time of the hearing.

4. Claimant completed the 11th grade, but has not received his GED.

5. Claimant is unable to work above chest level and is not able to lift more than 5 to 10 pounds due to claimant's September 2, 1982 injury.

6. Claimant reached maximum medical improvement on September 1, 1984.

7. The work injury on September 2, 1982 was the cause of twelve percent functional impairment to the body as a whole according to Arnold E. Delbridge, M.D., and eleven percent to the body as a whole according to W. John Robb, M.D.

8. Claimant's industrial disability is 30 percent.

9. Claimant failed to prove entitlement to payment for medical reports, prescription drugs or medical mileage.

10. The rate of compensation is $196.36 per week.

11. Defendants paid claimant 171 weeks of workers' compensation benefits prior to the hearing at the rate of $196.36 per week.

CONCLUSIONS OF LAW

Claimant established by a preponderance of the evidence that the injury of September 2, 1982 was the cause of both temporary and permanent partial disability.

Claimant established by preponderance of the evidence that he is entitled to healing period benefits from September 2, 1982 through September 1, 1984.

Claimant established that he is entitled to 150 weeks of permanent partial disability benefits based upon an industrial disability of 30 percent of the body as a whole.

Claimant did not prove entitlement to medical benefits.

Claimant's rate of compensation is $196.36 per week.

Defendants are entitled to a credit for 171 weeks of workers' compensation benefits paid at the rate of $196.36 per week prior to hearing.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant one hundred four (104) weeks of healing period benefits for the period from September 2, 1982 to September 1, 1984 at the rate of one hundred ninety-six and 36/100 dollars ($196.36) per week.

That defendants pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of one hundred ninety-six and 36/100 dollars ($196.36) commencing on September 2, 1984.

That these benefits are to be paid in a lump sum.

That defendants are entitled to a credit for one hundred seventy one (171) weeks of workers' compensation benefits paid at the rate of one hundred ninety-six and 36/100 dollars ($196.36).

That interest will accrue pursuant to Iowa Code section 85.30.

That defendants pay the cost of this action including the cost 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 February, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN J. NIELSEN, Claimant, vs. PETERSON MOTOR COMPANY, Employer, and IOWA AUTOMOBILE DEALERS ASSOCIATION, Insurance Carrier, Defendants.	File No. 816916 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 12; and defendants' exhibits A through N. Both parties filed briefs on appeal.

ISSUES

The dispositive issue on appeal is whether claimant suffered an injury on May 2, 1984 that arose out of and in the course of his employment.

REVIEW OF THE EVIDENCE

The arbitration decision filed December 29, 1988 adequately and accurately reflects the pertinent evidence and it will not be reiterated here.

APPLICABLE LAW

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

ANALYSIS

The crucial factual issue to be determined in this case is whether claimant ran an errand for his employer over his lunch hour. On October 18, 1984 (approximately 5 1/2 months after the accident) claimant gave a deposition as part of a third party action. Claimant also testified in this matter at a deposition taken October 22, 1986 and at the arbitration hearing November 12, 1987. Except for the question of what route claimant took and whether he actually stopped at another car dealership to examine a car, the three testimonies of claimant are very similar. All three times claimant consistently specified the times involved, the locations and distances involved, and how the accident occurred. In his first deposition he described a route of travel that did not include a stop for the alleged errand. Other testimony given by claimant in that deposition was very detailed and specific. He recalled specifically stopping at a stop sign, approaching an intersection with a stop light that was yellow and stopping for the stop light, and traveling in certain lanes of traffic. The allegation in claimant's appeal brief that claimant was confused in giving the deposition in October 1984 is simply not believable. The questions were straight forward and claimant's answers were very specific and responsive to the questions.

There are other discrepancies in the evidence that claimant in fact did examine a car at another car dealership. The description given by the claimant in October 1986 "just get underneath the hood...and just peel the sheathe open" (Exhibit L, Page 20, Lines 2-4) and the car was unlocked lead to the conclusion that claimant looked under the hood (in the engine compartment) of an unlocked car. Claimant's testimony at the hearing (Transcript, p. 19, line 17) gives the impression that he crawled underneath the car. The testimony of the other car dealer was that the cars on the lot would be locked.

Another aspect of the testimony that indicates that claimant did not stop at the new car dealership is the time involved in this case. The times described by claimant (three-four minutes to drive to the new car dealership and five minutes to examine the vehicle) do not allow claimant enough time to run the errand and to return to work in time to punch the time clock by one o'clock. Likewise, the time necessary for the alleged errand would not have allowed sufficient time for the errand, the accident, and notification of claimant's wife by the time she indicated (1:08 p.m.). The more believable time frame would be that time frame that claimant took the route he described in his deposition in October 1984.

When all the evidence in this case is considered, it is clear that claimant has not proved that he ran an errand for the employer and stopped at another car dealership over the lunch hour. To the contrary, the evidence shows that claimant did not make the stop as he alleges. It is worth noting that there is no evidence to corroborate claimant's testimony that he did in fact make the stop as he alleged. Claimant was enroute to and from his home over the lunch hour and was not engaged in his employer's business at the time of the accident. Claimant has not proved that he suffered an injury that arose out of and in the course of his employment.

FINDINGS OF FACT

1. Claimant was injured on May 2, 1984 when his motorcycle collided with a car while claimant was returning from his lunch break to his employer's place of business.

2. Claimant was not a credible witness.

3. Claimant did not stop at another car dealership between noon and 1:08 p.m. on May 2, 1984.

4. Claimant did not examine a car to check its electrical wiring at another car dealership between noon and 1:08 p.m. on May 2, 1984.

5. Claimant did not run an errand on May 2, 1984 for his employer over claimant's lunch hour.

6. Claimant was not injured while engaged in his employer's business on May 2, 1984.

CONCLUSION OF LAW

Claimant has not proved that he suffered an injury on May 2, 1984 that 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 claimant pay costs of this proceeding including costs of transcribing the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 18th day of December, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRAD OLSON, Claimant, vs. WILSON FOODS CORPORATION, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	:	File Nos. 782006 793867 858635 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

The undersigned has been delegated authority pursuant to Iowa Code section 86.3 to issue the final agency decision in this case. Claimant appeals from a Ruling on Applications for Assessment of Costs. The record on appeal consists of the transcript of the proceedings in Storm Lake, Iowa on May 22, 1989. The claimant, the defendant employer, and the Second Injury Fund of Iowa filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: "Whether the Deputy Industrial Commissioner erred in assessing fees and expenses against Olson's counsel in the sum of $1,290.00."

REVIEW OF THE EVIDENCE

Claimant filed his petition on February 25, 1987. That petition alleged two injuries, with injury number "1" designated as an injury on November 12, 1984, to the right hand. The number "2" injury was alleged to have occurred on April 17, 1985 and involved the left hand. The petition also indicated that second injury fund benefits were being sought, and the November 12, 1984 right hand injury was listed as the "first" injury for this purpose.

On December 10, 1987, claimant filed a new, amended petition. This petition again alleged the November 12, 1984, right hand injury, but the April 17, 1985 left hand injury was

omitted and replaced with an allegation of a July 2, 1986 left arm injury. The November 12, 1984 right hand injury was again utilized as the "first" loss for second injury fund purposes.

Answers were filed to the amended petition by both the employer and the Second Injury Fund of Iowa. A prehearing conference was held on December 29, 1987, and a prehearing order was issued on January 5, 1988.

On October 4, 1988, claimant filed a third petition. Once again the petition listed the November 12, 1984 right hand injury and the July 2, 1986 left arm injury, but this petition now listed the "first" injury for second injury fund purposes as a November 12, 1984 injury to the left hand. The November 12, 1984 injury was listed in the previous two petitions and in this petition as a right hand injury.

On April 21, 1989, claimant filed a fourth petition. This petition omitted the November 12, 1984 injury and replaced it with an April 17, 1985 right hand injury as the injury designated number "1" on the petition, and again listed the July 2, 1986 injury to the left arm as the number "2" injury. The April 17, 1985 left hand injury was substituted for the "first" injury for second injury fund purposes.

On May 5, 1989, defendant Second Injury Fund of Iowa filed a motion to sever the petition or in the alternative, to continue the hearing on claimant's petition, which was set for May 22, 1989. On May 18, 1989, a deputy industrial commissioner disallowed claimant's April 21, 1989 petition.

On May 22, 1989, counsel for the defendant and counsel for the Second Injury Fund of Iowa appeared for the hearing. Counsel for claimant did not appear, but claimant's attorney had left a telephone message that claimant's petition would be dismissed without prejudice.

An application for imposition of costs and an application for attorney's fees under Iowa Rule of Civil Procedure 80(a) was made on the record by counsel for the Second Injury Fund of Iowa. An order assessing costs, including attorney's fees and travel expenses, was verbally issued by the deputy commissioner.

On the afternoon of May 22, 1989, the hearing was reconvened with counsel for claimant now present also. Counsel for claimant indicated he had not received the ruling denying his latest amendment to his petition until Saturday, May 20, 1989. Claimant's attorney indicated he called the offices of opposing counsel on Monday, May 22, but learned that the attorneys for the parties had already departed for the site of the hearing in Storm Lake, Iowa.

Claimant's counsel also presented arguments in favor of imposing sanctions in a lesser monetary amount. The deputy industrial commissioner gave the parties until June 5, 1989, to submit any further written arguments on the matter of sanctions.

On May 30, 1989, claimant filed a new petition.

On August 4, 1989, the deputy industrial commissioner issued a Ruling on Applications for Assessment of Costs, which allowed claimant's motion to dismiss, but also assessed against claimant the costs of the action up until May 22, 1989, and assessed against claimant's counsel additional costs under rule 80(a), including $450 expert witness fee for a doctor that appeared at the time set for hearing; $240 in attorney's fees for the employer's attorney; and $600 for travel expenses and attorney's fees for the attorney for the Second Injury Fund of Iowa. Although the Second Injury Fund had requested attorney's fees at the rate of $75 per hour, both attorneys were compensated at the rate of $60 per hour. In addition, attorney's fees claimed by the attorney for the Second Injury Fund for "waiting" time while another case was tried by an attorney she had shared transportation with was disallowed.

Claimant filed a motion for rehearing, to reopen the record, to reconsider and to require findings of fact and conclusions of law. The deputy industrial commissioner reaffirmed his earlier ruling on August 25, 1989, with the exception of clarifying which of two attorneys appearing for claimant was the subject of the sanctions.

Claimant has appealed this ruling. In their appeal briefs, both defendants ask for further sanctions in the form of attorney fees for the appeal.

APPLICABLE LAW

Iowa 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 80(a) states, in part:

...Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: Counsel

> has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation....If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee...

Application of sanctions under rule 80(a) requires, first, a finding of a violation of rule 80(a). Once a violation is found, sanctions are mandatory. Mathias v. Glandon, 448 N.W. 2d 443, 445 (Iowa 1989).

To comport with due process, a court contemplating sanctions must notify the party's counsel that sanctions are being contemplated and give counsel an opportunity to resist or to alter his course of conduct. Counsel is entitled to notice that the court is contemplating a predicate to the sanction, i.e., a violation under 80(a), in addition to an opportunity to be heard on what sanctions should be imposed. Carr v. Hovick, ____ N.W.2d ____ (1990).

The provisions of rule 80(a) apply to each paper signed and would require that each filing of a pleading, motion or other paper reflect a reasonable inquiry. Mathias v. Glandon, 448 N.W. 2d 443, 445 (Iowa 1989).

ANALYSIS

In his appeal brief, claimant's counsel urges that the deputy lacked the authority to impose sanctions under Iowa Rule of Civil Procedure 80(a) because the provisions of rule 80(a) do not apply to proceedings before the industrial commissioner; because no evidentiary hearing was provided before sanctions were imposed; and because the conduct involved does not reflect any of the improper purposes set forth in the rule.

Initially, it is noted that under Iowa Industrial Commissioner Rule 4.35, the rules of civil procedure are applicable to proceedings before the industrial commissioner unless there is a conflict between the commissioner's rule and the rule of civil procedure or the rule of civil procedure is

obviously inapplicable to proceedings before the commissioner. Iowa Rule of Civil Procedure 80(a) is not in conflict with any rule of the Iowa industrial commissioner at the time of this decision. Also, Iowa Rule of Civil Procedure 80(a) is not obviously inapplicable to proceedings before the commissioner. Iowa Rule of Civil Procedure 80(a) does apply to proceedings before the Iowa Industrial Commissioner.

The next argument to be addressed is whether claimant's counsel's conduct constitutes conduct that calls for the imposition of sanctions under rule 80 (a). Claimant's attorney's conduct consists of frequent changes in the petition concerning injury dates and parts of the body injured. Because of the timing of the latest revision of the petition and the subsequent voluntary dismissal by claimant, opposing parties were inconvenienced and costs incurred.

It is noted that the deputy found that "the dismissals in these cases arose as a result of claimant's counsel's inattention to the facts surrounding the injuries...", and that claimant's counsel's position the day of the hearing was "primarily, though not exclusively, a result of counsel's own inadvertence. In particular, it was a result of counsel's failure to conduct a reasonable inquiry into the facts which were the subject matter of the litigation when preparing and serving pleadings....The lack of attention exhibited in this case is tantamount to interposing unnecessary delay and needlessly increasing the cost of the litigation." Ruling on Application for Assessment of Costs, page 3.

The deputy's decision concluded that claimant's counsel had made errors in the petitions through lack of attention. However, the portion of rule 80(a) the deputy relied on for concluding that sanctions were warranted appears to require deliberate action rather than inadvertence. The rule speaks of interposing a pleading "for any improper <u>purpose</u>, such as to harass or cause unnecessary delay or needless increase in the cost of litigation". (emphasis added). Thus, the rule speaks of the intent of counsel at the time of the filing, and not the result of the filing. Unnecessary delay and a needless increase in the cost of litigation appear to have definitely resulted in this case from claimant's counsel's inattention to his pleadings. But there is no showing in the record that the various petitions were filed with the intent to cause such a result.

More appropriate to claimant's counsel's conduct is another portion of rule 80(a):

> ...Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that:.... to the best of counsel's knowledge, information, and

> belief, formed after reasonable inquiry, it is well grounded in fact....

Claimant's attorney had an obligation upon filing the petition to adequately investigate the facts he was alleging. The frequent changes made by claimant's counsel in the injury dates and parts of claimant's body that were affected by those injuries indicates either that claimant's counsel did not adequately investigate the facts, or that counsel was negligent in his allegation of the facts in the pleadings. Either situation results in claimant's counsel failing to file a pleading well grounded in fact.

It is noted that in some cases, changes in claimant's condition may justify changes in the petition as to areas of the body affected, or even the injury dates. Claimant's counsel, in his Motion for Rehearing, to Reopen the Record, to Reconsider, and to Require Findings of Fact and Conclusions of Law, states that:

> 12. The Original Petition in this case was in fact correct. The Claimant had injured both hands during a period of seven months. After the first Petition was filed the Claimant's injured right arm failed to respond to treatment and became much worse. The Claimant realized that his right arm injury was more serious then either hand injury. The first amendment was made to reflect this change by making the right arm injury of July 2, 1986, the second injury. The second amendment was necessary to reflect the fact that the Claimant's left hand had deteriorated and was clearly the first injury. The only real error was made on the second petition when the first injury date was not changed to show April 17, 1985. That error was corrected by the third amendment that was not allowed. The fact is that this whole matter took place over a year and a half period from the time of the original petition. The Claimant continued to work at the fast and repetitious pace of Wilson Foods plant. The first two amendments were necessary to conform with the ongoing changes taking place in regard to the Claimant's extremities. The only true error was made in the second amendment which was corrected by the third petition.

However, although claimant states that "The original petition in this case was correct" in paragraph 12 of his Motion to Reconsider, in paragraph 13 he states that the left hand injury alleged in the original petition was not only erroneous, but that the defendant was not misled by this because the parties had entered into a settlement of that injury. In fact, the settlement occurred on December 2, 1985, more than a year before

the first petition was filed on February 23, 1987. Thus, claimant's initial petition alleged an injury that had already been settled.

It is noted that these allegations of physical change leading to the amendments of the petition were put forth by claimant's attorney after the deputy commissioner's ruling on sanctions. In addition, it is noted that no medical evidence corroborating the existence of a physical change accompanied the statements in the motion for reconsideration. Moreover, changes in claimant's condition would not explain the frequent changes in injury dates and parts of the body injured. It is concluded that the amendments to the petition were the result of claimant's counsel's failure to adequately investigate the nature of his client's condition before filing the petition.

The next argument to be addressed will be the question of whether claimant's counsel was entitled to an evidentiary hearing prior to the imposition of sanctions. Rule 80(a), on its face, does not require a hearing before sanctions are imposed. However, due process may, under some circumstances, require notice and an opportunity to be heard before the imposition of sanctions.

Federal cases on Federal Rule of Civil Procedure 11, which is the corollary of Iowa Rule of Civil Procedure 80(a), indicate that before attorney's fees are ordered as a sanction, a hearing is desirable if there are disputed issues of fact. See Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541 (1985). See also King v. McCord, 621 F2d 205 (1980), and Matter of First Colonial Corp. of America, 544 F2d 1291 (1977). However, one commentator has noted that "where the sanctions are based on a failure to make a proper inquiry into the facts or the law, and the judge assessing the sanctions participated in the proceedings, no formal pre-sanction hearing is required." Litigation Abuse and Misuse, 36 Drake Law Review 483, at 505 (1986-87); also see Invst. Fin. Group v. Chem-Nuclear Sys., 815 F. 2d at 405; Rogers v. Lincoln Towing Serv., Inc., 771 F. 2d at 205-06.

The Iowa Supreme Court case of Carr v. Hovick, ___ N.W.2d ___ (1990), deals with the due process requirements of imposing sanctions under rule 80(a). The Court noted that the advisory committee note to the 1983 amendment to federal rule 11, which Iowa rule 80(a) is based on, stated that sanctions under the rule must comport with due process requirements. The Court noted that due process requirements would probably need to be met under both the Federal and Iowa Constitutions.

In Carr, the Court remanded the case because although the attorney had been given an opportunity to be heard on the question of what sanctions were to be imposed, he had not been given notice that sanctions were being contemplated. The Court

noted that due process would depend on the circumstances of the case, and that "In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." Carr, id.

Due process requires both notice and an opportunity to be heard. Claimant's attorney did not have notice or an opportunity to be heard when sanctions were first verbally imposed at the morning hearing. However, claimant's attorney did participate at the afternoon reconvening of the hearing. Although the notice to counsel was only a few hours in advance of this hearing, claimant's counsel was aware, as evidenced by his arguments made at the reconvened hearing, that the purpose of the hearing was the question of what sanctions should be imposed. Claimant's counsel participated in the afternoon hearing, and thus claimant's attorney was given an opportunity to be heard.

It might be argued that, since sanctions had already been ordered at the morning session of the hearing, claimant's counsel was limited to addressing the extent of sanctions at the afternoon hearing and was foreclosed from addressing the question of whether sanctions were warranted at all. However, there is no indication in the record that claimant's counsel was foreclosed from attacking the imposition of sanctions. Apparently claimant's attorney chose to merely object to the amount of the mileage and attorney's fees, and did not choose to argue that rule 80(a) sanctions were not warranted.

Significantly, the deputy industrial commissioner allowed the defendants until May 30, 1989, to submit a written statement of costs. The claimant's attorney asked for an additional 3 days from that date in which to make a response. The deputy granted the claimant's attorney 6 days, until June 5, 1989, in which to do so.

Thus, claimant's attorney was given not only an opportunity to make oral argument on the matter of imposition of sanctions at the May 22, 1989 hearing, but was also given an additional period of time in which to make a written response. Claimant's attorney was therefore afforded both notice that sanctions were contemplated and an opportunity to be heard on the question of sanctions prior to the final order imposing the sanctions. Claimant's attorney was afforded due process.

The deputy awarded defendants the fees of Dr. Garner in the amount of $450. However, expert witness fees are limited by statute to $150 per day of testimony. The deputy noted that rule 80(a) does not contain a limitation on witness fees. If Dr. Garner had testified, court ordered costs for his expert witness fee would have been limited to $150. It makes little sense to pay an expert witness more for not testifying than if he had testified. Dr. Garner's expert witness fee is limited to $150.

CONCLUSIONS OF LAW

Iowa Rule of Civil Procedure 80(a) is applicable to proceedings before the Iowa industrial commissioner.

Claimant's attorney's conduct warranted sanctions under Iowa Rule of Civil Procedure 80(a).

Claimant's attorney was not denied due process.

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

ORDER

THEREFORE, it is ordered:

That the costs incurred up to the date of May 22, 1989 are assessed against the claimant. Additional costs under Iowa Rule of Civil Procedure 80 are assessed against claimant's counsel as follows:

Fees for Dr. Garner	$ 150.00
Fees for David Sayre	240.00
Total in favor of Employer	$ 390.00

Fees and expenses incurred by the Second Injury Fund of Iowa	$ 600.00
Total fees and expenses	$ 990.00

Signed and filed this 31st day of May, 1990.

Jon E. Heitland

JON E. HEITLAND
CHIEF DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BOBBY J. PAMPERIEN, Claimant, vs. H. J. HEINZ, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 816040 A P P E A L D E C I S I O N FILED JUL 31 1989 IOWA INDUSTRIAL COMMISSIONER

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 and joint exhibits 1 through 26. Neither party filed a brief on appeal.

ISSUE

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:

1) Whether claimant received an injury which arose out of and in the course of employment;

2) Whether there is a causal relationship between the alleged injury and the disability;

3) Whether claimant is entitled to permanent partial disability benefits to the hand;

4) Whether claimant is entitled to medical benefits under Iowa Code section 85.27.

REVIEW OF THE EVIDENCE

The arbitration decision dated March 1, 1981 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 a pricking to his middle finger on his left hand on December 5, 1985, when claimant wore a pair of gloves issued to him by defendant employer.

2. Claimant had previously cut his left middle finger in October of 1985.

3. Claimant received metal slivers in his left middle finger as a result of wearing company issued gloves.

4. Subsequent to the date of the injury, claimant sought medical treatment for an infection of his left middle finger.

5. The incident on December 5, 1985, did not result in any temporary or permanent disability to claimant's left middle finger.

6. Richard R. Ripperger, M.D., the treating orthopedic surgeon could not determine the cause of claimant's finger infection.

CONCLUSIONS OF LAW

Claimant has established that on December 5, 1985, while at work, he suffered an injury to his left middle finger.

Claimant has not established that there was a causal connection between the injury on December 5, 1985 and claimant's claimed disability.

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 appeal including the costs of transcription of the arbitration hearing.

That defendants pay all other costs of these proceedings pursuant to Division of Industrial Services Rule 343-4.33.

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAMELA PULJU,	:	
Claimant,	:	File Nos. 804656
vs.	:	814502
IBP, INC.,	:	
Employer,	:	A P P E A L
Self-Insured,	:	
and	:	D E C I S I O N
SECOND INJURY FUND OF IOWA	:	
Defendants.	:	

STATEMENT OF THE CASE

Defendant Second Injury Fund of Iowa appeals from an arbitration decision awarding permanent partial disability benefits as the result of alleged injuries on September 1, 1984 and August 1, 1985. Appeals by the claimant and the employer have been resolved by an agreement of settlement approved March 31, 1989.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 19; employer's exhibits A through D; and second injury fund exhibits 1 through 8. All parties filed briefs on appeal.

ISSUES

Defendant second injury fund states the following issues on appeal:

I. The deputy erred in failing to find that claimant was not a credible witness.

II. The deputy erred in finding that claimant sustained a left hand injury as alleged on September 1, 1984, or right hand injury on August 1, 1985.

III. The deputy erred in finding that claimant has permanent disability as a result of her right hand, left hand and right knee conditions.

IV. The deputy erred in finding that claimant is entitled to second injury fund benefits.

V. The deputy erred in awarding interest against the fund.

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 Second Injury Fund of Iowa (hereinafter the Fund) alleges the deputy failed to pass on the claimant's credibility. The Fund asserts that claimant made allegedly inconsistent statements, failed to report part of her work history subsequent to the injury, and asserts that claimant "has a mendacious character" and is a "faker".

A witness is presumed to be truthful unless and until the witness's credibility is brought into question. Even assuming that the Fund raised the issue of claimant's credibility by its cross-examination of claimant, the record does not disclose any indication of a lack of credibility on the part of claimant. Claimant worked at two positions of short duration subsequent to her injury that the Fund alleges were not adequately disclosed. Claimant was cross-examined on these omissions and offered an explanation. Taken as a whole, the record does not disclose a lack of credibility on the part of the claimant.

The Fund also asserts that claimant has failed to show that her present left and right hand conditions are causally related to her employment. However, the record contains the testimony of Ronald A. Dierwechter, M.D., which does establish a causal connection between claimant's hand conditions and her employment. Although Dr. Dierwechter indicated this connection by checking a box on a form without further elaboration, Dr. Dierwechter's causal connection opinion is uncontroverted in the record. Claimant has established by the greater weight of the evidence that her present hand conditions were causally connected to her employment.

The Fund urges that claimant has not shown that her leg and right and left hand conditions are permanent. In regards to claimant's right and left hands, several doctors offered ratings of permanent impairment. Oscar M. Jardon, M.D., rated both hands as being five percent impaired. Keith O. Garner, M.D., rated each hand at 10 percent. A. J. Wolbrink, M.D., rated claimant's left hand as 11 percent impaired, and the

right hand as 7 percent. The Fund stresses the fact that Dr. Dierwechter and Peter D. Wirtz, M.D., rated claimant's hands at zero percent impairment. The Fund also notes that Mark Schultz, M.D., indicated that claimant had "full use" of her limbs in 1986.

Claimant has been given permanent ratings of impairment by some of her doctors, and ratings of no impairment by other doctors. Dr. Schultz' examination of claimant appears to have been a general evaluation only, and did not result in a rating of "zero" impairment, but only a general statement as to "full use" of her limbs. Dr. Schultz is apparently a general practitioner. The opinions of Dr. Wirtz and Dr. Dierwechter did rate claimant's hand impairments as zero. Dr. Dierwechter's statements were made shortly after claimant's carpal tunnel surgeries. Dr. Wirtz's opinion of zero impairment of claimant's hands was based at least in part on an EMG study, and was the most recent evaluation of claimant's condition. Claimant expressed dissatisfaction with the manner in which the EMG was performed. Although Dr. Wirtz' report is admitted into the record and appears on his letterhead stationery, it is not signed by him.

Claimant's testimony and that of her mother indicate that claimant does continue to suffer impairment of her hands. The record is unclear whether claimant passed a manual dexterity test before working for Aalf's. Claimant has no permanent restrictions.

Based on the greater weight of the medical evidence, it is concluded that claimant has a five percent permanent partial impairment of each hand.

The Fund also alleges that claimant has not shown permanent impairment of the right leg. However, the record shows that Dr. Keane anticipated that claimant would have a 20 percent impairment of the right leg following the recovery from the motorcycle accident. Claimant was later seen by Dr. Garner, who rated claimant's right leg as 25 percent impaired. The other medical evidence indicates claimant cannot stand for prolonged periods of time because of her leg condition, and that her foot irregularities as a result of that accident result in back pain. Claimant has shown that her right leg condition has resulted in permanent impairment.

The Fund next urges that claimant is not entitled to benefits from the second injury fund. The Fund requests an interpretation of Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970) requiring that a "first" injury for purposes of the second injury fund result in at least a 90 percent impairment before the Fund is liable for compensation. Such a reading of Irish is unreasonable.

The Fund's final issue on appeal concerns the obligation

of the Fund to pay interest on unpaid compensation. The case of Braden v. Big W Welding Service, Appeal Decision, October 28, 1988, established that the Fund is not liable for interest payments.

FINDINGS OF FACT

1. Claimant sustained a carpal tunnel injury to her left hand on September 1, 1984 which arose out of and in the course of her employment with employer.

2. Claimant sustained a carpal tunnel injury to her right hand on August 1, 1985 which arose out of and in the course of her employment with employer.

3. Dr. Dierwechter, the surgeon for both of the carpal tunnel surgeries, stated that the carpal tunnel injuries were caused by claimant's employment.

4. Claimant performed several repetitive jobs with her hands while working for employer.

5. The carpal tunnel injuries were the cause of a permanent partial impairment of five percent to each hand.

6. Claimant sustained a severe injury to her right leg on June 10, 1973 in a motorcycle accident.

7. Claimant sustained permanent partial impairment of 25 percent of her right leg due to this injury of June 10, 1973.

8. Claimant has no medical restrictions due to any of these injuries.

9. Claimant is 35 years old, has a high school education, and has experience as a secretary, bookkeeper, accountant, cook, nurse's aide, bartender, production line worker and driving a truck and a school bus.

10. Claimant had an industrial disability of 20 percent as a result of the non-compensable right leg injury of June 10, 1973 and the left hand injury of September 1, 1984.

11. Claimant has an industrial disability of 25 percent as a result of the non-compensable right leg injury on June 10, 1973, the left hand injury on September 1, 1984, and the right hand injury of August 1, 1985.

CONCLUSIONS OF LAW

Claimant sustained an injury on September 1, 1984 and another injury on August 1, 1985 which arose out of and in

the course of employment with employer.

Both injuries were the cause of permanent disability.

Claimant is entitled to 9.5 weeks of permanent partial disability as a result of the injury to the left hand on September 1, 1984 and 9.5 weeks of permanent partial disability as a result of the injury to the right hand on August 1, 1985.

The disability attributable to the non-compensable injury to the right leg on June 10, 1973 is equivalent to 55 weeks.

The overall industrial disability as a result of the injuries of June 10, 1973, September 1, 1984 and August 1, 1985 is 75 percent. Prior to the August 1, 1985 injury claimant had an industrial disability of 20 percent.

The obligation of the Fund is 51 weeks of permanent partial disability benefits, 35.5 at the rate of $180.19 and 15.5 weeks at the rate of $188.67.

Claimant's entitlement to healing period compensation has been fully paid.

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

ORDER

THEREFORE, it is ordered:

That defendant employer pay to claimant nine point five (9.5) weeks of permanent partial disability benefits at the rate of one hundred eighty and 19/100 dollars ($180.19) per week for the injury of September 1, 1984 in the total amount of one thousand seven hundred eleven and 81/100 dollars ($1,711.81) commencing on October 6, 1984, at the end of the healing period.

That defendant employer pay to claimant nine point five (9.5) weeks of permanent partial disability benefits at the rate of one hundred eighty-eight and 67/100 dollars ($188.67) per week for the injury of August 1, 1985 in the total amount of one thousand seven hundred ninty-two and 37/100 ($1,792.37) commencing March 4, 1986, as stipulated.

That defendant Second Injury Fund of Iowa pay to claimant thirty-five point five (35.5) weeks of permanent partial disability benefits at the rate of one hundred eighty and 19/100 dollars ($180.19) per week in the total amount of six thousand three hundred ninety-six and 75/100 dollars ($6,396.75) commencing December 10, 1985 and an additional fifteen point five (15.5) weeks of permanent partial disability benefits at the rate of one hundred eight-eight and 67/100 dollars ($188.67) per

week commencing May 8, 1986 in the total amount of two thousand nine hundred twenty-four and 38/100 dollars ($2,924.38).

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

That interest on the employee's portion of this award will accrue pursuant to Iowa Code section 85.30.

That the costs of this action are to be paid by employer and Second Injury Fund of Iowa equally. The costs of appeal, including the costs of preparing the transcript, shall be paid by the second injury fund.

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 24th day of July, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAMELA PULJU, Claimant, vs. IBP, INC, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	:	File Nos. 804656/814502 O R D E R N U N C P R O T U N C

FILED

SEP 8 1989

IOWA INDUSTRIAL COMMISSIONER

The appeal decision filed July 24, 1989 stated in the Order that interest on the employee's portion of the award would accrue pursuant to Iowa Code section 85.30.

THEREFORE, it is ordered:

That said paragraph is amended to require defendant employer to pay interest on weekly benefits the employer is ordered to pay in the appeal decision as set forth in Iowa Code section 85.30.

Signed and filed this 8th day of September, 1989.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAMELA PULJU,	:	
	:	
Claimant,	:	File No. 804656
	:	814502
vs.	:	
	:	O R D E R
IBP, INC.,	:	
	:	N U N C
Employer,	:	
	:	P R O
and	:	
	:	T U N C
SECOND INJURY FUND OF IOWA,	:	
	:	
Defendants.	:	

FILED
JUL 26 1989
IOWA INDUSTRIAL COMMISSION

The appeal decision filed July 21, 1989, contained a conclusion of law stating that claimant's overall industrial disability as a result of the injuries of June 10, 1973, September 1, 1984, and August 1, 1985, was 75 percent. Claimant's actual industrial disability as a result of those injuries was 25 percent.

THEREFORE, it is ordered:

The appeal decision is hereby amended and corrected to reflect a conclusion of law that claimant's overall industrial disability as a result of the injuries of June 10, 1973, September 1, 1984, and August 1, 1985, was 25 percent.

Signed and filed this 26th day of July, 1989.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROSE A. PEDERSEN,

Claimant,

vs.

EVENTIDE LUTHERAN HOME FOR THE AGED,

Employer,

and

NORTHWESTERN NATIONAL INS.,

Insurance Carrier,
Defendants.

FILED

MAR 23 1990

IOWA INDUSTRIAL COMMISSIONER

File Nos. 826938
812431

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 2 through 8, 12, 13, 14, 24, 25, and 26. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the following issues on appeal:

I. The deputy commissioner erred in failing to apply the legal standard adopted by the commissioner and approved by the supreme court to determine causation where aggravation of employees' pre-existing disease occurs.

II. The deputy erred in his determination that the work claimant was doing was greater than that of non-employment life.

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 in the arbitration decision is adopted.

FINDINGS OF FACT

1. Claimant was employed by employer from December of 1980 until April 11, 1985 as a nurse's aide.

2. Claimant injured her back while turning a water mattress on April 11, 1985 to change the pad underneath the water mattress.

3. Claimant sustained an injury to the lumbar spine on April 11, 1985 that arose out of and in the course of her employment with employer.

4. The injury of April 11, 1985 was a substantial factor in the aggravation of a preexisting degenerative back condition and the cause of claimant's present disability.

5. Claimant works 40 hours a week and earns $4.00 per hour for a gross weekly wage of $160.00 per week.

6. Claimant's activity at the time of her work injury involved greater exertion than that experienced in the normal non-employment life of a normal person.

CONCLUSIONS OF LAW

Claimant did sustain the burden of proof by a preponderance of the evidence that she sustained an injury on April 11, 1985 to her lumber spine which arose out of and in the course of her employment with employer.

This injury was the cause of permanent total disability.

Claimant is entitled to permanent total disability benefits for the injury of April 11, 1985.

The issues of whether claimant sustained a carpal tunnel syndrome injury, whether it caused disability, whether claimant is entitled to benefits, and whether claimant gave proper notice of this injury are now moot.

The issue of whether claimant is an odd-lot employee is also moot.

The proper rate of compensation is $109.54 per week.

Claimant is entitled to $3,156.60 in medical expenses as stipulated to by the parties itemized above and set forth in exhibit 26.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant one hundred nine and 54/100 dollars ($109.54) per week commencing on April 12, 1985 for as long as claimant continues to be permanently and totally disabled.

That defendants are entitled to a credit for seventy-seven (77) weeks of workers' compensation benefits paid prior to hearing at the rate of one hundred one and 60/100 dollars ($101.60) per week.

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

That defendants pay claimant or the provider of services three thousand one hundred fifty-six and 60/100 ($3,156.60) in medical expenses as shown above.

That interest on the workers' compensation benefits, but not the medical benefits, will accrue pursuant to Iowa Code section 85.30.

That the costs of this action are charged to defendants including the cost of the transcription of the hearing proceeding pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 23rd day of March, 1990.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KARLA PHILLIPS,

Claimant,

vs.

JIMMY DEAN MEAT COMPANY,

Employer,

and

AETNA CASUALTY & SURETY COMPANY,

Insurance Carrier,
Defendants.

FILED

FEB 27 1990

IOWA INDUSTRIAL COMMISSIONER

File No. 790649

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 based on an industrial disability of 60 percent.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 5. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is the extent of claimant's industrial disability resulting from an injury on March 22, 1985.

REVIEW OF THE EVIDENCE

The arbitration decision filed November 30, 1988 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

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

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, 760-61 (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 sec. 555(17)a.

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager, 253 Iowa 369, 112 N.W.2d 299; Ziegler, 252 Iowa 613, 106 N.W.2d 591.

An employer takes an employee subject to any active or dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler, 252 Iowa 613, 620, 106 N.W.2d 591, and cases cited.

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.

The opinion of the supreme court in Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, cited with approval a decision of the industrial commissioner for the following proposition:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered....In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted.
> * * * *

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 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).

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 issue that is dispositive of this appeal is the extent of claimant's industrial disability. It should be noted that the parties stipulated that claimant's work injury was a cause of permanent disability. That stipulation is not obviously erroneous, not contrary to law, nor otherwise invalid and therefore is binding. Therefore, any arguments by defendants on appeal that the disability in this matter was temporary are inappropriate.

Defendants' major contention on appeal is that claimant's work injury on March 22, 1985 resulted in little industrial disability. Defendants attribute claimant's industrial disability to events prior to the March 22, 1985 work injury, namely an automobile accident in March 1983 and a work injury in October 1983.

The automobile accident in March 1983 did not result in any industrial disability. The medical report at the time of the accident described the injury as "mild cervical injury." Claimant did not seek treatment until 2 weeks after the accident and discontinued treatment within approximately one month after the accident (Exhibit 1, page 49). Claimant testified that she did not experience any continuing problems with her arm after recovery from that accident. Claimant returned to full duty without restrictions. It is worth noting that John T. Bakody, M.D., who gave the 20 percent impairment rating was aware of both the automobile accident and the carpal tunnel surgery (Ex. 1, pp. 64-70).

Likewise, claimant's work injury in October 1983 did not result in any ascertainable industrial disability. The symptoms claimant experienced at that time were to her upper extremity (Ex. 1, pp. 161-163). She did express some aching in the shoulder (Ex. 1, p. 160) but her primary and most frequent complaints were to the upper extremity. As a result, surgery for a right carpal tunnel syndrome was performed. She was released to return to work without restrictions. No rating of impairment was given by Thomas Carlstrom, M.D., who had performed the surgery. Claimant was able to perform her duties from July 30, 1984 until March 22, 1985.

The deputy correctly discussed the apportionment issue when he stated:

> Defendants claim that there should be some sort of an apportionment in this case due to either the prior carpal tunnel problems or her auto accident in 1983 which existed before Aetna's insurance coverage. Given the evidence presented, there can be no finding of prior permanent impairment before March 22, 1985. First, the impairment rating and work restrictions by Dr. Bakody does [sic] not appear to be based upon anything prior to March, 1985. Secondly, claimant's physicians in 1983 following both the car accident and the carpal tunnel problems returned her to full duty without restrictions. Thirdly, claimant credibly testified that she experienced no lingering chronic difficulties after the car accident. Claimant admitted that she had some lingering pain problems after the carpal tunnel surgery but was able to continue her employment without any significant change in her job at least until the work injury in this case.

All of claimant's current industrial disability resulted from the work injury of March 22, 1985.

The extent of claimant's industrial disability must be determined. Claimant was 29 years old at the time of the work injury. She is a younger worker who has an opportunity for retraining. Her prospects for retraining are good as demonstrated by her success in attending school. She has a 20 percent impairment related to the work injury. She has had an interbody fusion at C5-6 level and lifting restrictions of not more than 15 pounds. Certain activities, such as operating a wizard knife, are closed to her. She is motivated. She is a high school graduate and has attended school at a community college. She has had a significant reduction in wages. Claimant's only work experience prior to the work injury was working as a grocery store checker. When all things are considered claimant has suffered a

40 percent loss of earning capacity as a result of the March 22, 1985 work injury.

FINDINGS OF FACT

1. Claimant was born May 10, 1955 and was 29 years old on March 22, 1985, the date of the work injury.

2. Claimant was involved in an automobile accident in March 1983.

3. Following the automobile accident, claimant ceased treatment approximately one month after the accident and returned to work without restrictions.

4. Claimant suffered no ascertainable industrial disability as a result of the automobile accident.

5. Claimant suffered a work injury in October 1983.

6. As a result of the work injury in October 1983, claimant had surgery for right carpal tunnel syndrome. Following the surgery, claimant returned to work without restrictions.

7. Claimant suffered no ascertainable industrial disability as a result of the work injury in October 1983.

8. As a result of the work injury on March 22, 1985 claimant had an interbody fusion at C5-6 level, lifting restrictions of not more than 15 pounds, activity restrictions, and a 20 percent impairment to the body as a whole.

9. Claimant is a high school graduate and has attended community college.

10. Claimant is motivated and her prospects for retraining are good.

11. Claimant's work experience prior to the March 22, 1985 work injury was working as a grocery store checker and doing a variety of jobs in the defendant employer's packing plant.

12. Claimant has had a significant reduction in wages.

13. Claimant has suffered a 40 percent loss of earning capacity as a result of the March 22, 1985 work injury.

CONCLUSION OF LAW

Claimant has proved that the work injury of March 22, 1985 was the cause of an industrial disability of 40 percent.

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

ORDER

THEREFORE, it is ordered:

That defendants pay claimant two hundred (200) weeks of permanent partial disability benefits at the rate of two hundred ten and 82/100 dollars ($210.82) from February 20, 1987.

That defendants pay claimant healing period benefits for the periods of time stipulated in the prehearing report.

That defendants pay accrued weekly benefits in a lump sum and receive credit against this award for the benefits previously paid as stipulated in the prehearing report.

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

That defendants pay all 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 claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 27th day of February, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL PRUITT, Claimant, vs. IOWA POWER AND LIGHT COMPANY, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	:	File Nos. 619638/705526 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Second Injury Fund appeals and claimant cross-appeals from a review-reopening decision awarding claimant benefits from the Second Injury Fund.

The record on appeal consists of the transcript of the review-reopening hearing; claimant's exhibit 1; and defendant's exhibits A through C. Second Injury Fund and claimant filed briefs on appeal.

ISSUES

The issues on appeal are whether claimant is entitled to benefits from Second Injury Fund and if Second Injury Fund benefits accrue interest.

REVIEW OF THE EVIDENCE

The review-reopening decision filed April 17, 1989 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. The following additional citation is also appropriate.

The Iowa Supreme Court most recently discussed the liability of the Second Injury Fund in Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989). The court stated at 358:

> The language of the second injury act supports this conclusion by providing that "[t]he 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." To hold otherwise would in effect penalize the employer who hired a person with a prior injury. The purpose of Second Injury Fund statutes was to provide a more favorable climate for the employment of persons injured through service in World War II. Jackwig, The Second Injury Fund of Iowa: How Complex Can a Simple Concept Become?, 28 Drake L.Rev. 889, 890-91 (1979). Similar considerations still weigh heavily in our interpretation of the second injury act. See, e.g., Anderson v. Second Injury Fund, 262 N.W.2d 789, 791-92 (Iowa 1978) (purpose to encourage employers to hire handicapped workers).
>
> In the present case, there seems to be no argument about the extent of the second injury standing alone: it is a scheduled injury which does not extend to the body as a whole, even though the cumulative effect of this injury and the prior injuries was to cause such disability.
>
> In this case, if it had not been for the prior injuries sustained by Neelans, the employer would be liable only to the extent provided by the schedule for a leg injury. To hold that the present employer would be liable for payment of a greater amount as a result of the preexisting injuries would be inconsistent with the purpose and language of the statute.
>
> The industrial commissioner correctly ruled that the Second Injury Fund should be responsible for the industrial disability, less the total of the scheduled injuries, or a total of 262 weeks. Accordingly, we reverse and remand for reinstatement of the order by the commissioner.

ANALYSIS

Generally, the issues raised in this appeal have been addressed in prior decisions. The language from the prior decisions will be quoted as appropriate. The reasoning in those prior decisions is applicable in the instant case.

The Second Injury Fund argues that claimant must be "handicapped" and have an impairment greater than 15 percent.

The Second Injury Fund raises another argument in its appeal brief which, although not specifically addressed in Neelans, can be disposed of here. The Second Injury Fund argues that it is not liable because claimant does not have a qualifying disability because the injuries were not "substantial." In Neelans, the claimant had a ten percent impairment to the hand and a twenty percent impairment to the leg. The court found the Second Injury Fund liable. Second Injury Fund attempts to take the facts of prior supreme court cases and make law applicable to all cases. By doing so the Second Injury Fund attempts to modify the clear language of the statute. There is simply not good justification to require, as the Second Injury Fund urges, that a claimant's disability be "significant" or "substantial" in order for the Second Injury Fund to incur liability. This is particularly true in light of the Neelans case in which the Second Injury Fund was found to be liable in a case involving what could be characterized as nonsignificant or nonsubstantial disabilities, namely scheduled member disabilities of ten and twenty percent. See also McCoy v. Donaldson Company Inc., (Appeal Decision, April 28, 1989).

Mockenhaupt v. George A. Hormel & Company, (Appeal Decision, December 29, 1989).

Second Injury Fund next argues that it has no liability because the injuries occurred while working for the same employer. There is no statute nor case law to support his position. Also, in Mockenhaupt, claimant was awarded benefits when the injuries occurred while working for the same employer.

Second Injury Fund's next argument that an impairment rating must be established prior to the second injury. The Second Injury Fund has failed to cite any statute or other legal authority for such a holding. There is no requirement that an impairment rating be established prior to the second injury. All that is necessary is that the first injury resulted in disability.

Second Injury Fund's next argument that the disability should be apportioned was rejected in Neelans.

Second Injury Fund's last argument is that claimant has suffered no industrial disability because claimant suffered no loss of earnings.

The Second Injury Fund's third issue on appeal concerns the extent of claimant's industrial disability. In this regard, the analysis of the deputy is adopted. The deputy properly considered all of the factors involved in determining industrial disability and the determination of 35 percent industrial disability is approved. Again, the Second Injury Fund focuses on one factor, claimant's earnings after the injury, to the exclusion of the other factors that determine industrial disability.

Weiland v. Floyd Swanson, (Appeal Decision, December 29, 1989). In the instant case the deputy properly considered all of the factors involved in determining industrial disability and the determination of 25 percent industrial disability is approved. Second Injury Fund liability is 59 weeks. (25% x 500) - [(15% x 220) + (15% x 220)]

Claimant argues on cross-appeal that funds due from the Second Injury Fund should accrue interest. That issue was resolved in Braden v. Big "W" Welding Service, (Appeal Decision, October 28, 1988) and affirmed in Mockenhaupt, (Appeal Decision), wherein it was stated:

The Second Injury Fund correctly notes that it is not liable for interest on unpaid compensation benefits. See Braden v. Big "W" Welding Service, (Appeal Decision, October 28, 1988). 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 Second Injury 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 permanent impairment of 15 percent to his right knee from a work injury on November 30, 1979 and a permanent impairment of 15 percent to his left knee from a work injury on May 24, 1982.

2. After the injuries, up until the date of the hearing, claimant has experienced chronic pain, swelling, grittiness, grinding and grating in both of his knees.

3. Claimant's subjective symptoms are corroborated and verified by the medical evidence presented by John Kelley, M.D., the treating physician and Joshua Kimelman, D.O., the evaluating physician.

4. Claimant is to avoid climbing and squatting, but at the same time his job requires him to squat in order to splice cable and to climb ladders in order to get in and out of manholes.

5. Both Dr. Kelley and Dr. Kimelman expected claimant's condition to become worse in the future.

6. Claimant was born July 22, 1950 and was 31 years old on May 24, 1982.

7. Claimant has no special education other than high school.

8. Claimant has suffered no loss of wages due to the cumulative affect of his work injuries.

9. Claimant's employment for his current employer began in 1971 and has consisted of manual labor.

10. Claimant's prior work experience includes being a bartender and doing ward care work for disabled persons.

11. Claimant's cumulative loss of earning capacity as a result of injuries on November 30, 1979 and May 24, 1982 is 25 percent.

CONCLUSION OF LAW

Claimant is entitled to 59 weeks of permanent partial disability from Second Injury Fund.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That the Second Injury Fund pay to claimant fifty-nine (59) weeks of permanent partial disability benefits at the rate of two hundred eighty-six and 76/100 dollars ($286.76) per week in the total amount of sixteen thousand nine hundred eighteen and 24/100 dollars ($16,918.24) commencing on April 18, 1983.

That this amount is to be paid in a lump sum.

That interest will not accrue pursuant to Iowa Code section 85.30.

That the costs of this action including the cost of the transcription of the review-reopening hearing are charged to the Second Injury Fund pursuant to Division of Industrial Services Rule 343-4.33.

That the Second Injury Fund file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 28th day of February, 1990.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBRA K. RISIUS, Claimant, vs. TODD CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 737729 A P P E A L D E C I S I O N

FILED
MAY 31 1990
INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendant appeals from a remand decision awarding claimant permanent partial disability benefits based on an industrial disability of ten percent.

The record on appeal consists of the transcript of the arbitration hearing and exhibits 1 through 14 and 16 through 21. Both parties filed briefs on appeal.

ISSUES

The issue on appeal is whether claimant is entitled to permanent partial disability benefits because she was terminated from employment because of a work related injury.

REVIEW OF THE EVIDENCE

The arbitration decision filed May 20, 1988 and the remand decision filed November 6, 1989 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein. Additional facts necessary for disposition of this matter will be discussed as necessary.

APPLICABLE LAW

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

ANALYSIS

Defendant (the employer) appeals the deputy's finding that claimant is entitled to an industrial disability of ten percent due to its failure to give any sort of work to claimant after her work injury. There is no dispute that claimant suffered a work

injury on June 9, 1983. She sought care from her chiropractor and attempted to return to work doing light duty. The defendant requested that she undergo a medical evaluation which was done on August 16 and 17, 1983. Defendant was orally informed of the results of the evaluation on August 19. When defendant contacted claimant, she said she couldn't work and defendant told her she must have an excuse. On August 23, 1983 claimant's chiropractor took her off work "this week" and suggested claimant seek another medical opinion.

On September 6, 1983 the defendant received the written report on the medical evaluation which had been done on August 16 and 17. That report indicated that claimant could return to work but should avoid certain activities. When claimant received her copy of the report on September 9, 1983 she called defendant regarding returning to work. At that time she was suspended and then terminated from employment on September 11, 1983. Claimant's testimony is uncontroverted that she contacted the defendant in response to her receipt of the written report. In fact, defendant's records corroborate claimant's testimony in this regard.

Defendant argues that claimant was terminated for unexcused absences and emphasizes that claimant knew of the defendant's policy on unexcused absences. One must assume that defendant asserts claimant's absences between August 26 and September 9, 1983 were those alleged to be unexcused. Defendant's assertions are not convincing for a variety of reasons. That period of time followed very closely the evaluation done as requested by defendant. The timing of defendant's actions is inconsistent with its assertions. Defendant had told claimant that she needed an excuse from work which she obtained. While the excuse would have expired on August 26, 1983, defendant did nothing until claimant contacted the defendant. Defendant received a report which in essence said claimant could return to work but with restrictions. Claimant contacted defendant about going back to work. Defendant terminated claimant the next working day after claimant contacted the defendant. Two other things make defendant's assertions suspect. One is that defendant offered no witnesses of its own to support its assertion. The other thing is that claimant's unrebutted testimony (claimant's deposition, Exhibit 1) was that employees were terminated because they were old employees, pregnant, or had filed workers' compensation claims.

To decide whether the claimant is eligible for benefits the determination that must be made is whether claimant was terminated because of the work injury. Defendant stipulated that claimant suffered an injury that arose out of and in the course of her employment. After unsuccessful attempts of care at claimant's choosing and unsuccessful attempts to return to light duty work, defendant sent claimant for medical evaluation. When

claimant received the written report on the evaluation she contacted defendant. The report indicated that claimant could return to work with restrictions. Claimant was terminated the next working day after she contacted the defendant. The defendant refused to give claimant any sort of work as a result of the work injury which prevented claimant from doing "normal" work after claimant wanted to return to work following the medical evaluation done at the defendant's request. There is no testimony from defendant that claimant was offered light duty work on either August 19 when defendant called claimant or on September 9 when claimant contacted defendant. The actions of both the claimant and the defendant are less than exemplary. When all of the unique facts of this case are considered, defendant refused to give claimant employment because of claimant's injury.

FINDINGS OF FACT

1. Claimant suffered an injury on June 9, 1983 which arose out of and in the course of her employment.

2. In the time period June 14, 1983 through August 23, 1983 claimant sought care from her chiropractor. During this time claimant made several unsuccessful returns to light duty work. Also, during this time claimant's chiropractor would release her for light duty work. On August 23, 1983 the chiropractor took claimant off work for "this week" and recommended that she seek another medical opinion.

3. On August 16 and 17, 1983 claimant was evaluated by the Medical Occupational Evaluation Center at Mercy Hospital. As a result of that evaluation a report was sent to both claimant and defendant. The report indicated that claimant could return to work but should avoid "twisting, bending, reaching overhead, and heavy lifting."

4. The defendant did not offer claimant light duty work after August 19, 1983. That date is when defendant was verbally informed of the results of the evaluation done at defendant's request. Defendant did not offer claimant any work when claimant contacted defendant about a return to work.

CONCLUSIONS OF LAW

Claimant has a ten percent industrial disability resulting from her injury on June 9, 1983.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant fifty (50) weeks of permanent partial disability benefits at the rate of one hundred eighteen and 94/100 dollars ($118.94) per week from November 1, 1983.

That defendant pay claimant temporary total disability benefits from August 11, 1983 through October 31, 1983, at the rate of one hundred eighteen and 94/100 dollars ($118.94) per week.

That defendant pay all accrued benefits in a lump sum and defendant receive credit for all benefits previously paid.

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

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

That defendant file activity reports pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of May, 1990.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY ROACH, Claimant, vs. FIRESTONE TIRE & RUBBER COMPANY, Employer, and CIGNA INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 806034 A P P E A L D E C I S I O N FILED AUG 21 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding healing period benefits and permanent partial disability benefits based on an industrial disability of 35 percent of the body as a whole.

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 the claimant's injury was the cause of permanent partial impairment to the body as a whole and the extent of claimant's industrial disability.

REVIEW OF THE EVIDENCE

The arbitration decision dated April 22, 1988, adequately and accurately reflects the pertinent evidence and it will not be reiterated herein. However, it should be noted that one of the physicians was Sinesio Misol, M.D., orthopedic surgeon.

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 has suffered an injury to the body as a whole. A difficulty in resolving this issue is that the medical personnel involved had difficulty in determining the cause of claimant's complaints. Claimant was consistent in describing symptoms that included pain in the left shoulder and left shoulder blade. Scott Neff, D.O., and Dr. Misol; Judith L. Halverson, L.P.T.; and doctors at the University of Iowa Hospitals and Clinics all noted a winging of the left scapula. Also, Robert C. Jones, M.D., and the doctors at the University of Iowa Hospitals and Clinics diagnosed claimant as having long thoracic nerve injury. The doctors at the University of Iowa Hospitals and Clinics made the diagnosis when claimant was referred there by Dr. Misol who had suspected an injury to the long thoracic nerve. Claimant's complaints primarily manifest themselves in his inability to use his left arm. The medical evidence which explains that claimant's complaints are the result of an injury to the long thoracic nerve is not rebutted by any medical evidence from defendants. The actual situs of claimant's injury is his shoulder. The injury is an injury to the body as a whole.

The next issue to be resolved is the extent of claimant's industrially disability. The defendants correctly note that the deputy relied upon the stability of the employer in making a determination of industrial disability.

> 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. Knight v. Prince Manufacturing Co., (Appeal Decision June 2, 1989).

Dr. Jones gave claimant a permanent physical impairment rating of five percent and found no limitation of motion of the neck or shoulder. It appears Dr. Jones' rating was therefore to the left upper extremity. Dr. Neff originally opined in February 1985 that claimant did not have a "profound disability" and should be able to continue with essentially normal activity with the exception of heavy repetitive pulling with the left arm. One week later Dr. Neff opined that claimant could work without limitation or restriction and that claimant has no permanent impairment or disability. Dr. Neff does not explain his rather sudden change in opinion and his opinions can be

given little weight. Dr. Misol, in March 1985, did not believe that there would be permanent partial physical impairment in the long term. In November 1986, after consulting "appropriate AMA tables for peripheral nerves" Dr. Misol found "the amount of impairment to the extremity is 15 percent". Dr. Misol's change of opinions, if any, can be attributed to a later use of the AMA tables which he did not use earlier. Therefore, Dr. Misol's later opinion can be given some weight. In summary, the medical evidence in this case indicates that claimant has 5-15 percent permanent impairment to the left upper extremity and a limited impairment to the body as a whole.

Claimant attempted to return to his work at defendant employer doing tire building but was unable to do so. Claimant's medical condition prevents him from returning to his former work at defendant employer and any other work that he has held in the past to which he is best suited. Claimant is currently working a light duty job at defendant employer.

Claimant was 35 years old at the time of the injury and should be in the most productive years of his life. His disability is more severe than would be the case for a younger or older individual. Claimant is motivated to remain employed. When all factors are considered, claimant has suffered a 20 percent loss of earning capacity from his work injury.

FINDINGS OF FACT

1. Claimant was born in 1948 and was 35 years of age on December 14, 1983.

2. On December 14, 1983, claimant suffered an injury to his left shoulder and mid back consisting of an injury to the long thoracic nerve which arose out of and in the course of employment at defendant employer.

3. The work injury of December 14, 1983, was a cause of a permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no heavy pushing or pulling with his left arm or shoulder.

4. Claimant has a permanent impairment of 5-15 percent to the left upper extremity.

5. Claimant has a limited permanent impairment to the body as a whole.

6. Claimant is unable to return to tire building or most other work he has performed in the past which consists mostly of heavy manual labor in a manufacturing environment.

7. Claimant has suffered a loss of actual earnings.

8. Claimant's current job at defendant employer is a special light duty job.

9. Claimant is a high school graduate.

10. Claimant is motivated to be employed.

11. There is little evidence to indicate claimant's potential for vocational rehabilitation.

12. Claimant has suffered a 20 percent loss of earnings capacity as a result of the work injury on December 14, 1983.

CONCLUSIONS OF LAW

Claimant has established that the work injury of December 14, 1983 was an injury to the body as a whole.

Claimant has established that he suffered an industrial disability of 20 percent as a result of the work injury of December 14, 1983.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant one hundred (100) weeks of permanent partial disability benefits at the rate of three hundred ninety-eight and 24/100 dollars ($398.24) per week from November 21, 1986.

That defendants shall pay to claimant healing period benefits from April 8, 1986 through August 25, 1986 at the rate of three hundred ninety-eight and 24/100 dollars ($398.24) per week.

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.

That defendants shall pay the cost of this action including the costs of transcribing 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 24th day of August, 1989.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUSSELL ROSENBAUM,	:	
Claimant,	:	File No. 846923
vs.	:	A P P E A L
ASSOCIATED PROPERTIES, INC.,	:	D E C I S I O N
Employer, Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding claimant permanent partial disability benefits as the result of an alleged injury on June 12, 1985.

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

ISSUES

Defendant states the following issues on appeal:

1. The deputy commissioner's rulings on January 17, 1989 by telephone and January 20, 1989 by written order re sanctions, in view of the claimant's conduct, were an abuse of discretion.

2. The deputy commissioner erred in granting claimant's motion to amend the petition on January 24, 1989, regarding the name of the employer and the date of the injury.

3. The award made in this matter was excessive in view of the evidence presented.

REVIEW OF THE EVIDENCE

The arbitration decision filed March 27, 1989 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 evidence. In addition, the following authority is noted:

Iowa Division of Industrial Services Rule 343-4.17 states:

> Each party to a contested case shall serve all medical records and reports concerning the injured worker in the possession of the party upon each opposing party not later than twenty days following filing of an answer, or if not then in possession of a party, within ten days of receipt.

ANALYSIS

Defendant argues on appeal that the sanctions imposed by the deputy, cutting off further discovery and denying an independent medical examination, were an abuse of discretion. Defendant asserts that the reports of Harold J. Fletcher, M.D., were relevant to establishing the extent of claimant's prior disability, but that defendant did not learn of the existence of such reports until receiving the report of another doctor on January 9, 1989. Defendant points out that claimant indicated in his answers to interrogatories that he would provide all reports when he received them.

A reconstruction of the procedural history of the case from the file is required. Claimant filed his petition on May 8, 1987. Claimant answered interrogatories propounded by the employer, and listed past medical providers, including Dr. Fletcher. On June 10, 1987, the employer served a request for production of medical records. On June 29, 1987, claimant served interrogatories on the employer, one of which asked for the correct name of the employer.

On March 24, 1988, claimant requested that the employer file an answer to the interrogatories previously served. This request was renewed on April 26, 1988.

On May 2, 1988, claimant indicated he was ready for prehearing conference and hearing. On August 22, 1988, a hearing assignment order was issued, setting hearing for January 18, 1989. Paragraph 6 of the order required the parties to exchange witness and exhibit lists not less than 15 days before the hearing (January 3, 1989), and stated that any witness or exhibit not complying with that requirement would not be allowed into evidence at the hearing.

On January 9, 1989, the employer received claimant's medical records in response to the request for production. The records included a report by Robert E. VanDemark, Jr., M.D., dated June 19, 1987. There were no records of Dr. Fletcher in the response.

On January 12, the employer attempted to obtain copies of Dr. Fletcher's records directly from Dr. Fletcher. Dr. Fletcher's office indicated to the employer that the records would be mailed on January 13, 1989. On January 13, 1989, the employer contacted the office of the Iowa Industrial Commissioner, and orally requested a continuance of the hearing for the purpose of conducting an independent medical examination of claimant. On January 16, 1989, the employer was informed that claimant had withdrawn his patient's waiver on January 13 and again on January 16, and medical records would not be provided by Dr. Fletcher. At some point claimant reinstituted his patient waiver. Also on January 16, 1989, the employer answered claimant's interrogatories.

On January 17, 1989, the employer filed a motion for sanctions, and a request for an independent medical examination. The employer cited the fact that Dr. VanDemark's report was dated June 19, 1987, but not received by the employer until January 9, 1989. The employer alleged that the claimant presumably had the report in his possession more than 10 days, and therefore did not comply with Division of Industrial Services Rule 343-4.17. The employer also requested an independent medical exam.

The employer then filed a second motion for sanctions, and in the alternative, a request for a continuance. The employer alleged that claimant had failed to serve employer with reports from Dr. Fletcher, and had withdrawn the patient's waiver, thereby preventing the employer from obtaining the reports on its own.

A telephone hearing conducted by Deputy Industrial Commissioner Walleser was held on January 17 on both motions. Deputy Walleser denied the motion for continuance, noting that the parties had agreed on scheduling the hearing for January 18, 1989 at the time of pretrial, and that any discovery not completed by the time of hearing would be waived. It was also noted by the deputy that the employer had not previously filed a motion to compel claimant to comply with the request for production of medical records. The request for an independent medical examination was denied as well. Deputy Walleser then excluded all medical records of Dr. VanDemark and Dr. Fletcher, and any records of Dr. Durwood and Dr. Kruse not exchanged prior to January 3, 1989. Deputy Walleser then urged the parties to cooperate in discovery matters.

At the hearing on January 18, 1989, defendant requested a continuance, and the hearing deputy indicated counsel for defendant should place a call to the industrial commissioner's office. Deputy Walleser was absent from the office, and the call was forwarded to Deputy McGovern. Deputy McGovern's memo to the file indicates that she received a call requesting a continuance based on evidence newly discovered subsequent to the ruling by Deputy Walleser. Counsel for the employer indicated that in light of the newly discovered evidence, the ruling on sanctions by Deputy Walleser would result in penalizing the party requesting the sanctions instead of the party that allegedly perpetrated the need for the sanctions. Deputy McGovern informed the parties she lacked the authority to overturn another deputy's ruling. Mr. Flom, counsel for the employer, assured Deputy McGovern that he was not requesting a reversal of a ruling, but merely requesting a continuance in order to review the evidence. A continuance was granted.

Deputy McGovern specifically noted that no mention was made of a previously denied request for a continuance, and that a continuance would not have been granted had such information been made known to her.

On January 19, 1989, a third telephone conference was held. Deputy Walleser informed the parties that Deputy McGovern was unaware of the prior denial of a continuance, and that Deputy Walleser regarded the second request for a continuance as an effort to circumvent the earlier ruling. Deputy Walleser then rescinded the continuance and set the hearing for January 26, 1989.

On January 23, 1989, the claimant filed a motion for leave to amend the petition, reciting that the employer had not answered claimant's interrogatories until January 16, 1989, two days before the first scheduled hearing, and that the answers revealed that the employer had been incorrectly named in the petition. Claimant also sought to amend the petition to reflect the correct injury date. On January 24, 1989, leave to amend was granted. At the hearing on January 26, 1989, the employer resisted the motion to amend. The petition was amended by claimant on January 31, 1989.

The hearing deputy allowed the parties seven days to supplement the record in regard to Deputy's Walleser's ruling. The employer filed a statement indicating that the parties did inform Deputy McGovern of the prior request for a continuance; that Deputy McGovern indicated she was experiencing phone problems during the conference and may not have heard the mention of a prior request for continuance; and that at the conclusion of the first telephone conversation with Deputy Walleser, one of the attorneys for the employer indicated he did not understand the

ruling but Deputy Walleser declined to explain the ruling. The statement also indicates that even when Dr. Fletcher provided claimant's medical information to the employer, Dr. Fletcher misunderstood and only provided records back to 1985, even though he had been treating claimant since 1981. The employer indicates it was this "thwarting" of the discovery attempt that prompted the second request for a continuance. Claimant joined in the request and agreed to an independent medical examination, in return for the employer paying 90 days of benefits without admission of liability, and employer not resisting the amendment of the petition. However, the continuance was rescinded as set forth above.

A review of the record reveals that claimant listed Dr. Fletcher in his answers to interrogatories in 1987. Claimant went so far as to include in his interrogatory answers an invitation to defendant to subpoena any records that claimant did not have himself. At that point in time, claimant had executed a patient's waiver. Defendant apparently did not seek Dr. Fletcher's records until a few days before the scheduled hearing, when claimant had withdrawn his patient's waiver.

Defendant states that it relied to its detriment on claimant's interrogatory answer stating claimant would provide any further reports once they were obtained by claimant. Claimant exchanged copies of the medical reports he utilized at the hearing with defendant. The reports in question were not utilized by claimant.

Claimant listed Dr. Fletcher in his interrogatory answers. There is no showing that claimant received Dr. Fletcher's reports and failed to provide them to defendant. Defendant waited until the eleventh hour to compel the reports, even though defendant was on notice that such records might exist nearly two years prior to the hearing. Defendant apparently relied on claimant to obtain and utilize at the hearing all his medical records. Claimant is obligated to truthfully answer interrogatories, and to completely answer an interrogatory question as to past medical providers. Claimant did so. Defendant knew which records claimant would be offering into evidence at the hearing by the records claimant provided under our discovery rules. Under Division of Industrial Services Rule 343-4.17, claimant is only obligated to provide those medical reports that are in his possession. Defendant was aware that claimant had consulted Dr. Fletcher from claimant's answers to interrogatories. If defendant desired to use Dr. Fletcher's reports at the hearing, defendant had the opportunity to obtain those records. Claimant did not withdraw the patient's waiver until just prior to the scheduled hearing, and reinstated the waiver a short time later. Defendant then obtained the reports it desired. Even if claimant had never withdrawn his patient waiver and defendant had obtained

Dr. Fletcher's reports upon its first request, that request was untimely. Defendant would have been barred from using those reports at the hearing because defendant had not listed the reports on its list of exhibits at least 15 days prior to hearing. Thus, the withdrawal of the patient waiver, although not to be condoned, had no effect on the status of defendant's last minute discovery attempt. The request for Dr. Fletcher's records was untimely even before claimant withdrew the patient waiver.

It is noted that neither claimant nor defendant displayed exemplary compliance with our discovery rules. This appeal is poignant proof of the detrimental effect noncompliance with these rules can have on the functioning of the workers' compensation system. Discovery rules exist to prevent surprise and operate for the benefit of all parties. Proper utilization of the rules will provide a party with all information in an opposing party's possession or knowledge of where to obtain it. By waiting until just prior to the hearing, defendant has created its own time problems. In addition, the hearing assignment order notes that the parties agreed to waive any discovery not completed by the date of hearing. The deputy's sanction orders cutting off discovery were not an abuse of discretion.

Defendant also asserts that the deputy erred in allowing claimant to amend his petition to reflect defendant's proper business name and the correct date of injury. Defendant argues that the amendment in effect substitutes a new party outside the two year statute of limitations and should be barred. Defendant relies on the distinction between "Aqua Soo Water Treatment, Inc.," the name originally listed for defendant in the petition, and the amended and correct name, "Associated Properties, Inc., d/b/a Aqua Soo Water Treatment."

The record shows that as early as 1987, claimant propounded interrogatories to defendant, one of which asked for the full name of claimant's employer. Also, defendant filed an answer to the petition naming it as Aqua Soo Water, Inc. Claimant's pay checks bore the name "Aqua Soo." Defendant did not answer claimant's interrogatories until two days before the hearing.

The Iowa Supreme Court has held that allowing amendment to pleadings is the rule; denial is the exception. Galbraith v. George, 217 N.W.2d 598 (Iowa 1974). Considerable discretion is allowed in determining whether or not leave to amend should be granted. Ackerman v. Lauver, 242 N.W.2d 342 (Iowa 1976). Defendant cannot improperly fail to answer claimant's interrogatory on the proper name of the employer, let the two year statute of limitation pass, and then seek to disallow the amendment of the proper name and ask for dismissal because the new petition is untimely. It is also noted that the same person owns both Associated Properties and Aqua Soo Water Treatment. Defendant

has acknowledged that Aqua Soo Water Treatment is one of the names Associated Properties does business under. Clearly the real party in interest was involved in the litigation at all times. Similarly, defendant does not allege it was misled as to the injury in question by the reference to "July, 1985" in the petition, later amended by claimant to "June 12, 1985."

To the extent the original name and date of injury in the petition was incorrect, the error is negligible, caused no prejudice, and, in regards to the defendant's correct name, was in fact caused by defendant's lack of compliance with answering interrogatories. The deputy properly allowed the amendment of the petition.

As a final issue on appeal, defendant contends that the award was excessive. Defendant's brief on this issue merely points out that the vocational rehabilitation expert did not conduct actual tests of claimant. This fact was noted in the deputy's review of the evidence and given proper weight. A review of the record as a whole reveals the award was not excessive in light of the factors utilized to ascertain the extent of industrial disability.

FINDINGS OF FACT

1. Claimant injured his back on June 12, 1985 while working for defendant.

2. Claimant's impairment is the result of his injury on June 12, 1985.

3. Claimant is restricted from doing physical work involving bending or lifting more than 25 pounds.

4. Claimant has less than a seventh grade education and has difficulty reading.

5. Claimant has done manual labor all of his working life.

6. Claimant has known no other work for the last 24 years other than doing heavy and strenuous lifting and working in the water softener business.

7. At 50 years of age and with claimant's restrictions and limited education, claimant is not retrainable.

8. Claimant has a permanent impairment to the body as a whole.

9. Claimant has a 70 percent loss of earning capacity.

10. Claimant has not worked since March 8, 1988.

11. Claimant was paid his full wages by defendant beginning June 12, 1985 to December 31, 1988, inclusive, except for five weeks in 1987.

CONCLUSIONS OF LAW

Claimant's injury on June 12, 1985 arose out of and in the course of his employment with defendant.

Claimant's disability is causally connected to his injury of June 12, 1985.

Claimant has a 70 percent industrial disability.

Claimant is entitled to no healing period benefits because he continued to work for defendant after his injury and was paid his full wages.

Claimant's disability payments commence March 8, 1988.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant is entitled to three hundred fifty (350) weeks of permanent partial disability benefits at the rate of two hundred seventeen and 67/100 dollars ($217.67) per week beginning March 8, 1988.

That claimant is entitled to no healing period benefits.

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

That defendant shall receive credit against the permanent partial disability awarded for forty-two point seven one four (42.714) weeks previously paid.

That defendant shall pay interest on benefits here awarded as set forth in Iowa Code section 85.30 beginning January 1, 1989.

That defendant shall pay the cost of this action pursuant to Division of Industrial Services Rule 343-4.33.

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

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

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS SANBORN, Claimant, vs. GRISSEL COMPANY, INC. Employer, and ROYAL INSURANCE COMPANY and IOWA CONTRACTORS WORKERS' COMPENSATION GROUP, Insurance Carriers, Defendants.	File Nos. 732672 830408 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Both claimant and defendants appeal and claimant cross-appeals from an arbitration decision awarding claimant healing period benefits and permanent partial disability benefits based on an industrial disability of 50 percent and apportioning liability equally between the two insurance carriers.

The record on appeal consists of the transcript of the arbitration hearing and claimant's exhibits 1 through 13. Both parties filed briefs on appeal and defendants filed a reply brief.

ISSUES

The issues on appeal are:

1. Whether the deputy erred in finding 50 percent industrial disability as a whole.

2. Whether the deputy erred in not giving defendants credit for claimant's preexisting disability.

3. Whether the deputy erred in apportioning of liability between insurance carriers for claimant's permanent partial disability.

The claimant states an additional issue on cross-appeal as: Whether the deputy erred in determining healing period.

REVIEW OF THE EVIDENCE

The arbitration decision dated December 7, 1988, adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

Claimant was 43 at the time of the hearing with a history of obesity dating back to 1954. In addition to his weight problem, claimant experienced back injuries dating back to 1968.

In regard to this proceeding, claimant injured his back while working for Grissel Company on May 20, 1983. Iowa Contractors Workers' Compensation Group was the insurer at the time of this injury. Claimant was hospitalized from May 24, 1983 through May 27, 1983 as a result of the injury. Claimant received workers' compensation for his May 20, 1983 injury.

Claimant subsequently suffered an additional work related injury to his back on October 8, 1984. Royal Insurance Company was the insurer at the time of claimant's October 8, 1984 injury. Claimant has not returned to any employment since his October 8, 1984 injury. Claimant received workers' compensation for his October 8, 1984 injury.

James Turner, M.D., was claimant's treating physician following his October 8, 1984 injury and performed a laminectomy on October 23, 1984. Dr. Turner examined claimant on February 25, 1985 and opined: "He has probably gained weight rather than lost. This may be our contributing problem to the back ache. He will gradually try to increase his activities." (Exhibit 4, page 2) On April 3, 1985 Dr. Turner opined: "I think he has objectively improved, subjectively remains unchanged. Not working is getting to be a problem." (Ex. 4, p. 2) At his deposition, Dr. Turner testified concerning claimant's weight problem and his continued back problems:

> Q. ...Do you think the continuing weight problem results in furthering a continuation of his disability?
>
> A. It certainly doesn't help it or help his ability to recondition to come out of it.
>
> ....
>
> Q. Yes, and is it true also, Dr. Turner, that his obesity interferes in the effectiveness of that kind of rehabilitation?

A. It limits the effectiveness of it, yes.
(Ex. 12, pp. 39-40)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on May 20, 1983 and October 8, 1984 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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 of May 20, 1983 and October 8, 1984 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language.

Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman, 261 Iowa 352, 154 N.W.2d 128.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962).

An employer takes an employee subject to any active or dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960), and cases cited.

An employee is not entitled to recover for the results of a preexisting injury or disease 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 v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler, 252 Iowa 613, 106 N.W.2d 591. See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

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).

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).

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 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).

ANALYSIS

In the case sub judice, claimant suffered distinct and separate injuries on May 20, 1983 and October 8, 1984. This case is distinguishable from McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985) where the court applied the cumulative injury rule. In McKeever, claimant suffered a gradual, cumulative injury. Both claimant and the employer lacked notice of a workers' compensation claim until claimant became disabled. Reliance on McKeever is misplaced. Like Babe v. Greyhound Lines, Inc., (Appeal Decision, February 29, 1988) Court of Appeals March 23, 1990. Claimant's injuries were caused by single, noteable events. Industrial disability which resulted from each injury will be apportioned accordingly.

Defendants on appeal contend that an industrial disability of 50 percent permanent partial disability is too generous. Claimant, on the other hand, asserts that he is permanently totally disabled or very close to it.

Claimant was 43 at the time of his injury. Claimant has a high school education and an IQ of 113. Claimant was hired by Grissel Company, Inc., on June 19, 1973 as a journeyman sheet metal worker and left his employment following his October 8, 1984 injury. Claimant is currently unemployed. Claimant testified that he is mechanically inclined and enjoys working with his hands. Past work experience includes four years of training as a journeyman steel worker where claimant learned to read contract drawings or architectural drawings. He also learned to work with blueprints, pattern layouts and formulas to determine volume and area.

Dr. Turner testified that claimant could perform a high percentage of activities. Claimant has a 25 to 30 pound weight limitation, and is limited in the degree and amount of bending that he can perform. In addition, claimant cannot stand full time and should alternate between sitting and standing. Claimant was unable to complete the Kirkwood Skills Center testing program as he was unable to tolerate sitting for a prolonged period of time. Claimant testified that he was able to sit for fifty minutes to an hour.

Claimant has resigned himself to his current situation and has failed to take any steps on his own behalf. Claimant testified that he has not been treated by Dr. Turner since June 2, 1986. On cross-examination claimant testified:

> Q. I'm talking about somebody that you've selected yourself or something that you've done yourself to try to help yourself.

A. No. The impression I got is it's the way it's going to be; and if they go in and look again, maybe I could end up worse, maybe not any better.

(Transcript, pp. 59-60)

In addition, claimant has not applied for employment since the summer of 1987. As early as April 3, 1985 Dr. Turner opined "that not working is getting to be a problem." In his job search claimant contacted employers who were not advertising available positions and failed to follow up the contacts. Vocational rehabilitation workers had a difficult time reaching claimant at his home concerning potential job openings. Claimant's witness, Roger Marquardt, testified that the inability to maintain an immediate, direct contact can adverse impact job placement opportunities.

Furthermore, claimant was assigned a vocational rehabilitation counselor who requested a list of potential jobs claimant could do and those he would like to do. Claimant never completed the list. When questioned at the hearing claimant responded:

A. I didn't know of any jobs that I thought I could do.

Q. So you didn't do that?

A. How could I if I don't know what to put down.

(Tr., p. 61)

Vocational rehabilitation counselors also noted in reports dated November 4, 1986 and November 18, 1986 that claimant was in a "comfort zone" and that an aggressive effort was needed to motivate claimant to focus on a career choice. (Ex. 6)

Physicians advised claimant, at an early age, to lose weight. Claimant had temporary success in the past, but has regained most of the weight. Claimant's 1979 gastric stapling resulted in limited success. Defendants referred claimant to Richard F. Neiman, M.D., for consultation. Dr. Neiman advised claimant to lose at least 80 pounds. Dr. Turner concurred and opined that claimant's weight contributed to claimant's back aches. Dr. Turner testified that claimant's condition would improve significantly if he were to reduce his weight to an acceptable level.

Claimant was 43 years old at the time of the hearing and highly intelligent. Claimant is mechanically inclined and has drafting skills. Claimant had a past history of back problems prior to the May 20, 1983 and October 8, 1984 injuries. Claimant

testified that he has continuing problems with his back. Dr. Turner testified that claimant reached maximum recovery on June 2, 1986. Claimant attempted the Kirkwood Skills Center, but found sitting for an extended period of time difficult and failed to complete the program. Claimant failed to apply for jobs or seek medical treatment since the summer of 1987. Furthermore, claimant's lack of motivation to lose weight adversely reflects upon his overall motivation. Doctors have opined that claimant's condition would improve with weight loss. However, claimant is resigned to not only his back pain but also his obesity. Defendants are not liable for claimant's lack of motivation to obtain employment or improve his overall health. Greater weight of the evidence supports the finding of 60 percent industrial disability.

The issue of apportionment of liability is addressed next. Defendants are not satisfied with equal apportionment of liability for claimant's industrial disability resulting from two separate and distinct injuries.

Dr. Turner opined that five percent of claimant's functional impairment is attributable to preexisting injuries and the remaining 20 percent should be divided equally between the May 20, 1983 and October 8, 1984 injuries.

As a result of his back injury on May 20, 1983. Claimant was released to return to work after six weeks, compensation benefits were paid. Claimant returned to his former employment with defendants. However, claimant testified:

> After the '83 [sic], it never got real good. I started having problems with my right foot and I had to be careful in how I lifted things, and I noticed I could end up with aches and pains considerable more easier.

(Tr., p. 17)

Although claimant was able to return to his former employment after his May 20, 1983 injury, he was unable to perform his prior duties without problems and his earning capacity was reduced. Claimant's May 20, 1983 injury resulted in 20 percent permanent partial disability.

Claimant injured his back again on October 8, 1984. As a result of this injury, claimant has been unable to return to work. On October 23, 1985 claimant had a laminectomy. Currently, claimant has a 25 to 30 pound weight limitation and is limited in the degree and amount of bending he can perform. In addition, claimant cannot stand or sit for extended periods of time. Claimant was unable to complete vocational rehabilitation because his back injury was aggravated by sitting. As a result of claimant's October 8, 1984 back injury, he has permanent

partial disability of 30 percent. Claimant's preexisting condition accounts for ten percent permanent partial disability.

The deputy's mathematical error in computing healing period benefits is corrected.

FINDINGS OF FACT

1. Claimant sustained a back injury arising out of and in the course of his employment with defendants on May 20, 1983.

2. Claimant sustained a back injury arising out of and in the course of his employment with defendants on October 8, 1984.

3. Claimant had preexisting back problems.

4. As a result of claimant's injuries, he had a laminectomy on October 23, 1984.

5. Claimant is a 43 year old obese man who has limited experience outside of the sheet metal industry.

6. Claimant is a high school graduate with an IQ of 113.

7. Claimant received four years of training as a journeyman steel worker where he learned to read architectural drawings, work with blueprints, pattern layouts and formulas to determine volume and area.

8. Claimant was in healing period from October 8, 1984 to June 2, 1986.

9. Claimant returned to work after his May 20, 1983 injury but his earning capacity was reduced by the injury.

10. Claimant was unable to complete Kirkwood Skills Center due to the inability to tolerate sitting for an extended period of time.

11. Claimant has a 25 to 30 pound weight limitation and is limited in the degree and amount of bending he can perform.

12. As a result of the injuries sustained on May 20, 1983 and on October 8, 1984, claimant has not been able to secure employment and has had a loss of earnings.

13. Claimant is not well motivated.

14. Claimant's obesity contributes to his back pain.

15. Claimant has a functional impairment of 25 percent of the body as a whole.

16. As a result of the injury on May 20, 1983 claimant has an attributable functional impairment of ten percent of the body as a whole.

17. As a result of the injury on October 8, 1984 claimant has an attributable functional impairment of ten percent of the body as a whole.

18. As a result of preexisting injuries, claimant has an attributable functional impairment of five percent of the body as a whole.

19. Claimant's industrial disability is 60 percent.

20. Claimant's preexisting condition accounts for ten percent permanent partial disability.

21. Claimant's May 20, 1983 injury accounts for 20 percent permanent partial disability.

22. Claimant's October 8, 1984 injury accounts for 30 percent permanent partial disability.

23. Claimant was in the healing period from October 8, 1984 to June 2, 1986.

CONCLUSIONS OF LAW

The greater weight of the evidence shows that claimant suffered injuries on May 20, 1983 and October 8, 1984 to his back that arose out of and in the course of his employment with defendants and is permanently partially disabled.

The greater weight of the evidence shows that claimant's work related injuries of May 20, 1983 and October 8, 1984 were the cause of 60 percent industrial disability.

The greater weight of the evidence shows that claimant is entitled to healing period benefits from October 8, 1984 to June 2, 1986.

The greater weight of the evidence shows that claimant's preexisting condition is responsible for ten percent permanent partial disability. As a result of the May 20, 1983 injury claimant is 20 percent permanently partially disabled. Finally, 30 percent permanent partial disability is attributable to claimant's October 8, 1984 injury.

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

ORDER

THEREFORE, it is ordered:

That defendants, Iowa Contractors Workers' Compensation Group, pay unto claimant one hundred (100) weeks of permanent partial disability benefits for claimant's May 20, 1983 injury at the rate of three hundred eighty-one and 22/100 dollars ($381.22) per week.

That defendant, Royal Insurance Company, pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits for claimant's October 8, 1984 injury at the rate of three hundred fifty-five and 72/100 dollars ($355.72) per week.

That defendant, Royal Insurance Company, is to pay unto claimant eight-five and six-sevenths (85 6/7) weeks of healing period benefits at the rate of three hundred fifty-five and 72/100 dollars ($355.72).

That payments which have accrued shall be paid in a lump sum together with statutory interest therein pursuant to Iowa Code section 85.30.

That defendants, Grissell Company, Inc. and Iowa Contractors Workers' Compensation Group shall pay one half of this action. Defendants, Grissell Company, Inc. and Royal Insurance Company, shall pay one half of this action including the cost of transcription of the arbitration hearing.

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

Signed and filed this 10th day of May, 1990.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HENRY J. SCHAAPVELD, Claimant, vs. UNIVERSITY OF IOWA, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 814525 A P P E A L D E C I S I O N FILED AUG 15 1989

INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision granting claimant medical benefits as a result of an alleged injury on June 5, 1985.

The record on appeal consists of the transcript of the arbitration hearing and claimant's exhibits 1 and 2. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

A. Did the deputy commit error when he found that Claimant had proven a causal connection between his alleged injury and subsequent hospitalization and a work-related event where Claimant did not present any medical evidence establishing the causal relation?

B. Did the deputy err in awarding Claimant amounts for medical service where the Claimant failed to present any evidence regarding the amounts that were charged?

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 started to work for employer on July 27, 1983.

2. Claimant was employed by employer on June 5, 1985, as a custodian at the Medical Research Center.

3. One of claimant's supervisors surreptitiously kept turning off the lights in the areas where claimant was working at night.

4. Late at night, when claimant was in a room with only one door, the supervisor mysteriously appeared on the other side of the opaque window material of the door with his hand upraised as if to stab someone.

5. Claimant had a preexisting angina heart condition and had suffered a heart attack in 1976.

6. Within seconds of this frightening incident, claimant developed chest pain, pain down the left arm, shortness of breath, rapid breathing and inability to get his breath. Two nitroglycerin pills provided temporary relief, but claimant continued to have pain.

7. Claimant sustained an injury arising out of and in the course of his employment from the shock and fear caused by this incident.

8. Claimant's supervisor, Robinson, and possible other employer representatives sent claimant to the University of Iowa Hospital adjacent to the Medical Research Center and refused claimant's request to go to the Veterans Administration Hospital.

9. This injury was the cause of claimant's emergency hospitalization for these life threatening symptoms.

10. Claimant was hospitalized on June 5, 6, & 7, 1985.

11. Claimant incurred hospital and doctor expenses at the University of Iowa Hospitals and Clinics for his care and treatment there.

12. Defendant employer and the hospital are one and the same person.

13. Defendants have known at all times and know now how much the charges for hospital and doctor expenses amount to because defendants provided these services and prepared the statement of charges for these services.

14. Defendant employer chose the University of Iowa Hospitals and Clinics as the provider of medical services and denied claimant his choice of hospital and doctors.

15. The original notice and petition alleges that the hospital expenses are $3,495.60 and the doctors' charges are $105.

16. These services were ordered by employer's supervisor and its representatives rather than by claimant or his representatives.

17. Claimant did not initiate or participate in horseplay.

18. There is no evidence that Supervisor Stuart menaced and victimized claimant for reasons personal to such employee.

19. There is no evidence concerning the supervisor's motivation and that his behaviour was totally unexplained.

CONCLUSIONS OF LAW

Claimant did sustain the burden of proof by a preponderance of the evidence that he sustained an injury on June 5, 1985, when he experienced chest pain, pain down his left arm and breathing problems after being menaced and frightened by his supervisor.

The injury was the cause of claimant's immediate emergency hospitalization at the University of Iowa Hospitals and Clinics.

Claimant is entitled to have these medical expenses for the hospital and the doctors paid for by defendant employer and defendants are ordered to hold claimant harmless from any further or future prosecution for payment of these charges.

Claimant did not initiate or participate in horseplay, but rather was the victim of his supervisor's unexplained unusual behavior.

Defendants did not sustain the burden of proof by a preponderance of the evidence that the injury was the result of a willful act of a third party directed against the employee for reasons personal to such employee.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant or the provider of services the hospital and doctor expenses for claimant's care at the University of Iowa Hospitals and clinics on June 5, 6 & 7, 1985.

That defendants hold claimant harmless from any further or future prosecution for these medical expenses.

That the costs of this action are charged to defendants 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 15th day of August, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA R. SCOVILL, Claimant, vs. BENSON OPTICAL, Employer, and EMPLOYERS INSURANCE OF WAUSAU, Insurance Carrier, Defendants.	:	File No. 798004 A P P E A L D E C I S I O N FILED AUG - 3 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying any type of benefits as a result of an alleged injury in September of 1984.

The record on appeal consists of the transcript of the arbitration hearing, claimant's exhibit 1, and defendants' exhibits A through F. Both parties filed briefs on appeal.

ISSUES

Although claimant did not specifically state the issues on appeal, defendants stated the issues as follows:

1. Whether the claimant sustained an injury to her back and neck in September of 1984 which arose out of and in the course of her employment.

2. Whether the claimant's carpal tunnel syndrome injury in September of 1984 was the cause of any temporary total disability, and if so, the nature and extent of benefits.

3. Whether the claimant is entitled to any permanent disability benefits, and if so, the nature and extent of such benefits.

4. Whether the claimant is entitled to medical expenses incurred for treatment by Dr. L. E. Phipps, D.C., and if so, the fairness and reasonableness of these medical expenses.

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 has worked for employer from 1979 until the present time.

2. Claimant's job as a first inspector of finished lenses required the repetitive carrying of stacked trays and the adjustment of axis wheels on a lensometer and that these duties required the repetitive use of her fingers, hands and wrists.

3. Michael J. Kitchell, M.D., testified that claimant had a predisposition for and a susceptibility to carpal tunnel syndrome and that the finger, hand and wrist motions of her job aggravated her preexisting carpal tunnel syndrome condition.

4. None of claimant's many physicians specifically stated that claimant's employment was the cause of her neck and back condition on or about September of 1984; but rather the evidence indicates that claimant has suffered from degenerative neck and back problems for many years prior to September of 1984.

5. Claimant never mentioned her neck and back complaints to Dr. Kitchell because he never mentioned them in any of his reports or in his deposition testimony.

6. David J. Boarini, M.D., said that her chronic neck and low back pains are not work related.

7. There is no medical record that C. P. Toledano, M.D., or any other physician took claimant off work at any time for the carpal tunnel syndrome injury of September of 1984.

8. None of the many doctors awarded claimant an impairment rating for the carpal tunnel syndrome injury of September of 1984.

9. Dr. Kitchell said that claimant did not sustain any permanent impairment or disability as a result of the carpal tunnel syndrome injury of September of 1984.

10. Dr. Kitchell recommended against diathermy and ultrasound treatments for carpal tunnel syndrome and that Dr. Boarini recommended against chiropractic treatment in general for claimant's complaints.

11. Claimant's carpal tunnel syndrome condition of September of 1984 does not require chiropractic treatments.

12. There was no convincing evidence that chiropractic treatments two or three times per week totalling $12,264.00 had any beneficial effect on claimant's carpal tunnel syndrome injury of September of 1984.

CONCLUSIONS OF LAW

Claimant did sustain the burden of proof by a preponderance of the evidence that she sustained a carpal tunnel syndrome injury on or about September of 1984.

Claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained a neck and back injury on or about September of 1984.

Claimant did not sustain the burden of proof by a preponderance of the evidence that the carpal tunnel syndrome injury of September of 1984 was the cause of any temporary or permanent impairment or disability.

Claimant is not entitled to temporary or permanent disability benefits.

Claimant is not entitled to the payment of Dr. Phipps' bill in the amount of $12,264.00.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant is to receive nothing as a result of these proceedings.

That the costs of this action are charged to claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 3 day of August, 1989.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOANN SEIBERT, surviving spouse of DELBERT SEIBERT, SR.,	:	File Nos. 790700/790701
Claimant,	:	A P P E A L
vs.	:	D E C I S I O N
JOHN MORRELL & COMPANY,	:	FILED
Employer, Self-Insured, Defendant.	:	NOV 28 1989
	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an review-reopening decision denying death benefits and burial expenses.

The record on appeal consists of the transcript of the review-reopening hearing and joint exhibits 1 through 10. Both parties filed briefs on appeal.

ISSUE

Claimant states the issue on appeal is whether JoAnn Seibert is entitled to death and burial benefits when Delbert's two previous job-related heart attacks were a proximate cause of his death.

REVIEW OF THE EVIDENCE

The review-reopening decision filed December 16, 1988 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.

ANALYSIS

The analysis of the evidence in conjunction with the law in the review-reopening decision is adopted.

FINDINGS OF FACT

1. The decedent was employed by the defendant on August 15, 1983 and June 6, 1984 and that he suffered myocardial infarctions on each of those dates.

2. Decedent retired in November of 1984.

3. Decedent died on January 30, 1987 as a result of a third heart attack.

4. Decedent's final heart attack on January 30, 1987 was not induced or caused by any work related activity or incident of the defendant.

5. Decedent's death resulted from a heart attack decedent had on January 30, 1987.

6. JoAnn Seibert, the claimant, was married to Delbert Seibert at the time of his death.

CONCLUSION OF LAW

Claimant has failed to prove by a preponderance of the evidence that the death of decedent was proximately caused by an injury which arose out of and in the course of employment or that his death was proximately caused by his employment.

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.

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD J. SEYDEL,	:	
Claimant,	:	
vs.	:	File No. 818849
U OF I PHYSICAL PLANT,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
STATE OF IOWA,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding temporary total disability benefits as the result of an alleged injury on July 14, 1985. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 15. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. Whether the Deputy Industrial Commissioner erred by applying an incorrect legal standard in determining that claimants were entitled to a penalty under § 86.13.

2. Whether under the facts presented under this record support a penalty under § 86.13.

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 authority is also noted:

Section 86.13, unnumbered paragraph four states:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

ANALYSIS

On appeal, the issues address whether the penalty imposed by the deputy against the defendants was appropriate. Claimant's date of injury was July 14, 1985. Claimant testified he immediately reported the pain he was experiencing to his supervisor. Exhibit 5 is an accident report on this incident, which shows a filing date of July 14, 1985. Claimant later inquired at the university staff benefits office about the matter in November 1985.

Defendants assert that denial of payment was appropriate because a reasonable debate existed as to whether claimant had given the employer proper notice under section 85.23. Defendants offered the testimony of claimant's supervisor, who stated that although he recalls claimant asking to take a break on the date in question, he has no recollection of claimant mentioning he was in pain. The supervisor testified he would have asked claimant if he wanted to see a doctor and investigated the matter further if claimant had indicated he was experiencing pain. The supervisor also denied any recollection of the accident report.

Claimant obtained a copy of the accident report through discovery of defendants' records. Defendants imply that the report was backdated and somehow surreptitiously placed in claimant's personnel file. However, absolutely no evidence to support this contention was offered. There is no indication that claimant had access to his personnel file. Exhibit 14 is an affidavit of Thomas Hart, indicating that the accident report appeared in the personnel file as of August 8, 1986.

In addition, the record shows that claimant was never advised why his benefits were not being paid. Defendants did not offer any evidence establishing why benefits were not paid. Although defendants, in their appeal brief, assert that benefits were not paid because of a reasonable dispute over notice under section 85.23, the sole witness for defendants did not confirm that this was the reason for nonpayment.

Claimant's testimony that he filed an accident report immediately is controverted only by his supervisor's testimony, which merely states the supervisor does not recall the filing. Claimant's testimony is corroborated by the presence of exhibit 5 in defendants' own file. There is no evidence that exhibit 5 is the product of fabrication.

Thus, defendants have failed to show a reasonable dispute as to lack of notice under section 85.23. Defendants have also failed to show a reasonable dispute over any other aspect of claimant's entitlement for benefits. The deputy's imposition of a 50 percent penalty is appropriate.

Iowa Code section 86.13 provides the appropriate standard for determining whether a penalty should be imposed. It is not necessary to look to either Iowa Code chapter 507B or the law of any other jurisdiction to make this determination.

FINDINGS OF FACT

1. On July 14, 1985 claimant suffered an injury to the lower left abdomen which arose out of and in the course of employment with University of Iowa which either caused or aggravated a hernia condition necessitating hernia surgical repair on November 28, 1985. Claimant had no abdominal pain prior to July 14, 1985.

2. Two or three days after July 14, 1985, at the request of claimant's supervisor, claimant submitted a written report of injury to defendants of the July 14, 1985 injury which was given by claimant to his supervisor which ultimately became a part of claimant's personnel records at the University of Iowa.

3. The work injury of July 14, 1985 was a cause of a period of temporary disability from work beginning on November 27, 1985 through January 12, 1986, at which time claimant returned to work.

4. Claimant's gross weekly earnings on July 14, 1985 was $215.38 per week.

5. The work injury of July 14, 1985 was a cause of reasonable medical expenses in the amount of $3,033.40.

6. Defendants denied claimant's claim for weekly compensation benefits and delayed commencement of those benefits without reasonable or probable cause or excuse.

7. Claimant received no written or oral notice prior to the institution of litigation as to the reasons, if any, for the denial of his claim by the state of Iowa.

CONCLUSION OF LAW

Defendants were properly assessed a 50 percent penalty under Iowa Code section 86.13.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant temporary total disability benefits from November 27, 1985 through January 12, 1986 at the rate of one hundred forty-three and 12/100 dollars ($143.12) per week.

That defendants shall pay claimant the sum of three thousand thirty-three and 40/100 dollars ($3,033.40) as reimbursement for reasonable medical expenses.

That defendants shall, in addition, pay penalty benefits in the total amount of three point three six (3.36) weeks at the rate of one hundred forty-three and 12/100 dollars ($143.12) per week from November 27, 1985.

That defendants shall pay all 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 shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically defendants shall be taxed the sum of one hundred and 00/100 dollars ($100.00) for the medical reports of Drs. Shimp and Tung as requested in the prehearing report.

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 1st day of November, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY P. SHANK, Claimant, vs. MERCY HOSPITAL MEDICAL CENTER, Employer, and AETNA CASUALTY & SURETY CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No 719627 A P P E A L D E C I S I O N FILED AUG 28 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendant Second Injury Fund of Iowa appeals from an arbitration decision awarding permanent total disability benefits as the result of an alleged injury on November 15, 1982. Claimant and Mercy Hospital cross appeal.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1,3,4,5,6, and exhibit A. All parties filed briefs on appeal and claimant filed a reply brief.

ISSUES

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

1. Whether the deputy erred in finding that Claimant's bilateral visual impairment qualified as a prior loss under § 85.64 when no such claim had been pled or urged by Claimant?

2. Assuming arguendo the deputy could consider an unpled theory, whether the deputy erred in concluding that Claimant's bilateral visual impairment constituted a prior loss within the meaning of § 85.64?

3. Whether the deputy erred in finding Claimant permanently and totally disabled under § 85.34(3)?

4. Whether the deputy erred in failing to apportion industrial disability?

Claimant states the following issues on cross-appeal:

1. The deputy industrial commissioner erred when he failed to find the August 17, 1979, injury to the left foot produced permanent partial disability to the claimant.

2. It was error for the deputy industrial commissioner to determine that Mr. Shank suffers from a 79 percent impairment of the whole person for a preexisting impairment to his visual system.

3. There is no reliable evidence which supports a finding concerning any industrial disability caused by the claimant's congenital cataracts.

Claimant states the following issues in his reply brief:

1. Claimant agrees that the deputy erred in finding that claimant's bilateral visual impairment qualified as a prior loss under § 85.64.

2. Assuming arguendo the deputy industrial commissioner could consider the affects of the congenital cataracts, the deputy correctly concluded that the claimant's visual impairment constitutes a prior loss within the meaning of Iowa Code § 85.64.

3. The deputy commissioner properly determine [sic] that Larry Shank was permanently and totally disabled.

4. The opinion of the deputy commissioner properly addresses the apportionment issue.

Defendant Mercy Hospital in its cross-appeal brief recited defendant second injury fund's issues 1, 2 and 3.

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 petition for arbitration may state the claim in general terms and technical or formal rules of procedure need not be

observed." Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161, 163 (1949).

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.

Division of Industrial Services Rule 343-2.4 states:

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

Iowa Code section 85.34(2)(p) states: "For the loss of any eye, weekly compensation during one hundred forty weeks."

Iowa Code section 85.34(2)(q) states: "For the loss of an eye, the other eye having been lost prior to the injury, weekly compensation during two hundred weeks."

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.

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

Claimant brought an action for benefits against both defendant employer and the Second Injury Fund of Iowa (hereinafter the Fund). The Fund, on appeal, asserts that the deputy erred in relying on claimant's congenital eye defect as a prior injury under the Second Injury Compensation Act, where claimant relied on a different prior injury in his pleadings and at the hearing. The strict rules of pleading do not apply in a workers' compensation proceeding. The deputy is entitled to determine the nature of claimant's injury and entitlement to compensation from the evidence presented, regardless of particular theories pled. See Johnson v. George A. Hormel & Company, (Appeal Decision, June 21, 1988); and McCoy v. Donaldson Company, Inc., (Appeal Decision, April 28, 1989).

The Fund also urges that claimant is not entitled to an award of benefits from the second injury fund when the prior injury was a congenital condition. The Fund places undue emphasis on the word "lost" in Iowa Code section 85.64. There is no requirement that claimant's prior condition be a compensable condition. There is no requirement in the Second Injury Compensation Act that the prior loss be from an injury. From the standpoint of the worker, it makes little difference if the prior condition is from a traumatic event or a congenital defect. The resulting disability is the same. Claimant's congenital loss of vision hindered his ability to obtain and maintain employment. Benefits have been granted from the second injury fund when the prior loss was caused by polio. Asay v. Industrial Engineering Equipment Company, 33 Biennial Rep. of the Industrial Commissioner 224 (Appeal Decision 1977) (District Court Appeal dismissed). It is concluded that a prior loss based on a congenital condition does not foreclose entitlement to second injury fund benefits.

The Fund also urges that claimant is not permanently totally disabled. Claimant is unable to return to his position as a nursing assistant due to the condition of his right leg. Claimant has a rating of 10 percent permanent impairment of the right lower extremity. Claimant cannot operate a motor

vehicle or work in jobs requiring reading. Most sedentary jobs would require better vision than claimant has even with corrective lenses. Claimant is motivated to work and would rather be working. The employer failed to rehire claimant. Claimant's inability to drive makes him dependent on others for transportation to any job he might find.

Prior to the onset of claimant's right leg condition, claimant was able to maintain employment in spite of his congenital loss of vision by riding to work with his wife. His work required him to be on his feet. His present leg condition prevents him from returning to that job or any job requiring him to stand or walk. Claimant does, however, apparently participate in dog shows, which require him to walk. It is noted, however, that claimant initially experienced pain in his left foot while participating in such a dog show.

Claimant's vision loss is severe. It eliminates many job opportunities claimant would enjoy if he had normal or near-normal vision. By itself, claimant's vision loss did not foreclose his ability to maintain employment as a nursing assistant with the help of his wife. By itself, claimant's right leg condition might not prevent claimant from finding employment that did not require him to be on his feet. But claimant's eye and leg conditions do not exist in isolation, but rather exist concurrently. Claimant is foreclosed from any occupations that require him to stand or walk. Claimant is foreclosed from many "desk jobs" because he is unskilled and unable to see well enough to do bookwork, reading, or other tasks relying on sight. Claimant is also foreclosed from any occupations requiring an ability to operate a motor vehicle.

Claimant was born in 1947, and has a high school education. Based on these and all other appropriate factors for determining industrial disability, it is determined that claimant is permanently totally disabled.

The Fund's fourth issue on appeal is based on the Fund's assertion that the deputy was obligated to make a determination of the industrial disability as a result of the second injury, even though the second injury was to a scheduled member. However, this argument is rejected in light of Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989).

Claimant raises additional issues on appeal. Claimant urges that the deputy improperly concluded that claimant's left foot condition did not result in any prior loss of use of the left foot. Robert F. Breedlove, M.D., did rate claimant's left foot condition as having no impairment. However, Dr. Breedlove also noted that claimant was still in the process of healing. Later, J. D. Bell, D.O., assigned claimant's left foot a three percent permanent impairment rating. It thus appears that claimant suffered permanent physical impairment

to his left foot.

Claimant also urges that the deputy improperly used the AMA Guides to the Evaluation of Permanent Impairment where there was no medical testimony in the record as to the use of the guides in connection with claimant's vision. The medical evidence in the record utilized the guides for a rating of claimant's lower extremities but not his eyes. Division of Industrial Services Rule 343-2.4 allows the use of the AMA Guides to the Evaluation of Permanent Impairment. However, that rule does not contemplate the independent use of the Guides when the record does not contain medical testimony utilizing the Guides. Interpretation and application of the Guides by someone other than a trained medical professional invites erroneous results. A deputy is free to consult the Guides and treat them as part of the record in the case whenever a medical witness relies on the Guides in expressing a conclusion or opinion. Utilization of the Guides without such medical testimony is inappropriate.

Claimant and the Fund argue that claimant's vision loss is not a prior disability in light of claimant's record of working for several years. Claimant urges that he suffered no prior impairment from his vision. However, claimant's ability to obtain and maintain his nursing assistant job does not mean he did not have a prior loss. Clearly claimant's vision impairment from birth constituted a loss of his eyes for purposes of Iowa Code section 85.64. The mere fact that claimant's prior loss did not result in total disability does not lead to the conclusion that he did not have a prior loss. In addition, claimant's recitation of activities claimant could perform in spite of his vision loss is irrelevant. Since claimant's vision loss is a scheduled loss, the actual disability caused by that loss is not considered. Claimant's functional impairment from the vision loss is controlling.

Thus, claimant is determined to have had a prior loss of both eyes and a prior loss of his left foot. Claimant urges on appeal that claimant's prior loss of his foot be utilized as the sole prior loss under section 85.64 in terms of determining the "credit" the second injury fund is entitled to. However, claimant had more than one loss prior to his second injury. Limiting the "credit" to only one of those prior losses would result in an unfair award against the second injury fund for one of those prior losses. In addition, claimant would be compensated for a prior loss that may not have been compensable, such as his congenital cataracts. The better application of the Second Injury Compensation Act is to treat both prior conditions, claimant's vision loss and his left foot impairment, as prior losses under section 85.64.

The credit to be assigned to claimant's left foot loss is readily ascertainable. A rating of three percent permanent

impairment results in a credit of 4.5 weeks. Claimant's prior vision loss presents a more difficult question. Iowa Code section 85.34(2)(p) deals with the loss of an eye. Section 85.34(2)(q) deals with the loss of an eye where the other eye has experienced a prior loss. Since claimant's vision loss occurred in both eyes from birth, neither eye loss would come under section 85.34(2)(p) or (q), as neither eye was lost prior to the other. Instead, claimant's eye losses fall under section 85.34(2)(s). Although that section refers to a single "accident," since a prior congenital condition has been determined to be a "loss" for purposes of section 85.64, it follows that a loss under section 85.34(2)(s) need not be traumatic or caused by an "accident."

In that the deputy relied on the AMA Guides inappropriately, and in the light of the fact that the parties did not contemplate claimant's prior vision loss as a prior injury, it is not possible to ascertain the degree of disability to assign to claimant's prior congenital vision loss for purposes of providing a "credit" to the Second Injury fund. A remand is necessary to allow the parties an opportunity to put evidence into the record as to what degree of impairment and resulting disability was caused by claimant's congenital vision loss.

FINDINGS OF FACT

1. Claimant is a 39-year-old man with a history of congenital cataracts.

2. Claimant was employed for nearly 20 years by Mercy Hospital Center as an orderly.

3. Claimant's employment at Mercy produced injury to his right leg and has left him with a 10 percent permanent functional impairment of the right leg.

4. Claimant had a prior loss of three percent permanent functional impairment of his left foot.

5. Claimant's injury to his right leg has left him unable to engage in employment which requires extended standing or otherwise being on his feet.

6. Claimant's vision loss makes him incapable of obtaining employment requiring the use of his eyes.

CONCLUSIONS OF LAW

Claimant's cataract condition in his eyes constitutes a prior loss within the meaning of section 85.64.

Claimant's left foot condition constitutes a prior loss within the meaning of section 85.64.

The injury to claimant's right foot and leg, which arose out of and in the course of his employment at Mercy Hospital Medical Center, produced a permanent loss of use of that leg within the meaning of section 85.64.

Claimant is permanently and totally disabled within the meaning of section 85.34(3) of the Code.

The record is inadequate to determine the extent of disability caused by claimant's vision loss.

WHEREFORE, the decision of the deputy is affirmed in part and remanded in part.

ORDER

THEREFORE, it is ordered:

That the case is remanded to the original hearing deputy for further proceedings, limited to the question of the extent of claimant's present disability caused by claimant's congenital vision loss.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. SHIRLEY,

Claimant,

vs.

SHIRLEY AG SERVICE,

Employer,

and

EMPLOYERS MUTUAL,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

FILED

MAR 21 1990

File No. 811696 IOWA INDUSTRIAL COMMISSIONER

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Second Injury Fund appeals from an arbitration decision awarding claimant healing period and permanent partial disability benefits from claimant's employer and benefits from the Second Injury Fund.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 6; and Second Injury Fund's exhibits 1D, 2D, 3D, 5D and 7. Second Injury Fund and claimant filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant is entitled to benefits from the Second Injury Fund.

REVIEW OF THE EVIDENCE

The arbitration decision filed July 3, 1989 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 issue to be resolved is whether claimant is entitled to second injury fund benefits. This issue involves several matters.

The first matter to be discussed is Second Injury Fund's assertion that claimant's claim is barred. Claimant argues in his appeal brief that Second Injury Fund has not preserved the issue of statute of limitations as a bar to claimant's claim against the Second Injury Fund. Claimant's argument has some merit. The answer filed by the Second Injury Fund did not raise the issue of statute of limitations. The hearing assignment order does not indicate that statute of limitations was to be an issue. The prehearing report and order approving the same dated November 22, 2988 was signed by all parties including the Second Injury Fund. Paragraph 7 of the prehearing report indicated that untimely claim under Iowa Code section 85.26 was waived and the defense of entitlement to Second Injury Fund was asserted. The Second Injury Fund argues in both its appeal brief and its post hearing brief that Iowa Code section 85.26 is applicable. If Iowa Code section 85.26 is applicable as Second Injury Fund asserts, Second Injury Fund waived its right to claim a defense under section 85.26 by not raising the issue in its answer or at the time of the prehearing and by agreeing to the prehearing report and order. The issue of whether section 85.26 bars claimant's claim against the Second Injury Fund was not properly preserved at the arbitration hearing and will not be considered on appeal.

The second matter to be resolved is whether claimant's "second" injury qualifies under Iowa Code section 85.64. Second Injury Fund argues that the injury was to the shoulder (or more precisely subluxation of the left acromioclavicular joint) and therefore not a scheduled member. Under Second Injury Fund's theory it would not be liable. For the purpose of imposing Second Injury Fund liability, an injury which affects a scheduled member is all that is necessary. See Thompson v. Marshall & Swift, Inc., (Appeal Decision, August 28, 1988); and Cook v. Iowa Meat Processing Company, (Appeal Decision, May 12, 1987). Claimant's left arm is affected. He testified that he experiences continuing pain, discomfort and limitations regarding his left arm. He has been rated as having ten percent "disability" of the left upper extremity (Claimant's Exhibits 2 and 5).

The last general matter to be resolved is claimant's cumulative industrial disability. As a starting point for this discussion it should be noted that the deputy determined that claimant's industrial disability resulting from the work injury on January 27, 1984 was 15 percent. No party takes issue with that determination and upon review the deputy's determination is adopted as correct.

Claimant was born October 5, 1957 and was 26 years old on the date of his work injury on January 27, 1984. Claimant's primary disabling condition is the loss of his right arm which was amputated above the elbow prior to the 1984 work injury. He has a permanent impairment of the left shoulder as a result of his work injury on January 27, 1984. The deputy discussed other relevant factors and stated:

> Normally, earnings are a somewhat reliable indicator of earning capacity, but claimant's earnings in his family-owned business cannot be considered to be particularly reliable since there may well have been accommodation made for his disabilities or higher than normal wages due to the family relationship. Part-time work in a service station while attending college is likewise not a reliable indicator of earning capacity. Claimant has serious physical impairments. Fortunately, he appears to have good intellectual abilities, abilities which are much better than what his high school academic performance would indicate. The assessment of claimant's employment capabilities as made by the TETRA evaluation service seems overly pessimistic. The undersigned does not understand how the report could have overlooked sales positions of the type claimant is apparently adequately performing as a possible vocational field. The personality and communication skills which claimant exhibited at hearing were not inconsistent with sales work. Nevertheless, claimant had no college education at the time of his injury in 1984.

Claimant is a younger worker who hopefully can be retrained. He is motivated and his prospects for retraining are good as evidenced by his success in attending college. However, his prior work is effectively closed to him as possible future employment. When all relevant factors are considered it is determined that claimant's cumulative loss of earning capacity as a result of the loss of his right arm and work injury to his left shoulder is eighty percent.

Second Injury Fund's liability in this case is 95 weeks of compensation. (500 weeks x 80%) - [(500 weeks x 15%) + (230 weeks)].

FINDINGS OF FACT

1. Claimant was born October 5, 1957 and was 26 years old on the date of a work injury on January 27, 1984.

2. Claimant's right arm had been amputated above the elbow prior to January 27, 1984.

3. The compensable value of the loss of claimant's right arm is 230 weeks.

4. As a result of the work injury on January 27, 1984 claimant suffered a subluxation of the left acromioclavicular joint.

5. The work injury on January 27, 1984 resulted in a permanent impairment of the body of the whole (shoulder) and affected the left arm which had a ten percent impairment as a result.

6. The work injury of January 27, 1984 resulted in a 15 percent loss of earning capacity.

7. Claimant's work prior to the work injury of January 27, 1984 was primarily manual labor.

8. Claimant is motivated and his prospects for retraining are good.

9. Claimant's cumulative loss of earning capacity as a result of the loss of his right arm and work injury of January 27, 1984 to his left shoulder is 80 percent.

CONCLUSION OF LAW

Claimant has proved entitlement to 95 weeks of compensation for permanent partial disability benefits from Second Injury Fund.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That Shirley Ag Service, Inc., and Employers Mutual pay claimant healing period benefits at the rate of two hundred fifty and 14/100 dollars ($250.14) per week, as stipulated in the pre-hearing report, payable commencing January 27, 1984 and ending February 3, 1984.

That Shirley Ag Service, Inc., and Employers Mutual pay claimant seventy-five (75) weeks of compensation for permanent partial disability commencing at the end of the healing period, namely February 4, 1984, at the stipulated rate of two hundred fifty and 14/100 dollars ($250.14) per week.

That the Second Injury Fund of Iowa pay claimant ninety-five (95) weeks of compensation at the rate of two hundred fifty and 14/100 dollars ($250.14) per week payable commencing July 14, 1985 pursuant to Iowa Code section 85.64.

That all accrued benefits be paid in a lump sum.

That the employer and its insurance carrier pay interest pursuant to the provisions of Code section 85.30.

That the costs of this appeal including the costs of transcribing the arbitration hearing be assessed against the Second Injury Fund pursuant to Division of Industrial Services Rule 343-4.33.

That all other costs of this action are assessed against the employer and its insurance carrier 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 21st day of March, 1990.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GERALD SIMON,	:	
Claimant,	:	File No. 814545
vs.	:	A P P E A L
FDL FOODS, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying benefits.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibit A; and joint exhibit 1. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal are:

A. Whether Gerald Simon sustained personal injuries arising out of and in the course of his employment with FDL Foods on April 26, 1984.

B. Whether Gerald Simon suffered any permanent disability as result of the injury occurring on April 26, 1984 while employed by FDL Foods.

REVIEW OF THE EVIDENCE

The arbitration decision filed April 13, 1989 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 established that he suffered a fall down a flight of stairs while at work on April 26, 1984.

2. Claimant failed to establish that his alleged accident was related to any period of inability to work or that medical expenses were incurred because of a work injury.

3. Claimant failed to establish any causal connection between his fall on April 26, 1984 and any alleged disability or medical expenses.

CONCLUSIONS OF LAW

Claimant failed to establish any causal connection between the fall on April 26, 1984 and any alleged disability or medical expenses.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant takes nothing from these proceedings.

That the costs of the arbitration proceeding, with the exception of the cost of transcribing Gerald Simon's testimony, are assessed to defendant and the costs of the appeal are assessed to claimant including the cost of the transcription of the hearing transcript.

Signed and filed this 30th day of November, 1989.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL E. SMITH,

Claimant,

vs.

IOWA MOTOR CO., INC.,

Employer,

and

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 727394

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a ruling denying claimant's motion to reconsider a ruling dismissing claimant's petition pursuant to defendants' motion.

The record on appeal is the agency file in this matter. Neither party has submitted briefs.

ISSUE

The issue on appeal is whether the deputy industrial commissioner properly overruled claimant's motion to reconsider and has properly dismissed claimant's petition.

REVIEW OF THE EVIDENCE

The ruling on motion to reconsider, filed November 23, 1988 and ruling on motion to dismiss, filed October 19, 1988 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the ruling on the motion to dismiss filed October 19, 1988 are appropriate to the issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the ruling on the motion to dismiss is adopted.

FINDINGS OF FACT

1. Claimant alleges a work-related injury on August 20, 1982 to his right foot.

2. Claimant and defendants entered into a compromise special case settlement agreement pursuant to Iowa Code section 85.35, on March 6, 1983.

3. Deputy industrial commissioner approved the special case settlement on March 9, 1983.

4. Claimant received a sum of $7,400.00. A receipt and satisfaction was signed by the claimant on March 16, 1983.

CONCLUSION OF LAW

Claimant's petition should be dismissed because a compromise special case settlement pursuant to Iowa Code section 85.35 has been previously approved regarding the alleged injury.

WHEREFORE, the rulings of the deputy filed October 19, 1988 and November 23, 1988 dismissing claimant's petition and overruling claimant's motion to reconsider are affirmed.

ORDER

THEREFORE, it is ordered:

That claimant's petition is dismissed.

That all costs of this proceeding are assessed against claimant.

Signed and filed this 22nd day of November, 1989.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD P. SMITH,	:	
Claimant,	:	
vs.	:	File No. 798385
ARMSTRONG RUBBER COMPANY,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
TRAVELERS INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant healing period, medical expenses or permanent partial disability benefits on account of claimant's June 21, 1985 work injury.

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.

ISSUES

Claimant states the issues on appeal are:

1. Whether denial of benefits was supported by the evidence.

2. Whether claimant is entitled to a rehearing as a matter of law under 17A.15(2).

REVIEW OF THE EVIDENCE

The arbitration decision dated March 30, 1989 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. In addition, Iowa Code section 17A.15(2) is relevant in part, it states:

> When the agency did not preside at the reception of the evidence in a contested case, the presiding officer shall make a proposed decision. Findings of fact shall be prepared by the officer presiding at the reception of the evidence in a contested case unless the officer becomes unavailable to the agency. If the officer is unavailable, the findings of fact may be prepared by another person qualified to be a presiding officer who has read the record, unless demeanor of witnesses is a substantial factor. If demeanor is a substantial factor and the presiding officer is unavailable, the portions of the hearing involving demeanor shall be heard again or the case shall be dismissed.

ANALYSIS

In order to grant a rehearing under Iowa Code section 17A.15(2), the demeanor of the witness must be a "substantial factor" in the proposed decision. While the deputy accepted the opinion of William Wellington, M.D., on the issue of causal connection over that of John T. Bakody, M.D., the demeanor of Dr. Wellington was not a substantial factor in the decision. The deputy clearly set forth factors which were relevant to his decision. These factors clearly support the deputy's decision and the demeanor of Dr. Wellington was not an important factor in the deputy's conclusion. Also, physician frequently testify at hearings and are accustom to direct and cross-exmaination. Physicians testify as expert witnesses and are not subject to the same behavior while testifying as other non expert witnesses. The content of an expert witness' testimony, rather than how it is said, is relevant to a contested case. Therefore, their testimony is not likely to reveal outward behavior upon which the trier of fact would base his conclusion.

In addition, it is customary for the agency to accept the testimony of physician in depositions. The agency recognizes that in order to accommodate the busy schedules of physicians and to expedite the hearing processes, depositions of physicians are necessary.

Furthermore, there is a question as to whether claimant's request for the rehearing was timely made. Claimant waited until after the deputy rendered his decision before requesting a rehearing. If Dr. Wellington's demeanor was a substantial factor in the hearing, claimant should have requested a rehearing after the order to assign the case to another deputy was issued. The

request for rehearing is not timely made when the claimant is allowed to wait until the proposed decision is entered to evaluate the weakness of their case and to make their request for rehearing.

Finally, even if the request for the rehearing was timely filed, it would not be granted. To grant such a request would require the agency to grant rehearings in all intra-agency adjudications. The industrial commissioner decides the case based upon the record developed at the hearing level. Demeanor of a witness is arguably a substantial factor in all contested cases, surely claimant cannot suggest that all appealed decisions are entitled to rehearing. The demeanor of a physician, who does not have an interest in the outcome of the case, is not a substantial factor warranting a rehearing.

FINDINGS OF FACT

1. Claimant has a history of a spastic-ataxic neurological problem extending over a number of years which has manifested itself in the form of a peculiar gait.

2. Claimant's preexisting neurological problem, for which he underwent an anterior cervical interbody fusion at C-5 and C-6 on September 17, 1985 has been diagnosed as a spondyiotic compressive myelopathy.

3. Claimant suffered a work-related injury on June 21, 1985, when he fell backwards, injuring the back of his head. This injury was diagnosed as a contused laceration in the occipital region.

4. There has been shown to be no relationship between claimant's work injury and his spondylotic myelopathy, which was preexisting and which would have required medical treatment even had the work injury never occurred; however, the work injury did assist in speeding up diagnosis of the neurological problem.

CONCLUSIONS OF LAW

Claimant has failed to establish by his burden of proof that the stipulated work injury of June 21, 1985, is causally related to his surgical procedure, healing period, medical expenses, or related permanent partial disability.

Claimant has established entitlement to temporary total disability resulting from his work injury from June 21 through June 28, 1985; however, he has already been compensated for this disability by defendants.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall 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 20th day of June, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEVIN SPENCE,	:	
Claimant,	:	File No. 667226
vs.	:	A P P E A L
GRIFFIN WHEEL COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from a review-reopening decision awarding further permanent partial disability benefits as the result of an alleged injury on April 10, 1981. The record on appeal consists of the transcript of the review-reopening proceeding; and joint exhibits 1 through 19, and 22 through 26. Both parties filed briefs on appeal.

ISSUES

Defendant states the following issues on appeal:

I. Did the deputy commissioner err in finding that a change in claimant's condition occurred subsequent to the first settlement and award on April 13, 1984?

II. Did the deputy err in finding a significant existence of a finding that claimant had a mental problem proximately caused by the April 10, 1981 injury?

III. Did the deputy err in finding that claimant suffered a back problem which was proximately caused by the April 10, 1981 injury to his foot?

IV. Did the deputy err by basing his decision upon ... mistaken findings of fact and misapplications of law?

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. In addition, the following authority is applicable:

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*, 179 N.W.2d 24 (Iowa App. 1978).

A settlement has the same effect as an award of benefits. Upon review-reopening, claimant must show a change of condition subsequent to the settlement. To show a change of condition, claimant must show what his prior condition was at the time of the settlement. *Pilcher v. Penick & Ford*, Appeal Decision, October 21, 1987.

Claimant has the burden on review-reopening to establish by a preponderance of the evidence that he has suffered a change of condition as a proximate result of the original injury subsequent to the date of the agreement for compensation. *Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455, 457 (Iowa 1969).

As a general rule, a claimant may not introduce evidence of injuries, existing at the time of a previous award, for the first time on review to claim additional benefits. *Gosek v. Garmer and Stiles Co.*, 158 N.W.2d 731, 732 (Iowa 1968).

Claimant on review-reopening must show more than a change of circumstances has occurred. Claimant must show that the change of circumstances was not contemplated by the

original award. *Huffman v. Keokuk General Hospital*, Appeal Decision, August 22, 1988.

ANALYSIS

Claimant seeks a further award of benefits under review-reopening. Since claimant was previously given an award of benefits in a settlement on April 13, 1984, claimant bears the burden of showing that a change of condition has occurred since April 13, 1984, justifying an award of further benefits. An aggravation of claimant's condition subsequent to the settlement and not contemplated by the settlement would justify a further award of benefits. Similarly, a failure of claimant's condition to improve as contemplated by the settlement may also justify an award of further benefits. Claimant must also show that the condition he now seeks benefits for is causally connected to his original injury of April 10, 1981.

Claimant alleges his condition has worsened in two respects since the settlement. Claimant urges that his back is now impaired as a result of a change in his gait, which was in turn caused by the failure of blisters and lesions on his foot to heal. Secondly, claimant alleges he now suffers a mental impairment due to a fear of returning to a factory environment, and the Griffin Wheel environment in particular.

Claimant's allegations in regard to his back will be addressed first. The testimony of Donald Mackenzie, M.D., indicates claimant presently has a five percent impairment of the body as a whole due to his back condition. However, although Dr. Mackenzie relates claimant's back condition to his gait and in turn to his foot, Dr. Mackenzie does not opine as to whether or not claimant's back problem developed before or after the settlement. Claimant admitted at the hearing that he had problems with his gait already in 1981 and continuing through 1982 and 1983.

Claimant also acknowledged he experienced back pain prior to the settlement. A medical report attached to the settlement mentions claimant's back problem. Charles Eddingfield, M.D., prior to the settlement, indicated that claimant would have a limp as a result of his toe amputation, and that back problems could result. Just prior to the settlement, Bruce L. Sprague, M.D., stated claimant was having back problems stemming from his gait. Thus, claimant's alleged back condition was contemplated by the 1984 settlement.

Claimant testified that although the gait and back pain problems existed prior to the settlement, he felt they were worse now. Claimant argues that his back problems did not worsen prior to the settlement because he spent much of the two and one-half years between the injury and the settlement in hospitals and off his feet, and that the back problems arose when he returned to work and was on his feet more. However, claimant returned to work on September 25, 1983, more than seven months prior to the settlement. If the mere fact of being on his feet, as opposed to being hospitalized, were responsible for an increase in back pain, this would have manifested itself prior to the settlement.

The only significant change in claimant's job duties occurring after the settlement was the additional duty of delivering mail two times daily. There is no showing in the record that this activity requires any particular physical stress to claimant, such as extensive walking or lifting heavy mail containers. There is no medical evidence dealing with the effects of this increased duty on claimant's back.

Although claimant described numerous changes in his daily activities allegedly due to his increased back pain, claimant only related these changes to occurring after his injury. Claimant failed to establish that these changes occurred after the 1984 settlement. (See Transcript, pages 53-60; 67-71.) Claimant has failed to carry his burden to show a change of condition with his back subsequent to the 1984 settlement.

Claimant also alleges a change of condition in regard to his mental condition. Craig Blaine Rypma, M.D., testified that claimant suffers from a permanent partial mental impairment, based on claimant's anxiety when working around factory equipment. Defendant's psychologist offered a contrary opinion. Dr. Rypma had considerably more contact with claimant, including the conducting of tests. However, even if Dr. Rypma's assertion that claimant suffers a permanent mental impairment is accepted, claimant has offered no medical evidence indicating that impairment arose or worsened after the 1984 settlement. Again, claimant's testimony merely establishes that his mental condition did not exist prior to the injury. Claimant does not establish that it did not exist prior to the settlement, or that it has been aggravated since the settlement. Claimant's testimony reveals that he experienced nightmares about his injury and working in the factory immediately after the injury and ever since. (See Tr., pp. 62, 83.) Dr. Rypma was unable to state when claimant's mental condition arose, but was only able to state that it was not a long term chronic condition. Thus, claimant has failed to establish

that his present mental condition arose subsequent to the settlement.

Claimant alleges that being required to go into the factory environment twice daily to deliver mail has aggravated his mental impairment. However, the testimony of Dr. Rypma does not establish this. Claimant may be exposed to the source of his anxiety more often now than at the time of his settlement. However, there is no medical testimony to show that exposure has increased his mental impairment. Dr. Rypma did not examine claimant prior to the settlement and was unable to provide an opinion on whether claimant's present mental condition is any worse than it was prior to the settlement. At most, Dr. Rypma could only state that claimant's condition would prevent him from working inside the factory. Dr. Rypma also stated that claimant was capable of doing his present job. Claimant has failed to show that his mental impairment has been aggravated by his change in job duties requiring him to deliver mail into the factory two times daily.

Claimant has failed to establish a change in his mental condition not contemplated by the 1984 settlement.

Claimant's back pain and anxiety toward his work environment existed at the time of the 1984 settlement and did not arise subsequent to the settlement. Claimant has also failed to show that his back condition and mental condition have deteriorated in a manner not contemplated by the settlement. Claimant has failed to show a change of condition.

Although the above determinations effectively resolve the appeal, even if claimant had shown changes of condition relating to either his back or his mental condition, claimant has failed to establish that those present conditions are causally related to his injury.

Claimant experienced a severe car accident on January 11, 1985, subsequent to the settlement. This accident resulted in the demolition of claimant's vehicle. Claimant was thrown into the back seat. Claimant suffered a back injury in this accident. The medical records of the accident show claimant experienced an injury to his neck and back. Claimant argues that most of the damage from this accident was to his neck, rather than his lower back. The record is unclear whether Dr. Mackenzie was informed of this accident when he examined claimant. Claimant at his deposition stated that his back pain caused by his gait extended all up and down his back. At the hearing, claimant stated that the upper back pain was from his car accident, and the lower back pain from his gait.

Claimant has also suffered other injuries, including a motorcycle accident in which he had two broken legs and a broken wrist.

Claimant bears the burden of proof to show that his present back condition is causally connected to his original injury. It is impossible from the record to determine what effect claimant's 1985 car accident has had on claimant's present back condition. Claimant has failed to carry his burden.

Claimant also has the burden to show that his present mental condition is causally connected to his original injury. As previously stated, Dr. Rypma was unable to determine when claimant's mental impairment arose. Because of this, Dr. Rypma cannot state that the present impairment is causally related to the work injury. In addition, claimant's other injuries from his two accidents may be contributing causes of his present anxiety.

Furthermore, claimant's answers to Dr. Rypma's questionnaire are relevant to an assessment of Dr. Rypma's conclusions as well as assessing claimant's credibility. When asked what he thought therapy with Dr. Rypma would do for him, claimant answered: "Get me a quicker, more lucrative settlement." When asked how long the therapy should last, claimant answered: "As long as necessary to establish a cause-treatment-cure impression for the courts." When asked for any other information thought by claimant to be relevant, claimant stated: "I want my large settlement in one chunk and to be rid of Griffin Wheel forever (if possible)."

Claimant has failed to carry his burden to establish that his present mental condition is causally connected to his work injury.

Defendant's final issue on appeal concerns several findings of fact allegedly not supported by the record. The deputy found that claimant is restricted to working in a clean environment. There is no medical testimony establishing this restriction, other than a general statement that claimant should not go back to work at the foundry. Claimant does suffer from unhealed lesions on his feet. However, the medical testimony shows that during some medical examinations, claimant had lesions, and on other occasions, his amputation was described as "well healed." These examinations were conducted by various doctors at various times. It is concluded that claimant's foot lesions are not permanent, but sporadic. There was testimony indicating that the lesions were caused by the type of shoe claimant wore.

At any rate, apparently the deputy based his conclusion that claimant had a restriction not to work in a dirty environment upon his visual observation of these lesions at the hearing. However, since presumably claimant's feet would be encased in shoes at all times he worked, the cleanliness of the work environment would appear to have no logical relationship to his foot lesions. There is no support in the record for concluding that claimant is restricted to working in a clean environment.

The deputy also concluded that claimant's foot sores caused his gait problems, which in turn caused his back problems. Although there is support in the record for this, it cannot be determined from the record to what extent the presence of foot sores was contemplated by the parties at the time of the settlement. At any rate, it was contemplated that, by virtue of the loss of his toes, claimant would have a limp regardless of whether foot sores developed.

The deputy concluded that claimant's present job is unsuitable for him. However, the record shows claimant has performed at such job for over five years. Claimant stated he does not dislike the job, and acknowledges he can perform it. The job was custom made for claimant by his employer, with his restrictions in mind.

The stability of claimant's job is not a proper consideration. Claimant's circumstances at the time of the hearing are controlling. Basing any further award upon the possibility that claimant might lose his job in the future would be speculation.

FINDINGS OF FACT

1. Claimant suffered an injury to his foot on April 10, 1981, resulting in the amputation of his toes.

2. Claimant and defendant entered into an agreement for settlement in 1984.

3. Claimant was injured in a car accident in 1985 that resulted in an injury to his back.

4. Claimant experienced problems with his gait and with his back prior to the 1984 settlement.

5. Claimant experienced anxiety about his work environment prior to the 1984 settlement.

6. Claimant had returned to work prior to the 1984 settlement.

7. Claimant is presently employed at the same job he held at the time of the 1984 settlement, with the additional duty of delivering mail inside the plant twice daily.

8. Claimant is able to perform the duties of his present job.

CONCLUSIONS OF LAW

Claimant has failed to carry his burden to establish a change of his mental condition not contemplated by the 1984 settlement.

Claimant has failed to carry his burden to establish a change of his back condition not contemplated by the 1984 settlement.

Claimant has failed to show that his present back condition is causally connected to his work injury.

Claimant has failed to show that his present mental impairment is causally connected to his work injury.

Claimant does not have a restriction requiring work in a clean environment.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

Defendant shall pay the costs of this action.

Signed and filed this 18th day of October, 1989.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEVIN SPENCE,	:	
Claimant,	:	File No. 667226
vs.	:	R U L I N G
GRIFFIN WHEEL COMPANY,	:	O N
Employer, Self-Insured, Defendants.	:	R E H E A R I N G

STATEMENT OF THE CASE

Claimant has been granted a rehearing of the appeal decision of October 18, 1989.

ISSUES

Claimant states the following issues on appeal:

A. Claimant did not establish that the change in mental condition was not contemplated by the 1984 settlement and further, did not show that the mental condition was causily [sic] connected to the work injury.

B. That claimant did not establish that the change of his back condition was not contemplated by the 1984 settlement nor that his back condition was causily [sic] connected to his work injury.

C. That claimant does not have a restriction requiring work in a clean environment.

APPLICABLE LAW

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

ANALYSIS

Claimant on rehearing argues the record shows he did establish a change of condition subsequent to the settlement in this case entitling him to a further award for back problems and a psychological overlay allegedly stemming from the work injury that resulted in the amputation of his toes.

However, it is found claimant has failed to establish a change of condition occurring subsequent to the settlement and not contemplated at the time of the settlement. The analysis, findings of fact and conclusions of law in the October 18, 1989 appeal decision were correct and are restated at this time.

In addition, the following analysis of claimant's rehearing arguments is appropriate. Claimant states in his rehearing application and brief that the evidence should be "read in the light most favorable to claimant." This is an incorrect statement of the law. This is not a motion for summary judgment. Claimant bears the burden of proof. Similarly, claimant states that once he submitted medical evidence concerning his mental condition, "the burden shifted to respondents" to rebut that evidence. Again, claimant bears the burden of proving his entitlement to further benefits.

Claimant also misinterprets the word "contemplated." Claimant's brief argues that since the alleged mental and back conditions were not compensated by the settlement, they were therefore not "contemplated." It may very well be that claimant subjectively did not regard the settlement as addressing the back and mental complaints. However, the record clearly establishes that both conditions were in existence at the time of the settlement. The medical reports attached to the settlement documentation specifically mention claimant's back problems. Claimant's attorney, at the deposition of Mark Raymond Knabel, M.D., prior to the settlement, made a statement that his client was suffering from back problems. The fact that the settlement itself (as opposed to the supporting medical records) addressed the foot problem only does not lead to the conclusion that the back and mental problems were not contemplated at the time of the settlement. In this context, "contemplated" means the conditions and their possible compensable nature were known to the parties at the time of the settlement. If claimant chose not to seek compensation for those conditions in the settlement, they were nevertheless contemplated at the time of the settlement. Review-reopening is available to claimant for any condition that arose after the settlement, or failed to improve as anticipated, or worsened beyond the contemplation of the parties at the time of the settlement. But further benefits under review-reopening are not available to claimant where, as here, claimant neglected to seek compensation for his back and mental conditions in the 1984 settlement when those conditions and their relationship to his work injury were clearly known to him at the time of the settlement. "Contemplated" in this context is an objective, not a subjective, term.

Claimant also argues that his back and mental conditions could not have been contemplated by his settlement, as the settlement documents described claimant's condition as a scheduled injury. As to claimant's mental condition, the case of

Cannon v. Keokuk Steel Castings, (Appeal Decision, January 27, 1988), establishes that the schedule includes the psychological ramifications of a scheduled injury. A separate action for a psychological condition resulting from claimant's toe amputation would only be available to claimant if his injury otherwise extended to the body as a whole. Claimant chose to settle his case on the basis of a scheduled injury, thus abandoning, whether intentionally or not, any claim that the foot injury had resulted in a back condition, extending his injury to the body as a whole. Any psychological effects of the toe amputation are included in the scheduled injury settlement.

Similarly, claimant's argument that respondents have the burden to state in the settlement documents that the back and mental conditions were not contemplated is unpersuasive. Again, claimant bears the burden of proof. A settlement is presumed to contemplate all conditions reasonably known to the parties at the time the settlement is reached.

Claimant offers a narrow interpretation of various passages of medical testimony to establish that the mental and back conditions arose after the settlement. First, as noted above, the presence of the back condition at the time of the settlement is beyond dispute. In regard to the mental condition, the testimony of Craig Blaine Rypma, M.D., similarly fails to establish when the condition arose, and in fact claimant himself described mental problems related to his work injury as beginning immediately after the injury. Claimant attempts to read into the single word "now" in passages of medical testimony a statement equivalent to "since the settlement." This is not the case. Read in context, these passages simply refer to claimant's conditions at the time of the depositions, and do not establish when those conditions arose. Claimant has failed to establish a change of condition.

Iowa Code section 86.13 states that "[T]his section does not prevent the parties from reaching an agreement for settlement regarding compensation" (emphasis added). Compensation refers to compensation for all known results of a work injury. It is not limited to a particular member affected by the injury. An 86.13 settlement contemplates a total settlement of all known results of a work injury.

Workers' compensation law contemplates two kinds of actions for benefits as the result of a work injury. An arbitration action is available to a claimant when no prior benefits have been ordered. A review-reopening action is available to claimant when prior benefits have been ordered, but a change of condition has occurred that calls for a change in the amount of benefits claimant receives.

Claimant was previously awarded benefits in this case by virtue of an agreement for settlement under section 86.13 that was approved by this agency. Paragraph 3 of that settlement agreement states: "3. On payment of the benefits agreed on, the self-insured Employer is discharged from any liability under the Iowa Workers' Compensation Law on account of the Claimant's present condition."

Claimant can only be awarded further benefits through review-reopening. Claimant must show a change of condition. Claimant has difficulty showing a change of condition in his back or his mental condition unless those items were mentioned in his original settlement. By bringing an action in review-reopening, claimant is stating that a change of conditions has occurred in regard to his back and his mental condition, which indicates that claimant's back and mental conditions were contemplated in the original settlement.

Nor is this a case where claimant's back and mental conditions did not exist at the time of the original settlement, but became symptomatic after the settlement. Claimant's back condition and mental condition clearly existed at the time of the settlement, although the extent of these problems is not established by the settlement. It must be presumed that, since claimant was clearly aware of these problems at the time of the settlement, the settlement contemplated and compensated these problems.

Claimant is not arguing that his back condition and his mental condition were contemplated in the original settlement, and have now worsened. Claimant denies that these conditions were part of the settlement. Claimant's view of settlements under section 86.13 would lead to a chaotic situation. Claimant maintains that any body part not specifically mentioned in the settlement documents can be acted on later, even if it was known to be affected at the time of the settlement. This would result in an injured worker whose injury immediately affects the arm, leg, back and hearing, for example, being able to first bring an action for the effects on the arm, then another action for the leg, another for the back, and so on. Such multiplicity of suits would quickly bog down the workers' compensation system.

Claimant makes an argument that the rationale of the appeal decision would require all settlements to list every anatomical part of the body <u>not</u> contemplated by the settlement. This argument is also without merit. Claimant is merely required at the time of settlement to address all conditions or impairments known to him at that time. Claimant would not be precluded from pursuing a claim for further benefits if another body part or member is later affected by the original work injury if that was not known or foreseeable at the time of the settlement. But

claimant is precluded from seeking review-reopening benefits for conditions that were known to him at the time of the settlement.

It is presumed that a settlement entered into by the parties settles the case. A settlement that leaves results of claimant's injury uncompensated, only to be pursued later, is not a settlement at all. The workers' compensation law does not contemplate partial settlements. Clearly, claimant, in settling his case on the basis of the impairment to his foot, when he knew at the time of the settlement that he had back problems and mental problems from his injury, made an implicit decision to forego compensation of those results in favor of certain compensation of his foot injury.

Some confusion may stem from the misconception that a "settlement" is a physical document. A settlement under section 86.13 contemplates all effects of the injury known at the time of the settlement, regardless of whether those effects are specifically enumerated in the settlement document itself or not. In this sense, the settlement is something broader than a mere paper document labeled "settlement." Effects of the work injury known to claimant at the time of the settlement are part of the settlement by operation of law, even if the parties consciously choose to omit their enumeration. Many aspects of the settlement, such as claimant's age, education, etc., in an industrial disability case, are inherent in the settlement even though they are not specifically set out. All factors that are known or should have been known at the time of the settlement are within the contemplation of the settlement.

Claimant's final issue on rehearing is whether claimant established that he has a medical need to work in a clean environment. The record reveals only that claimant does need to keep his foot clean, and that claimant has experienced difficulty in finding work shoes for his injured foot. Claimant wears tennis shoes to work. There is no showing that claimant is unable to maintain a clean work environment by this method.

FINDINGS OF FACT

1. Claimant suffered an injury to his foot on April 10, 1981, resulting in the amputation of his toes.

2. Claimant and defendant entered into an agreement for settlement in 1984.

3. Claimant was injured in a car accident in 1985 that resulted in an injury to his back.

4. Claimant experienced problems with his gait and with his back prior to the 1984 settlement.

5. Claimant experienced anxiety about his work environment prior to the 1984 settlement.

6. Claimant had returned to work prior to the 1984 settlement.

7. Claimant is presently employed at the same job he held at the time of the 1984 settlement, with the additional duty of delivering mail inside the plant twice daily.

8. Claimant is able to perform the duties of his present job.

CONCLUSIONS OF LAW

Claimant has failed to carry his burden to establish a change of his mental condition not contemplated by the 1984 settlement.

Claimant has failed to carry his burden to establish a change of his back condition not contemplated by the 1984 settlement.

Claimant has failed to show that his present back condition is causally connected to his work injury.

Claimant has failed to show that his present mental impairment is causally connected to his work injury.

Claimant has failed to establish that his injury requires him to work in a clean environment.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

That defendant shall pay the costs of this action.

Signed and filed this 19th day of June, 1990.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID S. STOBER, Claimant, vs. CLEAR LAKE BAKERY, Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	FILED DEC 29 1989 IOWA INDUSTRIAL COMMISSIONER File No. 792635 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 12, 1985. The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 14 and 16 through 33; and defendants' exhibits A, B and C. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. Whether the Deputy Industrial Commissioner erred in awarding permanent total disability.

2. Whether the Deputy Industrial Commissioner erred in finding that claimant's decision not to continue light duty work with his employer, coupled with claimant's admission that he had not sought other employment in any form after leaving the employer was sufficient to cause the burden of proof to shift to the employer.

3. Whether the Deputy Industrial Commissioner erred in giving greater weight to the testimony of Katherine Schrot, due to her "increased level of familiarity with the labor market in North Central Iowa."

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

Defendants' three issues on appeal all deal with the question of whether claimant is permanently totally disabled. The deputy's decision finds the claimant to be an "odd-lot" employee. In order to establish that he is an "odd-lot" employee, claimant is required to show that he has made a reasonable effort to obtain substitute employment. In this case, claimant has not sought other employment. Claimant has shown a pattern of seeking rehiring by his old employer.

The deputy relied on the case of Pyle v. Carstensen Freight Lines, Inc., (Appeal Decision, July 24, 1987). That case involved a claimant who sought to retrain himself by attending a community college. Claimant in that case was unable to complete the training because of his impairment. It was held that claimant's attempt to obtain retraining constituted a reasonable effort to find substitute employment, and claimant was found to be "odd-lot".

In the present case, however, claimant has not attempted any such retraining. Claimant has confined his attempts to regain employment to his employer at the time of his injury. Claimant has not applied for a job with any other employer. He has not enrolled in any college or technical training programs. Thus, the doctrine espoused in Pyle is not applicable to this case. Although claimant may be motivated to return to work, and motivation is a factor of industrial disability, mere motivation is not the equivalent of the bona fide attempt to seek other employment required by Guyton and Pyle. Since claimant has not made a bona fide attempt to find substitute employment after his injury, claimant has failed to establish that he is an "odd-lot" employee. Claimant's industrial disability will therefore be determined without shifting to the defendants the burden of going forward with evidence of claimant's employability.

Claimant is 53 years old and lacks a high school education. Claimant is unable to return to the job he held at the time of his injury. Claimant has ratings of physical impairment of 16.5 percent of the body as a whole and 22 percent of the body as a whole as a result of his cervical condition. Claimant has

undergone two surgeries, including fusion surgery. Claimant has a lifting restriction of 15 pounds, and cannot stand or sit for any extended periods of time. Claimant must frequently lie down and rest. Claimant's work history has been exclusively in the bakery business. Defendant employer has stated that it cannot rehire claimant in light of his condition. Although claimant went back to work for defendant employer sporadically following his injury, claimant has been off work for some time and without wages.

Claimant has held sedentary supervisory positions in the bakery business in the past. Although defendant employer did accommodate claimant initially by assigning him to a sedentary position, the record shows that this was a temporary position and is no longer available to claimant. The record also shows that there are no similar baking businesses similar to defendant employer's in claimant's locale, although similar operations do exist in other cities in other parts of Iowa.

Vocational rehabilitation testimony in this case conflicts as to whether claimant is employable. However, both vocational rehabilitation experts agree claimant is not presently employable without professional assistance. Clark Williams testified that jobs meeting claimant's restrictions exist, such as baking instructor at a school or supervisor at a larger bakery, but did not identify any such jobs as being available to claimant. Williams also acknowledged that if claimant would find work outside the baking business, his income would be at or near minimum wages.

Kathryn Schhrot concluded that claimant was unemployable in light of his restrictions. Although challenged by defendants, the record shows that Kathryn Schrot is familiar with employment conditions and availability in the north central Iowa area.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to be permanently and totally disabled.

FINDINGS OF FACT

1. On April 12, 1985 and continuing up to the time of hearing, David Stober was a resident of Clear Lake, Iowa.

2. Claimant was injured on April 12, 1985 at his place of employment with Clear Lake Bakery in Clear Lake, Iowa while attempting to pull a rack.

3. At the time of injury, Stober was employed by Clear Lake Bakery as a production superintendent, a position in which he performed a substantial amount of physical labor.

4. During 1986 and 1987, claimant resumed employment with Clear Lake Bakery in a job that was intended by the employer to be a temporary, work hardening type of position. The job would not have been available on a permanent basis, even if claimant had been physically capable of performing it indefinitely.

5. Claimant is 53 years of age, but it appears that the physiological aging process affecting him is 10-15 years ahead of his actual chronological age.

6. At the time of injury, claimant was earning approximately $550 per week.

7. The charge of $23.00 incurred with Radiologists of Mason City on November 10, 1987 represents reasonable treatment for the April 12, 1985 injury, but the other expenses contained in exhibit 28 are not shown to be related to that injury.

8. At the present time, claimant experiences frequent headaches and neck pain. He experiences numbness and weakness regarding his left upper extremity and hand. Claimant's pain is aggravated by sitting and working at a desk where his neck is extended forward. Claimant has an impairment in the range of 20 percent of the whole person based upon the condition of his cervical spine. All the foregoing physical problems resulted from the April 12, 1985 injury. Claimant also has low back problems which are not shown to have been a result of the April 12, 1985 injury.

9. Claimant has a tenth grade education. His entire work life has been spent in the baking industry. He has not demonstrated aptitudes for academic achievement. He has not demonstrated capabilities which would enable him to work in a supervisory capacity in any other industry.

10. As a result of his injury on April 12, 1985 claimant has no earning capacity.

CONCLUSIONS OF LAW

1. Claimant sustained an injury to his cervical spine on April 12, 1985 which arose out of and in the course of his employment with Clear Lake Bakery.

2. Claimant is permanently and totally disabled under the provisions of Code section 85.34(3) as a result of the injuries he sustained on April 12, 1985.

3. Claimant is entitled to receive weekly compensation at the stipulated rate of $329.05 per week payable commencing April 14, 1985 and continuing for so long as he remains totally disabled.

4. Defendants are entitled to credit for the wages paid during claimant's attempt to resume gainful employment.

5. Claimant is not an odd-lot employee.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant weekly compensation for permanent total disability at the stipulated rate of three hundred twenty-nine and 05/100 dollars ($329.05) per week payable commencing April 14, 1985 and continuing each week thereafter for so long as claimant remains totally disabled under the provisions of Iowa Code section 85.34(3).

That defendants are entitled to credit against this award for all amounts of weekly compensation previously paid and also, on a week-to-week basis, for wages paid during claimant's periods of attempts to return to work in accordance with Division of Industrial Services Rule 343-8.4.

That defendants pay all remaining past due amounts in a lump sum together with interest pursuant to Iowa Code section 85.30.

That defendants pay claimant's medical expense with Radiologists of Mason City in the amount of twenty-three and 00/100 dollars ($23.00).

That defendants pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 including seventy-five and 00/100 dollars ($75.00) to reimburse claimant for the costs of reports from Dr. Walker and one hundred fifty and 00/100 dollars ($150.00) as an expert witness fee for Kathryn Schrot.

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 29th day of December, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHERYL A. THOMPSON, Claimant, vs. MARSHALL & SWIFT, INC., Employer, and U. S. INSURANCE GROUP, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	:	File No. 784394 A P P E A L D E C I S I O N FILED AUG 2 8 1989 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant employer appeals and the Second Injury Fund of Iowa (hereinafter the Fund) cross-appeals from an arbitration decision awarding healing period benefits, medical expenses, and permanent partial disability benefits which were to be paid by both defendant employer and the Fund.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 23, 27 and 28; claimant's exhibits 24 through 26 and 29 through 31; and defendants' exhibits A through D. All parties filed briefs on appeal.

ISSUES

The issues on appeal are the nature and extent of claimant's alleged disability, when claimant's healing period ended, and the liability, if any, of the Fund.

REVIEW OF THE EVIDENCE

The arbitration decision dated April 11, 1988 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 also appropriate.

While the deputy did not specifically so state, he was following agency precedent when he determined that there was liability of the Fund. For the purpose of imposing Fund liability, an injury which affects a scheduled member is all that is necessary. See Cook v. Iowa Meat Processing Company, Appeal Decision, May 12, 1987. As found by the deputy and adopted herein the work injury on January 8, 1985 affected claimant's body as a whole; however, that injury also resulted in loss of use of claimant's right arm. Iowa Code section 85.64 requires only that claimant lose the use of a listed member, not that the disability be confined to that member.

For purposes of determining the amount of the liability of the Fund, the extent of the disability from the work-related injury must be considered. The employer is liable for the disability resulting from the work-related injury. In this case, the disability resulting from the work-related injury was an industrial disability of 45 percent of the body as a whole. The Fund's liability is the cumulative industrial disability, less the total disability of the two injuries. Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989). In this case the Fund's liability is 50 percent (250 weeks) less the total of 45 percent industrial disability from the work injury (225 weeks) and ten percent of the leg (22 weeks) or three weeks, i.e., 250 - (225 + 22) = 3.

FINDINGS OF FACT

1. Claimant was born February 28, 1964 and was twenty years old at the time of the work injury.

2. Claimant graduated from high school and got above average grades in high school.

3. Claimant has no training or formal education beyond high school.

4. Claimant's employment history is manual labor which has not been heavy labor.

5. Claimant was injured on January 8, 1985 when her right hand and forearm was pulled into an ironer machine. The initial trauma did not include the shoulder.

6. During the weeks and months that followed, claimant developed a reflex sympathetic dystrophy of the right upper extremity which, in turn, produced impairment in claimant's right shoulder.

7. Reflex sympathetic dystrophy is a disorder of the autonomic nervous system and, as indicated by Dr. DeBartolo, is not a problem that is limited to the right arm, but extends into the shoulder.

8. Following the injury, claimant was medically incapable of performing work in employment substantially similar to the work she performed at the time of injury from January 8, 1985 until August 27, 1986, when her recovery and treatment had progressed to the point it was medically indicated that no additional treatment options remained and that further significant improvement from the injury was not anticipated.

9. Claimant was earning $4.00 per hour at the time of injury, but now earns $4.20 per hour.

10. At the time of the arbitration hearing claimant had returned to work and through the cooperation of the defendant employer was working. However, claimant had been able to generally work for only four hours per day.

11. Claimant has a 30 percent permanent functional impairment of the right upper extremity, including the shoulder, which is equivalent to a 23 percent permanent partial impairment of the whole person.

12. Claimant had a preexisting 10 percent permanent functional impairment of her left leg prior to the time she commenced employment with defendant employer.

13. Claimant has a 45 percent loss of earning capacity which was the result of the injuries she sustained on January 8, 1985.

14. Claimant currently has a 50 percent loss of earning capacity which was the result of the injuries she sustained on January 8, 1985 and her preexisting impairment to her left leg.

15. All the medical care that claimant has received was reasonable treatment for the injury and the expenses charged for that treatment were fair and reasonable, including in particular the $712.70 charged by the Mayo Clinic as shown in exhibit 24.

CONCLUSIONS OF LAW

Claimant has proved that she had a preexisting disability of 10 percent of the left leg.

Claimant has proved that the permanent partial disability from the work injury she sustained on January 8, 1985 was an injury to the body as a whole and it affected her right arm.

Claimant has proved that the work injury sustained on January 8, 1985 was a cause of an industrial disability of 45 percent.

Claimant has proved a current industrial disability of 50 percent as a result of the work injury and the preexisting disability to her left leg.

Claimant has proved that her healing period commenced on January 8, 1985 and ended August 27, 1986.

Claimant has proved entitlement to second injury fund benefits of three weeks.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That the employer and insurance carrier pay claimant eighty-five and two-sevenths (85 2/7) weeks of compensation for healing period at the stipulated rate of one hundred twelve and 02/100 dollars ($112.02) per week commencing January 8, 1985.

That the employer and insurance carrier pay claimant two hundred twenty-five (225) weeks of compensation for payment of permanent partial disability at the stipulated rate of one hundred twelve and 02/100 dollars ($112.02) per week payable commencing August 28, 1986.

That the employer and insurance carrier receive full credit for benefits they have previously paid.

That all past due accrued amounts paid to claimant by the employer and insurance carrier be in a lump sum together with interest in accordance with section 85.30 of the Iowa Code.

That the employer and insurance carrier pay claimant's medical expense with the Mayo Clinic in the amount of seven hundred twelve and 70/100 dollars ($712.70).

That the Second Injury Fund of Iowa pay claimant three (3) weeks of compensation for permanent partial disability at the stipulated rate of one hundred twelve and 02/100 dollars ($112.02) per week commencing at the time the employer completes making the permanent partial disability compensation payment which is computed to be December 20, 1990 (225 weeks after August 28, 1986).

That the employer and insurance carrier 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 employer and insurance carrier file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SANDRA K. VAUGHAN,	:	
Claimant,	:	File No. 714449
vs.	:	A P P E A L
OSCAR MAYER FOODS CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
DEC 29 1989
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying death benefits.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 20; and defendant's exhibit 22. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal are:

1. Did the preponderance of the evidence show the death of Richard Vaughan a natural incident or rational consequence arising out of and in the course of his employment?

2. Was the health condition or pre-existing health impairment accelerated or aggravated by some aspect of the employment, including the failure to treat?

3. Was the decision of the Deputy supported by substantial evidence in the record made before the agency when the record is reviewed as a whole?

REVIEW OF THE EVIDENCE

The arbitration decision filed September 14, 1988 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. Decedent's death occurred as a result of the normal progressive nature of coronary atherosclerosis.

2. Decedent's employment was not a substantial factor in producing the atherosclerosis disease.

3. Decedent's employment may have possibly, on occasion, aggravated the preexisting atherosclerosis disease, but any such aggravation was temporary in nature and did not substantially alter the course of the disease.

4. It is not possible to determine whether decedent's shoulder complaints were due to an orthopaedic condition in the shoulder itself, his now-documented coronary condition, or both.

5. Dr. From's opinion that decedent's employment with Oscar Mayer Foods Corporation aggravated the preexisting condition and hastened decedent's death is rejected since the evidence fails to show whether or not any of the pain decedent experienced was angina rather than shoulder pain, and the evidence fails to show that pain from an orthopaedic condition in decedent's shoulder masked any angina pain which may have been present.

6. Decedent and claimant were separated at the time of decedent's death, but decedent provided support for claimant and their children and the pending dissolution of marriage action had not become final through any decree or ruling by the court.

CONCLUSIONS OF LAW

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

Claimant has failed to prove, by a preponderance of the evidence, that decedent's employment with Oscar Mayer Foods Corporation was in any manner a proximate cause of his death.

Claimant was decedent's lawful wife at the time of his death.

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 are assessed against the claimant including the costs of the transcription of the hearing proceeding pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 29th day of December, 1989.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

AL WEILAND, Claimant, vs. FLOYD SWANSON, Employer, and FARM BUREAU MUTUAL INS. CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 783580 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

The Second Injury Fund of Iowa appeals from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on December 24, 1984. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 13. Both parties filed briefs on appeal.

ISSUES

I. Claimant is not entitled to assert and recover against the Fund for more than two separate scheduled injuries.

II. Claimant has failed to allege a qualifying first injury.

III. Claimant suffers from very little, if any, industrial disability.

IV. Claimant's industrial disability, if any, must be apportioned between his "first" and his "second" injuries.

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

Defendant Second Injury Fund of Iowa's first issue on appeal urges that claimant is prohibited from asserting more than one prior loss for purposes of establishing second injury fund liability. The Second Injury Fund argues that claimant is required to assert one, and only one, previous loss under Iowa Code section 85.64.

Initially, it is noted that the record shows that claimant is in fact relying on only one previous loss. The medical evidence establishes that claimant's 1980 injury was an aggravation of his high school football injury. K. M. Keane, M.D., testified that after the 1980 injury, claimant's left knee returned to its pre-injury state. Claimant's 1980 injury was a temporary aggravation of his 1966 high school football injury to his left knee. Claimant's 1966 left knee injury is a previous loss for purposes of section 85.64.

However, even if claimant had asserted two injuries prior to the December 24, 1984 injury, this would not have precluded second injury fund liability. See Shank v. Mercy Hospital Medical Center, (Appeal Decision, August 28, 1989).

The Second Injury Fund next argues that claimant has failed to allege a qualifying first injury. The Second Injury Fund here acknowledges the temporary nature of claimant's 1980 aggravation of his left knee condition, and correctly points out that a temporary aggravation cannot serve as a previous loss under section 85.64. The Second Injury Fund alleges that the deputy improperly "lumped together" the 1966 left knee injury and the 1980 aggravation of that injury. As previously determined, the 1980 aggravation was temporary in nature and did not permanently increase claimant's impairment. The deputy determined that claimant had a 15 percent impairment of his left lower extremity, based on the rating by Keith O. Garner, M.D. Although the deputy did state that both the 1966 football injury to the left knee and the 1980 aggravation of the knee would constitute the "first" injury for purposes of section 85.64, the deputy clearly considered the temporary nature of the 1980 incident. The deputy quoted Dr. Keane in the decision as follows:

Findings at the time showed evidence of old injury with atrophy, instability on clinical examination and definite degenerative changes already present in the knee with loose bodies. All of these were present before the injury of January 18, 1980. I think the injury that occurred at that time was simply an aggravation. Over the next several months he returned to the status which had been present prior to January of 1980. At that time it should be noted that he had considerable disability. (Ex. 1).

(Arbitration Decision, Page 5)

Even if the 1980 injury had permanently increased claimant's impairment, the deputy would have been correct to assess claimant's disability resulting from the combination of the two injuries. The deputy is obligated to make a determination of the extent of claimant's disability prior to the "second" injury, regardless of the number of injuries or other events that contributed to that disability.

The Second Injury Fund next argues that the 1966 football injury to the left knee standing alone also does not serve as a qualifying "first" injury. The Second Injury Fund points out that claimant was able to continue in sports and in school after that incident, and later was able to obtain employment doing farm work and continues to perform farm work to this day. The Second Injury Fund states that claimant is required to show a substantial handicap, and points out that claimant's ratings of physical impairment from his left knee injury is much less than the 90 percent rating in Irish v. McCreary Sawmill, 175 N.W.2d 364 (Iowa 1970). However, a prior ruling of this agency establishes that the Irish case does not require a minimum of 90 percent functional impairment in the first scheduled loss to trigger second injury fund liability. McCoy v. Donaldson Company, (Appeal Decision, April 28, 1989).

Claimant's ability to return to employment and other physical activities after suffering his injury does not preclude the existence of a physical impairment as a result of the injury. The Second Injury Fund improperly focuses on one factor of industrial disability, claimant's earnings after an injury, to the exclusion of the other factors and in disregard of the medical evidence in the record, which shows that claimant has suffered a 15 percent permanent partial impairment of his left lower extremity. This opinion is uncontroverted in the record, yet the Second Injury Fund maintains that claimant's 1966 injury produced no impairment merely because claimant was still able to obtain employment. Claimant is not required to show that his "first" injury rendered him totally unemployable. He is merely

required to show that it produced some degree of permanent impairment to a scheduled member.

The Second Injury Fund's third issue on appeal concerns the extent of claimant's industrial disability. In this regard, the analysis of the deputy is adopted. The deputy properly considered all of the factors involved in determining industrial disability and the determination of 35 percent industrial disability is approved. Again, the Second Injury Fund focuses on one factor, claimant's earnings after the injury, to the exclusion of the other factors that determine industrial disability.

The Second Injury Fund's final argument on appeal has been resolved by Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989).

FINDINGS OF FACT

1. Claimant sustained a 15 percent permanent functional impairment to the left leg due to the first injury, which occurred in 1966, and was temporarily aggravated again in 1980.

2. Claimant sustained a 20 percent permanent functional impairment rating of the right leg due to the injury of December 24, 1984, when his clothing became entangled in the beaters of the silage wagon which were connected to the power take off on the tractor.

3. Claimant sustained a 35 percent industrial disability to the body as a whole as a result of the combined effects of both scheduled member injuries above.

CONCLUSIONS OF LAW

Claimant is entitled to 44 weeks of permanent partial disability benefits from employer for the injury to the right leg on December 24, 1984.

Claimant is entitled to 98 weeks of permanent partial disability from the Second Injury Fund of Iowa.

Iowa Code section 85.64 does not prohibit the utilization of two prior injuries for purposes of determining Second Injury Fund liability.

Claimant has alleged a qualifying previous injury for purposes of Iowa Code section 85.64.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant employer pay forty-four (44) weeks of permanent partial disability benefits to claimant at the rate of one hundred sixty-nine and 45/100 dollars ($169.45) per week in the total amount of seven thousand four hundred fifty-five and 80/100 dollars ($7,455.80) commencing on May 21, 1985.

That the Second Injury Fund of Iowa pay to claimant ninety-eight (98) weeks of permanent partial disability at the rate of one hundred sixty-nine and 45/100 dollars ($169.45) per week in the total amount of sixteen thousand six hundred six and 10/100 dollars ($16,606.10) commencing on March 25, 1986, immediately after the employer's last payment of permanent partial disability benefits.

That defendant employer is entitled to a credit for thirty-five point two (35.2) weeks of permanent partial disability paid prior to hearing at the rate of one hundred sixty-nine and 45/100 dollars ($169.45) per week in the total amount of five thousand nine hundred sixty-four and 64/100 dollars ($5,964.64).

That these amounts are to be paid in a lump sum.

That the interest obligation of the employer will accrue pursuant to Iowa Code section 85.30.

That the costs of this action are to be divided equally between employer and the Second Injury Fund of Iowa pursuant to Division of Industrial Services Rule 343-4.33. The costs of the appeal will be paid by the Second Injury Fund.

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

Signed and filed this 29th day of December, 1989.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES WIEBERS, Claimant, vs. WESTINGHOUSE ELECTRIC, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 751080 A P P E A L D E C I S I O N FILED FEB 28 1990 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 22; and defendants' exhibit A. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal are:

A. Whether there is a relationship between the work injury and any alleged permanent partial disability.

B. The nature and extent of such disability.

REVIEW OF THE EVIDENCE

The arbitration decision dated April 19, 1989 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. Kerry L. Jensen, M.D., the first treating physician, Eugene E. Herzberger, M.D., the second treating physician, who was also claimant's choice of physicians and James E. Ives, M.D., all stated that claimant did not sustain any permanent impairment or disability and none of these doctors imposed any restrictions on claimant's activities.

2. John R. Walker, M.D., imposed no permanent restrictions or limitations on claimant's activities and recommended against any objective tests at this time.

3. Claimant returned to work as a millwright in 1984 and 1985 after claimant's injury.

4. Claimant performed a number of labor and skilled labor jobs that require dexterity and physical strength and is currently self-employed as a repairman and restorer of damaged houses.

5. Claimant did not sustain a permanent impairment or permanent disability as a result of the injury on November 12, 1983.

6. Claimant's treatment with Louie L. Burkert, D.C., and Dr. Herzberger was not authorized by defendants.

CONCLUSIONS OF LAW

Claimant failed to prove by the greater weight of the evidence that the injury of November 12, 1983 was the cause of permanent impairment or permanent disability.

Claimant is not entitled to permanent partial disability benefits.

Claimant is not entitled to the payment of the medical expenses incurred with Dr. Burkert, Dr. Herzberger nor Dr. Walker.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That no additional amounts are owed by defendants to claimant as a result of the injury of November 12, 1983.

That claimant pay the costs of this action including the costs of transcription of the arbitration hearing.

Signed and filed this 28th day of February, 1990.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAMELA S. WILLER, Claimant, vs. IOWA MEAT PROCESSING COMPANY, Employer, and ARGONAUT INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 732780 A P P E A L D E C I S I O N

FILED

FEB 19 1990

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal and claimant cross-appeals from an arbitration decision awarding healing period benefits and permanent partial disability benefits based upon an industrial disability of 55 percent.

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

ISSUE

The dispositive issue on appeal is whether there is a causal connection between claimant's injury and an alleged disability.

REVIEW OF THE EVIDENCE

The arbitration decision filed September 30, 1988 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 claimant has the burden of proving by a preponderance of the evidence that the injury of May 5, 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).

Claimant was examined by several physicians. The doctors at the University of Iowa Hospitals said the etiology of claimant's symptoms was unknown. (Exhibit A, page 3) Joel T. Cotton, M.D., indicated uncertain etiology. (Ex. C, p. 2) David G. Paulsrud, M.D., thought claimant's condition appeared to be congenital. (Ex. D) D. M. Nitz, M.D., a neurologist, indicated that claimant's symptoms were "most likely related to persistent posture from occupation." (Ex. F, p. 2) John N. Redwine, D.O., and Daniel M. Rhodes, M.D., two company physicians treated claimant on the basis that her condition was the result of employment activity but did not give an opinion as to causal connection. (Ex. G) Claimant was treated by Don Meylor, D.C., for about six months and he attributed claimant's condition to multiple factors including "work stress (primarily patient's work posture and work conditions), organic and/or functional physiological imbalances (demonstrated by lab results) and thoracic and cervical vertebrae misalignments." (Ex. K) Paul From, M.D., ruled out thoracic outlet syndrome but S. R. Winston, M.D., a neurosurgeon, refused to rule it out. (Ex. D, pp. 3-7 and 14-16).

John Dougherty, M.D., an orthopedic surgeon, was claimant's principle treating physician. Although on cross-examination by claimant's counsel he stated that it was reasonable to assume that claimant's problems were work related, he frequently wrote

"etiology (?)" in office notes. He indicated in his deposition that he was not sure why claimant's scapula rides up and he was unsure of the etiology.

In summary, the medical evidence in this case is that the examining physicians who did offer an opinion of the cause of claimant's condition were not in agreement and were uncertain as to the cause. The conclusion that must be reached when all of Dr. Dougherty's deposition is read together is that he simply could not explain claimant's problems. When pressed, he agreed that it was reasonable to assume that claimant's problems were related to her work. His opinion falls short of saying that claimant's work injury was the probable cause of her alleged disability.

While claimant's problems may be frustrating to both her and the physicians dealing with her, she must prove by a preponderance of the evidence that a work injury caused those problems. Demonstrating that the problems might not be related to any other cause does not in this case meet claimant's burden of proof. Claimant has not met the burden of proving that the work injury on May 5, 1983 is the cause of her alleged disability.

FINDINGS OF FACT

1. Claimant was employed by employer on May 5, 1983 in a job that required her to transfer packages of meat weighing from one pound to 35 pounds in a twisting movement by transferring the meat from a conveyor belt on her right to another conveyor belt behind her body.

2. On May 5, 1983 claimant experienced severe spasms in her right shoulder and other symptoms in her face, neck, back, arm, hand and rib cage and that her fingers turned purple.

3. Several possible neurological problems, which might have caused claimant's symptoms, were ruled out.

4. Two neurologists and a neurosurgeon could not find any pathological neurological reason for claimant's symptoms.

5. Claimant received treatment and evaluation on the basis that her problems were work related.

6. The cause of claimant's condition is unknown.

CONCLUSION OF LAW

Claimant has not proved that a work injury on May 5, 1983 was the cause of her alleged disability.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That defendants pay the costs of this proceeding including the costs of transcription of the arbitration hearing.

Signed and filed this 19th day of February, 1990.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANK WILLIAMS, Claimant, vs. IOWA PAVING CONTRACTORS, INC., (IOWA PAVERS), Employer, and AETNA CASUALTY & SURETY CO., Insurance Carrier, Defendants.	File No. 804198 A P P E A L D E C I S I O N

FILED

FEB 26 1990

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant benefits for an alleged injury which occurred on or about September 12, 1985.

The record on appeal consists of the transcript of the arbitration and defendants' exhibits 1 through 24. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the issues on appeal are:

1. Whether the deputy erred in refusing to admit claimant's witness and exhibits into evidence.

2. Whether the deputy erred in ruling that the claimant failed to prove that his injury arose out of and in the course of his employment.

REVIEW OF THE EVIDENCE

The arbitration decision dated August 26, 1988 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.

Doerfer Division of CCA v. Nicol, 359 N.W.2d 428 (Iowa 1984), states that the statute is to be liberally construed in favor of the worker. It does not, however, stand for the proposition that the facts should be liberally construed. Inconsistent facts are resolved by the trier of fact based upon his or her expertise and special knowledge. The statues, not facts, are construed liberally.

FINDINGS OF FACT

1. Claimant was not a credible witness.

2. At hearing, claimant alleged that on or about September 12, 1985 while he was working with three other employees of Iowa Paving Contractors, a screet weighing approximately 400-600 pounds fell on his right shoulder.

3. Claimant could identify September 12, 1985 only as a "possible" injury date.

4. Claimant provided various explanations of how his injury occurred.

5. Claimant provided various histories with regard to the course of his pain and symptoms.

6. Claimant failed to present credible evidence to sustain his burden that he incurred an injury which arose out of and in the course of his employment.

CONCLUSION OF LAW

Claimant failed to sustain his burden that he incurred an injury 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 is entitled to take nothing from this proceeding

That claimant pay the costs of this action including the costs of transcription of the arbitration hearing.

Signed and filed this 26th day of February, 1990.

David E. Linquist

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHERYLE L. WILSON, Claimant, vs. WILSON FOODS CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 788588 A P P E A L D E C I S I O N

FILED

JUL 31 1989

INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding claimant permanent partial disability benefits as a result of an alleged injury sustained on February 25, 1985.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 27. Both parties filed briefs on appeal. The defendant filed a reply brief.

ISSUE

The issue considered on appeal is: Whether claimant is entitled to permanent partial disability benefits, and if so, the extent of her entitlement.

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 42 years old at the time of the injury and 45 years old at the time of the hearing.

2. Claimant is a high school graduate whose past employments include a waitress, grocery clerk and food and laundry worker.

3. Claimant started to work for the employer on November 3, 1980, and had worked for approximately two and one-half years when she was injured.

4. Claimant sustained a very severe blow to the left side of her head when she was hit by a 12 to 15 pound ham, which had been thrown approximately 10 to 12 feet on February 25, 1985, when she was stunned and knocked partially to the floor.

5. Mark E. Wheeler, M.D., the treating orthopedic surgeon, determined that claimant had sustained a five percent permanent impairment of the left upper extremity due to the injury to her neck which occurred on February 25, 1985.

6. A five percent permanent impairment to the left upper extremity converts to a three percent permanent impairment of the body as a whole.

7. Claimant sustained an industrial disability of ten percent to the body as a whole, due to current difficulty in performing her work, as a result of the injury which occurred on February 25, 1985.

CONCLUSIONS OF LAW

The injury of February 25, 1985, was the cause of permanent impairment and permanent disability.

Claimant sustained a five percent impairment of the upper extremity which converts to a three percent permanent impairment of the body as a whole.

Claimant is entitled to 50 weeks or permanent partial disability benefits for an industrial disability of ten percent of the body as a whole.

Claimant did not sustain the burden of proof by a preponderance of the evidence that she is entitled to a diskogram as recommended by Horst G. Blume, M.D.

Claimant did not sustain the burden of proof by a preponderance of the evidence that she is entitled to an order for a change of care.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay to claimant fifty (50) weeks of permanent partial disability benefits at the rate of one hundred ninety-eight and 02/100 dollars ($198.02) per week in the total amount of nine thousand nine hundred and one dollars ($9,901) commencing on August 30, 1986, as stipulated to by the parties.

That defendant is entitled to a credit of fifteen (15) weeks of permanent partial disability benefits paid to claimant prior to hearing at the rate of one hundred ninety-eight and 02/100 dollars ($198.02) per week in the total amount of two thousand nine hundred seventy and 30/100 dollars ($2,970.30).

That the remaining benefits are to be paid to claimant in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

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 requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA J. WOLFE, Claimant, vs. IOWA MEAT PROCESSING, Employer, and CHUBB GROUP OF INSURANCE CO., and ARGONAUT INSURANCE CO., Insurance Carriers, and SECOND INJURY FUND, Defendants.	File Nos. 730638 775865 A P P E A L R U L I N G

Defendants, employer and Argonaut Insurance Company, filed an appeal on November 22, 1989. On November 27, 1989, claimant filed a cross-appeal to commissioner. On December 11, 1989, defendants filed a motion to dismiss cross-appeal and memorandum brief and argument on motion to dismiss cross-appeal. On December 14, 1989, claimant filed a resistance to motion to dismiss cross-appeal. The motion to dismiss cross-appeal is considered for determination.

Division of Industrial Services Rule 343-4.27 provides in relevant parts:

Except as provided in 4.2 and 4.25, an appeal to the commissioner from a decision, order or ruling of a deputy commissioner in contested case proceedings where the proceeding was commenced after July 1, 1975, shall be commenced within twenty days of the filing of the decision, order or ruling by filing a notice of appeal with the industrial commissioner. The notice shall be served on the opposing parties as provided in 4.13. An appeal under this section shall be heard in Polk county

or in any location designated by the industrial commissioner.

....

A cross-appeal may be taken under this or 4.25(17A,86) in the same manner as an appeal within the twenty days for the taking of an appeal or within ten days after filing of the appeal, whichever is later.

Division of Industrial Services Rule 343-4.13 provides:

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.

The cross-appeal by claimant shows that proof of service was by FAX. Defendants assert that their only notice was by FAX. Claimant does not deny this assertion. Therefore, it is found that the attempted service was by FAX. Pursuant to this agency's rule a cross-appeal must be served in a specific manner. Service by FAX is not one of the specified manners. Therefore, claimant has not properly served the notice of cross-appeal. Claimant's reliance upon Division of Industrial Services Rule 343-4.39, which allows filing with the agency, is misplaced. Filing with the agency by means of FAX is allowed. Service by means of FAX is not. It should be noted that claimant's cites and the undersigned knows of no precedent that would allow service by FAX.

THEREFORE, defendants' motion to dismiss, claimant's cross-appeal is granted and claimant's cross-appeal is dismissed.

Signed and filed this 14th day of February, 1990.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. YOUNGREN, II, Claimant, vs. MacMILLAN OIL COMPANY, INC., Employer, and CIGNA, Insurance Carrier, Defendants.	FILED MAR 23 1990 File No. 798464 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a ruling on application to reconsider filed on January 24, 1989 which ordered claimant to pay unto the defendants $1,892.33 as costs of the prior action.

ISSUE

Claimant raises the issue of whether defendants' application for assessment of costs should have been granted.

REVIEW OF THE EVIDENCE

On January 28, 1987 claimant filed a petition for benefits as a result of an alleged injury of July 5, 1985. On August 18, 1988 a hearing was held. On the day of hearing the parties filed a Pre-hearing Report & Order Approving Same which indicated that a statement of costs will be filed.

On September 26, 1988 an arbitration decision was filed which found against the claimant in favor of the defendants. The order stated:

> Claimant shall take nothing further from this proceeding.

> The costs of this action are assessed against the claimant pursuant to Division of Industrial Services Rule 343-4.33.

On October 17, 1988 claimant filed a request for rehearing. An order denying a rehearing was filed on October 24, 1988.

On December 21, 1988 defendants filed an application for specific assessment of costs. That document indicates that the original was filed and a copy was mailed to claimant's attorney. No resistance was filed by claimant. On December 27, 1988 the deputy entered an order indicating he lacked jurisdiction to rule on defendants' application.

On January 4, 1989 defendants filed an application to reconsider. The deputy, on January 24, 1989, filed a ruling on defendants' application to reconsider which is now the basis of this appeal.

APPLICABLE LAW

Division of Industrial Services Rule 343-4.33 states:

> 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 sections 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.

ANALYSIS

For years the practice of this agency has been for a deputy to assess costs to one or more of the parties in their decision. By far the most common practice has been to indicate who is to pay the costs without any itemization of the costs. This has been the practice because: (1) in the majority of cases the parties do not have any real question or objection to the costs; and (2) many of the costs would not be available at the time of hearing. The parties to an action are usually aware of the costs because they know who has testified or been deposed and are aware of the length of depositions and hearing. The parties are aware of rule 343-4.33 and can usually determine what cost can and what cost cannot be recovered.

Furthermore, a case being appealed to the commissioner may have an effect on who might end up paying the costs in a proceeding.

Clearly, the deputy retains jurisdiction to make a determination on what those costs include or exclude if some question regarding particular charges arises at a later time. If such jurisdiction was not retained such questions could never be determined if the parties were unable to resolve the questions themselves. This is especially true since the conflict or question regarding such a cost would not arise until after the decision became final.

Claimant argues that he is unduly prejudiced if the defendants can later prove up costs. The undersigned finds claimant's argument to be without merit because he was aware by the deputies original decision that he was ordered to pay costs.

Defendants have failed to file any proof of payment as required by rule 343-4.33.

WHEREFORE, the ruling on defendants' application to reconsider is reversed.

ORDER

THEREFORE, it is ordered:

That this matter is remanded to the deputy to allow defendants to file proof of payment or anything else they desire regarding the costs of this action. Claimant will be allowed to file a response thereto and the deputy can redetermine what costs will be allowed.

Signed and filed this 23rd day of March, 1990.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KURT ZANDERS, Claimant, vs. CITY OF MALVERN, Employer, and EMPLOYERS MUTUAL COMPANIES, Insurance Carrier, Defendants.	:	File No. 772273 A P P E A L D E C I S I O N FILED NOV 22 1989 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an 85.27 benefits decision denying certain medical benefits as the result of an alleged injury on August 10, 1984. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 5; and defendants' exhibits A through J. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal: "Is claimant C-5 quadriplegic entitled to a van as an 85.27 benefit to allow him to transport and use his electric wheelchair which has been prescribed by his doctors?"

REVIEW OF THE EVIDENCE

The 85.27 benefits decision adequately and accurately eflects the pertinent evidence and it will not be set forth erein.

APPLICABLE LAW

The citations of law in the 85.27 benefits decision ar propriate to the issues and the evidence.

ANALYSIS

Claimant is a quadriplegic as a result of a work-related injury. Claimant has been provided with an electric wheelchair by the employer. The employer has paid for extensive remodeling to claimant's home to accommodate his wheelchair. The employer has also paid for wheelchair modifications to claimant's van.

Claimant seeks a determination that defendants are responsible for the purchase price of the van under Iowa Code section 85.27. That section states, in relevant part:

> The employer ... shall furnish reasonable surgical, medical, ... hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

Clearly, claimant's van is not a crutch, a prosthetic device, or an artificial member. If claimant is to prevail in his assertion that the purchase price of the van is defendants' responsibility, claimant must establish that the van constitutes either a necessary transportation expense or an appliance under section 85.27.

Claimant asserts that he cannot be transported in a regular automobile. Claimant is unable to sit upright in a vehicle with normal seat belts. Claimant's bowel and bladder needs cannot be met in a car. Claimant also needs to shift his weight frequently, and cannot do so while seated in a car seat. With the specially equipped van, claimant is able to be transported in his wheelchair, which eliminates these problems. Claimant's physician has stated that claimant's mobility is conducive to avoiding or minimizing depression. However, claimant has not been diagnosed as suffering from depression.

Defendants argue that claimant's use of the van is mostly for personal matters. Claimant uses the van for visits to his doctor and to the hospital, but also uses the van for transportation to events connected with his hobby and other personal matters.

Defendants are obligated to provide claimant with reasonab] and necessary transportation to and from medical care under sec :ion 85.27. Defendants could comply with this obligation in s :ral ways. Defendants could contract with a private transpor ion service, such as an ambulance, to pick claimant up and ransport him to medical services. Defendants could purcha:

van in their own name and hire someone to transport claimant to the doctor or hospital. Defendants can also allow claimant to use his own vehicle for transportation to the doctor or hospital, with defendants obligated to reimburse him for reasonable and necessary mileage costs.

The fact that claimant's van is occasionally used for transportation to medical services does not make the vehicle a transportation expense under section 85.27. Defendants' provision of vehicular modifications and the payment of mileage expenses satisfies defendants' obligations to provide medical transportation to claimant.

Similarly, the fact that the van is used occasionally for medical transportation does not indicate that the van is an appliance. A van does not replace a body function lost by the injury, such as lost balance supplied by a walker, or lost support supplied by a back brace. A van provides vehicular transportation, a non-physical function that both uninjured and injured workers have the responsibility to provide themselves. Claimant's van is not an appliance within the meaning of section 85.27.

Section 85.27 contemplates the provision of reasonable medical expenses. That section does not obligate an employer to restore an injured worker to his or her pre-accident personal lifestyle. Claimant's personal living expenses, including transportation for nonmedical purposes, were his own obligation before his injury, and section 85.27 does not change that. To the extent his injury has deprived him of income that formerly was used to meet those expenses, that loss of earnings has already been addressed by the award of permanent total disability benefits.

Claimant's assertion that mobility is necessary for his mental state is also unpersuasive. The law does not allow this agency to order defendants to pay a particular item merely because to do so may make the claimant feel better. There are many items that would arguably suit this purpose, such as ordering defendants to provide a claimant with a sports car, a boat, a vacation in a tropical locale or even an outright gift of large sum of money for claimant to spend at his own discretion. ny of these items might relieve a claimant's depression. Even f these items were prescribed by a physician, that fact alone es not make them proper medical expenses under section 85.27. milarly, a van is not a reasonable medical expenditure merely cause it may contribute in some manner to improving claimant' ntal state.

Claimant is not entitled to reimbursement for the purc' ce of the van under section 85.27. To the extent that '

v. First Assembly of God Church, IV Iowa Industrial Commissioner Report 119 (Decision of 85.27 benefits, May 18, 1984), holds contrary to this opinion, that decision is incorrect and is hereby overruled.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment as a lifeguard with defendant employer on August 10, 1984.

2. Claimant is a C-5 quadriplegic who has no use of his body below his shoulders.

3. Claimant uses a motorized wheelchair which he operates by use of a mouth/chin control.

4. Claimant's wheelchair, with him in it, weighs approximately 500 pounds.

5. The most convenient way to transport claimant in his wheelchair is by use of the van but it is not the only mode of transportation available.

6. Although the use of the van provides convenience, the van in and of itself is not medically necessary to treat claimant's injuries.

CONCLUSION OF LAW

Claimant has failed to establish the purchase of a van is a medical expense under Iowa Code section 85.27 or is reasonably necessary to treat a work-related injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

That the costs of this proceeding are assessed against defendants pursuant to Division of Industrial Services Rule 4.33 in the following amounts:

Dr. Byron B. Oberst -	$150.00
Dr. Roger Leuck - expert fee (pursuant to Iowa Code section 622.72)	150.00

Blair and Associates - court reporters 79.00

Twin City Reporter 43.91

Signed and filed this 22nd day of November, 1989.

DAVID E. LINQUIST
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